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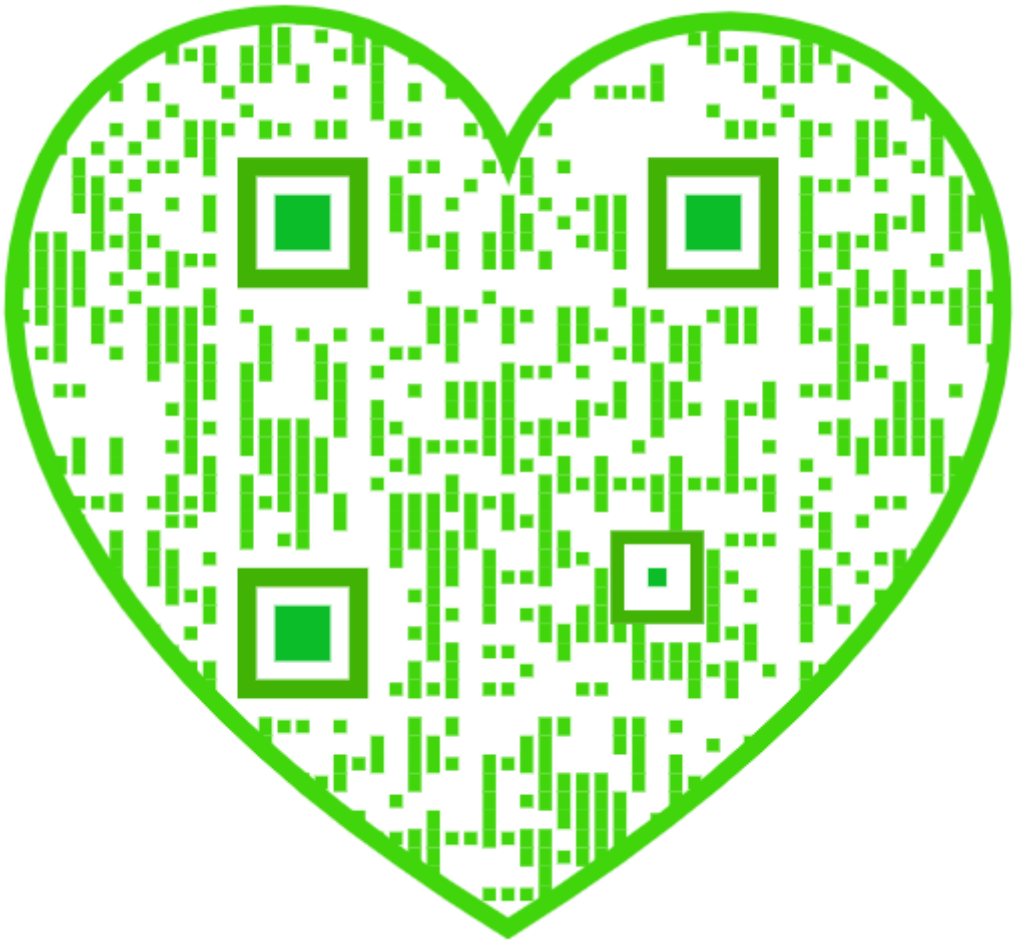

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I. DEFINITION.

Strictly speaking descent is the devolution of real estate to, and distribution is the division of personal estate among, the heirs of an intestate; but in many jurisdictions the terms are now used interchangeably.[1]

1. Bouvier L. Dict. It was one of the principles of the feudal system that on the death of the tenant in fee the land should descend and not ascend. Hence the title by inheritance is in all cases called descent, although by statute law the title is sometimes made to ascend. Bouvier L. Dict. See 1 Woerner Adm. § 8.

"Descent," in its technical, legal meaning, applies to real estate only. It denotes the transmission of real estate or some interest therein, by inheritance or mere operation of law, on the death of the owner intestate, to some person or persons, called the heir or heirs, according to certain rules of law.

Illinois.— Hudnall *v.* Ham, 172 Ill. 76, 49 N. E. 985; Adams *v.* Akerlund, 168 Ill. 632, 640, 48 N. E. 454.

Indiana.—Rountree *v.* Pursell, 11 Ind. App. 522, 39 N. E. 747.

Mississippi.— Hamilton *v.* Homer, 46 Miss. 378, 395, *quoting* the language of Lord Bacon: "Property of lands by descent is where a man hath lands of inheritance and dieth, not disposing of them, but leaving it go (as the law easteth it) upon the heir. This is called a descent of law."

New Jersey.— Horner *v.* Webster, 33 N. J. L. 387, 400.

Ohio.— Brower *v.* Hunt, 18 Ohio St. 311, 338; Spangenberg *v.* Guiney, 3 Ohio S. & C. Pl. Dec. 163, 165, 2 Ohio N. P. 39.

Texas.— Barclay *v.* Cameron, 25 Tex. 232.

Virginia.— Jackson *v.* Sanders, 2 Leigh 109, 117.

England.— Bickley *v.* Bickley, L. R. 4 Eq. 216.

Canada.— Spafford *v.* Breckinridge, 1 U. C. C. P. 492, 502.

"Descent, or hereditary succession, is the title whereby a man, on the death of his ancestor, acquires his estate by right of representation as his heir at law." 2 Blackstone Comm. 201. See Kelly *v.* McGuire, 15 Ark. 555, 586; Donahue's Estate, 36 Cal. 329, 332; O'Byrne *v.* Feeley, 61 Ga. 77, 82; Santa Clara Female Academy *v.* Sullivan, 116 Ill. 375, 390, 6 N. E. 183, 56 Am. Rep. 776; Martindale *v.* Troop, 3 Harr. & M. (Md.) 159, 163; Van Beuren *v.* Dash, 30 N. Y. 393, 422; Freeman *v.* Allen, 17 Ohio St. 527, 531; Barclay *v.* Cameron, 25 Tex. 232.

"Lineal" and "collateral" descents.— "Descents are, as is well known, of two sorts; lineal, as from father or grandfather to son or grandson, and collateral, as from brother to brother, and cousin to cousin, etc." Levy *v.* McCartee, 6 Pet. (U. S.) 102, 112, 8 L. ed. 334. See *infra*, III, A, 9, 11.

"Mediate" and "immediate" descents.— See Furenes *v.* Mickelson, 86 Iowa 508, 511, 53 N. W. 416; Garner *v.* Wood, 71 Md. 37, 17 Atl. 1031; Levy *v.* McCartee, 6 Pet. (U. S.) 102, 112, 8 L. ed. 334; Gardner *v.* Collins, 2 Pet. (U. S.) 58, 89, 7 L. ed. 347. And see *infra*, III, A, 1, b.

"Descent" of personal property.— While in its technical sense, the term "descent" applies to the transmission of real estate only, it is often used in statutes, in its popular sense, to denote "the course of transmission, by operation of law, of both real and personal property when the owner dies intestate, or his estate or any part thereof is deemed and taken as intestate estate." Hudnall *v.* Ham, 172 Ill. 76, 84, 49 N. E. 985. See also Rountree *v.* Pursell, 11 Ind. App. 522, 39 N. E. 747.

"Single step in the scale of genealogy."— One of the meanings of the term "descent" is "a single step in the scale of genealogy or generation," and it was so construed in an English case where the custom of a manor was stated in a presentment of the homage to be that copyholds for the first descent after a surrender descended to the eldest son, and, if no surrender, to the youngest son. Bickley *v.* Bickley, L. R. 4 Eq. 216 [*citing* Johnson Dict.].

"'Alienation' differs from 'descent' in this, that 'alienation' is effected by the voluntary act of the owner of the property, while 'descent' is the legal consequence of the decease of the owner, and is not changed by any previous act or volition of the owner." Burbank *v.* Rockingham Mut. F. Ins. Co., 24 N. H. 550, 558, 57 Am. Dec. 300.

"Descent" is distinguished from "purchase" in that title by descent is acquired by mere operation of law, while title by purchase is acquired by the conveyance or other act of the owner. O'Byrne *v.* Feeley, 61 Ga. 77, 82; Allen *v.* Bland, 134 Ind. 78, 33 N. E. 774; Bennett *v.* Hibbert, 88 Iowa 154, 55 N. W. 93; Garner *v.* Wood, 71 Md. 37, 17 Atl. 1031; Martindale *v.* Troop, 3 Harr. & M. (Md.) 159, 163; Hamilton *v.* Homer, 46 Miss. 378, 395; Freeman *v.* Allen, 17 Ohio St. 527, 530; Spangenberg *v.* Guiney, 3 Ohio S. & C. Pl. Dec. 163, 165, 2 Ohio N. P. 39 (where it is said: "Descent is what takes place when land, or some interest in land or other realty, belonging to a person passes, on his death intestate, to some one related to him. Descent is opposed to what takes place when land, on the death of a person, passes to some one else by virtue of a gift or limitation to him as *persona designata*"); Starr *v.* Hamilton, 22 Fed. Cas. No. 13,314, 1 Deady 268. See also *infra*, II, E, 5, b; and PURCHASE.

"Descent" and "devise" or "bequest" distinguished.— Transmission of real estate by devise or of personal property by bequest under a will is distinguished from transmission by descent. Persons taking by descent

II. NATURE AND COURSE.

A. In General — 1. When Rights Vest. It is a well settled principle that the rights of heirship do not become vested until the death of the intestate, at

take by mere operation of law, while persons taking by devise or bequest are regarded as taking, not by "descent," but by "purchase." Hudnall *v.* Ham, 172 Ill. 76, 49 N. E. 985; Allen *v.* Bland, 134 Ind. 78, 33 N. E. 774; Bennett *v.* Hibbert, 88 Iowa 154, 55 N. W. 93; Priest *v.* Cummings, 20 Wend. (N. Y.) 338, 349; Freeman *v.* Allen, 17 Ohio St. 527, 531; Starr *v.* Hamilton, 22 Fed. Cas. No. 13,314, 1 Deady 268. See also *infra*, II, E, 5, b; and PURCHASE; WILLS.

"Distribution," in its technical sense, denotes the division of personal assets of an intestate, after administration and the payment of all debts against the estate and expenses of the administration, among the persons entitled as heirs or next of kin. Hudnall *v.* Ham, 172 Ill. 76, 49 N. E. 985; Beard *v.* Lofton, 102 Ind. 408, 2 N. E. 129; Ales *v.* Plant, 61 Miss. 259, 263; Miller *v.* Colt, 32 N. J. Eq. 6; Thomson *v.* Tracy, 60 N. Y. 174. See also Chighizola *v.* LeBaron, 21 Ala. 405, 412. *Compare* Sasser *v.* McWilliams, 73 Ga. 678, 683. "In general, the term 'distribution,' when applied to the estate of a deceased person, refers to the ultimate division of the estate among the next of kin, in case of intestacy, or among the beneficiaries under a will, after the estate is free from debt," and does not include the payment of debts against the estate by the executor or administrator. Thomson *v.* Tracy, 60 N. Y. 174, 180, holding that a statute containing a restraint against "distribution" referred to the ultimate division of the residue of the personalty among the beneficiaries under a will after the payment of debts, and did not include or prohibit such payment. See also Wolf *v.* Griffin, 13 Ill. App. 559, 560, holding that the creditor of an estate who had recovered a judgment on his claim in the county court was not a "distributee" within the meaning of a statute.

"The 'distribution' of an estate includes the determination of the persons who by law are entitled thereto, and also the 'proportions or parts' to which each of these persons is entitled; and the 'parts' of the estate so distributed may be segregated or undivided portions of the estate." William Hill Co. *v.* Lawler, 116 Cal. 359, 48 Pac. 323.

"Distribution" with respect to real estate. — The term "distribution" is sometimes applied to the division among the heirs or next of kin (or devisees or legatees) of the residue of both real and personal estate. Bouvier L. Dict. [*quoted* in Thomson *v.* Tracy, 60 N. Y. 174, 181]. See Rogers *v.* Gillett, 56 Iowa 266, 9 N. W. 204 (holding that where, by the terms of an agreement between the heirs of a decedent, certain of the heirs were to receive an additional allowance upon final distribution of the estate, such distribution related to real as well as personal estate, and that a claim of such allowance set up in an action for the partition of the last remaining real estate of the decedent was not barred by the statute of limitations, although more than ten years had elapsed since the making of the agreement); Robinson *v.* Payne, 58 Miss. 690, 707 (holding that, in a statute providing that any married woman might become seized or possessed of "any property, real or personal, by direct bequest, demise, gift, purchase, or distribution, the word "distribution" applied "both to personalty and to realty derived by descent"). Ordinarily, however, the term does not apply to real estate. In Ales *v.* Plant, 61 Miss. 259, 263, it was said: "The word 'distribution may, as was said in Robinson *v.* Payne, 58 Miss. 690, be applied to realty when the context shows that it was so intended, but no accurate lawyer, choosing his words with care, would speak of any portion of the lands, which by law descend to the heirs or devisees of a decedent instantly with his death as constituting 'a surplus for distribution.' Such language in a carefully drawn code seems *ex vi termini* applicable to personalty only, unless the context plainly shows that they were intended to embrace realty also. There is no such context here."

"The terms 'payment' and 'distribution,' as applied to the estate of deceased persons, have their settled, distinctive meanings, and these are not destroyed by the casual application of the term distribution in other parts of the statute [relative to the settlement of decedent's estates] to the division, among creditors, of a fund raised expressly for the payment of debts." Thomson *v.* Tracy, 60 N. Y. 174, 181.

The words "settlement of estates of deceased persons," used in the constitution conferring probate jurisdiction on county courts, evidently refer to the adjustment of the claims and demands in favor of or against an estate. They do not necessarily include the word "distribution." *In re* Creighton, 12 Nebr. 280, 282, 11 N. W. 313.

"Distribution and dower are two separate and distinct things; one a lien created by law on the property of the husband at the time of the marriage, which necessarily takes precedence over all other subsequent accruing rights, and attaches to the specific property and is carved out of it. Distribution occurs after administration, and the payment of the debts; and the estate is then divided between the heirs or legatees. The widow is not entitled to any portion or distributive share after her dower has been allotted to her, for all that goes to the heirs or legatees after payment of debts, and the administrator is bound to distribute the residue in his hands." Hill *v.* Mitchell, 5 Ark. 608, 618 [*quoted* in

which time they become immediately vested, the heir taking title directly from the intestate.[2]

2. Civil Death. Civil death is the state of a living person who is deprived of all his civil rights and who, as to them, is regarded as if dead.[3] Such deprivation of civil rights is imposed in some jurisdictions as a portion of the penalty for the commission of a crime and imprisonment for life therefor, and in such cases includes the right of inheritance.[4] In other jurisdictions, however, the estate of one sentenced to imprisonment for life does not descend or vest as in case of death.[5]

3. Definition of "Heir." Technically an heir, at common law, is he who is born or begotten in lawful wedlock, and upon whom the law casts the estate in lands, tenements, or hereditaments immediately upon the death of his ancestor;[6] but in most jurisdictions the term has now come to mean the person who succeeds to the estate of a deceased person, whether real or personal, and whether by operation of law or by act of the party.[7]

4. Source of Capacity to Inherit. The common-law right to inherit sprang from the obligation of fealty under the feudal system and was dependent on the

Johnson *v.* K. of H., 53 Ark. 255, 261, 13 S. W. 794, 8 L. R. A. 732].

"Succession" and "inheritance."— "'Succession' in the civil law, denotes the transmission of the rights and obligations of a deceased person to his heir or heirs. The word 'succession' is often used synonymously with the word, 'descent.' Descent is hereditary succession to an estate in realty. 'Descent' usually applies to the devolution of real estate. The word 'inheritance,' is also often used synonymously with 'descent,' and refers to the devolution of real property. In its popular acceptation, however, the word, 'inheritance,' includes the devolution of both real and personal property, and is co-extensive in meaning with the word succession.'" Adams *v.* Akerlund, 168 Ill. 632, 640, 48 N. E. 454. See also Rountree *v.* Pursell, 11 Ind. App. 522, 39 N. E. 747 (holding that the term "inheritance" in a statute providing for transmission of property where the "inheritance" came to the intestate by "gift, devise, or descent," applied to personal property which came to the intestate by bequest); Nash *v.* Cutler, 16 Pick. (Mass.) 491 (holding that "inheritance" did not include an estate by devise); Fort *v.* West, 14 Wash. 10, 44 Pac. 104 (holding that the word "inheritance" applied to both real and personal property); Starr *v.* Hamilton, 22 Fed. Cas. No. 13,314, 1 Deady 268 (holding that "inheritance" in a constitutional provision was the "exact equivalent" of "descent" and opposed to acquisition of title by purchase, including in the latter term gift or devise).

2. Nesbit *v.* Trindle, 64 Ind. 183; Dean *v.* Sease, 8 Ind. 475; Case *v.* Wildridge, 4 Ind. 51 (holding that a granddaughter inheriting as heir inherits directly from the grandfather and not through her father, who had previously died); McKenzie *v.* Bacon, 40 La. Ann. 157, 4 So. 65; Thompson *v.* Thomas, 30 Miss. 152; Valentine v. Wethcrill, 31 Barb. (N. Y.) 655; Rose v. Clark, 8 Paige (N. Y.) 574. It follows that the estate of a person dying intestate will go to those who are his heirs or next of kin at the time of his death; and if one of them dies before distribution, his share will go, not to the others, but to his heirs or personal representative. See *infra*, IV, A, 4, e.

Vesting of title on death of intestate see *infra*, IV, A, 4.

Rights of expectant heirs see *infra*, IV, A, 1, a.

3. Bouvier L. Dict. And see Civil Death, 7 Cyc. 154.

4. *In re* Donnelly, 125 Cal. 417, 58 Pac. 61, 73 Am. St. Rep. 62; *In re* Nerac, 35 Cal. 392, 95 Am. Dec. 111; *In re* Scott, Myr. Prob. (Cal.) 168; State *v.* Reever, 97 Mo. 668, 10 S. W. 841, 10 Am. St. Rep. 349; Platner *v.* Sherwood, 6 Johns. Ch. (N. Y.) 118; Baltimore *v.* Chester, 53 Vt. 315, 38 Am. Rep. 677.

5. Willingham *v.* King, 23 Fla. 478, 2 So. 851; Smith *v.* Becker, 62 Kan. 541, 64 Pac. 70, 53 L. R. A. 141; Avery *v.* Everett, 110 N. Y. 317, 18 N. E. 148, 6 Am. St. Rep. 368, 1 L. R. A. 264; Davis *v.* Laning, 85 Tex. 39, 19 S. W. 846, 34 Am. St. Rep. 784, 18 L. R. A. 82.

Civil death under the common law see Platner *v.* Sherwood, 2 Johns. Ch. (N. Y.) 118; Frazer *v.* Fuleher, 17 Ohio 260.

6. Bouvier L. Dict. See also Meadowcroft *v.* Winnebago County, 181 Ill. 504, 54 N. E. 949; Maee *v.* Cushman, 45 Me. 250. And see Heir.

7. *Kansas.*— McKinney *v.* Stewart, 5 Kan. 284.

Louisiana.—Justus' Succession, 44 La. Ann. 721, 11 So. 95; Mumford *v.* Bowman, 26 La. Ann. 413.

Maine.— Maee *v.* Cushman, 45 Me. 250.

New Jersey.— State *v.* Engle, 21 N. J. L. 347.

Pennsylvania.— Crosby *v.* Davis, 2 Pa. L. J. Rep. 403, 4 Pa. L. J. 193, holding that it is not sufficient to constitute one an "heir" for him to be entitled to an estate of freehold in the land descended, such as dower or curtesy, but that he must take some actual interest in the inheritance.

Tennessee.— Leach *v.* Cooper, Cooke 249.

See 16 Cent. Dig. tit. "Descent and Distribution," § 3. And see Heir.

Construction of term in statute see *infra*, II, C, 2.

duty devolving on the natural-born subject in return for the protection supposed to be afforded to him by the sovereign.[8] The common-law rule of descent still exists, except as it has been modified by statutes, the legislature having the power to designate the particular classes of persons to inherit.[9]

5. Effect of Special Statute Naming Heir of Designated Person. The legislature has the power to grant to a person the capacity to inherit from another as his heir, giving him all the rights and privileges to which he would have been entitled as his child born in wedlock;[10] but such an act is not effectual to give him that status within the meaning of a prior will.[11] The law appears to be unsettled as to the extraterritorial effect of such a statute.[12]

6. Means of Changing Course of Descent by Diverting Property From Heirs at Law. The statutory order of descent can be defeated only by a legally executed will distributing the property and disinheriting the heirs at law either by express words or by necessary implication. The mere expression of an intention that the heirs at law shall not succeed to the estate is not sufficient.[13]

7. Rule of Descent as Dependent on Whether Property Is Personal or Real — a. In General. As in some cases property descends to different persons according as it may be real estate or personal property, it frequently becomes necessary to determine its character for the purposes of descent and distribution. As a general rule it may be stated that the character of the estate at the death of the intestate, as impressed upon it by his act, determines the course of its descent, so that when the heir and the next of kin are different persons and have adverse interests there can be no election.[14] A perpetual lease of real estate with option of purchasing at any time does not change the character of the title of the lessor or his heirs to personalty until the lessee exercises such option.[15] When an administrator completes the purchase of land contracted for by his intestate, although it is paid for out of the personal property, the heirs take it by descent from him.[16]

Surviving spouse as heir or next of kin see *infra*, III, B, 2.

Fiction or supposition.— The law does not make a person in the seizin or possession of land heir to another by fiction or supposition. Helm *v.* Howard, 2 Harr. & M. (Md.) 57.

8. Tannis *v.* St. Cyre, 21 Ala. 449.

9. Tannis *v.* St. Cyre, 21 Ala. 449; Hyde *v.* Planters' Bank, 8 Rob. (La.) 416. See *infra*, II, A, 5; II, B, 4; II, C, 3.

10. See Pace *v.* Klink, 51 Ga. 220, holding that the children of a person thus named heir, their father having died, took as his representatives in the distribution of the property of the person whose heir he was named. See also Walden *v.* Winston, 9 Leigh (Va.) 160; and *infra*, II, C, 3.

Vested rights see *infra*, II, C, 1, 3.

11. Barnum *v.* Barnum, 42 Md. 251.

12. In Alabama legitimation of a child in France was held ineffectual to make him an heir to property in that state. Lingen *v.* Lingen, 45 Ala. 410. And see to the same effect Barnum *v.* Barnum, 42 Md. 251; Smith *v.* Derr, 34 Pa. St. 126, 75 Am. Dec. 641. The contrary was held, however, in Scott *v.* Key, 11 La. Ann. 232. See also Bastards, 5 Cyc. 642. And see *infra*, II, B, 2, a.

13. *Alabama.*— Denson *v.* Autrey, 21 Ala. 205.

Indiana.— McIntire *v.* Cross, 3 Ind. 444; Doe *v.* Lanius, 3 Ind. 441, 56 Am. Dec. 518.

Maine.— Baxter *v.* Bradbury, 20 Me. 260, 37 Am. Dec. 49.

Mississippi.— Richards *v.* Mills, 31 Miss. 450. In this case a husband, in articles of separation, had covenanted never to demand any interest in his wife's property. The wife died and her property descended to her son, who also died intestate. Notwithstanding the covenant the court held that the father was entitled to the property as heir to his son.

North Carolina.— Cannon *v.* Nowell, 51 N. C. 436.

Pennsylvania.— *In re* Bair, 2 Lanc. L. Rev. 225; Weyand *v.* Weyand, 1 Woodw. 1.

South Carolina.— Youngblood *v.* Norton, 1 Strobh. Eq. 122.

United States.— Wilkins *v.* Allen, 18 How. 385, 15 L. ed. 396.

See 16 Cent. Dig. tit. "Descent and Distribution," § 6.

Operation and effect of will see *infra*, III, A, 3.

Rights of pretermitted children see *infra*, III, A, 3, c.

Disinheritance see *infra*, III, A, 3, d.

Effect of will as to surviving spouse see *infra*, III, B, 6, f; III, B, 7, d.

Forced heirs see *infra*, III, A, 5.

14. Jones *v.* Kirkpatrick, 2 Tenn. Ch. 693.

Conversion of land into personalty see Conversion, 9 Cyc. 851.

15. Smith *v.* Loewenstein, 50 Ohio St. 346, 34 N. E. 159.

16. Frick Coke Co. *v.* Laughead, 203 Pa. St. 168, 52 Atl. 172.

b. Interests in Land Regarded as Personal Property. A lease for years is for the purposes of descent and distribution regarded as personal property unless it is otherwise expressly provided by statute.[17] And the same is true of land obtained by an executor by foreclosure of a mortgage,[18] an unlocated land certificate,[19] and of an infant's personal estate which has been converted into realty by decree of the court during his infancy.[20]

c. Money, Rights of Action, Etc., Regarded as Real Estate. On the other hand the interest of a mortgagor of real estate remains realty, even after a decree of foreclosure, until after the sale;[21] and the same is true of the interest of the owner of land taken by eminent domain, until after the award.[22] The proceeds of the sale of the land of a decedent sold to pay debts or for any other purpose and of proceedings in partition are subject to the same rule of distribution as that which governs the distribution of the land;[23] and the rights of an heir in such proceeds descend to his heirs as real estate,[24] but in their hands become personal property.[25] In the same way the proceeds of the sale of the land of an infant or of an infant's interest in land under a decree of partition, although reinvested in personal property, descend as real estate in case of the infant's death during minority,[26] or in case he has arrived at majority, if he has not elected to take it as personalty.[27] The same is true of a lunatic's share in the proceeds of the sale of land.[28]

d. Slaves. In some jurisdictions slaves were regarded as real estate and held to descend as such,[29] while in others they were regarded as personalty,[30] and in others statutes provided that they could be so annexed to land that they would descend with it.[31]

8. Proof and Presumption of Death. No person can represent another as his heir, or claim a succession through him, in the absence of proof of his death, or of such facts as raise a presumption of death.[32] If it appears that one hundred years have elapsed since a person's birth his death will be presumed.[33] In some

17. Lenow *v.* Fones, 48 Ark. 557, 4 S. W. 56, holding also that a statute treating leases as real estate for certain other purposes was not sufficient to take them out of the rule. See also *infra*, IV, A, 4, c, (I) note.

18. Fifield *v.* Sperry, 20 N. H. 338.

19. Porter *v.* Burnett, 60 Tex. 220.

20. Paul *v.* York, 1 Tenn. Ch. 547.

21. Holden *v.* Dunn, 144 Ill. 413, 33 N. E. 413, 19 L. R. A. 481; Asay *v.* Hoover, 5 Pa. St. 21, 45 Am. Dec. 713.

22. Ballou *v.* Ballou, 78 N. Y. 325; Matter of Public Parks, 60 Hun (N. Y.) 576, 14 N. Y. Suppl. 347.

23. *Kentucky.*— Haggard *v.* Rout, 6 B. Mon. 247, a case of the proceeds of a sale under the direction of the testator in his will, to be invested in other lands, one of the heirs dying after the sale but before a reinvestment.

Maryland.— Garner *v.* Wood, 71 Md. 37, 17 Atl. 1031, surplus from the sale of the land of an intestate to pay his debts.

North Carolina.— Linsday *v.* Pleasants, 39 N. C. 320, where land was converted into personalty under the direction of a will, and the purpose of the change was disappointed.

Ohio.— Pence *v.* Pence, 11 Ohio St. 290.

Pennsylvania.— Pennell's Appeal, 20 Pa. St. 515.

See 16 Cent. Dig. tit. "Descent and Distribution," § 9.

24. Betts *v.* Wirt, 3 Md. Ch. 113; McCune's Appeal, 65 Pa. St. 450; Hay's Appeal, 52 Pa. St. 449. See also Vaughan *v.* Jones, 23 Gratt. (Va.) 444. But see Pence *v.* Pence, 11 Ohio St. 290; Pennell's Appeal, 20 Pa. St. 515.

25. McCune's Appeal, 65 Pa. St. 450; Hay's Appeal, 52 Pa. St. 449.

26. *New Jersey.*— Hatcher *v.* Moore, 9 N. J. L. J. 275; Snowhill *v.* Snowhill, 2 N. J. Eq. 30.

New York.— Matter of Woodworth, 5 Dem. Surr. 156.

North Carolina.— Dudley *v.* Winfield, 45 N. C. 91; March *v.* Berrier, 41 N. C. 524; Gillespie *v.* Foy, 40 N. C. 280.

Pennsylvania.— Holmes' Appeal, 53 Pa. St. 339.

Virginia.— Vaughan *v.* Jones, 23 Gratt. 444.

Contra, Armstrong *v.* Miller, 6 Ohio 118.

See 16 Cent. Dig. tit. "Descent and Distribution," § 9.

27. Dudley *v.* Winfield, 45 N. C. 91.

28. Campbell *v.* Campbell, 19 Grant Ch. (U. C.) 254.

29. Chinn *v.* Respass, 1 T. B. Mon. (Ky.) 25; McDonald *v.* Walton, 2 Mo. 48; McCollum *v.* Smith, Meigs (Tenn.) 342, 33 Am. Dec. 147.

30. May *v.* Rockett, 25 Miss. 233.

31. Dunn *v.* Bray, 1 Call (Va.) 38.

32. Boe *v.* Filleul, 26 La. Ann. 126. See *infra*, IV, A, 3, d; IV, A, 13, f.

33. Miller *v.* McElwee, 12 La. Ann. 476.

states when a person has been absent and has not been heard of for seven years, the probate court may assume that he is dead and appoint an administrator of his estate, and his heirs may bring ejectment to gain possession of his lands.[34] Such presumption of death is not conclusive, however, and may always be overthrown by proof to the contrary, in which case letters of administration granted, title given, or other action taken based upon such presumption becomes null and void.[35] There is no presumption in law that a man proved to be dead left no descendants. Such fact must be proved.[36] It seems that a decree of the probate court granting letters of administration is not admissible in proof of the death as between strangers.[37]

9. When Intestacy Arises. Intestacy frequently arises, although the deceased may have left a will which has been admitted to probate. Thus if a devise or bequest fails, the property devised or bequeathed is subject to descent or distribution as intestate estate;[38] and if a will fails to provide for a person entitled to dower or curtesy the testator will be deemed as to such person to have died intestate.[39] The proceeds of a settlement between the next of kin and a legatee, when the legatee pays the next of kin a sum of money, will be distributed as intestate estate.[40] But if a testator by a codicil reduces a bequest, the amount deducted, if no special provision is made for it, falls into the residue and is not subject to distribution as intestate estate.[41]

10. Proof and Presumption of Intestacy. The fact that a deceased person died intestate is established by the adjudication of a competent court having jurisdiction of the subject-matter and the parties.[42] A person who dies leaving a will which is admitted to probate is not "an intestate," although some of his property, because the will fails to dispose of it, descends as intestate estate.[43] But a non-

34. Henderson *v.* Bonar, 11 S. W. 809, 11 Ky. L. Rep. 219. See also *infra*, III, A, 6, e, (II); IV, A, 3, d; IV, A, 13, f. And see Death, 13 Cyc. 290; Executors and Administrators.

35. *Alabama.*— Duncan *v.* Stewart, 25 Ala. 408, 60 Am. Dec. 527.

California.— Stevenson *v.* San Francisco Super. Ct., 62 Cal. 60.

Illinois.— Thomas *v.* People, 107 Ill. 517, 47 Am. Rep. 458.

Kansas.— Perry *v.* St. Joseph, etc., R. Co., 29 Kan. 420.

Kentucky.— French *v.* Frazier, 7 J. J. Marsh. 425.

Louisiana.— Burns *v.* Van Loan, 29 La. Ann. 560.

Massachusetts.—Jochumsen *v.* Suffolk Sav. Bank, 3 Allen 87, 96, where it was said: "The only jurisdiction is over the estate of the dead man. When the presumption arising from the absence of seven years is overthrown by the actual personal presence of the supposed dead man, it leaves no ground for sustaining the jurisdiction." See also Day *v.* Floyd, 130 Mass. 488; Waters *v.* Stickney, 12 Allen 1, 90 Am. Dec. 122.

Missouri.— Johnson *v.* Beazley, 65 Mo. 250, 27 Am. Rep. 276.

New Hampshire.— Morgan *v.* Dodge, 44 N. H. 255, 82 Am. Dec. 213.

North Carolina.— State *v.* White, 29 N. C. 180.

Pennsylvania.— Devlin *v.* Com., 101 Pa. St. 273, 47 Am. Rep. 710; Peebles' Appeal, 15 Serg. & R. 39; McPherson *v.* Cunliff, 11 Serg. & R. 422, 14 Am. Dec. 642.

South Carolina.— Moore *v.* Smith, 11 Rich. 569, 73 Am. Dec. 122.

Tennessee.— D'Arusment *v.* Jones, 4 Lea 251, 40 Am. Rep. 12.

Texas.— Withers *v.* Patterson, 27 Tex. 491, 86 Am. Dec. 643.

Virginia.— Andrews *v.* Avory, 14 Gratt. 229, 73 Am. Dec. 355.

Wisconsin.— Melia *v.* Simmons, 45 Wis. 334, 30 Am. Rep. 746.

United States.— Scott *v.* McNeal, 154 U. S. 34, 14 S. Ct. 1108, 38 L. ed. 896 [*reversing* 5 Wash. 309, 31 Pac. 873, 34 Am. St. Rep. 863]; Griffith *v.* Frazier, 8 Cranch 9, 3 L. ed. 471.

See also Death, 13 Cyc. 290; Executors and Administrators.

36. Posey *v.* Hanson, 10 App. Cas. (D. C.) 496. As to the nature and the amount of evidence required see Chapman *v.* Kimball, 83 Me. 389, 22 Atl. 254.

37. Day *v.* Floyd, 130 Mass. 488. But see Wanner's Estate, 1 Woodw. (Pa.) 112.

38. Walker *v.* Bradbury, 15 Me. 207 (where the person to whom property was bequeathed relinquished all claim to the same); Fosdick *v.* Fosdick, 6 Allen (Mass.) 41 (invalid bequest); *In re* Filbert, 195 Pa. St. 295, 45 Atl. 733. As to partial intestacy see *infra*, III, A, 13.

39. Stokes *v.* O'Fallon, 2 Mo. 32. See, generally, Curtesy; Dower.

Forced heirs see III, A, 5.

Rights of children omitted from will see III, A, 13, c.

40. Fletcher *v.* Severs, 10 N. Y. Suppl. 6.

41. Hayward *v.* Loper, 147 Ill. 41, 35 N. E. 225.

42. Clemens *v.* Clemens, 37 N. Y. 59.

43. Messmann *v.* Egenberger, 46 N. Y. App. Div. 46, 61 N. Y. Suppl. 556.

resident may be held to have died intestate, although he left a will, when there is no evidence as to its contents.[44] A deceased person will be presumed to have died intestate until the contrary is shown.[45]

11. Presumption as to Survivorship. Most jurisdictions have adopted the rule of the common law that there is no presumption of law that either of two persons perishing in a common catastrophe survived the other; that the question is wholly one of fact and must be determined as such upon the evidence. Hence the person upon whom the onus lies must fail in the absence of evidence satisfactory to sustain the conclusion he seeks to establish.[46]

B. What Law Governs — 1. Statutes in Force at Time of Death. By the weight of authority, as all rights of inheritance become vested at the death of the person from whom they are derived, the statutes in force at the time of his death govern the disposition of the estate.[47]

2. Law of State or Country — a. In General. If the status of one who claims succession or inheritance in the estate of another is called in question, it is to be ascertained by the law of the domicile which creates the status, at least when such law is not repugnant to the laws of the state in which it is questioned.[48] The term "heirs," used in a deed, a will, or a federal law, must be interpreted according to the law of the state which has jurisdiction over the property at the

44. Stephenson *v.* Wait, 8 Blackf. (Ind.) 508, 46 Am. Dec. 489.

45. Lyon *v.* Kain, 36 Ill. 362; McClanahan *v.* Williams, 136 Ind. 30, 35 N. E. 897; Stokesberry *v.* Reynolds, 57 Ind. 425; Baxter *v.* Bradbury, 20 Me. 260, 37 Am. Dec. 49. See also *infra*, IV, A, 3, d.

46. Batchelder, Petitioner, 147 Mass. 465, 18 N. E. 225; Fuller *v.* Linzee, 135 Mass. 468; Cage *v.* Leach, 8 Metc. (Mass.) 371, 41 Am. Dec. 518; Moehring *v.* Mitchell, 1 Barb. Ch. (N .Y.) 264. And see Death, 13 Cyc. 309.

The laws of California, however (Code Civ. Proc. § 1963, subd. 40), provide that where two persons of different sex perish in the same calamity, both being over fifteen and under sixty years of age, the male will be presumed to have perished last. Hollister *v.* Cordero, 76 Cal. 649, 18 Pac. 855.

Weight and sufficiency of evidence of survivorship.— Ehle's Estate, 73 Wis. 445, 41 N. W. 627.

47. *Alabama.*— Rottenberry *v.* Pipes, 53 Ala. 447; Donovan *v.* Pitcher, 53 Ala. 411, 25 Am. Rep. 634 (capacity of heir to take lands); Taylor *v.* Taylor, 53 Ala. 135 (exemptions in favor of widow and children); Bell *v.* Mason, 10 Ala. 334.

California.— Coppinger *v.* Rice, 33 Cal. 408.

Florida.—Bushnell *v.* Dennison, 13 Fla. 77; Jones *v.* Dexter, 8 Fla. 276.

Georgia.— Bailey *v.* Simpson, 57 Ga. 523.

Illinois.— Kochersperger *v.* Drake, 167 Ill. 122, 47 N. E. 321, 41 L. R. A. 446; Wunderle *v.* Wunderle, 144 Ill. 40, 33 N. E. 195, 19 L. R. A. 84; Bales *v.* Elder, 118 Ill. 436, 11 N. E. 421; Henson *v.* Moore, 104 Ill. 403; Emmert *v.* Hays, 89 Ill. 11; Sturgis *v.* Ewing, 18 Ill. 176; Paschall *v.* Hailman, 9 Ill. 285.

Indiana.— Brown *v.* Critchell, 110 Ind. 31, 7 N. E. 888, 11 N. E. 486; Leib *v.* Wilson, 51 Ind. 550.

Iowa.— Lorieux *v.* Keller, 5 Iowa 196, 68 Am. Dec. 696.

Kentucky.— White *v.* White, 2 Metc. 185; McGaughey *v.* Henry, 15 B. Mon. 383; Evans *v.* Evans, 74 S. W. 224, 24 Ky. L. Rep. 2421.

Louisiana.— Beale *v.* Walden, 11 Rob. 67; Lange *v.* Richoux, 6 La. 560.

Maine.— Messer *v.* Jones, 88 Me. 349, 34 Atl. 177; Brewer *v.* Hamor, 83 Me. 251, 22 Atl. 161; Decker *v.* Hughes, 38 Me. 153; Hunt *v.* Hunt, 37 Me. 333.

Massachusetts.— Miller *v.* Miller, 10 Metc. 393.

Mississippi.— Marshall *v.* King, 24 Miss. 85.

New Hampshire.— Bell *v.* Scammon, 15 N. H. 381, 41 Am. Dec. 706.

New Jersey.— Holcomb *v.* Lake, 24 N. J. L. 686.

New York.— Matter of Kiernan, 38 Misc. 394, 77 N. Y. Suppl. 924; Hosack *v.* Rogers, 6 Paige 415; Jackson *v.* Mumford, 9 Cow. 254.

Ohio.— Birney *v.* Wilson, 11 Ohio St. 426.

Pennsylvania.— Wood's Appeal, 18 Pa. St. 478.

Texas.— Lindsay *v.* Freeman, 83 Tex. 259, 18 S. W. 727; McKinney *v.* Moore, 73 Tex. 470, 11 S. W. 493; Goodrich *v.* O'Connor, 52 Tex. 375 (holding that under an act granting land certificates "to the heirs" of a deceased person, those who would have been entitled to inherit as heirs under the laws of descent in force at the time of his death were entitled to the grant, and not those who were made heirs under laws enacted since his death); Wheeler *v.* Hollis, 33 Tex. 512.

Virginia.— Dilliard *v.* Tomlinson, 1 Munf. 183; Harrison *v.* Allen, 3 Call 289.

Contra, Armstrong *v.* Armstrong, 1 Oreg. 207, 75 Am. Dec. 555; *In re* Thorn, 24 Utah 209, 67 Pac. 22.

See 16 Cent. Dig. tit. "Descent and Distribution," § 16.

Vested rights see *infra*, II, C, 1, 3.

48. Ross *v.* Ross, 129 Mass. 243, 37 Am. Rep. 321. And see *supra*, II, A, 5, note 12.

time when the interest of the persons so described accrues.[49] If an antenuptial contract provides for the distribution of an estate according to the laws of the state or country where the contract was made, such laws will prevail.[50]

b. Realty and Other Immovable Property. The general doctrine is in accord with the principle which has become established in all civilized countries that real property is regulated in its descent, as in its tenure and transfer, by the *lex loci rei sitæ*.[51] This rule is equally applicable to the descent of all immovable property, whether real or personal.[52] In some states, however, provision has been made by statute for allowing and recording foreign wills according to the laws of the place where made.[53]

c. Personalty and Other Movable Property. On the other hand the succession to and the disposition and distribution of personal property, wherever situated, is governed by the *lex domicilii* of the owner or intestate at the time of his death, without regard to the location of the property or the place of the death.[54] This

49. Price *v.* Tally, 10 Ala. 946; Cutting *v.* Cutting, 6 Fed. 259, 6 Sawy. 396. And see, generally, HEIRS.

50. Baubichon's Estate, Myr. Prob. (Cal.) 55; McLeod *v.* Board, 30 Tex. 238, 94 Am. Dec. 301.

51. *Alabama.*— Grimball *v.* Patton, 70 Ala. 626; Brock *v.* Frank, 51 Ala. 85; Lingen *v.* Lingen, 45 Ala. 410. And see King *v.* Martin, 67 Ala. 177.

Arkansas.— Apperson *v.* Bolton, 29 Ark. 418.

Kansas.— Cooper *v.* Ives, 62 Kan. 395, 63 Pac. 434, holding also that the title cannot be affected by the decree of the court of another state.

Louisiana.— Berthelot *v.* Fitch, 44 La. Ann. 503, 10 So. 867; Abercrombie *v.* Caffray, 3 Mart. N. S. 1.

Maine.— Potter *v.* Titcomb, 22 Me. 300.

Maryland.— Brewer *v.* Cox, (1889) 18 Atl. 864.

New Jersey.— Pratt *v.* Douglas, 38 N. J. Eq. 516.

New York.— Bonati *v.* Welsch, 24 N. Y. 157 (holding that the rights of a widow in the proceeds of the sale of her real estate in France, brought by her husband, who had deserted her, to New York, where he died domiciled, were governed by the French laws); Bloomer *v.* Bloomer, 2 Bradf. Surr. 339.

Ohio.— McNicholl *v.* Ives, 4 Ohio S. & C. Pl. Dec. 75.

Pennsylvania.— Kessler *v.* Kessler, 3 Pa. Co. Ct. 522.

See 16 Cent. Dig. tit. "Descent and Distribution," §§ 17, 18. And see WILLS.

52. Townes *v.* Durbin, 3 Metc. (Ky.) 352, 77 Am. Dec. 176; Sneed *v.* Ewing, 5 J. J. Marsh. (Ky.) 460, 22 Am. Dec. 41; Cox *v.* Von Ahlefeldt, 105 La. 543, 30 So. 175; McCollum *v.* Smith, Meigs (Tenn.) 342, 33 Am. Dec. 147.

53. Slocomb *v.* Slocomb, 13 Allen (Mass.) 38; Bayley *v.* Bailey, 5 Cush. (Mass.) 245; Wilt *v.* Cutler, 38 Mich. 189. See WILLS.

54. *Alabama.*— Brock *v.* Frank, 51 Ala. 85; Lingen *v.* Lingen, 45 Ala. 410; Johnson *v.* Copeland, 35 Ala. 521.

Arkansas.— Hewitt *v.* Cox, 55 Ark. 225, 15 S. W. 1026, 17 S. W. 873; Gibson *v.* Dowell, 42 Ark. 164.

California.— Apple's Estate, 66 Cal. 432, 6 Pac. 7.

Colorado.— Goodrich *v.* Treat, 3 Colo. 408.

Connecticut.— Rockwell *v.* Bradshaw, 67 Conn. 8, 34 Atl. 758; Lawrence *v.* Kitteridge, 21 Conn. 577, 56 Am. Dec. 385.

Georgia.— Grote *v.* Pace, 71 Ga. 231.

Illinois.— Cooper *v.* Beers, 143 Ill. 25, 33 N. E. 61; Russell *v.* Madden, 95 Ill. 485; Paschall *v.* Hailman, 9 Ill. 265; Channel *v.* Capen, 46 Ill. App. 234.

Indiana.— Warren *v.* Hofer, 13 Ind. 167; Thieband *v.* Sebastian, 10 Ind. 454; Irving *v.* McLean, 4 Blackf. 52.

Kentucky.— Sneed *v.* Ewing, 5 J. J. Marsh 460, 22 Am. Dec. 41; Thomas *v.* Tanner, 6 T. B. Mon. 52.

Louisiana.— Abston *v.* Abston, 15 La. Ann. 137; Marcenaro *v.* Bertoli, 2 La. Ann. 980; Marigny *v.* Union Bank, 12 Rob. 283; Packwood's Succession, 9 Rob. 438, 41 Am. Dec. 341; Hicks *v.* Pope, 8 La. 554, 28 Am. Dec. 142.

Maryland.— Brewer *v.* Cox, (1889) 18 Atl. 864; Noonan *v.* Kemp, 34 Md. 73, 6 Am. Rep. 307; De Sobry *v.* De Laistre, 2 Harr. & J. 191, 3 Am. Dec. 555. And see Newcomer *v.* Orem, 2 Md. 297, 56 Am. Dec. 717.

Mississippi.—Garland *v.* Rowan, 2 Sm. & M. 617.

Missouri.— Richardson *v.* Lewis, 21 Mo. App. 531.

New Hampshire.— Champollion *v.* Corbin, 71 N. H. 78, 51 Atl. 674; Leach *v.* Pillsbury, 15 N. H. 137.

New York.— *In re* Devoe, 171 N. Y. 281, 63 N. E. 1102, 57 L. R. A. 536 [*affirming* 66 N. Y. App. Div. 1, 72 N. Y. Suppl. 962]; Parsons *v.* Lyman, 20 N. Y. 103; Matter of Florance, 54 Hun 328, 7 N. Y. Suppl. 578; Matter of Negus, 27 Misc. 165, 58 N. Y. Suppl. 377; Matter of Ruppaner, 15 Misc. 654, 37 N. Y. Suppl. 429, 25 N. Y. Civ. Proc. 158; Simonson *v.* Waller, 14 Misc. 95, 35 N. Y. Suppl. 201; Matter of Witter, 15 N. Y. Suppl. 133, 2 Connoly Surr. 530; Matter of Braithwaite, 19 Abb. N. Cas. 113; Sherwood *v.* Wooster, 11 Paige 441; Vroom *v.* Van Horne, 10 Paige 549, 42 Am. Dec. 94; Holmes

rule applies to the distribution of slaves and all other movable property as well as to that which is strictly personal property,[55] and to the allotment of the widow's or husband's rights in the property of the deceased;[56] but the rights of third parties acquired through the heirs or legatees are determined by the law of the domicile of such heirs or legatees,[57] and the rule does not govern in the distribution of money recovered by an administrator under a statute of another state, where such statute provides for its distribution,[58] nor in the descent of shares in public lands acquired under the provisions of a national law, where such law provides for their disposition.[59] There is no doubt that every state has power to establish and regulate the rights of property in things within its jurisdiction, whether the property be real or personal, movable or immovable.[60] Accordingly the law of the place under which an ancillary administration is taken must govern the distribution of the assets in the payment of debts there.[61] Some states have exercised this power for the purpose of regulating the descent and distribution of personal property within their limits, as well as of real estate, notwithstanding the laws of the domicile of the owner.[62]

d. Domicile For Purposes of Succession. To constitute a domicile, two things

v. Remsen, 4 Johns. Ch. 460, 8 Am. Dec. 581; Mills *v.* Fogal, 4 Edw. 559; Graham *v.* Public Administrator, 4 Bradf. Surr. 127; Burr *v.* Sherwood, 3 Bradf. Surr. 85; Bloomer *v.* Bloomer, 2 Bradf. Surr. 339; *In re* Mercure, 1 Tuck. Surr. 288.

North Carolina.— Grant *v.* Reese, 94 N. C. 720; Moye *v.* May, 43 N. C. 131; Williamson *v.* Smart, 1 N. C. 355, 2 Am. Dec. 638.

Ohio.— Swearingen *v.* Morris, 14 Ohio St. 424.

Pennsylvania.— *In re* Miller, 3 Rawle 312, 24 Am. Dec. 345; *In re* Hancock, 7 Kulp 36; Kessler *v.* Kessler, 3 Pa. Co. Ct. 522; Rutherford's Estate, 1 Chest. Co. Rep. 149, holding that the share of one of the next of kin could not be paid to her personally as she was under age, although by the laws of the state where she resided she was of full age. And see Troxell's Estate, 13 Montg. Co. Rep. 68.

South Carolina.— Stent *v.* McLeod, 2 McCord Eq. 354.

Tennessee.— Ellis *v.* Northwestern Mut. L. Ins. Co., 100 Tenn. 177, 43 S. W. 766, holding that life insurance will be distributed according to the laws of the domicile of deceased.

Texas.— Simpson *v.* Knox, 1 Tex. Unrep. Cas. 569.

West Virginia.— White *v.* Tennant, 31 W. Va. 790, 8 S. E. 596, 13 Am. St. Rep. 896.

United States.— Ennis *v.* Smith, 14 How. 400, 14 L. ed. 472; Armstrong *v.* Lear, 8 Pet. 52, 8 L. ed. 863; Harvey *v.* Richards, 11 Fed. Cas. No. 6,184, 1 Mason 381; Dixon *v.* Walker, 30 Fed. Cas. No. 18,291, 2 Hayw. & H. 316.

See 16 Cent. Dig. tit. "Descent and Distribution," §§ 17, 19. And see WILLS.

55. Price *v.* Tally, 10 Ala. 946; Sneed *v.* Ewing, 5 J. J. Marsh. (Ky.) 460, 22 Am. Dec. 41; Garland *v.* Rowan, 2 Sm. & M. (Miss.) 617; Williamson *v.* Smart, 1 N. C. 355, 2 Am. Dec. 638.

56. *Arkansas.*— Hewitt *v.* Cox, 55 Ark. 225, 15 S. W. 1026, 17 S. W. 873.

Maine.— Gilman *v.* Gilman, 53 Me. 184.

Mississippi.— Garland *v.* Rowan, 2 Sm. & M. 617.

Missouri.— Locke *v.* McPherson, 163 Mo. 493, 63 S. W. 726, 85 Am. St. Rep. 546, 52 L. R. A. 420 (holding, however, where a resident of New York married a woman in Missouri, who died before taking up her abode in New York, that the personalty in the hands of the Missouri administrator would be distributed according to the Missouri law, there being no statute of distribution in New York applying to the personal property of a married woman dying without descendants, and the marriage in Missouri not giving the husband title over the wife's personalty); Richardson *v.* Lewis, 21 Mo. App. 531.

New Jersey.— Harrall *v.* Harrall, 39 N. J. Eq. 279, 51 Am. Rep. 17; Harrall *v.* Wallis, 37 N. J. Eq. 458.

See 16 Cent. Dig. tit. "Descent and Distribution," §§ 17, 19.

Rights of surviving spouse see *infra*, II, B.

57. Penny *v.* Christmas, 7 Rob. (La.) 481; Muus *v.* Muus, 29 Minn. 115, 12 N. W. 343; Hill *v.* Townsend, 24 Tex. 575.

58. McDonald *v.* McDonald, 15 Ky. L. Rep. 367.

59. Proebstel *v.* Hogue, 15 Fed. 581, 8 Sawy. 592. In this case, however, the local law was held to govern because, although the act had been complied with, a patent had not been issued.

60. Penny *v.* Christmas, 7 Rob. (La.) 481; Jones *v.* Marable, 6 Humphr. (Tenn.) 116.

61. Goodall *v.* Marshall, 11 N. H. 88, 35 Am. Dec. 472. See, generally, EXECUTORS AND ADMINISTRATORS.

62. *In re* Baubichon, 49 Cal. 18, Myr. Prob. (Cal.) 55; Cooper *v.* Beers, 143 Ill. 25, 33 N. E. 61; Channel *v.* Capen, 46 Ill. App. 234; Cole *v.* His Executors, 7 Mart. N. S. (La.) 41, 18 Am. Dec. 241; Bryan *v.* Moore, 11 Mart. (La.) 26, 13 Am. Dec. 347; Mahorner *v.* Hooe, 9 Sm. & M. (Miss.) 247, 48 Am. Dec. 706.

must concur: first residence, and second the intention to make it the party's home.[63] The law attributes to every person at his birth the domicile of his father if he be legitimate, or if illegitimate, the domicile of his mother. This is the domicile of origin. It may be changed during the minority, at the will of the parent or guardian;[64] but as soon as the person becomes *sui juris* he is competent to assume another domicile, the continuance of which depends upon his will and act.[65] No person can have more than one domicile for one and the same purpose at the same time,[66] but every person has a domicile somewhere, retaining his domicile of origin till he changes it by acquiring another, and likewise each successive domicile until a new one is acquired.[67] A wife's domicile is generally that of her husband,[68] but this rule is subject to exceptions under special circumstances.[69]

e. Mexican and Spanish Law. In California the Mexican law was applicable to the descent and distribution of the estate of a deceased person until it was changed by statute,[70] while in Mississippi and New Mexico the laws of Spain were applicable.[71]

3. Common or Civil Law as to Degrees of Kindred. Until altered by statute, degrees of kindred, in relation to descent and distribution of property, have been reckoned according to the canons of the common law, but the English common law of descents, in its more essential features, has been universally rejected in the United States and every state has adopted a law of descents for itself.[72] In most

Personal property which has no fixed situs, however, such as debts, notes, or mortgages, cannot be affected by such statutes. Cooper *v.* Beers, 143 Ill. 25, 33 N. E. 61; Channel *v.* Capen, 46 Ill. App. 234. But see Jahier *v.* Rascoe, 62 Miss. 699, holding that notes taken by an agent for a foreign principal, in the business of loaning money for her, are subject to distribution as "personal property situated in this state."

63. State *v.* Hallett, 8 Ala. 159; Smith *v.* Croom, 7 Fla. 81 (holding that the actual residence of a man within some particular jurisdiction, of such character as shall, in accordance with certain well-established principles of the public law, give direction to the succession of his personal estate, constitutes his "domicile of succession"); Gorham *v.* Springfield, 21 Me. 58; Greene *v.* Windham, 13 Me. 225; Jennison *v.* Hapgood, 10 Pick. (Mass.) 77; Harvard College *v.* Gore, 5 Pick. (Mass.) 370. See, generally, Domicile.

64. Matter of Kiernan, 38 Misc. (N. Y.) 394, 77 N. Y. Suppl. 924.

65. Jarman Wills *12. And see, generally, Domicile.

66. White *v.* Brown, 29 Fed. Cas. No. 17,538, 1 Wall. Jr. 217. See, generally, Domicile.

67. State *v.* Hallett, 8 Ala. 159; Cooper *v.* Beers, 143 Ill. 25, 33 N. E. 61; Graham *v.* Public Administrator, 4 Bradf. Surr. (N. Y.) 127.

Actual residence therefore is not necessary to retain a domicile once acquired. It is acquired by the mere intention not to change it. Sears *v.* Boston, 1 Metc. (Mass.) 250; Thorndike *v.* Boston, 1 Metc. (Mass.) 242; Lincoln *v.* Hapgood, 11 Mass. 350; Granby *v.* Amherst, 7 Mass. 1; Abington *v.* Boston, 4 Mass. 312; Shattuck *v.* Maynard, 3 N. H. 123.

68. See, generally, Domicile.

69. Thus where a wife had been living apart from her husband for two years by mutual consent, during which time their children lived with her and were wholly supported by her, the husband living in another state and contributing nothing to her support, it was held that she acquired a domicile in the state where she lived. Matter of Florance, 54 Hun (N. Y.) 328, 7 N. Y. Suppl. 578. And where a minor child in the unrestricted custody of its mother resided in Pennsylvania, it was held that the law of that state determined the inheritance rights of his heirs, notwithstanding that the father, from whom the mother was divorced, resided in Minnesota. Fox *v.* Hicks, 81 Minn. 197, 83 N. W. 538, 50 L. R. A. 663. See, generally, Domicile.

70. McNeil *v.* San Francisco First Cong. Soc., 66 Cal. 105, 4 Pac. 1096.

71. Chew *v.* Calvert, Walk. (Miss.) 54; Crary *v.* Field, 9 N. M. 222, 50 Pac. 342.

72. *Colorado.*— Webb *v.* Jackson, 6 Colo. App. 211, 40 Pac. 467.

Connecticut.— Hale's Appeal, 69 Conn. 611, 38 Atl. 392; Campbell's Appeal, 64 Conn. 277, 29 Atl. 494, 24 L. A. R. 667; Howard *v.* Howard, 19 Conn. 313.

Florida.—Bushnell *v.* Dennison, 13 Fla. 77; Jones *v.* Dexter, 8 Fla. 276.

Indiana.— Bruce *v.* Baker, Wils. 462.

New Hampshire.—Bell *v.* Scammon, 15 N. H. 381, 41 Am. Dec. 706.

Oklahoma.— Crist *v.* Crosby, 11 Okla. 635, 69 Pac. 885.

South Carolina.—North *v.* Valk, Dudley Eq. 212.

Virginia.— Davis *v.* Rowe, 6 Rand. 355.

Wisconsin.— Brown *v.* Baraboo, 90 Wis. 151, 62 N. W. 921, 30 L. R. A. 320.

United States.— Bates *v.* Brown, 5 Wall. 710, 18 L. ed. 535.

jurisdictions the statutes are based upon the rules of the civil law and not upon the canons of the common law.[73]

4. When Rules of Common Law Will Prevail. Cases which do not come within the terms of the statutes are determined by the rules of the common law.[74] Entailed estates descend according to the course of the common law.[75] But where the statutes of descent purport to furnish a complete code, no rule of the common law which is manifestly opposed to the spirit of the statutes will be enforced, although not expressly repealed.[76]

C. Constitutional and Statutory Provisions — 1. In General. The statutory provisions of the several states differ so widely in the terms and language used that very few general principles can be deduced from the cases.[77] Some

See 16 Cent. Dig. tit. "Descent and Distribution," §§ 23, 24.

73. *California.*— People *v.* De la Guerra, 24 Cal. 73.

Illinois.— Hays *v.* Thomas, 1 Ill. 180.

Indiana.— Bruce *v.* Bissell, 119 Ind. 525, 22 N. E. 4, 12 Am. St. Rep. 422; Cloud *v.* Bruce, 61 Ind. 171; Bruce *v.* Baker, Wils. 462. See Rountree *v.* Pursell, 11 Ind. App. 522, 39 N. E. 747.

Maryland.— Stewart *v.* Jones, 8 Gill & J. 1.

New Jersey.— Smith *v.* Gaines, 36 N. J. Eq. 297.

New York.—Hurtin *v.* Proal, 3 Bradf. Surr. 414; Sweezey *v.* Willis, 1 Bradf. Surr. 495.

Ohio.— Clayton *v.* Drake, 17 Ohio St. 367.

Pennsylvania.— McDowell *v.* Addams, 45 Pa. St. 430.

See 16 Cent. Dig. tit. "Descent and Distribution," §§ 23, 24.

74. *Maryland.*— Coomes *v.* Clements, 4 Harr. & J. 480; Griffith *v.* Griffith, 4 Harr. & M. 101.

Nevada.— Clark *v.* Clark, 17 Nev. 124, 28 Pac. 238.

New Jersey.— Wills *v.* Cooper, 25 N. J. L. 137; Fidler *v.* Higgins, 21 N. J. Eq. 138; Boston Franklinite Co. *v.* Condit, 19 N. J. Eq. 394.

Pennsylvania.— Cresoe *v.* Laidley, 2 Binn. 279; Johnson *v.* Haines, 4 Dall. 64, 1 L. ed. 743.

South Carolina.— Martin *v.* Price, 2 Rich. Eq. 412.

United States.— Barnitz *v.* Casey, 7 Cranch 456, 3 L. ed. 403.

See 16 Cent. Dig. tit. "Descent and Distribution," § 25. And see *infra*, III, A, 2, note 63; and Common Law, 8 Cyc. 366.

75. Baker *v.* Mattocks, Quincy (Mass.) 69; Guthrie's Appeal, 37 Pa. St. 9; Goodright *v.* Morningstar, 1 Yeates (Pa.) 313. See Estates.

76. Bates *v.* Brown, 5 Wall. (U. S.) 710, 18 L. ed. 535, holding that the common-law rule of shifting inheritances was not in force in Illinois. See also to the same effect Cox *v.* Matthews, 17 Ind. 367; Drake *v.* Rogers, 13 Ohio St. 21. And see Common Law, 8 Cyc. 376.

77. For the construction of particular statutes see the following cases:

Arkansas.—Harrison *v.* Lamar, 33 Ark. 824 ("estate" includes both real and personal estate); Smith *v.* Allen, 31 Ark. 268 ("when any man shall die, leaving minor children and no widow" applies to the case where a woman dies leaving minor children and no husband).

California.—De Castro *v.* Barry, 18 Cal. 96.

Florida.— Jones *v.* Dexter, 8 Fla. 276.

Idaho.— Hall *v.* Blackman, (1902) 68 Pac. 19, possessory rights declared to be real estate.

Indiana.—Scott *v.* Silvers, 64 Ind. 76 (word "children" construed to mean "children or their descendants"); Bruce *v.* Baker, Wils. 462 (statute applied to personalty as well as to realty).

Kentucky.— Wells *v.* Head, 12 B. Mon. 166.

Maine.— Davis *v.* Stinson, 53 Me. 493.

Maryland.— Patapsco Female Inst. *v.* Rock Hill College, 51 Md. 470.

Massachusetts.— Runey *v.* Edmands, 15 Mass. 291; Sheffield *v.* Lovering, 12 Mass. 490.

Mississippi.— Cable *v.* Martin, 1 How. 558.

Nebraska.— Motley *v.* Motley, 60 Nebr. 593, 83 N. W. 830; Finders *v.* Bodle, 58 Nebr. 57, 78 N. W. 480; Hinds *v.* Hinds, 56 Nebr. 545, 76 N. W. 1087; Shellenberger *v.* Ransom, 41 Nebr. 631, 59 N. W. 935, 25 L. R. A. 564.

New Hampshire.—Bell *v.* Scammon, 15 N. H. 381, 41 Am. Dec. 706; Campbell *v.* Wallace, 12 N. H. 362, 37 Am. Dec. 219.

New York.—Riggs *v.* Palmer, 115 N. Y. 506, 22 N. E. 188, 12 Am. St. Rep. 819, 5 L. R. A. 340; McCarty *v.* Deming, 4 Lans. 440; Jackson *v.* Skeels, 19 Johns. 198.

Ohio.— Lathrop *v.* Young, 25 Ohio St. 451; Clayton *v.* Drake, 17 Ohio St. 367, "the ancestor from whom the estate came" construed to mean the last ancestor from whom it came. In this state it has been held that the ordinance of 1787, section 2, it still in force. Lyon *v.* Lyon, 24 Ohio Cir. Ct. 498.

Pennsylvania.— Carpenter's Estate, 170 Pa. St. 203, 32 Atl. 637, 50 Am. St. Rep. 765, 29 L. R. A. 145; Brenneman's Appeal, 40 Pa. St. 115.

Tennessee.— Cowden *v.* Pitts, 2 Baxt. 59.

Texas.— Jones *v.* Barnett, 30 Tex. 637.

Washington.— Fort *v.* West, 14 Wash. 10, 44 Pac. 104, "inheritance" construed as applying to both real and personal property.

United States.— Gardner *v.* Collins, 2 Pet. 58, 7 L. ed. 347, "a descent from a parent."

See 16 Cent. Dig. tit. "Descent and Distribution," § 28.

Effect of murder of ancestor by heir see *infra*, III, A, 14.

state constitutions contain provisions forbidding special laws changing the law of descent.[78] Statutes changing in any way the law of descent cannot act retrospectively so as to take away rights already vested.[79]

2. "Next of Kin" or "Heir." Where a statute uses the term "next of kin" or "heir," it will be received in the sense which it has at common law, unless it clearly appears that a different sense was intended.[80] They are given a broader sense, however, by most of the statutes, being used interchangeably in reference to both real and personal estate of a decedent.[81]

3. Vested Rights and Power to Change Laws of Inheritance. No one has a vested right to be the future heir of a living person. Hence laws of inheritance, resting in public policy, may be changed by the legislature at will without any violation of contractual or vested rights.[82]

D. Property Subject to Descent and Distribution — 1. In General. It may be stated as a general rule that all vested rights and interests, and all contingent interests where the person is certain, are subject to descent and distribution.[83]

78. Wunderle *v.* Wunderle, 144 Ill. 40, 33 N. E. 195, 19 L. R. A. 84, holding, however, that such a provision was not violated by a law general in its character, but which, on account of treaties with foreign nations, was made to a certain extent special in its operation. See, generally, STATUTES.

79. *Alabama.*— Donovan *v.* Pitcher, 53 Ala. 411, 25 Am. Rep. 634, where the estate had vested in the state for want of an heir.

Illinois.— Betts *v.* Bond, 1 Ill. 287.

Maryland.— Rock Hill College *v.* Jones, 47 Md. 1.

North Carolina.— Rutherford *v.* Green, 37 N. C. 121.

Oregon.— Ford *v.* Kennedy, 1 Oreg. 166.

Vermont.— Gilman *v.* Morrill, 8 Vt. 74.

Virginia.— Savage *v.* Mears, 2 Rob. 570, holding that a statute providing for children of a testator pretermitted in his will does not apply to a will published before the passage of the statute. See *supra*, II, B, 1; *infra*, III, A, 13, c.

See 16 Cent. Dig. tit. "Descent and Distribution," § 30. And see CONSTITUTIONAL LAW, 8 Cyc. 1017.

80. State *v.* Engle, 21 N. J. L. 347; McCool *v.* Smith, 1 Black (U. S.) 459, 17 L. ed. 218. See also *supra*, II, A, 3; and HEIR; WILLS.

81. *In re* Ricaud, Myr. Prob. (Cal.) 158; Hillhouse *v.* Chester, 3 Day (Conn.) 166, 3 Am. Dec. 265. And see HEIR.

82. Gregley *v.* Jackson, 38 Ark. 487; Brown *v.* Critchell, 110 Ind. 31, 7 N. E. 888, 11 N. E. 486; Sleight *v.* Read, 18 Barb. (N. Y.) 159; Hamilton *v.* Flinn, 21 Tex. 713. And see Caruthers *v.* Tarvin, 8 Ohio Dec. (Reprint) 344, 7 Cinc. L. Bul. 127 [*affirmed* in 8 Ohio Dec. (Reprint) 451, 8 Cinc. L. Bul. 21].

See also CONSTITUTIONAL LAW, 8 Cyc. 894.

83. *Alabama.*— Lewis *v.* Gainesville, 7 Ala. 85 (license to establish a ferry, which is subject to revocation if certain conditions are not complied with, descends to the heir); Hogan *v.* Bell, 4 Stew. & P. 286 (interest of residuary legatee).

Idaho.— Hall *v.* Blackman, (1902) 68 Pac. 19.

Indiana.— Murray *v.* Cazier, 23 Ind. App. 600, 53 N. E. 476, 55 N. E. 880, holding that rents of a husband's lands accruing under a lease in which the wife joined, after the husband's death are in the nature of chattels real, and descend to the heir, although the lease provided that they should be paid to the wife.

Iowa.— Potter *v.* Worley, 57 Iowa 66, 7 N. W. 685, 10 N. W. 298 (widow's dower unassigned during her lifetime); Pierson *v.* Armstrong, 1 Iowa 282, 63 Am. Dec. 440 (executed use).

Kansas.— Mooney *v.* Olsen, 21 Kan. 691 (possession of real estate under claim of ownership); Janes *v.* Holmden, (App. 1899) 52 Pac. 913 [*affirmed* in (Sup. 1898) 55 Pac. 1101].

Louisiana.— See Cox *v.* Von Ahlefeldt, 50 La. Ann. 1266, 23 So. 959.

Maryland.— Edelen *v.* Middleton, 9 Gill 161.

New Jersey.— Manners *v.* Manners, 20 N. J. L. 142, possibility coupled with an interest.

New York.— Tyler *v.* Heidorn, 46 Barb. 439 (rent reserved); Hunter *v.* Hunter, 17 Barb. 25 (rents reserved on perpetual leases); McNabb *v.* Pond, 4 Bradf. Surr. 7 (church pew).

North Carolina.— Robertson *v.* Fleming, 57 N. C. 387, contingent remainder, contingent executory bequest, or a future contingent trust, where the person is certain. And see Colson *v.* Martin, 62 N. C. 125.

Ohio.— Mickey *v.* Wintrode, 7 Ohio 124 (lease for ninety-nine years renewable forever, held personalty and not inheritable as realty); Murdock *v.* Ratcliff, 7 Ohio 119; Reynolds *v.* Stark County Com'rs, 5 Ohio 204; Bond *v.* Swearingen, 1 Ohio 395 (an estate forfeited to the heirs under an act of the territorial government, by a conveyance for a gambling debt, passes to heir subject to the grantor's debts).

Oklahoma.— Crist *v.* Cosby, 11 Okla. 635, 69 Pac. 885.

Pennsylvania.— Keller *v.* Auble, 58 Pa. St. 410, 98 Am. Dec. 297 (possession under claim of ownership); Allen *v.* McGowan, 8 Pa. Dist. 28 (interest of deceased partner in partner-

Ordinarily a trustee takes property subject to the same rules as to its devolution as a legal estate.[84] An equity in lands, or right to redeem, passes to the heirs by descent.[85] And an interest in a contract for the purchase of land is in equity real estate, and descends to the heirs of the purchaser.[86]

2. Interest of Vendor in Lands Sold. When a vendor retains the legal title, giving a bond for a deed, contracting to sell, or delivering the deed in escrow, upon his death the legal title descends to his heirs, who hold it, however, only as security for the purchase-money, subject to the equitable rights of the purchasers, and the purchase-money, when paid, goes to the executor or administrator.[87]

3. Interest in Public Lands. The interest of a deceased person in public land warrants and settlement claims is subject to the same laws of descent as other lands.[88]

ship engaged in dealing in lands descends as personalty). And see Cote's Appeal, 79 Pa. St. 235.

Virginia.— Medley *v.* Medley, 81 Va. 265, executory devise.

Washington.— Fort *v.* West, 14 Wash. 10, 44 Pac. 104, share in community property.

See 16 Cent. Dig. tit. "Descent and Distribution," § 33.

But the estate of an infant, consisting solely of her share of the property set apart to her and her infant brother out of their father's estate for their support, as exempt from distribution, passes on her death to her infant brother and does not go to her administrator. Wilson *v.* Parson, 106 Ky. 385, 50 S. W. 684, 20 Ky. L. Rep. 1931. See Executors and Administrators.

Burial lots see Cemeteries, 6 Cyc. 718.

Remainders, reversions, and executory devises see *infra*, II, E, 5.

Rights of surviving spouse see *infra*, III, B.

Community property see Husband and Wife.

84. Gill *v.* Logan, 11 B. Mon. (Ky.) 231 (holding that a trust estate will not revert but will pass by descent, although all the beneficiaries die); Schenck *v.* Schenck, 16 N. J. Eq. 174. See Anderson *v.* Mather, 44 N. Y. 249; Jenks *v.* Backhouse, 1 Binn. (Pa.) 91. But see McDougald *v.* Carey, 38 Ala. 320.

See 16 Cent. Dig. tit. "Descent and Distribution," § 34. And see, generally, Trusts.

85. Bowery Nat. Bank *v.* Duncan, 12 Hun (N. Y.) 405; Avery *v.* Dufrees, 9 Ohio 145; Harvey *v.* Steptoe, 17 Gratt. (Va.) 289, quasi-equity of redemption of grantor in deed of trust to secure debts.

86. *Arkansas.*— Strauss *v.* White, 66 Ark. 167, 51 S. W. 64.

District of Columbia.— Braxton *v.* Braxton, 20 D. C. 355.

Illinois.— Smith *v.* Smith, 55 Ill. 204.

Iowa.— Kellogg *v.* Logan, 38 Iowa 688, holding, however, that the heirs of a decedent who had assigned all his interest in a contract for the purchase of school lands could claim no interest in such land by descent.

New York.— Griffith *v.* Beecher, 10 Barb. 432 (holding also that the purchaser's administrator, if he receives rent for such land, or money for the sale of his interest therein, is accountable to the heirs for the amount so received); Williams *v.* Kierney, 6 N. Y. St. 560 (holding also that the unpaid purchase-money is payable out of the personal assets of the estate); Champion *v.* Brown, 6 Johns. Ch. 398, 10 Am. Dec. 343 (holding that the executor or administrator of the purchaser has no right to assign the contract).

Pennsylvania.— Aldrich *v.* Bailey, 71 Pa. St. 246.

Tennessee.— Myrick *v.* Boyd, 3 Hayw. 179.

See 16 Cent. Dig. tit. "Descent and Distribution," § 36.

Bond for title or offer to sell.—A bond for title descends to the heir of the obligee, the administrator being bound to pay out of the assets the amount which may remain due of the purchase-money. Myrick *v.* Boyd, 3 Hayw. (Tenn.) 179. But where a bond for title shows that the title was in a third person, and the obligor never procures a conveyance of the title to the obligee nor obtains it himself, the heir of the obligee does not take the land by descent. Allen *v.* Greene, 19 Ala. 34. And where one having the privilege of accepting an offer of sale within a certain time dies within that time without having accepted, he has no estate in the property which can descend to his heirs. Sutherland *v.* Parkins, 75 Ill. 338.

87. *Arkansas.*— Davie *v.* Davie, (1892) 18 S. W. 935, holding, however, that the land itself did not descend to the heirs.

Kentucky.— Litsey *v.* Phelps, 5 Ky. L. Rep. 513, child's share in land contracted to be sold.

New Jersey.— Flagg *v.* Teneick, 29 N. J. L. 25.

New York.— Hawley *v.* James, 5 Paige 318, holding that the vendor's interest in the lands does not descend to his heirs, but his interest under the contract descends as personal property.

Pennsylvania.— See Vincent *v.* Huff, 8 Serg. & R. 381.

See 16 Cent. Dig. tit. "Descent and Distribution," § 37.

88. *Alabama.*— Atwood *v.* Beck, 21 Ala. 590; Johnson *v.* Collins, 12 Ala. 322, holding that if the settler dies without performing the conditions imposed, his right to enter descends to his heir at law; but the heir cannot call upon the administrator to pay the purchase-money due the government,

4. Life Insurance. The interest of a beneficiary in a life-insurance policy is a vested interest and as such is transmissible by descent,[89] unless by the terms of the policy it is otherwise provided.[90]

E. Source of Title and Seizin of Intestate — 1. In General. Under the common-law rule that the heir was to deduce his title from the person last seized, the ancestor must have been actually seized in order to transmit the title; but in this country the common-law rule has been superseded by statutes under which actual seizin is not necessary to make the stock in the devolution of estates.[91] Mere possession, however, without title, is not sufficient,[92] for the heir takes the title which the ancestor had at the time of his death,[93] and no better.[94] The word "acquired" in statutes providing for the descent of property where the estate was acquired by the intestate applies to all lands that came in any other way than by gift, devise, or descent from a parent, or the ancestor of a parent.[95] Land

since his intestate was under no obligation to pay out the land.

Colorado.— Filmore *v.* Reithman, 6 Colo. 120.

Illinois.— See Kane County *v.* Herrington, 50 Ill. 232.

Kentucky.— Cobb *v.* Stewart, 4 Metc. 255, 83 Am. Dec. 465 (where a patent was issued to testator after his death, and it was held that the legal title vested in the heirs); Hart *v.* Young, 3 J. J. Marsh. 408; Hansford *v.* Minor, 4 Bibb 385 (survey not perfected by grant).

New York.— Jackson *v.* Howe, 14 Johns. 405 (where a patent was issued to a revolutionary soldier many years after his death and after the death of his brother, his heir at law, and it was held that the heirs of the brother were entitled); Jackson *v.* Winslow, 2 Johns. 80.

Ohio.— Bond *v.* Swearingen, 1 Ohio 395, holding that where lands located and surveyed by the ancestor are patented to the heirs, the heirs take by descent and not by purchase.

Pennsylvania.— Workman *v.* Gillespie, 3 Yeates 571.

Tennessee.— Armstrong *v.* Campbell, 3 Yerg. 201, 24 Am. Dec. 556.

Texas.— Neal *v.* Bartleson, 65 Tex. 478. *Compare* McReynolds *v.* Bowlby, 1 Tex. Unrep. Cas. 452.

See 16 Cent. Dig. tit. "Descent and Distribution," § 38.

Rights of settler on public lands.— Hall *v.* Russell, 101 U. S. 503, 25 L. ed. 829; McCune *v.* Essig, 118 Fed. 273 [*affirmed* in 122 Fed. 588, 59 C. C. A. 429].

A patent issued to the widow of a homestead settler upon her making the final proof, in accordance with the provision of the homestead law, conveys the land to her absolutely, and no interest therein passes by inheritance to the children of her husband. McCune *v.* Essig, 118 Fed. 273 [*affirmed* in 122 Fed. 588, 59 C. C. A. 429].

89. *Arkansas.*— Johnson *v.* Hall, 55 Ark. 210, 17 S. W. 874.

California.— Crowe *v.* Dobbel, 105 Cal. 350, 38 Pac. 957; *In re* Dobbel, 104 Cal. 432, 38 Pac. 87, 43 Am. St. Rep. 123.

Connecticut.— Continental L. Ins. Co. *v.* Palmer, 42 Conn. 60, 19 Am. Rep. 530.

Indiana.— See Hutson *v.* Merrifield, 51 Ind. 24, 19 Am. Rep. 722, where a wife, holding a policy on the life of her husband, died before the husband, and it was held that although her husband survived her she had an interest transmissible by descent.

Maine.— Libby *v.* Libby, 37 Me. 359.

Michigan.— Voss *v.* Connecticut Mut. L. Ins. Co., 119 Mich. 161, 77 N. W. 697, 44 L. R. A. 689.

Missouri.— Shields *v.* Sharp, 35 Mo. App. 178.

New Hampshire.— Connecticut Mut. L. Ins. Co. *v.* Fish, 59 N. H. 126.

See 16 Cent. Dig. tit. "Descent and Distribution," § 39. And see, generally, Life Insurance.

90. Anderson *v.* Groesbeck, 26 Colo. 3, 55 Pac. 1086, where the policy was made payable to the beneficiary only if she survived the insured.

91. *Connecticut.*— Hillhouse *v.* Chester, 3 Day 166, 3 Am. Dec. 265.

Georgia.— Thompson *v.* Sandford, 13 Ga. 238.

Indiana.— Parks *v.* Kimes, 100 Ind. 148.

North Carolina.— Sears *v.* McBride, 70 N. C. 152.

Tennessee.— Guion *v.* Burton, Meigs 565.

United States.— McCune *v.* Essig, 122 Fed. 588 [*affirming* 118 Fed. 273, 59 C. C. A. 429]; Obermiller *v.* Wylie, 36 Fed. 641.

See 16 Cent. Dig. tit. "Descent and Distribution," § 40.

92. White *v.* Cook, 73 Ga. 164.

93. Hall *v.* Caperton, 87 Ala. 285, 6 So. 388, title by adverse possession.

Where government lands are patented to the heirs of the original grantee, they take by descent, and the lands are liable for debts of the estate. McCauley *v.* Harvey, 49 Cal. 497; Frizzle *v.* Veach, 1 Dana (Ky.) 211. *Contra,* Rogers *v.* Clemmans, 26 Kan. 522.

94. Mankin *v.* Mankin, 91 Iowa 406, 59 N. W. 292; Grimes *v.* Ballard, 8 B. Mon. (Ky.) 625, holding that where the ancestor takes either an estate in fee, defeasible upon his death without issue, or a fee tail (converted by law into a fee simple) his alienation bars his issue, who in either case cannot claim otherwise than by descent. See also IV, A, 4, a.

95. *In re* Miller, 2 Lea (Tenn.) 54.

devised to a child who dies intestate is to be distributed according to the intestate law.[96]

2. Equitable Estate. The descent of land is controlled by the legal title, and the statutes of descent and distribution are to be construed and administered by rules of law and not upon equitable principles.[97] And although an equitable interest will descend as real estate,[98] it will not descend as ancestral property.[99] In the case of personal property, however, the rule that descent is controlled by the legal title does not apply.[1] When the legal and equitable titles unite in the same person the latter is merged in the former, and the whole estate descends according to the course of the legal title.[2]

3. Succession Dependent on Source of Intestate's Title[3] — a. In General. The general rule is that the land of an intestate obtained by gift, devise, or descent from an ancestor goes to the blood of the ancestor from whom it came, in preference to the next of kin of deceased not of his blood.[4] If, however, the statutes make no express provision for the descent of such property, the source of the intestate's title is not material.[5] The term "ancestor" in this connection includes collaterals and refers to antecessors in estate, and not necessarily to antecessors in pedigree.[6] The term as used in the statutes which are based upon this

96. Anonymous, 1 Dall. (Pa.) 20, 1 L. ed. 19.

97. Higgins *v.* Higgins, 57 Ohio St. 239, 48 N. E. 943; Patterson *v.* Lamson, 45 Ohio St. 77, 12 N. E. 531; Murdock *v.* Lantz, 34 Ohio St. 589 (holding that the fact that a married woman has parted with the possession of ancestral property in accordance with an agreement for an exchange, in which her husband joined, does not affect its descent as ancestral estate); Olmstead *v.* Douglass, 16 Ohio Cir. Ct. 171, 8 Ohio Cir. Dec. 465.

98. Roup *v.* Bradner, 19 Hun (N. Y.) 513; Bolton *v.* Ohio Nat. Bank, 50 Ohio St. 290, 33 N. E. 1115; Poor *v.* Considine, 6 Wall. (U. S.) 458, 18 L. ed. 869. And see Van Rensselaer *v.* Dunkin, 24 Pa. St. 252; Sill's Appeal, 1 Grant (Pa.) 235.

Surviving spouse see *infra*, III, B, 6, 7.

99. Nicholson *v.* Halsey, 1 Johns. Ch. (N. Y.) 417; Kihlken *v.* Kihlken, 59 Ohio St. 106, 51 N. E. 969; Higgins *v.* Higgins, 57 Ohio St. 239, 48 N. E. 943; Stembel *v.* Martin, 50 Ohio St. 495, 35 N. E. 208; Olmstead *v.* Douglass, 16 Ohio Cir. Ct. 171, 8 Ohio Cir. Dec. 465.

1. Bruer *v.* Johnson, 64 Ohio 7, 59 N. E. 741.

2. Nicholson *v.* Halsey, 1 Johns. Ch. (N. Y.) 417.

3. See also *infra*, III, A, 2; III, A, 9, h, (II); III, A, 11, b; III, A, 11, e, (II).

4. *Arkansas.*— Coolidge *v.* Burke, 69 Ark. 237, 62 S. W. 583; Campbell *v.* Ware, 27 Ark. 65; Kelly *v.* McGuire, 15 Ark. 555.

Indiana.— See Rountree *v.* Pursell, 11 Ind. App. 522, 39 N. E. 747.

Kentucky.— Driskell *v.* Hanks, 18 B. Mon. 855; Taylor *v.* Poston, 2 B. Mon. 5, holding, however, that this rule did not apply to descent of slaves.

Maryland.— Garner *v.* Wood, 71 Md. 37, 17 Atl. 1031; Stewart *v.* Jones, 8 Gill & J. 1.

Massachusetts.— Runey *v.* Edmands, 15 Mass. 291.

Michigan.— Henderson *v.* Sherman, 47 Mich. 267, 11 N. W. 153, holding that the statute applied only to real estate.

New Jersey.— Haring *v.* Van Buskirk, 8 N. J. Eq. 545.

North Carolina.— Wilkerson *v.* Bracken, 24 N. C. 315.

Ohio.— Brower *v.* Hunt, 18 Ohio St. 311; Freeman *v.* Allen, 17 Ohio St. 527; Penn *v.* Cox, 16 Ohio 30; Brewster *v.* Benedict, 14 Ohio 368.

Pennsylvania.—McWilliams *v.* Ross, 46 Pa. St. 369; Himelspark's Estate, 8 Pa. Dist. 183; *In re* Lee, 14 Lanc. Bar 12.

United States.— See Gardner *v.* Collins, 2 Pet. 58, 7 L. ed. 347, under Rhode Island statute.

See 16 Cent. Dig. tit. "Descent and Distribution," §§ 42, 45.

Construction of special statutes.— Austin *v.* Wight, 38 Conn. 405; White *v.* White, 19 Ohio St. 531; *In re* Miller, 2 Lea (Tenn.) 54; Perkins *v.* Simonds, 28 Wis. 90.

5. *California.*— *In re* Pearson, 110 Cal. 524, 42 Pac. 960.

Mississippi.— Hickey *v.* Gilbert, 1 How. 32.

Missouri.— Peacock *v.* Smart, 17 Mo. 402.

New Hampshire.— Prescott *v.* Carr, 29 N. H. 453, 61 Am. Dec. 652.

Tennessee.— Penniman *v.* Francisco, 1 Heisk. 511.

See 16 Cent. Dig. tit. "Descent and Distribution," §§ 42, 48.

Under a New Jersey statute, where the case of an intestate leaving lands received from the part of his or her mother by descent, devise, or gift was singled out, it was held that "from the part of his or her mother" meant not merely from the mother herself, but from the line of the maternal blood or ancestors. Banta *v.* Demarest, 24 N. J. L. 431.

6. See Cornett *v.* Hough, 136 Ind. 387, 35 N. E. 699 (where a husband who had left his property by will to his wife was held to come within the meaning of the term

rule means the immediate ancestor from whom the estate descended, and not one from whom it remotely descended.[7] The title to the land itself must have come to the intestate directly from the ancestor in order to come within the rule,[8] and it must have come by gift, devise, or descent.[9] The propinquity of kinship is determined by the canons of descent,[10] and the persons to whom such property descends are those "of the blood of the ancestor" nearest to the intestate in consanguinity.[11]

"ancestor"); Wheeler *v.* Clutterbuck, 52 N. Y. 67; Adams *v.* Smith, 20 Abb. N. Cas. (N. Y.) 60; Emanuel *v.* Ennis, 48 N. Y. Super. Ct. 430; Springer *v.* Fortune, 2 Handy (Ohio) 52, 12 Ohio Dec. (Reprint) 325. See *infra*, III, A, 1, b.

7. *Connecticut.*— Clark *v.* Shailer, 46 Conn. 119; Buckingham *v.* Jacques, 37 Conn. 402.

Kentucky.— Driskell *v.* Hanks, 18 B. Mon. 855.

New York.— Wheeler *v.* Clutterbuck, 52 N. Y. 67; Hyatt *v.* Pugsley, 33 Barb. 373; Emanuel *v.* Ennis, 48 N. Y. Super. Ct. 430; Adams *v.* Anderson, 23 Misc. 705, 53 N. Y. Suppl. 141.

Ohio.— Brower *v.* Hunt, 18 Ohio St. 311; Prickett's Lessee *v.* Parker, 3 Ohio St. 394; Curren *v.* Taylor, 19 Ohio 36.

Rhode Island.— Morris *v.* Potter, 10 R. I. 58.

Virginia.— Walkers *v.* Boaz, 2 Rob. 485, where five children inherited land from their mother and two died under age, leaving the father. It was held that the share of the child dying first went to the remaining four, and on the death of the second the share he inherited from his mother went to the remaining three, but that which he inherited from his brother went to the father.

United States.— See Gardner *v.* Collins, 2 Pet. 58, 7 L. ed. 347, under the Rhode Island statute.

But see Wilkerson *v.* Bracken, 24 N. C. 315, holding that where an estate came to a person through a series of descents or settlements, and that person died without issue, it resulted back to those of his collateral relations who would be heirs of the ancestor from whom it originally descended, or by whom it was originally settled. See also Stewart *v.* Jones, 8 Gill & J. (Md.) 1.

See 16 Cent. Dig. tit. "Descent and Distribution," § 42 *et seq.* And see *infra*, III, A, 1, b.

8. *Arkansas.*— West *v.* Williams, 15 Ark. 682, holding that a remainder-man under the will of an ancestor, taking the estate after the death of the life-tenant, took an ancestral estate.

Connecticut.— Bristol *v.* Austin, 40 Conn. 438; Terry's Appeal, 28 Conn. 339, holding that land purchased with the proceeds of a sale of ancestral estate did not become ancestral estate.

Indiana.— Cornett *v.* Hough, 136 Ind. 387, 35 N. E. 699, holding that lands obtained by an intestate by foreclosure of a mortgage received under her husband's will or by the taking of a quitclaim deed in satisfaction of such a mortgage came to her by purchase, and not "by gift, devise, or descent" from an ancestor.

Massachusetts.— Goodrich *v.* Adams, 138 Mass. 552. Where a person takes an estate by inheritance from a more remote ancestor, by right of representation of a nearer ancestor, he cannot be regarded as taking it by inheritance from the latter. Sedgwick *v.* Minot, 6 Allen 171.

Missouri.— Barnum *v.* Barnum, 119 Mo. 63, 24 S. W. 780.

New York.— Champlin *v.* Baldwin, 1 Paige 562. But see Conkling *v.* Brown, 57 Barb. 265, 8 Abb. Pr. N. S. 345; Adams *v.* Smith, 20 Abb. N. Cas. 60.

Ohio.— Russell *v.* Bruer, 64 Ohio St. 1, 59 N. E. 740; Patterson *v.* Lamson, 45 Ohio St. 77, 12 N. E. 531. holding that land bought by a father as a wedding gift to his daughter, but deeded directly to the daughter, was not ancestral estate.

Rhode Island.— McCabe, Petitioner, 15 R. I. 330, 5 Atl. 79 (holding that under a statute providing that if a ward's real estate is sold by her guardian by order of the court, the surplus remaining at the death of the ward descends to her heirs as real estate; such surplus of the sale of an ancestral estate by the guardian must be treated as ancestral estate); Watson *v.* Thompson, 12 R. I. 466.

But see Garner *v.* Wood, 71 Md. 37, 17 Atl. 1031.

See 16 Cent. Dig. tit. "Descent and Distribution," §§ 42, 45.

Partition among tenants in common.— It seems that the partition of land among tenants in common by mutual exchange of deeds to specific portions does not destroy its ancestral character. Day *v.* Carter, 31 Cinc. L. Bul. 71. Wilson *v.* Hall, 6 Ohio Cir. Ct. 570, however, is apparently to the contrary.

9. Thus where intestate's mother inherited land from another son, and it came to the intestate by forfeiture incurred by his mother by a second marriage, it was held that the land did not come within the statute. Cutter *v.* Waddingham, 22 Mo. 206. See *infra*, II, E, 4.

The imposition of conditions or encumbrances in a devise will not change the devisee into a purchaser. Kinney *v.* Glasgow, 53 Pa. St. 141.

10. Pierce *v.* Pierce, 14 R. I. 514; Smith *v.* Smith, 4 R. I. 1.

11. *Arkansas.*— Oliver *v.* Vance, 34 Ark. 564, holding that an estate derived from a paternal uncle goes to brothers in preference to the mother or paternal aunt.

b. Property Derived From Parent. Unless otherwise provided by statute, land inherited by an intestate from a parent will in default of issue go to the line on the part of the parent from whom the land was derived.[12] Provision is sometimes expressly made by statute for the disposition of property of an intestate derived from a parent,[13] but such statutes apply only to cases coming strictly within their terms,[14] and they have reference only to an immediate, and not to a mediate,

Michigan.— Ryan *v.* Andrews, 21 Mich. 229, holding that the exclusion of all those not of the blood of the ancestor does not divert the inheritance from the nearest of kin.

New Jersey.— Miller *v.* Speer, 38 N. J. Eq. 567.

New York.— Beebe *v.* Griffing, 14 N. Y. 235; Emanuel *v.* Ennis, 48 N. Y. Super. Ct. 430, holding that relatives of the "blood" of the ancestor include relatives of the half blood.

Ohio.— Brower *v.* Hunt, 18 Ohio St. 311; Dunn *v.* Evans, 7 Ohio 169, holding that if after land has been vested in the next of kin of the blood of the ancestor, a brother of half blood is born, it passes immediately to him. But see Drake *v.* Rogers, 13 Ohio St. 21, to the contrary.

Pennsylvania.— Welles' Estate, 161 Pa. St. 218, 28 Atl. 1116, 1117 (half brothers of ancestor not of his blood); Robert's Appeal, 39 Pa. St. 417 (holding that a mother cannot inherit from her intestate son land inherited by him from his father, as she is not "of the blood of" her husband, and a father cannot inherit from an intestate daughter land derived by her from her mother); Moyer *v.* Thomas, 38 Pa. St. 426; Irwin *v.* Covode, 24 Pa. St. 162 (half brothers and half sisters).

Rhode Island.— Smith *v.* Smith, 4 R. I. 1, holding that the mother, brothers, and sisters of an intestate being, by the rule established by the statute, of the same degree of kindred to the intestate, property derived from a brother by descent passes to them in equal shares.

United States.— Cole *v.* Batley, 6 Fed. Cas. No. 2,977, 2 Curt. 562, holding that a father is "of the blood of" his daughter. And see Gardner *v.* Collins, 2 Pet. 58, 7 L. ed. 347, under Rhode Island statute.

See 16 Cent. Dig. tit. "Descent and Distribution," §§ 42, 45.

12. *Arkansas.*— Beard *v.* Mosely, 30 Ark. 517.

Indiana.— Murphy *v.* Henry, 35 Ind. 442.

Maryland.— Garner *v.* Wood, 71 Md. 37, 17 Atl. 1031; Stewart *v.* Jones, 1 Gill & J. 1.

Missouri.— Childress *v.* Cutter, 16 Mo. 24.

New York.— Morris *v.* Ward, 36 N. Y. 587; Wells *v.* Seeley, 47 Hun 109, 13 N. Y. St. 239 (holding that a devise from the father to the mother for life with remainder over, augmented by a brother's share under the same provision, came entirely from the father's side); Adams *v.* Anderson, 23 Misc. 705, 53 N. Y. Suppl. 141 (where a son inheriting land from his father conveyed it to his mother for a valuable consideration, and it was by her devised to him. It was held that the land must be deemed to have come to him on the part of his mother). And see Shires *v.* Shires, 76 N. Y. App. Div. 621, 78 N. Y. Suppl. 603, property conveyed by father to mother and inherited by son from her.

North Carolina.— Bell *v.* Dozier, 12 N. C. 333.

Ohio.— Stannard *v.* Case, 40 Ohio St. 211.

Pennsylvania.— Walker *v.* Dunshee, 38 Pa. St. 430; Parr *v.* Bankhart, 22 Pa. St. 291; *In re* Lee, 14 Lanc. Bar 12. See Shippen *v.* Izard, 1 Serg. & R. 222.

Tennessee.— Beaumont *v.* Irwin, 2 Sneed 291; Butler *v.* King, 2 Yerg. 115; Prichitt *v.* Kirkman, 2 Tenn. Ch. 390.

United States.— See Gardner *v.* Collins, 2 Pet. 58, 7 L. ed. 347, under Rhode Island statute.

See 16 Cent. Dig. tit. "Descent and Distribution," § 48.

13. As to such statutes see the following cases:

Arkansas.— Galloway *v.* Robinson, 19 Ark. 396; Kelly *v.* McGuire, 15 Ark. 555.

Indiana.— Rountree *v.* Pursell, 11 Ind. App. 522, 39 N. E. 747.

Kentucky.— Power *v.* Dougherty, 83 Ky. 187.

Maine.— Albee *v.* Vose, 76 Me. 448, paternal grandfather given no preference because property was inherited from father.

Maryland.— Garner *v.* Wood, 71 Md. 37, 17 Atl. 1031; Stewart *v.* Evans, 3 Harr. & J. 287.

Michigan.— Burke *v.* Burke, 34 Mich. 451.

New York.— Morris *v.* Ward, 36 N. Y. 587.

Ohio.— Doppler *v.* Clouwetter, 11 Ohio Cir. Dec. 374.

Pennsylvania.— Clepper *v.* Livergood, 5 Watts 113, holding, under a statute excluding the father where the estate of deceased child came on the part of his mother, that if such estate had been converted by his guardian into personalty, but could be readily identified and traced to the stock from which it came, it descended in the same manner as if the minor had survived his father. And see Shippen *v.* Izard, 1 Serg. & R. 222.

Tennessee.— Lucas *v.* Malone, 106 Tenn. 380, 61 S. W. 82.

Texas.— Pease *v.* Stone, 77 Tex. 551, 14 S. W. 161.

Virginia.— Liggon *v.* Fuqua, 6 Munf. 281, holding that on the death of an infant leaving no relatives except a grandmother and uncle in the paternal line, land inherited from his father went to the uncle.

See 16 Cent. Dig. tit. "Descent and Distribution," § 48.

14. *Kentucky.*— Cooksey *v.* Hill, 106 Ky. 297, 50 S. W. 235, 20 Ky. L. Rep. 1873, hold-

descent from a parent.[15] Where an intestate's brothers and sisters are the persons to take, the property goes to those who are children of the parent from whom the estate descended, whether they are of the whole blood or half blood in relation to the intestate, but brothers and sisters of the half blood who are not children of such parent are excluded.[16]

c. Descent of Minor's Property. In many states special provision is made by statute for the descent of property of intestate minors.[17]

d. Property Derived From Former Spouse. Apart from statute, property derived by a wife from her husband or *vice versa* does not, on her or his death intestate, descend as ancestral estate, as the relation of ancestor and heir cannot arise between husband and wife.[18] In some jurisdictions, however, it is otherwise by statute.[19]

ing that statutes regulating descent of land derived from a parent do not apply to that derived from a grandparent.

Michigan.— Burke *v.* Burke, 34 Mich. 451.

New York.— Adams *v.* Anderson, 23 Misc. 705, 53 N. Y. Suppl. 141, holding that a statute providing that if an inheritance comes to an intestate through his mother it shall descend to her heirs, the term "inheritance" being defined in another section of the statute to mean real estate, did not apply to proceeds of a mortgage placed by the intestate on such real estate.

Pennsylvania.— Lewis *v.* Gorman, 5 Pa. St. 164, holding that land derived from the intestate's mother descended to his father's nephews in preference to the grandchildren of a brother of his maternal grandmother.

South Carolina.— Gilbert *v.* Hendricks, 2 Brev. 161, holding that a maternal aunt of the intestate was entitled to land inherited from his father in preference to children of a paternal uncle.

See 16 Cent. Dig. tit. "Descent and Distribution," § 48.

15. Smith *v.* Croom, 7 Fla. 81. See also Smith *v.* Smith, 2 Bush (Ky.) 520 (holding that a statute regulating the descent of an infant's property derived from one of his parents did not apply to property derived from a grandparent); Turner *v.* Patterson, 5 Dana (Ky.) 292. And see Case *v.* Wildridge, 4 Ind. 51; Gardner *v.* Collins, 2 Pet. (U. S.) 58, 7 L. ed. 437, Rhode Island statute. *Compare* Stewart *v.* Jones, 8 Gill & J. (Md.) 1.

16. Prescott *v.* Carr, 29 N. H. 453, 61 Am. Dec. 652; Ham *v.* Martin, 8 N. C. 423 (holding that an estate derived from a mother descends to the intestate's niece in preference to his sister of the half blood on the paternal side); Lucas *v.* Malone, 106 Tenn. 380, 61 S. W. 82; Lane *v.* Crutchfield, 3 Head (Tenn.) 452; Butler *v.* King, 2 Yerg. (Tenn.) 115; Galbreath *v.* Galbreath, (Tenn. Ch. 1900) 64 S. W. 361; Gardner *v.* Collins, 2 Pet. (U. S.) 58, 7 L. ed. 347 (Rhode Island statute).

17. Clark's Appeal, 58 Conn. 207, 20 Atl. 456 (holding under the Connecticut statute that land derived from an intestate minor's maternal grandfather passed to maternal uncles and aunts in preference to the minor's father); Smith *v.* Croom, 7 Fla. 81; Williams *v.* Williams, 91 Ky. 547, 16 S. W. 361, 13 Ky. L. Rep. 293 (holding that land derived from an intestate minor's father passed to the father's kindred in preference to the minor's mother); Smith *v.* Smith, 2 Bush (Ky.) 520; *In re* Welle, 161 Pa. St. 218, 28 Atl. 1116, 1117 (construing the Connecticut statute). See also *infra*, III, A, 9, c.

18. *In re* Proctor, 103 Iowa 232, 72 N. W. 516. On the death of a widow who has been twice married, the estate which vested in her on the death of her second husband will go to her children by her first husband as her heirs, to the exclusion of relatives of her second husband. Estate of Linehan, Myr. Prob. (Cal.) 83.

19. It is now provided in Ohio (Rev. St. § 4162) that property coming to an intestate from any former deceased husband or wife shall upon his or her death without issue descend to the lineal descendants of such former deceased husband or wife; and if there are no such descendants, then one half to the brothers and sisters of such intestate or their legal representatives and one half to the brothers and sisters of such deceased husband or wife or their personal representatives. See Ellis *v.* Ellis, 2 Ohio Cir. Dec. 105. The words "relict of a deceased husband or wife" are used to designate the relationship to a former married pair, of the survivor of a marriage union, and such relationship is not destroyed or changed by the subsequent marriage of such survivor. Spitler *v.* Hester, 42 Ohio St. 100. The words "any former deceased husband or wife" refer to any husband or wife who has died leaving a spouse to whom property has come, and is not confined to cases in which the intestate has had two or more husbands or wives who are deceased. Anderson *v.* Gilchrist, 44 Ohio St. 440, 8 N. E. 242. Half blood are not on an equality with whole blood under this statute. Stembel *v.* Martin, 50 Ohio St. 495, 35 N. E. 208; Martin *v.* Falconer, 5 Ohio Cir. Ct. 584. The legal "representatives" last referred to are the lineal descendants and not the collateral relatives of such brothers and sisters. Thomas *v.* Lett, 6 Ohio S. & C. Pl. Dec. 429, 4 Ohio N. P. 393. But if at the death of an intestate widow there should be living no descendants of her deceased husband, and

e. Descent of Lunatic's Property. A Tennessee statute provides that where a "lunatic or *non compos mentis*" dies intestate, and possessed of personalty derived from an intestate spouse, such property shall pass to the next of kin of the person from whom it was derived.[20]

f. Ancestral Character of Personal Property. Personal property, if it comes within the terms of the statutes, will assume the character of an ancestral estate.[21] If, however, it does not remain the same in specie as when the intestate received it, it does not retain its ancestral character, even though the change in form occurred while in the hands of the ancestor's executor or the intestate's guardian.[22]

4. Succession Dependent on Whether Intestate's Title Is by Purchase or by Descent. Lands which came to an intestate by purchase do not descend as ancestral estate, although they may have belonged to an ancestor. It is frequently necessary therefore and sometimes difficult to determine whether the title of the intestate was acquired by purchase or by descent.[23]

no brother or sister or legal representative of brother or sister, then the property will go, under the statute, to her brothers and sisters. Ellis *v.* Ellis, 2 Ohio Cir. Dec. 105. Money coming to a widow as a beneficiary of a policy on her husband's life is not within such a statute. Richardson *v.* Michener, 11 Ohio Dec. (Reprint) 830, 30 Cinc. L. Bul. 120. Nor is land acquired by purchase with personalty derived from a deceased husband. Russell *v.* Bruer, 64 Ohio St. 1, 59 N. E. 740. The law in force at the time of the death of the former spouse determines the character in which the surviving husband or wife takes the estate. Birney *v.* Wilson, 11 Ohio St. 426.

Change of law.— The legislature has power to change the rule of descent from the surviving spouse at any time before his or her death. Caruthers *v.* Tarvin, 8 Ohio Dec. (Reprint) 344, 7 Cinc. L. Bul. 127 [*affirmed* in 8 Ohio Dec. (Reprint) 451, 8 Cinc. L. Bul. 21]. And see *supra*, II, C, 3.

20. Stratton Claimants *v.* Morris Claimants, 89 Tenn. 497, 15 S. W. 87, 12 L. R. A. 70.

21. Rountree *v.* Pursell, 11 Ind. App. 522, 39 N. E. 747, holding that the term "inheritance" in the statute (Ind. Rev. St. (1894) § 2626) providing that if the "inheritance" came to intestate "by gift, devise, or descent" from the paternal line, it shall go to the next of kin on the paternal side, applies to personal property which came to the intestate by bequest. *Compare infra*, III, A, 11, b.

22. Rountree *v.* Pursell, 11 Ind. App. 522, 39 N. E. 747.

23. See *supra*, II, E, 3, a, note 9.

"Descent" and "purchase" see *supra*, I, note 1.

Title by descent.— In the following cases title was held to have been derived by descent: Conkling *v.* Brown, 8 Abb. Pr. N. S. (N. Y.) 345 (title of heirs to land acquired by a voluntary partition and mutual releases); Carter *v.* Day, 59 Ohio St. 96, 51 N. E. 967, 69 Am. St. Rep. 777 (title of parcener dying seized of a parcel, where the estate in common came by devise); Freeman *v.* Allen, 17 Ohio St. 527 (where one of the tenants in common, upon partition, elected to take the land, title to so much of it as came to him by inheritance); Higgins *v.* Higgins, 11 Ohio Cir. Ct. 131 (title of heirs obtained by enforcing specific performance of a contract for purchase made by the intestate, the heir securing the means to pay the balance of the purchase-money by a sale of a part of the land, the intestate having entered into possession before his death); Montgomery *v.* Petriken, 29 Pa. St. 118 (title acquired by devise from grandfather and by descent from father).

Title by purchase.— In the following cases title was held to have been acquired by purchase:

California.— *In re* Donahue, 36 Cal. 329, title of a devisee, the court holding that to come within the statute as an estate acquired by "inheritance," the title must have been cast upon the heir by the single operation of the law.

Indiana.— Spencer *v.* McGonagle, 107 Ind. 410, 8 N. E. 266, title of a widow purchasing at a sale of land of her intestate husband under partition proceedings.

Kentucky.— Churchill *v.* Reamer, 8 Bush 256, title of a remainder-man under a deed upon the death of his mother, the life-tenant.

Maryland.— Latrobe *v.* Carter, 83 Md. 279, 34 Atl. 472, title of a son on the death of his mother to land devised to her by her mother, the latter's antenuptial contract providing that if she died intestate her property would descend to such persons as would have been her heirs if there had been no marriage.

New Jersey.— Holme *v.* Shinn, 62 N. J. Eq. I, 49 Atl. 151, title acquired by conveyance by a devisee, his wife and only child, of all their interest to a third party, who reconveyed to them as joint tenants.

North Carolina.— Ballard *v.* Griffin, 4 N. C. 237, title of devisee in tail upon converting the estate into a fee simple.

Ohio.— Brown *v.* Whaley, 58 Ohio St. 654, 49 N. E. 479, 65 Am. St. Rep. 793 (title of daughter to a conveyance made in consideration of love and affection, and of her obedience and faithful services, and of one dollar); Brower *v.* Hunt, 18 Ohio St. 311 (where specific tracts of land had been allotted to co-devisees, in accordance with the will, and afterward one conveyed his tract to a co-

5. Descent of Remainders, Reversions, and Executory Devises — a. In General. By the common law, the ancestor from whom the inheritance was taken by descent must have had actual seizin, or seizin in deed, of the lands in order to transmit them to his heir. It is the seizin which makes a person the stirps or stock from which all future inheritance by right of blood is derived, upon the maxim *non jus sed seisina facit stipitem*.[24] Accordingly, under the common law, if a person entitled to the reversion or remainder after a freehold estate died during the continuance of the particular estate, he could not transmit his interest to his heirs, as he had never had seizin, but the heirs of the person last actually seized were entitled to the inheritance.[25] The common-law rule, however, has been greatly modified by statute so that now the prevailing rule is that actual seizin is not necessary, and any vested interest of an intestate descends to his heir.[26] And if a person entitled to a reversionary interest in personal property dies before the particular interest expires his interest goes to his personal representatives and eventually to his distributees.[27]

b. Title Acquired by Intestate by Purchase. One who has a vested remainder in fee simple, expectant on the determination of a present freehold estate, where the estate was acquired by purchase, is held to have such a seizin in law as will constitute him a stirps or stock of descent aside from any statutory provision.[28]

6. Reversion of Gift. When an estate has come to an intestate by gift or by a conveyance in consideration of love and affection, it is frequently provided that if he dies without children or other descendants, it shall revert to the donor, if living, subject to the rights of the husband or the wife of the donee.[29] Even where

devisee, for an expressed consideration, but in fact for a like conveyance by the latter to him); Freeman *v.* Allen, 17 Ohio St. 527 (where one of the tenants in common, upon partition, elected to take the land, title to so much of it as did not come to him by inheritance); Helfinger *v.* Wolff, 11 Ohio Dec. (Reprint) 906, 30 Cinc. L. Bul. 383 (title of heir who conveyed the estate without consideration to one who immediately reconveyed it).

Pennsylvania.— Walker *v.* Dunshee, 38 Pa. St. 430, title of widow acquired by devise from her husband, the widow taking the land in lieu of dower.

Rhode Island.— Shepard *v.* Taylor, 16 R. I. 166, 13 Atl. 105, title of minor to land devised by his grandfather in trust for his son with power in the trustee to convey to the son or his heirs as he might think proper; the trustee having exercised the power in favor of the minor.

See 16 Cent. Dig. tit. "Descent and Distribution," § 50.

24. 4 Kent Comm. 385. See also 2 Blackstone Comm. 209.

25. *Delaware.*—Kean *v.* Hoffecker, 2 Harr. 103, 29 Am. Dec. 336, executory devise.

New York.— Jackson *v.* Hilton, 16 Johns. 96; Bates *v.* Shraeder, 13 Johns. 260; Jackson *v.* Hendrick, 3 Johns. Cas. 214.

North Carolina.—Lawrence *v.* Pitt, 46 N. C. 344.

Virginia.— Dickenson *v.* Holloway, 6 Munf. 422.

United States.— Cook *v.* Hammond, 6 Fed. Cas. No. 3,159, 4 Mason 467.

See 16 Cent. Dig. tit. "Descent and Distribution," § 51.

26. *Connecticut.*— Hillhouse *v.* Chester, 3 Day 166, 3 Am. Dec. 265.

Georgia.— Wright *v.* Wright, 99 Ga. 324, 25 S. E. 673.

Kentucky.— Steward *v.* Barclay, 2 Bush 550.

Michigan.— Curtis *v.* Fowler, 66 Mich. 696, 33 N. W. 804.

New Jersey.— Moore *v.* Rake, 26 N. J. L. 574.

New York.— People *v.* Conklin, 2 Hill 67 (heirs of remainder-man taking by devise); Lakey *v.* Scott, 15 N. Y. Wkly. Dig. 148.

North Carolina.— Clark *v.* Cox, 115 N. C. 93, 20 S. E. 176 (holding that where the person who is to take is certain, but the event is uncertain, a contingent remainder, conditional limitation, or executory devise, is transmissible by descent); Hackney *v.* Griffin, 59 N. C. 381; Robertson *v.* Fleming, 57 N. C. 387.

Pennsylvania.— Cote's Appeal, 79 Pa. St. 235.

South Carolina.— Hicks *v.* Pegues, 4 Rich. Eq. 413.

Vermont.— Gourley *v.* Woodbury, 42 Vt. 395.

United States.— Gardner *v.* Collins, 2 Pet. 58, 7 L. ed. 347; Cook *v.* Hammond, 6 Fed. Cas. No. 3,159, 4 Mason 467.

See 16 Cent. Dig. tit. "Descent and Distribution," § 51.

27. Matter of Kane, 2 Barb. Ch. (N. Y.) 375; Hoes *v.* Van Hoesen, 1 Barb. Ch. (N. Y.) 379. And see Edelen *v.* Middleton, 9 Gill (Md.) 161; Colson *v.* Martin, 62 N. C. 125.

Rights of surviving spouse see *infra*, III, B, 6, c; III, B, 7, b.

28. Turner *v.* Patterson, 5 Dana (Ky.) 292; Wendell *v.* Crandall, 1 N. Y. 491; Vanderheyden *v.* Crandall, 2 Den. (N. Y.) 9.

29. Mitchell *v.* Parkhurst, 17 Ind. 146; Gillispie *v.* Day, 19 La. 263; Rouanet *v.* Hunt, 17 La. 407 [*overruling* Prejean *v.* Le Blanc,

the title has never been in the donor, as where a father purchases land but has it conveyed by the grantor directly to his daughter, the case may come within such a statute.[30] Such a statute applies to an estate received by a wife by gift or conveyance from her husband in consideration of love and affection.[31]

III. PERSONS ENTITLED AND THEIR RESPECTIVE SHARES.

A. Heirs and Next of Kin — 1. KINDRED IN GENERAL — a. Meaning of Term "Next of Kin." The words "next of kin" properly denote the persons nearest of kindred to the decedent, that is, those who are most nearly related to him by blood; but they are sometimes construed to mean those who are entitled to take under the statute of distributions, and sometimes to include other persons.[32] They are usually limited in legal meaning, as in common use, to blood relations, and do not include a husband or wife.[33]

b. Meaning of Term "Ancestor." In its popular sense the term "ancestor" means one who has preceded another in a direct line of descent; a lineal ascendant or progenitor;[34] and it is sometimes used in this sense in statutes of descent and distribution.[35] Generally, however, it is used in such statutes in a technical sense, to denote any one from whom an estate is immediately inherited, although he may not be a progenitor.[36] To this extent the term is synonymous with "kindred,"[37] and embraces both lineals and collaterals.[38] It may include for example a child,[39] a husband or wife,[40] a brother,[41] or an uncle.[42]

c. Degrees of Kindred. Degrees of kindred are to be reckoned by the statutes directing the course of descent, as positive rules establishing such degrees.[43] Under the rule of the civil law, adopted in most jurisdictions, the degree of

3 La. 19]; Butler *v.* King, 2 Yerg. (Tenn.) 115; Whipple *v.* Latrobe, 20 R. I. 508, 40 Atl. 160.

30. Dolin *v.* Leonard, 144 Ind. 410, 43 N. E. 568.

31. Dolin *v.* Leonard, 144 Ind. 410, 43 N. E. 568 [*overruling* Thomas *v.* Thomas, 18 Ind. 9].

32. Black L. Dict. And see Slosson *v.* Lynch, 43 Barb. (N. Y.) 147, 28 How. Pr. (N. Y.) 417. See also NEXT OF KIN.

Construction of statutes see II, C, 2.

"Heir" see *supra*, II, A, 3.

33. Haraden *v.* Larrabee, 113 Mass. 430; Murdock *v.* Ward, 67 N. Y. 387; Dickens *v.* New York Cent. R. Co., 23 N. Y. 158; Dewey *v.* Goodenough, 56 Barb. (N. Y.) 54; Knickerbacker *v.* Seymour, 46 Barb. (N. Y.) 198; Slosson *v.* Lynch, 43 Barb. (N. Y.) 147, 28 How. Pr. (N. Y.) 417; Merchants' Ins. Co. *v.* Hinman, 15 How. Pr. (N. Y.) 182. *Compare*, however, Merchants' Ins. Co. *v.* Hinman, 34 Barb. (N. Y.) 410; Steel *v.* Kurtz, 28 Ohio St. 191. See also *infra*, III, B, 2; and NEXT OF KIN.

34. Black L. Dict. See Mitchell *v.* Thorne, 134 N. Y. 536, 32 N. E. 10, 30 Am. St. Rep. 699.

35. Pratt *v.* Atwood, 108 Mass. 40; Valentine *v.* Wetherill, 31 Barb. (N. Y.) 655.

36. *Connecticut.*— Clark *v.* Shailer, 46 Conn. 119; Buckingham *v.* Jacques, 37 Conn. 402.

Florida.— Smith *v.* Croom, 7 Fla. 871.

Indiana.— Cornett *v.* Hough, 136 Ind. 387, 35 N. E. 699; Murphy *v.* Henry, 35 Ind. 442; Greenlee *v.* Davis, 19 Ind. 60.

Massachusetts.— Lavery *v.* Egan, 143 Mass. 389, 391, 9 N. E. 747. But see Pratt *v.* Atwood, 108 Mass. 40.

Michigan.— Bailey *v.* Bailey, 25 Mich. 185, 188.

New Jersey.— Den *v.* D'Hart, 3 N. J. L. 481.

New York.— Wheeler *v.* Clutterbuck, 52 N. Y. 67; McCarthy *v.* Marsh, 5 N. Y. 263; Emanuel *v.* Ennis, 48 N. Y. Super. Ct. 430. See also Righter *v.* Ludwig, 39 Misc. 416, 80 N. Y. Suppl. 16; Matter of Kene, 8 Misc. 102, 29 N. Y. Suppl. 1078. But see Valentine *v.* Wetherill, 31 Barb. (N. Y.) 655.

Ohio.— Brower *v.* Hunt, 18 Ohio St. 311; Birney *v.* Wilson, 11 Ohio St. 426; Prickett *v.* Parker, 3 Ohio St. 394; Penn *v.* Cox, 16 Ohio 30; Brewster *v.* Benedict, 14 Ohio 368.

Rhode Island.— Morris *v.* Potter, 10 R. I. 58.

England.—Zetland *v.* Lord Advocate, 3 App. Cas. 505, 38 L. T. Rep. N. S. 297, 26 Wkly. Rep. 725.

See also *supra*, II, E, 3, a.

"Ancestor" must be of blood of intestate. — Birney *v.* Wilson, 11 Ohio St. 426, 431.

37. Greenlee *v.* Davis, 19 Ind. 60.

38. Wheeler *v.* Clutterbuck, 52 N. Y. 67; McCarthy *v.* Marsh, 5 N. Y. 263; Righter *v.* Ludwig, 39 Misc. (N. Y.) 416, 80 N. Y. Suppl. 16. But see Pratt *v.* Atwood, 108 Mass. 40; Valentine *v.* Wetherill, 31 Barb. (N. Y.) 655. And see *infra*, II, E, 3, a.

39. Lavery *v.* Egan, 143 Mass. 389, 391, 9 N. E. 747.

40. Cornett *v.* Hough, 136 Ind. 387, 35 N. E. 699.

41. Prickett *v.* Parker, 3 Ohio St. 394.

42. Brewster *v.* Benedict, 14 Ohio 368.

43. Pierce *v.* Pierce, 14 R. I. 514; Smith *v.* Smith, 4 R. I. 1.

relationship is ascertained by counting the sum of the two lines, that is, up the line to the common ancestor and then down the other line.[44] According to the rules of the canon law, however, which applies in cases which are not within the statutes, the degree of kindred is ascertained by counting down from the common ancestor to the more remote.[45] In ascertaining who are the next of kin the court is not limited in the line of lineal ascent to that of grandfather or grandmother. Such next of kin may be found in the line of lineal ascent further removed in degree of kindred.[46]

d. Exclusive Rights of Next of Kin. Kindred of the degree nearest to the intestate succeed to the estate, to the exclusion of those of more distant degrees.[47]

e. Distribution as Between Members of Class of Distributees. Where the next of kin of the intestate who are entitled to share in the estate are in equal degree to the deceased, they share equally in his estate.[48]

f. Rights of Kindred of the Half Blood.[49] At common law collateral kindred of an intestate could not inherit if they were kindred of the half blood only,[50] but this rule has been changed by statutes varying in the different jurisdictions. In some states the statutes give kindred of the half blood the same rights as those of the whole blood,[51] while in others kindred of the half blood inherit only where there are no kindred of the whole blood in the same degree,[52] and in others kindred of the half blood inherit a less share than kindred of the whole blood.[53] Under some statutes collateral kindred of the half blood take equally with those of the whole blood, except where the property is ancestral estate, in which case they share only where they are of the blood of the ancestor from whom the estate came,[54] provided in some jurisdictions they are kindred in the same

44. *District of Columbia.*— Matter of Aflick, 3 MacArthur 95, paternal grandfather nearer of kin than a maternal uncle.

Illinois.— Barger *v.* Hobbs, 67 Ill. 592.

Indiana.— Bruce *v.* Baker, Wils. 462, great grandmother one degree nearer than great uncle or great aunt.

Iowa.— Martindale *v.* Kendrick, 4 Greene 307.

Louisiana.— Walker *v.* Vicksburg, etc., R. Co., 110 La. 718, 34 So. 749, children are descendants in the first degree, and grandchildren are descendants in the second degree.

Pennsylvania.—Ranck's Appeal, 113 Pa. St. 98, 4 Atl. 924; McDowell *v.* Addams, 45 Pa. St. 430; Fister's Estate, 2 Woodw. 323; Nichol *v.* Hall, 28 Pittsb. Leg. J. 239.

See 16 Cent. Dig. tit. "Descent and Distribution," § 59.

The civil law as to degrees of kindred is adopted in most states. See *supra*, II, B, 3.

Construction of particular statutes.— Rowley *v.* Stray, 32 Mich. 70; Jackson *v.* Fitzsimmons, 10 Wend. (N. Y.) 9, 24 Am. Dec. 198.

45. Wetter *v.* Habersham, 60 Ga. 193; State *v.* Greenwell, 4 Gill & J. (Md.) 407; McDowell *v.* Addams, 45 Pa. St. 430.

46. Bruce *v.* Baker, Wils. (Ind.) 462.

47. Witsell *v.* Linder, 3 Desauss. (S. C.) 481, holding that relatives in the fifth degree succeeded to the estate of any intestate to the exclusion of those of the sixth degree.

48. Knapp *v.* Windsor, 6 Cush. (Mass.) 156; Hill *v.* Nye, 17 Hun (N. Y.) 457.

Taking by representation in case of different degrees see *infra*, III, A, 6, e; III, A, 11, g; III, A, 12.

49. See also *infra*, III, A, 9, h; III, A, 11, e.

50. 2 Blackstone Comm. 227; 2 Tiffany Real Prop. § 430. And see Brown *v.* Brown, 1 D. Chipm. (Vt.) 360; *In re* Kirkendall, 43 Wis. 167, 174.

51. Oglesby Coal Co. *v.* Pasco, 79 Ill. 164 (holding that a statute providing that in "no case shall there be a distinction between the kindred of the whole and the half blood" is not confined to cases where the ancestor from whom the estate was derived leaves children by different mothers, but applies equally to children of the same mother who have different fathers); Larrabee *v.* Tucker, 116 Mass. 562; *In re* Bell, 34 N. Y. Suppl. 191; Hatch *v.* Hatch, 21 Vt. 450. See *infra*, III, A, 9, h, (I).

52. 1 Stimson Am. St. L. § 3133. And see Lyon *v.* Lyon, 24 Ohio Cir. Ct. 498.

53. Estes *v.* Nicholson, 39 Fla. 759, 23 So. 490; King *v.* Middlesborough Town, etc., Co., 106 Ky. 73, 50 S. W. 37, 1108, 20 Ky. L. Rep. 1859. And see Berg *v.* Berg, 105 Ky. 80, 48 S. W. 432, 20 Ky. L. Rep. 1083. See also *infra*, III, A, 9, h, (I).

54. *Arkansas.*— Kelly *v.* McGuire, 15 Ark. 555.

California.— *In re* Smith, 131 Cal. 433, 63 Pac. 729, 82 Am. St. Rep. 358.

Indiana.— Robertson *v.* Burrell, 40 Ind. 328; Aldridge *v.* Montgomery, 9 Ind. 302.

Iowa.— Neeley *v.* Wise, 44 Iowa 544.

Maryland.— Lowe *v.* Maccubbin, 1 Harr. & J. 550.

Michigan.— Ryan *v.* Andrews, 21 Mich. 229.

Missouri.— Cutter *v.* Waddingham, 22 Mo. 206.

New York.— Valentine *v.* Wetherill, 31 Barb. 655.

Ohio.— See Stembel *v.* Martin, 50 Ohio St.

degree.[55] In the United States there is no distinction between kindred of the whole blood and kindred of the half blood unless it is made by the statutes.[56] The words "next of kin" include kindred of the half blood as well as kindred of the whole blood.[57] And the same is true of the words "brothers and sisters," [58] and of the word "cousins," [59] etc.

2. Order of Succession in General. The rights of descent flow from the legal status of the parties, and where the status is fixed the law supplies the rules of descent.[60] The Roman law of succession, and also the Spanish, provided first for descendants, then ascendants, and lastly collaterals, paying no regard to the line from which the property came, except in the case of a brother leaving paternal and maternal property and half brothers and sisters on both sides.[61] The common law, however, proceeding upon feudal reasons, after the descendants of the last owner were exhausted, looked to the source from which the property came, and it descended to the collateral relations only where they were of the blood of the first purchaser.[62] In the United States the statutes of the several states direct the order of succession, but when a case does not come within the terms of a statute the common-law rule prevails and the heir at common law is entitled to an intestate's real estate.[63]

3. Shifting Inheritances. At common law, although land descended to the person who was the heir at the time of the intestate's death, his inheritance was divested upon the subsequent birth at any time of another person so related to the intestate that he would have inherited if he had been living at the time the descent was cast, and the inheritance shifted to the latter.[64] This doctrine of

495, 35 N. E. 208; White *v.* White, 19 Ohio St. 531; Cliver *v.* Sanders, 8 Ohio St. 501.

Pennsylvania.— Simpson *v.* Hall, 4 Serg. & R. 337.

Wisconsin.— *In re* Kirkendall, 43 Wis. 167; Perkins *v.* Simonds, 28 Wis. 90.

See 16 Cent. Dig. tit. "Descent and Distribution," § 103. And see *infra*, III, A, 9, h, (II).

Personal property.— Some statutes thus excluding kindred of the half blood have been held not to be applicable to personal property. Kelly *v.* McGuire, 15 Ark. 555; Shuman *v.* Shuman, 80 Wis. 479, 50 N. W. 670; *In re* Kirkendall, 43 Wis. 167.

55. *In re* Smith, 131 Cal. 433, 63 Pac. 729, 82 Am. St. Rep. 358. And see Ryan *v.* Andrews, 21 Mich. 229; *In re* Kirkendall, 43 Wis. 167.

56. *California.*—*In re* Lynch, 132 Cal. 214, 64 Pac. 284.

Delaware.— McKinney *v.* Mellon, 3 Houst. 277.

Georgia.— Ector *v.* Grant, 112 Ga. 557, 37 S. E. 984, 53 L. R. A. 723.

Indiana.— Cox *v.* Matthews, 17 Ind. 367.

Kentucky.— Clay *v.* Cousins, 1 T. B. Mon. 75.

Michigan.— Rowley *v.* Stray, 32 Mich. 70.

New Hampshire.— Prescott *v.* Carr, 29 N. H. 453, 61 Am. Dec. 652.

South Carolina.— Edwards *v.* Barksdale, 2 Hill Eq. 416.

Vermont.— Brown *v.* Brown, 1 D. Chipm. 360.

See 16 Cent. Dig. tit. "Descent and Distribution," § 102. And see *infra*, III, A, 9, h.

57. McKinney *v.* Mellon, 3 Houst. (Del.) 277; Edwards *v.* Barksdale, 2 Hill Eq. (S. C.) 416.

58. The words "brothers and sisters of decedent" in a statute include those of the half blood as well as those of the whole blood. *In re* Lynch, 132 Cal. 214, 64 Pac. 284; *In re* Smith, 131 Cal. 433, 63 Pac. 729, 82 Am. St. Rep. 358; Rowley *v.* Stray, 32 Mich. 70; Prescott *v.* Carr, 29 N. H. 453, 61 Am. Dec. 652; Brown *v.* Brown, 1 D. Chipm. (Vt.) 360. The same has been held of the words "brothers and sisters of the ancestor." Cliver *v.* Sanders, 8 Ohio St. 501; Burdick *v.* Shaw, 10 Ohio S. & C. Pl. Dec. 533, 8 Ohio N. P. 22.

59. Ector *v.* Grant, 112 Ga. 557, 37 S. E. 984, 53 L. R. A. 723.

60. Humphries *v.* Davis, 100 Ind. 274, 50 Am. Rep. 788.

Adopted children and parents by adoption see Adoption of Children, 1 Cyc. 931.

Effect of alienage see Aliens, 2 Cyc. 89, 94.

Effect of illegitimacy see Bastards, 5 Cyc. 639.

Effect of murder of ancestor by heir or next of kin see *infra*, III, A, 14.

61. See Cutter *v.* Waddingham, 22 Mo. 206.

62. 2 Blackstone Comm. 220; Coke Litt. § 4; 2 Tiffany Real Prop. § 432. And see Cutter *v.* Waddingham, 22 Mo. 206, 259, showing the distinction in this respect between the civil and the common law. See also *supra*, II, E, 3, a; *infra*, III, A, 11, b.

63. Johnson *v.* Haines, 4 Dall. (Pa.) 64, 1 L. ed. 743; Packer *v.* Nixon, 9 Pet. (U. S.) 793, 9 L. ed. 314, 18 Fed. Cas. No. 10,653.

When common law prevails see *supra*, II, B, 4.

64. 2 Blackstone Comm. 208; 1 Coke Litt. 11*b*. And see Bates *v.* Brown, 5 Wall. (U. S.) 710, 18 L. ed. 535.

shifting inheritances was recognized in some of the earlier cases in the United States,[65] but in others it has been repudiated as not applicable under the statutes.[66]

4. Disposition of Estate on Failure of Kindred Within Certain Degrees. Aside from providing for an escheat to the state on the failure of kindred, special provision is sometimes made by statute for the disposition of the estate on the failure of kindred within certain degrees.[67]

5. Necessary or Forced Heirs — a. In General. Ordinarily a person has no such right to the estate of another as can be asserted against his disposition thereof by will or gift.[68] It is occasionally provided, however, that a certain portion of the estate of a deceased person shall be divided among his descendants, parents, or brothers and sisters, notwithstanding an attempted disposition thereof by gift or will. A person who thus succeeds to the estate of a deceased person or to any part thereof is termed a forced heir.[69] Thus in Lonisiana it is provided that donations *inter vivos* or *mortis causa* cannot exceed two thirds of the property of the disposer, if he leaves at his decease a legitimate child; one half, if he leaves two children; and one third if he leaves three or a greater number.[70] Natural children cannot be regarded as forced heirs.[71] If the disposer, having no children, leave a father, a mother, or both, donations *inter vivos* or *mortis causa* cannot exceed two thirds of the property.[72] Under this statute it is held that if only one parent survives, such parent is forced heir for one third of the estate if the child left a will, but is entitled to only one fourth if no will.[73] Only the father and mother can be forced heirs in the ascending line;[74] but neither is the forced heir of an illegitimate child. Such child can dispose of his whole estate.[75] Collaterals are forced heirs in no event.[76] Forced heirs cannot be postponed by the intervention of a life-estate in the portion to which they are entitled.[77] Property which is the subject of a particular legacy will not be reduced to provide for the forced heir unless the value of the residue falls short of the legal reservation.[78]

65. Den *v.* Black, 27 N. C. 463; Den *v.* Whedbee, 12 N. C. 160; Cutlar *v.* Cutlar, 9 N. C. 324. See *infra*, III, A, 9, d.

66. Cox *v.* Matthews, 17 Ind. 367; Drake *v.* Rogers, 13 Ohio St. 21 [*overruling* Dunn *v.* Evans, 7 Ohio 169, which had been followed in Springer *v.* Fortune, 2 Handy (Ohio) 52, 12 Ohio Dec. (Reprint) 325]; Bates *v.* Brown, 5 Wall. (U. S.) 710, 18 L. ed. 535. See also under particular statutes Grant *v.* Bustin, 21 N. C. 77; Melton *v.* Davidson, 86 Tenn. 129, 5 S. W. 530; Grimes *v.* Orrand, 2 Heisk. (Tenn.) 298.

67. **In Florida** it is provided (Rev. St. § 1820) that if an intestate decedent leaves neither husband or wife, nor children or their descendants, nor father or mother, nor brother or sister, or their descendants, the inheritance shall be divided into moieties, one of which shall go to the paternal, and the other to the maternal, kindred. Estes *v.* Nicholson, 39 Fla. 759, 23 So. 490, also holding that the section of the statute (1823) directing that collaterals of the half blood should inherit only half as much as collaterals of the whole blood does not interfere with the operation of such provision.

In Maryland, by an early statute, the personal estate of persons dying intestate, without any relations within the fifth degree of consanguinity, were distributed to certain schools or colleges of the county in which the deceased resided. Thomas *v.* Frederick County School, 7 Gill & J. 369.

68. Uhlich *v.* Muhlke, 61 Ill. 499; Thorne *v.* Cosand, 160 Ind. 566, 67 N. E. 257. And see *infra*, III, A, 13; IV, A, 1; and Wills.

69. La. Civ. Code, art. 1495; Hagerty *v.* Hagerty, 12 Tex. 456. See also Wells *v.* Goss, 110 La. 347, 34 So. 470; Cox *v.* Von Ahlefeldt, 105 La. 543, 30 So. 175; Hoggatt *v.* Gibbs, 15 La. Ann. 700.

Rights of children omitted from will see *infra*, III, A, 13, c.

Conveyances in fraud of heirs see *infra*, IV, A, 1, b.

Gifts and donations by ancestor see *infra*, IV, A, 1, c.

70. La. Civ. Code, art. 1480; Louis *v.* Richard, 12 La. Ann. 684.

71. Reed *v.* Crocker, 12 La. Ann. 436.

72. La. Civ. Code, art. 1481.

73. Jacobs' Succession, 104 La. 447, 29 So. 241; Marks' Succession, 35 La. Ann. 993; Grover *v.* Clarke, 7 La. Ann. 174 [*overruling* Cole *v.* Cole, 7 Mart. N. S. (La.) 414], holding that articles 899 and 900 of the code, providing that if an intestate leaves no descendants the succession shall go half to the father and mother, and half to the brothers and sisters; and if only one of the parents survives, the portion which would have been inherited by the other will go to the brothers and sisters or to their descendants — do not enlarge the rights of the disposer as limited by article 1481.

74. Johnston *v.* Kirkland, 6 Mart. N. S. (La.) 344.

75. Wood *v.* January, 15 La. Ann. 516.

76. Marks' Succession, 35 La. Ann. 993; Cole *v.* Cole, 7 Mart. N. S. (La.) 414.

77. Parker *v.* Parker, 10 Tex. 83.

78. Jacobs' Succession, 104 La. 447, 29 So. 241.

b. Forced Heirs of Surviving Second Wife. In Indiana children by a first or other former wife, where deceased leaves no children by his widow, become forced heirs of the widow at her decease as to real estate which descended to her from their father.[79]

c. Effect of Will Disregarding Rights of Forced Heirs. Where the law of forced heirship is in force the right of the forced heirs cannot be avoided by will[80] or postponed[81] without their consent.[82] But a will disregarding the rights of forced heirs is not wholly void.[83]

6. DESCENDANTS — a. In General. The general rule is that if a person dies intestate, leaving real estate, the estate descends to his lawful descendants in the direct line of lineal descent. If there be but one person, then it descends to him or her alone, and if more than one, and all of equal degree of consanguinity to the ancestor, then it descends to the several persons in equal parts as tenants in common.[84] The term "descendants" when used in statutes means children or children's children to the remotest degree, and not all who may properly take by descent.[85] It does not include collaterals[86] or ascendants.[87] A husband is not a "descendant" of his wife.[88]

b. Children in General.[89] Under this rule subject to the rights of a surviving husband or wife,[90] the property of an intestate descends to his children in equal shares.[91]

79. Rushton *v.* Harvey, 144 Ind. 382, 43 N. E. 300; Stephenson *v.* Boody, 139 Ind. 60, 38 N. E. 331; Rogers *v.* Rogers, 137 Ind. 151, 36 N. E. 895 (holding that a statute (Act of March 11, 1889, § 1) changing the second wife's interest from a fee in one third, subject to a right of inheritance by the children of the former wife as her forced heirs, to a life-estate with remainder in fee in the husband's children, if retroactive, would not take away the right of the children as forced heirs and leave the fee in the wife); Thorp *v.* Hanes, 107 Ind. 324, 6 N. E. 920; Bryan *v.* Uland, 101 Ind. 477, 1 N. E. 52 (holding that a conveyance by the widow will not destroy the right of inheritance in the children); Utterback *v.* Terhune, 75 Ind. 363; Loudon *v.* James, 31 Ind. 69. As to the Indiana statute see also *infra*, III, B, 9, b.

80. Cox *v.* Von Ahlefeldt, 105 La. 543, 30 So. 175; Conn *v.* Davis, 33 Tex. 203; and other cases cited *supra*, note 69 *et seq.*

81. Budd *v.* Fisher, 17 Tex. 423, where the testator attempted to postpone the inheritance of the forced heirs by providing in his will that the property should be kept together for the support and education of the family until the youngest child should arrive at the age of twelve years.

82. Portis *v.* Cummings, 14 Tex. 171.

83. Cox *v.* Von Ahlefeldt, 105 La. 543, 30 So. 175; Hagerty *v.* Hagerty, 12 Tex. 456. And see WILLS.

84. 4 Kent Comm. 375. And see the cases cited in the notes following.

85. Jewell *v.* Jewell, 28 Cal. 232; Waldron *v.* Taylor, 52 W. Va. 284, 45 S. E. 336. And see DESCENDANT, 13 Cyc. 1047.

86. Bryan *v.* Walton, 20 Ga. 480; Akin *v.* Anderson, 19 Ga. 229.

87. Bryan *v.* Walton, 20 Ga. 480; Morse *v.* Hayden, 82 Me. 227, 19 Atl. 443.

88. Prather *v.* Prather, 58 Ind. 141.

89. Definition of "child" and "children" see CHILDREN, 7 Cyc. 123.

90. See *infra*, III, B.

91. *Arkansas.*— McClelland *v.* Lowry, 21 Ark. 452, holding that the only child of a deceased married woman is entitled to her distributive share in the personal estate of her father not reduced into possession. And see Kelly *v.* McGuire, 15 Ark. 555.

Indiana.— Murphy *v.* Henry, 35 Ind. 442, holding that the widow and only child of an intestate take one half each as tenants in common, and on the death of the widow her share also descends to the child.

Iowa.— Joslin *v.* Joslin, (1898) 75 N. W. 487.

Kansas.— Dodge *v.* Beeler, 12 Kan. 524.

Kentucky.— Berry *v.* Hall, 11 S. W. 474, 11 Ky. L. Rep. 30, holding that the wife's half of land conveyed to husband and wife jointly, after the death of the husband subsequent to that of the wife, descends to the children, notwithstanding a deed of the husband purporting to convey the whole.

Louisiana.— Cottin *v.* Cottin, 5 Mart. 93, holding that by the Spanish law which was not repealed by the old code, a child to inherit must have lived twenty-four hours.

Maine.— Benson *v.* Swan, 60 Me. 160.

Michigan.—Benedict *v.* Beurmann, 90 Mich. 396, 51 N. W. 461.

Mississippi.— Olive *v.* Walton, 33 Miss. 103 (holding that a wife's separate property descended to all her children equally); Whitcomb *v.* Reid, 31 Miss. 567, 66 Am. Dec. 579.

Pennsylvania.— *In re* Anderson, 85 Pa. St. 262 (holding that on the death of the insured in a life-insurance policy, subsequent to the death of the beneficiary, his wife, the proceeds belonged to the estate of the wife and were to be distributed, share and share alike, between her child and the husband's estate); Walker *v.* Dunshee, 38 Pa. St. 430.

South Carolina.—Trammell *v.* Trammell, 57 S. C. 89, 36 S E. 533.

Tennessee.— Lane *v.* Crutchfield, 3 Head

c. Children of Successive Marriages. Upon the death of an intestate leaving issue of different marriages, the estate, subject to the rights of a surviving husband or wife, descends to all the children equally,[92] unless such distribution is prevented by statute.[93] A Georgia statute provided that when a *feme covert* having a child or children living by a former husband should be entitled to property by inheritance, it should not belong to the husband, but should be equally divided between her and her children.[94]

d. Posthumous Children. Both at common law and under the statutes of the different states posthumous children take as heirs and distributees, an infant being deemed *in esse* for the purpose of taking an estate for its benefit, from the time of conception, provided it is born alive,[95] and after such a period of fœtal

452; McCollum *v.* Smith, Meigs 342, 33 Am. Dec. 147.

Texas.— Clemons *v.* Clemons (Civ. App. 1898) 45 S. W. 199, holding that on the death of a husband of a surviving second wife, leaving children by both marriages, community property of the first marriage descended one half to his children by the first wife, and the other half to all his children, subject to the widow's dower in the second half.

Vermont.— Davis *v.* Burnham, 27 Vt. 562, children inherit the personal estate equally with the real estate.

Wisconsin.— Shepardson *v.* Rowland, 28 Wis. 108.

Canada.—*Re* Tait, 9 Manitoba 617, holding, however, that prior to the act of May, 1871, the law of primogeniture was in force, under which land descended to the eldest son to the exclusion of the other children.

See 16 Cent. Dig. tit. "Descent and Distribution," § 76.

Allowances to children see EXECUTORS AND ADMINISTRATORS.

Exemptions in favor of children see EXEMPTIONS; HOMESTEADS.

92. *Indiana.*— Ilgenfritz *v.* Ilgenfritz, 84 Ind. 241 (holding that where the widow was entitled to one third, the remainder should be divided equally among the children of both marriages, but at the death of the widow her share went to her children); McClanahan *v.* Trafford, 46 Ind. 410; Barnes *v.* Loyd, 37 Ind. 523 (applying the same rule to the death of a surviving spouse in case of estate by entirety).

Louisiana.— Hooke *v.* Hooke, 14 La. 22, holding that where a woman dies leaving children by two marriages, those of the first divide equally half of the property belonging to the first community, while the other half is equally divided between the children of both marriages. But see Doucet *v.* Broussard, 6 Mart. N. S. 196.

Mississippi.—Bates *v.* Cotton, 32 Miss. 266; Marshall *v.* King, 24 Miss. 85.

South Carolina.— Trammell *v.* Trammell, 57 S. C. 89, 35 S. E. 533.

Tennessee.— Wheless *v.* Espy, 7 Coldw. 237.

See 16 Cent. Dig. tit. "Descent and Distributions," § 77. And see *infra*, III, B, 9, a.

93. Mathers *v.* Scott, 37 Ind. 303, holding that a statute preventing a widow who marries a second or a subsequent time from alienating any portion of the real estate inherited from her previous husband also prevents the husband or the children of such later marriage from inheriting any portion of such real estate on her death. See also *infra*, III, B, 9, h.

94. Ga. Act (1845), § 1. See Rohy *v.* Boswell, 23 Ga. 51 (where the property was inherited before the first marriage, but a portion was not paid until after the second marriage); Matthews *v.* Bridges, 13 Ga. 325 (where the widow became entitled before, but did not acquire possession until after, the second marriage). See also *infra*, III, B, 9, h.

95. *Alabama.*— Nelson *v.* Iverson, 24 Ala. 9, 60 Am. Dec. 442; Bishop *v.* Hampton, 11 Ala. 254.

Georgia.— Morrow *v.* Scott, 7 Ga. 535.

Illinois.— Botsford *v.* O'Connor, 57 Ill. 72; McConnel *v.* Smith, 23 Ill. 611; Smith *v.* McConnell, 17 Ill. 135, 63 Am. Dec. 340.

Kentucky.— Massie *v.* Hiatt, 82 Ky. 314.

Maine.—Waterman *v.* Hawkins, 63 Me. 156.

Maryland.— Shriver *v.* State, 65 Md. 278, 4 Atl. 679, holding that a statute allowing posthumous children of an intestate to inherit as other heirs, but providing that no other posthumous child shall, does not refer to posthumous children of collateral relatives who were born before the death of the intestate from whom they inherit.

Massachusetts.—Bowen *v.* Hoxie, 137 Mass. 527; Hall *v.* Hancock, 15 Pick. 255.

Michigan.— Catholic Ben. Assoc. *v.* Firmine, 50 Mich. 82, 14 N. W. 707.

Minnesota.— Prentiss *v.* Prentiss, 14 Minn. 18.

Mississippi.— Harper *v.* Archer, 4 Sm. & M. 99, 43 Am. Dec. 472, where a child born eight months and twenty-one days after the death of his sister was held entitled to share in her estate.

Missouri.— Aubuchon *v.* Bender, 44 Mo. 560, holding that an unborn child will not only inherit an estate, but may take the remainder, whether vested or contingent, as though living when the particular estate determined.

New York.— Marsellis *v.* Thalhimer, 2 Paige 35, 21 Am. Dec. 66, holding that if a child be born dead it is considered as never having been born or conceived.

North Carolina.— Hill *v.* Moore, 5 N. C 233.

Pennsylvania.— Martin's Estate, 3 Pa. Co. Ct. 212, child born dead.

existence that its continuance in life may be reasonably expected.[96] A posthumous child takes directly from the parent at birth, his estate remaining meanwhile in abeyance.[97] Accordingly it cannot be divested of an inheritance, unless by due process of law to which it is made a party.[98]

e. Issue of Different Degrees of Consanguinity — (i) *In General.* If the intestate leaves lawful issue of different degrees of consanguinity, the property descends to his living children and grandchildren, and to the issue of such as have died, and so on to the remotest degree, as tenants in common; but the grandchildren and their descendants inherit only such share as their parents respectively would have inherited if living.[99]

(ii) *Presumptions.* If an heir has disappeared and has not been heard of for seven years, he is presumed to be dead and his share goes to his children directly.[1] But there is no presumption of law that a man presumed to be dead left a surviving wife, child, or children.[2]

(iii) *Rights of Surviving Wife or Husband of Intestate.*[3] Under a statute providing that the "heirs" of such children or grandchildren as have died before the intestate take the parents' shares by representation, it has been held in Iowa that the widow of the intestate is not entitled to inherit as heir of their deceased child.[4] But in Kansas it has been held that the surviving husband of an intestate is the sole heir of children dying before the death of the mother and as such is entitled to inherit the shares in her estate which they would have inherited if they had survived her.[5]

f. Descent of Estates Tail. Before the law was changed by statute estates

South Carolina.— Pearson *v.* Carlton, 18 S. C. 47.

United States.— Knotts *v.* Sterns, 91 U. S. 638, 23 L. ed. 252.

See 16 Cent. Dig. tit. "Descent and Distribution," §§ 78, 227.

Rights under statutes relating to pretermitted children see *infra*, III, A, 13, c, (II).

96. Harper *v.* Archer, 4 Sm. & M. (Miss.) 99, 43 Am. Dec. 472 (holding that the right of an unborn infant to take property, by descent or otherwise, from the date of its conception, is an inchoate right, which will not be completed by a premature birth); Marsellis *v.* Thalhimer, 2 Paige (N. Y.) 35, 21 Am. Dec. 66 (holding that a child born in so early a state of gestation as to be incapable of living, although not actually dead at its birth, is to be so considered as respects those claiming through it).

97. McConnel *v.* Smith, 23 Ill. 611; Sansberry *v.* McElroy, 6 Bush (Ky.) 440.

98. Botsford *v.* O'Conner, 57 Ill. 72; Massie *v.* Hiatt, 82 Ky. 314 (holding that where land is sold and the proceeds divided without reference to the rights of an after-born child, the latter may reclaim his interest from a remote vendee of the purchaser); Giles *v.* Solomon, 10 Abb. Pr. N. S. (N. Y.) 97 note (holding that where, after the death of a mortgagor, a foreclosure suit was brought against his widow and children without making a posthumous child a party, the decree was not binding upon such child, and it was entitled to its share of the premises and back rents on paying its share of the mortgage, taxes, interest, and improvements).

99. 4 Kent Comm. 390. And see the following cases:

Arkansas.— Kelly *v.* McGuire, 15 Ark. 555.

Indiana.— Kyle *v.* Kyle, 18 Ind. 108, holding that the word "child" in a statute was equivalent to "children or their descendants."

Kansas.— Couch *v.* Wright, 20 Kan. 103; Dodge *v.* Beeler, 12 Kan. 524.

Missouri.— *In re* Williams, 62 Mo. App. 339.

New Jersey.—Rodman *v.* Smith, 2 N. J. L. 7.

Pennsylvania.— Eshleman's Appeal, 74 Pa. St. 42; Girard Life Insurance Annuity & Trust Co. *v.* Wilson, 57 Pa. St. 182; Hughes' Appeal, 57 Pa. St. 179; Ilgenfritz's Appeal, 5 Watts 25; Hersha *v.* Brenneman, 6 Serg. & R. 2; Stoke's Estate, 29 Wkly. Notes Cas. 162, 20 Phila. 172; Hughes' Estate, 6 Phila. 350.

Texas.— Eans *v.* Sawyer, 27 Tex. 448.

But see Calhoun *v.* Crossgrove, 33 La. Ann. 1001, holding that deceased's children inherit in their own right and not by right of representation.

See 16 Cent. Dig. tit. "Descent and Distribution," § 79.

1. Esterly's Appeal, 109 Pa. St. 222. See also *supra*, II, A, 8; *infra*, IV, A, 3, d; and Death, 13 Cyc. 290.

2. Nehring *v.* McMurrian, (Tex. Civ. App. 1899) 53 S. W. 381 [*reversed* on other grounds in 94 Tex. 45, 57 S. W. 943].

3. Rights of surviving husband or wife generally see *infra*, III, B.

4. *In re* Overdieck, 50 Iowa 244; Journell *v.* Leighton, 49 Iowa 601; McMenomy *v.* McMenomy, 22 Iowa 148. See also *infra*, III, A, 7; III, B, 2.

5. Delashmutt *v.* Parrent, 40 Kan. 641, 20 Pac. 504. See, however, Stewart *v.* Barclay, 2 Bush (Ky.) 550. See also *infra*, III, A, 7; III, B, 2.

tail general descended to the eldest son, to the exclusion of all the other children.[6]

7. PARENTS — a. In General. Parents and all lineal ancestors were, by the English law, totally excluded from succession.[7] But this rule has been changed by statute and the general rule now is that if a person dies intestate without lawful descendants, but leaving parents, his or her estate, both real and personal, goes to them, subject to the right of a surviving husband or wife.[8] Sometimes the father is given preference over the mother,[9] and sometimes they take jointly or as tenants in common.[10] Usually if one parent is dead, the surviving parent takes all the estate, both real and personal, of a deceased child dying without issue, subject to the rights of a surviving husband or wife.[11] If, however, the surviving parent is the mother, her right to take the estate is sometimes qualified.[12]

6. Spachius *v.* Spachius, 16 N. J. L. 172. See ESTATES.

7. 4 Kent Comm. 395. And see McNitt *v.* Logan, Litt. Sel. Cas. (Ky.) 60; Blankenbeker *v.* Blankenbeker, 6 Munf. (Va.) 427.

8. 4 Kent Comm. 392. See Magness *v.* Arnold, 31 Ark. 103; McClelland *v.* Lowry, 21 Ark. 452; Leonard *v.* Lining, 57 Iowa 648, 11 N. W. 623; King *v.* Middlesborough Town, etc., Co., 106 Ky. 73, 50 S. W. 37, 1108, 20 Ky. L. Rep. 1859; Gardner *v.* Collins, 2 Pet. (U. S.) 58, 7 L. ed. 347. And see Case *v.* Wildridge, 4 Ind. 51; Heyward *v.* Williams, 48 S. C. 564, 26 S. E. 797.

In Minnesota under Rev. St. (1851) c. 50, § 1 (Comp. St. (1858) c. 37, § 1) the widow took a life-estate, and the remainder descended in equal shares to the brothers, sisters, and mother, and the remainder after the widow's life-estate descended as if no widow had survived. Lindley *v.* Groff, 42 Minn. 346, 44 N. W. 196.

Parents as forced heirs see *supra*, III, A, 5, a.

Rights of surviving husband or wife see *infra*, III, B.

9. *Arkansas.*— Kountz *v.* Davis, 34 Ark. 590, father takes life-estate, and brothers and sisters remainder in fee.

Florida.— Magee *v.* Doe, 9 Fla. 382, except where husband is made heir of wife.

New York.— Matter of Kane, 38 Misc. 276, 77 N. Y. Suppl. 874; Smith *v.* Van Dursen, 15 Johns. 343.

Pennsylvania.— Robinson *v.* Martin, 2 Yeates 525; Murgitroyd's Estate, 1 Brewst. 317, 6 Phila. 343.

Tennessee.— Wright *v.* Wright, 100 Tenn. 313, 45 S. W. 672; Gardenhire *v.* Hinds, 1 Head 402.

See 16 Cent. Dig. tit. "Descent and Distribution," § 84.

10. Bassil *v.* Loffer, 38 Iowa 451; Guier *v.* Bridges, 70 S. W. 288, 24 Ky. L. Rep. 945; Frankenfield *v.* Gruver, 7 Pa. St. 448; Brown *v.* Baraboo, 90 Wis. 151, 62 N. W. 921, 30 L. R. A. 320.

11. *Arkansas.*— Oliver *v.* Vance, 34 Ark. 564.

California.— Emeric *v.* Alvarado, 64 Cal. 529, 2 Pac. 418, under the Mexican law.

Illinois.—Voris *v.* Sloan, 68 Ill. 588 (vested remainder in real estate); Hays *v.* Thomas, 1 Ill. 180.

Indian Territory.— Nivens *v.* Nivens, (1901) 64 S. W. 604.

Iowa.— Hale *v.* Hunter, 24 Iowa 181.

Massachusetts.— Merrill *v.* Preston, 135 Mass. 451.

Missouri.— Lynde *v.* Williams, 68 Mo. 360.

Nebraska.— Gwyer *v.* Hall, 34 Nebr. 589, 52 N. W. 372, where the intestate left no issue, widow, father, brother, or sister.

New Jersey.—*In re* Sanderson, 28 N. J. Eq. 435, where, although the husband was excluded from all control over a bequest to his wife for life, with remainder to their children, it was held, after his wife and one child died intestate, that he was entitled to the share of the child.

Pennsylvania.—Mechling's Appeal, 2 Grant 157.

South Carolina.— Trapp *v.* Billings, 2 McCord Eq. 403.

Tennessee.— Penniman *v.* Francisco, 1 Heisk. 511.

Texas.— Prendergast *v.* Anthony, 11 Tex. 165.

See 16 Cent. Dig. tit. "Descent and Distribution," § 85.

Rights of surviving husband or wife see *infra*, III, B.

12. In the following cases she was held entitled to share equally with the brothers and sisters of the deceased child:

Georgia.— Snipes *v.* Parker, 98 Ga. 522, 25 S. E. 580.

Kentucky.— Noland *v.* Johnson, 5 J. J. Marsh. 351.

Massachusetts.— Goodrich *v.* Adams, 138 Mass. 552. See also Mayo *v.* Boyd, 3 Mass. 13.

Michigan.— Jenks *v.* Trowbridge, 48 Mich. 94, 11 N. W. 822.

Minnesota.—Lindley *v.* Groff, 42 Minn. 346, 44 N. W. 196.

Nevada.— *In re* Foley, 24 Nev. 197, 51 Pac. 834, 52 Pac. 649.

North Carolina.— Ferrand *v.* Howard, 38 N. C. 381; Anonymous, 3 N. C. 230.

Tennessee.— De Vault *v.* De Vault, (Ch. App. 1898) 48 S. W. 361, under N. C. Code (1883), § 1478.

Wisconsin.— Westcott *v.* Miller, 42 Wis. 454.

See 16 Cent. Dig. tit. "Descent and Distribution," § 85.

One half.— In the following cases the sur-

b. Right of Parent to Inherit Property Derived From Other Parent. As a general rule, where real property has come to an intestate through one parent, the surviving parent acquires no interest therein.[13] Frequently, however, the father is given the right to inherit property which has come to the intestate through the mother.[14] And in some states the mother inherits or takes a life-estate in property which has come to the child from the father.[15] If the intestate left neither issue nor brothers or sisters nor issue of such, of the blood of the parent from whom the estate was derived, the property goes to the surviving

viving mother was held to inherit one half of her deceased child's estate, other children surviving: McKinney *v.* Stewart, 5 Kan. 384; Berg *v.* Berg, 48 S. W. 432, 20 Ky. L. Rep. 1083, holding that, under Ky. Gen. St. c. 31, § 1, providing that the mother shall inherit one moiety of an intestate child's estate, the other moiety descending to the brothers and sisters, and section 3, providing that "collaterals of the half blood shall inherit only half as much as those of the whole blood, or as ascending kindred, when they take with either," the mother is entitled to only one half of the estate, although the brothers and sisters are of the half blood.

Life-estate.— In the following cases, the surviving mother was held entitled to a life-estate: Magness *v.* Arnold, 31 Ark. 103 (holding that the remainder, after the mother's life-estate, descended first to the line of the paternal ancestry until that became extinct and then to the maternal line); Norris *v.* McGaffick, 21 Iowa 201; Barber *v.* Brundage, 169 N. Y. 368, 62 N. E. 417 [*affirming* 50 N. Y. App. Div. 123, 63 N. Y. Suppl. 347] (holding that the reversion to the brothers and sisters vested immediately upon the intestate's death, and descended *per stirpes* to the heirs of their respective parents); McCarthy *v.* McCarthy, 4 Phila. (Pa.) 323; Glass *v.* Glass, 6 Pa. Co. Ct. 408.

Death during life-tenancy of mother of child entitled to remainder.— When a child entitled to a remainder after its mother's life-estate dies during its mother's life, its interest descends to the mother and the surviving brothers and sisters. Ferguson *v.* Alcorn, 1 B. Mon. (Ky.) 160.

13. *California.*— De Castro *v.* Barry, 18 Cal. 96.

Indiana.— Ramsey *v.* Ramsey, 7 Ind. 607.

Kentucky.—Walden *v.* Phillips, 86 Ky. 302, 5 S. W. 757, 9 Ky. L. Rep. 569; Driskell *v.* Hanks, 18 B. Mon. 855; Carroll *v.* Carroll, 12 B. Mon. 637 (holding, however, that the mother is entitled to property inherited by one child from another, although originally inherited from the father); Shelby *v.* Shelby, 1 B. Mon. 266 (holding, however, that the mother shares equally with the surviving brothers and sisters in the personalty of her deceased infant child coming through the father).

Massachusetts.— Goodrich *v.* Adams, 138 Mass. 552; Merrill *v.* Preston, 135 Mass. 451.

New Jersey.— Haring *v.* Van Buskirk, 8 N. J. Eq. 545.

New York.— Torrey *v.* Shaw, 3 Edw. 356, holding that the words property "which came to the son from the part of his mother" applies to property devised to the son by a maternal ancestor as well as to property descended to him.

North Carolina.— Caldwell *v.* Black, 27 N. C. 463; Wilsay *v.* Sawyer, 5 N. C. 493; Swann *v.* Mercer, 3 N. C. 246.

Pennsylvania.— Maffit *v.* Clark, 6 Watts & S. 258; *In re* Hartman, 4 Rawle 39 (holding, however, that where a child derived his estate from his father by purchase his mother was entitled); Shippen *v.* Izard, 1 Serg. & R. 222; May *v.* Espenshade, 1 Pearson 139; Eckert's Estate, 12 Phila. 93; Nichol *v.* Hall, 28 Pittsb. Leg. J. 239; Emes *v.* Brown, 1 Am. L. Reg. 634.

Rhode Island.—Tillinghast *v.* Coggeshall, 7 R. I. 383.

Tennessee.— Hoover *v.* Gregory, 10 Yerg. 444; Roberts *v.* Jackson, 4 Yerg. 308.

Virginia.— Addison *v.* Core, 2 Munf. 279; Templeman *v.* Steptoe, 1 Munf. 339; Tomlinson *v.* Dilliard, 3 Call 105.

Washington.— Fort *v.* West, 14 Wash. 10, 44 Pac. 104.

See 16 Cent. Dig. tit. "Descent and Distribution," § 86.

14. *Alabama.*— Fowler *v.* Trewhit, 10 Ala. 622.

Arkansas.—Moss *v.* Ashbrooks, 20 Ark. 128.

Indiana.— Case *v.* Wildridge, 4 Ind. 51.

Kentucky.— Duncan *v.* Lafferty, 6 J. J. Marsh. 46; Lingenfelter *v.* Carlisle, 4 Ky. L. Rep. 896.

Nebraska.— Shellenberger *v.* Ransom, 31 Nebr. 61, 47 N. W. 700, 28 Am. St. Rep. 500, 10 L. R. A. 810.

New York.— Morris *v.* Ward, 36 N. Y. 587 (father takes life-interest); Harring *v.* Coles, 2 Bradf. Surr. 349 (where a child had taken under his grandfather's will which left certain property to the sole and separate use of his daughters and their issue free from any control or interference of their husbands).

Oregon.— Stitt *v.* Bush, 22 Oreg. 239, 29 Pac. 737.

Texas.— Chandler *v.* Copeland, 31 Tex. 151.

See 16 Cent. Dig. tit. "Descent and Distribution," § 86.

15. Verret *v.* Theriot, 15 La. 106. And see Rowland *v.* Rowland, 4 Greene (Iowa) 183; Gwyer *v.* Hall, 34 Nebr. 589, 52 N. W. 372; Whitten *v.* Davis, 18 N. H. 88; McAfee *v.* Gilmore, 4 N. H. 391; McCarthy *v.* McCarthy, 4 Phila. (Pa.) 323; Glass *v.* Glass, 6 Pa. Co. Ct. 408; Owen *v.* Coghill, 4 Hen. & M. (Va.) 487.

parent.[16] The same rule as that applied to real estate is sometimes applied to personal property.[17]

c. Rights of Surviving Parent Who Marries Again. The rule of the Spanish law is adopted in Louisiana,[18] forbidding the surviving husband or wife, who marries again, to dispose of property given by the deceased or inherited from a child of the first marriage, but the rule is limited to property inherited by children of the first marriage from the deceased parent.[19]

8. Stepchildren and Stepfather or Stepmother. Ordinarily a stepfather or stepmother is not an heir to the stepchild,[20] but he or she sometimes inherits such child's estate under statutes providing that if the parents be dead the share in a deceased child's estate which they would have inherited if they had survived shall be disposed of as if they had outlived the intestate.[21]

9. Brothers and Sisters and Their Descendants — a. In General. When an intestate dies without issue or parents, the estate usually goes to his brothers and sisters and their representatives.[22] The widow of a brother of an intestate is in such capacity in no event an heir at law,[23] although the statutes sometimes allow her to take the share which her husband would have taken if living.[24] Under some statutes, if one parent is living the brothers and sisters share with such parent.[25] Where the descent is to brothers and sisters or their descendants the

16. Little *v.* Buie, 58 N. C. 10; McMichal *v.* Moore, 56 N. C. 471; Towls *v.* Rains, 2 Heisk. (Tenn.) 355; Wheless *v.* Espy, 7 Coldw. (Tenn.) 237. And see Gwyer *v.* Hall, 34 Nebr. 589, 52 N. W. 372; Whitten *v.* Davis, 18 N. H. 88; Doe *v.* Lee, 7 Ohio 15.

17. Tomlinson *v.* Dilliard, 3 Call (Va.) 105; Fort *v.* West, 14 Wash. 10, 44 Pac. 104; Shuman *v.* Shuman, 80 Wis. 479, 50 N. W. 670. See, however, McClelland *v.* Lowry, 21 Ark. 452; Jenks *v.* Trowbridge, 48 Mich. 94, 11 N. W. 822; Henderson *v.* Sherman, 47 Mich. 267, 11 N. W. 153; Hay's Appeal, 52 Pa. St. 449; Eckert's Estate, 12 Phila. (Pa.) 93.

18. La. Civ. Code (1900), art. 1753.

19. Verret *v.* Theriot, 15 La. 106. As to the construction of this provision see Zeigler *v.* Creditors, 49 La. Ann. 144, 21 So. 666; Webb *v.* Keller, 39 La. Ann. 55, 1 So. 423; Hale's Succession, 26 La. Ann. 195; Swayze's Succession, 13 La. Ann. 244; Cook *v.* Doremus, 10 La. Ann. 679.

20. Skipwith *v.* Lea, 16 La. Ann. 247.

21. *In re* Parker, 97 Iowa 593, 66 N. W. 908; Moore *v.* Weaver, 53 Iowa 11, 3 N. W. 741. See also Sarver *v.* Beal, 36 Kan. 555, 13 Pac. 743.

22. *Indiana.*— Clark *v.* Sprague, 5 Blackf. 412.

Iowa.— Blackman *v.* Wadsworth, 65 Iowa 80, 81, 21 N. W. 190 (holding that under a statute providing that "if a devisee die before the testator, his heirs shall inherit the amount so devised to him" a brother is, but a widow is not, an heir of the devisee); Lash *v.* Lash, 57 Iowa 88, 10 N. W. 302 [*distinguishing* Moore *v.* Weaver, 53 Iowa 11, 3 N. W. 741].

Kansas.— Couch *v.* Wright, 20 Kan. 103.

Maryland.— Duvall *v.* Harwood, 1 Harr. & G. 474; Maxwell *v.* Seney, 5 Harr. & J. 23.

Massachusetts.—Minot *v.* Harris, 132 Mass. 528.

Michigan.— *In re* Chapoton, 104 Mich. 11, 61 N. W. 892, 53 Am. St. Rep. 454.

Ohio.— Martin *v.* Martin, 56 Ohio St. 333, 46 N. E. 981 (holding that the children of a deceased brother take their father's share subject to an indebtedness of their father to the intestate); Jenks *v.* Langdon, 21 Ohio St. 362; Freeman *v.* Allen, 17 Ohio St. 527; Ellis *v.* Ellis, 3 Ohio Cir. Ct. 186.

Pennsylvania.— Philadelphia Trust, etc., Co. *v.* Isaac, 167 Pa. St. 270, 31 Atl. 651.

Rhode Island.— Daboll *v.* Field, 9 R. I. 266; Smith *v.* Smith, 4 R. I. 1.

Tennessee.— Riley *v.* Byrd, 3 Head 20; Rhodes *v.* Holland, 2 Yerg. 341.

Vermont.— Auger *v.* Taylor, 2 Tyler 260, where the personal estate of an unmarried intestate, leaving brothers and sisters, was so distributed under a statute that the shares of the brothers should be equal, and those of the sisters equal, but a brother's share should be double that of a sister.

Virginia.— Hepburn *v.* Dundas, 13 Gratt. 219.

Washington.— Fort *v.* West, 14 Wash. 10, 44 Pac. 104.

United States.— Poor *v.* Considine, 6 Wall. 458, 18 L. ed. 869.

See 16 Cent. Dig. tit. "Descent and Distribution," § 93.

Collaterals as forced heirs see *supra*, III, A, 5, a.

23. Green *v.* Grant, 108 Ga. 751, 32 S. E. 846.

24. See Couch *v.* Wright, 20 Kan. 103.

25. Miller *v.* Calvert, 1 Metc. (Ky.) 472 (holding that under a statute providing that collaterals of the half blood shall inherit only half as much as those of the whole blood, or as ascending kindred, and that a mother shall have the same share as a brother or sister, a mother takes twice the share of a half brother); Driskell *v.* Hanks, 18 B. Mon. (Ky.) 855; McComb *v.* Dillo, 5 Serg. & R. (Pa.) 304 (life-estate to father); Mowry *v.* Staples, 1 R. I. 10 (estates by purchase as well as estates by descent); Bailey *v.* Teackle, Wythe (Va.) 173; Blunt *v.* Gee, 5 Call (Va.)

rule of the common law that in the descent of a newly purchased inheritance the blood of the father is to be preferred is not applicable.[26]

b. Property Derived From Parent. Where the property of an intestate was derived from or through his father, and he leaves brothers or sisters, but no issue, such property passes to his brothers or sisters even though he may leave a mother also.[27]

c. Child Dying After Intestate, but During Infancy and Before Marriage. It is sometimes provided by statute that where, upon the descent of an estate to children, one of them dies under age, not having been married, his share of the inheritance goes to his surviving brothers and sisters.[28] Under such a statute the share of such deceased minor must be considered as so descending from the parent and not from the deceased child,[29] and surviving brothers and sisters of the deceased minor are for the purpose of such statute the children of the intestate, to the exclusion of brothers and sisters of the half blood.[30]

d. After-Born Brothers and Sisters. In some states it has been held that when the brothers and sisters of an intestate are entitled to the inheritance, those in being take the property, but if any are subsequently born, they become equally entitled;[31] and if for the want of brothers or sisters the inheritance passed to others, upon the subsequent birth of a brother or sister, their estate is divested and becomes vested in such brother or sister.[32] This rule is sometimes qualified so as to include only those subsequently born who were *in ventre sa mere* at the time of the intestate's death.[33]

e. Brother Preferred to Grandfather. The grandfather and brother of an intestate are not related to the intestate in equal degree within the meaning of a statute providing that an estate shall be distributed to the next of kin in equal degree, and the brother will take to the exclusion of the grandfather.[34]

f. Nephews and Nieces. Under a devise "to my legal heirs as the law provides" other than the testator's wife and brother for whom he had otherwise provided, it was held that the brother's daughter took to the exclusion of his uncles and aunts.[35]

g. Grandnephews and Grandnieces. As a general rule grandnephews and

481. *Contra*, Heyward *v.* Williams, 48 S. C. 564, 26 S. E. 797. See also *supra*, III, A, 7, a.

26. Brown *v.* Burlingham, 5 Sandf. (N. Y.) 418.

27. Wells *v.* Seeley, 47 Hun (N. Y.) 109; Walker *v.* Dunshee, 38 Pa. St. 430 (holding that such property goes to his next collateral relatives on his father's side to the exclusion of relatives on his mother's side); Harris *v.* Hayes, 6 Binn. (Pa.) 422 (rule applied to both real and personal property).

28. See Hale's Appeal, 69 Conn. 611, 38 Atl. 392 (holding that such a statute was not a statute of descent but was only supplemental to the general statutes of descent, and that, when an intestate was survived by two children who died minors and unmarried before any distribution of the estate, the estate went to the heirs of the minor child last deceased, and not to the next of kin of the intestate); Burke *v.* Burke, 34 Mich. 451 (where the statute provided that the estate of such minor should go to those who would have taken the same if such child had died before the ancestor); Clark *v.* Pickering, 16 N. H. 284. See Goodrich *v.* Adams, 138 Mass. 552; Nash *v.* Cutler, 16 Pick. (Mass.) 491; Sheffield *v.* Lovering, 12 Mass. 490; Mayo *v.* Boyd, 3 Mass. 13. The statute applies only to intestate estates. Terry's Appeal, 28 Conn. 339.

29. Wiesner *v.* Zaun, 39 Wis. 188 (holding, however, that the surviving children will not take the minor's estate as though such minor had never existed. If the estate had been sold under a statute for his maintenance or education, the purchaser's title is not divested on the minor's death); Perkins *v.* Simonds, 28 Wis. 90.

30. Clark *v.* Pickering, 16 N. H. 284.

As to rights of half blood see *infra*, III, A, 9, h.

31. Cutlar *v.* Cutlar, 9 N. C. 324; Springer *v.* Fortune, 2 Handy (Ohio) 52, 12 Ohio Dec. (Reprint) 325; Baker *v.* Heiskell, 1 Coldw. (Tenn.) 641. *Contra*, Goodwin *v.* Keerl, 3 Harr. & M. (Md.) 403.

32. Caldwell *v.* Black, 27 N. C. 463. *Contra*, Cox *v.* Matthews, 17 Ind. 367; Drake *v.* Rogers, 13 Ohio St. 21 [*overruling* Dunn *v.* Evans, 7 Ohio 169].

Doctrine of shifting inheritance repudiated see *supra*, III, A, 3.

33. Grant *v.* Bustin, 21 N. C. 77; Melton *v.* Davidson, 86 Tenn. 129, 5 S. W. 530; Grimes *v.* Orrand, 2 Heisk. (Tenn.) 298.

34. Matter of Marsh, 5 Misc. (N. Y.) 428, 26 N. Y. Suppl. 718.

35. Minot *v.* Harris, 132 Mass. 528.

grandnieces will not share in the estate of an intestate, at least unless they take as next of kin;[36] but children of a deceased nephew or niece are sometimes entitled to a distributive share of the estate by right of representation.[37]

h. Rights of the Half Blood[38] — (i) *In General.* Before the rule was changed by statute, brothers and sisters of the half blood were entirely excluded from the inheritance of an intestate.[39] It is now the general rule, however, that those of the half blood inherit equally with those of the whole blood in the same degree, when they are in the line of inheritance.[40] Sometimes the rule is quali-

36. *California.*— *In re* Curry, 39 Cal. 529, holding that the word "children" in the provision of the statute of descents regulating the distribution of property in the collateral descending line does not include grandchildren.

Maine.— Davis *v.* Stinson, 53 Me. 493.

Maryland.—McComas *v.* Amos, 29 Md. 120, 132; Duvall *v.* Harwood, 1 Harr. & G. 474.

Michigan.— *In re* Chapoton, 104 Mich. 11, 61 N. W. 892, 53 Am. St. Rep. 454; Van Cleve *v.* Van Fossen, 73 Mich. 342, 41 N. W. 258.

Nebraska.—Clary *v.* Watkins, 63 Nebr. 386, 89 N. W. 1042.

New York.— *In re* Suckley, 11 Hun 344; Doughty *v.* Stillwell, 1 Bradf. Surr. 300.

South Carolina.— Stokes *v.* Stokes, 62 S. C. 346, 40 S. E. 662; Poaug *v.* Gadsden, 2 Bay 293.

Tennessee.—Penniman *v.* Francisco, 1 Heisk. 511, 512, under a statute declaring that "there is no representation among collaterals, after brothers' and sisters' children."

See 16 Cent. Dig. tit. "Descent and Distribution," § 99.

37. *Maine.*—Reynold's Appeal, 57 Me. 350; Doane *v.* Freeman, 45 Me. 113. This rule is not extended, however, to great grandchildren of a deceased brother or sister. Stetson *v.* Eastman, 84 Me. 366, 24 Atl. 868.

Missouri.— Copenhaver *v.* Copenhaver, 78 Mo. 55.

New Jersey.—Rodman *v.* Smith, 2 N. J. L. 3.

New York.— Matter of Healy, 27 Misc. 352, 58 N. Y. Suppl. 927.

Pennsylvania.— Lane's Appeal, 28 Pa. St. 487.

Rhode Island.— Daboll *v.* Field, 9 R. I. 266, under a statute providing that descendants of any person deceased shall inherit the estate which such person would have inherited had such person survived the intestate. And see Smith *v.* Smith, 4 R. I. 1.

Vermont.— Gaines *v.* Strong, 40 Vt. 354.

See 16 Cent. Dig. tit. "Descent and Distribution," § 100.

Contra.— *Maine.*— Quinby *v.* Higgins, 14 Me. 309.

Maryland.— McComas *v.* Amos, 29 Md. 132.

Massachusetts.— Conant *v.* Kent, 130 Mass. 178; Bigelow *v.* Morong, 103 Mass. 287.

Nebraska.— Douglas *v.* Cameron, 47 Nebr. 358, 66 N. W. 430.

South Carolina.— North *v.* Valk, Dudley Eq. 212.

Vermont.— Hatch *v.* Hatch, 21 Vt. 450.

Canada.— Matter of Price, 27 N. Brunsw. 205 (holding, however, that where the intestate leaves no widow, there may be representation after brothers' and sisters' children); Crowther *v.* Cawthra, 1 Ont. 128.

See 16 Cent. Dig. tit. "Descent and Distribution," § 100.

38. See also *supra*, III, A, 1, f; III, A, 9, c, note 30; *infra*, III, A, 11, e.

39. *Kentucky.*— Bowlin *v.* Pollock, 7 T. B. Mon. 26.

Louisiana.— Price *v.* Grubbs, 1 Rob. 91.

Missouri.— Ravenscroft *v.* Shelby, 1 Mo. 694.

North Carolina.— Ham *v.* Martin, 8 N. C. 423.

South Carolina.— Lawson *v.* Perdriaux, 1 McCord 456 (holding that a mother took in preference to a half brother); Wren *v.* Carnes, 4 Desauss. 405; Hagermeyer *v.* Charleston, Riley Eq. 117.

Virginia.— Bailey *v.* Teackle, Wythe 173, holding that a statute providing that every brother and sister of a deceased child should share equally with the mother, meant brother and sister by the same father.

See 16 Cent. Dig. tit. "Descent and Distribution," § 102.

40. *Alabama.*— Johnson *v.* Copeland, 35 Ala. 521.

Arkansas.— Byrd *v.* Lipscomb, 20 Ark. 19; Kelly *v.* McGuire, 15 Ark. 555.

California.— Lynch *v.* Lynch, 132 Cal. 214, 64 Pac. 284.

Connecticut.— Clark *v.* Russell, 2 Day 112.

Illinois.—Oglesby Coal Co. *v.* Pasco, 79 Ill. 164.

Indiana.—Armington *v.* Armington, 28 Ind. 74; McClerry *v.* Matson, 2 Ind. 79; Doe *v.* Abernathy, 7 Blackf. 442.

Kentucky.—Milner *v.* Calvert, 1 Metc. 472; Grigsby *v.* Breckinridge, 12 B. Mon. 629 (holding that where an infant died without issue, the half sisters and brothers by the mother inherited the real estate); Napier *v.* Davis, 7 J. J. Marsh. 283. But see Bowlin *v.* Pollock, 7 T. B. Mon. 26; Clay *v.* Cousins, 1 T. B. Mon. 75; Nunnally *v.* Nunnally, 5 Ky. L. Rep. 318, holding that the estate of an intestate who left no issue or parents passed to his brothers and sisters, although they were only of the half blood.

Maryland.— Keller *v.* Harper, 64 Md. 74, 1 Atl. 65 (personalty); Seekamp *v.* Hammer, 2 Harr. & G. 9 (personalty); Lowe *v.* Maccubbin, 1 Harr. & J. 550.

Massachusetts.— Larrabee *v.* Tucker, 116 Mass. 562; Sheffield *v.* Lovering, 12 Mass. 490.

Michigan.— Rowley *v.* Stray, 32 Mich. 70, holding that the estate of an intestate inher-

fied so as to divide the inheritance between the whole blood and the half blood in certain fixed proportions.[41] Under other statutes those of the whole blood take precedence over those of the half blood in the distribution of real property, kindred of the half blood taking if there are no kindred of the whole blood in equal degree,[42] and children of a deceased brother or sister of the whole blood being preferred to brothers or sisters of the half blood.[43]

(II) *RIGHTS AS AFFECTED BY SOURCE OF INTESTATE'S TITLE.*[44] When the estate of an intestate came by gift, devise, or descent from an ancestor, the rule that those only who are of the blood of such ancestor can inherit generally excludes kindred of the half blood who are not of the blood of such ancestor, so that when a father dies leaving children, one of whom dies intestate and unmarried, the surviving children will take the deceased child's share in their father's estate, to the exclusion of his brothers and sisters of the half blood.[45] If, however, there are no brothers or sisters of the whole blood, those of the half blood are usually admitted in preference to kindred of the whole blood of a more remote degree, the half blood being merely postponed to the whole blood of the

ited from his father passed to his half brothers and sisters, children of his mother's second marriage, in preference to his father's mother.

Missouri.— Smith *v.* White, 165 Mo. 590, 65 S. W. 1013.

New Hampshire.— Prescott *v.* Carr, 29 N. H. 453, 61 Am. Dec. 652; Clark *v.* Pickering, 16 N. H. 284.

New York.— Valentine *v.* Wetherill, 31 Barb. 655.

North Carolina.— State University *v.* Brown, 23 N. C. 387; Pritchard *v.* Turner, 9 N. C. 435; Cutlar *v.* Cutlar, 9 N. C. 324; Ross *v.* Toms, 9 N. C. 9; Ballard *v.* Hill, 7 N. C. 410; Sheppard *v.* Sheppard, 7 N. C. 333.

Ohio.— Stone *v.* Doster, 50 Ohio St. 495, 35 N. E. 208 [*affirming* 7 Ohio Cir. Ct. 8], holding that the term "brothers and sisters" as used in a statute relative to the descent of estate coming from a former husband or wife included brothers and sisters both of the whole and the half blood. See also Freeman *v.* Allen, 17 Ohio St. 527; Springer *v.* Fortune, 2 Handy 52.

Pennsylvania.— Lynch *v.* Lynch, 132 Pa. St. 422, 19 Atl. 281 (holding that under the act of April 8, 1833, section 6, brothers and sisters of whole blood and their descendants had preference, but after that no distinction was made); Preston *v.* Hoskins, 2 Yeates 545 (personalty); Miller's Estate, 2 Woodw. 174 (personalty); Larsh *v.* Larsh, Add. 310.

South Carolina.— Felder *v.* Felder, 5 Rich. Eq. 509.

Tennessee.—Chaney *v.* Barker, 3 Baxt. 424; Nesbit *v.* Bryan, 1 Swan 468; Deadrick *v.* Armour, 10 Humphr. 588 (personalty); Nichol *v.* Dupree, 7 Yerg. 415; Pritchitt *v.* Kirkman, 2 Tenn. Ch. 390.

Vermont.— Hatch *v.* Hatch, 21 Vt. 450.

Wisconsin.— McCracken *v.* Rogers, 6 Wis. 278.

United States.— Gardner *v.* Collins, 9 Fed. Cas. No. 5,223, 3 Mason 398 [*affirmed* in 2 Pet. 58, 7 L. ed. 347].

See 16 Cent. Dig. tit. "Descent and Distribution," § 102. And see *supra*, III, A, 1, f.

41. Estes *v.* Nicholson, 39 Fla. 759, 23 So. 490; King *v.* Middlesborough Town, etc., Co., 106 Ky. 73, 50 S. W. 37; Petty *v.* Malier, 15 B. Mon. (Ky.) 591, 1108, 20 Ky. L. Rep. 1859; Nixon *v.* Nixon, 8 Dana (Ky.) 5; Sharp *v.* Klienpeter, 7 La. Ann. 264; Lee *v.* Smith, 18 Tex. 141; Marlow *v.* King, 17 Tex. 177. And see *supra*, III, A, 1, f.

42. *Alabama.*— McLemore *v.* McLemore, 8 Ala. 687. And see Cox *v.* Clark, 93 Ala. 400, 9 So. 457.

Maryland.— Keller *v.* Harper, 64 Md. 74, 1 Atl. 65; Hall *v.* Jacobs, 4 Harr. & J. 245.

Mississippi.— Fatheree *v.* Fatheree, Walk. 311.

Ohio.— See Lyon *v.* Lyon, 24 Ohio Cir. Ct. 498.

Pennsylvania.— Stark *v.* Stark, 55 Pa. St. 62; Baker *v.* Chalfant, 5 Whart. 477, holding that the estate of an intestate will pass to a sister of the half blood to the exclusion of the more remote kindred of the whole blood.

Vermont.— Brown *v.* Brown, 1 D. Chipm. 360.

United States.— Chirac *v.* Reinecker, 2 Pet. 613, 7 L. ed. 538.

See 16 Cent. Dig. tit. "Descent and Distribution," § 102.

43. Hitchcock *v.* Smith, 3 Stew. & P. (Ala.) 29; Scott *v.* Terry, 37 Miss. 65.

44. See also *supra*, II, E, 3; III, A, 1, f; *infra*, III, A, 11, c, (I).

45. *Indiana.*— Armington *v.* Armington, 28 Ind. 74.

Massachusetts.— Nash *v.* Cutler, 16 Pick. 491 (where, however, the half brothers and sisters shared in the estate on the ground that the intestate received it from the father by devise and not by "inheritance," which was the term used in the statute); Sheffield *v.* Lovering, 12 Mass. 490 (where, however, the half brother and sisters shared as there were none of the full blood).

New Hampshire.—Prescott *v.* Carr, 29 N. H. 453, 61 Am. Dec. 652; Crowell *v.* Clough, 23 N. H. 207; Clark *v.* Pickering, 16 N. H. 284; McAfee *v.* Gilmore, 4 N. H. 391.

New Jersey.— Pierson *v.* D'Hart, 3 N. J. L. 481.

same degree.[46] And if the half brothers and sisters are of the blood of the ancestor from whom the property descended, they are entitled to share as of the whole blood.[47] The term "ancestor" when used with reference to the descent of real property, embraces, as we have seen, collaterals as well as lineals through whom the inheritance is derived, and means the ancestor from whom it immediately, not one from whom it remotely, descended.[48] The term "of the blood" includes half brothers and sisters.[49] If the property is personalty,[50] or property which did not come to the intestate by descent, devise, or gift from an ancestor, kindred of the half blood take equally with those of the whole blood.[51]

(III) *DESCENT OF ESTATES TAIL.* On the death of a tenant in tail without issue, his half sisters were held entitled equally with those of the whole blood, all being children of the father, from whom the estate was derived.[52]

i. Rights of Descendants of Half Blood. The children of a deceased half brother or sister, by right of representation, are entitled according to some of the cases to the same rights of inheritance as would have belonged to the half brother or sister if surviving.[53]

North Carolina.— Dozier *v.* Grandy, 66 N. C. 484.

Pennsylvania.— Danner *v.* Shissler, 31 Pa. St. 289.

Tennessee.— Butler *v.* King, 2 Yerg. 115.

Wisconsin.— Wiesner *v.* Zaun, 39 Wis. 188; Perkins *v.* Simonds, 28 Wis. 90.

See 16 Cent. Dig. tit. "Descent and Distribution," § 103.

Contra.— Oglesby Coal Co. *v.* Pasco, 79 Ill. 164, 166, holding that a statute providing that in "no case shall there be a distinction between the kindred of the whole and the half-blood" extends to cases where the half brother or sister is not of the blood of the ancestor from whom the estate was derived.

46. *Alabama.*—Coleman *v.* Foster, 112 Ala. 506, 20 So. 509; Cox *v.* Clark, 93 Ala. 400, 9 So. 457, holding half brothers and sisters entitled as against own uncles and aunts.

California.— *In re* Smith, 131 Cal. 433, 63 Pac. 729.

Indiana.— Pond *v.* Irwin, 113 Ind. 243, 15 N. E. 272 (holding a half brother entitled as against a brother of the parent from whom the estate came); Robertson *v.* Burrell, 40 Ind. 328.

Massachusetts.— Sheffield *v.* Lovering, 12 Mass. 490.

Michigan.— Rowley *v.* Stray, 32 Mich. 70, holding half brothers and sisters entitled as against the mother of the parent from whom the estate was derived.

New Jersey.— Hance *v.* McKnight, 11 N. J. L. 385; Arnold *v.* Phœnix, 5 N. J. L. 862, holding that lands derived from the father descend to brothers and sisters on the mother's side equally with a half sister on the father's side.

Ohio.— Martin *v.* Falconer, 5 Ohio Cir. Ct. 584.

Pennsylvania.— Hart's Appeal, 8 Pa. St. 32; May *v.* Espenshade, 3 Luz. Leg. Obs. 142.

See 16 Cent. Dig. tit. "Descent and Distribution," § 103.

Contra.— Kelly *v.* McGuire, 15 Ark. 555 (but holding that personalty will pass to half blood); Valentine *v.* Wetherill, 31 Barb. (N. Y.) 655; Hilliard *v.* Moore, 4 N. C. 392; Amy *v.* Amy, 12 Utah 278, 42 Pac. 1121.

47. Neeley *v.* Wise, 44 Iowa 544; Lowe *v.* Maccubbin, 1 Harr. & J. (Md.) 550; Delaplaine *v.* Jones, 8 N. J. L. 340; Den *v.* Urison, 2 N. J. L. 212; Valentine *v.* Wetherill, 31 Barb. (N. Y.) 655. But see King *v.* Middlesborough Town, etc., Co., 106 Ky. 73, 50 S. W. 37, 1108, which holds that under the statute (Gen. St. c. 31, §§ 3, 9) brothers and sisters of the half blood take only one half the share which those of the whole blood take, although the estate of the intestate was derived from the common parent. See also Freeman *v.* Allen, 17 Ohio St. 527; Gardner *v.* Collins, 2 Pet. (U. S.) 58, 7 L. ed. 347.

48. Smith *v.* Croom, 7 Fla. 81; Wheeler *v.* Clutterbuck, 52 N. Y. 67; Emanuel *v.* Ennis, 48 N. Y. Super. Ct. 430. See *supra*, III, A, 1, b.

49. May *v.* Espenshade, 1 Pearson (Pa.) 139.

50. Preston *v.* Hoskins, 2 Yeates (Pa.) 545; Kyle *v.* Moore, 3 Sneed (Tenn.) 183.

51. *Alabama.*— Eatman *v.* Eatman, 83 Ala. 478, 3 So. 850.

Indiana.— Clark *v.* Sprague, 5 Blackf. 412.

Michigan.— Van Sickle *v.* Gibson, 40 Mich. 170.

New Hampshire.— Prescott *v.* Carr, 29 N. H. 453, 61 Am. Dec. 652.

New Jersey.—Den *v.* Urison, 2 N. J. L. 212.

New York.— Champlin *v.* Baldwin, 1 Paige 562, land purchased with money bequeathed to one by an ancestor is not an ancestral estate.

North Carolina.— Ross *v.* Toms, 9 N. C. 9; McKay *v.* Hendon, 7 N. C. 209.

United States.— Vattier *v.* Hinde, 7 Pet. 252, 8 L. ed. 675.

See 16 Cent. Dig. tit. "Descent and Distribution," § 103.

52. Pennington *v.* Ogden, 1 N. J. L. 223. See, generally, ESTATES.

53. Stallworth *v.* Stallworth, 29 Ala. 76; Anderson *v.* Bell, 140 Ind. 375, 39 N. E. 735, 29 L. R. A. 541; Matter of Southworth, 6 Dem. Surr. (N. Y.) 216, 14 N. Y. St. 486; Burgwyn *v.* Devereux, 23 N. C. 583. *Contra*,

10. Grandparents and Remote Ascendants — a. In General. In some states the rule of the common law that the inheritance can never lineally ascend remains partly in force so that an estate cannot ascend to a grandparent,[54] while in others it has been abolished.[55] Generally, where paternal and maternal grandparents are next of kin, they take equally the property of a grandchild dying intestate, and the source of the inheritance is immaterial.[56] Where the next of kin are a grandfather and a brother of the intestate, the grandfather is excluded by the brother from the distribution of personal estate;[57] but where the intestate, having inherited real property from his father, leaves a mother, uncles, and a grandfather, the grandfather takes to the exclusion of the mother and uncles.[58]

b. Preference of Grandparents Over Uncles and Aunts. Where the source from which the property originally came does not govern its descent, if a person dies intestate leaving no husband, wife, or children, nor issue of deceased children, nor father, mother, brother, or sister, but leaves grandparents, uncles, and aunts, the grandparents take property to the exclusion of the uncles and aunts, the former being nearer of kin to the intestate than the latter;[59] but where the source of the property controls its descent, if the intestate dies possessed of real estate inherited from a paternal ancestor, a paternal uncle or aunt takes by descent to the exclusion of a maternal grandparent.[60]

c. Great Grandparents. Where the nearest heirs are great grandparents and great uncles and aunts, real estate passes to the great grandparents to the exclusion of the great uncles and great aunts.[61]

11. Remote Collaterals — a. In General. Under the old Spanish law where there were no descendants, the ascendants were preferred to collaterals;[62] and this is the general rule under the statutes of distribution in the various states.[63]

Stretch *v.* Stretch, 4 N. J. L. 182 (holding that the statute enabling the half blood to inherit extends only to brothers and sisters, and not to their issue); *Ex p.* Mays, 2 Rich. (S. C.) 61.

54. Bray *v.* Taylor, 36 N. J. L. 415; Taylor *v.* Bray, 32 N. J. L. 182.

55. McDowell *v.* Addams, 45 Pa. St. 430; May *v.* Espenshade, 3 Luz. Leg. Obs. (Pa.) 142; and other cases following.

56. *Kentucky.*— Wells *v.* Head, 12 B. Mon. 166.

Maine.— Albee *v.* Vose, 76 Me. 448.

Massachusetts.— Nash *v.* Cutler, 16 Pick. 491.

New York.— Hill *v.* Nye, 17 Hun 457.

Oregon.— Shadden *v.* Hembree, 17 Oreg. 14, 18 Pac. 572.

England.— Moor *v.* Barham, 1 P. Wms. 53, 24 Eng. Reprint 289.

See 16 Cent. Dig. tit. "Descent and Distribution," § 103.

57. Matter of Marsh, 5 Misc. (N. Y.) 428, 26 N. Y. Suppl. 718.

Brothers and sisters see *supra*, III, A, 9.

58. Elwood *v.* Lannon, 27 Md. 200.

59. *Alabama.*— Phillips *v.* Peteet, 35 Ala. 696, personal estate.

Kentucky.— Berkley *v.* Stewart, 5 Ky. L. Rep. 609.

Maine.— Decoster *v.* Wing, 76 Me. 450; Cables *v.* Prescott, 67 Me. 582.

Maryland.— Elwood *v.* Lannon, 27 Md. 200.

New Hampshire.— Kelsey *v.* Hardy, 20 N. H. 479.

North Carolina.—Gillespie *v.* Foy, 40 N. C. 280.

Oregon.—Smallman *v.* Powell, 18 Oreg. 367, 23 Pac. 249, 17 Am. St. Rep. 742.

Pennsylvania.— Sturgeon *v.* Hustead, 196 Pa. St. 148, 46 Atl. 377; McDowell *v.* Addams, 45 Pa. St. 430; Nichol *v.* Hall, 28 Pittsb. Leg. J. 239; Fister's Estate, 2 Woodw. (Pa.) 323.

Tennessee.— Latimer *v.* Rogers, 3 Head 692.

United States.— Cole *v.* Batley, 6 Fed. Cas. No. 2,977, 2 Curt. 562.

Contra, Thatcher *v.* Thatcher, 17 Colo. 404, 29 Pac. 800 (holding that grandparents and uncles and aunts take equally); *In re* Davenport, 36 Misc. (N. Y.) 475, 73 N. Y. Suppl. 810 (under Code Civ. Proc. § 2732, subd. 12, as amended in 1898). In New York, until the amendment of 1898, grandparents excluded uncles and aunts. See Hill *v.* Nye, 17 Hun 457; Bogert *v.* Furman, 10 Paige 496; Sweezey *v.* Willis, 1 Bradf. Surr. 495.

See 16 Cent. Dig. tit. "Descent and Distribution," § 109.

60. Gillespie *v.* Foy, 40 N. C. 280; Latimer *v.* Rogers, 3 Head (Tenn.) 692.

In New York grandparents are excluded by relations of the intestate's father and mother, where the intestate inherited land from his father, and it is immaterial that the land descended to the father from his father. The reason of this is that the title is traced back only to the person from whom the intestate took directly. Hyatt *v.* Pugsley, 33 Barb. 373.

61. Bruce *v.* Bissell, 119 Ind. 525, 22 N. E. 4, 12 Am. St. Rep. 436; Cloud *v.* Bruce, 61 Ind. 171; Bruce *v.* Baker, Wils. (Ind.) 462; Sturgeon *v.* Hustead, 196 Pa. St. 148, 46 Atl. 377.

62. Childress *v.* Cutter, 16 Mo. 24.

63. See *supra*, III, A, 7.

Where there are no parents or grandparents, however, nor brothers or sisters or their descendants, the estate goes to the more remote collaterals. In some states the property of a person dying intestate, without children, brothers, or sisters, or descendants of such, or father or mother, descends to the intestate's paternal and maternal relatives equally where there are relatives on both sides,[64] while in other states the source, that is whether the property came to the intestate from the paternal or the maternal side, governs where it shall descend.[65] Where an intestate dies possessed of real estate of inheritance not derived from his father or mother, such real estate, in default of a living mother, father, brother, sister, or their descendants, descends in equal moieties to the maternal and paternal kindred of the intestate;[66] and it has been held that the same is true where the intestate inherited real estate from his grandfather[67] or directly from his brother,[68] or as a residue from the assignee for the benefit of the creditors of the father of the intestate;[69] but where the intestate dies in infancy possessed of real estate inherited from the maternal grandfather and leaves no issue, husband, or wife, the estate descends to his father rather than to his mother's brothers and sisters.[70]

b. Rights Dependent on Source of Intestate's Title. In those states where the source whence the property of the intestate came governs its descent, the rule is that collateral heirs of the blood of the ancestor from whom real estate has descended or has been inherited,[71] or the collateral heirs of the blood of the first purchaser,[72] inherit to the exclusion of the collateral heirs of other blood. There are some cases, however, to the contrary.[73] The rule does not always apply to

64. *Alabama.*— Deloney *v.* Walker, 9 Port. 497.

California.— *In re* Pearsons, 110 Cal. 524, 42 Pac. 960.

Florida.— Estes *v.* Nicholson, 39 Fla. 759, 23 So. 490.

Kentucky.— Well *v.* Head, 12 B. Mon. 166; Pinkard *v.* Smith, Litt. Sel. Cas. 331.

Missouri.— Peacock *v.* Smart, 17 Mo. 402.

Rhode Island.— Taft *v.* Dimond, 16 R. I. 584, 18 Atl. 183; Shepard *v.* Taylor, 15 R. I. 204, 3 Atl. 382; Cozzens *v.* Joslin, 1 R. I. 122.

South Carolina.— Shaffer *v.* Nail, 2 Brev. 160.

Texas.— McKinney *v.* Ahhott, 49 Tex. 371; Jones *v.* Barnett, 30 Tex. 637.

Virginia.— Royall *v.* Royall, 5 Munf. 82.

See 16 Cent. Dig. tit. "Descent and Distribution," § 112.

Where there are no relatives on one side the whole of the property of course goes to the relatives on the other side. See Cozzens *v.* Joslin, 1 R. I. 122.

Distribution.— Where the property of an intestate goes equally to the paternal and maternal kindred, each moiety is distributed as a distinct estate, i. e., the paternal kindred take one moiety and the maternal kindred the other moiety, the former moiety being divided among all the paternal kindred entitled to inherit, the latter moiety being divided among all the maternal kindred entitled to inherit, and it is immaterial that there are more paternal kindred entitled to inherit than maternal kindred (Cozzens *v.* Joslin, 1 R. I. 122; Browne *v.* Turberville, 2 Call (Va.) 390), or that the kindred of one line may be nearer in degree than the kindred of the other line (Cozzens *v.* Joslin, 1 R. I. 122; McKinney *v.* Abbott, 49 Tex. 371).

Collaterals as forced heirs see *supra*, III, A, 5, a.

65. See *infra*, III, A, 11, b.

66. Well *v.* Head, 12 B. Mon. (Ky.) 166. *Contra*, Coolidge *v.* Burke, 69 Ark. 237, 62 S. W. 583.

67. Smith *v.* Smith, 2 Bush (Ky.) 520; Well *v.* Head, 12 B. Mon. (Ky.) 166. *Contra*, Whipple *v.* Latrobe, 20 R. I. 508, 40 Atl. 160. See *infra*, III, A, 11, b.

68. Hyatt *v.* Pugsley, 23 Barb. (N. Y.) 285.

69. Taft *v.* Dimond, 16 R. I. 584, 18 Atl. 183.

70. Turner *v.* Patterson, 5 Dana (Ky.) 292; Duncan *v.* Lafferty, 6 J. J. Marsh. (Ky.) 46. See also Smith *v.* Smith, 2 Bush (Ky.) 520.

71. *Arkansas.*— Coolidge *v.* Burke, 69 Ark. 237, 62 Pac. 583; Kelly *v.* McGuire, 15 Ark. 555.

Kentucky.— Driskell *v.* Hanks, 18 B. Mon. 855; Duncan *v.* Tafferty, 6 J. J. Marsh. 46; Power *v.* Dougherty, 6 Ky. L. Rep. 621.

Maryland.— Savary *v.* Da Camara, 60 Md. 139.

New York.— Shires *v.* Shires, 76 N. Y. App. Div. 621, 78 N. Y. Suppl. 603.

Pennsylvania.— Parr *v.* Bankhart, 22 Pa. St. 291; Bevan *v.* Taylor, 7 Serg. & R. 397; Gilmore *v.* Ross, 2 Pittsb. 500.

Rhode Island.— Whipple *v.* Latrobe, 20 R. I. 508, 40 Atl. 160.

Tennessee.— Latimer *v.* Rogers, 3 Head 692.

See 16 Cent. Dig. tit. "Descent and Distribution," § 113. See also *supra*, II, E, 3, a; III, A, 2; *infra*, III, A, 11, e, (II).

72. Johnson *v.* Lybrook, 16 Ind. 473.

73. See Smith *v.* Smith, 2 Bush (Ky.) 520 (holding that a provision that "if an infant

the inheritance of personal property, but the next of kin may inherit such property regardless of the blood of the ancestor from whom the intestate received the same.[74]

c. Uncles and Aunts — (I) *In General.* Where the statute of descent contains no reference to the blood of the first purchaser, paternal and maternal uncles and aunts take equally,[75] but they are excluded from taking by brothers and sisters of the half blood who are not of the blood of the first purchaser.[76] Where the statute contains such a reference real estate devised by or descended from the father to an intestate who dies leaving neither brother nor sister passes to paternal uncles and aunts of the intestate to the exclusion of maternal uncles and aunts,[77] or to a paternal aunt to the exclusion of the intestate's half brother who is not of the blood of the father,[78] and to the exclusion of the intestate's mother.[79] So *vice versa* where real estate is derived immediately from the mother, the father living, it goes to the mother's brothers and sisters or to their lineal descendants.[80] But real estate which descended to an intestate from a brother does not pass to such uncles and aunts exclusively.[81] Where the intestate leaves maternal uncles and aunts and first cousins on the paternal side, the latter take to the exclusion of the former.[82] The real estate which an intestate took by descent from her maternal grandfather goes in the absence of her issue to her maternal uncle as heir of her maternal grandfather and not to her father as her next of kin.[83] If the inheritance is not ancestral, but is a new acquisition, it goes under some statutes first to the line of the intestate's paternal uncles and aunts to the exclusion of maternal uncles and aunts.[84] Inasmuch as a great uncle and a first cousin of an intestate are relatives in an equal degree, they, being the nearest surviving kindred, will succeed to real estate as tenants in common.[85]

(II) *Personal Property.* An intestate's personal property passes to his parent to the exclusion of uncles and aunts,[86] and to uncles and aunts to the exclusion of first cousins.[87]

dies without issue, having title to real estate, derived by gift, devise, or descent from one of his parents, the whole shall descend to that parent, and his or her kindred," etc., does not embrace real estate derived by gift, devise, or descent, from a grandparent); Duncan *v.* Lafferty, 6 J. J. Marsh. (Ky.) 46 (holding that if an infant inheriting real estate from the mother lives until he has attained twenty-one years of age and then dies without issue his father's and not his mother's relations succeed to his estate).

74. Kelly *v.* McGuire, 15 Ark. 555; Latimer *v.* Rogers, 3 Head (Tenn.) 692. *Compare supra*, II, E, 3, f.

75. *In re* Pearsons, 110 Cal. 524, 42 Pac. 960; Clary *v.* Watkins, 64 Nebr. 386, 89 N. W. 1042; Dodge *v.* Lewis, 71 N. H. 324, 51 Atl. 1071; *In re* Davenport, 172 N. Y. 454, 65 N. E. 275 [*affirming* 67 N. Y. App. Div. 191, 73 N. Y. Suppl. 653]; Matter of White, 31 Misc. (N. Y.) 484, 65 N. Y. Suppl. 567.

76. Cox *v.* Clark, 93 Ala. 400, 9 So. 457. See *supra*, III, A, 9, h.

77. Kelly *v.* McGuire, 15 Ark. 555; Driskell *v.* Hanks, 18 B. Mon. (Ky.) 855; Bevan *v.* Taylor, 7 Serg. & R. (Pa.) 397 [*overruling* Walker *v.* Smith, 3 Yeates (Pa.) 480].

78. *Alabama.*— See Cox *v.* Clark, 93 Ala. 400, 9 So. 457.

Arkansas.— Kelly *v.* McGuire, 15 Ark. 555.

Missouri.— Cutter *v.* Waddingham, 22 Mo. 206.

New York.— Conkling *v.* Brown, 57 Barb. 265.

Pennsylvania.— Henszey *v.* Gross, 185 Pa. St. 353, 39 Atl. 949.

Wisconsin.— Perkins *v.* Simmonds, 28 Wis. 90.

See also *supra*, III, A, 9, h.

79. Scroggin *v.* Allin, 2 J. J. Marsh. (Ky.) 466.

80. Templeman *v.* Steptoe, 1 Munf. (Va.) 339.

81. Driskell *v.* Hanks, 18 B. Mon. (Ky.) 855.

82. Speer *v.* Miller, 37 N. J. Eq. 492.

83. Coolidge *v.* Burke, 69 Ark. 237, 62 S. W. 583.

84. Kelly *v.* McGuire, 15 Ark. 555; Hall *v.* Jacobs, 4 Harr. & J. (Md.) 245.

85. Smith *v.* Gaines, 35 N. J. Eq. 65.

86. Scroggin *v.* Allin, 2 J. J. Marsh. (Ky.) 466.

Parents see *supra*, III, A, 7.

87. *Maryland.*— Levering *v.* Heighe, 3 Md. Ch. 365; Ellicott *v.* Ellicott, 2 Md. Ch. 468; Levering *v.* Heighe, 2 Md. Ch. 81.

Nebraska.— Clary *v.* Watkins, 64 Nebr. 386, 89 N. W. 1042.

New Hampshire.— Dodge *v.* Lewis, 71 N. H. 324, 51 Atl. 1071.

New York.—Matter of Gooseberry, 52 How. Pr. 310. See *In re* Davenport, 172 N. Y. 454, 65 N. E. 275 [*affirming* 67 N. Y. App. Div. 191, 73 N. Y. Suppl. 653].

(III) *TAKING EQUALLY WITH GRANDPARENTS.* It has been held under some statutes that where an intestate leaves surviving neither parent nor issue, real[88] and personal property[89] descends to the grandparents and uncles and aunts equally.

(IV) *PREFERENCE OF MALES OVER FEMALES.* The common-law rule that males shall be admitted before females, although superseded in most cases, still obtains in New York in case of remote collateral kinship, so that a great uncle will inherit to the exclusion of great aunts and descendants of great aunts, that is, to the exclusion of females of the same degree and their descendants, as at common law.[90]

d. Cousins. Cousins are not next of kin if the intestate left living an uncle or an aunt,[91] except where the uncle is a great uncle and the cousin a first cousin, in which case they are both related in the fourth degree.[92] Nor are they heirs if the intestate left a wife, child, father, mother, grandfather, or grandmother.[93] As to cousins the rule of distribution is that first cousins are entitled to take the property of an intestate to the exclusion of second[94] and third cousins.[95] This is true even where the first cousin is of the half blood and the second cousin is of the whole blood.[96] Maternal and paternal cousins are equal in respect to distribution.[97]

e. Rights of Half Blood — (I) *IN GENERAL.* Under the statutes of descent and distribution, as has already been seen in other connections,[98] the half blood and their descendants generally take personal property[99] as well as real property equally with the whole blood,[1] except where the statute makes the descent

Pennsylvania.— Macer's Appeal, 3 Walk. 107.

88. Thatcher *v.* Thatcher, 17 Colo. 404, 29 Pac. 800; Pease *v.* Stone, 77 Tex. 551, 14 S. W. 161.

89. Thatcher *v.* Thatcher, 17 Colo. 404, 29 Pac. 800.

90. Hunt *v.* Kingston, 3 Misc. (N. Y.) 309, 23 N. Y. Suppl. 352, 19 L. R. A. 577.

91. Montgomery *v.* Petriken, 29 Pa. St. 118; Smith's Estate, 10 Pa. Dist. 92. And see *In re* Davenport, 172 N. Y. 454, 65 N. E. 275 [*affirming* 67 N. Y. App. Div. 191, 73 N. Y. Suppl. 653]. See also Carter *v.* Crawley, 1 Freem. 296, T. Raym. 496; Maw *v.* Harding, Prec. Ch. 28, 2 Vern. Ch. 233; Beeton *v.* Darkin, 2 Vern. Ch. 168.

92. Smith *v.* Gaines, 35 N. J. Eq. 65.

93. Bamber's Estate, 13 Pa. Co. Ct. 403; Byers *v.* Wallace, 87 Tex. 503, 28 S. W. 1056, 29 S. W. 760.

94. Ector *v.* Grant, 112 Ga. 557, 37 S. E. 984, 53 L. R. A. 723; Adee *v.* Campbell, 14 Hun (N. Y.) 551 [*affirmed* in 79 N. Y. 52]; Rogers' Estate, 131 Pa. St. 382, 18 Atl. 871; Brenneman's Appeal, 40 Pa. St. 115; Bamber's Estate, 13 Pa. Co. Ct. 403; Byers *v.* McAuley, 149 U. S. 608, 13 S. Ct. 906, 37 L. ed. 867; Shields *v.* McAuley, 37 Fed. 302. See also Davis *v.* Vanderveer, 23 N. J. Eq. 558. A first cousin will take to the exclusion of the half brother on the side of the deceased son of a deceased daughter of the sister. Selby *v.* Hollingsworth, 13 Lea (Tenn.) 145. And first cousins exclude half brothers of second cousins. Selby *v.* Hollingsworth, 13 Lea (Tenn.) 145.

Contra.— Dexter *v.* Dexter, 7 Fed. Cas. No. 3,860, 4 Mason 302, holding that under the laws of Rhode Island a second cousin of the whole blood may share by right of representation with a first cousin of the whole blood.

95. Adee *v.* Campbell, 14 Hun (N. Y.) 551 [*affirmed* in 79 N. Y. 52]. See also Davis *v.* Vanderveer, 23 N. J. Eq. 558.

96. Ector *v.* Grant, 112 Ga. 557, 37 S. E. 984, 53 L. R. A. 723. See *supra*, III, A, 1, f; III, A, 9, h.

97. Redd *v.* Clopton, 17 Ga. 230.

98. See *supra*, III, A, 1, f; III, A, 9, c, note 30; III, A, 9, h.

99. Johnson *v.* Copeland, 35 Ala. 521; Byrd *v.* Lipscomb, 20 Ark. 19; Kelly *v.* McGuire, 15 Ark. 555; Milner *v.* Calvert, 1 Metc. (Ky.) 472; Deadrick *v.* Armour, 10 Humphr. (Tenn.) 588.

Uncles and aunts.—Hallett *v.* Hare, 5 Paige (N. Y.) 315.

Cousins.— Kiegel's Appeal, 12 Wkly. Notes Cas. (Pa.) 179; Graham's Estate, 6 Wkly. Notes Cas. (Pa.) 402.

Nephews and nieces.— Hatch *v.* Hatch, 21 Vt. 450.

1. *Alabama.*—Johnson *v.* Copeland, 35 Ala. 521.

Arkansas.— Kelly *v.* McGuire, 15 Ark. 555.

Florida.— Estes *v.* Nicholson, 39 Fla. 759, 23 So. 490.

Louisiana.— Pearson *v.* Grice, 6 La. Ann. 232, holding that in collateral successions, except in the case of whole and half brothers and sisters of a deceased brother or sister, there is no distinction between heirs of the whole blood and heirs of the half blood, and they share equally.

New York.— Adams *v.* Smith, 20 Abb. N. Cas. 60.

North Carolina.— Seville *v.* Whedbee, 12 N. C. 160; Pritchard *v.* Turner, 9 N. C. 435.

Pennsylvania.— Kiegel's Appeal, 12 Wkly. Notes Cas. 179.

South Carolina.— Edwards *v.* Barksdale, Riley Eq. 16.

dependent upon the source of the intestate's title.[2] In some states, however, as has been seen, the statute prefers kindred of the whole blood, or gives them a larger share.[3] A preference was given by the South Carolina statute to uncles and aunts of the half blood over cousins of the whole blood.[4]

(II) *RIGHTS DEPENDENT ON SOURCE OF INTESTATE'S TITLE.* In those states where the source of the intestate's title determines whether the paternal or maternal heirs shall take the property,[5] the half blood in the line of the ancestor[6] from whom the intestate took the property by inheritance or devise, or in the line of the first purchaser, take real property to the exclusion of the half blood[7] and of the whole blood[8] who are not of the blood of the transmitting ancestor; but brothers and sisters of the half blood not of the blood of the ancestor from whom the property came are excluded by brothers and sisters of the whole blood,[9] by nephews and nieces,[10] by first cousins,[11] and by other remote collateral heirs,[12] who are of the blood of the ancestor from whom the intestate took the property, and will share equally[13] or under some statutes unequally[14] with those of the half blood of the ancestor.

f. Stepdaughter's Children. The children of the intestate's deceased stepdaughter are in no way related to the intestate and do not participate in the distribution of the estate.[15]

g. Right to Take by Representation. Under some statutes the right to take by representation does not extend beyond the children of brothers and sisters,[16]

See 16 Cent. Dig. tit. "Descent and Distribution," § 116.

Uncles and aunts.— Beebe *v.* Griffing, 14 N. Y. 235; Danner *v.* Shissler, 31 Pa. St. 289.

Nephews and nieces.— Matter of Southworth, 6 Dem. Surr. (N. Y.) 216.

Cousins.— Davis' Estate, 14 Phila. (Pa.) 256.

2. See *infra*, III, A, 11, e, (II).

3. Pinkard *v.* Smith, Litt. Sel. Cas. (Ky.) 331; King *v.* Neely, 14 La. Ann. 165; Hulme *v.* Montgomery, 31 Miss. 105. But see Davis' Estate, 14 Phila. (Pa.) 256, holding that the preference given to the whole blood is confined to the inheritance of realty by brothers and sisters and their descendants. See also *supra*, III, A, 1, f; III, A, 9, h.

4. Karwon *v.* Lowndes, 2 Desauss. (S. C.) 210; Perry *v.* Logan, 5 Rich. Eq. (S. C.) 202.

5. See *supra*, II, E, 3, a; III, A, 11, b.

6. Definition of "ancestor" see *supra*, III, A, 1, b.

7. Byrd *v.* Lipscomb, 20 Ark. 19; Kelly *v.* McGuire, 15 Ark. 555; Nichol *v.* Dupree, 7 Yerg. (Tenn.) 415. See also Johnson *v.* Copeland, 35 Ala. 521; Henszey *v.* Gross, 185 Pa. St. 353, 39 Atl. 949. And see *supra*, III, A, 1, f; III, A, 9, h.

8. Johnson *v.* Copeland, 35 Ala. 521; Cliver *v.* Sanders, 8 Ohio St. 501; May *v.* Espenshade, 3 Luz. Leg. Obs. (Pa.) 142; Pritchitt *v.* Kirkham, 2 Tenn. Ch. 390; Chaney *v.* Barker, 3 Baxt. (Tenn.) 424; Nesbit *v.* Bryan, 1 Swan (Tenn.) 468. See also Gardner *v.* Collins, 2 Pet. (U. S.) 58, 7 L. ed. 347. *Compare* Cox *v.* Clark, 93 Ala. 400, 9 So. 457.

9. *Alabama.*— See Cox *v.* Clark, 93 Ala. 400, 9 So. 457.

Arkansas.— Kelly *v.* McGuire, 15 Ark. 555.

Missouri.— Cutter *v.* Waddingham, 22 Mo. 206; Childress *v.* Cutter, 16 Mo. 24.

New York.— Conkling *v.* Brown, 57 Barb. (N. Y.) 265.

Tennessee.— Deadrick *v.* Armour, 10 Humphr. (Tenn.) 588; Nichol *v.* Dupree, 7 Yerg. (Tenn.) 415.

Wisconsin.— Perkins *v.* Simonds, 28 Wis. 90.

And see *supra*, III, A, 9, h.

10. Hitchcock *v.* Smith, 3 Stew. & P. (Ala.) 29.

11. Felton *v.* Billups, 19 N. C. 308.

12. Dozier *v.* Grandy, 66 N. C. 484.

13. Grimes *v.* Orrand, 2 Heisk. (Tenn.) 298; Baker *v.* Heiskell, 1 Coldw. (Tenn.) 641.

14. Talbott *v.* Talbott, 17 B. Mon. (Ky.) 1.

15. Gazlay *v.* Cornwell, 2 Redf. Surr. (N. Y.) 139.

16. *Georgia.*—Ector *v.* Grant, 112 Ga. 557, 37 S. E. 984, 53 L. R. A. 723.

Maine.— Quinby *v.* Higgins, 14 Me. 309.

Maryland.— McComas *v.* Amos, 29 Md. 132; Elwood *v.* Lannon, 27 Md. 200; Duvall *v.* Harwood, 1 Harr. & G. (Md.) 474; Porter *v.* Askew, 11 Gill & J. (Md.) 346; Ellicott *v.* Ellicott, 2 Md. Ch. 468; Levering *v.* Heighe, 2 Md. Ch. 81.

Massachusetts.— Conant *v.* Kent, 130 Mass. 178; Snow *v.* Snow, 111 Mass. 389; Bigelow *v.* Morong, 103 Mass. 287.

Nebraska.—Clary *v.* Watkins, 64 Nebr. 386, 89 N. W. 1042; Douglas *v.* Cameron, 47 Nebr. 358, 66 N. W. 430.

New Hampshire.— Page *v.* Parker, 61 N. H. 65.

New Jersey.— Davis *v.* Vanderveer, 23 N. J. Eq. 558.

New York.— Adee *v.* Campbell, 79 N. Y. 52 [*affirming* 14 Hun 551]; *In re* Suckley, 11 Hun 344; Hannan *v.* Osborn, 4 Paige 336.

North Carolina.— Caldwell *v.* Cowan, 60 N. C. 639. See Draper *v.* Bradley, 126 N. C. 72, 35 S. E. 228.

Pennsylvania.— Rogers' Estate, 131 Pa. St. 382, 18 Atl. 871; Perot's Appeal, 102 Pa. St. 235; Brenneman's Appeal, 40 Pa. St. 115.

it being held that the words "brothers and sisters" in the statutes refer to brothers and sisters of the intestate only.[17] Under these statutes children of deceased uncles and aunts do not take by representation as next of kin of the intestate,[18] nor do children of first cousins who have died before the intestate take by right of representation.[19] In some of the states statutes have been passed extending the right to take by representation,[20] while in other states the common-law right of representation does not exist at all.[21]

12. Taking Per Stirpes or Per Capita. The rule generally is that when all the heirs of an intestate are in equal degree of consanguinity to the decedent, they take *per capita*,[22] and it is immaterial how numerous the issue of one of the persons of the deceased previous class of kin may be,[23] but when they stand in

Contra, Whitaker's Estate, 175 Pa. St. 139, 34 Atl. 572; Hayes' Appeal, 89 Pa. St. 256; Bamber's Estate, 2 Pa. Dist. 536; Kraut's Estate, 6 Phila. (Pa.) 422.

See 16 Cent. Dig. tit. "Descent and Distribution," § 118 *et seq.*

17. Porter *v.* Askew, 11 Gill & J. (Md.) 346; Davis *v.* Vanderveer, 23 N. J. Eq. 558.

18. *Maryland.*— Porter *v.* Askew, 11 Gill & J. 346; Ellicott *v.* Ellicott, 2 Md. Ch. 468; Levering *v.* Heighe, 2 Md. Ch. 81.

New Hampshire.— Page *v.* Parker, 61 N. H. 65; Parker *v.* Nims, 2 N. H. 460.

New Jersey.— Bailey *v.* Ross, 32 N. J. Eq. 544.

New York.— *In re* Davenport, 172 N. Y. 454, 65 N. E. 275 [*affirming* 67 N. Y. App. Div. 191, 73 N. Y. Suppl. 653].

North Carolina.— Johnston *v.* Chesson, 59 N. C. 146.

Ohio.— See Clayton *v.* Drake, 17 Ohio St. 367.

Contra, under the Pennsylvania statute. Whitaker's Estate, 175 Pa. St. 139, 34 Atl. 572; Bamber's Estate, 2 Pa. Dist. 536; Haines' Estate, 2 Pa. Dist. 104, 12 Pa. Co. Ct. 401.

See 16 Cent. Dig. tit. "Descent and Distribution," § 119.

19. *Connecticut.*— Campbell's Appeal, 64 Conn. 277, 29 Atl. 494, 24 L. R. A. 667.

Louisiana.— Ratcliffe *v.* Ratcliffe, 7 Mart. N. S. 335.

New Jersey.—Davis *v.* Vanderveer, 23 N. J. Eq. 558.

New York.— Adee *v.* Campbell, 79 N. Y. 52, personal estate. *Contra*, in the case of real estate, Hyatt *v.* Pugsley, 23 Barb. 285.

Pennsylvania.— Clendaniel's Estate, 12 Phila. 54.

20. *Missouri.*— Copenhaver *v.* Copenhaver, 9 Mo. App. 200 [*affirmed* in 78 Mo. 55].

New Jersey.— Fidler *v.* Higgins, 21 N. J. Eq. 138.

New York.— Adams *v.* Smith, 20 Abb. N. Cas. 60; Pond *v.* Bergh, 10 Paige 140.

Pennsylvania.— Hayes' Appeal, 89 Pa. St. 256; Kraut's Appeal, 60 Pa. St. 380 [*affirming* 6 Phila. 422]; Ortt's Appeal, 35 Pa. St. 267; Bamber's Estate, 2 Pa. Dist. 536. See also White's Estate, 5 Pa. Dist. 103, 17 Pa. Co. Ct. 395; Whitaker's Estate, 5 Pa. Dist. 83, 17 Pa. Co. Ct. 387.

Texas.— Witherspoon *v.* Jernigan, (Sup. 1903) 76 S. W. 445 [*reversing* (Civ. App. 1903) 73 S. W. 39].

Vermont.— Gaines *v.* Strong, 40 Vt. 354.

21. Schenck *v.* Vail, 24 N. J. Eq. 538; Clayton *v.* Drake, 17 Ohio St. 367.

22. *Arkansas.*— Byrd *v.* Lipscomb, 20 Ark. 19; Scull *v.* Vaugine, 15 Ark. 695; Kelly *v.* McGuire, 15 Ark. 555.

District of Columbia.— Iglehart *v.* Holt, 12 App. Cas. 68.

Indiana.— Baker *v.* Bourne, 127 Ind. 466, 26 N. E. 1078; Blake *v.* Blake, 85 Ind. 65.

Maryland.— Stewart *v.* Collier, 3 Harr. & J. 289.

Massachusetts.— Snow *v.* Snow, 111 Mass. 389; Knapp *v.* Windsor, 6 Cush. 156.

Minnesota.— Staubitz *v.* Lambert, 71 Minn. 11, 73 N. W. 511.

New Hampshire.— Nichols *v.* Shepard, 63 N. H. 391.

New Jersey.— Fisk *v.* Fisk, 60 N. J. Eq. 195, 46 Atl. 538; Wagner *v.* Sharp, 33 N. J. Eq. 520. See also Hayes *v.* King, 37 N. J. Eq. 1.

New York.— Barber *v.* Brundage, 50 N. Y. App. Div. 123, 63 N. Y. Suppl. 347; Hyatt *v.* Pugsley, 33 Barb. 373; Fletcher *v.* Severs, 10 N. Y. Suppl. 6; Adams *v.* Smith, 20 Abb. N. Cas. 60; Jackson *v.* Thurman, 6 Johns. 322; Pond *v.* Bergh, 10 Paige 140.

North Carolina.— Skinner *v.* Wynne, 55 N. C. 41.

Pennsylvania.— *In re* Cremer, 156 Pa. St. 40, 26 Atl. 782; Person's Appeal, 74 Pa. St. 121; Eshleman's Appeal, 74 Pa. St. 42; Miller's Appeal, 40 Pa. St. 387; McConnell's Estate, 5 Pa. Super. Ct. 120; Kenderdine's Estate, 6 Pa. Dist. 260, 19 Pa. Co. Ct. 201; Dorsey *v.* Van Horn, 9 Wkly. Notes Cas. 95; *In re* Chess, 2 Pittsb. 130; *In re* De Haven, 1 Pa. L. J. Rep. 336, 2 Pa. L. J. 323; Fister's Estate, 2 Woodw. 323; *In re* McConnell, 27 Pittsb. Leg. J. N. S. 209; *In re* Sutton, 27 Pittsb. Leg. J. N. S. 291.

Texas.— See Witherspoon *v.* Jernigan, (Sup. 1903) 76 S. W. 445 [*reversing* (Civ. App. 1903) 73 S. W. 39].

Vermont.— Hatch *v.* Hatch, 21 Vt. 450.

Virginia.— Davis *v.* Rowe, 6 Rand. 355.

Contra, McComas *v.* Amos, 29 Md. 120; Crump *v.* Faucett, 70 N. C. 345; Cromartie *v.* Kemp, 66 N. C. 382; Haynes *v.* Johnson, 58 N. C. 124; Clement *v.* Cauble, 55 N. C. 82; Hayes' Appeal, 89 Pa. St. 256; Brenneman's Appeal, 40 Pa. St. 115.

See 16 Cent. Dig. tit. "Descent and Distribution," § 121.

23. See the cases cited in the preceding note.

different degrees of consanguinity, then the more remote take by representation or *per stirpes*.[24] This rule applies no matter how remote from the intestate the first degree may be.[25]

13. Operation and Effect of Will[26] **— a. In General.** In the absence of a statute to the contrary, a person has the right to dispose of his or her property by will as he or she may see fit,[27] subject only to the rights of the surviving wife or husband,[28] and the statutes of descent and distribution apply only where the owner of property dies intestate.[29] If a will, however, does not, by a residuary clause or otherwise, dispose of all the testator's property, he is intestate as to the property not disposed of, and it is governed by the statutes.[30] And in many states the statutes confer rights upon the surviving spouse or children omitted from a will purporting to dispose of all the testator's property.[31] Under such statutes where a will makes no provision for testator's widow, or for his child or children, the estate as to the widow or the omitted child or children is regarded as intestate to the extent of the legal claims of the omitted person.[32] In cases of partial intestacy both the next of kin and the widow take under the statute of distributions;[33] and a devise of a life-estate "as his full portion of the testator's estate" will not exclude the devisee from participating in the distribution of the

24. *Arkansas.*— Garret *v.* Bean, 51 Ark. 52, 9 S. W. 435; Byrd *v.* Lipscomb, 20 Ark. 19.

Georgia.—Houston *v.* Davidson, 45 Ga. 574.

Indiana.— Kilgore *v.* Kilgore, 127 Ind. 276, 26 N. E. 56; Blake *v.* Blake, 85 Ind. 65; Cox *v.* Cox, 44 Ind. 368.

Iowa.— Johnson *v.* Bodine, 108 Iowa 594, 79 N. W. 348.

Kentucky.— Jackson *v.* Moore, 8 Dana 170.

Maine.— Healey *v.* Cole, 95 Me. 272, 49 Atl. 1065; Doane *v.* Freeman, 45 Me. 113.

Maryland.— Gulick *v.* Fisher, 92 Md. 353, 48 Atl. 375; Conner *v.* Waring, 52 Md. 724; Maxwell *v.* Seney, 5 Harr. & J. 23.

Michigan.— Ernst *v.* Freeman, 129 Mich. 271, 88 N. W. 636.

Missouri.— Aull *v.* Day, 133 Mo. 337, 34 S. W. 578; Copenhaver *v.* Copenhaver, 78 Mo. 55 [*affirming* 9 Mo. App. 200].

New Hampshire.—Preston *v.* Cole, 64 N. H. 459, 13 Atl. 788.

New York.— Pond *v.* Bergh, 10 Paige 140.

Ohio.— Dutoit *v.* Doyle, 16 Ohio St. 400; Ewers *v.* Follin, 9 Ohio St. 327.

Pennsylvania.— Person's Appeal, 74 Pa. St. 121; Eshleman's Appeal, 74 Pa. St. 42; Krout's Appeal, 60 Pa. St. 380; Miller's Appel, 40 Pa. St. 387; Ortt's Appeal, 35 Pa. St. 267.

Rhode Island.— Daboll *v.* Field, 9 R. I. 266; Smith *v.* Smith, 4 R. I. 1.

South Carolina.— Payne *v.* Harris, 3 Strobh. Eq. 39.

Texas.— Jones *v.* Barnett, 30 Tex. 637. And see Witherspoon *v.* Jernigan, (Sup. 1903) 76 S. W. 445 [*reversing* (Civ. App. 1903) 73 S. W. 39].

Virginia.— Ball *v.* Ball, 27 Gratt. 325; Davis *v.* Rowe, 6 Rand. 355. See also Moore *v.* Conner, (1890) 20 S. E. 936, holding that under Code (1887), § 2548, where an intestate leaves living a mother and nephews and nieces of the half blood as his nearest next of kin, the nephews and nieces take *per stirpes* and not *per capita*.

Contra, The next of kin of the same degree of consanguinity take *per stirpes* not *per capita*. Iglehart *v.* Holt, 12 App. Cas. (D. C.) 68 (holding that nephews and nieces who were next of kin to the intestate took personal property *per stirpes*, to the absolute exclusion of the issue of deceased nephews and nieces); Odam *v.* Caruthers, 6 Ga. 39 (holding that grandchildren took *per stirpes*, not *per capita*); Jackson *v.* Thurman, 6 Johns. (N. Y.) 322; Stent *v.* McLeod, 2 McCord Eq. (S. C.) 354. Next of kin of different degrees of consanguinity take *per capita*. Balch *v.* Stone, 149 Mass. 39, 20 N. E. 322.

25. Davis *v.* Rowe, 6 Rand. (Va.) 355.

26. Revocation of will by marriage and birth of child see Wills.

Forced heirs see *supra*, III, A, 5, c.

27. See Wills.

28. See Curtesy, 12 Cyc. 1001; Dower; Homestead.

29. Hall *v.* Cowles, 15 Colo. 343, 25 Pac. 705; Merrill *v.* Hayden, 86 Me. 133, 29 Atl. 949. See also *infra*, III, A, 13, c, (IV). And see, generally, Wills.

30. Hilton *v.* Hilton, 2 MacArthur (D. C.) 70; Ward *v.* Dodd, 41 N. J. Eq. 414, 5 Atl. 650; Skellenger *v.* Skellenger, 32 N. J. Eq. 659; Richmond *v.* Vanhook, 38 N. C. 581; Snelgrove *v.* Snelgrove, 4 Desauss. (S. C.) 274; Richardson *v.* Sinkler, 2 Desauss. (S. C.) 127. And see Gill *v.* Grand Tower Min., etc., Co., 92 Ill. 249.

Hotchpot see *infra*, IV, B, 7.

Property not disposed of by will see Wills.

Property embraced in void bequest or devise see Wills.

Construction and effect of residuary clause see Wills.

31. Pretermitted children see *infra*, III, A, 13, c.

Forced heirs see *supra*, III, A, 5, c.

Operation and effect of will as to surviving wife or husband see *infra*, III, B, 6, f; III, B, 7, d.

32. See *In re* Taylor, 55 Ill. 252; and other cases cited *supra*, III, A, 13, c.

33. Skellenger *v.* Skellenger, 32 N. J. Eq. 659.

residue of which the testator died intestate.[34] A direction in a will that a sale of certain land should be made, without any action thereunder, does not prevent the land from descending to the legal heirs of the testator as intestate property.[35] Where a will directs all the estate to be sold by the executors for the payment of legacies, the legatees and the amount of each legacy being specified, the personal estate is to be exhausted first, and the real estate is to be resorted to only to make up any deficiency.[36]

b. Devise to Heir or Next of Kin. Where a testator makes a devise of land to his heir at law, the devisee will take by descent and not by purchase, where the estate devised to him is the same estate which he would have taken by descent in case of intestacy,[37] unless there is a conversion;[38] but if the devise is of an estate different in quantity or quality from that which the devisee would have taken in case of intestacy, the devise is valid and the devisee takes by purchase.[39]

c. Pretermitted Children — (i) *In General.* In many states by express statutory provision, if a testator fails to name or make provision for a child in his will without showing that it is intentional, and in some states even where the omission is intentional, the pretermitted child will take the same share in the estate and hold by the same title as though the testator had died intestate,[40] unless

34. Ward *v.* Dodd, 41 N. J. Eq. 414, 5 Atl. 650. See WILLS.

35. Gill *v.* Grand Tower Min., etc., Co., 92 Ill. 249. See, generally, WILLS.

36. Hilton *v.* Hilton, 2 MacArthur (D. C.) 70. See WILLS.

37. *District of Columbia.*— Jost *v.* Jost, 1 Mackey 487.

Indiana.— Davidson *v.* Koehler, 76 Ind. 398.

Maryland.— Gilpin *v.* Hollingsworth, 3 Md. 190, 56 Am. Dec. 737; Philips *v.* Dashiell, 1 Harr. & J. 478.

Massachusetts.— Sears *v.* Russell, 8 Gray 86; Ellis *v.* Page, 7 Cush. 161.

New York.— Buckley *v.* Buckley, 11 Barb. 43.

North Carolina.— McKay *v.* Hendon, 7 N. C. 209; Campbell *v.* Herron, 1 N. C. 381.

South Carolina.— Seabrook *v.* Seabrook, McMull. Eq. 201.

Tennessee.— Hoover *v.* Gregory, 10 Yerg. 444.

See 16 Cent. Dig. tit. "Descent and Distribution," §§ 124, 125.

38. Buckley *v.* Buckley, 11 Barb. (N. Y.) 43.

39. Buckley *v.* Buckley, 11 Barb. (N. Y.) 43; Campbell *v.* Herron, 1 N. C. 381.

40. *Arkansas.*—Bloom *v.* Strauss, 70 Ark. 483, 69 S. W. 548, 72 S. W. 563; Trotter *v.* Trotter, 31 Ark. 145; Branton *v.* Branton, 23 Ark. 569.

California.— *In re* Callaghan, 119 Cal. 571, 51 Pac. 860, 39 L. R. A. 689; Painter *v.* Painter, 113 Cal. 371, 45 Pac. 689; *In re* Salmon, 107 Cal. 614, 40 Pac. 1030, 48 Am. St. Rep. 164; Rhoton *v.* Blevin, 99 Cal. 645, 34 Pac. 513; Smith *v.* Olmstead, 88 Cal. 582, 26 Pac. 521, 22 Am. St. Rep. 336, 12 L. R. A. 46 [*affirming* (1890) 22 Pac. 1143]; *In re* Barter, 86 Cal. 441, 25 Pac. 15; *In re* Stevens, 83 Cal. 322, 23 Pac. 379, 17 Am. St. Rep. 252; *In re* Grider, 81 Cal. 571, 22 Pac. 908; Wardwell's Estate, 57 Cal. 484; Pearson *v.* Pearson, 46 Cal. 609; *In re* Utz, 43 Cal. 200; *In re* Garraud, 35 Cal. 336.

Indian Territory.— George *v.* Robb, (1901) 64 S. W. 615.

Kentucky.— Shelby *v.* Shelby, 1 B. Mon. 266; Breckenridge *v.* Floyd, 7 Dana 456; Shelby *v.* Shelby, 6 Dana 60.

Massachusetts.— Tucker *v.* Boston, 18 Pick. 162; Wilder *v.* Goss, 14 Mass. 357; Church *v.* Crocker, 3 Mass. 17; Wild *v.* Brewer, 2 Mass. 570; Terry *v.* Foster, 1 Mass. 146, 2 Am. Dec. 6.

Michigan.— Carpenter *v.* Snow, 117 Mich. 489, 76 N. W. 78, 72 Am. St. Rep. 576, 41 L. R. A. 820; Forbes *v.* Darling, 94 Mich. 621, 54 N. W. 385; *In re* Stebbins, 94 Mich. 304, 54 N. W. 159, 34 Am. St. Rep. 345.

Missouri.— Woods *v.* Drake, 135 Mo. 393, 37 S. W. 109; Thomas *v.* Black, 113 Mo. 66, 20 S. W. 657; McCracken *v.* McCracken, 67 Mo. 590; Schneider *v.* Koester, 54 Mo. 500; McCourtney *v.* Mathes, 47 Mo. 533; Burch *v.* Brown, 46 Mo. 441; Hill *v.* Martin, 28 Mo. 78; Hargadine *v.* Pulte, 27 Mo. 423; Bradley *v.* Bradley, 24 Mo. 311; State *v.* Pohl, 30 Mo. App. 321.

New Hampshire.— Smith *v.* Smith, 72 N. H. 168, 54 Atl. 1014; McIntire *v.* McIntire, 64 N. H. 609, 15 Atl. 218; Gage *v.* Gage, 29 N. H. 533.

Ohio.— German Mut. Ins. Co. *v.* Lushey, 10 Ohio S. & C. Pl. Dec. 25, 7 Ohio N. P. 62.

Pennsylvania.— Owens *v.* Haines, 199 Pa. St. 137, 48 Atl. 859.

Rhode Island.— *In re* O'Connor, 21 R. I. 465, 44 Atl. 591, 79 Am. St. Rep. 814; Potter *v.* Brown, 11 R. I. 232.

Tennessee.— Ensley *v.* Ensley, 105 Tenn. 107, 58 S. W. 288.

Utah.— *In re* Atwood, 14 Utah 1, 45 Pac. 1036, 60 Am. St. Rep. 878.

Virginia.— Allison *v.* Allison, 101 Va. 537, 44 S. E. 904.

Washington.— Morrison *v.* Morrison, 25 Wash. 466, 65 Pac. 779; *In re* Gorkow, 20 Wash. 563, 56 Pac. 385; Hill *v.* Hill, 7 Wash. 409, 35 Pac. 360; *In re* Barker, 5 Wash. 390, 31 Pac. 976. See also Bower *v.* Bower, 5 Wash. 225, 31 Pac. 598.

the property would go to the father if there had been an intestacy. In such a case the pretermitted child does not take.[41] The rule applies not only to a child but to the issue of a deceased child of the testator,[42] if such child was deceased at the time of the execution of the will and the issue was then presumptive heir at law of the testator.[43] The statute does not apply where the testator had a power of appointment merely.[44] Nor does it apply in favor of "the issue of the deceased child" in a case where a daughter, to whom the father has bequeathed a life annuity, dies before he dies, and leaves issue born before the bequest.[45]

(II) *POSTHUMOUS CHILDREN AND CHILDREN BORN AFTER EXECUTION OF WILL.* Under a statute providing that a child born after the execution of the will and being pretermitted shall take a share in the parent's property as if there had been an intestacy, a pretermitted child born after the execution of the will and before the testator's death,[46] or a pretermitted posthumous

Wisconsin.— Moon *v.* Evans, 69 Wis. 667, 35 N. W. 20. See Newman *v.* Waterman, 63 Wis. 612, 23 N. W. 696, 53 Am. Rep. 310.

United States.— Conlan *v.* Doull, 133 U. S. 216, 10 S. Ct. 253, 33 L. ed. 596 (under Utah statute); Boman *v.* Boman, 49 Fed. 329, 1 C. C. A. 274 [*reversing* 47 Fed. 849] (under Washington statute).

See 16 Cent. Dig. tit. "Descent and Distribution," § 126.

Children by a first wife come within the rule when the will provides only for the children by a second wife. Thomas *v.* Black, 113 Mo. 66, 20 S. W. 657.

An illegitimate child omitted from its mother's will comes within the statute. *In re* Wardell, 57 Cal. 484. *Contra* (Kent *v.* Barker, 2 Gray (Mass.) 535), unless the parents have married and the father has acknowledged the child (Monson *v.* Palmer, 8 Allen (Mass.) 551; Loring *v.* Thorndike, 5 Allen (Mass.) 257). See BASTARDS, 5 Cyc. 640.

The statute applies to community property as well as to a testator's separate property. Hill *v.* Hill, 7 Wash. 409, 35 Pac. 360.

Dower, homestead, and the year's support are not excluded in determining the share of a pretermitted child, where the widow elects to take under the will. Ensley *v.* Ensley, 105 Tenn. 107, 58 S. W. 288.

Where pretermitted children are the only heirs the will is inoperative, there being no property on which it can act. Bloom *v.* Strauss, 70 Ark. 483, 69 S. W. 548, 72 S. W. 563.

Probate of will.— The pretermitted child cannot resist the probate of the will. Matter of Gall, 5 Dem. Surr. (N. Y.) 374.

Effect of other statutes.—A statute providing for a pretermitted child is not affected by a statute providing for the revocation of a will by the birth of a first child after the execution of the will. German Mut. Ins. Co. *v.* Lushey, 10 Ohio S. & C. Pl. Dec. 25, 7 Ohio N. P. 62.

A will published before enactment of a statute providing for inheritance by pretermitted children has been held not to be affected by the statute. Savage *v.* Mears, 2 Rob. (Va.) 570.

41. *In re* Witter, 15 N. Y. Suppl. 133, 2 Connoly Surr. (N. Y.) 530.

42. Ward *v.* Ward, 120 Ill. 111, 11 N. E. 336; Tucker *v.* Boston, 18 Pick. (Mass.) 162; Terry *v.* Foster, 1 Mass. 146, 2 Am. Dec. 6; Gage *v.* Gage, 29 N. H. 533; Newman *v.* Waterman, 63 Wis. 612, 23 N. W. 696, 53 Am. Rep. 310. See also Guitar *v.* Gordon, 17 Mo. 408.

43. *In re* Barter, 86 Cal. 441, 25 Pac. 15.

44. Sewall *v.* Wilmer, 132 Mass. 131.

45. Wilder *v.* Thayer, 97 Mass. 439.

46. *Illinois.*— Hawhe *v.* Chicago, etc., R. Co., 165 Ill. 561, 46 N. E. 240; Salem Nat. Bank *v.* White, 159 Ill. 136, 42 N. E. 312; Ward *v.* Ward, 120 Ill. 111, 11 N. E. 336; Osborn *v.* Jefferson Nat. Bank, 116 Ill. 130, 4 N. E. 791.

Kentucky.— Shelby *v.* Shelby, 1 B. Mon. 266; Breckinridge *v.* Floyd, 7 Dana 456; Shelby *v.* Shelby, 6 Dana 60; Woodard *v.* Spiller, 1 Dana 179, 25 Am. Dec. 139; Haskins *v.* Spiller, 1 Dana 170.

Massachusetts.— Bancroft *v.* Ives, 3 Gray 367.

New Jersey.— Stevens *v.* Shippen, 28 N. J. Eq. 487.

New York.— *In re* Murphy, 144 N. Y. 557, 39 N. E. 691; Smith *v.* Robertson, 24 Hun 210 [*affirmed* in 89 N. Y. 555]; Plummer *v.* Murray, 51 Barb. 201; Drishler *v.* Van Den Henden, 49 N. Y. Super. Ct. 508; Davis *v.* Davis, 27 Misc. 455, 59 N. Y. Suppl. 223; *In re* Witter, 15 N. Y. Suppl. 133, 2 Connoly Surr. 530; Bruce *v.* Bruce, 14 N. Y. Suppl. 659, 20 N. Y. Civ. Proc. 362, 27 Abb. N. Cas. 61.

Ohio.— German Mut. Ins. Co. *v.* Lushey, 66 Ohio St. 233, 64 N. E. 120.

Oregon.— Northrop *v.* Marquam, 16 Oreg. 173, 18 Pac. 449.

Pennsylvania.— Owens *v.* Haines, 199 Pa. St. 137, 48 Atl. 859; McCulloch's Appeal, 113 Pa. St. 247, 6 Atl. 253; Grosvenor *v.* Fogg, 81 Pa. St. 400; Hollingsworth's Appeal, 51 Pa. St. 518; Walker *v.* Hall, 34 Pa. St. 483.

Rhode Island.— Chace *v.* Chace, 6 R. I. 407, 78 Am. Dec. 446.

Texas.— Morgan *v.* Davenport, 60 Tex. 230.

See 16 Cent. Dig. tit. "Descent and Distribution," § 128.

The Married Woman's Act of New York of 1849 did not change this rule. Cotheal *v.* Cotheal, 40 N. Y. 405 [*overruling* Plummer *v.* Murray, 51 Barb. (N. Y.) 201].

child,[47] such pretermission, in some of the states, not being intended,[48] take that share which he or she would have been entitled to if the deceased had died intestate. And this is applicable in favor of a posthumous child, although the testator made provision for his "surviving children," he not appearing to have had in mind the birth of the posthumous child,[49] as well as in favor of a pretermitted child born in the testator's lifetime, although the will contains in general terms a residuary devise of property not specifically devised to the testator's children,[50] or a contingent devise to his children,[51] or shows an intention that a particular kind of property should go wholly to the testator's sons.[52]

(III) "*PROVISION*" *DEFINED.* The "provision" for a child referred to in the statutes need not necessarily be such as the court may consider adequate for the child, nor need it be made out of property of any particular kind or in any particular locality;[53] but the provision must constitute an estate which vests when the will takes effect,[54] and it must be definite, certain, and enforceable, and not dependent on the will and bounty of the widow.[55] No general rule for determining the sufficiency of a provision in a will can be given, but reference must be had to the cases.[56]

The New York statute (2 Rev. St. p. 65, § 49), although using the word "testator," applies to the will of the mother of an after-born child. *In re* Huiell, 15 N. Y. St. 715, 6 Dem. Surr. (N. Y.) 352.

The Massachusetts statute (Rev. St. c. 62, § 21) has been held to apply to a child born after the making of the will, and before the death of the father. Bancroft *v.* Ives, 3 Gray (Mass.) 367.

Males and females.— The statute, although using the words "his will," applies to females as well as males. Owens *v.* Haines, 199 Pa. St. 137, 48 Atl. 859.

Will not invalid.— The statutes do not make the birth of a child a revocation of the will or afford any reason against its probate; and therefore it is immaterial that a child claiming under the statute failed to institute action until after expiration of the time limited for appeal from the probate. Owens *v.* Haines, 199 Pa. St. 137, 48 Atl. 859.

A child born out of wedlock before the date of its father's will, and rendered legitimate by the subsequent marriage of the father and mother after the date of the will, is not an after-born child within the meaning of the statute. McCulloch's Appeal, 113 Pa. St. 247, 6 Atl. 253, 18 Wkly. Notes Cas. (Pa.) 172.

47. *California.*— *In re* Buchanan, 8 Cal. 507.

Kentucky.— Sansbery *v.* McElroy, 6 Bush 440; Shelby *v.* Shelby, 1 B. Mon. 266; Shelby *v.* Shelby, 6 Dana 60.

Maine.— Waterman *v.* Hawkins, 63 Me. 156.

Massachusetts.—Bowen *v.* Hoxie, 137 Mass. 527.

Michigan.— Catholic Mut. Ben. Assoc. *v.* Firnane, 50 Mich. 82, 14 N. W. 707.

New Hampshire.— Eyre *v.* Storer, 37 N. H. 114.

New Jersey.— Wilson *v.* Fritts, 32 N. J. Eq. 59.

New York.— Sanford *v.* Sanford, 5 Lans. 486; Sanford *v.* Sanford, 61 Barb. 293.

North Carolina.— Alston *v.* Alston, 42 N. C. 172.

Oregon.— Northrop *v.* Marquam, 16 Oreg. 173, 18 Pac. 449.

Pennsylvania.— Wilson *v.* Ott, 160 Pa. St. 433, 28 Atl. 848; *In re* Willard, 68 Pa. St. 327; Edward's Appeal, 47 Pa. St. 144.

Tennessee.— Ensley *v.* Ensley, 105 Tenn. 107, 58 S. W. 288; Burns *v.* Allen, 93 Tenn. 149, 23 S. W. 111.

Virginia.— Armistead *v.* Dangerfield, 3 Munf. 20, 5 Am. Dec. 501.

United States.— Chicago, etc., R. Co. *v.* Wasserman, 22 Fed. 872, Nebraska statute.

See 16 Cent. Dig. tit. "Descent and Distribution," § 128.

The New Jersey statute (Gen. St. p. 3760, § 19), providing that if a testator, having children when he makes his will, "shall at his death leave a child" born thereafter and not provided for by the will, such child shall take a share, includes a posthumous child. Van Wickle *v.* Van Wickle, (N. J. Ch. 1899) 44 Atl. 877.

48. Minot's Petition, 164 Mass. 38, 41 N. E. 63. And see Hurley *v.* O'Sullivan, 137 Mass. 86; Allison *v.* Allison, 101 Va. 537, 44 S. E. 904.

49. Bowen *v.* Hoxie, 137 Mass. 527.

50. Haskins *v.* Spiller, 1 Dana (Ky.) 170.

51. Holloman *v.* Copeland, 10 Ga. 79.

52. Armistead *v.* Dangerfield, 3 Munf. (Va.) 20, 5 Am. Dec. 501.

53. *In re* Callaghan, 119 Cal. 571, 51 Pac. 860, 39 L. R. A. 689 (holding that a devise of land which the testator did not own at the time of the execution of his will, nor at any subsequent time, excludes the application of the statute); Case *v.* Young, 3 Minn. 209 (holding that where a small legacy is given, but no fund provided for the payment thereof and apparently no unbequeathed fund out of which to pay it, the statute will not apply); Minot *v.* Minot, 17 N. Y. App. Div. 521, 45 N. Y. Suppl. 554.

54. Minot *v.* Minot, 17 N. Y. App. Div. 521, 45 N. Y. Suppl. 554, holding that a contingent remainder is not a "provision."

55. Ensley *v.* Ensley, 105 Tenn. 107, 58 S. W. 288.

56. Insufficient provision.— There was held to be no sufficient "provision" in the following cases:

(IV) *INTENTION TO OMIT CHILD* — (A) *In General.* Under most of the statutes a child takes no share of the testator's estate where his or her omission from the will was intentional.[57] Where the statute provides that in case of an omission to name or provide for a child or the issue of a deceased child he shall take as though there had been no will, unless it appears that such omission was intentional, or if such omission was occasioned by accident or mistake,[58] the intention or want of intention may be shown in various ways. There is no general rule for determining what is sufficient indication of intention to omit, and a very slight reference to the omitted child is sometimes considered sufficient.[59] On the other hand it has been held that although a will may refer to children such reference may not be sufficient to exclude the child from the benefit of the statute.[60] According to

Maine.— Waterman *v.* Hawkins, 63 Me. 156, general devise of a reversion to his heirs.

Massachusetts.—Minot's Petition, 164 Mass. 38, 41 N. E. 63, after wife's life, reversion to those who would then be his heirs.

Pennsylvania.— *In re* Willard, 68 Pa. St. 327, reversion to his children and heirs after a life-estate to testator's mother, and reversion to those heirs living after a life-estate given his wife.

Virginia.— Allison *v.* Allison, 101 Va. 537, 44 S. E. 904, vested remainder.

Wisconsin.— *In re* Donges, 103 Wis. 497, 79 N. W. 786, 74 Am. St. Rep. 885, remainder to his children if any are born, at the majority of the youngest.

United States.— Mercantile Trust, etc., Co. *v.* Rhode Island Hospital Trust Co., 36 Fed. 863, amount of residue given his wife increased if he have issue.

Sufficient provision.— There was held to be sufficient provision in these cases: Jackson *v.* Jackson, 2 Pa. St. 212 (direction that legatee have the guardianship and tuition of after-born children); Leisenring's Estate, 5 Pa. Dist. 232, 38 Wkly. Notes Cas. (Pa.) 127 (devise in codicil of one third of his estate to his daughter on her arrival at the age of twenty-five).

57. Merrill *v.* Hayden, 86 Me. 133, 29 Atl. 949; Minot's Petition, 164 Mass. 38, 41 N. E. 63; Hurley *v.* O'Sullivan, 137 Mass. 86; and other cases in the notes following.

58. Ramsdill *v.* Wentworth, 101 Mass. 125; *In re* McMillen, (N. M. 1903) 71 Pac. 1083.

59. An intention to omit a child was held to be shown in the following cases:

California.— Rhoton *v.* Blevin, 99 Cal. 645, 34 Pac. 513 (a devise of all property to his wife, knowing that she "will ever continue the same kind, devoted mother to our children," and making "no provisions for said children further," shows an intention to omit the grandchildren); Payne *v.* Payne, 18 Cal. 291 (mention in codicil).

Georgia.— McMichael *v.* Pye, 75 Ga. 189, gifts to all children living, but no mention of a child deceased before the will was executed, or to the issue of such child.

Illinois.— Hawhe *v.* Chicago, etc., R. Co., 165 Ill. 561, 46 N. E. 240.

Massachusetts.—Bowdlear *v.* Bowdlear, 112 Mass. 184; Prentiss *v.* Prentiss, 11 Allen (Mass.) 47; Tucker *v.* Boston, 18 Pick. (Mass.) 162; Wilder *v.* Goss, 14 Mass. 357; Church *v.* Crocker, 3 Mass. 17 (holding that the naming of a child in his father's will, although no legacy was given, was sufficient); Wild *v.* Brewer, 2 Mass. 570 (a devise to "children of my daughter S," excludes such daughter); Terry *v.* Foster, 1 Mass. 146, 2 Am. Dec. 6 (holding that the mere naming of a child, whether he be given a legacy or not, is sufficient).

Minnesota.— Prentiss *v.* Prentiss, 14 Minn. 18; Case *v.* Young, 3 Minn. 209.

Missouri.— Woods *v.* Drake, 135 Mo. 393, 37 S. W. 109 (holding that specific bequests by name to the minor children of the testator's adopted daughter, with whom they lived, was a sufficient reference to the daughter under Rev. St. (1889) § 8877); Wetherall *v.* Harris, 51 Mo. 65; Pounds *v.* Dale, 48 Mo. 270 (holding that an heir need not be directly named in a will, but the will must contain language which refers directly to him); McCourtney *v.* Mathes, 47 Mo. 533 (gift to wife, she to manage and educate the children, and remainder to his heirs if wife remarry); Hockensmith *v.* Slusher, 26 Mo. 237 (provision for a son-in-law without naming the relation, shows that his wife, the testator's daughter, is not forgotten); Beck *v.* Metz, 25 Mo. 70; Guitar *v.* Gordon, 17 Mo. 408 (a deceased daughter named, but no mention of her death or of her children, raises a presumption that the children were intentionally omitted); Block *v.* Block, 3 Mo. 594 (provision that a child named should take nothing).

New Hampshire.— Smith *v.* Smith, 72 N. H. 168, 54 Atl. 1014; Merril *v.* Sanborn, 2 N. H. 499.

Rhode Island.— *In re* O'Connor, 21 R. I. 465, 44 Atl. 591, 79 Am. St. Rep. 814.

Tennessee.— Reeves *v.* Hager, 101 Tenn. 712, 50 S. W. 760.

Utah.— *In re* Atwood, 14 Utah 1, 45 Pac. 1036, 60 Am. St. Rep. 878.

Virginia.— Allison *v.* Allison, 101 Va. 537, 44 S. E. 904.

United States.— Coulan *v.* Doull, 133 U. S. 216, 10 S. Ct. 253, 33 L. ed. 596, Utah statute.

See 16 Cent. Dig. tit. "Descent and Distribution," § 127.

60. An intention to omit was held not to be shown in the following cases:

California.— Painter *v.* Painter, 113 Cal. 371, 45 Pac. 689 (holding that a reference to the testator's sons then living and who are specially mentioned will not exclude from succession a son born after the execution of the will and not provided for therein); *In re*

some of the cases a gift of all the testator's estate to his wife is not sufficient to exclude a child from the benefit of the statute.[61] It is immaterial that the testator's intention was influenced by misinformation as to extrinsic facts.[62]

(B) *Evidence of Intent.* What is sufficient evidence to show an intent to omit a child depends on the circumstances of each case.[63] It seems that the parol evidence of the circumstances under which the will was made is admissible.[64] Some courts admit parol evidence of the testator's declarations and of other extrinsic facts to show the testator's intention to omit a child[65] while others

Salmon, 107 Cal. 614, 40 Pac. 1030, 48 Am. St. Rep. 164; Smith *v.* Olmstead, 88 Cal. 582, 26 Pac. 521, 22 Am. St. Rep. 336, 12 L. R. A. 46; Stevens' Estate, 83 Cal. 322, 23 Pac. 379, 17 Am. St. Rep. 252; *In re* Grider, 81 Cal. 571, 22 Pac. 908; Pearson *v.* Pearson, 46 Cal. 609; Bush *v.* Lindsey, 44 Cal. 121 (a devise to a grandson, the son of his deceased son, does not show that the omission of his children was intentional); *In re* Utz, 43 Cal. 200 (a devise "to my children," naming them but omitting the names of the children of a deceased child, does not exclude such grandchildren).

Illinois.— See Lurie *v.* Radnitzer, 166 Ill. 609, 46 N. E. 1116, 57 Am. St. Rep. 157, holding that a provision for an after-born child which has been so imperfectly erased that it remains legible, and the testator's certificate as to the erasure, does not form part of the will, so that the will shows an intent to disinherit such unborn child, and thus exclude him from the benefits of the statute for pretermitted children.

Michigan.— Stebbins *v.* Stebbins, 94 Mich. 304, 54 N. W. 159, a provision giving the family bible to one of two sole heirs, if the other did not wish it, and giving the former the privilege of making certain selections from his books and clothing, but no further provision for him.

Missouri.— Webb *v.* Archibald, 128 Mo. 299, 34 S. W. 54 (unequal provisions); Wetherall *v.* Harris, 51 Mo. 65 (the mention of minor children as objects of testator's care not enough to exclude grown-up children); Pounds *v.* Dale, 48 Mo. 270 (mention of certain ones out of a family of certain children); Hargadine *v.* Pulte, 27 Mo. 423 (a devise of all his property to his wife "to the exclusion of all and every person or persons, be the same relatives or not, forever"); Bradley *v.* Bradley, 24 Mo. 311. See also Thomas *v.* Black, 113 Mo. 66, 20 S. W. 657, holding that a devise to testator's second wife for life, with remainder to her children begotten by him, does not exclude from succession the testator's children by his first wife.

New Hampshire.— Gage *v.* Gage, 29 N. H. 533, holding that the naming of a grandchild and describing him as such is not sufficient reference to his father or mother.

Ohio.— German Mut. Ins. Co. *v.* Lushey, 10 Ohio S. & C. Pl. Dec. 24, 7 Ohio N. P. 62, a provision that no subsequent birth of child shall change the will.

Pennsylvania.— Hoffner *v.* Wynkoop, 97 Pa. St. 130.

Rhode Island.— Potter *v.* Brown, 11 R. I. 232, holding that a devise to testator's daughter in trust until she was twenty, or until married, then the trust fund to his daughter, but in case of her death under twenty or unmarried, the trust fund to go equally to her brothers and sisters, does not exclude a son born after the execution of his father's will.

Tennessee.— Ensley *v.* Ensley, 105 Tenn. 107, 58 S. W. 288.

Washington.— Bower *v.* Bower, 5 Wash. 225, 31 Pac. 598, devise of all his property to his wife "and to her heirs forever."

United States.— Boman *v.* Boman, 49 Fed. 329, 1 C. C. A. 274 [*reversing* 47 Fed. 849], devise "to each of my heirs at law the sum of one dollar."

61. Smith *v.* Olmstead, 88 Cal. 582, 26 Pac. 521, 22 Am. St. Rep. 336, 12 L. R. A. 46; Stevens' Estate, 83 Cal. 322, 23 Pac. 379, 17 Am. St. Rep. 252; *In re* Grider, 81 Cal. 571, 22 Pac. 908; Pearson *v.* Pearson, 46 Cal. 609; Hargadine *v.* Pulte, 27 Mo. 423; Bradley *v.* Bradley, 24 Mo. 311; Ensley *v.* Ensley, 105 Tenn. 107, 58 S. W. 288; Bower *v.* Bower, 5 Wash. 225, 31 Pac. 598. *Contra*, Hawhe *v.* Chicago, etc., R. Co., 165 Ill. 561, 46 N. E. 240; Leonard *v.* Enochs, 92 Ky. 186, 17 S. W. 437, 13 Ky. L. Rep. 506, a provision making the wife the sole beneficiary excludes a child born after the execution of the will and a posthumous child seven months begotten.

62. Hurley *v.* O'Sullivan, 137 Mass. 86.

63. See Peters *v.* Siders, 126 Mass. 135, 30 Am. Rep. 671 (holding that where a testatrix who made an antenuptial agreement reserving to herself certain property and the right to dispose of it by will, and who nine months after her marriage made a will making no provision for children, and one month after the execution of the will bore a child, is sufficient evidence that the omission was intentional); Bancroft *v.* Ives, 3 Gray (Mass.) 367 (holding that the statement, "You will have all there is," made by the testator to his wife after the death of his children but before the birth of his last child was not sufficient to show an intent to omit after-born children); Burns *v.* Allen, 93 Tenn. 149, 23 S. W. 111; Bresee *v.* Stiles, 22 Wis. 120 (holding that the fact that the testator lived many years after the birth of children born after the execution of his will without making any express provision for them therein was not evidence of an intention to disinherit them). And see the other cases cited *supra*, III, A, 13, c, (IV), (A).

64. Buckley *v.* Gerard, 123 Mass. 8.

65. Minot's Petition, 164 Mass. 38, 41 N. E. 63; Peters *v.* Siders, 126 Mass. 135; Buckley *v.* Gerard, 123 Mass. 8; Wilder *v.* Thayer, 97

exclude such evidence and hold that the intention of the testator is to be determined solely from the face of the will itself.[66]

(c) *Presumption and Burden of Proof.* Where a testator fails to give a legacy to or name a child or the issue of a child, there is a presumption that he was unintentionally overlooked,[67] but this presumption of course is rebuttable,[68] the burden of proof being on those who oppose the claim of the omitted child.[69]

(d) *Question For Jury.* It has been held that the question whether the omission was unintentional, or by accident or mistake, is for the jury.[70]

(v) *Accrual of Right.* The right of a pretermitted child born in the testator's lifetime accrues on the testator's death,[71] while the right of a posthumous child accrues at the time of its birth.[72] It is immaterial that the posthumous child dies shortly after its birth.[73]

(vi) *Waiver and Loss of Right.* The benefit of the statute may be waived or renounced by a pretermitted child.[74] But where a child has once secured the right under a statute for the benefit of pretermitted children he will not lose such right because he does not bring an action within the statutory period.[75] Nor will he be deprived of his right in the testator's land and be compelled to resort to the proceeds of sale because of a power of sale given the widow in connection with a devise to her in fee of all the testator's property, where the sale is made by the widow as sole devisee and not under the power,[76] or where the sale is made under the power.[77] Nor will such child be divested of his title in the land by a clause empowering the executor to sell land to pay the testator's debts.[78]

(vii) *Property Contributing to Make Up Share.* The share given a pretermitted or posthumous child is to be paid in the first place from the residuary estate,[79] and to furnish the rest of such child's share where the residuary estate is insufficient, the devises and legacies given by the will are abated,[80] and a

Mass. 439; Converse *v.* Wales, 4 Allen (Mass.) 512; Wilson *v.* Fosket, 6 Metc. (Mass.) 400, 39 Am. Dec. 736; *In re* O'Connor, 21 R. I. 465, 44 Atl. 591, 79 Am. St. Rep. 814; *In re* Atwood, 14 Utah 1, 45 Pac. 1036, 60 Am. St. Rep. 878; Coulam *v.* Doull, 4 Utah 267, 9 Pac. 568 [*affirmed* in 133 U. S. 216, 10 S. Ct. 253, 33 L. ed. 596].

66. *California.*— *In re* Salmon, 107 Cal. 614, 40 Pac. 1030, 48 Am. St. Rep. 164; Rhoton *v.* Blevin, 99 Cal. 645, 34 Pac. 513; Stevens' Estate, 83 Cal. 322, 23 Pac. 379, 17 Am. St. Rep. 252; *In re* Garraud, 35 Cal. 336.

Illinois.— Lurie *v.* Radnitzer, 166 Ill. 609, 46 N. E. 1116, 57 Am. St. Rep. 157.

Michigan.— Carpenter *v.* Snow, 117 Mich. 489, 76 N. W. 78, 72 Am. St. Rep. 576, 41 L. R. A. 820.

Missouri.— Thomas *v.* Black, 113 Mo. 66, 20 S. W. 657; McCourtney *v.* Mathes, 47 Mo. 533.

Tennessee.— Burns *v.* Allen, 93 Tenn. 149, 23 S. W. 111.

Washington.— Bower *v.* Bower, 5 Wash. 225, 31 Pac. 598.

Wisconsin.— Bresee *v.* Stiles, 22 Wis. 120.

See 16 Cent. Dig. tit. "Descent and Distribution," § 127.

67. Tucker *v.* Boston, 18 Pick. (Mass.) 162; Thomas *v.* Black, 113 Mo. 66, 20 S. W. 657; Wetherall *v.* Harris, 51 Mo. 65; Rupp *v.* Eberly, 79 Pa. St. 141. See also Merril *v.* Sanborn, 2 N. H. 499.

68. Tucker *v.* Boston, 18 Pick. (Mass.) 162; Thomas *v.* Black, 113 Mo. 66, 20 S. W. 657; Coulam *v.* Doull, 4 Utah 267, 9 Pac. 568 [*affirmed* in 133 U. S. 216, 10 S. Ct. 253, 33 L. ed. 596] (extrinsic evidence showing testator had children living); Moon *v.* Evans, 69 Wis. 667, 35 N. W. 20.

69. Ramsdill *v.* Wentworth, 106 Mass. 320; Thomas *v.* Black, 113 Mo. 66, 20 S. W. 657; *In re* Atwood, 14 Utah 1, 45 Pac. 1036, 60 Am. St. Rep. 878; Loring *v.* Marsh, 6 Wall. (U. S.) 337, 18 L. ed. 802 [*affirming* 15 Fed. Cas. No. 8,515, 2 Cliff. 469]; and other cases in the preceding notes.

70. Carpenter *v.* Snow, 117 Mich. 489, 76 N. W. 78, 72 Am. St. Rep. 576, 41 L. R. A. 820; *In re* Stebbin, 94 Mich. 304, 54 N. W. 159, 34 Am. St. Rep. 345.

Framing issue for jury.— Fay *v.* Vanderford, 154 Mass. 498, 28 N. E. 681.

71. Shelby *v.* Shelby, 6 Dana (Ky.) 60; Schneider *v.* Koester, 54 Mo. 500.

72. Sansberry *v.* McElroy, 6 Bush (Ky.) 440; Shelby *v.* Shelby, 6 Dana (Ky.) 60.

73. Catholic Mut. Ben. Assoc. *v.* Firnane, 50 Mich. 82, 14 N. W. 707.

74. Farnum *v.* Bryant, 34 N. H. 9.

75. Johnson *v.* Chapman, 45 N. C. 213; Alston *v.* Alston, 42 N. C. 172.

76. Robeno *v.* Marlatt, 136 Pa. St. 35, 20 Atl. 512.

77. Kolb *v.* Komp, 3 Yeates (Pa.) 164. See also Northrop *v.* Marquam, 16 Oreg. 173, 18 Pac. 449.

78. Worley *v.* Taylor, 21 Oreg. 589, 28 Pac. 903, 28 Am. St. Rep. 771.

79. Waterman *v.* Hawkins, 63 Me. 156; Bowen *v.* Hoxie, 137 Mass. 527.

80. Shelby *v.* Shelby, 1 B. Mon. (Ky.) 266 (holding that each devisee and each legatee must contribute proportionately); Wilson *v.*

legacy given in lieu of dower is abated the same as any other legacy or devise;[81] but the widow's dower is not abated,[82] and the child takes subject to the widow's dower[83] or the husband's curtesy.[84] The doctrine of hotchpot does not apply to such cases.[85] A child born after the making of a will by its father cannot recover of any brother or sister born before the will was made any portion of any advancement made by the father in his lifetime and before the birth of such child to such brother or sister.[86]

d. Disinheritance. In most of the states in order to disinherit an heir a clear intention to disinherit is necessary,[87] and a mere testamentary direction that an heir shall not take is not sufficient, a devise or bequest over to somebody else being necessary[88] to prevent such heir from taking the share given him by the laws as to intestate property. Therefore, although a testator may make a small provision for an heir, and also direct or declare that such heir shall take nothing more than the property named, he is not barred from taking a share in property not disposed of in the will.[89] In some states an unborn child cannot be disinherited by a clause in a will providing that no after-born child shall take anything.[90] A void will cannot have any operation as an expression of intention to disinherit heirs.[91]

14. Disqualification to Take. The capacity of aliens and bastards is elsewhere considered.[92] Formerly, under a statute providing that no free person of color should be permitted to acquire any real estate, the heirs of such person could not acquire any title to land purchased by him.[93] And under a statute providing that free negroes or persons of color, whose ancestors were slaves, were not citizens of the United States or of the state, such persons of color were held incapacitated to take land by descent.[94] By the weight of authority, in the absence of express provision excluding from inheritance an heir murdering the intestate, the

Fritts, 32 N. J. Eq. 59; Talbird *v.* Verdier, 1 Desauss. (S. C.) 592; Burke *v.* Wilder, 1 McCord Eq. (S. C.) 551.

81. Mitchell *v.* Blain, 5 Paige (N. Y.) 588. *Contra,* Burke *v.* Wilder, 1 McCord Eq. (S. C.) 551.

82. Shelby *v.* Shelby, 1 B. Mon. (Ky.) 266.

83. Salem Nat. Bank *v.* White, 159 Ill. 136, 42 N. E. 312.

84. Plummer *v.* Murray, 51 Barb. (N. Y.) 201.

85. Stewart *v.* Pattison, 8 Gill (Md.) 46; Wilson *v.* Miller, 1 Pat. & H. (Va.) 353.

Hotchpot see *infra,* IV, B, 7.

86. Sanford *v.* Sanford, 5 Lans. (N. Y.) 486, 61 Barb. (N. Y.) 293.

87. Burns' Successions, 52 La. Ann. 1377, 27 So. 883 (holding that a will stating, "I desire to, and do, by these presents, disinherit my son, Thomas Burns," stating a good legal cause for disinheritance, does disinherit the son); Miller *v.* Wilson, 3 Phila. (Pa.) 343. But see Heeb *v.* Heeb, 93 Iowa 416, 61 N. W. 932 (holding that an expressed intent to disinherit is not necessary where a testator bequeaths his whole estate to a person not his child); Stennett *v.* Hall, 74 Iowa 279, 37 N. W. 332 (holding that an heir is disinherited where the testator did not provide for or mention him in a will disposing of all the testator's property). See also *supra,* II, A, 6.

Disinheriting child not named in will.— *In re* McMillen, (N. M. 1903) 71 Pac. 1083. And see *supra,* III, A, 13, c.

88. *Alabama.*—Wolffe *v.* Loeb, 98 Ala. 426, 13 So. 744; Whorton *v.* Morange, 62 Ala. 201; Banks *v.* Sherrod, 52 Ala. 267; Denson *v.* Autrey, 21 Ala. 205.

Illinois.— Ames *v.* Holmes, 190 Ill. 561, 60 N. E. 858; Parsons *v.* Millar, 189 Ill. 107, 59 N. E. 606; Lawrence *v.* Smith, 163 Ill. 149, 45 N. E. 259.

Kentucky.— Todd *v.* Gentry, 109 Ky. 704, 60 S. W. 639, 22 Ky. L. Rep. 1319.

Maine.— Howard *v.* American Peace Soc., 49 Me. 288.

Maryland.— Stewart *v.* Pattison, 8 Gill 46.

Missouri.— Hurst *v.* Von de Veld, 158 Mo. 239, 58 S. W. 1056.

New York.— Henriques *v.* Yale University, 28 N. Y. App. Div. 354, 51 N. Y. Suppl. 284.

South Carolina.— Crosshy *v.* Smith, 3 Rich. Eq. 244.

89. *Kansas.*— Andrews *v.* Harron, 59 Kan. 771, 51 Pac. 885.

Kentucky.— Todd *v.* Gentry, 109 Ky. 704, 60 S. W. 639, 22 Ky. L. Rep. 1319.

New Hampshire.— Wells *v.* Anderson, 69 N. H. 561, 44 Atl. 103.

New York.— Miller *v.* Von Schwarzenstein, 1 N. Y. App. Div. 18, 64 N. Y. Suppl. 475.

Pennsylvania.— Miller *v.* Wilson, 3 Phila. 343.

90. German Mut. F. Ins. Co. *v.* Lushey, 20 Ohio Cir. Ct. 198, 11 Ohio Cir. Dec. 52.

91. Henriques *v.* Yale University, 28 N. Y. App. Div. 354, 51 N. Y. Suppl. 284.

92. See Aliens, 2 Cyc. 88 *et seq*; Bastards, 5 Cyc. 639 *et seq.*

93. Planter's Loan, etc., Bank *v.* Johnson, 70 Ga. 302.

94. Donovan *v.* Pitcher, 53 Ala. 411, 25 Am. Rep. 634.

operation of the statute of descent is not affected by the fact that the ancestor was murdered by the heir apparent in order to obtain the inheritance at once, and therefore an heir who murders his ancestor in order that he may inherit the estate at once is not disqualified from taking.[95] A woman is not barred from inheriting property which has descended from her husband to her legitimate posthumous son because she was "living in adultery" at the decease of her husband and at the time of the death of the child.[96] A limitation of a life-estate to a donee does not prevent him from taking the reversion as heir at law of the donor.[97]

B. Surviving Husband or Wife — 1. In General. At common law a surviving wife was entitled, by virtue of the marital relation, to dower in her deceased husband's real property and to a certain portion of his personal property,[98] and a surviving husband was entitled to an estate by the curtesy in his wife's real property and to all of her personal property absolutely.[99] The rules of the common law, however, no longer govern, for in all jurisdictions the subject is now regulated by statutes expressly giving to a surviving husband or wife a certain portion of the deceased spouse's property.[1]

2. Survivor as Heir or Next of Kin of Deceased Spouse. As a general rule the word "heirs" as applied to the succession of personal estate means "next of kin," and the words "next of kin" do not include a widow or a husband of an intestate.[2] Sometimes, however, the word "heirs," when applied to personalty, is used in a broad sense to designate all the persons who under the statutes in case of intestacy would take the personalty, just as when applied to real estate it means all the persons who would take in case of intestacy.[3]

95. Shellenberger *v.* Ransom, 41 Nebr. 631, 59 N. W. 935, 25 L. R. A. 564, 31 Nebr. 61, 47 N. W. 700, 28 Am. St. Rep. 500, 10 L. R. A. 810; Deem *v.* Milliken, 6 Ohio Cir. Ct. 357 [*affirmed* in 53 Ohio St. 668, 44 N. E. 1134]; Deem *v.* Risinger, 11 Ohio Dec. (Reprint) 492, 27 Cinc. L. Bul. 156; Carpenter's Estate, 170 Pa. St. 203, 32 Atl. 637, 50 Am. St. Rep. 765, 29 L. R. A. 145. And see Owens *v.* Owens, 100 N. C. 240, 6 S. E. 794, where it was held that a widow was not barred from her dower right because she had murdered her husband. But see to the contrary Riggs *v.* Palmer, 115 N. Y. 506, 22 N. E. 188, 12 Am. St. Rep. 819, 5 L. R. A. 340 (where a child who killed his grandfather, was held by a divided court to be barred from taking a residuary legacy under his grandfather's will); Lundy *v.* Lundy, 24 Can. Supreme Ct. 650 [*affirming* 24 Ont. 132, and *reversing* 21 Ont. App. 560]. *Compare*, however, Ellerson *v.* Westcott, 148 N. Y. 149, 42 N. E. 540 [*reversing* 88 Hun 389, 34 N. Y. Suppl. 813].

96. Goodwin *v.* Owen, 55 Ind. 243.

97. Harris *v.* McLaran, 30 Miss. 533.

98. See *infra*, III, B, 6, a.

99. See *infra*, III, B, 7, a.

1. See *infra*, III, B, 6, 7.

2. *Georgia.*— Wetter *v.* Walker, 62 Ga. 142.

Illinois.— Gauch *v.* St. Louis Mut. L. Ins. Co., 88 Ill. 251, 254, 30 Am. Rep. 554 (holding that a statute providing that "the widow or surviving husband shall receive, as his or her absolute personal estate, one third of all the personal estate of the intestate," does not make one the heir of the other); Townsend *v.* Radcliffe, 44 Ill. 446.

Indiana.— Brannon *v.* May, 42 Ind. 92, holding that the widow does not take by descent her interest in the husband's estate as an heir, but by virtue of the marriage relation.

Iowa.— Blackman *v.* Wadsworth, 65 Iowa 80, 21 N. W. 190.

Massachusetts.— Loring *v.* Thorndike, 5 Allen 257; Clarke *v.* Cordis, 4 Allen 466. And see Sweet *v.* Dutton, 109 Mass. 589, 12 Am. Rep. 744.

Michigan.— Barnett *v.* Powers, 40 Mich. 317; Miller *v.* Stepper, 32 Mich. 194.

Nebraska.— Warren *v.* Englehart, 13 Nebr. 283, 13 N. W. 401.

New Jersey.— Welsh *v.* Crater, 32 N. J. Eq. 177.

New York.— Tillman *v.* Davis, 95 N. Y. 17, 47 Am. Rep. 1; Drake *v.* Pell, 3 Edw. 251.

North Carolina.— Peterson *v.* Webb, 39 N. C. 56.

Ohio.— See Collier *v.* Collier, 3 Ohio St. 369.

Pennsylvania.— See Eby's Appeal, 84 Pa. St. 241; McGill's Appeal, 61 Pa. St. 46.

Tennessee.— Gardenhire *v.* Hinds, 1 Head 402. And see Alexander *v.* Wallace, 8 Lea 569.

See 16 Cent. Dig. tit. "Descent and Distribution," § 136. And see *supra*, II, A, 3; III, A, 1, a, note 33; III, A, 6, e, (III). See also Heir; Next of Kin.

3. *Massachusetts.*— Sweet *v.* Dutton, 109 Mass. 589, 12 Am. Rep. 744; Houghton *v.* Kendall, 7 Allen 72.

Mississippi.— See Hope *v.* Hoover, (1896) 21 So. 134.

New Jersey.— See Welsh *v.* Crater, 32 N. J. Eq. 177.

New York.— Lawton *v.* Corlies, 127 N. Y. 100, 27 N. E. 847.

North Carolina.— Corbitt *v.* Corbitt, 54

3. Effect of Death of Surviving Spouse Before Distribution. If the surviving spouse of an intestate dies before a distribution of the intestate's personalty has been made, the survivor's distributive share vests on the other's death, both at common law and under the statutes, and passes to the survivor's personal representatives.[4]

4. Seizin of Intestate. The provisions in the statutes of descent and distribution in favor of the surviving husband or wife of an intestate apply only where the intestate dies seized of the estate. Hence where a daughter dies before her father her surviving husband can inherit nothing from her father's estate as her legal representative.[5]

5. Repeal of Statutes. The general rule that a statute is impliedly repealed by a subsequent statute which is inconsistent therewith applies of course to statutes relating to the rights of a surviving husband or wife in his or her deceased spouse's property, but such a statute, or a particular section of it, is not repealed, unless in express terms, if the subsequent statute is consistent with it, so that both may stand.[6]

6. Rights of Surviving Wife — a. In General. By the common law, as modified by English statutes at the time this country was settled, a surviving wife was entitled to dower and nothing more in her deceased husband's real property,[7] and also where he died intestate to a part of his personal estate — one third where he left issue and one half where he left no issue.[8] In all the United States, however, statutes have been enacted changing the common-law rules and varying more or less in the different states. These statutes give a surviving wife a certain portion of her deceased husband's personal estate or all of it, according to the circumstances, and a part of his real estate, either for life, as at common law, or

N. C. 114; Henderson *v.* Henderson, 46 N. C. 221; Freeman *v.* Knight, 37 N. C. 72; Croom *v.* Herring, 11 N. C. 393.

Pennsylvania.— Eby's Appeal, 84 Pa. St. 241.

Tennessee.— Alexander *v.* Wallace, 8 Lea 569.

England.— Jacobs *v.* Jacobs, 16 Beav. 557, 17 Jur. 293, 22 L. J. Ch. 668, 1 Wkly. Rep. 238; Evans *v.* Salt, 6 Beav. 266; Withy *v.* Mangles, 10 Cl. & F. 215, 8 Eng. Reprint 724; Doody *v.* Higgins, 2 Kay & J. 729, 25 L. J. Ch. 773, 4 Wkly. Rep. 737. For a statement of the English law on this question see Tillman *v.* Davis, 95 N. Y. 17, 27, 47 Am. Rep. 1.

See also Heirs; Next of Kin; Wills.

4. *Connecticut.*— Kingsbury *v.* Scovill, 26 Conn. 349; Hartford County Bank *v.* Waterman, 26 Conn. 348.

Illinois.— York *v.* York, 38 Ill. 522.

Indiana.— Mills *v.* Marshall, 8 Ind. 54.

Louisiana.— Piffet's Succession, 39 La. Ann. 556, 2 So. 210.

Massachusetts.— Hayward *v.* Hayward, 20 Pick. 517; Foster *v.* Fifield, 20 Pick. 67.

New Hampshire.— Probate Judge *v.* Robins, 5 N. H. 246.

New York.— Howland *v.* Heckscher, 3 Sandf. Ch. 519.

Ohio.— Conger *v.* Barker, 11 Ohio St. 1.

Vermont.— Johnson *v.* Johnson, 41 Vt. 467.

See 16 Cent. Dig. tit. "Descent and Distribution," § 140.

5. Lane *v.* McKinstry, 31 Ohio St. 640.

6. Rawson *v.* Rawson, 52 Ill. 62; Mace *v.* Cushman, 45 Me. 250 (holding that a provision by which the husband of a woman dying intestate was entitled to the residue of her personal property after payment of her debts was not repealed by a subsequent statute providing that the real and personal estate of a married woman dying intestate should descend or be distributed to her heirs); Dickinson *v.* Dickinson, 61 Pa. St. 401 (holding that a statute providing that the power of any married woman to bequeath or devise her property by will should be restricted as regards the husband to the same extent as the husband's power in his property was restricted as regards the wife, etc., did not repeal a former statute providing for the descent and distribution of the property of a married woman dying intestate). And see Evans *v.* Evans, 74 S. W. 224, 24 Ky. L. Rep. 2421, holding that Ky. St. (1899) § 2132, was inconsistent with and repealed Ky. St. (1899) § 1403, subs. 4. See, generally, Statutes.

7. Dower rights see Dower.

8. St. 22 & 23 Car. II, c. 10; 2 Blackstone Comm. 515. And see Coomes *v.* Clements, 4 Harr. & J. (Md.) 480; Griffith *v.* Griffith, 4 H. & M. (Md.) 101; Clark *v.* Clark, 17 Nev. 124, 28 Pac. 238.

Homestead rights see Homestead.

Community property rights see Husband and Wife.

Widow's allowance see Executors and Administrators.

Exempt property going to widow see Exemptions.

in fee simple.[9] Where the husband dies intestate leaving no issue the statutes of some states have followed the English statute of distribution,[10] in giving the

9. 1 Stimson Am. St. L. §§ 3105, 3109, 3115, 3119, 3123, 3262; 2 Tiffany Real Prop. § 427. As to the statutes in particular states see the following cases:

Alabama.— Mueller *v.* Mueller, 127 Ala. 356, 28 So. 465.

Arkansas.— Hill *v.* Mitchell, 5 Ark. 608.

Delaware.— Pettyjohn *v.* Pettyjohn, 1 Houst. 332.

Florida.— Godwin *v.* King, 31 Fla. 525, 13 So. 108.

Georgia.— Love *v.* Anderson, 89 Ga. 612, 16 S. E. 68.

Illinois.— Grattan *v.* Grattan, 18 Ill. 167, 65 Am. Dec. 726, balance only of estate is to be distributed after deducting widow's dower and share of personalty.

Indiana.— Sigler *v.* Hooker, 30 Ind. 386 (holding that a widow's share in the personal property left for distribution on settlement of the estate of her deceased husband is the same, whether she be the widow of a first or any subsequent marriage); Shaffer *v.* Richardson, 27 Ind. 122.

Iowa.— Robson *v.* Lambertson, 115 Iowa 366, 88 N. W. 943; Kite *v.* Kite, 79 Iowa 491, 44 N. W. 716; Nicholas *v.* Purcell, 21 Iowa 265, 89 Am. Dec. 572, the widow being entitled to half of the estate of her deceased husband cannot be compelled to take the homestead as her share.

Kansas.— Dodge *v.* Becler, 12 Kan. 524, half to widow and half to children.

Kentucky.— Tomppert *v.* Tomppert, 13 Bush 326, 26 Am. Rep. 197 (widow having no children by her last husband, who left children by a former marriage, entitled to only one third, and not to one half, of the surplus personalty); Com. *v.* Bracken, 32 S. W. 609, 17 Ky. L. Rep. 785 (widow, as against heir, entitled to one third of net estate after deducting exempt property and claims of creditors); Nall *v.* Wurtley, 30 S. W. 208, 17 Ky. L. Rep. 115 (widow takes absolute title to personal property but only life-estate in real property or in notes set apart to her for her one-third interest in lands of her deceased husband sold by the heirs with her consent); Swearingen *v.* Nash, 21 S. W. 229, 14 Ky. L. Rep. 735 (under Texas statute); Miller *v.* Simpson, 2 S. W. 171, 8 Ky. L. Rep. 518. And see Evans *v.* Evans, 74 S. W. 224, 24 Ky. L. Rep. 2421.

Louisiana.— Bollinger's Succession, 30 La. Ann. 193; Duplessis *v.* Young, 11 La. Ann. 120.

Massachusetts.— Stearns *v.* Stearns, 1 Pick. 157.

Minnesota.— Lake Phalen Land, etc., Co. *v.* Lindeke, 66 Minn. 209, 68 N. W. 974.

Mississippi.— Hope *v.* Hoover, (1896) 21 So. 134 (holding that a widow is "a legitimate heir" of her husband, within the meaning of a statute, so as to take to the exclusion of illegitimate descendants of the husband); Whitley *v.* Stephenson, 38 Miss. 113.

Missouri.— McReynolds *v.* Gentry, 14 Mo. 495; Cox *v.* Dunn, 3 Mo. App. 348. *Compare* Jarboe *v.* Hey, 122 Mo. 341, 26 S. W. 968. See also Haniphan *v.* Long, 70 Mo. App. 351, holding that the statute giving a surviving widow a child's share of the deceased husband's personalty, where he dies "leaving a child, or children, or other descendants," applies where the husband dies leaving a child by a previous marriage, and it is not necessary that he shall leave a child by the surviving wife. And see Brawford *v.* Wolfe, 103 Mo. 391, 15 S. W. 426.

New Hampshire.— Mathes *v.* Bennett, 21 N. H. 188; Probate Judge *v.* Robins, 5 N. H. 246, widow entitled as heir to share of personal estate of husband dying intestate.

New Jersey.— Skellenger *v.* Skellenger, 32 N. J. Eq. 659.

New York.— Knickerbocker *v.* Seymour, 46 Barb. 198; Howland *v.* Heckscher, 3 Sandf. Ch. 519, where a widow is entitled to a third of decedent's estate, a particular debt due the decedent is not a component part of her third, so as to constitute her a creditor of the debtor, where she has never accepted such debt as a part of her third. As to the additional allowance of one thousand dollars and one hundred and fifty dollars see Matter of Steward, 90 Hun 94, 35 N. Y. Suppl. 366; Matter of Durscheidt, 65 Hun 136, 19 N. Y. Suppl. 973; Matter of Shedd, 60 Hun 367, 14 N. Y. Suppl. 841 [*affirming* 11 N. Y. Suppl. 788]; Matter of Mulligan, 4 Misc. 361, 24 N. Y. Suppl 321, 1 Pow. Surr. 141; Daggett *v.* Daggett, 14 N. Y. Suppl. 182 [*affirming* 9 N. Y. Suppl. 652, 2 Connoly Surr. 230]; *In re* Tipple, 13 N. Y. Suppl. 263, 2 Connoly Surr. 508; *In re* Steward, 10 N. Y. Suppl. 24; Koch's Estate, 9 N. Y. Suppl. 814, 24 Abb. N. Cas. 468.

North Carolina.— Arrington *v.* Dortch, 77 N. C. 367.

Ohio.— Doyle *v.* Doyle, 50 Ohio St. 330, 34 N. E. 166; Barber *v.* Hite, 39 Ohio St. 185; *In re* Hutchin, 21 Ohio Cir. Ct. 720.

Pennsylvania.— *In re* Drenkle, 3 Pa. St. 377; Maffet's Estate, 9 Kulp 136; Thompson *v.* Owen, 8 Kulp 36; Phipps *v.* Phipps, 3 Pa. L. J. Rep. 275, 5 Pa. L. J. 176.

South Carolina.— Heyward *v.* Williams, 48 S. C. 564, 26 S. E. 797.

Tennessee.— Bayless *v.* Bayless, 4 Coldw. 359; De Vault *v.* De Vault, (Ch. App. 1898) 48 S. W. 361.

Utah.— *In re* Little, 22 Utah 204, 61 Pac. 899.

Vermont.— Johnson *v.* Johnson, 41 Vt. 467.

See 16 Cent. Dig. tit. "Descent and Distribution," § 144 *et seq.*

What law governs right see *supra*, II, B, 2, c, note 56.

The statutes in force at the husband's death determine the share of his estate to which his widow is entitled. Evans *v.* Evans, 74 S. W. 224, 24 Ky. L. Rep. 2421. And see *supra*, II, B, 1.

10. St. 22 & 23 Charles II, c. 10.

widow one half of his personal estate,[11] while others, putting descent on the same footing as distribution, have given the widow one half of the real estate in fee as well as one half of the personal property.[12] There have also been various other statutes determining the widow's share on failure of issue, or in the absence of both issue and parents.[13] Where a man dies intestate leaving neither issue nor

11. Carothers *v.* Little, 4 Ind. 571; *In re* Susman, 28 Pittsb. Leg. J. N. S. 101.

In Kentucky the provision of the amendment of March 15, 1894, to the act of May 16, 1893, gives to the widow one half the surplus personalty of the deceased husband, whether he leaves issue or not, and cannot be reconciled with the previous statute giving her one third where he leaves issue, and one half where he leaves no issue. Hoskins *v.* Crabtree, 44 S. W. 434, 19 Ky. L. Rep. 1757. The earlier provision therefore is repealed. Evans *v.* Evans, 74 S. W. 224, 24 Ky. L. Rep. 2421.

12. *Florida.*—Harrell *v.* Harrell, 8 Fla. 46.

Illinois.— Sturgis *v.* Ewing, 18 Ill. 176, widow taking one half strictly confined to cases of intestacy.

Iowa.— Linton *v.* Crosby, 54 Iowa 478, 6 N. W. 726; Dodds *v.* Dodds, 23 Iowa 306, 26 Iowa 311; Nicholas *v.* Purcell, 21 Iowa 265, 89 Am. Dec. 572. See also Ralston *v.* Ralston, Greene 535, share of real estate in addition to dower.

Mississippi.— Lombard *v.* Lombard, 57 Miss. 171; Gibbons *v.* Brittenum, 56 Miss. 232.

Missouri.— Hockensmith *v.* Hockensmith, 57 Mo. App. 374, holding that Rev. St. (1889) § 4518, restores to the widow absolutely, free from any debt of the husband, all the property which she brought into the marriage relation, and gives her absolutely, after payment of the husband's debts, one half of the property, real and personal, belonging to the husband in his own right. See also Brawford *v.* Wolfe, 103 Mo. 391, 15 S. W. 426.

New Hampshire.— One half the real estate in fee and one half the personal estate absolutely in addition to dower. Robinson *v.* Tuttle, 37 N. H. 243; *In re* Lund, 18 N. H. 337.

Pennsylvania.— Kline's Estate, 1 Leg. Gaz. 428, one half in value, not quantity, whether estate is or is not susceptible of partition.

See 16 Cent. Dig. tit. "Descent and Distribution," § 145.

13. *Alabama.*—Nolan *v.* Doss, 133 Ala. 259, 31 So. 969; Mueller *v.* Mueller, 127 Ala. 356, 28 So. 465, all of the personal estate in the absence of issue.

Illinois.— Ringhouse *v.* Keever, 49 Ill. 470 (one half of the real estate in fee and dower in remainder); Tyson *v.* Postlethwaite, 13 Ill. 727 (one half of the real estate and all of the personal estate in addition to dower). See also Sutherland *v.* Sutherland, 69 Ill. 481.

Indiana.—Where the husband dies intestate leaving no parent or child, all of his property real or personal vests in the widow, although he may leave brothers and sisters or other relatives. Scott *v.* Silvers, 64 Ind. 76; Longlois *v.* Longlois, 48 Ind. 60; Lindsay *v.* Lindsay, 47 Ind. 283; De Moss *v.* Newton, 31 Ind. 219; Nebeker *v.* Rhoads, 30 Ind. 330; Leard *v.* Leard, 30 Ind. 171; Armstrong *v.* Berreman, 13 Ind. 422; Haugh *v.* Smelser, 31 Ind. App. 571, 66 N. E. 55, 506.

Massachusetts.— Elliot *v.* Elliot, 137 Mass. 116, holding that the statute (St. (1890) c. 211, § 1) providing that the widow of a person dying intestate, and without leaving issue living, should take real estate of the deceased in fee to an amount not exceeding five thousand dollars in value, conferred upon such widow an estate in addition to that given to her by Gen. St. c. 90, § 15, in lieu of dower.

Michigan.— Finch *v.* Rhodes, 49 Mich. 33, 21 N. W. 899, life-estate in land where the deceased left neither parents nor children.

Minnesota.— Lindley *v.* Groff, 42 Minn. 346, 44 N. W. 196, life-estate in lands, where the husband left brothers and sisters and a mother, but no issue or father.

Nebraska.— Hinds *v.* Hinds, 56 Nebr. 545, 76 N. W. 1087, all the personal property, after payment of debts, to the exclusion of brothers and sisters and their descendants.

New Hampshire.— One third of estate in addition to dower and homestead, where the husband dies testate, leaving no lineal descendant and fails to provide for the widow in his will, or she waives a provision for her. Colby *v.* Cate, 64 N. H. 476, 13 Atl. 864, 65 N. H. 667, 23 Atl. 629, holding that this provision of the statute (Gen. St. c. 183, § 7) was not repealed by Laws (1872), c. 41.

Pennsylvania.— Cote's Appeal, 79 Pa. St. 235, half the real estate for life, and half the personal estate absolutely, in the absence of issue.

Rhode Island.— Cronshaw *v.* Cronshaw, 21 R. I. 126, 43 Atl. 1038, in the absence of issue, real estate suitable to her situation and support, to hold in addition to dower, which includes the share of the proceeds of a sale in partition which would have belonged to the husband if he had survived. And see Matthewson *v.* Matthewson, 16 R. I. 12, 11 Atl. 166, holding that dower must be assigned before such additional real estate can be set off.

South Carolina.— Trapp *v.* Billings, 2 McCord Eq. 403, one half of the real and personal property, where the husband left a mother but no issue, although he also left brothers and sisters, the other half in such case going to the mother.

See 16 Cent. Dig. tit. "Descent and Distribution," § 145.

Grandchildren.— A statute giving a widow certain property where her husband dies leaving no "children" means leaving no children or their descendants. Kyle *v.* Kyle, 18 Ind. 108.

Spanish and Texas law.— Under the Span-

kindred to inherit his estate the statutes very generally provide that the whole estate shall go to the widow.[14]

b. Estimation of Distributive Share. Except as to the widow's allowance, which is elsewhere considered,[15] the statutes as a rule do not give a surviving wife a distributive share free from the husband's debts, funeral expenses, and charges of administration.[16] The widow's allowance out of the estate for her present support is not to be regarded as a part of her distributive share, and cannot be deducted therefrom,[17] unless the statute so provides.[18] Nor is her right to the distributive share fixed by the statute affected by a statutory or constitutional exemption of a certain amount of personal property from the claims of creditors.[19] Under some statutes the value of the statutory separate estate of the widow is to be deducted in estimating the amount of her share.[20] In ascertaining the distributive share of a widow who dissents from her husband's will, all his personal estate, whether consisting of advancements that were before made to children, or legacies to grandchildren or to strangers, is to be brought together, and her share is to be taken out of it pursuant to the statute.[21]

ish law in force in Texas prior to the act of the republic of Dec. 18, 1837, the widow of a person dying intestate and without children, but leaving other relatives capable of inheriting, did not inherit the deceased husband's estate; and this rule was not changed by section 2 of that act (Hart Dig. arts. 574, 3251), providing that the survivor of a husband or wife dying intestate, "leaving no heirs," should inherit the estate of the deceased spouse. Branch *v.* Texas Lumber Mfg. Co., 56 Fed. 707, 6 C. C. A. 92. And see Kircher *v.* Murray, 60 Fed. 48, 8 C. C. A. 448 [*affirming* 54 Fed. 617]. See also Boone *v.* Hulsey, 71 Tex. 176, 9 S. W. 531.

14. Wunderle *v.* Wunderle, 144 Ill. 40, 33 N. E. 195, 19 L. R. A. 84 (holding that under a statute providing that if any intestate leaves a widow and no kindred his estate shall descend to such widow, where an intestate leaves a widow who is a citizen, and kindred who are non-resident aliens, his lands descend to his widow immediately upon his death, no proceedings of escheat being necessary); Daugherty *v.* Deardorf, 107 Ind. 527, 8 N. E. 296; Sofield *v.* White Water Valley Canal Co., 3 Ind. 179; Barber's Succession, 52 La. Ann. 960, 27 So. 363; Broad Top Coal, etc., Co. *v.* Riddlesburg Coal, etc., Co., 65 Pa. St. 435.

15. Widow's allowance free from debts see EXECUTORS AND ADMINISTRATORS.

16. Towery *v.* McGaw, 56 S. W. 727, 982, 22 Ky. L. Rep. 155; Miller *v.* Simpson, 2 S. W. 171, 8 Ky. L. Rep. 518 (holding under a statute entitling widow to one third of the personalty of her deceased husband after deducting charges of administration, that such charges do not include the expenses of protracted litigation between the heirs over the will of the deceased husband); Lake Phalen Land, etc., Co. *v.* Lindeke, 66 Minn. 209, 68 N. W. 974; Hockensmith *v.* Hockensmith, 57 Mo. App. 374; Cox *v.* Dunn, 3 Mo. App. 348 (even though the statute omits mention of such debts and charges); *In re* Lund, 18 N. H. 337.

17. Hays *v.* Buffington, 2 Ind. 369.

18. Mathes *v.* Bennett, 21 N. H. 188, where the statute left it within the discretion of the probate court to treat the widow's allowance as a part of her distributive share.

19. Godwin *v.* King, 31 Fla. 525, 13 So. 108; Whitley *v.* Stephenson, 38 Miss. 113. And see Com. *v.* Bracken, 32 S. W. 609, 17 Ky. L. Rep. 785.

20. Mueller *v.* Mueller, 127 Ala. 356, 28 So. 465; Zachry *v.* Lockard, 98 Ala. 371, 13 So. 514; Harris *v.* Harris, 71 Ala. 536; Smith *v.* Smith, 30 Ala. 642. *Contra*, Whitley *v.* Stephenson, 38 Miss. 113.

Vested remainder.— Under such a statute a deduction is to be made where the widow owns a separate estate consisting of a vested remainder in land as well as where she has a separate estate in possession. Zachry *v.* Lockard, 98 Ala. 371, 13 So. 514.

Insurance on husband's life.— The widow is barred of her dower and distributive share in her husband's estate, where the amount collected by her on a policy of insurance taken out by him for her sole benefit, together with her separate estate, exceeds her distributive share and dower interest. Wadsworth *v.* Miller, 103 Ala. 130, 15 So. 520; Williams *v.* Williams, 68 Ala. 405.

Separate estate other than statutory.— The Alabama statute requiring the widow's separate estate to be deducted refers only to her statutory separate estate, and does not require the value of an equitable separate estate to be deducted. Mueller *v.* Mueller, 127 Ala. 356, 28 So. 465; Harris *v.* Harris, 71 Ala. 536. Property secured to her sole and separate use under the provisions of her father's will, or by deed of gift, is not to be considered as part of her statutory separate estate. Huckabee *v.* Andrews, 34 Ala. 646; Smith *v.* Smith, 30 Ala. 642.

21. Arrington *v.* Dortch, 77 N. C. 367. *Compare* Whitley *v.* Stephenson, 38 Miss. 113.

Child's share.— The acceptance by two sons of their shares of their father's estate by way of advancement and their receipt for the same in full does not prevent them from being counted as living children of the intestate, in determining the aliquot part (a child's share) of the widow in the estate; and in determining the share of the widow,

c. Property in Which Widow Is Entitled to Share. Where a statute gives the widow a part of the real estate of her deceased husband, it applies to the share of the proceeds of a sale on partition which would have belonged to the husband if he had survived;[22] and it applies to a vested remainder to which the husband was entitled.[23] As a rule a widow's right to a share in her deceased husband's personal property attaches to all the property owned by him at the time of his death, and not disposed of by him by will;[24] and in some states she takes a certain share notwithstanding a will.[25] Her distributive share does not include an interest in the land itself before conversion, but only a share of the personal estate of the decedent and of the fund created by the conversion of the realty.[26] She is not entitled to a distributive share of the rents and profits of real estate received by the husband's administrator, with the consent of the heirs, as they constitute no part of his personal estate.[27] In determining her right to participate in the distribution, equitable estates are subject to the same incidents, properties, and consequences in equity as are similar legal estates at law.[28] Under some statutes her share of her husband's personalty does not include choses in action.[29] In some states where dower has been abolished the widow is entitled to no share in real estate which was owned by the husband, but which has been sold in his lifetime on execution or other judicial sale.[30]

d. Effect of Antenuptial Agreement. While an antenuptial contract could not bar dower at common law, such a contract, although wanting in the requisites of a legal or statutory jointure, was and is now held in equity sufficient to bar the wife's right to dower;[31] and in like manner, in the absence of fraud, a woman who is *sui juris* may in equity, by antenuptial contract, relinquish her statutory rights as heir or distributee in her husband's estate, the marriage of the parties alone being in some cases held a sufficient consideration to sustain such a contract.[32]

the sums so paid by the intestate to his sons and receipted for by them should be considered. De Vault *v.* De Vault, (Tenn. Ch. App. 1898) 48 S. W. 361.

22. Cronshaw *v.* Cronshaw, 21 R. I. 126, 43 Atl. 1038.

23. Cote's Appeal, 79 Pa. St. 235.

24. Hill *v.* Mitchell, 5 Ark. 608.

Property disposed of by husband in his lifetime see *infra*, III, B, 6, f.

25. Operation and effect of will see *infra*, III, B, 6, e.

26. Thompson *v.* Owen, 8 Kulp (Pa.) 36.

27. Stearns *v.* Stearns, 1 Pick. (Mass.) 157.

28. Skellenger *v.* Skellenger, 32 N. J. Eq. 659.

29. Hill *v.* Mitchell, 5 Ark. 608. *Contra*, Cummings *v.* Cummings, 51 Mo. 261.

30. Mosteller *v.* Gorrell, 41 Kan. 392, 21 Pac. 232; Andrews *v.* Alcorn, 13 Kan. 351.

31. See DOWER.

32. *Connecticut.*— Cowles *v.* Cowles, 74 Conn. 24, 40 Atl. 195; Staub's Appeal, 66 Conn. 127, 33 Atl. 615.

Illinois.— Barth *v.* Lines, 118 Ill. 374, 7 N. E. 679, 59 Am. Rep. 374; McGee *v.* McGee, 91 Ill. 548.

Indiana.— McNutt *v.* McNutt, 116 Ind. 545, 19 N. E. 115, 2 L. R. A. 372; Shaffer *v.* Shaffer, 90 Ind. 472; Shaffer *v.* Matthews, 77 Ind. 83.

Iowa.— Ditson *v.* Ditson, 85 Iowa 276, 52 N. W. 203.

Kansas.— Hafer *v.* Hafer, 33 Kan. 449, 6 Pac. 537.

Kentucky.— Forwood *v.* Forwood, 86 Ky. 114, 5 S. W. 361, 9 Ky. L. Rep. 415.

Massachusetts.— Paine *v.* Hollister, 139 Mass. 144, 29 N. E. 541, injunction against widow's prosecuting a petition to the probate court for an allowance out of her husband's estate, contrary to the terms of an antenuptial contract.

New York.— *In re* Young, 92 N. Y. 235 [*affirming* 27 Hun 54]; Pierce *v.* Pierce, 71 N. Y. 154, 27 Am. Rep. 22 [*affirming* 9 Hun 50]. *Compare* Curry *v.* Curry, 10 Hun 366.

North Carolina.— Cauley *v.* Lawson, 58 N. C. 132; Rutherford *v.* Crails, 3 N. C. 262.

See 16 Cent. Dig. tit. "Descent and Distribution," § 150. And see, generally, HUSBAND AND WIFE. See also *infra*, III, B, 7, c.

Contra at common law.— Snellings *v.* Richmond, 5 Allen (Mass.) 187, 81 Am. Dec. 742.

Life insurance.—An antenuptial agreement by a wife that she will not claim any dower or any share or interest in the husband's personal estate does not estop her after the husband's death to claim under a policy on his life, issued while he was married to his first wife, providing that the insurance money shall be paid to his personal representatives "for the benefit of his widow, if any." Van Dermoor *v.* Van Dermoor, 80 Hun (N. Y.) 107, 30 N. Y. Suppl. 19.

Failure of husband to perform contract.— When a man in contemplation of marriage agrees to make a settlement on his wife, in consideration of which she agrees to relinquish her rights in his property at his decease, and he fails to make the settlement, she

But a surviving wife's right to her distributive share in her husband's personal estate, or to her share of his real estate given to her by statute as his heir and in addition to dower, is not barred by an antenuptial contract releasing dower only,[33] or by a contract that she should have nothing to do with her husband's property, which was intended to operate during the marriage only.[34]

e. Sale, Gift, or Conveyance by Husband in Lifetime. At common law, and generally under the statutes, a husband cannot by a conveyance defeat his wife's right of dower in land after it has once attached;[35] but as to personal property, the rule is that the husband may deprive his wife of her distributive share by a sale, gift, or other transfer made in good faith during his lifetime.[36] A sale, gift, or other transfer of personal property, however, made fraudulently for the mere purpose of depriving the wife of her distributive share is invalid as to her.[37]

f. Operation and Effect of Will.[38] Under some of the statutes a surviving wife has no right to a distributive share of personalty which her husband has disposed of by will, although it is generally otherwise with respect to the widow's allowance provided for by the statutes.[39] Under other statutes the husband can-

is not barred of any right in his estate which she might have asserted if no such agreement had been made. Pierce *v.* Pierce, 9 Hun (N. Y.) 50 [*affirmed* in 71 N. Y. 154, 27 Am. Rep. 22].

Effect of marriage contract as to marital portion in Louisiana see *infra*, III, B, 10, note 93.

33. Christy *v.* Marmon, 163 Ill. 225, 45 N. E. 150; Sutherland *v.* Sutherland, 69 Ill. 481; Pitkin *v.* Peet, 87 Iowa 268, 54 N. W. 215; Ellmaker *v.* Ellmaker, 4 Watts (Pa.) 89; Findley *v.* Findley, 11 Gratt. (Va.) 434.

Settlement "as jointure."— Glass *v.* Davis, 118 Ind. 593, 21 N. E. 319.

34. Mallory *v.* Mallory, 12 Ky. L. Rep. 684.

35. See DOWER.

36. *Arkansas.*—McClure *v.* Owens, 32 Ark. 443.

Delaware.— Chandler *v.* Hollingsworth, 3 Del. Ch. 99.

Florida.— Smith *v.* Hines, 10 Fla. 258.

Illinois.— Padfield *v.* Padfield, 78 Ill. 16, although made to defeat the rights of the wife.

Indiana.— Warner *v.* Warner, 30 Ind. App. 578, 66 N. E. 760. And see Shaffer *v.* Richardson, 27 Ind. 122.

Iowa.— Samson *v.* Samson, 67 Iowa 253, 25 N. W. 233.

Michigan.— Cranson *v.* Cranson, 4 Mich. 230, 66 Am. Dec. 534.

Missouri.— McLaughlin *v.* McLaughlin, 16 Mo. 242; Dyer *v.* Smith, 62 Mo. App. 606; Brandon *v.* Dawson, 51 Mo. App. 237.

Pennsylvania.— *In re* Young, 202 Pa. St. 431, 51 Atl. 1036; Perry *v.* Perry, 3 C. Pl. 163. *Compare* Jones *v.* Drake, 6 Phila. 416.

Tennessee.— Richards *v.* Richards, 11 Humphr. 429, holding that if a husband causes a note for money due him to be executed by the debtor to his (the husband's) children, for the purpose of excluding his widow from any share therein, she is without remedy.

Virginia.— Gentry *v.* Bailey, 6 Gratt. 594.

See 16 Cent. Dig. tit. "Descent and Distribution," § 152.

Gift causa mortis.— In Hatcher *v.* Buford, 60 Ark. 169, 29 S. W. 641, 27 L. R. A. 507, it was held that property covered by a gift *causa mortis* from a husband was subject to the widow's right, on the ground that a donor *causa mortis* remains seized or possessed of the property until death. *Compare*, however, Gentry *v.* Bailey, 6 Gratt. (Va.) 594, where there was a conveyance to take effect after death.

37. *Florida.*— Smith *v.* Hines, 10 Fla. 258.

Kentucky.— Manikee *v.* Beard, 85 Ky. 20, 2 S. W. 545, 8 Ky. L. Rep. 736; Wilson *v.* Wilson, 64 S. W. 981, 23 Ky. L. Rep. 1229.

Missouri.— Tucker *v.* Tucker, 29 Mo. 350; Stone *v.* Stone, 18 Mo. 389; Davis *v.* Davis, 5 Mo. 183; Dyer *v.* Smith, 62 Mo. App. 606.

North Carolina.— McGee *v.* McGee, 26 N. C. 105.

Ohio.— McCammon *v.* Summons, 2 Disn. 596.

Pennsylvania.— *In re* Young, 202 Pa. St. 431, 51 Atl. 1036; Hummel's Estate, 161 Pa. St. 215, 28 Atl. 1113.

Vermont.— Nichols *v.* Nichols, 61 Vt. 426, 18 Atl. 153; Thayer *v.* Thayer, 14 Vt. 107, 39 Am. Dec. 211.

See 16 Cent. Dig. tit. "Descent and Distribution," § 152.

The burden of proof is on the widow to show intent on the part of the husband to defraud her. Brandon *v.* Dawson, 51 Mo. App. 237.

As to real estate see Riehl *v.* Bingenheimer, 28 Wis. 84.

Non-resident widow.— Small *v.* Small, 56 Kan. 1, 42 Pac. 323, 54 Am. St. Rep. 581, 30 L. R. A. 243.

38. **Revocation of will by marriage** see WILLS.

39. Shaffer *v.* Richardson, 27 Ind. 122; *In re* Davis, 36 Iowa 24; Dobson *v.* Dobson, 30 Iowa 410; Clark *v.* Griffith, 4 Iowa 405; Miller *v.* Stepper, 32 Mich. 194; *In re* Robinson, (Minn. 1903) 93 N. W. 314; *In re* Rausch, 35 Minn. 291, 28 N. W. 920.

not by will defeat his widow's right to her distributive share, unless she chooses to take under the will in lieu of such share.[40] Under others, where the testator's will makes no provision for the wife, his estate is regarded intestate as to her.[41] A widow is entitled to her distributive share in personalty undisposed of by her husband's will, even though she is provided for in the will.[42]

7. Rights of Surviving Husband — a. In General. At common law a surviving husband has an estate by the curtesy and nothing more in his wife's real property,[43] and he is entitled absolutely to all her personal property, including chattels real.[44] His rights are now very generally regulated by statute. Some statutes give him a fee-simple interest in the whole or a particular portion of his wife's real property, according to circumstances,[45] and all or a certain share of her per-

Presumption of revocation of will.— Tyler *v.* Tyler, 19 Ill. 151. See, generally, Wills.

40. Griffith *v.* Griffith, 4 Harr. & M. (Md.) 101; Arrington *v.* Dortch, 77 N. C. 367; Gupton *v.* Gupton, 3 Head (Tenn.) 488. See also *In re* Robinson, (Minn. 1903) 93 N. W. 314.

A provision in lieu of dower does not defeat the widow's right to her distributive share of personalty. Edsall *v.* Waterbury, 2 Redf. Surr. (N. Y.) 48.

Under the Iowa statute providing that the widow's share cannot be affected by any will of her husband, unless she consents thereto within six months after notice to her of the provisions of the will, a husband cannot by an antenuptial will deprive his wife of her share either of real or personal property. *In re* Lyon, 70 Iowa 375, 30 N. W. 642; Linton *v.* Crosby, 61 Iowa 293, 16 N. W. 113; Ward *v.* Wolf, 56 Iowa 465, 9 N. W. 348.

Construction of particular statutes see the following cases:

Indiana.— Like *v.* Cooper, 132 Ind. 391, 31 N. E. 1118; Armstrong *v.* Berreman, 13 Ind. 422.

Iowa.— McGuire *v.* Brown, 41 Iowa 650; Dobson *v.* Dobson, 30 Iowa 410.

Maryland.— Collins *v.* Carman, 5 Md. 503.

Massachusetts.— Holmes *v.* Hancock, 158 Mass. 398, 33 N. E. 608; Cochran *v.* Thorndike, 133 Mass. 46.

North Carolina.— Gwyn *v.* Gwyn, 54 N. C. 145.

Ohio.— Gardner *v.* Gardner, 13 Ohio St. 426.

Pennsylvania.— *In re* Petterson, 195 Pa. St. 78, 45 Atl. 654.

Rhode Island.— Wood *v.* Mason, 17 R. I. 99, 20 Atl. 264.

See 16 Cent. Dig. tit. "Descent and Distribution," § 154.

41. *Florida.*— Smith *v.* Hines, 10 Fla. 258.

Illinois.— *In re* Taylor, 55 Ill. 252.

Missouri.— Stokes *v.* O'Fallon, 2 Mo. 32.

Ohio.— Doyle *v.* Doyle, 50 Ohio St. 330, 34 N. E. 166.

Pennsylvania.— Perry's Estate, 4 Pa. Co. Ct. 107, 19 Wkly. Notes Cas. 183.

42. *Indiana.*— Linsday *v.* Linsday, 47 Ind. 283; Armstrong *v.* Berreman, 13 Ind. 422.

Kentucky.— South *v.* Hoy, 3 T. B. Mon. 88.

Massachusetts.— *In re* Kempton, 23 Pick. 163.

North Carolina.— Liles *v.* Fleming, 16 N. C. 185, 18 Am. Dec. 585.

Pennsylvania.— Darrah *v.* McNair, 1 Ashm. 236.

See 16 Cent. Dig. tit. "Descent and Distribution," § 155.

43. See Babbit *v.* Scroggin, 1 Duv. (Ky.) 272.

Curtesy see Curtesy.

44. 2 Tiffany Real Prop. § 427. And see the following cases:

Alabama.— Vanderveer *v.* Alston, 16 Ala. 494.

District of Columbia.— McCarthy *v.* McCarthy, 20 App. Cas. 195; Chadsey *v.* Fuller, 6 Mackey 117.

Georgia.— Dwelle *v.* Roath, 29 Ga. 733; Bryan *v.* Rooks, 25 Ga. 622, 71 Am. Dec. 194; Lee *v.* Wheeler, 4 Ga. 541.

Kentucky.— Brown *v.* Alden, 14 B. Mon. 114; Cox *v.* Coleman, 13 B. Mon. 451; Miller *v.* Miller, 1 J. J. Marsh. 169, 19 Am. Dec. 59.

Maryland.— West *v.* Biscoe, 6 Harr. & J. 460; Manship *v.* Evitts, 2 Md. Ch. 366.

New Hampshire.— Atherton *v.* McQuesten, 46 N. H. 205.

New York.— Whitaker *v.* Whitaker, 6 Johns. 112. And see Robins *v.* McClure, 100 N. Y. 328, 3 N. E. 663, 53 Am. Rep. 184; Ransom *v.* Nichols, 22 N. Y. 110.

North Carolina.— Hoppiss *v.* Eskridge, 37 N. C. 54; Dozier *v.* Sanderlin, 18 N. C. 246; Hoskins *v.* Miller, 13 N. C. 360. See also Colson *v.* Martin, 62 N. C. 125.

Pennsylvania.— See Sill's Appeal, 1 Grant 235.

Rhode Island.— Kenyon *v.* Saunders, 18 R. I. 590, 30 Atl. 470, 26 L. R. A. 232.

Tennessee.— Hays *v.* Bright, 11 Heisk. 325; Tune *v.* Cooper, 4 Sneed 296; Hardin *v.* Young, (Ch. App. 1896) 41 S. W. 1080.

England.— St. 29 Car. II, c. 3, § 25. And see Elliot *v.* Collier, 3 Atk. 526, 26 Eng. Reprint 1104; Squib *v.* Wyn, 1 P. Wms. 378, 24 Eng. Reprint 432; 2 Blackstone Comm. 434; Coke Litt. 351.

See also Executors and Administrators; Husband and Wife.

45. See De Castro *v.* Barry, 18 Cal. 96; Dye *v.* Davis, 65 Ind. 474; Noble *v.* Noble, 19 Ind. 431; Cunningham *v.* Doe, 1 Ind. 94; Smith *v.* Zuckmeyer, 53 Iowa 14, 3 N. W. 782; Harrington *v.* Harrington, 53 Vt. 649. And see Matter of Ingram, 78 Cal. 586, 21 Pac. 435, 12 Am. St. Rep. 80; O'Brien *v.* Ash, 169 Mo. 283, 69 S. W. 8.

Interest in husband's land vesting in wife on judicial sale.— Where a husband makes

sonal estate.[46] In the absence of statutory provision to the contrary, the statutes which authorize a married woman to hold property as if unmarried do not destroy the husband's estate by the curtesy,[47] or deprive him of his common-law or statutory right to his wife's personalty when she dies intestate.[48] Under some of the statutes the surviving husband of an intestate takes one half of the real estate in fee,[49]

an assignment for the benefit of creditors, but before the assignment is recorded land owned by him is sold under execution on a judgment against him, and one third of such land thereupon vests in his wife under a statute, and the wife afterward dies, the interest so vesting in her descends to her husband. Elliott *v.* Cale, 113 Ind. 383, 14 N. E. 708. See also Summit *v.* Ellett, 88 Ind. 227, where the sale of the husband's land was on foreclosure of a mortgage, and the wife died before the purchaser at the foreclosure sale was entitled to a sheriff's deed.

46. Under the statutes in particular states see the following cases:

Alabama.— Trawick *v.* Davis, 85 Ala. 342, 5 So. 83; Brown *v.* Grimes, 60 Ala. 647; Marshall *v.* Crow, 29 Ala. 278.

California.— *In re* Dobbel, 104 Cal. 432, 38 Pac. 87, 43 Am. St. Rep. 123; De Castro *v.* Barry, 18 Cal. 96. And see Matter of Ingram, 78 Cal. 586, 21 Pac. 435, 12 Am. St. Rep. 80.

Georgia.— Smith *v.* Williams, 89 Ga. 9, 15 S. E. 130, 32 Am. St. Rep. 67.

Illinois.— Laurence *v.* Balch, 195 Ill. 626, 63 N. E. 506.

Indiana.— Noble *v.* Noble, 19 Ind. 431.

Kentucky.— Kent *v.* Owensboro Deposit Bank, 91 Ky. 70, 14 S. W., 962, 12 Ky. L. Rep. 668, holding that under Gen. St. c. 52, art. 4, § 15, bank stock held by a married woman to her separate use passes upon her death to those who as her heirs succeed to the realty and not to her husband.

Maryland.—Mobray *v.* Leckie, 42 Md. 474; Edelen *v.* Middleton, 9 Gill 161. In this state under the act of 1892, chapter 571, a surviving husband now takes absolutely all of his intestate wife's personal property, including choses in action, where she leaves no child or descendants, but if she leaves a child or children or descendants, he takes such property for life only, and after his death it goes to her children and descendants *per stirpes*, and during his life-estate it is to be invested under the direction of the orphans' court. See Hunter *v.* Hersperger, 96 Md. 292, 54 Atl. 65, holding that where a wife dies leaving a husband and children, and a judgment as the principal asset of her estate, interest accruing on the judgment after her death, when paid, was a part of the *corpus* of her estate, and did not go to the husband absolutely.

Massachusetts.— Bartlett *v.* Bartlett, 137 Mass. 156.

Missouri.— O'Brien *v.* Ash, 169 Mo. 283, 69 S. W. 8.

New Hampshire.— Atherton *v.* McQuesten, 46 N. H. 205.

New York.— Matter of Kane, 2 Barb. Ch. 375.

Pennsylvania.— Van Rensselaer *v.* Dunkin, 24 Pa. St. 252; Brown *v.* Niethammer, (Pa. 1886) 4 Atl. 918.

South Carolina.— *Ex p.* Wells, 3 Desauss. 155.

Vermont.— Harrington *v.* Harrington, 53 Vt. 649.

Virginia.— Andes *v.* Roller, 98 Va. 620, 37 S. E. 297.

See 16 Cent. Dig. tit. "Descent and Distribution," § 156 *et seq.*

What law governs see *supra*, II, B, 2, c, note 56.

Death of husband before administration.— The fact that there was no administration of the deceased wife's estate until after the death of the husband does not deprive his estate of his right as her heir, or of his common-law rights. *In re* Dobbel, 104 Cal. 432, 38 Pac. 87, 43 Am. St. Rep. 123. See also Vanderveer *v.* Alston, 16 Ala. 494; Dwelle *v.* Roath, 29 Ga. 733; Bryan *v.* Rooks, 25 Ga. 622, 71 Am. Dec. 194; Dozier *v.* Sanderlin, 18 N. C. 246.

Husband's interest in wife's slaves.— Upon the wife's death, intestate, her slaves became the property of her husband. Little *v.* McLendon, 58 N. C. 216; Tucker *v.* Medaris, 3 Humphr. (Tenn.) 628. For the construction of statutory provisions as to slaves see the following cases:

Kentucky.— Hart *v.* Soward, 14 B. Mon. 301.

Mississippi.— Richmond *v.* Delay, 34 Miss. 83.

Missouri.— Terril *v.* Boulware, 24 Mo. 254.

North Carolina.— Skinner *v.* Barrow, 27 N. C. 414; Hinton *v.* Hinton, 21 N. C. 587.

Texas.— Powell *v.* De Blane, 23 Tex. 66.

Virginia.— Robinson *v.* Brock, 1 Hen. & M. 212.

See 16 Cent. Dig. tit. "Descent and Distribution," § 162.

47. See CURTESY.

48. *District of Columbia.*—Chadsey *v.* Fuller, 6 Mackey 117.

Kentucky.— Brown *v.* Alden, 14 B. Mon. 114.

New Jersey.— Vreeland *v.* Ryno, 26 N. J. Eq. 160.

New York.— Robins *v.* McClure, 100 N. Y. 328, 3 N. E. 663, 53 Am. Rep. 184; Olmsted *v.* Keyes, 85 N. Y. 593; Ransom *v.* Nichols, 22 N. Y. 110; Jaycox *v.* Collins, 26 How. Pr. 496; McCosker *v.* Golden, 1 Bradf. Surr. 64.

Rhode Island.— Kenyon *v.* Saunders, 18 R. I. 590, 30 Atl. 470, 26 L. R. A. 232.

Compare, however, Baldwin *v.* Carter, 17 Conn. 201, 42 Am. Dec. 735; Wilson *v.* Breeding, 50 Iowa 629; *In re* Page, 75 Pa. St. 87.

49. Lockwood *v.* Moffett, 177 Ill. 49, 52 N. E. 260; Marvin *v.* Collins, 98 Ill. 510;

under others one third in fee,[50] and under others he is entitled to administration and all the property, real and personal.[51] In Massachusetts the husband takes a fee to an amount not exceeding five thousand dollars in value in his wife's land.[52] Where the intestate wife leaves neither issue nor kindred, the whole estate goes to the husband;[53] and under some statutes this is the rule where the wife leaves neither issue nor a parent.[54]

b. Rights With Respect to Particular Property or Rights — (i) *Conversion of Realty Into Personalty.* Money arising from a sale and conveyance of the wife's land by a deed of the husband and wife or from partition proceedings has none of the characteristics of real estate but is distributed as personalty.[55] But if the sale or partition has not been completed at the time of the wife's death the property descends as real estate.[56]

(ii) *Insurance on Husband's Life.* A wife's interest in a policy of insurance taken out by her husband or herself on his life and made payable to the wife, her executors, administrators, and assigns, is her separate property, and if she dies before her husband such interest or a share thereof, according to the statute, goes to him or to his executor or administrator, like other personal property.[57]

(iii) *Choses in Action.* By the weight of authority, both at common law and under the English statute of distributions,[58] and under the statutes in some of the United States, a surviving husband is entitled to his deceased wife's choses in action, although not reduced to possession in her lifetime.[59] In some states, how-

Townsend *v.* Radcliffe, 44 Ill. 446; Smith *v.* Zuckmeyer, 53 Iowa 14, 3 N. W. 782; Nicholas *v.* Purczell, 21 Iowa 265, 89 Am. Dec. 572; Burns *v.* Keas, 21 Iowa 257; O'Brien *v.* Ash, 169 Mo. 283, 69 S. W. 8; House *v.* Brent, 69 Tex. 27, 7 S. W. 65. See also Bryan *v.* Weems, 25 Ala. 195; Boyd *v.* Small, 56 N. C. 39.

50. O'Harra *v.* Stone, 48 Ind. 417; Cunningham *v.* Doe, Smith (Ind.) 34.

51. Coogler *v.* Rogers, 25 Fla. 853, 7 So. 391; Rabb *v.* Griffin, 26 Miss. 579.

In Georgia a surviving husband formerly took the whole of his wife's separate estate as sole heir at law, and to the exclusion of her children. Smith *v.* Williams, 89 Ga. 9, 15 S. E. 130, 32 Am. St. Rep. 67; Lathrop *v.* White, 81 Ga. 29, 6 S. E. 834; Bailey *v.* Simpson, 57 Ga. 523. The law, however, was changed by the act of 1871–1872, under which he merely shares equally with the children. Ga. Civ. Code (1895), § 3354.

52. Howe *v.* Berry, 168 Mass. 418, 47 N. E. 104, holding that the husband is entitled to his five thousand dollars' worth in fee of the wife's real estate, even though no children had been born of the union.

53. *In re* Ingram, 78 Cal. 586, 21 Pac. 435, 12 Am. St. Rep. 80; Southgate *v.* Annan, 31 Md. 113; Barnes *v.* Underwood, 47 N. Y. 351; Matter of Gilligan, 3 N. Y. Suppl. 17, 1 Connoly Surr. (N. Y.) 137; Rogers' Estate, 2 Chest. Co. Rep. (Pa.) 500.

54. Shaw *v.* Breese, 12 Ind. 392. In the Indiana statute of 1852, providing that if a husband or wife should die, leaving no child and no father or mother, the whole of his or her personal and real property should go to the survivor, the word "child" was construed as meaning "children or their descendants." Kyle *v.* Kyle, 18 Ind. 108. See also Children, 7 Cyc. 123.

55. *Alabama.*— Marshall *v.* Gayle, 58 Ala. 284, where husband and wife sold the wife's land and took notes for the purchase-price.

Maryland.— Hammond *v.* Stier, 2 Gill & J. 81.

North Carolina.— Rouse *v.* Lee, 50 N. C. 352.

Tennessee.— Cowden *v.* Pitts, 2 Baxt. 59.

United States.— Rinehart *v.* Harrison, 20 Fed. Cas. No. 11,840, Baldw. 177.

See 16 Cent. Dig. tit. "Descent and Distribution," § 161.

56. Kinner *v.* Walsh, 44 Mo. 65; Hay's Appeal, 52 Pa. St. 449; *In re* Biggert, 20 Pa. St. 17; *Ex p.* Moore, 3 Head (Tenn.) 171.

57. *In re* Dohble, 104 Cal. 432, 38 Pac. 87, 43 Am. St. Rep. 123; Simmons *v.* Biggs, 99 N. C. 236, 5 S. E. 235; U. B. Mut. Aid Soc. *v.* Miller, 107 Pa. St. 162; *In re* Anderson, 85 Pa. St. 202; Deginther's Appeal, 83 Pa. St. 337. See also *In re* Warner, 11 N. Y. Suppl. 894, 2 Connoly Surr. (N. Y.) 347. *Compare* U. S. Trust Co. *v.* Mutual Ben. L. Ins. Co., 115 N. Y. 152, 21 N. E. 1025.

58. St. 29 Car. II, c. 3, § 25.

59. *District of Columbia.*—Chadsey *v.* Fuller, 6 Mackey 117.

Georgia.— Bryan *v.* Rooks, 25 Ga. 622, 71 Am. Dec. 194; Lee *v.* Wheeler, 4 Ga. 541.

Kentucky.— Miller *v.* Miller, 1 J. J. Marsh. 169, 19 Am. Dec. 59. And see Rawlings *v.* Landes, 2 Bush 158; Rice *v.* Thompson, 14 B. Mon. 377; Cox *v.* Coleman, 13 B. Mon. 451; Baker *v.* Red, 4 Dana 158 (but holding that choses in action belonging to the wife before marriage pass to her administrator and not to her husband, until after administration); Irvin *v.* Divine, 7 T. B. Mon. 246.

Maryland.— Manship *v.* Evitts, 2 Md. Ch. 366.

ever, there are decisions to the contrary, either because the court has taken a different view as to the common law or because of a special statutory provision.[60]

(iv) *Wife's Rights as Heir or Legatee.* Where as shown in the preceding section a surviving husband is entitled to his deceased wife's choses in action not reduced to his possession in her lifetime, he is so entitled to a legacy or distributive share which was vested in her, although not reduced to possession before her death;[61] but in some states this rule does not apply.[62] On the death of a wife entitled to a share in the real property of her intestate father, such share goes to her heirs and the probate court has no power to vest it in her husband.[63] If under the statute the husband is sole heir of his deceased wife, real estate inherited by her in her lifetime vests in him on her death.[64]

(v) *Remainder in Personal Property.* Where a wife, being entitled to a vested remainder in personal property, dies before the termination of the life-estate, the remainder vests in her surviving husband to the same extent as other personal property.[65]

Mississippi.— Henderson *v.* Guyot, 6 Sm. & M. 209; Wade *v.* Grimes, 7 How. 425.

New Hampshire.— Probate Judge *v.* Chamberlain, 3 N. H. 129. And see Atherton *v.* McQueston, 46 N. H. 205.

New Jersey.— Vreeland *v.* Ryno, 26 N. J. Eq. 160.

New York.— Robins *v.* McClure, 100 N. Y. 328, 3 N. E. 663, 53 Am. Rep. 184; Olmsted *v.* Keyes, 85 N. Y. 593; Ransom *v.* Nichols, 22 N. Y. 110; Matter of Warner, 11 N. Y. Suppl. 894, 2 Connoly Surr. 347 (interest in life-insurance policy); Whitaker *v.* Whitaker, 6 Johns. 112.

North Carolina.— Hoppiss *v.* Eskridge, 37 N. C. 54. And see Hoskins *v.* Miller, 13 N. C. 360.

Rhode Island.— See Kenyon *v.* Saunders, 18 R. I. 590, 30 Atl. 470, 26 L. R. A. 232.

Tennessee.— Tune *v.* Cooper, 4 Sneed 296; Hamrico *v.* Laird, 10 Yerg. 222; Lasseter *v.* Turner, 1 Yerg. 413; Hardin *v.* Young, (Ch. App. 1896) 41 S. W. 1080.

England.— Elliot *v.* Collier, 3 Atk. 526, 26 Eng. Reprint 1104. *Compare*, however, Fleet *v.* Perrins, L. R. 4 Q. B. 500, 9 B. & S. 575, 38 L. J. Q. B. 257, 20 L. T. Rep. N. S. 814, 17 Wkly. Rep. 862 [*affirming* L. R. 3 Q. B. 536, 8 B. & S. 575, 37 L. J. Q. B. 233, 19 L. T. Rep. N. S. 147].

See 16 Cent. Dig. tit. "Descent and Distribution," § 164.

60. Cox *v.* Morrow, 14 Ark. 603; Gillet *v.* Camp, 19 Mo. 404; Leakey *v.* Maupin, 10 Mo. 368, 47 Am. Dec. 120; Hood *v.* Archer, 2 Nott & M. (S. C.) 149; Sturgineger *v.* Hannah, 2 Nott & M. (S. C.) 147; Speight *v.* Meigs, 1 Brev. (S. C.) 486; Wilson *v.* Bates, 28 Vt. 765.

61. *Georgia.*— Bryan *v.* Rooks, 25 Ga. 622, 71 Am. Dec. 194. And see Smith *v.* Williams, 89 Ga. 9, 15 S. E. 130, 32 Am. St. Rep. 67; Wiggins *v.* Blount, 33 Ga. 409.

Indiana.— Brown *v.* Critchell, 110 Ind. 31, 7 N. E. 888, 11 N. E. 486.

Kentucky.— Miller *v.* Miller, 1 J. J. Marsh. 169, 19 Am. Dec. 59. And see Baker *v.* Red, 4 Dana 158; Irvin *v.* Devine, 7 T. B. Mon. 246; Ewing *v.* Handley, 4 Litt. 346, 14 Am. Dec. 140.

Mississippi.— Henderson *v.* Guyot, 6 Sm. & M. 209; Wade *v.* Grimes, 7 How. 425.

New Hampshire.— Probate Judge *v.* Chamberlain, 3 N. H. 129.

New Jersey.— Vreeland *v.* Ryno, 26 N. J. Eq. 160.

Tennessee.— Tune *v.* Cooper, 4 Sneed 296; Hardin *v.* Young, (Ch. App. 1896) 41 S. W. 1080.

Virginia.— Brent *v.* Washington, 18 Gratt. 526; Wade *v.* Boxley, 5 Leigh 442. And see Andes *v.* Roller, 98 Va. 620, 37 S. E. 297.

United States.— U. S. *v.* Baker, 24 Fed. Cas. No. 14,503, 2 Cranch C. C. 615.

See 16 Cent. Dig. tit. "Descent and Distribution," § 165.

A charge upon land devised by will is a pecuniary legacy which passes to the surviving husband of the legatee. Gray *v.* McDowell, 6 Bush (Ky.) 475.

Death of wife before father.—Where a wife dies without issue prior to the death of her father, her husband, upon the death of the latter, does not inherit as by adoption the share of his estate which the law would have cast upon his wife had she survived her father. Graham *v.* Babcock, 109 Ind. 205, 9 N. E. 701.

62. Leakey *v.* Maupin, 10 Mo. 368, 47 Am. Dec. 120. And see Gillet *v.* Camp, 19 Mo. 404. See also Hood *v.* Archer, 2 Nott & M. (S. C.) 149; Sturgineger *v.* Hannah, 2 Nott & M. (S. C.) 147; Speight *v.* Meigs, 1 Brev. (S. C.) 486.

63. Fogelsonger *v.* Somerville, 6 Serg. & R. (Pa.) 267.

64. And he may recover the same, on the strength of her ancestor's possession, from one who does not show a better title, without regard to the question whether he did or did not, in the exercise of his marital rights, reduce the land to possession as his own during the wife's lifetime. Snipes *v.* Parker, 98 Ga. 522, 25 S. E. 580.

65. *Kentucky.*— Rawling *v.* Landes, 2 Bush 158; Ewing *v.* Handley, 4 Litt. 346, 14 Am. Dec. 140.

Missouri.— Houck *v.* Complin, 25 Mo. 378.

North Carolina.— Colson *v.* Martin, 62 N. C. 125.

(vi) *Wife's Separate Equitable Estate.* Where the law allows the creation in a married woman of a separate equitable estate, which she may dispose of by will unless prevented by the instrument creating the same, and by statute or otherwise a surviving husband is entitled to his wife's personal estate, a surviving husband takes to the exclusion of children his intestate wife's equitable separate estate in personal property which she was not prevented from alienating by the instrument creating it.[66]

c. Effect of Antenuptial Agreement. Husband and wife may by an antenuptial contract for which the marriage is a sufficient consideration, exclude the operation of the common law or statutes in so far as they fix the rights of the husband in the wife's property, not only during coverture, but also after the wife's death, and if the husband thereby surrenders the rights which he will otherwise have in the wife's property as survivor such rights will be barred.[67] Whether the husband merely surrenders his marital rights during coverture or also surrenders his prospective rights as survivor depends on the intention of the parties as expressed in the agreement.[68] Where the antenuptial agreement merely secures to the wife full control over her property, with the right to dispose of the same by deed or will, a failure on her part to make such disposition leaves the husband's rights to her property upon her death the same as if no such agreement had been made.[69]

d. Operation and Effect of Will. Under some of the statutes a wife, although authorized by statute to dispose of her property by will, cannot by will deprive her husband of his rights to either her realty or personalty,[70] unless the husband

Tennessee.— Tune *v.* Cooper, 4 Sneed 296; Hardin *v.* Young, (Ch. App. 1896) 41 S. W. 1080.

Virginia.— Wade *v.* Boxley, 5 Leigh 442; Dade *v.* Alexander, 1 Wash. 30.

See 16 Cent. Dig. tit. "Descent and Distribution," § 167. And see *supra*, II, E, 5.

66. Andes *v.* Roller, 98 Va. 620, 37 S. E. 297, holding that a will giving a married woman personal property "to her sole and separate use free from the debts and control of her husband," without other restrictive provisions, did not restrain her power to dispose of the legacy by will or otherwise, and that on her death intestate the surviving husband was entitled thereto. See also Cox *v.* Coleman, 13 B. Mon. (Ky.) 451. *Compare* Olive *v.* Walton, 33 Miss. 103, under the Mississippi married woman's acts of 1839 and 1846.

67. *Georgia.*— Sheppard *v.* Sheppard, 22 Ga. 426.

Indiana.— Leach *v.* Rains, 149 Ind. 152, 48 N. E. 858.

Maryland.— Ward *v.* Thompson, 6 Gill & J. 349.

North Carolina.— Hooks *v.* Lee, 42 N. C. 83.

Pennsylvania.— Gackenback *v.* Brouse, 4 Watts & S. 546, 39 Am. Dec. 104.

Tennessee.— Gamble *v.* Nunn, 5 Sneed 465; Loftus *v.* Penn, 1 Swan 445; Hamrico *v.* Laird, 10 Yerg. 222.

Virginia.— Charles *v.* Charles, 8 Gratt. 486, 56 Am. Dec. 155.

United States.— Marshall *v.* Beall, 6 How. 70, 12 L. ed. 347.

See 16 Cent. Dig. tit. "Descent and Distribution," § 168. And see *supra*, III, B, 6, d.

Antenuptial contracts generally see Husband and Wife.

68. Ward *v.* Thompson, 6 Gill & J. (Md.) 349; Loftus *v.* Penn, 1 Swan (Tenn.) 445; Marshall *v.* Beall, 6 How. (U. S.) 70, 12 L. ed. 347; and other cases in the note preceding and the note following.

69. *Kentucky.*— Hart *v.* Soward, 14 B. Mon. 301.

New York.— Stewart *v.* Stewart, 7 Johns. Ch. 229.

Pennsylvania.— Talbot *v.* Calvert, 24 Pa. St. 327.

South Carolina.— Rochell *v.* Tompkins, 1 Strobh. Eq. 114. See also Baskins *v.* Giles, Rice Eq. 315.

Tennessee.— Brown *v.* Brown, 6 Humphr. 127. See also Hays *v.* Bright, 11 Heisk. 325; Loftus *v.* Penn, 1 Swan 445; Hardin *v.* Young, (Ch. App. 1896) 41 S. W. 1080. *Compare*, however, Hamrico *v.* Laird, 10 Yerg. 222.

Virginia.— Pickett *v.* Chilton, 5 Munf. 467.

West Virginia.— Beard *v.* Beard, 22 W. Va. 130.

But see Wright *v.* Pratt, 17 Mo. 43.

See 16 Cent. Dig. tit. "Descent and Distribution," § 168.

70. *Illinois.*— Laurence *v.* Balch, 195 Ill. 626, 63 N. E. 506 [*affirming* 98 Ill. App. 111], holding that where a wife disposes of all her property without making provision for her husband, he is entitled to the one third of her estate given him by Hurd Rev. St. (1899) c. 41, § 10.

Indiana.— O'Harra *v.* Stone, 48 Ind. 417.

Iowa.— May *v.* Jones, 87 Iowa 188, 54 N. W. 231.

Kentucky.— Smoot *v.* Heyser, 67 S. W. 21, 23 Ky. L. Rep. 2401.

consents;[71] and under some statutes the rule applies even when the husband consents to the making of a will excluding him.[72] Under some statutes, however, as where the husband is given certain rights where the wife dies intestate, the wife may by will defeat rights which he would otherwise have.[73] But even under such a statute a will does not affect the husband's rights as to property not disposed of thereby.[74] The consent of the husband is not necessary to give validity to the will or effect its operation, except in so far as it may deprive him of his rights as surviving husband.[75] A sufficient provision for a husband within the meaning of a statute is made by a will providing that he be executor and trustee for the children, and if the testatrix dies without children living the husband is to take the whole estate.[76]

e. Gift, Sale, or Conveyance by Wife. Where a wife cannot deprive her husband by will of his distributive share of her estate, she cannot do so by a *donatio causa mortis*, which is but another form of testamentary disposition.[77] She may, however, deprive her husband of his share by a completed and valid sale or gift of all her property in her lifetime.[78]

8. Property Acquired by Gift. Under a statute providing that where a person dies intestate without children or their descendants, property acquired by gift or conveyance, in consideration of love and affection, shall revert to the donor if living at the intestate's death, saving to the widow or widower, however, his or her rights therein, a husband or wife who has conveyed property to the other in consideration of love and affection takes the whole on the other's death intestate and without leaving children or descendants.[79] Where the gift or conveyance was from a third person, the surviving husband or wife takes the share given by statute to a surviving husband or wife and the remainder goes to the donor.[80]

9. Rights in Case of Remarriages — a. In General. In the absence of express provision to the contrary, the right or interest of a surviving husband or wife,

Massachusetts.— Silsby *v.* Bullock, 10 Allen 34. See also Johnson *v.* Williams, 152 Mass. 414, 25 N. E. 611; Lavery *v.* Egan, 143 Mass. 389, 9 N. E. 747. *Compare* Burke *v.* Colbert, 144 Mass. 160, 10 N. E. 753.

Missouri.— O'Brien *v.* Ash, 169 Mo. 283, 69 S. W. 8.

New Hampshire.—Baker *v.* Smith, 66 N. H. 422, 23 Atl. 82.

New Jersey.— Beals *v.* Storm, 26 N. J. Eq. 372; Vreeland *v.* Ryno, 26 N. J. Eq. 160. And see Nelson *v.* Nelson, (Ch. 1897) 36 Atl. 280.

New York.— Matter of Harris, 20 N. Y. Suppl. 68, 2 Connoly Surr. 4.

See 16 Cent. Dig. tit. "Descent and Distribution," § 170.

71. Silsby *v.* Bullock, 10 Allen (Mass.) 94, where the statute required written consent. See also Everett *v.* Croskrey, 92 Iowa 333, 60 N. W. 732; Shields *v.* Keys, 24 Iowa 298; Johnson *v.* Williams, 152 Mass. 414, 25 N. E. 611; Beals *v.* Storm, 26 N. J. Eq. 372.

What shows consent of husband.— May *v.* Jones, 87 Iowa 188, 54 N. W. 231.

72. O'Harra *v.* Stone, 48 Ind. 417, under a statute giving a surviving husband one third of his wife's real estate, whether she should die intestate or testate.

73. Bryan *v.* Weems, 25 Ala. 195. See also Burke *v.* Colbert, 144 Mass. 160, 10 N. E. 753.

74. Bryan *v.* Weems, 25 Ala. 195. And see Nelson *v.* Nelson, (N. J. Ch. 1897) 36 Atl. 280.

75. Laurence *v.* Balch, 195 Ill. 626, 63 N. E. 506 [*affirming* 98 Ill. App. 111]; Burke *v.* Colbert, 144 Mass. 160, 10 N. E. 753; Burroughs *v.* Nutting, 105 Mass. 228; Silsby *v.* Bullock, 10 Allen (Mass.) 94.

Failure to provide for husband.— Where a wife leaving no issue disposes of all her property by will, the fact that she makes no provision for her husband does not entitle him to the whole estate as in case of intestacy under Hurd Rev. St. (1899) c. 39, § 1; but he is merely entitled to the one third given him by chapter 41, section 10. Laurence *v.* Balch, 195 Ill. 626, 63 N. E. 506 [*affirming* 98 Ill. App. 111]; Cribben *v.* Cribben, 136 Ill. 609, 27 N. E. 70.

76. Carter *v.* Harvey, 77 Miss. 1, 25 So. 862.

77. Baker *v.* Smith, 66 N. H. 422, 23 Atl. 82.

78. Harris *v.* Spencer, 71 Conn. 233, 41 Atl. 773.

Powers of married women as to conveyances see Husband and Wife.

79. Fontaine *v.* Houston, 86 Ind. 205, holding that such provision was not affected by a later section of the statute providing that on the death intestate of a husband or wife, leaving no child, but leaving a father and mother or either of them, his or her property should descend, three fourths to the widow or widower, and one fourth to the father and mother jointly, or to the survivor of them.

80. Myers *v.* Myers, 57 Ind. 307, where the surviving wife took one third and the donor the remainder.

common-law or statutory, in the real or personal property of the deceased spouse, is not in any way defeated or lessened by a second marriage, in favor of children of the previous marriage or otherwise, but becomes subject, like the survivor's other property, to the marital rights of the second spouse, and goes on such survivor's death to his or her heirs or personal representatives, subject to the surviving second spouse's rights.[81] So also in the absence of provision to the contrary, where a surviving spouse marries again and then dies, the surviving second spouse and the children of the second marriage have the same rights in the deceased spouse's property as in the case of a first marriage, subject only to the right of children of the first marriage if any to their share.[82] Of course in all states where as at common law a surviving husband or wife is given merely a life-estate in his or her deceased spouse's real estate, a second spouse of such survivor takes no interest therein on his or her death.[83]

b. Under Statutory Provisions.[84] The rules above stated are sometimes changed by statutes, as by excluding or limiting the right of a surviving second spouse in the property of the deceased spouse in favor of children of the deceased spouse by a former marriage,[85] or by giving them, to the exclusion both of the

81. *Georgia.*— Ralston *v.* Thornton, 36 Ga. 546; Wiggins *v.* Blount, 33 Ga. 409, holding that a surviving second wife was entitled to the share in an estate to which the first wife before her marriage had a vested right by inheritance, both the husband and the first wife having died without issue before distribution.

Indiana.— Sigler *v.* Hooker, 30 Ind. 386; Pickins *v.* Hill, 30 Ind. 269, where on the death of a woman leaving a second husband, the latter was held entitled to personal property received by her on the settlement by administration of the estate of a former husband, as against a subsequent administrator of such former husband.

Kentucky.— Rice *v.* Thompson, 14 B. Mon. 377, holding that if a husband fails to reduce to possession a personal right which belonged to the wife before coverture or appropriate such right it survives to her; and that if she marries again and dies the surviving second husband, as survivor, administrator, or distributee, may claim such right to the exclusion of the children of the wife.

Massachusetts.— Foster *v.* Fifield, 20 Pick. 67, holding that where a widow married a second time and died before distribution of the estate of her first husband her children by the first husband were not entitled exclusively to the latter's estate, but that her administrator was entitled to her distributive share.

Mississippi.— See Kilcrease *v.* Shelby, 23 Miss. 161.

Missouri.— Wall *v.* Coppedge, 15 Mo. 448, holding that a second husband had the right, on reducing it to his possession during coverture, to the distributive share of his wife in her first husband's estate.

See 16 Cent. Dig. tit. "Descent and Distribution," § 176 *et seq.* And see *supra*, III, A, 6, c.

82. Sigler *v.* Hooker, 30 Ind. 386 (holding that, in the absence of provision to the contrary, a statute giving to a surviving husband or wife a certain share or interest in the deceased spouse's property applies as well to the survivor of a second marriage of the deceased spouse as to the survivor of a first marriage, and notwithstanding there are children of the first marriage); Carlton *v.* Burleigh, 52 Kan. 392, 34 Pac. 1050 (holding that, under a statute giving a surviving wife one half of her deceased husband's real estate in fee, subject to certain qualifications, but making no distinction between a first and a second or other subsequent wife, a surviving third wife, with children, of a man who had previously had two other wives, both of whom had children by him, who were still living, was entitled to the one half of his real estate in fee, the other half descending to all his children equally, and that on the death of such widow her one-half share descended to her children to the exclusion of the children by the former wives).

83. Thus in Texas the separate real estate of a married woman descends on her death to her children, subject to the homestead interest of the husband, or to a life-estate in one third thereof, and if he marries again and dies no part of the same goes to his widow. Dyer *v.* Pierce, (Tex. Civ. App. 1901) 60 S. W. 441. See also CURTESY, 12 Cyc. 1001; DOWER.

84. Property exempted from execution.— See EXEMPTIONS; HOMESTEADS.

85. In Georgia the act of 1845 (not now in force) provided that whenever any *feme covert*, having a child or children living by a former husband, should be entitled to property by inheritance, such property should not belong to her husband, but should be equally divided between her and all of her children. Under this statute where a widow at the time she married a second husband had children by a former, and was then entitled to land by inheritance from her former husband, of which she was in possession, but which had not been divided so as to assign her separate share, such share, when afterward assigned to her, became the common property of herself and her children, and was not affected by a marriage contract between her and her second husband. Smith *v.* Pitner, 88 Ga. 710, 15

surviving second spouse and of the children of the second marriage, property

S. E. 808. See also under such statute Roby *v.* Boswell, 23 Ga. 51; Matthews *v.* Bridges, 13 Ga. 325.

Indiana statute prior to 1889.— In Indiana, where the statute gives a widow a certain share of her deceased husband's land in fee simple, a subsequent section provided, prior to the statute of 1889, that "if a man marry a second or other subsequent wife, and has by her no children, and dies leaving children alive by a previous wife, the land which at his death descends to such wife, shall at her death, descend to his children." Rev. St. (1881) § 2487. Under this statute, on the death of the widow without children living, her share of land which descended from her deceased husband descended to the husband's children by his previous marriage (Thompson *v.* Henry, 153 Ind. 56, 54 N. E. 109; Montgomery *v.* McCumber, 128 Ind. 374, 27 N. E. 1114; Habig *v.* Dodge, 127 Ind. 31, 25 N. E. 182; Thorp *v.* Hanes, 107 Ind. 324, 6 N. E. 920; Bryan *v.* Uland, 101 Ind. 477, 1 N. E. 52; Flenner *v.* Benson, 89 Ind. 108; Miller *v.* Noble, 86 Ind. 527; Armstrong *v.* Cavitt, 78 Ind. 476; Long *v.* Miller, 48 Ind. 145; Longlois *v.* Longlois, 48 Ind. 60; Louden *v.* James, 31 Ind. 69; Rockhill *v.* Nelson, 24 Ind. 422; Ogle *v.* Stoops, 11 Ind. 380; Martindale *v.* Martindale, 10 Ind. 566), or their children (his grandchildren), the words "leaving children alive by a previous wife" in the statute being construed to mean "leaving children or their descendants alive by a previous wife" (Scott *v.* Silvers, 64 Ind. 76); and their right could not be defeated by a conveyance of such land by the widow, in which they (being of age) did not join (Thompson *v.* Henry, 153 Ind. 56, 54 N. E. 109; Byrum *v.* Henderson, 151 Ind. 102, 51 N. E. 94; Haskett *v.* Maxey, 134 Ind. 182, 33 N. E. 358, 19 L. R. A. 379; Thorp *v.* Hanes, 107 Ind. 324, 6 N. E. 920; Bryan *v.* Uland, 101 Ind. 477, 1 N. E. 52; Flenner *v.* Benson, 89 Ind. 108; Armstrong *v.* Cavitt, 78 Ind. 476; Utterback *v.* Terhune, 75 Ind. 363; Louden *v.* James, 31 Ind. 69), or by a sheriff's sale to satisfy a judgment against her (Miller *v.* Noble, 86 Ind. 527), or by her consent to a sale and conveyance of her interest by the husband's administrator to pay his debts, and her receipt of the residue of the proceeds of the sale (Armstrong *v.* Cavitt, 78 Ind. 476).

Effect of will.— Land set off to a childless widow, whose husband left children by a former marriage surviving him, upon her refusal to accept the provisions of his will, descended upon her death to such children, freed from any provisions of the will. Rushton *v.* Harvey, 144 Ind. 382, 43 N. E. 300.

The widow will not be presumed to have been a second or other subsequent wife. Utterback *v.* Terhune, 75 Ind. 363.

Existence and death of children by second marriage.— By its express terms the statute does not apply where there are children by the second marriage at the time of the husband's death, and in such case, on the death of the widow, the property which descended to her from the deceased husband goes equally to her children by such deceased husband and her children by a former marriage, to the exclusion of such husband's children by his former marriage. Heavenridge *v.* Nelson, 56 Ind. 90; Coffman *v.* Bartsch, 25 Ind. 201; McMakin *v.* Michaels, 23 Ind. 462; Smith *v.* Smith, 23 Ind. 202. And it is immaterial that such children die after the husband and before the widow. Williams *v.* Venner, 53 Ind. 396. The statute applies, however, although there was a child by the second marriage, where such child died before the husband. Rockhill *v.* Nelson, 24 Ind. 422; Ogle *v.* Stoops, 11 Ind. 380.

Existence and death of children by first marriage.— By the express terms of the statute it does not apply, where at the time of the husband's death there are no children by his previous marriage living; but the words "children alive" in the statute have been construed to mean "children or their descendants alive," so that the statute applies where there is living at the husband's death a grandchild, being a child of his child by the previous marriage. Scott *v.* Silvers, 64 Ind. 76. In order that the statute may continue to apply a child or descendant of a child by the previous marriage must also be alive at the death of the widow. If the children of the husband by his first marriage and their descendants, if any, die before the widow, the real estate which descended to her from the husband will, on her death intestate, go to her heirs the same as if she were a first wife, or she may devise or convey the same (Johnson *v.* Johnson, 153 Ind. 60, 54 N. E. 124; Byrum *v.* Henderson, 151 Ind. 102, 51 N. E. 94; Bateman *v.* Bennett, 31 Ind. App. 277, 67 N. E. 713); and a conveyance in the lifetime of a child of the deceased husband's first marriage will be valid as against her heirs, if such child dies before her, leaving no descendant (Byrum *v.* Henderson, 151 Ind. 102, 51 N. E. 94). Where a childless second wife conveys land inherited from her husband, whose child by a former marriage is living at the time of the conveyance, and the child dies before her death leaving no descendants the next of kin of such child do not inherit any interest in such land. Byrum *v.* Henderson, 151 Ind. 102, 51 N. E. 94.

Estate of widow.—Under the statute above referred to it was formerly held that a childless widow took a life-estate only, with remainder to the children of her deceased husband by his former wife. Chisham *v.* Way, 73 Ind. 362; Hendrix *v.* Sampson, 70 Ind. 350; Swain *v.* Hardin, 64 Ind. 85 (holding that as against the deceased husband's children by his first wife the surviving widow could claim on sale of the husband's land in partition proceedings only such portion of one third of the net proceeds of the sale as the value of her life-estate bore to the value of her entire estate in one third of the land); Hendrix *v.* McBeth, 61 Ind. 473, 28 Am. Rep.

which came to their parent from the deceased former spouse, their other

680; Russell *v.* Russell, 48 Ind. 456; Long *v.* Miller, 48 Ind. 145; Longlois *v.* Longlois, 48 Ind. 60; Louden *v.* James, 31 Ind. 69; Rockhill *v.* Nelson, 24 Ind. 422; Ogle *v.* Stoops, 11 Ind. 380; Martindale *v.* Martindale, 10 Ind. 566. But this view was overruled in 1881, and it was held that she took her share in fee simple, and that the child or children of the former marriage or their descendants had no interest whatever in such share during her lifetime, but only an expectancy to take the same as her forced heirs at her death. Utterback *v.* Terhune, 75 Ind. 363. See also to the same effect Johnson *v.* Johnson, 153 Ind. 60, 54 N. E. 124; Thompson *v.* Henry, 153 Ind. 56, 54 N. E. 109; Helt *v.* Helt, 152 Ind. 142, 52 N. E. 699; Byrum *v.* Henderson, 151 Ind. 102, 51 N. E. 94; Myers *v.* Boyd, 144 Ind. 496, 43 N. E. 567; Stephenson *v.* Boody, 139 Ind. 60, 38 N. E. 331; Haskett *v.* Maxey, 134 Ind. 182, 33 N. E. 358, 19 L. R. A. 379; Montgomery *v.* McCumber, 128 Ind. 374, 27 N. E. 1114; Habig *v.* Dodge, 127 Ind. 31, 25 N. E. 182; Gwaltney *v.* Gwaltney, 119 Ind. 144, 21 N. E. 552; Erwin *v.* Garner, 108 Ind. 488, 9 N. E. 417; Thorp *v.* Hanes, 107 Ind. 324, 6 N. E. 920; Bryan *v.* Uland, 101 Ind. 477, 1 N. E. 52; Flenner *v.* Travellers' Ins. Co., 89 Ind. 164; Flenner *v.* Benson, 89 Ind. 108; McClamrock *v.* Ferguson, 88 Ind. 208; Hendrix *v.* McBeth, 87 Ind. 287; Caywood *v.* Medsker, 84 Ind. 520; Slack *v.* Thacker, 84 Ind. 418; Armstrong *v.* Cavitt, 78 Ind. 476; Bateman *v.* Bennett, 31 Ind. App. 277, 67 N. E. 713. In the case of contracts or conveyances prior to the decision in 1881 in Utterback *v.* Terhune, 75 Ind. 363, that the widow took the fee and not merely a life-estate, and overruling the prior cases to the contrary, it was held that the rights of the parties were governed by the law as declared by the previous decisions. Thompson *v.* Henry, 153 Ind. 56, 54 N. E. 109; Byrum *v.* Henderson, 151 Ind. 102, 51 N. E. 94; Stephenson *v.* Boody, 139 Ind. 60, 38 N. E. 331; Haskett *v.* Maxey, 134 Ind. 182, 33 N. E. 358, 19 L. R. A. 379. But the time of the conveyance must be made to affirmatively appear, or the law as declared in the later cases will apply. Thompson *v.* Henry, 153 Ind. 56, 54 N. E. 109.

Effect of conveyances by stepchildren.— Nor were such children barred as forced heirs of the widow by a quitclaim deed made by them or their guardian during the widow's lifetime, on a conveyance of their "right, title and interest" merely, even though with full covenants of warranty. Johnson *v.* Johnson, 153 Ind. 60, 54 N. E. 124; Haskett *v.* Maxey, 134 Ind. 182, 33 N. E. 358, 19 L. R. A. 379; Montgomery *v.* McCumber, 128 Ind. 374, 27 N. E. 1114; Habig *v.* Dodge, 127 Ind. 31, 25 N. E. 182; Erwin *v.* Garner, 108 Ind. 488, 9 N. E. 417; Bryan *v.* Uland, 101 Ind. 477, 1 N. E. 52. Where one of the children of the husband by his first marriage executed a warranty deed to her expected interest in the widow's third, and died before the widow, it was held that such deed did not bind her children or estop them to claim as the forced heirs of the widow on the latter's death. Habig *v.* Dodge, 127 Ind. 31, 25 N. E. 182. But where a stepchild assumed to convey and warrant the title to a reversionary interest equal to the undivided one third of the real estate previously set off to the widow, it was held that the grantee acquired a title to a one-third interest in his land, subject to the estate of the widow, and the grantor and all claiming through him were estopped to assert the contrary. Habig *v.* Dodge, 127 Ind. 31, 25 N. E. 182.

Proceeds on joinder with stepchildren in conveyance.— Where the widow joined with the children of her deceased husband by a former marriage in a sale and conveyance of his real estate, it was held that she was entitled to receive her share of the proceeds unconditionally, independent of any interest the children might have therein on her death. Johnson *v.* Johnson, 153 Ind. 60, 54 N. E. 124.

Sale to pay deceased husband's debts.—The estate in fee which, upon the death of the widow, descends to the stepchildren as her forced heirs, is not subject to sale to pay the deceased husband's debts. Flenner *v.* Travellers' Ins. Co., 89 Ind. 164; Flenner *v.* Benson, 89 Ind. 108; McClamrock *v.* Ferguson, 88 Ind. 208; Caywood *v.* Medsker, 84 Ind. 520 [*distinguishing* Hendrix *v.* Sampson, 70 Ind. 350]; Armstrong *v.* Cavitt, 78 Ind. 476; Louden *v.* James, 31 Ind. 69.

Improvements placed on the land by the widow, or by a third person in possession under a conveyance by her taken with knowledge of the facts, inure to the benefit of the stepchildren on her death. Bryan *v.* Uland, 101 Ind. 477, 1 N. E. 52.

The statute of limitations does not begin to run against the stepchildren by the first wife until the death of the second wife. Haskett *v.* Maxey, 134 Ind. 182, 33 N. E. 358, 19 L. R. A. 379.

Indiana act of 1889.— In 1889 the statute above referred to was amended by declaring that the interest of the second or subsequent childless wife in the deceased husband's lands "shall only be a life estate, and the fee of the same shall at the death of such husband vest in such children [that is, the children of the husband by his former wife], subject only to the life estate of the widow." Rev. St. (1897) § 2695, being the act approved March 11, 1889. This act, however, was held void as being an attempt to amend the act of 1853 which had been repealed by the act of 1867, so that the former law remained in force. Helt *v.* Helt, 152 Ind. 142, 52 N. E. 699.

Action against widow to enjoin waste.— From the ruling that the widow took the fee under these statutes, and that the husband's children by his former marriage had no interest in the land during her lifetime, but merely an expectancy to take as her forced heirs, it followed that such children or their grantee could not maintain against the widow or her grantee an action to enjoin commis-

parent,[86] or by giving the survivor of the former marriage a life-estate or the usufruct only, in the property of the former spouse, with remainder to the children if any of such marriage,[87] or, although giving the survivor of the first marriage a certain share in fee, by restricting his or her power of alienation during a second marriage, and giving the property, on his or her death during the second marriage, to the children of the former marriage.[88] Statutes sometimes give to a

sion of waste. Thompson *v.* Henry, 153 Ind. 56, 54 N. E. 109; Gwaltney *v.* Gwaltney, 119 Ind. 144, 21 N. E. 552.

Effect of sale under order of court.— And it was held that such children were not bound or barred as forced heirs of the widow by the judgment of the court during her lifetime ordering the land or their supposed interest therein to be sold, and a sale and conveyance thereunder. Johnson *v.* Johnson, 153 Ind. 60, 54 N. E. 124; Erwin *v.* Garner, 108 Ind. 488, 9 N. E. 447; Flenner *v.* Travellers' Ins. Co., 89 Ind. 164; Miller *v.* Noble, 86 Ind. 527; Armstrong *v.* Cavitt, 78 Ind. 476.

Effect of partition.— Nor were such children barred as forced heirs of the widow by a judgment in a partition suit not involving the question of title, but merely setting apart to the widow a certain part of the deceased husband's land as her share. Thompson *v.* Henry, 153 Ind. 56, 54 N. E. 109; Stephenson *v.* Boody, 139 Ind. 60, 38 N. E. 331; Haskett *v.* Maxey, 134 Ind. 182, 33 N. E. 358, 19 L. R. A. 379; Habig *v.* Dodge, 127 Ind. 31, 21 N. E. 182; Thorp *v.* Hanes, 107 Ind. 324, 6 N. E. 920; Bryan *v.* Uland, 101 Ind. 477, 1 N. E. 52; Kenney *v.* Phillipy, 91 Ind. 511; Miller *v.* Noble, 86 Ind. 527; Utterback *v.* Terhune, 75 Ind. 363.

Indiana act of 1899.— In 1899 a statute (Acts (1899), pp. 131, 132) was enacted repealing all acts in conflict therewith and providing that "if a man die intestate leaving surviving him a second or other subsequent wife without children by him, but leaving a child or children or their descendants alive, by a previous wife, such surviving, childless, second or other subsequent wife, shall take only a life estate in the lands of her deceased husband, and the fee thereof shall at the death of such husband vest at once in such child or children, or the descendants of such as may be dead, subject only to the life estate of such widow." Subsequent sections of this act validate conveyances by the children of the husband by his former wife, made after his death and during the lifetime of the widow, and conveyances by the widow and such children or their guardians.

Forced heirs of surviving second wife see also *supra*, III, A, 5, b.

86. Ogle *v.* Stoops, 11 Ind. 380, where a statute provided that if a widow should marry a second time and die, leaving children by a former husband, all real estate held by her in virtue of her previous marriage shall go to such children. And see the other Indiana cases cited *infra*, note 88.

87. Cook *v.* Doremus, 10 La. Ann. 679; Le Blanc *v.* Landry, 7 Mart. N. S. (La.) 665. Under the present statute in Louisiana, where a wife dies leaving a child by a former marriage, and no child by the second marriage, the surviving husband has no right of usufruct with respect to her estate, whether paraphernal or in community. Emonot's Succession, 109 La. 359, 33 So. 368.

88. In Indiana, where a widow is given a certain portion of her deceased husband's real estate in fee simple (Rev. St. (1897) § 2691), it is provided that if a widow shall marry a second or any subsequent time, holding real estate in virtue of any previous marriage, and there is a child or children or their descendants alive by such marriage, she may not during such second or subsequent marriage, with or without the assent of her husband, alienate such real estate, unless the children of the previous marriage are of age and join in the conveyance; and if she shall die during such marriage, it shall go to such children, if there be any (Rev. St. (1897) § 2692). See also *infra*, IV, A, 9, e.

Estate taken by widow.— Under these provisions the widow takes a fee simple in such real estate, subject only to the restraint on her power of alienation in case of remarriage (Forgy *v.* Davenport, 146 Ind. 399, 45 N. E. 592; Schlemmer *v.* Rossler, 59 Ind. 326; Jackson *v.* Finch, 27 Ind. 316; Barnes *v.* Allen, 25 Ind. 222; Philpot *v.* Webb, 20 Ind. 509), and her second or subsequent marriage does not divest her title (Forgy *v.* Davenport, 146 Ind. 399, 45 N. E. 592; Small *v.* Roberts, 51 Ind. 281; Philpot *v.* Webb, 20 Ind. 509), the statute being a rule of descent and not a limitation of her estate (Jackson *v.* Finch, 27 Ind. 316).

Rights of children of first marriage.— If the widow dies before the second husband, the property goes to her children by the former husband to the exclusion of the second husband and of her children by him. Horlacher *v.* Brafford, 141 Ind. 528, 40 N. E. 1078; Teter *v.* Clayton, 71 Ind. 237; Edmondson *v.* Corn, 62 Ind. 17; Mathers *v.* Scott, 37 Ind. 303. The children of the first marriage, however, have no interest in the widow's share of real estate upon her remarriage until her death during the second marriage. Horlacher *v.* Brafford, 141 Ind. 528, 40 N. E. 1078, holding that where the widow during the second marriage attempted to sell and convey the land, there was no sale of property of a child of the deceased husband by a previous marriage which he could ratify on becoming of age.

Conveyance, mortgage, or sale on execution. —The statute prevents and renders void, where there are children by the first husband, either an absolute conveyance of such real estate by the widow during the second marriage or by her and her second husband (Horlacher *v.* Brafford, 141 Ind. 528, 40 N. E. 1078; Marsh

widow the property of her deceased husband which came to him by virtue of the marriage.[89]

10. Marital Portion Under Civil Law. The Louisiana statute,[90] which is based upon the civil law, provides that when the wife has not brought any dowry,[91] or when what she brought as a dowry is inconsiderable with respect to the condition of the husband, if either the husband or the wife die rich, leaving the survivor in necessitous circumstances,[92] the latter has the right to take out of the succession of

v. Thompson, 102 Ind. 272, 1 N. E. 630; Connecticut Mut. L. Ins. Co. *v.* Athon, 78 Ind. 10; Avery *v.* Akins, 74 Ind. 283; Sebrell *v.* Hughes, 72 Ind. 186; Edmondson *v.* Corn, 62 Ind. 17; Griner *v.* Butler, 61 Ind. 362, 28 Am. Rep. 675; Mattox *v.* Hightshue, 39 Ind. 95; Knight *v.* McDonald, 37 Ind. 463), or a mortgage (McCullough *v.* Davis, 108 Ind. 292, 9 N. E. 276; Ætna L. Ins. Co. *v.* Buck, 108 Ind. 174, 9 N. E. 153; Bowers *v.* Van Winkle, 41 Ind. 432; Vinnedge *v.* Shaffer, 35 Ind. 341), or a sale on execution against her (Miller *v.* Noble, 86 Ind. 527; Smith *v.* Beard, 73 Ind. 159; Schlemmer *v.* Rossler, 59 Ind. 326); but it does not prevent a widow from conveying land which came to her from her husband where it is conveyed before her second marriage, and if she does so, although without consideration and without surrendering possession, even after an engagement to remarry, and afterward takes a reconveyance, the land is no longer within the statute (Nesbitt *v.* Trindle, 64 Ind. 183. And see Swain *v.* Hardin, 64 Ind. 85; Piper *v.* May, 51 Ind. 283; Small *v.* Roberts, 51 Ind. 281).

Direction as to particular land to be sold on execution.— The statute does not prevent a widow who marries a second time from directing which of two pieces of land shall be sold on execution to pay a judgment against the first husband, which must be paid by the sale, independent of her consent, of one or the other. Blackleach *v.* Harvey, 14 Ind. 564.

Lease.— Nor does the statute prevent her from leasing such real estate during her natural life or for a term of years. Forgy *v.* Davenport, 146 Ind. 399, 45 N. E. 592.

Sale in proceedings for partition.— Nor does it prevent the court from directing a sale of such real estate in proceedings for partition (Klinesmith *v.* Socwell, 100 Ind. 589; Small *v.* Roberts, 51 Ind. 281; Finch *v.* Jackson, 30 Ind. 387), and the widow's share of the proceeds of such a sale must be paid to her unconditionally and not invested (Klinesmith *v.* Socwell, 100 Ind. 589; Small *v.* Roberts, 51 Ind. 281 [*qualifying* Finch *v.* Jackson, 30 Ind. 387]).

Effect of partition by actual division of land.— A judgment in partition between the widow and the children by the former marriage, which allots to her in fee simple a part of the lands of the former husband to hold "free from any and all claim or demand whatever" of the children, operates only upon existing rights, and will not estop the children from claiming the land on her death. Avery *v.* Akins, 74 Ind. 283.

Cessation of second marriage.— The suspension of the widow's power of alienation ceases if the second or subsequent marriage ceases for any cause during her life. Forgy *v.* Davenport, 146 Ind. 399, 45 N. E. 592; Piper *v.* May, 51 Ind. 283. And if she has children by the second or subsequent marriage and dies unmarried, leaving children by both marriages, the land received in virtue of the first marriage will go to all the children alike. Teter *v.* Clayton, 71 Ind. 237. And see Forgy *v.* Davenport, 146 Ind. 399, 45 N. E. 592; Heavenridge *v.* Nelson, 56 Ind. 90.

On her death, either during the existence of the second marriage or afterward, the property is liable for her debts. Philpot *v.* Webb, 20 Ind. 509.

Real estate not acquired in virtue of former marriage.— The statute under consideration by its terms applies to such real estate only as the widow acquires in virtue of the previous marriage, and does not apply therefore to land which she acquires by purchase, as in the case of land of her deceased husband purchased by her at a commissioner's sale under partition proceedings (Spencer *v.* McGonagle, 107 Ind. 410, 8 N. E. 266; McMakin *v.* Michaels, 23 Ind. 462), or land devised to her by her deceased husband in fee in lieu of her interest in his estate (Allen *v.* Bland, 134 Ind. 78, 33 N. E. 774).

Personal property.—The statute has no application to personal property. Sigler *v.* Hooker, 30 Ind. 386; Pickens *v.* Hill, 30 Ind. 269.

89. See Griffith *v.* Walker, 3 Mo. 191, holding that under a statute giving a widow property of her husband which came to him from her by virtue of the marriage only where he leaves no children or other descendants capable of inheriting, she is not entitled thereto where he leaves a child or children by a former wife, as the words "capable of inheriting" do not mean capable of inheriting from the wife.

90. La. Rev. Civ. Code, art. 2382.

91. The right to claim the marital portion exists as well in those cases where there was no marriage contract as in those in which no dowry is stipulated in the marriage contract. Dunbar *v.* Dunbar, 5 La. Ann. 158.

92. Necessitous circumstances.— The survivor is entitled to the marital portion only where the deceased died rich and the survivor was left thereby in necessitous circumstances, taking into consideration in all cases not only the amount of property left by the deceased and that owned by the survivor, but also the condition in life of the parties and their mode of life during the marriage. Dupuy *v.* Dupuy, 52 La. Ann. 869, 27 So. 287; Leppelman's Succession, 30 La. Ann. 468; Connor *v.* Con-

the deceased what is called the "marital portion;"[93] that is, the fourth of the succession in full property, if there be no children,[94] and the same portion in usufruct only, when there are but three or a smaller number of children;[95] and if there be more than three children, the survivor, whether husband or wife,

nor, 10 La. Ann. 440; Armstrong *v.* Steeber, 3 La. Ann. 713; Duriaux *v.* Doiron, 9 Rob. (La.) 101; Harrell *v.* Harrell, 17 La. 374; Mason *v.* Mason, 12 La. 589; Melançon *v.* His Executor, 6 La. 105. "The terms 'necessitous circumstances,'" as applied to a widow, "are used relatively to the fortune of her husband and to the condition in which she lived during the marriage." Smith *v.* Smith, 43 La. Ann. 1140, 1151, 10 So. 248. If the husband leaves the wife "an annuity sufficient to enable her to live in the same style as to comfort and elegance as persons of her rank live in, then she is not left in necessitous circumstances, so if she have the means of doing so, independently of her husband." Melançon *v.* His Executor, 6 La. 105, 111. See also Rogge's Succession, 50 La. Ann. 1220, 23 So. 933; Justus' Succession, 44 La. Ann. 721, 11 So. 95; Leppelman's Succession, 30 La. Ann. 468, 471 (where it is said: "Rich is a relative term. Property which would make a person in one condition of life rich, would be inadequate to supply the wants, albeit they are artificial, of one in another condition of life"); Gee *v.* Thompson, 11 La. Ann. 657; Derouen's Succession, 10 La. Ann. 675; Dunbar *v.* Dunbar, 5 La. Ann. 158; Fortier's Succession, 3 La. Ann. 104.

A decree of separation from bed and board does not bar a surviving wife's right to the marital portion of her deceased husband's estate. Gee *v.* Thompson, 11 La. Ann. 657. See also Liddell's Succession, 22 La. Ann. 9.

Abandonment and adultery.— But a wife who has abandoned her husband and is living in adultery at the time of his death cannot be said to have been left in necessitous circumstances, and cannot claim the marital portion. Armstrong *v.* Steeber, 3 La. Ann. 713.

Mere immodest conduct is not enough to bar the surviving wife's right. Leppelman's Succession, 30 La. Ann. 468.

Long separation of the parties may preclude the right to the marital portion. Rogge's Succession, 50 La. Ann. 1220, 23 So. 933; Pickens *v.* Gillam, 43 La. Ann. 350, 8 So. 928.

93. See Dupuy *v.* Dupuy, 52 La. Ann. 869, 27 So. 287; Connor *v.* Connor, 10 La. Ann. 440.

Putative marriage.— The right to the marital portion is one of the civil effects of marriage, and may therefore be claimed by a surviving spouse, although the marriage was only putative. La. Rev. Civ. Code, art. 117; Smith *v.* Smith, 43 La. Ann. 1140, 10 So. 248.

Marriage and domicile in another state.— The right to the marital portion results from the marriage, no matter where contracted. Therefore a widow is entitled to the marital portion out of the husband's real estate, although she married, and she and the husband resided, and he died, in another state. Abercrombie *v.* Caffray, 3 Mart. N. S. (La.) 1. See also Connor *v.* Connor, 10 La. Ann. 440; Dunbar *v.* Dunbar, 5 La. Ann. 158.

A marriage contract stipulating that in case of the death of either party the property should return to the estate of the person to whom it belonged does not prevent a widow in necessitous circumstances from claiming her marital fourth. Doucet's Succession, 13 La. Ann. 613.

94. Where a husband dies rich and without children, leaving his wife in necessitous circumstances, she may claim one fourth of all the property left by him in this state, independently of her right, as surviving spouse, to any portion of the property left by him in another state. Foster *v.* Ferguson, 1 La. Ann. 262. And see Connor *v.* Connor, 10 La. Ann. 440.

Right inchoate until accepted or claimed.— The right of a surviving husband or wife to the marital fourth in full property, where there are no children, is a personal and optional right, which remains inchoate and does not vest absolutely until accepted or claimed. It is not an inheritance and the survivor is not an heir. Justus' Succession, 44 La. Ann. 721, 11 So. 95. See also Vives' Succession, 35 La. Ann. 371; Durkin's Succession, 30 La. Ann. 669; Robertson's Succession, 28 La. Ann. 832.

Descent to heirs.— It follows that such right does not pass to the survivor's heirs where he or she has not urged it. Justus' Succession, 44 La. Ann. 721, 11 So. 95; Durkin's Succession, 30 La. Ann. 669; Robertson's Succession, 28 La. Ann. 832. But where a surviving husband claims his marital fourth in full property and then dies, the prosecution of the claim may be continued by his heirs. Piffet's Succession, 39 La. Ann. 556, 2 So. 210.

Prematurity of claim.—A survivor's claim of the marital portion is premature if made before the succession has reached a point in its settlement at which it may be shown that the deceased died rich and that the survivor is in necessitous circumstances. Vasseur *v.* Dupre, 8 La. Ann. 488; Duriaux *v.* Doiron, 9 Rob. (La.) 101; Harrell *v.* Harrell, 17 La. 374. *Compare* Shaw *v.* Reneau, 10 La. Ann. 190. But it is not premature if made after presentation of a final account of administration by the executor, although circumstances subsequently occurring may prevent an absolute decree fixing the precise amount. Piffet's Succession, 39 La. Ann. 556, 2 So. 210. See also Leppelman's Succession, 30 La. Ann. 468, holding that a widow's claim to the marital portion might be raised and passed upon in her opposition to the executor's account.

95. The widow takes the usufruct only where the husband leaves a child, although by a former marriage. Abercrombie *v.* Caffray, 3 Mart. N. S. (La.) 1.

shall receive only a child's share in usufruct,[96] and he or she is bound to include in this portion what has been left to him or her as a legacy by the husband or wife who died first.[97] Formerly the civil law was in force in Texas.[98]

11. Estoppel, Waiver, or Release of Right — a. In General. Where a wife is legally incompetent to contract with her husband she cannot be estopped by a contract made with him to release her claims on his property, or by her conveyances in pursuance of such a contract.[99] And even where she is competent to contract with him, a mere release by her to him of her right, title, and interest in certain property in dispute, although for a valuable consideration, is no bar to her right to a distributive share in his estate.[1] A waiver by a wife by a contract of all claims she might have as widow by or under the laws of one state will not bar her subsequent claim for allowance and distributive share in another state in which the parties subsequently became domiciled, unless the identity of the laws of the two states governing her rights affirmatively appears from the record.[2] A husband's right to inherit certain property at the wife's death may be waived by express agreement,[3] but ordinarily a release by a husband of his marital rights

96. The surviving spouse cannot in any case take from the succession of the deceased spouse more than a child's share. When the surviving spouse has already inherited a child's share he or she cannot take another's share as a marital portion. Derouen's Succession, 10 La. Am. 675.

97. **Legacies must be included in portion.** Dupuy *v.* Dupuy, 52 La. Ann. 869, 27 So. 287; Melançon *v.* His Executor, 6 La. 105. If the survivor is in necessitous circumstances independently of the legacies left him, he is not debarred from claiming the marital portion, but is merely required to include the legacies in his portion. Piffet's Succession, 39 La. Ann. 556, 2 So. 210.

An indebtedness which the survivor owed the deceased, and from which he or she has been released and discharged by the will, is not a legacy within the meaning of the statute, and is not to be deducted from the survivor's marital portion. Piffet's Succession, 39 La. Ann. 556, 2 So. 210.

98. See Babb *v.* Carroll, 21 Tex. 765. And see Boone *v.* Hulsey, 71 Tex. 176, 9 S. W. 531.

99. Pinkham *v.* Pinkham, 95 Me. 71, 49 Atl. 48, 85 Am. St. Rep. 392; Whitney *v.* Closson, 138 Mass. 49. See Husband and Wife.

"Pecuniary provision" under Maine statute.— A release by the husband to the wife of his prospective claims in her estate at her decease is not a "pecuniary provision" for her within the Maine statute (Rev. St. c. 103, §§ 8, 9), and her release to him during coverture, in consideration thereof, of her right and interest by descent in his real estate is invalid. Pinkham *v.* Pinkham, 95 Me. 71, 49 Atl. 48, 85 Am. St. Rep. 392.

1. Newton *v.* Truesdale, 69 N. H. 634, 45 Atl. 646.

Contract to facilitate divorce.— Where a husband through unfair advantage and unwarranted coercion secured the signature of his wife to a contract to facilitate the procuring of a divorce, which he desired, and by such contract succeeded in gaining her consent to take as her share a fractional part of his property, it was held that the contract was void as against public policy, and that it did not bar the wife from her right of inheritance in the property of the husband on his death. Palmer *v.* Palmer, 26 Utah 31, 72 Pac. 3, 61 L. R. A. 641.

Waiver of right to administer only.—Where a county judge refused to appoint a certain person administrator of a decedent's estate without a waiver of the widow's right to appointment, and she thereupon addressed a communication to the judge which recited that she waived her right to administer, and requested the appointment of such person, and added, "I also wish to receive a child's part in the division of said estate," it was held that the latter provision did not constitute a relinquishment of the right to the distributive share of decedent's estate, which she would otherwise have been entitled to. Evans *v.* Evans, 74 S. W. 224, 24 Ky. L. Rep. 2421.

Ignorance and undue influence.— In a Kentucky case it appeared that shortly after her husband's death, a widow, who was frail in health, unable to read or write, and in ignorance of her rights, signed a paper by which she relinquished her rights as widow in consideration of a child's share, which amounted to one seventh of the surplus personalty, and which was less than three thousand dollars, and one seventh of certain real estate. As widow she would have been entitled to one half of the surplus personalty, amounting to about ten thousand dollars, and to a life-estate in one third of the land, which was of more value than one seventh thereof in fee. The paper was intended to operate as a family settlement, but one of the heirs refused to sign the same. Under these circumstances it was held that the widow was entitled to the cancellation of such paper, and to recover her share as widow. Evans *v.* Evans, 74 S. W. 224, 24 Ky. L. Rep. 2421.

2. Knapp *v.* Knapp, 95 Mich. 474, 55 N. W. 353.

3. Leach *v.* Rains, 149 Ind. 152, 48 N. E. 858. See Husband and Wife. A written

over his wife's separate property affects only his rights during coverture and not those as survivor.[4] The same effect will be given to the husband's relinquishment of all claim and title in the wife's property that might vest in him under the law by reason of the marriage, and if the wife dies intestate and without descendants, the surviving husband to the exclusion of the next of kin may claim the whole of her estate as sole distributee.[5]

b. Relinquishment of Right of Dower. A relinquishment by a wife of all right of dower in or out of an estate which she had or could in any way have at law or in equity will not exclude her from a share in the personal estate of her husband under the statute of distribution;[6] and it makes no difference that the release of dower right is made for full consideration, and that the personal estate is augmented by the residue of the price of the land.[7]

c. Consent That Spouse May Devise. The consent by a husband that his wife may devise her realty to her children by a former marriage does not divest his claim to marital rights in the property after her death.[8]

d. Release of Surplus by Widow in Compromise of Suit. Where a widow in her own behalf and as guardian of her children compromises a suit brought by creditors and agrees to the payment of part of their claim out of a surplus once ordered to be set apart for her and her children, and releases the administrator to that amount, she will be estopped by such release.[9]

e. Receipt of Proceeds of Sale of Husband's Realty by Widow. The mere receipt by a widow of part of the proceeds of a sale of her interest in her husband's real estate as part of the distributive share does not estop her from asserting her right as widow in the land.[10]

f. Renunciation of Inheritance by Wife. Where a statute permitted a married woman to renounce her inheritance by deed in which her husband joined, it was held that the word "inheritance" included any descendable or inheritable estate, although it may have come to her by devise,[11] and that such a relinquishment, if the deeds were properly executed, would bar the wife's inheritance if recorded within the joint lifetime of the husband and wife, although not within the time prescribed by the statute.[12]

g. Agreement by Survivor Not to Take Against Will. Where a husband not mentioned in his wife's will signs an agreement with the legatees not to take against the will and transfers to them all his interest in his wife's estate, such agreement operates to pass to them a share in a fund which subsequently becomes payable to her estate.[13]

h. Failure to Object to Probate of Will. Where a distributive share in his deceased wife's estate vests by statute in the husband on her death testate with no provisions for him in her will, his failure to object to the probate of the will or to claim such share before being entitled thereto is no abandonment of his rights.[14]

statement by the husband that he resigns all right, title, and claim to his wife's personalty in the event of her death, being a declaration of intention only, and not a testamentary paper, gift, contract, release, or declaration of trust, will not defeat his right nor those of his legatees. Bair's Estate, 2 Lanc. L. Rev. 225.

4. Stewart *v.* Stewart, 7 Johns. Ch. (N. Y.) 229. See *supra*, III, B, 6, d.

5. Beard *v.* Beard, 22 W. Va. 130. See also *supra*, III, B, 6, d.

6. Ellmaker *v.* Ellmaker, 4 Watts (Pa.) 89.

7. Barber *v.* Hite, 39 Ohio St. 185.

8. Roach *v.* White, 94 Ind. 510.

9. Robbins *v.* Mylin, 34 N. J. Eq. 205.

10. Compton *v.* Pruitt, 88 Ind. 171.

11. Kottman *v.* Ayer, 1 Strobh. (S. C.) 552.

12. Campbell *v.* Moon, 16 S. C. 107. As to the acknowledgment and certificate of the wife's renunciation of her inheritance under the South Carolina statute and the recording of the same see also Williams *v.* Cudd, 26 S. C. 213, 2 S. E. 14, 4 Am. St. Rep. 714; Wingo *v.* Parker, 19 S. C. 9; McLaurin *v.* Wilson, 16 S. C. 402; Bruce *v.* Perry, 11 Rich. (S. C.) 121; Kottman *v.* Ayer, 1 Strobh. (S. C.) 552.

13. *In re* Irwin, 17 Lanc. L. Rev. 409.

14. Hayes *v.* Seavey, 69 N. H. 308, 46 Atl. 189 [*citing* Reed *v.* Blaisdell, 16 N. H. 194, 41 Am. Dec. 722; Cutter *v.* Butler, 25 N. H. 343, 57 Am. Dec. 330; Shute *v.* Sargent, 67 N. H. 305, 307, 36 Atl. 282].

i. Acceptance of Settlement in Lieu of Dower. Although a postnuptial settlement in lieu of dower, maintenance, and distribution be voidable at the election of the wife, yet if she claims dower and distribution after the death of her husband she must renounce the benefit of the deed.[15]

j. Effect of Agreement For Separation.[16] Where a wife, on an agreement for separation reasonable in terms and based on sufficient consideration, agrees to discharge her husband, his heirs, executors, etc., from all liability to her other than that assumed by the agreement, and such agreement is carried into effect, the wife after the husband's death is held in some jurisdictions to be barred from claiming any right in his estate,[17] especially if the agreement provides for the wife as ample maintenance as would have been awarded her by a court.[18] Elsewhere the contrary has been held on the ground of incompetency of a married woman to bind herself by such contracts, or on the ground that such contracts are illegal.[19] A mere agreement between husband and wife in contemplation of divorce, by which specific articles of property are to be held by each separately, is no bar to the rights of the surviving husband, if no divorce has in fact been granted.[20]

k. Effect of Divorce.[21] A woman who has been divorced *a vinculo matrimonii*, even where the fault was entirely the husband's, is not in any sense his widow, and in the absence of a statute can claim no distributive share of his estate, at least in the jurisdiction where the divorce was granted;[22] and the rule is usually the same where the divorce was granted in another jurisdiction.[23] So ordinarily a divorced husband is barred as to the property of the wife. But in New York a divorce in another state obtained by the wife is under certain circumstances not recognized, and the husband is not barred at her death from his distributive share in the wife's property within the state.[24] When by statute the wife's right of dower is preserved when she is divorced for the fault of the husband, such statute does not also entitle her to a widow's share or a right in his personal estate at his death.[25] A divorce *a mensa et thoro* merely does not bar a wife's rights in her husband's property on his death.[26]

l. Waiver by Delay in Making Election. An unreasonable delay on the part of the surviving wife in electing between her rights either to retain the occupancy of the homestead or to take one third of the real estate in fee has been held in Iowa to amount to a waiver of her right to take a distributive share.[27]

12. Forfeiture of Rights[28] **— a. Abandonment, Adultery, and Non-Support.** In the absence of statutory provision to the contrary, the fact that a wife had

15. Parham *v.* Parham, 6 Humphr. (Tenn.) 287.

16. **Separation agreements** see, generally, Husband and Wife.

17. Scott's Estate, 147 Pa. St. 102, 23 Atl. 214; Dillenger's Appeal, 35 Pa. St. 357.

18. Loud *v.* Loud, 4 Bush (Ky.) 453.

19. Watkins *v.* Watkins, 7 Yerg. (Tenn.) 283. See also Foote *v.* Nickerson, 70 N. H. 496, 48 Atl. 1088, 54 L. R. A. 554, holding that a contract between husband and wife, which provided that they should live separately, and which released their claims on each other's property before and after death, was illegal and void as to the separation, and therefore, being an indivisible contract, was entirely void. And see, generally, Husband and Wife.

20. Willis *v.* Jones, 42 Md. 422.

21. **Effect of divorce** see, generally, Divorce.

22. *In re* Ensign, 103 N. Y. 284, 8 N. E. 544, 57 Am. Rep. 717 [*affirming* 37 Hun 152].

23. Boyles *v.* Latham, 61 Iowa 174, 16 N. W. 68; Marvin *v.* Marvin, 59 Iowa 699, 13 N. W. 851. The divorce and remarriage of a mother before the death of her daughter intestate and without other heirs has been held to prevent her from claiming the proceeds of an insurance policy on her former husband's life, payable to the daughter, the husband having died after the daughter, as the divorce annulled the right of survivorship between husband and wife. Hecht's Estate, 9 Pa. Co. Ct. 564.

24. Matter of Degaramo, 86 Hun (N. Y.) 390, 33 N. Y. Suppl. 502.

25. Kent *v.* McCann, 52 Ill. App. 305; Weindel *v.* Weindel, 126 Mo. 640, 29 N. W. 715.

26. Hokamp *v.* Hagaman, 36 Md. 511.

27. Cunningham *v.* Gamble, 57 Iowa 46, 10 N. W. 278.

Right of election see *infra*, III, B, 13.

28. **Forfeiture of marital portion under civil law** see *supra*, III, B, 10.

Forfeiture of dower see Dower.

Forfeiture of right to widow's allowance see Executors and Administrators.

Murder of ancestor by heir see *supra*, III, A, 14.

abandoned or deserted her husband or even the fact that she abandoned him and lived in adultery does not bar her rights as surviving widow in his estate,[29] except under an early English statute as to dower.[30] And the same is true of a surviving husband's rights in his deceased wife's estate.[31] In some states, however, statutes declare a forfeiture of a surviving wife's rights in her husband's estate where she has left him and been living in adultery;[32] and there are statutes forfeiting a husband's rights in his deceased wife's property, because of his desertion of her, or his wilful neglect or refusal to support her, etc.[33]

29. Nolen *v.* Doss, 133 Ala. 259, 31 So. 969; Turner *v.* Cole, 24 Ala. 364; Gates *v.* Walker, 8 La. Ann. 277; Nye's Appeal, 126 Pa. St. 341, 17 Atl. 618, 12 Am. St. Rep. 873; Holbrook's Estate, 20 Wkly. Notes Cas. (Pa.) 79; Adose *v.* Fossit, 1 Pearson (Pa.) 304; Stegall *v.* Stegall, 22 Fed. Cas. No. 13,351, 2 Brock. 256.

Contra, where a wife without cause deserted her husband and for years lived in adultery with another man, and afterward, on learning that a divorce had been obtained by her deserted husband, caused a marriage ceremony to be performed with her paramour, and continued to cohabit with him, and then, on her husband's death, sought to attack his divorce decree as void for want of proper service, and to claim his estate as surviving widow. Arthur *v.* Israel, 15 Colo. 147, 25 Pac. 81, 22 Am. St. Rep. 381, 10 L. R. A. 693. And see Israel *v.* Arthur, 18 Colo. 158, 32 Pac. 68.

30. See DOWER.

31. Vreeland *v.* Ryno, 26 N. J. Eq. 160.

32. See Owen *v.* Owen, 57 Ind. 291 (holding that the statute was not repealed by subsequent acts); Goodwin *v.* Owen, 55 Ind. 243; Gaylor *v.* McHenry, 15 Ind. 383; Hoyt *v.* Davis, 21 Mo. App. 235 (holding that the personal estate of a deceased husband given to the widow by statute was dower within a statute barring dower in case of abandonment and adultery); Drinkhouse's Estate, 11 Pa. Co. Ct. 96, 29 Wkly. Notes Cas. (Pa.) 35.

Abandonment and "living in adultery" at time of husband's death.— A statute providing that a wife shall not share in her husband's estate if she shall have left him and shall be living at the time of his death in adultery does not apply where she has been guilty of a single act of adultery only, but if the single act was committed under circumstances showing a deep degree of abandonment, such fact may, with the other circumstances of the case, be submitted to the jury to enable them to determine as to her course of life at the time of her husband's death. Gaylor *v.* McHenry, 15 Ind. 383. Habitual prostitution is "living in adultery" within the meaning of the statute. Goodwin *v.* Owen, 55 Ind. 243. Such a statute does not apply to a wife who has been abandoned by her husband, and who has thereafter been guilty of adultery, but not for several years immediately preceding his death. Zeigler *v.* Mize, 132 Ind. 403, 31 N. E. 945. In order to bar her rights two things must concur: First, she must have left her husband, and second, she must have been living in adultery at the time of his death. Shaffer *v.* Richardson, 27 Ind. 122.

Prior desertion by husband.— The Missouri statute barring dower (held to include also the widow's share of personalty) in case the wife leaves her husband and lives with an adulterer does not apply where a wife, after her husband's desertion of her, and his pretended marriage with another, goes away and lives with an adulterer. Hoyt *v.* Davis, 21 Mo. App. 235. See also Payne *v.* Dotson, 81 Mo. 145, 51 Am. Rep. 225; McAlister *v.* Novenger, 54 Mo. 251.

Condonation by husband.— Desertion and adultery by the wife if condoned by the husband will not deprive her of the right to share in his estate, and a renewal of marital relations by the husband will constitute such condonation. Drinkhouse's Estate, 11 Pa. Co. Ct. 96, 29 Wkly. Notes Cas. (Pa.) 35.

33. **The New Hampshire statute** (Laws (1879), c. 37), providing that a husband should not be entitled to an "estate by the curtesy," in any lands and tenements of his deceased wife, nor to any portion of her personal property "if he shall have willingly abandoned and absented himself from the deceased, or wilfully neglected to support and maintain her, or shall not have been heard from, in consequence of his own neglect, for the term of three years next preceding her death," related merely to the husband's estate by the curtesy in her real property and his rights in her personal property, and did not apply to the estate in fee in real property given by Gen. Laws, c. 202, § 16, to a husband where the wife dies without issue, and the husband has no estate by the curtesy. Martin *v.* Swanton, 65 N. H. 10, 18 Atl. 170. The present statute, however, is broader and declares that under such circumstances the husband "shall not be entitled to any interest or portion in her estate, real or personal, except such as she may have given to him in her will." Pub. St. c. 195, § 18.

Adultery and abandonment.— Under this statute mere adultery on the part of the husband does not forfeit his rights; nor does the fact that he lived in adultery for many years show an abandonment as a matter of law, but it is evidence tending to prove his intention to abandon. Clark *v.* Clement, 71 N. H. 5, 51 Atl. 256, holding also that the facts that the wife corresponded with the husband after knowing of his adultery, visited him at his home, and never applied for a divorce, were competent evidence on the question of abandonment.

b. Remarriage in Mistaken Belief That Spouse Is Dead. Where a woman who has been deserted by her husband remarries in the belief that he is dead, when in fact he is living, she is not thereby estopped on his death from electing to take against his will as his widow.[34]

13. Election — a. Right of Election in General.[35] In many states the statutes give a widow the right to elect between dower and a certain distributive share, and in some states a right of election is given a surviving husband. The statutes vary in the different states.[36] In Illinois if a husband or wife dies testate, leaving no child or descendants of a child, the surviving husband or wife may elect to take, in lieu of dower and of personal estate to which he or she may be entitled with such dower, absolutely, and in his or her own right, one half of all real and personal estate after payment of debts.[37] In Missouri, where the husband dies

Separation by agreement.— This statute does not apply where husband and wife agreed to live apart for a number of years, and there is no evidence that the wife ever revoked her agreement or objected to the separation, for there is in such case no abandonment. Clark *v.* Clement, 71 N. H. 5, 51 Atl. 256. See also Foote *v.* Nickerson, 70 N. H. 496, 48 Atl. 1088, 54 L. R. A. 554.

Under the Pennsylvania statute forfeiting a husband's right to his deceased wife's personal property, where from "drunkenness, profligacy, or other cause" the husband "shall neglect or refuse to provide for his wife, or shall desert her," a husband does not forfeit his right by reason of drunkenness or debauchery unless there is also proof of neglect or refusal to support the wife, or of desertion. Cremers' Estate, 12 Phila. (Pa.) 153; Hilker's Estate, 5 Pa. Co. Ct. 142, 22 Wkly. Notes Cas. (Pa.) 148. The statute applies, however, where by reason of the husband's drunkenness or neglect the wife is compelled to labor and support herself and family by her labor. Hilker's Estate, 5 Pa. Co. Ct. 142, 22 Wkly. Notes Cas. (Pa.) 148. And it applies to a case of wilful desertion by a husband for the prescribed period, although he has contributed to his wife's support under an order of court entered against him either with or without his consent. Birchard's Estate, 1 Pa. Dist. 185, 11 Pa. Co. Ct. 234 [*affirmed* in 154 Pa. St. 89, 25 Atl. 1060], holding also that a bond executed by the husband to the commonwealth in pursuance of such order of the court, in which the fact of his desertion is distinctly set forth, is sufficient evidence to support a finding by an auditor that there was such a wilful desertion as to bar the husband's claim. Where a husband left his wife surreptitiously, refused her request to return to him, sent no money to pay her expense in traveling to him, made no preparation to receive her in his new place of abode, and for twenty-one years prior to her death neglected to contribute to her support, it was held that he was not entitled to participate in the distribution of her estate. *In re* White, 188 Pa. St. 633, 41 Atl. 742.

If a husband compels his wife to leave him by failing to provide for her support, this amounts to an abandonment of her within the meaning of such statutes. High *v.* Bailey, 107 N. C. 70, 12 S. E. 45, under N. C. Code, § 1482.

34. Willis *v.* Jones, 42 Md. 422.

35. Election to take under or against will see WILLS.

Determination of distributive share.— Where a widow dissented to a will of her deceased husband and elected to take her distributive share, it was held that her share of the personal estate was to be determined by deducting the debts and expenses of administration from the total value of the personalty, exclusive of specific legacies, and paying to her one half of the remainder, less the amount paid for her year's support. Baptist Female University *v.* Borden, 132 N. C. 476, 44 S. E. 47, 1007.

Election between homestead and distributive share see *infra*, III, B, 13, d, (II). And see HOMESTEADS.

36. *Colorado.*— Crandall *v.* Sterling Coal Min. Co., 1 Colo. 106.

Georgia.— Truett *v.* Funderburk, 93 Ga. 686, 20 S. E. 260; Nosworthy *v.* Blizzard, 53 Ga. 668.

Illinois.— Scheible *v.* Rinck, 195 Ill. 636, 63 N. E. 497; Sturgis *v.* Ewing, 18 Ill. 176.

Iowa.— Conn *v.* Conn, 58 Iowa 747, 13 N. W. 51.

Massachusetts.— Mathews *v.* Mathews, 141 Mass. 511, 6 N. E. 776.

Missouri.— Brawford *v.* Wolfe, 103 Mo. 391, 15 S. W. 426; Welch *v.* Anderson, 28 Mo. 293.

New Hampshire.— Hunkins *v.* Hunkins, 65 N. H. 95, 18 Atl. 655.

South Carolina.— Glover *v.* Glover, 45 S. C. 51, 22 S. E. 739; Douglass *v.* Clarke, 4 Desauss. 143; Gray *v.* Givens, 2 Hill Eq. 511.

See 16 Cent. Dig. tit. "Descent and Distribution," § 194 *et seq.*

There can be no election by a widow between rights conferred by statute, unless the statute provides therefor. Hutchings *v.* Davis, 68 Ohio St. 160, 67 N. E. 251.

37. See Scheible *v.* Rinck, 195 Ill. 636, 63 N. E. 497, holding that this provision does not apply to a surviving husband who has not renounced the provision made in his wife's will within one year after probate

without any child or other descendants capable of inheriting, the widow is given the right to elect to take in fee one half of his real and personal property in lieu of dower. Under the statute ancestral or collateral kindred are not descendants.[38] The widow's right to such election cannot be defeated by assailing the validity of the administrator's appointment, when such appointment is within the apparent jurisdiction of the probate court.[39] Since a widow has no dower interest in land of the husband in which she has been given a life-estate under a marriage contract, she cannot elect to take absolutely a child's part in lieu of dower therein.[40] In Maine a widow may waive a "pecuniary provision" made for her after marriage and save her right and interest by descent.[41]

b. Necessity of Election. Where the statute gives the widow the right to elect to take a certain share of the husband's estate as an alternative to other provision, but requires her to make such election within a specified time, she may by failing to make election as required forfeit the right altogether.[42] It follows from her right to such share being dependent on her election that she takes no interest in land transmissible to her heirs or devisees in case of her failure to make it.[43] A recent Georgia decision goes so far as to deny the right of dower also when the widow fails to apply therefor within the time prescribed by law, although she has already failed duly to elect to take a child's part, the result being that she has no leviable interest in the realty whatever.[44] In Missouri it is held that the widow's right to her statutory portion of personalty is absolute and requires no election on her part to confirm it;[45] but as to realty the rule seems to be similar to that stated above, and the widow who fails to make the election prescribed by the statute is given dower and deprived of her rights under an alternative provision.[46] In South Carolina, although it was held that the husband might be forced to elect between his right of curtesy in his deceased wife's land and his claim under the statute of distribution,[47] the representatives of the widow of an intestate, after her death without having claimed dower, were held in an early case entitled to the benefit of the statutory provision in lieu thereof.[48] Where a statute entitles a husband to a distributive share in his wife's estate in the absence of provision for him on her part by will, his right becomes absolute on her death without having made such provision for him, and requires of course no waiver on his part under another statute requiring a waiver of provisions made for him in the wife's will as a prerequisite.[49]

c. Who May Exercise Right of Election. It has been held in South Carolina that where a widow dies without making her election between her dower and the statutory provision in lieu thereof, election may be made by her heirs;[50] but in Missouri it was held that the right of election is a personal right and is not transmissible by descent.[51] So in Georgia it was held that where a widow died in less than one year after administration on the estate of her husband, without having

(see WILLS), so as to become entitled to dower.

38. Brawford *v.* Wolfe, 103 Mo. 391, 15 S. W. 426.

39. Brawford *v.* Wolfe, 103 Mo. 391, 15 S. W. 426.

40. Payne *v.* Payne, 119 Mo. 174, 24 S. W. 781.

41. Pinkham *v.* Pinkham, 95 Me. 71, 49 Atl. 48, 85 Am. St. Rep. 392.

42. Crandall *v.* Sterling Coal Min. Co., 1 Colo. 106; Farmers' Banking Co. *v.* Key, 112 Ga. 301, 37 S. E. 447; Nosworthy *v.* Blizzard, 53 Ga. 668.

43. Truett *v.* Funderburk, 93 Ga. 686, 20 S. E. 260.

44. Farmers' Banking Co. *v.* Key, 112 Ga. 301, 37 S. E. 447.

45. Hasenritter *v.* Hasenritter, 77 Mo. 162.

46. Welch *v.* Anderson, 28 Mo. 293.

47. Gray *v.* Givens, 2 Hill Eq. (S. C.) 511.

48. Douglass *v.* Clarke, 4 Desauss. (S. C.) 143.

49. Adams *v.* Adams, 10 Metc. (Mass.) 170; Hayes *v.* Seavey, 69 N. H. 308, 46 Atl. 189 [*citing* Seaver *v.* Adams, 66 N. H. 142, 19 Atl. 776, 49 Am. St. Rep. 597; Cressey *v.* Wallace, 66 N. H. 566, 29 Atl. 842; Hall *v.* Smith, 59 N. H. 315; Wakefield *v.* Phelps, 37 N. H. 295; Probate Judge *v.* Robins, 5 N. H. 246]. See also WILLS.

50. Snelgrove *v.* Snelgrove, 4 Desauss. (S. C.) 274; Douglass *v.* Clarke, 4 Desauss. (S. C.) 143.

51. Welch *v.* Anderson, 28 Mo. 293.

elected to take a child's part of the real estate, her executor could not recover it after her death.[52] Of course a widow cannot claim an election in lieu of dower, as authorized by statute, in land in which she is not entitled to dower.[53]

d. What Constitutes an Election[54] — (I) *Between Dower and Distributive Share.* It was held in Illinois that allegations by the widow in legal proceedings of her ownership of a portion of the premises in fee constituted a sufficient election against dower.[55] But in Missouri the institution of a suit by her to recover dower, and her signed and sworn declaration in the petition that she thereby elected to take as dower the third part of the husband's lands were held to be no bar to her subsequent claim, made within the prescribed period, of the right to take a child's share in lieu thereof.[56] If during the time within which the widow has a right to elect against dower she sells the whole of the land, or an estate therein beyond the term of her own life, her election is made, and her conveyance will pass her distributive share.[57] And there is an election against dower if she purchases part of the real estate and joins with the other heirs at law in the deeds for other portions, and receives part of the purchase-price.[58] In Pennsylvania it was held that the widow's acceptance of a distributive share was no bar to her recovery of dower in land which the husband had aliened during his lifetime.[59] It has been held that where the question of the widow's election by conduct to take dower has once been fairly submitted to the jury and decided by them, the court will not disturb their finding on appeal.[60]

(II) *Between Homestead and Distributive Share.* Where a widow may take from her husband's real estate either a distributive share or the homestead for and during her life, and cannot take both, occupancy of the homestead for some years after the death of her husband will generally be regarded as an election to take it for life instead of her distributive share;[61] but such occupancy merely creates a presumption, and under some circumstances will not be considered important or controlling, as when the widow holds by the terms of a lease made to her by all the heirs.[62] This presumption will not be overcome by the fact of the widow's having begun proceedings, afterward abandoned, to have her distributive share set apart, or by the fact that she made a mortgage and a lease of her undivided interest in the land.[63] The primary right, however, is to the distributive share, and this can only be defeated when a homestead election is made.[64] The widow's allegations of her occupation of a portion of the premises

52. Beavors *v.* Winn, 9 Ga. 189.

53. Von Arb *v.* Thomas, 163 Mo. 33, 63 S. W. 94, claim by widow of remainderman who had died before the tenant for life.

54. Presumption as to election see *infra*, III, B, 13, f.

55. Gullett *v.* Farley, 164 Ill. 566, 45 N. E. 972, where a widow filed a bill for partition, alleging that she was the owner in fee of the undivided one half of land left by her husband.

56. Watson *v.* Watson, 28 Mo. 300.

In Montana see Dahlman *v.* Dahlman, 28 Mont. 373, 72 Pac. 748.

57. Brown *v.* Cantrell, 62 Ga. 257.

58. Avant *v.* Robertson, 2 McMull. (S. C.) 215.

59. Leinaweaver *v.* Stoever, 1 Watts & S. (Pa.) 160.

60. Avant *v.* Robertson, 2 McMull. (S. C.) 215.

61. Zwick *v.* Johns, 89 Iowa 550, 56 N. W. 665; Schlarb *v.* Holderbaum, 80 Iowa 394, 45 N. W. 1051; Conn *v.* Conn, 58 Iowa 747, 13 N. W. 51; Deboe *v.* Rushing, 51 S. W. 613, 21 Ky. L. Rep. 423. See also McDonald *v.* McDonald, 76 Iowa 137, 40 N. W. 126; Stevens *v.* Stevens, 50 Iowa 491; Butterfield *v.* Wicks, 44 Iowa 310. *Compare* Whited *v.* Pearson, 87 Iowa 513, 58 N. W. 30, 90 Iowa 488, 58 N. W. 32.

62. Robson *v.* Lambertson, 115 Iowa 366, 88 N. W. 943 [*citing* McDonald *v.* Young, 109 Iowa 704, 81 N. W. 155; Wold *v.* Berkholtz, 105 Iowa 370, 75 N. W. 329; Stephens *v.* Hay, 98 Iowa 37, 66 N. W. 1048; *In re* Franke, 97 Iowa 704, 66 N. W. 918; Blair *v.* Wilson, 57 Iowa 177, 10 N. W. 32].

Presumption of election see *infra*, III, B, 13, f.

63. Zwick *v.* Johns, 89 Iowa 550, 56 N. W. 665.

A devise of her share in the husband's estate by a widow who has taken possession of the homestead, but to whom her distributive share was never actually set apart, gives no distributive right in the estate, and does not amount to setting apart an interest therein. Mobley *v.* Mobley, 73 Iowa 654, 35 N. W. 691.

64. See Wilcox *v.* Wilcox, 89 Iowa 388, 56 N. W. 517 [*citing* Egbert *v.* Egbert, 85 Iowa

as a homestead and of her election to take and hold it as such, made in legal proceedings, are not conclusive against her subsequent right to claim a distributive share;[65] nor is her actual occupation of the homestead during the time allowed for filing claims, if proceedings to admeasure the distributive share are duly instituted.[66] Conversely a mere election to have the distributive share set off or proceedings instituted for that purpose will not bar the right of homestead till the final order setting off the distributive share.[67] So a mere declaration by a surviving husband or wife in possession, of intention to take only a distributive share, unaccompanied by an actual setting apart thereof, does not divest the land of its homestead character nor render it liable for the decedent's debts.[68] But a binding election may be made by the widow to take the distribution share before it is set off, as when she has executed mortgages upon it, and a decree for its setting off has been entered upon her petition, even though she is still occupying the homestead as her own.[69]

e. Time of Election and Formal Requisites. In Georgia a widow is not put to an election between a child's part and dower until there is an administration upon the estate of her husband;[70] and a declaration by her before the ordinary of intention to take a child's part in lieu of dower is valid without notice to the administrator.[71] In Missouri under a statute requiring the widow's declaration of election to be filed within twelve months, the mailing of such declaration, it having subsequently miscarried, was held insufficient, and such insufficiency was not allowed to be cured by a subsequent declaration made by her after the prescribed period had elapsed.[72]

f. Presumption as to Election.[73] The failure of a widow entitled to dower or to a distributive share in the alternative to elect her dower within the allotted time, and her acts signifying acceptance of the distributive share, with the fact that the election of the latter would have been more to her advantage, may be construed as an election against her dower, and the presumption is, in the absence of evidence to the contrary, that such election was made within the proper time.[74] Her election to take her statutory alternative may be presumed from conduct as well as shown by evidence of an express exercise of the right.[75] A presumption of the widow's election against dower, especially where such election would be for her interest, will be raised by her remaining in possession of the land until her right of dower becomes barred,[76] but such presumption may be rebutted by evidence of her intention not to hold the land for herself, but for the use of herself and minor children till the youngest becomes of age, and that the land shall then be divided among all the children.[77] In the absence of evidence showing

525, 52 N. W. 478]. And see Peebles *v.* Bunting, 103 Iowa 489, 73 N. W. 882. See also *infra*, III, B, 13, f.

65. *In re* Lund, 107 Iowa 264, 77 N. W. 1048.

66. *In re* Lund, 107 Iowa 264, 77 N. W. 1048. But it had previously been held that until the distributive share has been set off, the widow, by continuing to occupy the homestead, must be regarded as having elected to take it. McDonald *v.* McDonald, 76 Iowa 137, 40 N. W. 126 [*citing* Thomas *v.* Thomas, 73 Iowa 657, 35 N. W. 693; Mobley *v.* Mobley, 73 Iowa 654, 35 N. W. 691; Darrah *v.* Cunningham, 72 Iowa 123, 33 N. W. 445; Holbrook *v.* Perry, 66 Iowa 286, 23 N. W. 671; Burdick *v.* Kent, 52 Iowa 583, 3 N. W. 643; Whitehead *v.* Conklin, 48 Iowa 478; Butterfield *v.* Wicks, 44 Iowa 310].

67. Hornbeck *v.* Brown, 91 Iowa 316, 59 N. W. 33.

68. Darrah *v.* Cunningham, 72 Iowa 123, 33 N. W. 445 [*citing* Bradshaw *v.* Hurst, 57 Iowa 745, 11 N. W. 672; Burdick *v.* Kent, 52 Iowa 583, 3 N. W. 643].

69. Wilcox *v.* Wilcox, 89 Iowa 388, 56 N. W. 517 [*distinguishing* McDonald *v.* McDonald, 76 Iowa 137, 40 N. W. 126]. See also Small *v.* Wicks, 82 Iowa 744, 47 N. W. 1031.

70. Smith *v.* King, 50 Ga. 192.

71. Royston *v.* Royston, 21 Ga. 161.

72. Allen *v.* Hartnett, 116 Mo. 278, 22 S. W. 717.

73. Presumption as to election between homestead and distributive share see *supra*, III, B, 13, d, (II).

74. Sloan *v.* Whitaker, 58 Ga. 319.

75. Farmers' Banking Co. *v.* Key, 112 Ga. 301, 37 S. E. 447. See also *supra*, III, B, 13, d, (II).

76. Sewell *v.* Smith, 54 Ga. 567. See also *supra*, III, B, 13, d, (II).

77. Farmers' Banking Co. *v.* Key, 112 Ga. 301, 37 S. E. 447.

the election of the widow to take her alternative right, the presumption is that she took her primary right,[78] and it has been held that in case of her failure to elect such alternative right within the proper time no presumption arises that she ever had any vested estate in fee in decedent's realty.[79]

g. Effect of Election — (I) *In General.* The rights to dower and distributive share being both legal rights, the acceptance of one, whether intended as a waiver of the other or not, is a bar both at law and in equity to a claim for the other;[80] and such election unless caused by deceptive misstatements will not be set aside.[81] But where under a statute having alternative provisions the widow is required, if she claims under one of them, to make a formal election, but no such requirement is imposed on her if she wishes to take under others, an election to take under the latter is no bar to her subsequent election to take under the former.[82] Where the widow has once elected to take money, and there is no money of the estate or evidence of debt due the decedent, she cannot claim in lieu thereof proceeds of the sale of personal property.[83] A written relinquishment by the widow of property once regularly appraised and set apart to her, and her election to take other property of equivalent value will conclude her, if all the proceedings have been regular and free from fraud.[84]

(II) *To Accept Distributive Share as Barring Dower.* The acceptance of the statutory alternative provision by the widow is a legal bar to her right of dower, and such acceptance may be pleaded at law as a defense to her demand therefor.[85] In South Carolina she was held to be bound both as to lands aliened by the husband and as to those of which he died seized,[86] but in Missouri as to lands aliened she was held not to be barred where the husband had at any time during the marriage a legal or equitable seizin.[87] It was held that her election of a distributive share amounted to a ratification of a conveyance taken by the husband to himself in such a way as to defraud her of the dower to which she would have been entitled,[88] but this doctrine is apparently overruled by a later decision.[89] The widow's right to revoke a binding election must depend on her affirmatively proving that she was misled as to the condition of the estate before making it.[90] An agreement made by a widow who has administered on her husband's estate to take personal property which she has purchased with the profits of the estate in lieu of dower will be binding, and on her death such property will pass to such husband's estate.[91]

78. Peebles *v.* Bunting, 103 Iowa 489, 73 N. W. 882. See also *supra*, III, B, 13, d, (II).

79. Snipes *v.* Parker, 98 Ga. 522, 25 S. E. 580.

80. Buist *v.* Dawes, 3 Rich. Eq. (S. C.) 281.

In Ohio it has been recently held that there is no such inconsistency between the right of dower and the distributive share in personalty as to make the taking of one an exclusion of the other. Hutchings *v.* Davis, 68 Ohio St. 160, 67 N. E. 251.

81. Hornsey *v.* Casey, 23 Mo. 371.

82. Watson *v.* Watson, 28 Mo. 300.

83. Gerrity's Estate, 1 Leg. Rec. (Pa.) 214.

84. Telford *v.* Boggs, 63 Ill. 498, so holding where the specific property given by statute to the widow of a deceased person and relinquished by her in writing had been regularly appraised together with the other property of the estate, which she elected to take and received, and the conduct of the appraisers and administrators had been free from fraud.

85. Avant *v.* Robertson, 2 McMull. (S. C.) 215.

In Montana the wife's right to dower or election under Civ. Code, §§ 228 and 236, are separate from her rights as an heir of her husband under section 1852, and hence the fact that she participates in the distribution of the estate as an heir of her husband under the latter section does not waive her right to dower or the statutory substitute. Dahlman *v.* Dahlman, 28 Mont. 373, 72 Pac. 748.

86. Evans *v.* Pierson, 9 Rich. (S. C.) 9.

87. Crecelius *v.* Horst, 4 Mo. App. 419.

88. Crecelius *v.* Horst, 4 Mo. App. 419.

89. Newton *v.* Newton, 162 Mo. 173, 61 S. W. 881 [*citing* Flowers *v.* Flowers, 89 Ga. 632, 15 S. E. 834, 18 L. R. A. 75; Stone *v.* Stone, 18 Mo. 389; Davis *v.* Davis, 5 Mo. 183; Walker *v.* Walker, 66 N. H. 390, 31 Atl. 14, 49 Am. St. Rep. 616, 27 L. R. A. 799; Dickerson's Appeal, 115 Pa. St. 198, 8 Atl. 64, 2 Am. St. Rep. 547; Killinger *v.* Reidenhauer, 6 Serg. & R. (Pa.) 531].

90. Lavender *v.* Daniel, 58 S. C. 125, 36 S. E. 546.

91. Hunter *v.* Jones, 6 Rand. (Va.) 541.

(III) *To Renounce Dower.* When a widow in lieu of dower elects to take her statutory share, she thereby becomes seized in fee of an interest in the estate which can be attached in a suit against her.[92] But under such circumstances the widow taking as an heir has no claim which can prevail against an equitable right of a third person to a conveyance of the land.[93]

(IV) *To Take Dower.* In some states a widow entitled to dower cannot also claim a distributive share of property as to which the husband died intestate.[94] She will not be allowed to retract an election once made to take dower instead of claiming her alternative right as heir,[95] where such election has been made in the form prescribed by law,[96] unless perhaps upon grounds of equity shown to exist by evidence inherent in the circumstances or extrinsic.[97] She cannot afterward recover an interest in fee in subsequently discovered realty, although she may have dower therein;[98] nor can her representatives do so after her death, although offering to make compensation for the dower, or sum in lieu thereof, received.[99] Where the real estate of the husband has been converted into personalty in accordance with the provisions of his will, and the widow having elected dower therein has accepted the value of her interest from the proceeds, she cannot afterward claim distribution from the same proceeds or of personalty.[1]

IV. RIGHTS AND LIABILITIES OF HEIRS AND DISTRIBUTEES.

A. Nature and Establishment of Rights in General — 1. Transactions Before Death of Ancestor — a. Rights of Expectant Heirs. An expectant heir has no interest in the property until the death of the owner,[2] but agreements by heirs apparent to convey the estate which may come to them by descent have been held to be valid.[3]

b. Conveyances in Fraud of Heirs. It has often been held that equity will relieve heirs at law against a fraudulent conveyance by an ancestor.[4] Other cases,

92. Wigley *v.* Beauchamp, 51 Mo. 544, holding that a widow who elects to take absolutely a child's share in the lands of which her husband died seized becomes seized of an undivided interest in such lands equal to such child's share.

93. Hunkins *v.* Hunkins, 65 N. H. 95, 18 Atl. 655.

94. Beaty *v.* Richardson, 56 S. C. 173, 34 S. E. 73, 46 L. R. A. 517. *Contra*, Hutchings *v.* Davis, 68 Ohio St. 160, 67 N. E. 251.

95. Glover *v.* Glover, 45 S. C. 51, 22 S. E. 739; Quarles *v.* Garrett, 4 Desauss. (S. C.) 145; Buist *v.* Dawes, 3 Rich. Eq. (S. C.) 281.

96. Mathews *v.* Mathews, 141 Mass. 511, 6 N. E. 776.

97. Buist *v.* Dawes, 3 Rich. Eq. (S. C.) 281.

98. Hamilton *v.* Phillips, 83 Ga. 293, 9 S. E. 606.

99. Buist *v.* Dawes, 3 Rich. Eq. (S. C.) 281.

1. *In re* Davis, 12 Ohio Cir. Dec. 29. See also *In re* Hutchins, 21 Ohio Cir. Ct. 720.

2. *Illinois.*— Hackleman *v.* Hackleman, 199 Ill. 84, 65 N. E. 113; Sutherland *v.* Sutherland, 69 Ill. 481, holding that the owner therefore may dispose of the inheritance during life, or after his death it may be exhausted by his creditors.

Indiana.— Thorne *v.* Cosand, 160 Ind. 566, 67 N. E. 257.

Louisiana.— Cox *v.* Von Ahlefeldt, 105 La. 543, 30 So. 175; Ludewig's Succession, 3 Rob. 99.

Maryland.— Sellman *v.* Sellman, 63 Md. 520, holding that one cannot maintain an action relative to property, his interest in which is an expectant one dependent upon a future inheritance.

Mississippi.— Winn *v.* Cole, Walk. 119.

Texas.— Clark *v.* Southern Pac. R. Co., 27 Tex. 100; Lee *v.* Smith, 18 Tex. 141.

See 16 Cent. Dig. tit. "Descent and Distribution," §§ 206, 207. See also II, C, 1, 3.

3. Lee *v.* Lee, 2 Duv. (Ky.) 134; Jenkins *v.* Stetson, 9 Allen (Mass.) 128; Fitch *v.* Fitch, 8 Pick. (Mass.) 480; Boynton *v.* Hubbard, 7 Mass. 112; Fitzgerald *v.* Vestal, 4 Sneed (Tenn.) 258. See Assignments, 4 Cyc. 15.

4. *Delaware.*— Dutton *v.* Jackson, 2 Del. Ch. 86.

Indiana.—Jennings *v.* Kee, 5 Ind. 257.

Louisiana.— Cox *v.* Von Ahlefeldt, 105 La. 543, 23 So. 959; McQueen *v.* Sandel, 15 La. Ann. 140; Lahauve *v.* Boudreau, 9 Rob. 28; Terrel *v.* Cropper, 9 Mart. 352, 13 Am. Dec. 309; Croizet *v.* Gaudet, 6 Mart. 524; Greffin *v.* Lopez, 5 Mart. 145. See Rogge Succession, 50 La. Ann. 1220, 23 So. 933.

South Carolina.— Sweatman *v.* Edmunds, 28 S. C. 58, 5 S. E. 165.

Tennessee.— Wade *v.* Harper, 3 Yerg. 383.

however, hold that an heir cannot attack a conveyance by his ancestor as without consideration or in fraud of his rights.[5]

c. Gifts or Donations by Ancestor. A person may dispose of his property during life by gift or donation, except in so far as he may be restricted by statute, and generally his heirs or distributees cannot attack the same;[6] but he cannot deprive forced heirs of the portion of his estate reserved for them by law except in cases where he has a just cause to disinherit them.[7]

d. Release of Expectant Share to Ancestor. According to the weight of authority the release of an expectant share to an ancestor, in consideration of an advancement or for other valuable consideration, excludes the heir from participation in the ancestor's estate at his death,[8] provided the person executing the release

Texas.— Epperson *v.* Mills, 19 Tex. 65. See Crain *v.* Crain, 21 Tex. 790.

Wisconsin.— Disch *v.* Timm, 101 Wis. 179, 77 N. W. 196.

See 16 Cent. Dig. tit. "Descent and Distribution," § 208.

5. McCleskey *v.* Leadbetter, 1 Ga. 551; Collins *v.* Pratt, 15 La. Ann. 42; Virginia *v.* Himel, 10 La. Ann. 185; Trahan *v.* Trahan, 8 La. Ann. 455; Jones *v.* Somerville, 78 Miss. 269, 28 So. 940, 84 Am. St. Rep. 627; Upton *v.* Haines, 55 N. H. 283; Rowland *v.* Rowland, 2 Sneed (Tenn.) 543; Richards *v.* Richards, 11 Humphr. (Tenn.) 429.

6. *Alabama.*— Gaunt *v.* Tucker, 18 Ala. 27, gift *causa mortis*.

Indiana.— Thorne *v.* Cosand, 160 Ind. 566, 67 N. E. 257.

Louisiana.— Bernard *v.* Noel, 45 La. Ann. 1135, 13 So. 737 (donation *inter vivos* by a wife of all of her property to her husband); Moore's Succession, 42 La. Ann. 332, 7 So. 561 (provision of code as to determining the disposable portion of succession, etc., where there are donations *inter vivos*); Lazare *v.* Jaques, 15 La. Ann. 599 (donation of immovable property void under code); Wood *v.* January, 15 La. Ann. 516 (meaning of father and mother in code referring to donations *inter vivos* or *mortis causa*). See also Maples *v.* Mitty, 12 La. Ann. 759; Miller *v.* Andrus, 1 La. Ann. 237; Hoa's Succession, 1 La. Ann. 142; Brittain *v.* Richardson, 3 Rob. 78; Terrel *v.* Cropper, 9 Mart. 350, 13 Am. Dec. 309. See also Grasser *v.* Blank, 110 La. 493, 34 So. 648.

Maine.— McLean *v.* Weeks, 65 Me. 411, gift of personal property by an insolvent.

Missouri.— Moore *v.* Moore, 67 Mo. 192, deed of gift from parent to child.

Pennsylvania.— Lewis' Estate, 139 Pa. St. 640, 22 Atl. 635, holding indorsements of interest as paid on notes a sufficient gift as against an heir objecting thereto.

Texas.— Crain *v.* Crain, 17 Tex. 80.

See 16 Cent. Dig. tit. "Descent and Distribution," § 209. And see, generally, GIFTS.

7. See Leleu *v.* Dooley, 48 La. Ann. 508, 19 So. 470; Scudder *v.* Howe, 44 La. Ann. 1103, 11 So. 824; Ball *v.* Ball, 42 La. Ann. 204, 7 So. 567 (action by forced heirs for reduction of donations); Moore's Succession, 40 La. Ann. 531, 4 So. 400; Spencer *v.* Lewis, 39 La. Ann. 316, 1 So. 671; Carroll *v.* Cockerham, 38 La. Ann. 813; Scott *v.* Briscoe, 37 La. Ann. 178; Boone *v.* Carroll, 35 La. Ann. 281; Guilbeau *v.* Thibodeau, 30 La. Ann. 1099; Barbet *v.* Roth, 14 La. Ann. 381; Laycock *v.* Bird, 13 La. Ann. 173; Tompkins *v.* Prentice, 12 La. Ann. 465; Louis *v.* Richard, 12 La. Ann. 684; Brittain *v.* Richardson, 3 Rob. (La.) 78; Sevier *v.* Teal, 33 Tex. 77; Patterson *v.* Gaines, 6 How. (U. S.) 550, 12 L. ed. 553. See also Wells *v.* Goss, 110 La. 347, 34 So. 470. *Compare* Grasser *v.* Blank, 110 La. 493, 34 So. 648. And see *supra*, III, A, 5.

8. *Florida.*— Towles *v.* Roundtree, 10 Fla. 299, holding, however, that a release by a son-in-law of "his" prospective share of his father-in-law's estate was not such a release as would extinguish his wife's prospective rights, and that, the wife having died before her father, it was no bar to the claim of grandchildren.

Georgia.— Barham *v.* McKneely, 89 Ga. 812, 15 S. E. 761; Newsome *v.* Cogburn, 30 Ga. 291.

Illinois.— Gary *v.* Newton, 201 Ill. 170, 66 N. E. 267; Wallace *v.* Roddick, 119 Ill. 151, 8 N. E. 801; Long *v.* Long, 19 Ill. App. 383; Simpson *v.* Simpson, 114 Ill. 603, 4 N. E. 137, 7 N. E. 287 [*reversing* 16 Ill. App. 170]; Kersbaw *v.* Kershaw, 102 Ill. 307; Galbraith *v.* McLain, 84 Ill. 379; Bishop *v.* Davenport, 58 Ill. 105.

Iowa.— Stotenburg *v.* Diericks, 117 Iowa 25, 90 N. W. 525; O'Connell *v.* O'Connell, 73 Iowa 733, 36 N. W. 764.

Kentucky.— Cushing *v.* Cushing, 7 Bush 259; Daniel *v.* Lewis, 13 Ky. L. Rep. 827. *Compare* Peak *v.* Wigginton, 11 S. W. 89, 10 Ky. L. Rep. 922, holding that deeds of release by children operated only to discharge an estate from all claims on account of payments made by the father, and that the children were entitled as heirs of their mother to their distributive shares in the land in question.

Maine.— Smith *v.* Smith, 59 Me. 214; Curtis *v.* Curtis, 40 Me. 24, 63 Am. Dec. 651.

Massachusetts.— Trull *v.* Eastman, 3 Metc. 121, 37 Am. Dec. 126; Kenney *v.* Tucker, 8 Mass. 143; Quarles *v.* Quarles, 4 Mass. 680.

New Jersey.— Brands *v.* De Witt, 44 N. J. Eq. 545, 10 Atl. 181, 14 Atl. 894, 6 Am. St. Rep. 909; Havens *v.* Thompson, 26 N. J. Eq. 383.

New York.— Kinyon *v.* Kinyon, 72 Hun 452, 25 N. Y. Suppl. 225, 31 Abb. N. Cas. 76.

North Carolina.— See Love *v.* Love, 38 N. C. 104.

was at the time competent to contract, and the release was not obtained by means of fraud or undue influence.[9]

e. Division of Property Among Heirs. A division of property by one among his children or other prospective heirs is generally binding upon them.[10]

2. Rights in General Upon Death of Ancestor — a. Acceptance of Estate — (I) *Necessity of Acceptance.* By the laws of Louisiana, on the death of a person possessed of or entitled to property, real or personal, the right to the property descends to his heirs;[11] but the heir is not obliged to accept the succession,[12] and the right does not vest (that is, become fixed and without suspense) in him until he does some act accepting the succession.[13]

(II) *What Constitutes Acceptance.* A simple acceptance may be either express or tacit.[14]

Pennsylvania.— Summerville's Estate, 129 Pa. St. 631, 18 Atl. 554; Powers' Appeal, 63 Pa. St. 443. See also Skinner's Appeal, 1 Mona. 439. *Compare* Miller's Appeal, 31 Pa. St. 337; Morris *v.* Carlin, 5 Pa. Dist. 714, 18 Pa. Co. Ct. 281.

West Virginia.— Coffman *v.* Coffman, 41 W. Va. 8, 11, 23 S. E. 523; Roberts *v.* Coleman, 37 W. Va. 143, 16 S. E. 482.

Compare, however, Stokesberry *v.* Reynolds, 57 Ind. 425 (where a gift of money by a father to a son was regarded simply as an advancement); Cass *v.* Brown, 68 N. H. 85, 44 Atl. 86; Needles *v.* Needles, 7 Ohio St. 432, 70 Am. Dec. 85; Buck *v.* Kittle, 49 Vt. 288; Robinson *v.* Robinson, Brayt. (Vt.) 59.

See 16 Cent. Dig. tit. "Descent and Distribution," § 213.

Necessity for agreement in writing.— Gary *v.* Newton, 201 Ill. 170, 66 N. E. 267; Wallace *v.* Roddick, 119 Ill. 151, 8 N. E. 801; Galbraith *v.* McLain, 84 Ill. 379; Long *v.* Long, 19 Ill. App. 383; Brands *v.* De Witt, 44 N. J. Eq. 545, 10 Atl. 181, 14 Atl. 894, 6 Am. St. Rep. 909.

Grandchildren have no right to distribution in the estate of their intestate grandfather, where their ancestor who had received an advancement from the intestate and executed a release in full of all rights and claims to such estate in consideration of the advancement died before the intestate. Simpson *v.* Simpson, 114 Ill. 603, 4 N. E. 137, 7 N. E. 287 [*reversing* 16 Ill. App. 170]; Quarles *v.* Quarles, 4 Mass. 680.

Advancements see *infra*, IV, B.

9. Bishop *v.* Davenport, 58 Ill. 105, holding such a release by a *feme covert* or a minor void.

10. *Illinois.*— Hackleman *v.* Hackleman, 199 Ill. 84, 65 N. E. 113.

Kentucky.— Rogers *v.* Rogers, 14 B. Mon. 108, a case in which another child was born after the date of a contract by a father to convey to two other sons.

Louisiana.— See Lacour *v.* Lacour, 12 La. Ann. 724, partitions under code.

Michigan.— Beardslee *v.* Reeves, 76 Mich. 661, 43 N. W. 677.

Ohio.— Pence *v.* Blackford, 11 Ohio Cir. Ct. 204, 5 Ohio Cir. Dec. 320.

South Carolina.—Bossard *v.* White, 9 Rich. Eq. 483.

Tennessee.— Owen *v.* Hancock, 1 Head 563.

See 16 Cent. Dig. tit. "Descent and Distribution," § 214.

11. Merrick Rev. Civ. Code La. (1900) arts. 940, 941; Womack *v.* Womack, 2 La. Ann. 339; Calvit *v.* Mulhollan, 12 Rob. (La.) 258; Le Page *v.* New Orleans Gas Light, etc., Co., 7 Rob. (La.) 183; Addison *v.* New Orleans Sav. Bank, 15 La. 527.

12. Merrick Rev. Civ. Code La. (1900) art. 977. And see Davis *v.* Elkins, 9 La. 135; Poultney *v.* Cecil, 8 La. 321; O'Donald *v.* Lobdell, 2 La. 299.

13. Miller *v.* Jones, 29 Ala. 174. And see Lumsden's Succession, 17 La. Ann. 38; Davis *v.* Elkins, 9 La. 135; Merrick Rev. Civ. Code La. (1900) art. 946.

14. Merrick Rev. Civ. Code La. (1900) art. 988. And see Samford *v.* Toadvine, 15 La. Ann. 170; McMasters *v.* Place, 8 La. Ann. 431; Duplessis *v.* White, 6 La. Ann. 514; Greig *v.* Muggah, 5 Rob. (La.) 473; Le Cesne *v.* Cottin, 2 Mart. N. S. (La.) 475; Lacey *v.* Ferguson, 1 McGloin (La.) 171.

The acceptance is express when the heir assumes the quality of heir in an unqualified manner in some authentic or private instrument or some judicial proceeding. Clauss *v.* Burgess, 12 La. Ann. 142.

The written declaration or admission of the mere capacity of heirship made by the descendants of a dead man does not of itself constitute an acceptance of his succession. Griffin *v.* Burris, 109 La. 216, 33 So. 201.

What constitutes a tacit acceptance see Brashear *v.* Conner, 29 La. Ann. 347 (institution of suit in capacity of heir); Scott *v.* Briscoe, 36 La. Ann. 278 (mortgaging property); Sevier *v.* Gordon, 29 La. Ann. 440 (proceedings for partition); Loubière *v.* Le Blanc, 12 La. Ann. 210 (payment of debts); Todd *v.* Place, 9 La. Ann. 517 (selling interest in succession to a co-heir); Gosselin *v.* Abat, 3 La. 549 (intermeddling). And see Stephenson *v.* Wilson, 7 La. Ann. 553; Gaiennie *v.* Thompson, 6 La. Ann. 475 (both of which were taking possession of the estate without letters of administration or other judicial proceeding); Dangerfield *v.* Thruston, 8 Mart. N. S. (La.) 232 (suffering judgment to be recovered against him without the benefit of an inventory or without renouncing). *Compare* Union Nat. Bank *v.* Choppin, 46 La. Ann. 629, 15 So. 304, tacit admission resulting from judgment by default.

(III) *WHO MAY ACCEPT.* Minor heirs need not make any formal acceptance of a succession.[15]

(IV) *TIME FOR ACCEPTANCE.* The faculty of accepting or renouncing a succession becomes barred by the lapse of time required for the longest prescription of the rights to immovables.[16]

(V) *OPERATION AND EFFECT OF ACCEPTANCE.* An acceptance relates back to the day of the opening of the succession.[17] The effect of the simple acceptance of the succession,[18] whether express or tacit, is such that when made by an heir of age it binds him to the payment of all debts of the succession, not only out of the effects which have fallen to him from the succession, but even personally, and out of his own property, as if he had himself contracted the debts or as if he was the deceased himself;[19] but the heir who accepts with the benefit of inventory[20]

What does not constitute a tacit acceptance see Burbridge *v.* Chinn, 34 La. Ann. 681 (purchase at tax-sale of succession property); Miltenberger *v.* Weems, 31 La. Ann. 259 (purchase at tax-sale of succession property); Mumford *v.* Bowman, 26 La. Ann. 413 (naming oneself as heir in an act disconnected with the succession); Soubiran *v.* Rivollet, 4 La. Ann. 328 (taking possession of personal effects with no view of gain); Gordon *v.* Gilfoil, 99 U. S. 168, 25 L. ed. 383 (taking possession as universal heir of community property subject to mortgage by but one of the ancestors); Walker *v.* Coyette, 17 Quebec Super. Ct. 288 (using property belonging to estate to defray necessary expenses of the ancestor incurred before his death).

Defaulting when cited to declare whether or not they accept or renounce will raise an inference of an unqualified acceptance. Self *v.* Morris, 7 Rob. (La.) 24; Picou *v.* Dussuau, 4 Rob. (La.) 412; Field *v.* Mathison, 3 Rob. (La.) 38.

Presumption of acceptance may be rebutted by showing an intention other than that of accepting the succession. Loubière *v.* Le Blanc, 12 La. Ann. 210.

Acceptance under the Mexican law is discussed in Blair *v.* Cisneros, 10 Tex. 34.

15. Merrick Rev. Civ. Code La. (1900) art. 977.

The tutor of a minor child, if opposed by creditors, may take possession of and administer a succession falling to him. Lemmon *v.* Clark, 36 La. Ann. 744; Soye *v.* Price, 30 La. Ann. 93.

Under the codes of 1808 and 1825 inheritances accruing to minors could only be accepted with the authority of the judge by the advice of a family meeting; and not purely and simply, but with the benefit of inventory. Pargoud *v.* Pace, 10 La. Ann. 613.

The Spanish law in force in Texas prior to its independence, relating to this question, is stated in Blair *v.* Cisneros, 10 Tex. 34.

16. Merrick Rev. Civ. Code La. (1900) § 1030. Thus in Waters' Succession, 12 La. Ann. 97, it is held that an heir who had permitted thirty years to elapse without having done any act showing an intention to accept his succession was barred by prescription of any right as heir. But it was held in Edwards *v.* Ricks, 30 La. Ann. 926, that, in the absence of renunciation, the heirs of age were presumed to accept the succession.

By "term for deliberating" is understood to mean the time given to the beneficiary heir to examine if it be for his interest to accept or reject the succession which has fallen to him. Merrick Rev. Civ. Code La. (1900) § 1033. In Lumsden's Succession, 17 La. Ann. 38, it is said that an inheritance remains without an heir and in abeyance until the rightful heir accepts or rejects it according to the provision of this article of the civil code.

Thirty days is the term given to the beneficiary heir to deliberate whether he will accept or reject the succession. Merrick Rev. Civ. Code La. (1900) art. 1050.

17. Merrick Rev. Civ. Code La. (1900) arts. 946, 947, 987.

The retroactive effect of an acceptance under the old code should not be so extended as to prejudice the rights of third persons previously acquired. Poultney *v.* Cecil, 8 La. 321.

As against innocent third persons, as to the effect of an acceptance of the succession by an heir, see Gardner *v.* Montague, 16 La. Ann. 299.

18. Demand for accounting made upon an heir who has accepted the succession of one who was a director of a corporation see Southern Mut. Ins. Co. *v.* Pike, 32 La. Ann. 488.

The credits belonging to the succession which has been accepted by the heirs purely and simply are *ipso facto* and by operation of law divided among the heirs. Plunkett's Succession, 12 La. Ann. 558.

19. Merrick Rev. Civ. Code La. (1900) § 1013.

Confusion.— Where a succession is accepted purely and simply by the heirs its liability to them is extinguished by confusion. Whitten's Succession, 9 La. Ann. 417.

The widow by accepting purely and simply the succession of her deceased husband becomes owner of the assets and liable for the debts, and loses any right of claiming the allowance accorded by law to a necessitous widow. Claudel *v.* Palao, 28 La. Ann. 872.

20. Effect of benefit of inventory see Merrick Rev. Civ. Code La. (1900) art. 1054.

By an inventory the heir becomes liable for the charges and debts only to the value of the effects of the succession. Murray's Suc-

may institute suits touching the succession without making himself unconditionally liable for his ancestor's debts.[21] He who has the power of accepting the entire succession cannot divide and only accept a part.[22]

b. Renunciation or Waiver of Rights. An heir may renounce his claim to the succession or waive his rights thereunder.[23]

c. Representation of Absent Heirs[24] — (1) *IN GENERAL.* Under the Louisiana practice, on the opening of a vacant succession, or of one of which the heirs or part of them are absent from and not represented[25] within the limits of the

cession, 41 La. Ann. 1109, 7 So. 126; Merrick Rev. Civ. Code La. (1900) art. 1032. And see Le Cesne *v.* Cottin, 2 Mart. N. S. (La.) 475. When an inventory is made the heirs are not liable unconditionally, and confusion does not take place. Gosselin *v.* Abat, 3 La. 549. But although an heir accepts a succession that has fallen to him with the benefit of inventory, yet if he treats the property as his own and offers it for sale or makes sale thereof he makes himself an unconditional heir, and binds himself for the payment of the debts of the deceased. Benedict *v.* Bonnot, 39 La. Ann. 972, 3 So. 223.

By failure to make a correct inventory the heir loses his right as a beneficiary heir. Le Cesne *v.* Cottin, 2 Mart. N. S. (La.) 475.

Omission to include small articles in the inventory, if not fraudulent, does not avoid the inventory. Gosselin *v.* Abat, 3 La. 549.

By the Spanish law the heir who makes a fraudulent inventory must pay double the amount concealed to those entitled to any part of the succession. Casanova *v.* Acosta, 1 La. 179.

21. Lamm's Succession, 40 La. Ann. 312, 4 So. 53.

The heir who accepts a succession, with the benefit of an inventory, is placed nearly on the same footing with curators of vacant estates. His engagement is to administer as beneficiary heir. Lamm's Succession, 40 La. Ann. 312, 4 So. 53.

22. Merrick Rev. Civ. Code La. (1900) § 986.

No administration can be granted after acceptance. Miltenberger *v.* Knox, 21 La. Ann. 399. And see Beauregard *v.* Lampton, 33 La. Ann. 827.

Where the testator bequeaths a disposable portion to his forced heirs under certain conditions, such heirs cannot repudiate the will and its conditions and still claim the excess over its legatee. Strauss' Succession, 38 La. Ann. 55; Macias' Succession, 31 La. Ann. 127.

23. *Georgia.*— Alabama, etc., R. Co. *v.* Redding, 112 Ga. 62, 37 S. E. 91, by agreement.

Kentucky.—Haden *v.* Haden, 7 J. J. Marsh. 168; Kern *v.* Raunser, 50 S. W. 838, 20 Ky. L. Rep. 1954.

Louisiana.— Merrick Rev. Civ. Code La. (1900) art. 977. And see Jacobs' Succession, 104 La. 447, 29 So. 241; James *v.* Meyer, 41 La. Ann. 1100, 7 So. 618; Carter *v.* Fowler, 33 La. Ann. 100; Cole *v.* Reddick, 28 La. Ann. 843; Titche *v.* Lee, 22 La. Ann. 435.

New Hampshire.— Farnum *v.* Bryant, 34 N. H. 9, waiver in writing by child of share in father's estate.

New York.— See Bennett *v.* Bennett, 50 N. Y. App. Div. 127, 63 N. Y. Suppl. 387, an ineffectual release.

See 16 Cent. Dig. tit. "Descent and Distribution," § 221.

Manner of renunciation is prescribed by statute see Merrick Rev. Civ. Code La. (1900) art. 1017. The renunciation may be shown by declaration in a judicial proceeding. Carter *v.* Fowler, 33 La. Ann. 100.

Relinquishment or renunciation by surviving spouse see *supra*, III, B, 11.

A special transfer and assignment of rights to an estate in favor of one person cannot be viewed as a renunciation, and is not a ratification of a promise to renounce. Reed *v.* Crocker, 12 La. Ann. 436.

Subsequent formal renunciation of heirs, if accepted, will not undo the effect of their acceptance. Clauss *v.* Burgess, 12 La. Ann. 142.

Revocation of renunciation.— One who renounces the succession cannot revoke the renunciation after the other heirs and legatees have accepted the succession. Hymel's Succession, 49 La. Ann. 461, 21 So. 641.

The surviving wife has thirty days within which to make a choice between renunciation and acceptance; but after this delay she still has the right of renunciation until she has been compelled by action to make the choice. Titche *v.* Lee, 22 La. Ann. 435.

Where the tutrix is present and renounces a community, and does not accept or renounce for the minor heirs, no citation or other notice to them is necessary. Poultney *v.* Cecil, 8 La. 321.

Citation to heirs is only necessary in a proceeding by creditors to administer an estate *in concurso* to ascertain if they will accept or renounce. Poultney *v.* Cecil, 8 La. 321.

24. Appointment of curators to successions in case of absent heirs or of heirs not represented see, generally, EXECUTORS AND ADMINISTRATORS.

25. Proof of existence of absent heirs is necessary before the appointment of such attorney. Harris' Succession, 29 La. Ann. 743; Lacey *v.* Newport, 3 La. Ann. 226; Robouam *v.* Robouam, 12 La. 73.

Where the heirs are present or represented such an attorney cannot be appointed. Rabasse's Succession, 47 La. Ann. 1452, 17 So. 867, 49 Am. St. Rep. 433. See also Addison *v.* New Orleans Sav. Bank, 15 La. 527.

The attorney cannot act to have the heirs recognized. The recognition must be sought contradictorily with him. Mager's Succession, 12 Rob. (La.) 413.

state,[26] it is the duty of the judge ordering inventories to be made of the effects of the succession, to appoint a counsel for the absent heirs to assist at the inventories and to otherwise represent them.[27]

(II) *Compensation of Representative.* The fees of attorneys for absent heirs, unless their services are proved to have been valuable to the succession,[28] should be paid out of the shares of the heirs they represent.[29]

3. Establishment and Determination of Heirship or Right to Share in Distribution — a. In General. Statutes varying greatly in the different states prescribe the jurisdiction of courts in the establishment and determination of heirship or the right to share in distribution,[30] and also prescribe the steps to be taken for

The functions of the attorney cease whenever the heirs present themselves or send their powers of attorney to claim their respective portions of the estate. Morgan's Succession, 1 Rob. (La.) 514.

26. Meaning of words "represented in the state" see Durnford's Succession, 8 Rob. (La.) 488.

27. Merrick Rev. Civ. Code La. (1900) § 1210 *et seq.* See also Thompson's Succession, 13 La. Ann. 263; De Lizardi's Succession, 7 Rob. (La.) 167. But see State *v.* Probate Judge, 18 La. 570, where a succession has been opened in another state, and a will has been ordered to be registered in Louisiana.

The object of the appointment is to guard the interests of the absent heirs, and it is his duty to oppose everything that may tend to their prejudice. Percy *v.* Provan, 15 La. 69.

The attorney of present heirs may be appointed to represent absent heirs. Fly *v.* Noble, 37 La. Ann. 667.

Collateral attack upon the capacity of the attorney so appointed is not permitted. State *v.* Lazarus, 37 La. Ann. 830.

The attorney's right to act commences from the date of his appointment. Mercier *v.* Sterlin, 5 La. 472.

The attorney is bound to show his authority and the rights of those claiming as heirs. Sibley *v.* Slocum, 1 Mart. N. S. (La.) 638.

The attorney needs no specific authority to institute suits under article 1213 of the civil code. Rawle *v.* Fennessey, 5 Mart. N. S. (La.) 11.

Money recovered by the attorney from the curator must be paid into the state treasury. Denis *v.* Cordeviella, 4 Mart. (La.) 654.

Where more than the law allows is bequeathed to natural children, there being an executor and the legal heirs being absent, a partition must be made and an attorney for the absent heirs appointed as well as a curator for their share when ascertained. Johnson *v.* Davidson, 6 Mart. (La.) 506.

Irregularity in the appointment does not necessarily vitiate the proceedings. Fly *v.* Noble, 37 La. Ann. 667.

Necessity of notice to the attorney see Mullen *v.* King, 10 La. Ann. 674.

Sufficiency of notice of appointment to the attorney see Mullen *v.* King, 10 La. Ann. 674.

Regularity of appointment presumed.— The appointment of an attorney for absent heirs, under the signature of the probate judge and seal of court and certificate stating that he was duly appointed, will be presumed to be regular until the contrary be shown. Michel *v.* Michel, 11 La. 149.

An appeal lies from an order revoking the appointment of an attorney for absent heirs. State *v.* Pitot, 12 Mart. (La.) 485.

The attorney cannot resign without leave of court. McMicken *v.* Ficklin, 1 La. 45.

The attorney does not become functus officio by the discharge of the testamentary executor. Dupre *v.* Reggio, 6 La. 653.

Where the court of probate appoints the attorney, such attorney cannot act in another court. Harrod *v.* Norris, 10 Mart. (La.) 16.

28. Florance's Succession, 36 La. Ann. 304; Cox's Succession, 32 La. Ann. 1035; Harris' Succession, 29 La. Ann. 743; Merrick Rev. Civ. Code La. (1900) art. 1219. See also Stein *v.* Bowman, 9 La. 281, where it is held that the fees for the attorney of absent heirs should be graduated by the value of the services rendered. But *compare* Rolland's Succession, 1 La. Ann. 224; Asbridge's Succession, 1 La. Ann. 206, both cases construing La. Const. (1845) art. 71.

29. Hisem *v.* Lemel, 19 La. 425; Aubry *v.* Cajus, 8 La. 43.

30. As to the jurisdiction of the courts in particular states see the following cases:

California.— More *v.* More, 133 Cal. 489, 65 Pac. 1044; Sheid's Estate, 122 Cal. 528, 55 Pac. 328, 129 Cal. 172, 61 Pac. 920; McDonald *v.* McCoy, 121 Cal. 55, 53 Pac. 421; Blythe's Estate, 112 Cal. 689, 45 Pac. 6; Burris *v.* Kennedy, 108 Cal. 331, 41 Pac. 458; *In re* Burton, 93 Cal. 459, 29 Pac. 36; Pennie *v.* San Francisco Super. Ct., 89 Cal. 31, 26 Pac. 617; Smith *v.* Westerfield, 88 Cal. 374, 26 Pac. 206; *In re* Jessup, 81 Cal. 408, 21 Pac. 976, 22 Pac. 742, 1028, 6 L. R. A. 594; Hitchcock *v.* San Francisco Super. Ct., 73 Cal. 295, 14 Pac. 872.

Louisiana.— Malone *v.* Casey, 25 La. Ann. 466.

Maryland.— Wilson *v.* McCarty, 55 Md. 277.

Minnesota.—In this state the statute (Gen. Laws (1897), c. 157) authorizes a decree of heirship upon the petition of an heir to an estate where the same has not been administered for five years after the death of an intestate, and provides for a final judgment that is conclusive upon all parties interested; and it has been held that the decree of heir-

such purpose;[31] and in order that the proceedings and judgment or decree of distribution may be valid the statutory steps must be taken.[32] Distributive shares

ship so provided for is within the exercise of the authority delegated to probate courts by section 7, article 6, of the state constitution, which limits their jurisdiction to the "estates of deceased persons, and persons under guardianship." Fitzpatrick *v.* Simonson Bros. Mfg. Co., 86 Minn. 140, 90 N. W. 378.

Mississippi.— Wells *v.* Smith, 44 Miss. 296, chancery courts.

New York.— The surrogate's court may inquire into the legitimacy of children. Matter of Laramie, 2 Silv. Supreme 539, 6 N. Y. Suppl. 175. But it cannot determine the right of inheritance, under the statute of descents, of heirs at law to realty, in a contested proceeding. Matter of Woodworth, 5 Dem. Surr. 156.

North Carolina.— Edwards *v.* Cobb, 95 N. C. 4; Hunt *v.* Sneed, 64 N. C. 176.

Oregon.— Hanner *v.* Silver, 2 Oreg. 336, no power in county courts to determine persons entitled to realty and to make partition.

Pennsylvania.— Davis' Estate, 13 Phila. 407.

Utah.— Garr *v.* Davidson, 25 Utah 335, 71 Pac. 481, holding that the probate court had exclusive jurisdiction to determine questions of heirship and descent where letters of administration had been issued.

See 16 Cent. Dig. tit. "Descent and Distribution," § 230. And see COURTS, 11 Cyc. 791.

A federal court has jurisdiction of a suit by aliens to establish their relationship to a decedent and their status as heirs, and to determine the validity of a will under which a citizen of the state claims the estate, notwithstanding the pendency of probate proceedings in the state court, and although there are other persons claiming an interest in the estate who are not parties. O'Callaghan *v.* O'Brien, 116 Fed. 934.

An administrator appointed by a court of one state is not subject to an action in a court of another state or jurisdiction by an heir to establish his right to a distributive share in the estate; jurisdiction to determine such right being exclusively in the courts of the state of the administration, and primarily in the court of probate. Scruggs *v.* Scruggs, 105 Fed. 28.

Validity of marriage.— Where the existence of a marriage as a fact has been established, the probate court or a referee has no jurisdiction to try its validity or power to treat it as a nullity. Wiser *v.* Lockwood, 42 Vt. 720.

Jurisdiction to admit will to probate.— In a proceeding to determine heirship under Cal. Code Civ. Proc. § 1664, the court has no jurisdiction to admit an alleged will to probate. Christensen's Estate, 135 Cal. 674, 68 Pac. 112.

Jurisdiction of: Actions by heirs and distributees see *infra*, IV, A, 13, b. Actions between heirs and distributees see *infra*, IV, A, 14, b. Actions and proceedings by surviving spouse see *infra*, IV, A, 15, b. Actions against heirs and distributees see *infra*, IV, A, 16, c; IV, C, 11, f. Actions and proceedings with respect to advancements see *infra*, IV, B, 8, a.

31. Under the California statute (Code Civ. Proc. § 1664) see Christensen's Estate, 135 Cal. 674, 68 Pac. 112; Kasson's Estate, 127 Cal. 496, 59 Pac. 950 (right of parties to cross-examine witnesses); Sheid's Estate, 122 Cal. 528, 55 Pac. 328 (premature petition of heir, premature appeal, and right to jury trial); *In re* Blythe, 110 Cal. 226, 42 Pac. 641, 112 Cal. 689, 45 Pac. 6; Blythe's Estate, 108 Cal. 124, 41 Pac. 33 (right to appeal); Blythe *v.* Ayres, 102 Cal. 254, 36 Pac. 522 (right to appeal); Westerfield's Estate, 96 Cal. 113, 30 Pac. 1104 (time of appeal and review); *In re* Burton, 93 Cal. 459, 29 Pac. 36 (rights of assignees); Pennie *v.* San Francisco Super. Ct., 89 Cal. 31, 26 Pac. 617 (stay of proceedings on appeal); Smith *v.* Westerfield, 88 Cal. 374, 26 Pac. 206 (jurisdiction and time of appeal); *In re* Grider, 81 Cal. 571, 22 Pac. 908 (time of appeal); Oxarart's Estate, 78 Cal. 109, 20 Pac. 367; Hitchcock *v.* San Francisco Super. Ct., 73 Cal. 295, 14 Pac. 872 (refusal to open order adjudging default as to persons not appearing); Roach *v.* Coffey, 73 Cal. 281, 14 Pac. 840 (administrator cannot litigate claim of one alleged heir as against another).

Partial distribution under Cal. Code Civ. Proc. § 1663 see Painter's Estate, 115 Cal. 635, 47 Pac. 700; *In re* Grider, 81 Cal. 571, 22 Pac. 908 (effect and conclusiveness of decree of partial distribution); *In re* Jessup, 81 Cal. 408, 21 Pac. 976, 22 Pac. 742, 1028, 6 L. R. A. 594.

In Minnesota, under Gen. Laws (1897), c. 157, authorizing a decree of heirship upon the petition of an heir to an estate, where the same has not been administered for five years after the death of an intestate, and providing for a final judgment that is conclusive upon all parties interested, it has been held that the words "when any person shall die intestate" in the act are to be construed liberally, and that the act applies to estates of a person who died before as well as after its enactment. Fitzpatrick *v.* Simonson Bros. Mfg. Co., 86 Minn. 140, 90 N. W. 378.

32. Burris *v.* Kennedy, 108 Cal. 331, 41 Pac. 458; Smith *v.* Westerfield, 88 Cal. 374, 26 Pac. 206 (time of filing petition to determine rights as distributees); Barber's Succession, 52 La. Ann. 960, 27 So. 363; Allen's Succession, 44 La. Ann. 801, 11 So. 42; Shriver *v.* State, 65 Md. 278, 4 Atl. 679.

In Louisiana failure of curators of vacant estates to publish the death, name, and place of birth and death of deceased as required by statute does not affect the right of the heirs to be recognized as such, and if this duty is omitted by the curators the heirs may still be recognized by complying with

uncalled for are by statute in several states to be invested or paid into the public treasury until demanded.[33]

b. Limitations and Laches. Claimants cannot at common law lose their right to relief by limitation;[34] but it is otherwise in most jurisdictions by express statutory provision.[35] In equity they may lose their right to relief by laches.[36]

c. Pleading. In an action to establish one's right as heir or distributee of an estate, he must allege every fact necessary to support such right, including the fact that there are no other relatives entitled to take in preference to him.[37]

the law in such cases. Mayo *v.* Duke, 23 La. Ann. 674.

Powers, duties, and liabilities of administrators see EXECUTORS AND ADMINISTRATORS.

33. As to the construction and effect of such statutes see the following cases:

California.—Pyatt *v.* Brockman, 6 Cal. 418.

Indiana.— State *v.* Taggart, 88 Ind. 269.

Massachusetts.— Chase *v.* Thompson, 153 Mass. 14, 26 N. E. 137 (holding that the interest of a distributee in money ordered by the probate court to be paid to him, and upon his refusal to receive it deposited by the administrator in a trust company was equitable only, and could not be reached by trustee process as his property); Stockbridge's Petitioner, 145 Mass. 517, 14 N. E. 928 (ordering amount of legacy deposited in a savings bank by order of the probate court, on representation of the executors that the residence of the legatee was unknown, to be paid to his issue upon it appearing that he died before the testator).

Missouri.— *In re* Bomino, 83 Mo. 433, ordering payment of fund deposited on discovery and petition of heirs.

Nevada.— McMahan's Estate, 19 Nev. 241, 8 Pac. 797, premature order for payment of fund into county treasury.

New York.— People *v.* Chapin, 101 N. Y. 682 (holding that money of an estate paid into the state treasury under the statute, where the person entitled thereto is unknown, is not money of the state, or belonging to any of its funds or fund under its management within the constitutional prohibition against the paying out of such moneys except in pursuance of such an appropriation by law, and that upon the compliance with the requirements of the code and the production of a certified copy of an order directing payment to a claimant, it is the duty of the controller to draw his warrant therefor without such an appropriation); Koch's Estate, 15 Abb. N. Cas. 139 note (when decree should direct such payment).

Texas.—State Treasurer *v.* Wygall, 51 Tex. 621, as to suits by heirs against the state for assets deposited in the state treasury under the statute.

34. *Arkansas.*—Jones *v.* Jones, 28 Ark. 19; Harriet *v.* Swan, 18 Ark. 495.

Florida.— Amos *v.* Campbell, 9 Fla. 187.

Indiana.— Smith *v.* Calloway, 7 Blackf. 86.

North Carolina.— Woody *v.* Brooks, 102 N. C. 334, 9 S. E. 294; Bushee *v.* Surles, 77 N. C. 62.

Tennessee.— Lafferty *v.* Turley, 3 Sneed 157. See also Carr *v.* Lowe, 7 Heisk. 84; Taylor *v.* Walker, 1 Heisk. 734.

35. *California.*— *In re* Grider, 81 Cal. 571, 22 Pac. 908.

Georgia.— Cannon *v.* Lynch, 112 Ga. 660, 37 S. E. 858.

Kentucky.— Robinson *v.* Elam, 90 Ky. 300, 14 S. W. 84, 12 Ky. L. Rep. 271; Hargis *v.* Sewell, 87 Ky. 63, 7 S. W. 557, 9 Ky. L. Rep. 920.

Louisiana.— Sallier *v.* Rosteet, 108 La. 378, 32 So. 383; Bothick's Succession, 47 La. Ann. 613, 17 So. 198; Nolasco *v.* Lurty, 13 La. Ann. 100; Layre *v.* Pasco, 5 Rob. 9; Conrad *v.* Thurston, 11 La. 426.

Maryland.— Biays *v.* Roberts, 68 Md. 510, 13 Atl. 366.

Missouri.— State *v.* Grigsby, 92 Mo. 419, 5 S. W. 39.

Pennsylvania.— Blackmore *v.* Gregg, 2 Watts & S. 182; Chandler *v.* Lamborne, 2 Pa. L. J. Rep. 124, 3 Pa. L. J. 367.

Tennessee.— Alvis *v.* Oglesby, 87 Tenn. 172, 10 S. W. 313.

Limitation of: Actions by heirs and distributees see *infra*, IV, A, 13, c. Actions between heirs and distributees see *infra*, IV, A, 14, c. Actions and proceedings by surviving spouse see *infra*, IV, A, 15, c. Actions against heirs and distributees see *infra*, IV, A, 16, b; IV, C, 11, g. Actions and proceedings with respect to advancements see *infra*, IV, B, 8, e, (I).

36. Fidelity Ins., etc., Co.'s Appeal, 115 Pa. St. 157, 10 Atl. 37. Delay by heirs to assert their claim because of the belief that they were not entitled until the youngest became of age was held not to be laches. Thomas *v.* Armstrong, 12 Fed. 666, 4 McCrary 176. See also Sullivan *v.* Andoe, 6 Fed. 641, 4 Hughes 290, where under the circumstances it was held that there had been no laches in the case of foreign claimants.

37. Montgomery *v.* White, 11 S. W. 10, 10 Ky. L. Rep. 905, holding that in an action by collateral relatives of an intestate for property alleged to have descended to them they must allege that there are no other relatives entitled to take in preference to them, and an allegation that they are the "only heirs" of the intestate is insufficient, being a mere conclusion. See also Gardner *v.* Kelsoe, 80 Ala. 497, 2 So. 680; Larue *v.* Hays, 7 Bush (Ky.) 50; Craig *v.* Welch-Hackley Coal, etc., Co., 73 S. W. 1035, 24 Ky. L. Rep. 2225, 74 S. W. 1097, 25 Ky. L. Rep. 232.

Averments held sufficient.— In Rhino *v.* Emery, 72 Fed. 382, 18 C. C. A. 600, it was held that an averment that the blood of both

d. Presumptions and Burden of Proof. Persons claiming the right to take an estate as heirs or distributees, or through others as such, have the burden of proving the facts necessary to sustain their right,[38] including the death of the alleged intestate,[39] the relationship to him of the alleged heirs or distributees,[40] and that there are no other relatives entitled to take before them.[41] Where the claimant's

the ancestors on the paternal side in the second generation, from one from whom the pleader claimed to inherit as next of kin on the mother's side, was extinct, was a sufficient averment that there was no one of the blood of such ancestors to inherit. In Boyer *v.* Dively, 58 Mo. 510, it was held that a petition alleging that claimants were the children of a decedent who left a will in which they were not named, and praying for distribution according to law, was sufficient, as the authority of the court to order distribution in such cases attached before any distribution of the estate, and hence it was not necessary to allege that the legacies had been paid and the estate distributed.

Pleading in: Actions by heirs and distributees see *infra*, IV, A, 13, e. Actions between heirs and distributees see *infra*, IV, A, 14, f. Actions and proceedings by surviving spouse see *infra*, IV, A, 15, e. Actions and proceedings with respect to advancements see *infra*, IV, B, 8, b.

38. *Alabama.*— Gardner *v.* Kelsoe, 80 Ala. 497, 2 So. 680; Hall *v.* Wilson, 14 Ala. 295.

California.— Garrity's Estate, Myr. Prob. 180.

Delaware.— Hurdle *v.* Stockley, 6 Houst. 447.

Iowa.— Anson *v.* Stein, 6 Iowa 150.

Kentucky.— Currie *v.* Fowler, 5 J. J. Marsh. 145; Taylor *v.* Whiting, 4 T. B. Mon. 364.

Louisiana.— Crouzeille's Succession, 106 La. 442, 31 So. 64; Solari *v.* Barras, 45 La. Ann. 1128, 13 So. 627.

Maine.— Stinchfield *v.* Emerson, 52 Me. 465, 83 Am. Dec. 524.

Missouri.— Daudt *v.* Musick, 9 Mo. App. 169.

New Hampshire.— Emerson *v.* White, 29 N. H. 482; Morrill *v.* Otis, 12 N. H. 466.

New Jersey.— Delany *v.* Noble, 3 N. J. Eq. 441.

Pennsylvania.—In re Ruchizky, 205 Pa. St. 105, 54 Atl. 492.

Wisconsin.— Hayward *v.* Ormsbee, 7 Wis. 111.

United States.—O'Callahan *v.* O'Brien, 116 Fed. 934.

See 16 Cent. Dig. tit. "Descent and Distribution," § 233.

Presumption as to intestacy see *supra*, II, A, 10, note 45.

Presumption and burden of proof in: Actions by heirs and distributees see *infra*, IV, A, 13, f. Actions between heirs and distributees see *infra*, IV, A, 14, g. Actions and proceedings by surviving spouse see *infra*, IV, A, 15, f. Actions and proceedings with respect to advancements see IV, B, 8, f.

39. Hurdle *v.* Stockley, 6 Houst. (Del.) 447; Taylor *v.* Whiting, 4 T. B. Mon. (Ky.) 364; Stinchfield *v.* Emerson, 52 Me. 465, 83 Am. Dec. 524; Shaub *v.* Giffin, 84 Md. 557, 36 Atl. 443; Hayward *v.* Ormsbee, 7 Wis. 111. See also *supra*, II, A, 8.

40. Hall *v.* Wilson, 14 Ala. 295; Anson *v.* Stein, 6 Iowa 150; Currie *v.* Fowler, 5 J. J. Marsh. (Ky.) 145; Taylor *v.* Whiting, 4 T. B. Mon. (Ky.) 364; Emerson *v.* White, 29 N. H. 482; Morrill *v.* Otis, 12 N. H. 466.

Identity.— There is no presumption of law that one bearing the name of the son of a person seized of land is the heir or one of the heirs of a particular ancestor; but the question of identity is one of fact, to be determined by the jury upon all the circumstances, such as the identity of name, residence of the claimant, and that of the other members of the family, etc. Freeman *v.* Loftis, 51 N. C. 524.

Marriage.— Where a former wife admits the marriage of her husband to another, who claims property under such marriage, the burden is on her to establish the prior marriage, and that it had not been dissolved. Goldwater *v.* Burnside, 22 Wash. 215, 60 Pac. 409.

41. *Alabama.*— Gardner *v.* Kelsoe, 80 Ala. 497, 2 So. 680.

California.— Garrity's Estate, Myr. Prob. 180.

Illinois.— Skinner *v.* Fulton, 39 Ill. 484.

Iowa.— Anson *v.* Stein, 6 Iowa 150.

Maine.— Stinchfield *v.* Emerson, 52 Me. 465, 83 Am. Dec. 524.

Missouri.— Daudt *v.* Musick, 9 Mo. App. 169.

Nebraska.— Sorenson *v.* Sorenson, (1903) 94 N. W. 540.

New Hampshire.— Emerson *v.* White, 29 N. H. 482.

New Jersey.—Delaney *v.* Noble, 3 N. J. Eq. 441.

Wisconsin.— Hayward *v.* Ormsbee, 7 Wis. 111.

See 16 Cent. Dig. tit. "Descent and Distribution," § 233. And see *infra*, IV, A, 13, f.

Contra, Celis *v.* Oriol, 6 La. 403, holding that where it is proved that certain persons who claim an estate are the legal heirs of the deceased proprietor, they will be considered his only heirs unless it is shown that others exist.

In Louisiana it was held that a collateral claiming an estate need only deny that there are heirs in the descending line, and that this negative need not be proved by him; that his opponents must show that there are some, and he must then establish their death; that he must always prove the death of ascendants by evidence, or show the lapse of one hundred years from their birth, in which case their death is presumed. Miller *v.* McElwee, 12 La. Ann. 476; Marcos *v.* Barcas, 5

right to inherit depends upon the death of persons who if living are the heirs of the decedent, he has the burden of proving their death or of proving facts from which their death may be legally presumed.[42] It will generally be presumed that an intestate left heirs capable of succeeding to his estate, unless the contrary is proved.[43]

e. **Admissibility of Evidence.** The admissibility of evidence to prove heirship is determined of course by the general rules relating to the admissibility of evidence.[44] Declarations of the deceased are competent on the question of

La. Ann. 265; Bernardine *v.* L'Espinasse, 6 Mart. N. S. (La.) 94; Owens *v.* Mitchell, 5 Mart. N. S. (La.) 667; Hooter *v.* Tippet, 12 Mart. (La.) 390.

42. *California.*— Garrity's Estate, Myr. Prob. 180, holding that evidence of inquiries at the last known residence of heirs, who appear to have removed therefrom, and not to have been heard from for a considerable time, does not furnish a basis for presumption of their death.

Delaware.— Hurdle *v.* Stockley, 6 Houst. 447, holding that there was no presumption of the death of certain heirs without issue from the fact that they had not been heard from for forty-five or fifty years.

Kentucky.— Martin *v.* Royse, 52 S. W. 1062, 21 Ky. L. Rep. 775, 54 S. W. 177, 21 Ky. L. Rep. 1353.

Louisiana.— Miller *v.* McElwee, 12 La. Ann. 476; Marcos *v.* Barcas, 5 La. Ann. 265.

Maine.— Johnson *v.* Merithew, 80 Me. 111, 13 Atl. 132, 6 Am. St. Rep. 162; Stinchfield *v.* Emerson, 52 Me. 465, 83 Am. Dec. 524.

Maryland.— Schaub *v.* Griffin, 84 Md. 557, 36 Atl. 443.

New York.—*In re* Taylor, 20 N. Y. Suppl. 960. And see McCartee *v.* Camel, 1 Barb. Ch. 455.

Tennessee.— See Shown *v.* McMackin, 9 Lea 601, 42 Am. Rep. 680.

See 16 Cent. Dig. tit. "Descent and Distribution," § 233.

Presumption of death see *supra*, II, A, 8; III, A, 6, e, (II); and, generally, DEATH.

Presumption and proof of survivorship.— Schaub *v.* Griffin, 84 Md. 557, 36 Atl. 443 (holding that no presumption of survivorship arises from the fact that a father was heard of at a later period than his son; and that, although one who has been absent and unheard of for seven years will be presumed to be dead, no presumption arises as to the time of his death); Ehle's Estate, 73 Wis. 445, 41 N. W. 627 (holding that those claiming real estate by descent from a person on the ground that it descended to him from his children had the burden of showing that he survived such children, all having perished in the same fire; but those claiming personal property from such person under and through his widow and children had the burden of showing that they or some of them survived him). See also, as to presumption of survivorship, *supra*, II, A, 11; and, generally, DEATH.

Presumption where several perish in same disaster.— Johnson *v.* Merithew, 80 Me. 111, 13 Atl. 132, 6 Am. St. Rep. 162. And see, generally, DEATH.

43. *Illinois.*— Fell *v.* Young, 63 Ill. 106; Chicago *v.* Major, 18 Ill. 349, 68 Am. Dec. 553; Pile *v.* McBratney, 15 Ill. 314; Harvey *v.* Thornton, 14 Ill. 217.

Louisiana.— See Addison *v.* New Orleans Sav. Bank, 15 La. 527.

Maine.— Stinchfield *v.* Emerson, 52 Me. 465, 83 Am. Dec. 524, holding that where title is claimed to be in a father because of the death of his son, it must be shown, not only that the son is dead, but also that he died without issue.

Missouri.— Daudt *v.* Musick, 9 Mo. App. 169, holding that there was no presumption that no brother or sister or their descendants were left by a man who died at the age of seventy years from the fact that he had resided in one place more than forty years before his death and that his neighbors knew nothing of his family and had never heard him speak of such relatives.

New York.— See *In re* Taylor, 20 N. Y. Suppl. 960.

North Carolina.— State University *v.* Harrison, 90 N. C. 385.

See 16 Cent. Dig. tit. "Descent and Distribution," § 233. *Compare supra*, III, A, 6, e, (II).

Evidence that a person had not been heard from for a long time and had never married, although competent on the question of whether he died leaving heirs, has been held not to raise the presumption that he left no heirs. State University *v.* Harrison, 90 N. C. 385. But see Shown *v.* McMackin, 9 Lea (Tenn.) 601, 42 Am. Rep. 680, holding that there was a presumption that one died without leaving heirs, where he had been absent for more than twenty-five years and was unmarried when last heard from. And see Hollingsworth *v.* Barbour, 4 Pet. (U. S.) 466, 7 L. ed. 922, holding that the presumption, if any, that a deceased person left heirs is repelled by the facts that he was a foreigner and that for twenty-five years after his death none appeared or were discovered.

44. See EVIDENCE.

Statute rendering claimant incompetent as a witness.— In Illinois the statute removing the common-law disability of a party to a suit or person interested in the event thereof to testify in his own behalf expressly provides that it shall not apply when any adverse party sues or defends as the heir of any deceased person, except when called as a witness by such adverse party so suing or defending. Rev. St. c. 51, § 2. Under this statute a complainant suing for partition of the estate of a deceased person, whose daugh-

heirship.[45] A will recognizing persons as children of the testator is evidence that they are his heirs.[46] Witnesses as to heirship must testify as to facts and not give mere conclusions of law.[47]

f. Sufficiency of Evidence. To establish the right of persons claiming as heirs or distributees the evidence must be sufficient to satisfy the court that the alleged intestate is dead, that the claimants are so related to him as to be his heirs or next of kin, and also that there are no other persons entitled to take as heirs or next of kin.[48]

g. Hearing and Determination. In a proceeding to put heirs in possession of an estate issue must be joined and judgment rendered contradictorily recognizing

ter and heir at law she alleges herself to be, which fact is expressly denied by the defendant heir, is incompetent to testify as to whether she is a daughter of the deceased. Crumley *v.* Worden, 201 Ill. 105, 66 N. E. 318. See also Laurence *v.* Laurence, 164 Ill. 367, 45 N. E. 1071, holding incompetent as a witness one claiming to be the common-law wife of a decedent and as such heir to part of his estate.

Evidence inadmissible to show illegitimacy see Eloi *v.* Mader, 1 Rob. (La.) 581, 38 Am. Dec. 192. See also BASTARDS, 5 Cyc. 659.

Evidence to prove one the widow of decedent see Stevens *v.* Joyal, 48 Vt. 291.

Recitals in act authorizing heirs to sell land.— Recital of the names of the minor children and heirs of a decedent in an act of the legislature authorizing them to sell their interests in land, if evidence of who they were, does not in the absence of other evidence overcome a recital in the deed that the persons named therein were at the date of its execution his only children and heirs. Scotch Lumber Co. *v.* Sage, 132 Ala. 598, 32 So. 607.

Unprobated will.— In a proceeding to determine heirship under Cal. Code Civ. Proc. § 1664, parties whose claims are based wholly upon an asserted will of the decedent, not alleged to have been admitted to probate, cannot, while it remains unprobated, introduce evidence to prove its execution as an olographic will, or introduce the will in evidence to maintain a title founded upon it. *In re* Christensen, 135 Cal. 674, 68 Pac. 112.

Admissibility of evidence of paternity of an illegitimate child, including admissions, evidence as to intention of the decedent toward the mother of the child, letters of the mother, photographs, and testimony as to the christening of the child by the family name of the decedent see *In re* Jessup, 81 Cal. 408, 21 Pac. 976, 22 Pac. 742, 1028, 6 L. R. A. 594.

Admissibility of evidence in: Actions by heirs and distributees see *infra*, IV, A, 13, f. Actions between heirs and distributees see *infra*, IV, A, 14, g. Actions and proceedings by surviving spouse see *infra*, IV, A, 15, f.

45. Wise *v.* Wynn, 59 Miss. 588, 42 Am. Rep. 381, holding that declarations of a deceased person that he has a brother, without other proof of relationship, are inadmissible to enable his heirs to inherit from the brother, but are competent to establish the right of his brother's heirs to take from him. See also Cuddy *v.* Brown, 78 Ill. 415; Moffit *v.* Witherspoon, 32 N. C. 185; Adie *v.* Com., 25 Gratt. (Va.) 712. *Compare* Stevens *v.* Joyal, 48 Vt. 291.

46. Cowan *v.* Hite, 2 A. K. Marsh. (Ky.) 238.

47. Morrill *v.* Otis, 12 N. H. 466, holding that testimony of a witness that a decedent died without issue leaving his brother, his nephew, and his niece as his heirs at law was incompetent. See also Currie *v.* Fowler, 5 J. J. Marsh. (Ky.) 145; Banks *v.* Johnson, 4 J. J. Marsh. (Ky.) 649; Taylor *v.* Whiting, 4 T. B. Mon. (Ky.) 364; Birney *v.* Hann, 3 A. K. Marsh. (Ky.) 322, 13 Am. Dec. 167; Bradford *v.* Erwin, 34 N. C. 291.

48. As to the sufficiency of the evidence see the following cases:

Alabama.— Gardner *v.* Kelsoe, 80 Ala. 497, 2 So. 680.

Delaware.— Hurdle *v.* Stockley, 6 Houst. 447.

Illinois.— Crumley *v.* Worden, 201 Ill. 105, 66 N. E. 318 (holding evidence sufficient to justify a finding that the complainant in a suit for partition of the estate of a deceased person was not a child of the body or legal heir of the deceased); Cuddy *v.* Brown, 78 Ill. 415 (holding proof of heirship sufficient); Skinner *v.* Frelton, 39 Ill. 484 (holding that proof that certain children were the only ones who survived their father did not establish their claim as his only heirs, it not being shown that none of those who died before their father left children or husbands or wives).

Iowa.— Anson *v.* Stein, 6 Iowa 150, holding that where a person claims as heir he must establish affirmatively his relationship with the deceased, and negatively that no other descendants exist to impede the descent to him.

Kansas.— Reville *v.* Dubach, 60 Kan. 572, 57 Pac. 522, holding notorious recognition of a child sufficient to establish heirship.

Kentucky.— Selman *v.* Lee, 6 Bush 215 (evidence held sufficient); Hopkins *v.* Claybrook, 5 J. J. Marsh. 234; Banks *v.* Johnson, 4 J. J. Marsh. 649 (holding insufficient testimony of a witness that certain persons were heirs, without stating relationship); Taylor *v.* Whiting, 4 T. B. Mon. 364; Birney *v.* Hann, 3 A. K. Marsh. 322, 13 Am. Dec. 167.

Louisiana.— O'Neil's Succession, 52 La. Ann. 1754, 28 So. 259; Seymour's Succession, 52 La. Ann. 120, 24 So. 218, 26 So. 783;

their capacity, and the adjudication is a judgment *in rem*.[49] The mode of proceeding and the jurisdiction of the courts are regulated by statutes varying in the different states.[50] The question who are heirs of a deceased person is strictly a question of law for the court,[51] but the facts upon which the question of law arises are for the jury.[52] The effect and conclusiveness of the judgment or decree depends upon the statute in the particular jurisdiction.[53]

Maguire *v.* Bass, 8 La. Ann. 270; Hubbell *v.* Inkstein, 7 La. Ann. 252, status as widow.

Maine.— Stinchfield *v.* Emerson, 52 Me. 465, 83 Am. Dec. 524; Pratt *v.* Pierce, 36 Me. 448, 58 Am. Dec. 759, holding that marriage may be established by proof of facts from which it may be inferred.

Maryland.— Copes *v.* Pearce, 7 Gill 247, recognition of relationship held sufficient to establish that claimant was a half sister of an intestate. And see as to proof of survivorship Schaub *v.* Griffin, 84 Md. 557, 36 Atl. 443.

Missouri.— Daudt *v.* Musick, 9 Mo. App. 169.

New Hampshire.— Emerson *v.* White, 29 N. H. 482; Morrill *v.* Otis, 12 N. H. 466.

New Jersey.— Keavey *v.* Barrett, 62 N. J. Eq. 454, 49 Atl. 1073 (holding evidence sufficient to establish claimant's identity as the child of decedent, and to support an inference of legitimacy); Delany *v.* Noble, 3 N. J. Eq. 441.

New York.— Matter of Murray, 44 N. Y. App. Div. 640, 60 N. Y. Suppl. 676; Matter of O'Brien, 1 N. Y. App. Div. 632, 37 N. Y. Suppl. 482, holding evidence sufficient to show identity of intestate as grand aunt of claimant.

North Carolina.— Ernull *v.* Whitford, 48 N. C. 474; Bradford *v.* Erwin, 34 N. C. 291, holding that a witness' testimony that certain persons were the heirs at law of an intestate, being a mere conclusion of law, was not evidence of such fact.

Ohio.— Kendall *v.* Kendall, 8 Ohio Dec. (Reprint) 428, 8 Cinc. L. Bul. 1, holding claim of heirship not supported by the evidence.

Pennsylvania.— *In re* Young, 199 Pa. St. 35, 48 Atl. 692; Sheehan's Estate, 139 Pa. St. 168, 20 Atl. 1003; Clement's Estate, 2 Pa. Dist. 341, 13 Pa. Co. Ct. 129.

South Carolina.— Keys *v.* Norris, 6 Rich. Eq. 388, question of marriage.

Tennessee.— Rogers *v.* Park, 4 Humphr. 480, holding marriage and heirship sufficiently established.

Texas.— Kaise *v.* Lawson, 38 Tex. 160, holding that proof of the living together of parents of claimants as man and wife was sufficient to establish heirship of the children, until the contrary should be proven.

Virginia.— Adie *v.* Com., 25 Gratt. 712, holding that the evidence was sufficient to establish the identity between one James Eadie of Scotland under whom plaintiffs claimed and the James Adie for the proceeds of whose estate the suit was brought.

Washington.— Goldwater *v.* Burnside, 22 Wash. 215, 60 Pac. 409, identity of decedent as claimant's husband.

Wisconsin.—Hayward *v.* Ormsbee, 7 Wis. 111.

United States.— Secrist *v.* Green, 3 Wall. 744, 18 L. ed. 153; McClaskey *v.* Barr, 47 Fed. 154; Robinson *v.* Taylor, 42 Fed. 803; Amory *v.* Amory, 1 Fed. Cas. No. 335, 6 Biss. 174. See also O'Callaghan *v.* O'Brien, 116 Fed. 934.

See 16 Cent. Dig. tit. "Descent and Distribution," § 235.

A wife claiming property under a decedent, alleged to have deserted her after marriage in a foreign country, and to have removed to the United States, cannot recover without proof identifying the deceased with her husband. Goldwater *v.* Burnside, 22 Wash. 215, 60 Pac. 409.

An official certificate of a foreign court reciting that a certain person within its jurisdiction has established his relationship to a decedent of Pennsylvania is *prima facie* evidence of such relationship on a question of distribution in the orphans' court. *In re* Yung, 199 Pa. St. 35, 48 Atl. 692.

Indians.— As to the heirship of one claiming to inherit from an Indian as his child and the validity of Indian marriages see Compo *v.* Jackson, 50 Mich. 578, 16 N. W. 295. See also INDIANS.

Sufficiency of evidence in: Actions by heirs and distributees see *infra*, IV, B, 13, f. Actions between heirs and distributees see *infra*, IV, A, 14, g. Actions and proceedings by surviving spouse see *infra*, IV, A, 15, f.

49. Duperier *v.* Berard, 107 La. 91, 31 So. 653; Lorenz's Succession, 41 La. Ann. 1091, 6 So. 886, 7 L. R. A. 265; Bonella *v.* Maduel, 26 La. Ann. 112.

50. See *supra*, IV, A, 3, a.

51. Bradford *v.* Erwin, 34 N. C. 291. And see Ernull *v.* Whitford, 48 N. C. 474.

52. Ernull *v.* Whitford, 48 N. C. 474.

53. **Conclusiveness of judgment or decree.** — The general rule is that the decree of the probate court as to who are entitled as heirs or distributees, while it will protect the administrator who makes distribution in accordance therewith, is not conclusive as against persons who are not parties and have no opportunity to be heard. Shores *v.* Hooper, 153 Mass. 228, 26 N. E. 846, 11 L. R. A. 308; *In re* Patterson, 146 N. Y. 327, 40 N. E. 990. In Sherwood *v.* Wooster, 11 Paige (N. Y.) 441, where, a person having died intestate in Louisiana leaving two children, one of whom had been absent and not heard of for a number of years, it was held under the statutes of Louisiana that a decision of the probate court in that state declaring the other child sole heir was not conclusive evidence of her right so as to bar the claim of the other child who subsequently appeared and claimed his share. A probate decree,

4. Title of Heirs and Distributees — a. In General. An heir taking property by descent cannot be treated as a purchaser, but merely succeeds to the rights and the possession of the ancestor, and to nothing more, and he takes subject to the rights of third parties against the ancestor.[54]

b. Real Property and Interests Therein — (i) *In General.* By the common law, and under the statutes in most of the states, the title to real property vests in the heir or heirs immediately on the death of the intestate,[55] subject to dower

based upon the findings of a jury that a person was the daughter and sole heir of a testator who gave his estate to his heirs at law, reopening the account of the administrator with the will annexed and charging him with sums paid to supposed heirs of the testator, and authorizing her to sue the administrator's bond for his failure to account to her, is not conclusive in favor of her title to land of the estate granted by such supposed heirs to one who was not a party to the probate proceedings; and in a writ of entry brought by her against such grantee to recover the granted premises, such findings are not admissible in evidence against the tenant for any purpose. Shores *v.* Hooper, 153 Mass. 228, 26 N. E. 846, 11 L. R. A. 308. Under some of the statutes, however, a decree as to heirship and the persons entitled to share in an estate is final and conclusive. See Fitzpatrick *v.* Simonson Bros. Mfg. Co., 86 Minn. 140, 90 N. W. 378. A party to proceedings for the determination of heirship under Cal. Code Civ. Proc. § 1664, is concluded by such determination, in the distribution of the estate; and where the decision of the court in such proceedings is against the claim of heirship or interest of such party in the estate, and such decision is affirmed upon his appeal therefrom, he cannot afterward be heard to affirm the contrary upon appeal from a decree of distribution of the estate. Blythe's Estate, 112 Cal. 689, 45 Pac. 6. *Compare* McDonald *v.* McCoy, 121 Cal. 55, 53 Pac. 421; *In re* Grider, 81 Cal. 571, 22 Pac. 908. See also Judgments.

54. Morgan *v.* Corbin, 21 Iowa 117; Burns *v.* Berry, 42 Mich. 176, 3 N. W. 924; Stewart *v.* Ackley, 52 Barb. (N. Y.) 283; Russell *v.* Roberts, 121 N. C. 322, 28 S. E. 406. See also Davenport *v.* Alder, 52 La. Ann. 263, 26 So. 836; Addison *v.* New Orleans Sav. Bank, 15 La. 527; Poydras *v.* Mourain, 9 La. 492; Poydras *v.* Taylor, 9 La. 488. And see Head *v.* Spier, 66 Kan. 386, 71 Pac. 833. See also *supra*, II, E, 1, note 94; *infra*, IV, A, 4, b, note 59; *infra*, IV, A, 16, d.

Property fraudulently conveyed.— Where property is fraudulently assigned in trust, the heirs of the beneficiary who knew of such fraud stand in no better position than the beneficiary, and since he could not maintain an action to recover the trust funds his heirs cannot maintain such an action. Stewart *v.* Ackley, 52 Barb. (N. Y.) 283.

Sale by ancestor without delivery.—A sale of personal property without delivery, being valid as between the parties, and void only as against *bona fide* purchasers and creditors, the heir of one who has sold property cannot claim the same from the purchaser because there was no delivery. Davenport *v.* Alder, 52 La. Ann. 263, 26 So. 836.

Where a decedent has assigned all his interest in a contract for the purchase of school lands, his heirs can claim no interest therein by descent. Kellogg *v.* Logan, 38 Iowa 688.

55. *Alabama.*— Shamblin *v.* Hall, 123 Ala. 541, 26 So. 285; Brown *v.* Mize, 119 Ala. 10, 24 So. 453; Stovall *v.* Clay, 108 Ala. 105, 20 So. 387; Wood *v.* Legg, 91 Ala. 511, 8 So. 342; Cooper *v.* Davison, 86 Ala. 367, 5 So. 650; Hart *v.* Kendall, 82 Ala. 144, 3 So. 41; Nelson *v.* Murfee, 69 Ala. 598; Cruikshank *v.* Luttrell, 67 Ala. 318; Turner *v.* Kelly, 67 Ala. 173; Tyson *v.* Brown, 64 Ala. 244; Calhoun *v.* Fletcher, 63 Ala. 574; Cockrell *v.* Coleman, 55 Ala. 583; Farmer *v.* Ray, 42 Ala. 125, 94 Am. Dec. 633.

Arkansas.— Chowning *v.* Stanfield, 49 Ark. 87, 4 S. W. 276; Stewart *v.* Smiley, 46 Ark. 373; Carnall *v.* Wilson, 21 Ark. 62, 76 Am. Dec. 351.

California.— Estep *v.* Armstrong, 91 Cal. 659, 27 Pac. 1091; Spotts *v.* Hanley, 85 Cal. 155, 24 Pac. 738; Brenhan *v.* Story, 39 Cal. 179; Woodworth's Estate, 31 Cal. 595; Meeks *v.* Hahn, 20 Cal. 620; Updegraff *v.* Trask, 18 Cal. 458; Farrell *v.* Enwright, 12 Cal. 450; Beckett *v.* Silover, 7 Cal. 215, 68 Am. Dec. 237.

Georgia.— Holt *v.* Anderson, 98 Ga. 220, 25 S. E. 496.

Illinois.— Walbridge *v.* Day, 31 Ill. 379, 83 Am. Dec. 227 (holding that the administrator cannot affect the title of the heirs except by a sale authorized by an order of the probate court); Buck *v.* Eaman, 18 Ill. 529; Smith *v.* McConnell, 17 Ill. 135, 63 Am. Dec. 340; Vansyckle *v.* Richardson, 13 Ill. 171; Smith *v.* Hall, 19 Ill. App. 17; McGillick *v.* McAllister, 10 Ill. App. 40.

Indiana.— Humphries *v.* Davis, 100 Ind. 369; Taylor *v.* Fickas, 64 Ind. 167, 31 Am. Rep. 114; Hankins *v.* Kimball, 57 Ind. 42.

Iowa.— Gray *v.* Myers, 45 Iowa 158; Kinsell *v.* Billings, 35 Iowa 154; Laverty *v.* Woodward, 16 Iowa 1.

Kentucky.— Moore *v.* Dodd, 1 A. K. Marsh. 140; Hatcher *v.* Galloway, 2 Bibb 180.

Louisiana.— Ware *v.* Jones, 19 La. Ann. 428; Davis *v.* Elkins, 9 La. 135. As to acceptance and renunciation of succession see *supra*, IV, A, 2.

Maine.— Walsh *v.* Wheelwright, 96 Me. 174, 52 Atl. 649.

Massachusetts.— Lobdell *v.* Hayes, 12 Gray 236.

Michigan.— Burns *v.* Berry, 42 Mich. 176, 3 N. W. 924; Warren *v.* Tobey, 32 Mich. 45.

Minnesota.— State *v.* Ramsey County Probate Ct., 25 Minn. 22.

of the widow, or rights of the husband as tenant by the curtesy, and to homestead

Mississippi.— Cohea *v.* Jemison, 68 Miss. 510, 10 So. 46; McPike *v.* Wells, 54 Miss. 136; Hargrove *v.* Baskin, 50 Miss. 194; Root *v.* McFerrin, 37 Miss. 17, 75 Am. Dec. 49; Pinson *v.* Williams, 23 Miss. 64; Bullock *v.* Sneed, 13 Sm. & M. 293; Campbell *v.* Brown, 6 How. 230. And the administrator cannot divest the title of the heirs by surrendering the deed by which the land was conveyed to their ancestor. Pinson *v.* Williams, 23 Miss. 64.

Nebraska.— Security Invest. Co. *v.* Lottridge, (1902) 89 N. W. 298; Johnson *v.* Colby, 52 Nebr. 327, 72 N. W. 313; Shellenberger *v.* Ransom, 41 Nebr. 631, 59 N. W. 935, 25 L. R. A. 564; Rakes *v.* Brown, 34 Nebr. 304, 51 N. W. 848.

Nevada.— Gossage *v.* Crown Point Gold, etc., Min. Co., 14 Nev. 153.

New Hampshire.— Lucy *v.* Lucy, 55 N. H. 9; Lane *v.* Thompson, 43 N. H. 320; Plumer *v.* Plumer, 30 N. H. 558.

New Jersey.— Romaine *v.* Hendrickson, 24 N. J. Eq. 231; Herbert *v.* Tuthill, 1 N. J. Eq. 141.

New York.— Hubbard *v.* Gilbert, 25 Hun 596; Covell *v.* Weston, 20 Johns. 414; Smith *v.* Lorillard, 10 Johns. 338.

North Carolina.— Beam *v.* Jennings, 89 N. C. 451; Floyd *v.* Herring, 64 N. C. 409; Ferebee *v.* Proctor, 19 N. C. 439.

Ohio.— Overturf *v.* Dugan, 29 Ohio St. 230.

Oregon.— King *v.* Boyd, 4 Oreg. 326.

Pennsylvania.— Webster *v.* Webster, 53 Pa. St. 161.

Tennessee.— Smith *v.* Thomas, 14 Lea 324; Stephenson *v.* Yandle, 3 Hayw. 109.

Texas.— Ackerman *v.* Smiley, 37 Tex. 211; Morris *v.* Halbert, 36 Tex. 19; Clubb *v.* Johnson, 11 Tex. 469.

Vermont.— Austin *v.* Bailey, 37 Vt. 219, 86 Am. Dec. 703; Hyde *v.* Barney, 17 Vt. 280, 44 Am. Dec. 335; Chipman *v.* Sawyer, 1 Tyler 83.

Virginia.— Tapscott *v.* Cobbs, 11 Gratt. 172; Trent *v.* Trent, Gilm. 174, 9 Am. Dec. 594.

Wisconsin.— Marsh *v.* Waupaca County, 38 Wis. 250; Jones *v.* Billstein, 28 Wis. 221.

United States.— Lindenberger *v.* Matlack, 15 Fed. Cas. No. 8,360, 4 Wash. 278.

Canada.— Spafford *v.* Breckenridge, 1 U. C. C. P. 492.

See 16 Cent. Dig. tit. "Descent and Distribution," §§ 239, 243.

Right of heirs to possession see *infra,* IV, A, 5, A.

Right of heirs to rents, profits etc., see *infra,* IV, A, 6.

Actions by heirs see *infra,* IV, A, 13, *a,* (II).

Non-resident alien heirs.— Since the title to real estate vests in the heirs immediately on the death of the intestate, where the statute does not enable non-resident aliens to inherit, the real estate of an intestate vests on his death in his resident heirs to the exclusion of non-resident aliens, and the latter acquire no right to the property by afterward becoming residents of the state. Farrell *v.* Enright, 12 Cal. 450.

Vendee's interest in land.— The interest of a vendee in land held by him under a contract of purchase is in equity regarded as real property and on his death goes to his heirs and not to his personal representative. Bowen *v.* Lansing, 129 Mich. 117, 88 N. W. 384, 95 Am. St. Rep. 427, 57 L. R. A. 643. See, generally, EXECUTORS AND ADMINISTRATORS.

A vendor's equitable lien for the purchase-money descends to his heir on his death intestate. Hanrick *v.* Walker, 50 Ala. 34; Reed *v.* Ash, 30 Ark. 775; Lavender *v.* Abbott, 30 Ark. 172. And see Tierman *v.* Beam, 2 Ohio 383, 15 Am. Dec. 557.

Interest of vendor in lands sold see *supra,* II, D, 2.

Where land is sold under a deed of trust after the death of the grantor, the proceeds after satisfying the debts secured are payable to the heirs of the grantor, although if it is sold before the death of the grantor such surplus goes to his personal representative. *In re* Thompson, 6 Mackey (D. C.) 536.

Recovery of proceeds of land wrongfully sold.— Where one who holds the legal title to land merely as security for a debt due from the real owner and after the latter's death intestate wrongfully sells and conveys the same so as to cut off the right of redemption and converts the proceeds to his own use the heir at law of the intestate, to whom the right of redemption descended, may maintain an action to recover the proceeds. Bowery Nat. Bank *v.* Duncan, 12 Hun (N. Y.) 405.

Fixtures.— Property affixed to the freehold goes to the heir as real property and not to the administrator. Kinsell *v.* Billings, 35 Iowa 154, 156, applying the rule to a sawmill built in a permanent manner and affixed to the soil, and stating the rule to be that "as between the heir and the executor or administrator the rule obtains with the greatest rigor in favor of the inheritance, and against the right to consider as a personal chattel anything which has been affixed to the freehold." And see, generally, FIXTURES.

Covenants real.— The heir has the right of action for breaches of covenants real occurring after the death of the obligee. See *infra,* IV, A, 4, d.

Bond for title.— Where a bond to convey title to the obligee shows that the title is in a third person, and that the obligor has never procured a conveyance of the title to the obligee, nor obtained it himself, the heir of the obligee cannot take the land by descent. Allen *v.* Greene, 19 Ala. 34.

Entry on public lands.— The right which a person acquires by an entry on public lands generally descends to his heirs and cannot be impaired by the administrator. Moore *v.* Dodd, 1 A. K. Marsh. (Ky.) 140. See also *supra,* II, D, 3; and, generally, PUBLIC LANDS.

rights,[56] and in most jurisdictions to the debts of the intestate,[57] and to the exercise of such special powers as may be conferred upon the administrator by statute, as the right to possession and the right to sell for payment of debts, etc.[58] The heir of course succeeds to the title and interest of the intestate and to nothing more.[59]

(II) *LAND DIRECTED BY TESTATOR TO BE SOLD.* The title to land directed by a testator to be sold, for disposition of the proceeds to legatees or otherwise, but not devised for that purpose, vests in the testator's heirs until a sale by the executors.[60]

Confirmation of Mexican grant.— Where, after the death of the grantee of an unconfirmed Mexican grant, his heirs petitioned for and obtained a confirmation of the title to them, and a patent issued to them, it was held that they became vested with the legal title and could maintain ejectment against the purchasers of the land at a sale by the administrator under an order of the probate court. Hartley *v.* Brown, 51 Cal. 465.

Title of forced heirs in Louisiana see Cox *v.* Von Ahlefeldt, 105 La. 543, 30 So. 175.

Irregular heirs.— In Louisiana irregular heirs, such as the surviving spouse, are not considered in law as succeeding to the deceased from the instant of his death, but they have only a right of action to cause themselves to be put in possession of the succession, and proceedings to this end must be taken in the manner prescribed by law. Barber's Succession, 52 La. Ann. 960, 27 So. 363; Allen's Succession, 44 La. Ann. 801, 11 So. 42; Willis *v.* Elam, 28 La. Ann. 857.

Interest in land regarded as personal property see *supra*, II, A, 7, b.

Money and rights of action regarded as real property see *supra*, II, A, 7, c.

Conversion of land into personalty see *supra*, II, A, 7, b; and CONVERSION, 9 Cyc. 851.

Descent cast as color of title see ADVERSE POSSESSION, 1 Cyc. 1101.

56. Shamblin *v.* Hall, 123 Ala. 541, 26 So. 285; Farmer *v.* Ray, 42 Ala. 125, 94 Am. Dec. 633. See CURTESY; DOWER; HOMESTEADS.

57. Vansyckle *v.* Richardson, 13 Ill. 171; Flood *v.* Strong, 108 Mich. 561, 66 N. W. 473; Armstrong *v.* Loomis, 97 Mich. 577, 56 N. W. 938; State *v.* Ramsey County Probate Ct., 25 Minn. 22; Overturf *v.* Dugan, 29 Ohio St. 230 [*citing* Sheldon *v.* Newton, 3 Ohio St. 494; Ramsdall *v.* Craighill, 9 Ohio 197; Stiver *v.* Stiver, 8 Ohio 217]. See Covell *v.* Weston, 20 Johns. (N. Y.) 414.

58. *Alabama.*— Banks *v.* Speers, 97 Ala. 560, 11 So. 841; Sullivan *v.* Robb, 86 Ala. 433, 5 So. 746; Leatherwood *v.* Sullivan, 81 Ala. 458, 1 So. 718; Comer *v.* Hart, 79 Ala. 389; Nelson *v.* Murfee, 69 Ala. 598; Turner *v.* Kelly, 67 Ala. 173; McCullough *v.* Wise, 57 Ala. 623.

California.— Harper *v.* Strutz, 53 Cal. 655; Meeks *v.* Kirby, 47 Cal. 169; Chapman *v.* Hollister, 42 Cal. 462.

Illinois.— Wallbridge *v.* Day, 31 Ill. 379, 83 Am. Dec. 227, as to the administrator's control over and power to affect the title of the heirs.

Michigan.— Burns *v.* Berry, 42 Mich. 176, 3 N. W. 924.

Mississippi.— McPike *v.* Wells, 54 Miss. 136; Hargrove *v.* Baskins, 50 Miss. 194.

Nebraska.— Security Invest. Co. *v.* Lottridge, (1902) 89 N. W. 298; Rakes *v.* Brown, 34 Nebr. 304, 51 N. W. 848.

New York.— Covell *v.* Weston, 20 Johns. 414.

Wisconsin.— Jones *v.* Billstein, 28 Wis. 221.

See, generally, EXECUTORS AND ADMINISTRATORS.

Unconstitutional statute authorizing administrator to sell.—An act of the legislature authorizing an administrator to sell property belonging to the estate of his decedent, except in satisfaction of the lien of creditors, for the support of the family or to pay the expenses of administration is unconstitutional. Brenham *v.* Story, 39 Cal. 179.

59. Heirs can take no better title to real estate than their ancestor had at the time of his death, and they take subject to any encumbrances which then existed. Burns *v.* Berry, 42 Mich. 176, 3 N. W. 924. Where an ancestor at the time of his death has only an equity of redemption in the land in controversy, one claiming as his heir can have no legal estate in the land. Russell *v.* Roberts, 121 N. C. 322, 28 S. E. 406. See also *supra*, II, E, 1, note 94; IV, A, 4, a.

Trusts.— On the death of one who holds the title to land in trust for another, nothing but the legal estate goes to his heirs, and they hold the same for the *cestui que trust.* Walton *v.* Coulson, 29 Fed. Cas. No. 17,132, 1 McLean 120. And see Chowning *v.* Stanfield, 49 Ark. 87, 4 S. W. 276.

Election by grantee.—Where nothing passes to the grantee before election, he must make it in his lifetime, but where the estate passes by the grant the grantee's heir or executor may make it. Thus when a title bond is conditioned to convey to the obligee a given number of acres out of a certain tract of land, to be taken out of either of four corners, in a square or oblong, at the option of the grantee, the election in case of the death of the obligee passes to his executor or devisee, otherwise to the heir. Anderson *v.* Donelson, 1 Yerg. (Tenn.) 197.

60. *California.*— Estep *v.* Armstrong, 91 Cal. 659, 27 Pac. 1091.

Florida.— Simmons *v.* Spratt, 26 Fla. 448, 8 So. 123, 9 L. R. A. 343.

Massachusetts.— Greenough *v.* Welles, 10 Cush. 571; Fay *v.* Fay, 1 Cush. 93.

(III) *PENDING CONTEST OF WILL.* And lands devised vest in the testator's heirs at law pending a contest of the will.[61]

(IV) *STATUTES REQUIRING ADMINISTRATION.* In some states the statute requires administration with respect to real as well as personal property,[62] and in California, it seems, even where there are no debts administration cannot be dispensed with by consent of the heirs and conveyances between them.[63] Generally, however, where there are no debts administration may be dispensed with and the real estate as well as the personal property[64] may be divided by agreement between the heirs,[65] or the heirs may sue to recover the possession.[66] In Connecticut the statute provides for distribution of real estate under direction of the probate court, but allows the heirs to divide the same by an agreement executed and acknowledged like deeds of land, and recorded in said court.[67] In Louisiana real estate vests in the heirs at law and they may if *sui juris* divide it as they please.[68]

e. Personal Property — (I) *IN GENERAL.* At common law, and under the statutes in most of the states, the title to chattels real of an intestate[69] and to personal property generally vests in the administrator and not in the heirs or distributees, and their rights therefore must generally be enforced through administration and distribution.[70] The legal title to personal property is sus-

Mississippi.— Cohea *v.* Jemison, 68 Miss. 510, 10 So. 46.

New Jersey.— Romaine *v.* Hendrickson, 24 N. J. Eq. 231; Herbert *v.* Tuthill, 1 N. J. Eq. 141.

New York.— Jackson *v.* Schauber, 7 Cow. 187; Jackson *v.* Burr, 9 Johns. 104.

North Carolina.— Beam *v.* Jennings, 89 N. C. 451; Ferebee *v.* Proctor, 19 N. C. 439.

South Carolina.— Howell *v.* House, 2 Mill 80.

United States.— Lindenberger *v.* Matlock, 15 Fed. Cas. No. 8,360, 4 Wash. 278. See also Beadle *v.* Beadle, 40 Fed. 315, 2 McCrary 586.

Contra.— Richardson *v.* Woodbury, 43 Me. 206.

61. Floyd *v.* Herring, 64 N. C. 409.

62. *In re* Strong, 119 Cal. 663, 51 Pac. 1078; Pina's Estate, 112 Cal. 14, 44 Pac. 332; Harwood *v.* Marye, 8 Cal. 580; McDade *v.* Burch, 7 Ga. 559, 5 Am. Dec. 407. See, generally, EXECUTORS AND ADMINISTRATORS.

Under the Mexican law, which was at one time in force in California, on the death of an intestate, the heirs succeeded immediately to the estate, and became personally responsible for the debts of the deceased, whether the heirs were adults or minors, and no administration in the common-law sense was needed or could be had at any time. Coppinger *v.* Rice, 33 Cal. 408.

63. *In re* Strong, 119 Cal. 663, 51 Pac. 1078.

64. Distribution of personal property without administration see *infra*, IV, A, 4, c, (II).

65. Johnson *v.* Hall, 101 Ga. 687, 29 S. E. 37. But the fact that there are no debts and that the heirs have settled the estate and divided the land without an administration cannot be set up to defeat a sale under an order of the court in subsequent administration proceedings, as the order cannot be thus collaterally attacked. McDade *v.* Burch, 7 Ga. 559, 50 Am. Dec. 407.

66. Gossage *v.* Crown Point Gold, etc., Min. Co., 14 Nev. 153.

67. See Dickinson's Appeal, 54 Conn. 224, 6 Atl. 422 (holding that a division by agreement among the heirs does not preclude a decree of the probate court ordering distribution, where the division is not made, executed, and acknowledged like a deed of land and recorded, as required by the statute); Hewitt's Appeal, 53 Conn. 24, 1 Atl. 815; Holcomb *v.* Sherwood, 29 Conn. 418 (effect of conveyance by heir before distribution); Baxter *v.* Gay, 14 Conn. 119.

68. Ray *v.* McLain, 106 La. 780, 31 So. 315, holding that all the heirs of a testate succession, being *sui juris*, and being both heirs at law and testamentary heirs, may ignore the will and divide the estate as they please.

69. Hagthorp *v.* Hook, 1 Gill & J. (Md.) 270. But see Murray *v.* Cazier, 23 Ind. App. 600, 53 N. E. 476, 55 N. E. 880.

70. *Alabama.*— Davenport *v.* Brooks, 92 Ala. 627, 9 So. 153; Huddleston *v.* Huey, 73 Ala. 215; Costephens *v.* Dean, 69 Ala. 385; Lockhart *v.* Cameron, 29 Ala. 355; Gardner *v.* Gantt, 19 Ala. 666; Miller *v.* Eatman, 11 Ala. 609.

Arkansas.— Whelan *v.* Edwards, 31 Ark. 723; Pryor *v.* Ryburn, 16 Ark. 671; Lemon *v.* Rector, 15 Ark. 436.

Colorado.— Hall *v.* Cowles, 15 Colo. 394, 25 Pac. 705.

Connecticut.— West *v.* Howard, 20 Conn. 581; Roorbach *v.* Lord, 4 Conn. 347; Taber *v.* Packwood, 2 Day 52.

District of Columbia.— Robey *v.* Prout, 7 D. C. 81 [*affirmed* in 15 Wall. (U. S.) 471, 21 L. ed. 58].

Georgia.— Smith *v.* Turner, 112 Ga. 533, 37 S. E. 705; Thompson *v.* Fenn, 100 Ga. 234, 28 S. E. 39; Morgan *v.* Woods, 69 Ga. 599; Gouldsmith *v.* Coleman, 57 Ga. 425; Murphy *v.* Pound, 12 Ga. 278; Liptrot *v.* Holmes, 1 Ga. 381.

Illinois.— Hardy *v.* Wallis, 103 Ill. App. 141.

Indiana.— Pond *v.* Sweetser, 85 Ind. 144; Turner *v.* Campbell, 34 Ind. 317.

pended between the time of the intestate's death and the granting of letters of

Iowa.— Ritchie *v.* Barnes, 114 Iowa 67, 86 N. W. 48; Baird *v.* Brooks, 65 Iowa 40, 21 N. W. 163; Haynes *v.* Harris, 33 Iowa 516.

Kentucky.— McChord *v.* Fisher, 13 B. Mon. 193; Wells *v.* Bowling, 2 Dana 41; Munsell *v.* Bartlett, 6 J. J. Marsh. 20; Sneed *v.* Ewing, 5 J. J. Marsh. 460, 22 Am. Dec. 41; Robertson *v.* McDaniel, 5 J. J. Marsh. 11; Thomas *v.* White, 3 Litt. 177, 14 Am. Dec. 56; Woodyard *v.* Threlkeld, 1 A. K. Marsh. 10; Grider *v.* Phœnix Brewing Co., 7 Ky. L. Rep. 594.

Maine.— Grant *v.* Bodwell, 78 Me. 460, 7 Atl. 12.

Maryland.— Rockwell *v.* Young, 60 Md. 563; Smith *v.* Wilson, 17 Md. 460, 79 Am. Dec. 665; Cecil *v.* Negro Rose, 17 Md. 92; Alexander *v.* Stewart, 8 Gill & J. 226; Hagthorp *v.* Hook, 1 Gill & J. 270; Neale *v.* Hagthorp, 3 Bland 551.

Massachusetts.— Pritchard *v.* Norwood, 155 Mass. 539, 30 N. E. 80; Lawrence *v.* Wright, 23 Pick. 128.

Mississippi.— Thompson *v.* Thomas, 30 Miss. 152; Marshall *v.* King, 24 Miss. 85; Browning *v.* Watkins, 10 Sm. & M. 482; Miller *v.* Womack, Freem. 486.

Missouri.— Green *v.* Tittman, 124 Mo. 372, 27 S. W. 391; Smith *v.* Denny, 37 Mo. 20; Hanenkamp *v.* Borgmier, 32 Mo. 569; Naylor *v.* Moffatt, 29 Mo. 126; Hastings *v.* Meyers, 21 Mo. 519; Bartlett *v.* Hyde, 3 Mo. 490; Jacobs *v.* Maloney, 64 Mo. App. 270; Adey *v.* Adey, 58 Mo. App. 408; McMillan *v.* Wacker, 57 Mo. App. 220; Becraft *v.* Lewis, 41 Mo. App. 546; State *v.* Moore, 18 Mo. App. 406; Rouggley *v.* Teichmann, 10 Mo. App. 257.

Nebraska.— Cox *v.* Yeazel, 49 Nebr. 343, 68 N. W. 483.

New Hampshire.— Champollion *v.* Corbin, 71 N. H. 78, 51 Atl. 674; Weeks *v.* Jewett, 45 N. H. 540; Tappan *v.* Tappan, 30 N. H. 50.

New York.— Segilken *v.* Meyer, 94 N. Y. 473; Palmer *v.* Green, 63 Hun 6, 17 N. Y. Suppl. 441; Beecher *v.* Crouse, 19 Wend. 306; Woodin *v.* Bagley, 13 Wend. 453; Rose *v.* Clark, 8 Paige 574.

North Carolina.— Varner *v.* Johnston, 112 N. C. 570, 17 S. E. 483; Davidson *v.* Potts, 42 N. C. 272; Whit *v.* Ray, 26 N. C. 14.

Ohio.— Chappelear *v.* Martin, 45 Ohio St. 126, 12 N. E. 448; Davis *v.* Corwine, 25 Ohio St. 668; Rousch *v.* Hundley, 2 Ohio Dec. (Reprint) 445, 3 West. L. Month. 126.

South Carolina.—Darwin *v.* Moore, 58 S. C. 164, 36 S. E. 539; Richardson *v.* Cooley, 20 S. C. 347; McVaughters *v.* Elder, 2 Brev. 307; Fripp *v.* Fripp, Rice Eq. 84; Bradford *v.* Felder, 2 McCord Eq. 168; Gregory *v.* Forrester, 1 McCord Eq. 318.

Tennessee.— Brown *v.* Bibb, 2 Coldw. 434; Thurman *v.* Shelton, 10 Yerg. 383; Trafford *v.* Wilkinson, 3 Tenn. Ch. 449.

Texas.— See Richardson *v.* Vaughan, 86 Tex. 93, 23 S. W. 640 [*affirming* (Civ. App. 1893) 22 S. W. 1112].

Wisconsin.— Murphy *v.* Hanrahan, 50 Wis. 485, 7 N. W. 436; *In re* Kirkendall, 43 Wis. 167.

United States.— Scruggs *v.* Scruggs, 105 Fed. 28; Newman *v.* Schwerin, 61 Fed. 865, 10 C. C. A. 129; Allen *v.* Simons, 1 Fed. Cas. No. 237, 1 Curt. 122.

See 16 Cent. Dig. tit. "Descent and Distribution," § 252 *et seq.* And see EXECUTORS AND ADMINISTRATORS.

Right of heirs to possession see *infra*, IV, A, 5, b.

Actions by heirs see *infra*, IV A, 13, a, (III).

Set-off against administrator.— Neither an heir nor his assignee can set off his distributive share against a judgment in favor of the administrator. Green *v.* Tittman, 124 Mo. 372, 27 S. W. 391.

Presumption of former administration to protect title and possession see Woolfolk *v.* Beatly, 18 Ga. 520.

A leasehold interest in land is personal property and goes to the personal representative of the lessee and not to his heirs at law. Bean *v.* Reynolds, 15 App. Cas. (D. C.) 125. See EXECUTORS AND ADMINISTRATORS.

Option of lessee to purchase.— And where a right is given in a grant of a leasehold interest in land for ninety-nine years to the lessee, his executors, administrators, and assigns to purchase the fee-simple title for a specified sum at any time during the term, such right of purchase does not descend to the heirs at law of an intestate assignee of the leasehold, but passes, through the process of administration, to his personal representative, upon whom is also devolved the leasehold interest. Bean *v.* Reynolds, 15 App. Cas. (D. C.) 125.

Interest of heirs or representative of lessor. Where a lease gives the lessee an option to purchase, and he declares his option after the death of the lessor, it has been held that the real estate is thereby converted retrospectively into personalty as between the heir and the personal representative of the lessor, and that the personal representative is entitled to the purchase-money. Lewenstein *v.* Townsend, 4 Ohio Cir. Ct. 69; Lawes *v.* Bennett, Cox Ch. 167, 29 Eng. Reprint 1111; Townley *v.* Bedwell, 14 Ves. Jr. 591, 33 Eng. Reprint 648. But it has been held that this rule does not apply to a perpetual lease with an option to purchase at any time, and that in such a case, when the option is exercised after the lessor's death, the heirs of the lessor are entitled to the proceeds unless they are necessary for the payment of debts or legacies of the lessor. Loewenstein *v.* Townsend, 4 Ohio Cir. Ct. 69.

Vendor's interest in land sold.— The interest of a vendor in land held by the vendee under a contract of purchase is regarded in equity as personal property, and goes on the death of the vendor to his administrator and not to his heir as realty. Bowen *v.* Lansing, 129 Mich. 117, 88 N. W. 384, 95 Am. St. Rep. 427, 57 L. R. A. 643.

administration.[71] When the letters are granted the title of the administrator relates back to the time of the intestate's death.[72] Persons entitled as heirs or distributees acquire a vested equitable right immediately on the death of the intestate, and on distribution their title relates back to the intestate's death.[73] Personal property vests in the heirs after the time for granting letters of administration has expired.[74] And under some statutes the title to personal property of an intestate as well as real property vests in the heir immediately on the death of the intestate,[75] subject to be divested by the appointment of an administrator or by the exercise of his statutory powers or by the action of creditors.[76]

(II) *WHERE ADMINISTRATION IS UNNECESSARY.* In most states it is held that where there are no debts administration may be dispensed with, so that the heirs or distributees may without administration take and hold or recover personal property, or divide it among themselves by agreement.[77] It has also been held

Presumption.—It has been held that the grant of letters of administration, when necessary to vest title to personal property of a deceased person, cannot be presumed from lapse of time. Smith *v.* Wilson, 17 Md. 460, 79 Am. Dec. 665. But see Clay *v.* Clay, 13 Tex. 195.

Assent of administrator.— That the title to personal property and the right to recover the same may be vested in the heirs or distributees by the assent of the administrator see Anderson *v.* Irvine, 6 B. Mon. (Ky.) 231; Deatly *v.* Murphy, 3 A. K. Marsh. (Ky.) 472; Gillespie *v.* Gillespie, 2 Bibb (Ky.) 89. But that they acquire no title without his assent see Munsell *v.* Bartlett, 6 J. J. Marsh. (Ky.) 20; Sneed *v.* Ewing, 5 J. J. Marsh. (Ky.) 460, 22 Am. Dec. 41; Emerson *v.* Staton, 3 T. B. Mon. (Ky.) 116; Thomas *v.* White, 3 Litt. (Ky.) 177, 14 Am. Dec. 56; Woodyard *v.* Threlkeld, 1 A. K. Marsh. (Ky.) 10; Miller *v.* Womack, Freem. (Miss.) 486; Brown *v.* Bibb, 2 Coldw. (Tenn.) 434. *Contra*, under special statute as to slaves. Brown *v.* Bibb, 2 Coldw. (Tenn.) 434; Elliott *v.* Holder, 3 Head (Tenn.) 698.

Waiver or renunciation by an administrator of his right to personal property as assets has been held sufficient to allow heirs to sue for its recovery. Hendrick *v.* Robinson, 7 Dana (Ky.) 165.

Interest in land regarded as personal property see *supra*, II, A, 7, b.

Money and rights of action regarded as real property see *supra*, II, A, 7, c.

Conversion of land into personalty see *supra*, II, A, 7, b; and CONVERSION, 9 Cyc. 851.

71. Hagthorp *v.* Hook, 1 Gill & J. (Md.) 270; Jewett *v.* Smith, 12 Mass. 309; Whit *v.* Ray, 26 N. C. 14 (holding that where a man dies intestate, and there is no administration on his estate, and the next of kin take possession, no legal title vests in them, however long they may possess it; but if an administrator is appointed, even after the lapse of ten years, the legal title vests in him); Rousch *v.* Hundley, 2 Ohio Dec. (Reprint) 445, 3 West. L. Month. 126.

72. Jahns *v.* Nolting, 29 Cal. 507; Pritchard *v.* Norwood, 155 Mass. 539, 30 N. E. 80; Lawrence *v.* Wright, 23 Pick. (Mass.) 128; Whit *v.* Ray, 26 N. C. 14; McVaughters *v.* Elder, 2 Brev. (S. C.) 307. And see Hardy *v.* Wallis, 103 Ill. App. 141. See, generally, EXECUTORS AND ADMINISTRATORS.

73. Perryman *v.* Greer, 39 Ala. 133 (holding that a distributee's interest in the estate of an intestate accrues by operation of law immediately upon the death of the intestate, and the subsequent distribution merely serves to ascertain and define, convert into a legal right, and reduce to possession, an equity which existed before in the form of the chose in action cognizable in chancery; and therefore a statute restraining a married woman's power of alienation with respect to after-acquired property did not apply to a married woman's distributive share of an estate which vested in her before the passage of the act, although there was no distribution until after its passage); Moore *v.* Gordon, 24 Iowa 158; Thompson *v.* Thomas, 30 Miss. 152 (holding therefore that the personal estate of an intestate goes to those who are his next of kin at the time of his death and not to those who are his next of kin at the time of distribution); Rose *v.* Clark, 8 Paige (N. Y.) 574. It follows that the share of a distributee who dies after the intestate and before distribution goes to his personal representative. See *infra*, IV, A, 4, d.

74. Murphy *v.* Murphy, 80 Iowa, 740, 45 N. W. 914; Phinny *v.* Warren, 52 Iowa 332, 1 N. W. 522, 3 N. W. 157; Roberts *v.* Messinger, 134 Pa. St. 298, 19 Atl. 625.

75. Jahns *v.* Nolting, 29 Cal. 507; Coldron *v.* Rhode, 7 Ind. 151; Ackerman *v.* Smiley, 37 Tex. 211; Chubb *v.* Johnson, 11 Tex. 469. Under a statute providing that in case of the death of a wife her slaves "shall descend and go to her children and their descendants," subject to the use of the husband during his life, without liability to his creditors, it was held that the title to slaves of a wife vested in her children immediately on her death, without any administration on her estate. McKee *v.* McKee, 17 Md. 352.

76. Coldron *v.* Rhode, 7 Ind. 151; Ackerman *v.* Smiley, 37 Tex. 211. See, generally, EXECUTORS AND ADMINISTRATORS.

77. *Alabama.*— McGhee *v.* Alexander, 104 Ala. 116, 16 So. 148; Perryman *v.* Greer, 39 Ala. 133.

Connecticut.— See Woodhouse *v.* Phelps, 51 Conn. 521.

Georgia.— McElhaney *v.* Crawford, 96 Ga.

that this may be done where there are debts if the creditors do not object.[78] The heirs or distributees, however, cannot, by taking possession or by agreement among themselves to settle the estate without administration, deprive creditors of the right to insist upon administration, or to hold them liable for conversion.[79]

174, 22 S. E. 895; Gouldsmith *v.* Coleman, 57 Ga. 425; Amis *v.* Cameron, 55 Ga. 449; Barron *v.* Burney, 38 Ga. 264; Smith *v.* Smith, 36 Ga. 184, 91 Am. Dec. 761 (agreement between adult and minor heirs enforceable against former); Alderman *v.* Chester, 34 Ga. 152; Desverges *v.* Desverges, 31 Ga. 753; Harris *v.* Seals, 29 Ga. 585; Fulton *v.* Smith, 27 Ga. 413; Moore *v.* Gleaton, 23 Ga. 142; Finch *v.* Finch, 14 Ga. 362; Josey *v.* Rogers, 13 Ga. 478 (minor heirs cannot be prejudiced); Turk *v.* Turk, 3 Ga. 422, 46 Am. Dec. 434.

Illinois.— McCleary *v.* Menke, 109 Ill. 294; People *v.* Abbott, 105 Ill. 588 [*affirming* 10 Ill. App. 62]; Lynch *v.* Rotan, 39 Ill. 14; Lewis *v.* Lyons, 13 Ill. 117.

Indiana.— Bowen *v.* Stewart, 128 Ind. 507, 26 N. E. 168, 28 N. E. 73; Robertson *v.* Robertson, 120 Ind. 333, 22 N. E. 310; Begien *v.* Freeman, 75 Ind. 398; Mitchell *v.* Dickson, 53 Ind. 110; Martin *v.* Reed, 30 Ind. 218.

Massachusetts.— See Robinson *v.* Simmons, 146 Mass. 167, 15 N. E. 558, 4 Am. St. Rep. 299, where in a suit by the administrators of a deceased partner against the surviving partner money found to be due to heirs of the deceased partner was ordered to be paid directly to them.

Michigan.— Foote *v.* Foote, 61 Mich. 181, 28 N. W. 90; Needham *v.* Gillett, 39 Mich. 574.

Minnesota.— Granger *v.* Harriman, 89 Minn. 303, 94 N. W. 869.

Mississippi.— Ricks *v.* Hilliard, 45 Miss. 359; Andrews *v.* Brumfield, 32 Miss. 107; Hargroves *v.* Thompson, 31 Miss. 211; Henderson *v.* Clarke, 27 Miss. 436; Kilcrease *v.* Shelby, 23 Miss. 161, but agreement not binding on infant distributees. And see Watson *v.* Byrd, 53 Miss. 480; Maxwell *v.* Craft, 32 Miss. 307.

Missouri.— Richardson *v.* Cole, 160 Mo. 372, 61 S. W. 182, 83 Am. St. Rep. 479 (holding that a court of equity will not enforce the mere legal title of an administrator, where there are no debts against the estate, in order that he may uselessly override the distributees' equitable rights); McCracken *v.* McCaslin, 50 Mo. App. 85.

Nevada.— Wright *v.* Smith, 19 Nev. 143, 7 Pac. 365, community property.

New Hampshire.— Woodman *v.* Rowe, 59 N. H. 453; George *v.* Johnson, 45 N. H. 456; Clarke *v.* Clay, 31 N. H. 393; Hibbard *v.* Kent, 15 N. H. 516. And see Langley *v.* Farmington, 66 N. H. 431, 27 Atl. 224, 49 Am. St. Rep. 624.

North Carolina.— Elliott *v.* Whedbee, 94 N. C. 115, where in a suit by an administrator against certain next of kin of the intestate, to recover life-insurance money which had been received by defendants, it was held that the latter were entitled to retain their distributive shares, the money not being necessary for the payment of debts.

Pennsylvania.— Weaver *v.* Roth, 105 Pa. St. 408; Walworth *v.* Abel, 52 Pa. St. 370; Lee *v.* Gibbons, 14 Serg. & R. 105.

South Carolina.— Grant *v.* Poyas, 62 S. C. 426, 40 S. E. 891. And see Fripp *v.* Fripp, Rice Eq. 84.

Tennessee.— Hurt *v.* Fisher, 96 Tenn. 570, 35 S. W. 1085; Christian *v.* Clark, 10 Lea 630. *Compare* Wright *v.* Wright, Mart. & Y. 43, where it was said that the practice of distribution by agreement among the distributees without administration should not be encouraged.

Texas.— McIntyre *v.* Chappell, 4 Tex. 187; Ward *v.* Ward, 1 Tex. Unrep. Cas. 123. See Francis *v.* Hall, 13 Tex. 189.

See 16 Cent. Dig. tit. "Descent and Distribution," § 252 *et seq.* And see *infra*, IV, A, 11, b, (II); and, generally, EXECUTORS AND ADMINISTRATORS.

Contra.—Davis *v.* Corwine, 25 Ohio St. 668; Rousch *v.* Hundley, 2 Ohio Dec. (Reprint) 445, 3 West. L. Month. 126.

Division of the property by agreement cannot be set up to defeat an action by an administrator to recover the property for the purpose of administration. Echols *v.* Barrett, 6 Ga. 443. *Compare* Turk *v.* Turk, 3 Ga. 422, 46 Am. Dec. 434.

Revocation of agency to collect debts.— Where the heirs of a deceased person authorized one of their number to collect all debts due the estate on account of a particular business conducted by the deceased in his lifetime, and to take full charge, management, and control of such business, the agreement to continue in force for one year, it was held that the contract constituted such heir the agent of all the heirs, but that they or any of them could revoke it at any time before its complete execution, and that the appointment of an administrator at the instance of one of them effected such revocation. Patterson *v.* Patterson, 74 Ill. App. 321.

78. Bowen *v.* Stewart, 128 Ind. 507, 26 N. E. 168, 28 N. E. 73. But see Allen *v.* Simons, 1 Fed. Cas. No. 237, 1 Curt. 122, holding that where an estate is indebted an agreement between distributees that no administration shall be taken out, and that one of them who was in possession at the time of the intestate's death shall continue to hold and manage the property for the joint benefit, will not be enforced in equity.

79. Amis *v.* Cameron, 55 Ga. 449; Barron *v.* Burney, 38 Ga. 264; Bowen *v.* Stewart, 128 Ind. 507, 26 N. E. 168, 28 N. E. 73. In some cases it has been held that it is competent for all the heirs of a decedent, if they are *sui juris*, to settle and pay the debts of the estate and divide the property among themselves without the intervention of an administrator,

d. Choses in Action — (I) *In General.* As a general rule the title to all choses in action belonging to an intestate at the time of his death vests, not in his heirs or distributees, but in his administrator,[80] and actions to enforce or collect the same must be brought by him.[81] It follows as a general rule that debtors of an estate cannot discharge their liability to the administrator by payment to the heirs.[82] According to the weight of authority, however, where there are no debts and no letters of administration have been granted, the heirs or distributees may take or divide and enforce choses in action of the intestate, or receive payment of and discharge the same.[83]

(II) *Covenants Real.* Upon covenants real the heir and not the administrator has the right of action for breaches after the death of the obligee, but for breaches in the lifetime of the obligee the right of action is in the administrator.[84]

e. Distributive Shares and Legacies of Persons Dying Before Distribution. Since the right to personal property vests in the persons entitled as distributees at the time of the intestate's death, and the legal title on distribution relates back to such time,[85] if a person entitled as distributee dies before distribution, his share goes to his personal representative, and not to the other person or persons entitled

and that neither debtors nor creditors of the estate have a right to complain. Babbitt *v.* Bowen, 32 Vt. 437; Taylor *v.* Phillips, 30 Vt. 238.

Claim for libel.— It has been held that where, pending an action for libel, defendant therein dies intestate, the claim of plaintiff, even if meritorious, is not such a "debt" against the estate of the decedent as will prevent his widow as sole heir at law from taking possession of his estate without administration. McElhaney *v.* Crawford, 96 Ga. 174, 22 S. E. 895.

80. *Arkansas.*— McCustian *v.* Ramey, 33 Ark. 141.

Massachusetts.— Pritchard *v.* Norwood, 155 Mass. 539, 30 N. E. 80.

Missouri.— Jacobs *v.* Maloney, 64 Mo. App. 270.

Nebraska.— Cox *v.* Yeazel, 49 Nebr. 343, 68 N. W. 483.

Ohio.— Chappelear *v.* Martin, 45 Ohio St. 126, 12 N. E. 448.

Wisconsin.— Murphy *v.* Hanrahan, 50 Wis. 485, 7 N. W. 436.

See 16 Cent. Dig. tit. "Descent and Distribution," § 253; and *infra*, IV, A, 13, a, (IV). And see, generally, Executors and Administrators.

Substitution of new note.— Before administration on the estate of the payee, an heir cannot take a new note in exchange for notes due the decedent since there is no one to assent for the payee, and therefore the old notes remain in force and the new one is without consideration. Jacobs *v.* Maloney, 64 Mo. App. 270.

81. See *infra*, IV, A, 13, a, (IV).

82. McCustian *v.* Ramey, 33 Ark. 141; Chappelear *v.* Martin, 45 Ohio St. 126, 12 N. E. 448. See, generally, Executors and Administrators.

83. *Alabama.*— Wright *v.* Robinson, 94 Ala. 479, 10 So. 319; Cooper *v.* Davison, 86 Ala. 367, 5 So. 650; Carter *v.* Owens, 41 Ala. 217; Vanzant *v.* Morris, 25 Ala. 285.

Arkansas.— See Sanders *v.* Moore, 52 Ark. 376, 12 S. W. 783.

Illinois.— People *v.* Abbott, 105 Ill. 588 [*affirming* 10 Ill. App. 62]. But *compare* Leamon *v.* McCubbin, 82 Ill. 263.

Indiana.— Robertson *v.* Robertson, 120 Ind. 333, 22 N. E. 310; Begien *v.* Freeman, 75 Ind. 398; Moore *v.* Monroe County, 59 Ind. 516; Schneider *v.* Piessner, 54 Ind. 524; Mitchell *v.* Dickson, 53 Ind. 110; Martin *v.* Reed, 30 Ind. 218.

Michigan.— Foote *v.* Foote, 61 Mich. 181, 28 N. W. 90, receipt of payment of note.

Minnesota.— Granger *v.* Harriman, 89 Minn. 303, 94 N. W. 869; Vail *v.* Anderson, 61 Minn. 552, 64 N. W. 47, payment of debt due intestate to sole heir and distributee, where the remainder of the estate was sufficient to meet all claims against it.

New Hampshire.— See Langley *v.* Farmington, 66 N. H. 431, 27 Atl. 224, 49 Am. St. Rep. 624, payment of note.

Pennsylvania.—Weaver *v.* Roth, 105 Pa. St. 408.

See 16 Cent. Dig. tit. "Descent and Distribution," § 255; and *infra*, IV, A, 13, a, (IV). And see, generally, Executors and Administrators.

Contra.— Rousch *v.* Hundley, 2 Ohio Dec. (Reprint) 445, 3 West. L. Month. 126; Murphy *v.* Hanrahan, 50 Wis. 485, 7 N. W. 436.

84. Frink *v.* Bellis, 33 Ind. 135, 5 Am. Rep. 193 (covenant against encumbrances in deed of conveyance to ancestor); Hatcher *v.* Galloway, 2 Bibb (Ky.) 180; Abney *v.* Brownlee, 2 Bibb (Ky.) 170. See Hubbard *v.* Gilbert, 25 Hun (N. Y.) 596; Talbot *v.* Bedford, Cooke (Tenn.) 447. See Covenants, 11 Cyc. 1080 *et seq.* And see, generally, Executors and Administrators.

A covenant to convey land is a covenant real within this rule. Hatcher *v.* Galloway, 2 Bibb (Ky.) 180; Abney *v.* Brownlee, 2 Bibb (Ky.) 170.

85. See *supra*, IV, A, 4, c, (I).

as distributees.[86] The right to such share, being a chose in action and personalty, vests in the administrator of the deceased distributee, and not in his heirs or distributees, and it should not be paid directly to them, nor can an action to recover the same be maintained by them,[87] except under special circumstances, as is elsewhere explained.[88] The same is true of the right to a legacy on the death of the legatee before distribution.[89] In such cases therefore the administrator of the deceased distributee or legatee is a necessary party to proceedings for settlement of the estate.[90]

5. Possession and Control of Property — a. Real Property. At common law and under the statutes in many states the heirs of an intestate, to whom the title descends, and not the administrator, are entitled to the possession of the same immediately upon the intestate's death.[91] Where a will directs land to be sold but

86. *Alabama.*— See McMullen *v.* Brazelton, 81 Ala. 442, 1 So. 778.

Connecticut.— Kingsbury *v.* Scovill, 26 Conn. 349, death of widow of intestate before distribution. And see Hartford County Bank *v.* Waterman, 26 Conn. 348. *Contra*, by express statutory provision in case of a minor child's death before marriage and before disposition of the estate. *In re* North, 48 Conn. 583; Terry's Appeal, 28 Conn. 339.

Iowa.— Moore *v.* Gordon, 24 Iowa 158.

Massachusetts.— Hayward *v.* Hayward, 20 Pick. 517; Foster *v.* Fifield, 20 Pick. 67.

Mississippi.—Thompson *v.* Thomas, 30 Miss. 152.

New York.— Rose *v.* Clark, 8 Paige 574; Howland *v.* Heckscher, 3 Sandf. Ch. 519.

Effect of death of surviving spouse before distribution see *supra*, III, B, 3.

87. *Arkansas.*— George *v.* Elms, 46 Ark. 260, holding that the heirs of a deceased heir could not sue on the administrator's bond for the distributive share of the deceased heir, the proper party to sue being the deceased heir's administrator.

Iowa.— Rhodes *v.* Stout, 26 Iowa 313.

Maine.— Grant *v.* Bodwell, 78 Me. 460, 7 Atl. 12.

Maryland.— Schaub *v.* Griffin, 84 Md. 557, 36 Atl. 443; Duvall *v.* Harwood, 1 Harr. & G. 474.

Mississippi.— See Maxwell *v.* Craft, 32 Miss. 307.

See 16 Cent. Dig. tit. "Descent and Distribution," § 260.

88. Maxwell *v.* Craft, 32 Miss. 307 (holding that if a distributee dies before receiving his distributive share, leaving the same heirs as the intestate, and owing no debts, and owning no property but such distributive share, distribution of his estate ought to be made directly to his heirs and not to an administrator); Hurt *v.* Fisher, 96 Tenn. 570, 35 S. W. 1085 (bill by heir of deceased distributee sustained where there were no debts). See *supra*, IV, A, 4, d, (I); *infra*, IV, A, 13, a, (IV).

89. Where a legatee dies intestate before distribution, his share goes to his personal representative for distribution to his heirs or next of kin. Terry's Appeal, 28 Conn. 339; Shaver *v.* Shaver, 1 N. J. Eq. 437. The administrator of the deceased legatee is entitled to receive the legacy and to sue therefor. Bluett *v.* Nicholson, 1 Fla. 384. The children or distributees of the legatee cannot collect or sue for the legacy, but the personal representative must collect and sue (Sullivan *v.* Lawler, 72 Ala. 68; Purcelly *v.* Carter, 45 Ark. 299; Whelan *v.* Edwards, 31 Ark. 723; Marcenaro *v.* Mordella, 10 La. Ann. 772; Hanson *v.* Hanson, 4 Gill (Md.) 69; Gale *v.* Nickerson, 151 Mass. 428, 24 N. E. 400, 9 L. R. A. 200; Shaver *v.* Shaver, 1 N. J. Eq. 437; Puckett *v.* James, 2 Humphr. (Tenn.) 565; Trafford *v.* Wilkinson, 3 Tenn. Ch. 449), except where there are no debts and no administration, and no necessity for administration (Vanzant *v.* Morris, 25 Ala. 285). It has been held that the next of kin of a decedent cannot sue in their own names for a legacy to the deceased, the right of action being in the personal representative; and that the rule is not changed by the fact that from lapse of time the right to take out letters of administration is barred by statutory limitation. Trafford *v.* Wilkinson, 3 Tenn. Ch. 449. *Compare*, however, Phinny *v.* Warren, 52 Iowa 332, 1 N. W. 552, 3 N. W. 157.

90. McMullen *v.* Brazelton, 81 Ala. 442, 1 So. 778; Thomas *v.* Dumas, 30 Ala. 83; McConico *v.* Cannon, 25 Ala. 462; Hall *v.* Andrews, 17 Ala. 40; Boyett *v.* Kerr, 7 Ala. 9.

91. *Alabama.*— Calhoun *v.* Fletcher, 63 Ala. 574.

Arkansas.— Chowning *v.* Stanfield, 49 Ark. 87, 4 S. W. 276; Stewart *v.* Smiley, 46 Ark. 373.

California.— Soto *v.* Kroder, 19 Cal. 87. The law has been changed by statute. See *infra*, note 93.

Florida.— Rose *v.* Withers, 39 Fla. 460, 22 So. 724.

Georgia.— Cross *v.* Johnson, 82 Ga. 67, 8 S. E. 56 (widow, not taking dower, as coheir with children); Johnson *v.* Johnson, 80 Ga. 260, 5 S. E. 629.

Indiana.— Humphries *v.* Davis, 100 Ind. 369. See Comparet *v.* Randall, 4 Ind. 55.

Michigan.— Covert *v.* Morrison, 49 Mich. 133, 13 N. W. 390; Warren *v.* Tobey, 32 Mich. 45; Marvin *v.* Schilling, 12 Mich. 356.

Mississippi.— Cohea *v.* Jemison, 68 Miss. 510, 10 So. 46.

New Hampshire.— Lane *v.* Thompson, 43 N. H. 320, subject by statute to be divested

does not devise it for such purpose the heirs of the testator have the right to possession until a sale.[92] Other statutes give the administrator the right to possession until the close of the administration,[93] if in some states he asserts the right as provided by the statute,[94] and if the real estate is necessary for the pay-

by a sale by the administrator for payment of debts, or to be suspended by a decree of insolvency.

New York.— Fosgate *v.* Herkimer Mfg., etc., Co., 9 Barb. 287; Smith *v.* Lorillard, 10 Johns. 338.

Virginia.— Tapscott *v.* Cobbs, 11 Gratt. 172; Trent *v.* Trent, Gilm. 174, 9 Am. Dec. 594.

Wisconsin.— Jones *v.* Billstein, 28 Wis. 221.

United States.— Lindenberger *v.* Matlack, 15 Fed. Cas. No. 8,360, 4 Wash. 278.

See 16 Cent. Dig. tit. "Descent and Distribution," § 268 *et seq.*; and *supra*, IV, A, 4, b.

Rights of forced heirs in Louisiana see Cox *v.* Von Ahlefeldt, 105 La. 543, 30 So. 175.

Where the widow of an intestate continues after his death in possession of land to which his heirs are entitled, she is as against them a mere tenant at sufferance; her possession is *prima facie* their possession, and they may maintain ejectment against her or one claiming under her. Caffrey *v.* McFarland, 1 Phila. (Pa.) 555.

Widow as guardian of minor heirs.— Where a widow, having infant children, who are heirs of her deceased husband, is in possession of real estate left by him at his decease, a man who marries the widow and continues such possession, or other person who enters under her, does not thereby become liable to such infant heirs in an action for trespass. Wirt *v.* Turner, 2 Ohio Dec. (Reprint) 19, 1 West. L. Month. 94. And see Jackson *v.* De Walts, 7 Johns. (N. Y.) 157; Byrne *v.* Van Hoesen, 5 Johns. (N. Y.) 66. See, generally, GUARDIAN AND WARD.

Insolvency of estate.— The insolvency of the ancestor's estate is no ground for an injunction forbidding the heir to take possession; a decree must be rendered against the heir. Harrison *v.* Wood, 21 N. C. 437.

92. Cohea *v.* Jemison, 68 Miss. 510, 10 So. 46; Beam *v.* Jennings, 89 N. C. 451; Lindenberger *v.* Matlack, 15 Fed. Cas. No. 8,360, 4 Wash. 278. And see *supra*, IV, A, 4, b, 2.

93. *Alabama.*— Banks *v.* Speers, 97 Ala. 560, 11 So. 841; Sullivan *v.* Rahb, 86 Ala. 433, 5 So. 746; Leatherwood *v.* Sullivan, 81 Ala. 458, 1 So. 718; Comer *v.* Hart, 79 Ala. 389; Cruikshank *v.* Luttrell, 67 Ala. 318; Brewton *v.* Watson, 67 Ala. 121; Calhoun *v.* Fletcher, 63 Ala. 574; McCullough *v.* Wise, 57 Ala. 623; Philips *v.* Gray, 1 Ala. 226, under statute giving administrator authority to lease real property.

Arizona.— Oury *v.* Duffield, 1 Ariz. 509, 25 Pac. 533.

Arkansas.— Chowning *v.* Stanfield, 49 Ark. 87, 4 S. W. 276; Stewart *v.* Smiley, 46 Ark. 373; Carnall *v.* Wilson, 21 Ark. 62, 76 Am. Dec. 351.

California.— Crosby *v.* Dowd, 61 Cal. 557; Page *v.* Tucker, 54 Cal. 121; Harper *v.* Strutz, 53 Cal. 655; Meeks *v.* Kirby, 47 Cal. 169; Chapman *v.* Hollister, 42 Cal. 462; Meeks *v.* Hahn, 20 Cal. 620; Harwood *v.* Mayre, 8 Cal. 580 (holding that in an action against the heir to foreclose a mortgage on land of an intestate the administrator was a necessary party); Beckett *v.* Selover, 7 Cal. 215, 68 Am. Dec. 237.

Florida.— Jacksonville, etc., R. Co. *v.* Adams, 27 Fla. 443, 9 So. 2; Doyle *v.* Wade, 23 Fla. 90, 1 So. 516, 11 Am. St. Rep. 334; Sanchez *v.* Hart, 17 Fla. 507. It is otherwise under the present statute. Rose *v.* Withers, 39 Fla. 460, 22 So. 724.

Georgia.— Albritton *v.* Bird, R. M. Charlt. 93.

Louisiana.— See Westholz *v.* Westholz, 19 La. Ann. 293; Ogden's Succession, 10 Rob. 457. After the heirs, however, have once been put into possession by a competent court the property cannot be placed in control of an executor or administrator as succession property. State *v.* Jefferson Parish Judge, 22 La. Ann. 61.

Minnesota.— State *v.* Ramsey County Probate Ct., 25 Minn. 22.

Texas.— Northcroft *v.* Oliver, 74 Tex. 162, 11 S. W. 1121; Gaston *v.* Boyd, 52 Tex. 282; Gunter *v.* Fox, 51 Tex. 383.

Vermont.— Austin *v.* Bailey, 37 Vt. 219, 86 Am. Dec. 703.

Washington.— Hazelton *v.* Bogardus, 8 Wash. 102, 35 Pac. 602; Lawrence *v.* Bellingham Bay, etc., R. Co., 4 Wash. 664, 30 Pac. 1099; Balch *v.* Smith, 4 Wash. 497, 30 Pac. 648; Dunn *v.* Peterson, 4 Wash. 170, 29 Pac. 998.

Wisconsin.— Jones *v.* Billstein, 28 Wis. 221; Edwards *v.* Evans, 16 Wis. 181.

See 16 Cent. Dig. tit. "Descent and Distribution," § 268 *et seq.* And see, generally, EXECUTORS AND ADMINISTRATORS.

Retrospective operation of statute.— A statute changing the law as to the right to possession of real property as between the heirs and the administrator of an intestate is not to be construed so as to apply retrospectively. Soto *v.* Kroder, 19 Cal. 87; Philips *v.* Gray, 1 Ala. 226. See also CONSTITUTIONAL LAW, 8 Cyc. 1017; STATUTES.

94. *Alabama.*— Stovall *v.* Clay, 108 Ala. 105, 20 So. 387; Cruikshank *v.* Luttrell, 67 Ala. 318; Calhoun *v.* Fletcher, 63 Ala. 574, 580, where it was said: "The right of the personal representative to the possession, rents, income and profits of lands, of which decedent died seized, is one which he may or may not exercise; and when he fails to assert it, the descent is not intercepted, and no stranger can gainsay or dispute the heir's possession, or right to the possession. . . . The possession of the personal representative, which will work a dispossession of the heir, must be an actual possession; a taking or

ment of debts, but not otherwise.[95] If there is no administration the heirs are entitled to possession.[96] And even where the heirs have no right of possession and control as against the administrator, they are entitled to possession as against strangers who do not claim under the administrator.[97] The heirs are entitled to possession after the estate is fully administered and all debts paid.[98]

b. Personal Property. The right to the possession of personal property of an intestate is in the administrator, and not in the heir or next of kin, until after the administration and distribution or after expiration of the time therefor.[99] And the right of possession relates back to the death of the intestate.[1] The heirs are

claiming the control, use, occupation, or the rents, income, and profits of the premises. Less than this will not dispossess the heir, nor intercept the descent. There is no such thing as the right of the personal representative drawing it to the possession, by construction, or friction of law. Only the title can do that, and the personal representative has no title."

Arkansas.— Carnall *v.* Wilson, 21 Ark. 62, 76 Am. Dec. 351.

Georgia.— Cross *v.* Johnson, 82 Ga. 67, 8 S. E. 56.

Michigan.— Marvin *v.* Schilling, 12 Mich. 356.

Wisconsin.— Jones *v.* Billstein, 28 Wis. 221.

95. Chowning *v.* Stanfield, 49 Ark. 87, 4 S. W. 276; Stewart *v.* Smiley, 46 Ark. 373; Carnall *v.* Wilson, 21 Ark. 62, 76 Am. Dec. 351; Holt *v.* Anderson, 98 Ga. 220, 25 S. E. 496; Humphries *v.* Davis, 100 Ind. 369. See, generally, EXECUTORS AND ADMINISTRATORS.

96. Updegraff *v.* Trask, 18 Cal. 458; Houston, etc., R. Co. *v.* Knapp, 51 Tex. 569.

97. Berry *v.* Eyraud, 134 Cal. 82, 66 Pac. 74; Spotts *v.* Hanley, 85 Cal. 155, 24 Pac. 738.

98. Powell's Succession, 38 La. Ann. 181. In Nevada, where the administrator is by statute given the right to possession of real as well as personal property, it has been held that where there are no creditors to be affected, no debts outstanding against the estate, and no equity in favor of the administrator, the heirs of the estate have the right of possession, and may bring an action of ejectment in their own name to recover any property belonging to the estate. Gossage *v.* Crown Point Gold, etc., Min. Co., 14 Nev. 153. Where administration upon the decedent's estate has been closed, or where so long a time has elapsed since his death as to show that the lands are not required for purposes of administration, an administrator cannot disturb the possession of heirs, tenants, or grantees in possession. Cox *v.* Ingleston, 30 Vt. 258 (thirty years having elapsed since death of intestate); Cushman *v.* Jordon, 13 Vt. 597 (administrator appointed more than sixty years after death of intestate not allowed to oust tenants claiming under heirs or to be let into possession with them as a tenant in common). The same rule holds after the elapse of a shorter period when the administrator, later appointed, fails to show the existence of outstanding debts or of other heirs than defendant. Roberts *v.* Morgan, 30 Vt. 319, so holding in case of an administrator appointed sixteen years after the intestate's death.

99. *California.*— Jahns *v.* Nolting, 29 Cal. 507, even though the statute may vest the title in the heirs.

Connecticut.— Roorbach *v.* Lord, 4 Conn. 347.

Georgia.— Albritton *v.* Bird, R. M. Charlt. 93.

Indiana.— Williams *v.* Williams, 125 Ind. 156, 25 N. E. 176.

Iowa.— Ritchie *v.* Barnes, 114 Iowa 67, 86 N. W. 48.

Massachusetts.— Lawrence *v.* Wright, 23 Pick. 128.

Missouri.— Gillet *v.* Camp, 19 Mo. 404.

New Hampshire.— Tappan *v.* Tappan, 30 N. H. 50, until after settlement of the administrator's account in the probate court.

North Carolina.— Davidson *v.* Potts, 42 N. C. 272.

South Carolina.— McVaughters *v.* Elder, 2 Brev. 307.

See 16 Cent. Dig. tit. "Descent and Distribution," § 273; and *supra*, IV, A, 4, c, (I). And see, generally, EXECUTORS AND ADMINISTRATORS.

In Louisiana see Baumgarden's Succession, 35 La. Ann. 675; Soye *v.* Price, 30 La. Ann. 93; McMasters *v.* Place, 8 La. Ann. 431; Marcos *v.* Barcas, 5 La. Ann. 265; Self *v.* Morris, 7 Rob. 24; Powell's Succession, 38 La. 181; Dufour *v.* Camfranc, 11 Mart. 675. An heir is not entitled to be put into possession of certain funds in the hands of an administrator, when it appears that this fund is in litigation between the succession and another claimant. The heir cannot receive it until the litigation is terminated, although otherwise he might be entitled to it. Calhoun *v.* McKnight, 39 La. Ann. 325, 1 So. 612. The transfer of the effects of a succession to the widow in community, in usufruct, made by the legal heir, is an act of heirship which vests the whole succession unconditionally in such heir; it is an acceptance of the succession pure and simple. Under such circumstances the property is vested in the heir and not in the succession, and the administrator cannot disturb the heir or those holding under him in their possession. Sanford *v.* Toadvine, 15 La. Ann. 170.

1. Jahns *v.* Nolting, 29 Cal. 507; Lawrence *v.* Wright, 23 Pick. (Mass.) 128; McVaugh-

entitled to possession after the succession is fully administered and all debts paid.[2] And in most states they are entitled to possession if there are no debts and no administration.[3]

6. Rents and Profits, Income and Accumulations — a. In General. Where the title and right to possession of the real property of an intestate vests in his heirs at the instant of his death,[4] they are entitled to receive the rents, profits, etc., which accrue after the death of the intestate and before the property is sold, if at all, by order of the court for the payment of debts,[5] unless the rule is changed

ters *v.* Elder, 2 Brev. (S. C.) 307. See *supra*, IV, A, 4, c, (I).

2. Powell's Succession, 38 La. Ann. 181.

3. Humphries *v.* Davis, 100 Ind. 369; Martin *v.* Reed, 30 Ind. 218; and cases cited *supra*, IV, A, 4, c, (II). See also Williams *v.* Williams, 125 Ind. 156, 25 N. E. 176. And see, generally, Executors and Administrators.

4. **Heirs' title to real property and right to possession** see *supra*, IV, A, 4, b; IV, A, 5, a.

5. *Alabama.*— Stovall *v.* Clay, 108 Ala. 105, 20 So. 387; Clancy *v.* Stephens, 92 Ala. 577, 39 So. 522, 524; Cruikshank *v.* Luttrell, 67 Ala. 318; Tyson *v.* Brown, 64 Ala. 244; Calhoun *v.* Fletcher, 63 Ala. 574; Cockrell *v.* Coleman, 55 Ala. 583.

Arkansas.— Stewart *v.* Smiley, 46 Ark. 373.

California.— Estep *v.* Armstrong, 91 Cal. 659, 27 Pac. 1091.

Georgia.— Cross *v.* Johnson, 82 Ga. 67, 8 S. E. 56; Johnson *v.* Johnson, 80 Ga. 260, 5 S. E. 629.

Illinois.— Dixon *v.* Niccolls, 39 Ill. 372, 89 Am. Dec. 312; Foltz *v.* Prouse, 17 Ill. 487; Sherman *v.* Dutch, 16 Ill. 283.

Indiana.— Humphries *v.* Davis, 100 Ind. 369; Dorsett *v.* Gray, 98 Ind. 273; Kidwell *v.* Kidwell, 84 Ind. 224; McClead *v.* Davis, 83 Ind. 263; Trimble *v.* Pollock, 77 Ind. 576; Evans *v.* Hardy, 76 Ind. 527; King *v.* Anderson, 20 Ind. 385.

Iowa.— Toerring *v.* Lamp, 77 Iowa 488, 42 N. W. 378; Crane *v.* Guthrie, 47 Iowa 542; Shawhan *v.* Long, 26 Iowa 488, 96 Am. Dec. 164; Kinsell *v.* Billings, 35 Iowa 154; Laverty *v.* Woodward, 16 Iowa 1 (administrator individually liable to heirs for rents and profits collected by him); Beezley *v.* Burgett, 15 Iowa 192; Gladson *v.* Whitney, 9 Iowa 267; Foteaux *v.* Lepage, 6 Iowa 123.

Kansas.— Head *v.* Sutton, 31 Kan. 616, 3 Pac. 280.

Kentucky.— Ball *v.* Covington First Nat. Bank, 80 Ky. 501; Eastin *v.* Hatchitt, 15 Ky. L. Rep. 780; Marble *v.* Marble, 4 Ky. L. Rep. 360.

Maine.— Kimball *v.* Sumner, 62 Me. 305; Mills *v.* Merryman, 49 Me. 65; Stinson *v.* Stinson, 38 Me. 593.

Massachusetts.— Cummings *v.* Watson, 149 Mass. 262, 21 N. E. 365; Choate *v.* Jacobs, 136 Mass. 297; Brooks *v.* Jackson, 125 Mass. 307; Almy *v.* Crapo, 100 Mass. 218; Lobdell *v.* Hayes, 12 Gray 236; Jaques *v.* Gould, 4 Cush. 384; Clapp *v.* Stoughton, 10 Pick. 463; Foster *v.* Gorton, 5 Pick. 185; Gibson *v.* Farley, 16 Mass. 280.

Mississippi.— Bloodworth *v.* Stevens, 51 Miss. 475.

Missouri.— Shouse *v.* Krusor, 24 Mo. App. 279.

New Hampshire.—Lucy *v.* Lucy, 55 N. H. 9.

New Jersey.— Allen *v.* Van Houton, 19 N. J. L. 47.

New York.— Matter of Spears, 89 Hun 49, 35 N. Y. Suppl. 35; Fay *v.* Holloran, 35 Barb. 295; Wright *v.* Williams, 5 Cow. 501; Kohler *v.* Knapp, 1 Bradf. Surr. 241.

North Carolina.— Fleming *v.* Chunn, 57 N. C. 422.

Ohio.— Overturf *v.* Dugan, 29 Ohio St. 230.

Pennsylvania.— Bakes *v.* Reese, 150 Pa. St. 44, 24 Atl. 634; Haslege *v.* Krugh, 25 Pa. St. 97; Adams *v.* Adams, 4 Watts 160; McCoy *v.* Scott, 2 Rawle 222, 19 Am. Dec. 640; Giblin's Estate, 2 Kulp 292; Burnell's Estate, 13 Phila. 387; Pepper's Estate, 1 Phila. 562; Young *v.* Jones, 1 Lehigh Val. L. Rep. 175.

Rhode Island.— Draper *v.* Barnes, 12 R. I. 156.

Tennessee.— Smith *v.* Thomas, 14 Lea 324 (and they cannot be applied to payment of debts except as provided by statute); Rowan *v.* Riley, 6 Baxt. 67; Read *v.* Franklin, (Ch. App. 1900) 60 S. W. 215.

Virginia.— Hobson *v.* Yancey, 2 Gratt. 73.

United States.— Kurtz *v.* Hollingshead, 14 Fed. Cas. No. 7,953, 4 Cranch C. C. 180; Lindenberger *v.* Matlack, 15 Fed. Cas. No. 8,360, 4 Wash. 278.

See 16 Cent. Dig. tit. "Descent and Distribution," §§ 276, 277. And see Executors and Administrators.

Prior to sale under power in will see Herbert *v.* Tuthill, 1 N. J. Eq. 141; Lindenberger *v.* Matlock, 15 Fed. Cas. No. 8,360, 4 Wash. 278. And see *supra*, IV, A, 4, b, (II).

Where rent reserved generally.— The fact that rent payable periodically was reserved generally in the lease and not to any particular person does not prevent the heir of the deceased lessor from bringing an action of debt for its recovery. Jaques *v.* Gould, 4 Cush. (Mass.) 384.

Indebtedness of estate to person collecting rent.— In an action by an heir for rent accruing from the lands of an intestate against one who has collected them it is no defense that the estate of the deceased is indebted to the person who has collected the rent. Bakes *v.* Reese, 150 Pa. St. 44, 24 Atl. 634.

Rents and profits of dower estate.— The heirs of a doweress cannot maintain a suit for the rents and profits of her dower estate; it should be brought in the name of her

by statute, as is the case in some states;[6] but rents which accrued prior to the intestate's death go to the personal representative, although not collected until after the death of the lessor.[7] Even where the decedent has died insolvent or heavily in debt, the heirs are none the less usually held entitled to the rents and profits of the property from his death until the property by order of the court is sold for payment of debts.[8] And even after the order for sale has been rendered by the court, the heirs are entitled to the profits accruing till the sale is actually made.[9] In Alabama it is held that an heir may sue for the recovery of rents accruing after the death of his ancestor whose estate has been declared insolvent, if neither the administrator nor the creditor objects,[10] but elsewhere the right of the heir or devisee to such rents, till the realty is sold by order of the court, has been held to be absolute.[11]

b. Crops and Emblements. Crops planted and grown after the death of the intestate generally belong to the heirs.[12] Growing clover and hay, fruit, and other natural produce of the land are not emblements and descend with the land to the heir.[13] But corn and other annual produce of the soil as emblements will if planted before the death of the ancestor go to the personal representative as against the heir,[14] although harvested after the death of the ancestor.[15]

c. Rents of Mortgaged Land. Rents which accrue upon mortgaged property after the mortgagor's death and before entry go to his heir;[16] nor does a decree

personal representative. Coons *v.* Nall, 4 Litt. (Ky.) 263.

In case of lease by ancestor conveying no estate.— Where the ancestor's lease conveyed no estate but passed the right of possession only, the heirs, having no right to the possession till the lease expires, are not entitled to the rents. Autrey *v.* Autrey, 94 Ga. 579, 20 S. E. 431.

Land allotted as dower.— Rents received by an administrator after the widow has taken possession of the land allotted to her as dower belong exclusively to the heirs and distributees, in the absence of a contrary provision. Munden *v.* Bailey, 70 Ala. 63. But if an administrator rents the dwelling occupied by the decedent at the time of his death before the widow's dower has been assigned to her, he is not liable to the heirs for the rent. McLaughlin *v.* Godwin, 23 Ala. 846.

As against personal representative of husband with curtesy.— The heir of the reversioner is entitled, upon the death of the surviving husband of the reversioner, who held an estate by the curtesy in the land, to the rents accruing after the death of such husband as against his personal representative. Condit *v.* Neighbor, 13 N. J. L. 83.

6. Statutory power of administrator over rents and profits see *infra*, IV, A, 6, g.

7. *Alabama.*— Brewster *v.* Buckholts, 3 Ala. 20.

Georgia.— Autrey *v.* Autrey, 94 Ga. 579, 20 S. E. 431.

Indiana.— Humphries *v.* Davis, 100 Ind. 369; Dorsett *v.* Gray, 98 Ind. 273; King *v.* Anderson, 20 Ind. 385.

Iowa.— Crawford *v.* Ginn, 35 Iowa 543.

Kentucky.— Ball *v.* Covington First Nat. Bank, 80 Ky. 501.

Mississippi.— Bloodworth *v.* Stevens, 51 Miss. 475.

New York.— Miller *v.* Crawford, 14 N. Y. Suppl. 358, 26 Abb. N. Cas. 376.

North Carolina.— Fleming *v.* Chunn, 57 N. C. 422.

Tennessee.— Rowan *v.* Riley, 6 Baxt. 67.

See 16 Cent. Dig. tit. "Descent and Distribution," § 277. And see, generally, EXECUTORS AND ADMINISTRATORS.

Rents payable in advance are held to be "accrued rents" by these authorities, even though not collected during the lessor's lifetime. Miller *v.* Crawford, 14 N. Y. Suppl. 358, 26 Abb. N. Cas. 376.

8. Lobdell *v.* Hayes, 12 Gray (Mass.) 236; Gibson *v.* Farley, 16 Mass. 280; Hobson *v.* Yancey, 2 Gratt. (Va.) 73; Kurtz *v.* Hollingshead, 14 Fed. Cas. No. 7,953, 4 Cranch C. C. 180. But see U. S. Bank *v.* Peter, 2 Fed. Cas. No. 933, 5 Cranch C. C. 485.

9. Draper *v.* Barnes, 12 R. I. 156; Ritchie *v.* U. S. Bank, 20 Fed. Cas. No. 11,863, 5 Cranch C. C. 605.

10. Mobile Branch Bank *v.* Fry, 23 Ala. 770.

11. Brown *v.* Fessenden, 81 Me. 522, 17 Atl. 709; Kimball *v.* Sumner, 62 Me. 305. See also Fuller *v.* Young, 10 Me. 365; Heald *v.* Heald, 5 Me. 387.

12. Kidwell *v.* Kidwell, 84 Ind. 224; McClead *v.* Davis, 83 Ind. 263.

13. **Uncut grass, hay, or grain.**— Evans *v.* Hardy, 76 Ind. 527; Craddock *v.* Riddlesbarger, 2 Dana (Ky.) 205; Evans *v.* Iglehart, 6 Gill & J. (Md.) 171; Kain *v.* Fisher, 6 N. Y. 597; McDowell *v.* Addams, 45 Pa. St. 430.

Fruit.—Kain *v.* Fisher, 6 N. Y. 597.

14. Penhallow *v.* Dwight, 7 Mass. 34, 5 Am. Dec. 21. See, generally, EXECUTORS AND ADMINISTRATORS.

15. Wadsworth *v.* Allcott, 6 N. Y. 64.

16. Gibson *v.* Farley, 16 Mass. 280; Wathen *v.* Glass, 54 Miss. 382.

of foreclosure *proprio vigore* entitle the mortgagee thereto. The administrator therefore has no right to collect them.[17]

d. Action For Use and Occupation. It has been held that the administrator and not the heir must sue for the use and occupation of premises, in the absence of a lease and rent, which would give the right to the heir.[18] Other decisions, however, are to the contrary.[19] The heir entitled may sue for use and occupation where a lease has been made by the administrator for his benefit but without his authority.[20]

e. Heir's Right Where No Privity of Estate With Lessee. A statute giving the grantee or heir of a lessor the same remedies for the recovery of rents as the lessor has been held not to allow an heir entitled to the reversion of a trust estate, on the expiration of a beneficial life-interest, the right to distrain upon a lessee of the person with the life-interest, for rent accruing before the descent was cast upon the heir, there being no privity of estate between the heir and such lessee.[21]

f. As Between Heir and Devisee or Legatee. Where land is devised from and after the expiration of a certain term, as after the termination of an existing lease, and the testator dies before the term expires, the heir and not the devisee is entitled to the rents and profits of the land till the expiration of the term.[22] As against legatees the heir, if entitled to any part of his ancestor's estate, is entitled to an account of the rents and profits.[23]

g. Statutory Power of Administrator Over Rents and Profits. In some jurisdictions the general rule that heirs are entitled to the rents and profits of real estate accruing after the intestate's death has been changed by statutes vesting the right thereto in the administrator,[24] if under some statutes he properly asserts his right thereto,[25] and they are necessary for the purpose of paying debts or effecting an equitable division among the heirs.[26] The fact that statutes give the executor or administrator power to dispose of or rent the realty pending settlement of the estate does not render the heir liable for rents received or damages until such statutory power is lawfully exercised, unless the real estate is actually devised to the executors or the rents and profits are otherwise disposed of by will.[27] Under such a statute the personal representative has authority in prefer-

17. Wathen *v.* Glass, 54 Miss. 382. See, generally, EXECUTORS AND ADMINISTRATORS.

18. Logan *v.* Caldwell, 23 Mo. 372.

19. Murr *v.* Glover, 34 Ill. App. 373; Burk *v.* Osborn, 9 B. Mon. (Ky.) 579; Haslage *v.* Krugh, 25 Pa. St. 97.

20. Burk *v.* Osborn, 9 B. Mon. (Ky.) 579.

21. Murr *v.* Glover, 34 Ill. App. 373, holding, however, that the heir might recover for subsequent use and occupation of the premises.

22. Ware *v.* Hall, 16 N. J. L. 333.

23. Scoby *v.* Sweatt, 28 Tex. 713.

24. State *v.* Ramsey County Probate Ct., 25 Minn. 22; Edwards *v.* Evans, 16 Wis. 181. See Dunn *v.* Peterson, 4 Wash. 170, 29 Pac. 998. And see, generally, EXECUTORS AND ADMINISTRATORS.

25. Leatherwood *v.* Sullivan, 81 Ala. 458, 1 So. 718; Cruikshank *v.* Luttrell, 67 Ala. 318; Calhoun *v.* Fletcher, 63 Ala. 574; Cockrell *v.* Coleman, 55 Ala. 583; Estep *v.* Armstrong, 91 Cal. 659, 27 Pac. 1091. And see *Ex p.* Barker, 127 Ala. 203, 28 So. 574 [*citing* Landford *v.* Dunklin, 71 Ala. 594; Calhoun *v.* Fletcher, 63 Ala. 574; Tarver *v.* Smith, 38 Ala. 135; Golding *v.* Golding, 24 Ala. 122].

26. Stovall *v.* Clay, 108 Ala. 105, 20 So. 387; Stewart *v.* Smiley, 46 Ark. 373.

27. Patton *v.* Crow, 26 Ala. 426, on the principle that the heirs are the owners and may lawfully expend the usufruct until advised of the necessity to apply it otherwise. See Autrey *v.* Autrey, 94 Ga. 579, 20 S. E. 431, holding that if there are no creditors and the administrator rents out the land the accruing rents when not needed to pay the expenses of administration belong to the heirs as such, although the legal right to collect is in the administrator, as a mere trustee for them.

In **Iowa** under the code an executor under the order and direction of the court may apply the rents and profits of the decedent's real estate accruing after his death to the payment of debts and claims against the estate, in case the personal assets are insufficient; and the right so to take and apply rents and profits is not restricted to real property, possession of which is taken by the executrix because there is no heir or devisee competent to take it. But before an order is made so to take and apply rents and profits, the heir or devisees in possession should be made parties, and it should be made to appear that there is a necessity for such appropriation by reason of the insufficiency of personal assets. Toerring *v.* Lamp, 77 Iowa 488, 42 N. W. 378.

ence to an heir to receive rents accruing under a lease after the death of the lessor.[28] But until the administrator asserts his right by notice to the tenant or by actual suit, the heir is usually not barred from recovering the rent in a suit brought by himself,[29] and the heirs, distributees, and devisees are not liable to the executor or administrator for rents and profits received, unless possession has been taken by the latter under the statute.[30]

h. Right of Heir to Accounting For Rents and Profits. The right of the heir to an account and discovery of rents and profits realized from the land after the death of the ancestor extends to a variety of cases. For example it exists where a sale of decedent's lands to pay debts is set aside upon a bill of review and a decree of restitution obtained;[31] where a father, after the death of his wife, has been enjoying the possession of the land inherited from her by his minor children;[32] and against the tenant of a widow who, remaining in possession after her husband's death, leases the whole estate before partition between herself and the heirs.[33] So where a trustee for all the heirs conveys a part of the estate to certain of them, these must account for the profits thereon with interest before being entitled to share in the proceeds of a sale of the remainder.[34] Heirs who occupy a portion of the succession property are liable in Louisiana to the succession for rents thereof during their occupancy.[35]

i. Implied Trust Enforced in Favor of Heirs. The heirs to whom the testator's land would descend at his death are given a resulting trust in the surplus of rents and profits accruing at the death of the *cestui* devisee; and where the deceased *cestui* was himself one of the heirs, the right to the surplus may be claimed by his personal representative.[36] So heirs are entitled to the surplus of rents and profits, with interest, of lands conveyed in trust to secure a debt.[37] The heir may charge as constructive trustees distributees, with notice, of a guardian of the heir who held and disposed of the heir's estate subject to its true owner's claim.[38]

j. Limitations on Heir's Right to Accounting. Heirs are in Louisiana not chargeable with the rents and revenues of property which they have possessed and used as sole heirs in good faith before notice was brought to them of the existence of another heir previously unheard of.[39] In New Jersey, in a case where the heir in possession acted under the honest belief that she had acquired full title to the premises and largely improved them, the heir subsequently claiming was given the right to the rents and profits upon his share only for six years before the commencement of suit and the value of his share in the real estate was computed as at the death of the ancestor which had occurred a long time previously.[40] Heirs who after judicial recognition by a decree later reversed have

28. Harkins *v.* Pope, 10 Ala. 493. And see, generally, EXECUTORS AND ADMINISTRATORS.

29. Masterson *v.* Girard, 10 Ala. 60.

30. Gayle *v.* Johnson, 80 Ala. 388.

31. Ritchie *v.* U. S. Bank, 20 Fed. Cas. No. 11,863, 5 Cranch C. C. 605.

32. Bedford *v.* Bedford, 136 Ill. 354, 26 N. E. 662 [*affirming* 32 Ill. App. 455], in which case the father, his own estate being inadequate for the support of the minor children, was held entitled to credit for their maintenance, but not for improvements made by him upon the land.

33. Murray *v.* Mounts, 19 Ind. 364 (holding the tenant accountable to the heir for the rent of the portion not subsequently set off to the widow); Foster *v.* Gorton, 5 Pick. (Mass.) 185 (in which case an attaching creditor of the tenant was denied the right, as against the heirs, to the produce of the land, etc., and the attaching officer was held liable in trover).

34. Clayton *v.* Clayton, 12 S. W. 312, 11 Ky. L. Rep. 472, where a widow of decedent held the land in trust for heirs and conveyed to certain ones.

35. Bauman's Succession, 30 La. Ann. 1138.

36. Gray *v.* Corbit, 4 Del. Ch. 135, 357.

37. Where land is conveyed in trust to secure a debt and is sold by the trustee after the grantor's death, leaving a surplus after satisfying the trust, the heir is entitled to the interest accruing on such surplus as against creditors of the grantor up to the time of the decree directing its distribution. Jones *v.* Lackland, 2 Gratt. (Va.) 81.

38. Moore *v.* Shepherd, 2 Duv. (Ky.) 125.

39. Harrington *v.* Barfield, 30 La. Ann. 1297.

40. Rowden *v.* Murphy, (N. J. Ch. 1890) 20 Atl. 379 [*citing* Hall *v.* Piddock, 21 N. J. Eq. 311].

collected rents and profits will not be ordered to return them or enjoined from subsequent collection, if their status as heirs entitled to possession be recognized in the later proceeding.[41] Where a statute gives the widow the right to occupy land under special circumstances, without assignment of dower, the heir cannot recover the rents and profits of the land so occupied by her until proper steps for assignment of dower or partition have been taken.[42] Where an heir has himself handed over a portion of the profits to which he was entitled to share, to one of several co-heirs entitled with him, he cannot recover such portion from the co-heirs jointly, but if at all, only from the co-heir to whom he delivered it.[43] The right of an unknown heir who has given no notice of his claim for several years after the division of the estate may be barred as to the profit realized upon his share before his bill for accounting was filed.[44] Where the heir has been aware of the use by the administrator of the property of the intestate for carrying on business, he will be held to elect to take profits, instead of rents and hires, unless he expressly elects otherwise.[45]

7. Mutual Rights and Liabilities of Heirs and Distributees — a. In General — (I) *Ascertainment of Disposable Portion.* The ascertainment of the disposable portion of an inheritance and the shares of those who are to inherit is incidental to the settlement of the estate, and must be fixed before the property is received by the beneficiaries or heirs.[46]

(II) *Equality in Distribution.* On the principle that in the distribution of a decedent's estate among heirs equality is equity, where one of several heirs acting for all secures to himself an advantage in the distribution of the estate, he will not be permitted to avail himself of it.[47] But where equality among the heirs is inconsistent with rights of election and preference secured to the respective heirs by the acts regarding descent, a bill by an heir praying for a sale or partition in a manner which will place all the heirs on an equality cannot be maintained.[48] Where certain heirs have received a benefit, as maintenance or education, from the estate, which others have not enjoyed, sums so received by them should be charged against them in favor of the others.[49] And if one heir has discharged an encumbrance upon the estate to which he and his co-heirs are entitled, he is entitled to priority over the others in respect of the amount of such payment.[50]

(III) *Effect of Priority in Distribution.* It has been held that where land is divided between two heirs by deed, the descriptions in which are mutually irreconcilable, neither of the heirs acquires a preference over the other by reason of his priority in the distribution.[51]

(IV) *Heir's Right to Recover in Case of Failure to Receive Proper Share.* Where an heir has failed to receive from the estate the share to which he was properly entitled, he will be allowed to recover such share or the amount thereof necessary to place him in his proper position, as in the case of a mutual mistake as to the amount of the shares to which the inheritance law entitles the heirs,[52] or where one beneficiary attempts to bar another's right by securing an

41. Baumgarden's Succession, 36 La. Ann. 46.

42. Benedict *v.* Beurmann, 90 Mich. 396, 51 N. W. 461.

43. Darnall *v.* Hill, 12 Gill & J. (Md.) 388.

44. Bird *v.* Graham, 36 N. C. 196, so holding, although the heir had apparently been ignorant of his right.

45. French *v.* Davis, 38 Miss. 167.

46. Moore's Succession, 42 La. Ann. 332, 7 So. 561.

47. Mason *v.* Myer, Wright (Ohio) 641.

48. Chaney *v.* Tipton, 11 Gill & J. (Md.) 253.

49. State *v.* Stephenson, 12 Mo. 178, so holding where older children had been educated and supported out of an estate, and distribution was made before the minor children had been benefited.

As to advancements see *infra*, IV, B.

50. Braxton *v.* Braxton, 20 D. C. 355.

51. Roberti *v.* Atwater, 43 Conn. 540.

52. Haven *v.* Foster, 9 Pick. (Mass.) 112, 19 Am. Dec. 353.

Enforcing promise of heir or distributee.— Where one heir or distributee of an estate, who has received more than his proportionate part of the estate, promises the other heirs or distributees to account with them therefor, the administrator of such estate cannot enforce such promise. This must be done by

improper conveyance to himself,[53] or where the original inheritance is subsequently increased by a reversion.[54] So where some of several co-heirs are paid for a release of a joint title, they must account for the price to their co-heirs.[55] An heir or distributee who receives or recovers from the administrator more than his share may be compelled to refund the excess for the benefit of the other heirs or distributees; but where he has obtained no more than his share he cannot be compelled to refund or contribute for the benefit of others who have not received their shares because of waste or other default of the administrator.[56]

(v) *Where Certain Heirs Have Claims Against the Estate.* A division of the property among the several heirs is no bar to a claim by one of them against the estate of the ancestor.[57] When the ancestor has made a wrongful conveyance of property which should have descended to certain heirs, such heirs may recover the price received out of his entire estate, but their recovery will be diminished *pro tanto* if part of such proceeds has been expended in improvements increasing the value of other lands which they inherit.[58] The fact that the ancestor on advancing money to one of the heirs has taken from him a covenant to repay the sums so advanced to his co-heirs in settlement of the estate, if above his ratable portion, does not prevent the heir from recovering from the estate a bonded debt for a sum subsequently loaned by him to the ancestor.[59]

(vi) *Non-Joinder of Co-Heir in Action to Recover Land.* The non-joinder of one with interest as tenant in common with the demandants in a writ of right, unless pleaded in abatement, will not defeat the right of the demandants to the portion of the estate to which they prove themselves entitled.[60]

(vii) *Sale or Purchase by Heir of Inheritance Property* — (a) *Sale.* If an heir be employed to sell the estate for another, he may be compelled to account for and pay over the proceeds, in a court of ordinary jurisdiction.[61]

(b) *Purchase.* In Louisiana a co-heir of age may at a sale of the hereditary effects become a purchaser to the amount due him from the succession, and need not pay over the surplus over the amount coming to him till such amount is definitely fixed by partition.[62] But it is held that an heir purchasing at an administrator's sale cannot withhold the price because of claims in his favor against his co-heir.[63] Where one of several heirs assumes the liability of a purchaser of part of the inheritance, he will be liable to his co-heirs therefor only in the amount due them of the unpaid purchase-money, after allowing full credit for all pay-

the parties to whom it was made. Stovall *v.* Clay, 108 Ala. 105, 20 So. 387.

53. Where a widow procured a mortgage on her deceased husband's real estate to be foreclosed, and the premises to be bid off in her name at the sale and paid for with funds of the estate, so that the title was vested in her, it was held that whatever may have been her intention as to the rights of an infant heir the proceedings were in effect fraudulent and void and could not prejudice his rights to the land. Terry *v.* Tuttle, 24 Mich. 206.

54. Allen *v.* Allen, Jeff. (Va.) 86.

55. King *v.* Robinson, 2 Rich. Eq. (S. C.) 157.

56. Case *v.* Richason, 29 Ind. App. 331, 64 N. E. 629. And see Sims *v.* Sims, 10 N. J. Eq. 158; Auburn Theological Seminary *v.* Cole, 20 Barb. (N. Y.) 321; Lupton *v.* Lupton, 2 Johns. Ch. (N. Y.) 614.

57. Smith *v.* Smith, 28 N. J. L. 208, 74 Am. Dec. 49, holding that where a son who, relying on his father's promise void by the statute of frauds, that he should have a farm, erected buildings thereon, did not lose his right to recover the value of such improvements from his father's estate, by reason of his taking an interest in the premises as heir.

58. Todd *v.* Todd, 18 B. Mon. (Ky.) 144.

59. Webb *v.* Lyon, 40 N. C. 67, so holding, although the amount of the bonded debt was less than the amount of the advancement.

60. Where upon a writ of right by three demandants, it appeared that the tenement demanded descended to the demandants and their two infant brothers from their mother and that those two infants had died without issue and were survived by their father as well as by the demandants, it was held that the fact that the father through the death of the two infants had become interested as tenant in common to the extent of the share of the infant first deceased could not prevent the demandants from receiving so much of the tenement as they showed themselves entitled to. Walkers *v.* Boaz, 2 Rob. (Va.) 485.

61. Bronaugh *v.* Bowles, 3 La. 120.

62. Harrell's Succession, 12 La. Ann. 337.

63. Rils *v.* Questi, 2 La. 249.

ments and offsets, and not in the amount due to each of them on a final settlement of the whole estate.[64]

(VIII) *WHETHER ACTS BY ONE CO-HEIR INURE TO BENEFIT OF OTHERS.* The legal entry of one co-heir or tenant in common inures to the benefit of the others.[65] But a judgment against a tenant in a writ of entry brought in the name of one of several co-heirs at their joint expense was held not to inure to the benefit of the other co-heirs in an action for the mesne profits.[66] And if a donec of property restores it or its proceeds to one of the donor's heirs, such heir cannot be required to make distribution among the other heirs.[67] A disclaimer by an heir of any interest in premises in controversy in chancery does not vest the disclaimed interest in the remaining heirs.[68]

(IX) *RIGHTS OF HEIRS RECEIVING DIFFERENT PORTIONS OF ESTATE AS TO BENEFITS AND BURDENS.* Heirs receiving different portions of the ancestor's estate take the same, as between themselves as well as with respect to third persons, in the same condition and subject to the same benefits and burdens, as quasi-easements under which the same were held by the ancestor.[69]

(X) *RIGHT OF HEIR TO HAVE ENCUMBRANCE ON REAL ESTATE PAID OUT OF PERSONALTY.* An heir to whom lands have descended which are subject to a mortgage given by his ancestor in his lifetime has no right as against one entitled to the surplus of personalty after payment of all debts duly allowed against the estate, to have such surplus applied to the payment of the mortgage, when the latter has not been duly presented and allowed as a claim against the estate.[70]

b. Authority to Act For Co-Heirs. In general one of several co-heirs has no authority to represent the others or to affect their rights by his acts unless actually empowered to do so as their agent.[71] Where one of the heirs being also an administrator is in the possession of real estate, his authority to bind the others and affect their rights depends upon his express or implied authority to act as their agent.[72]

c. Liability Upon Taking Possession of Estate or Property Thereof — (I) *IN GENERAL.* An heir who receives from a co-heir "property to be accounted for on a settlement of the estate" is liable therefor only after such a settlement as by determining the respective rights of the parties will show the necessity of the restoration.[73] The effect of an heir's taking a conveyance in his own name to the use of himself and the rest will be under the statute of uses to render him liable

64. Arnous *v.* Lesassier, 10 La. 592, 29 Am. Dec. 470.

65. Carothers *v.* Dunning, 3 Serg. & R. (Pa.) 373.

66. Allen *v.* Carter, 8 Pick. (Mass.) 175, on the ground that the other heirs were not privy to the writ of the co-heir, not having joined in the action and no possession on their part being shown.

67. Day *v.* Day, 100 Ind. 460.

68. Kane County *v.* Herrington, 50 Ill. 232.

69. Where A died intestate, seized of land on which there was a mill, then in full operation, and on the division of the land under the act to direct descents among his heirs, the mill was on the portion allotted to B, and the dam covered a part of the portion allotted to C, it was held that B had a right to use the mill and dam in the same way and to the same extent as they had been used by A in his lifetime. Kilgour *v.* Ashcom, 5 Harr. & J. (Md.) 82.

70. Clark *v.* Davis, 32 Mich. 154.

71. One of several co-heirs, the others being minors, has no authority to execute a forfeiture of a lease made by the ancestor for non-payment of rent, without the consent of the other heirs. Wilson *v.* Goldstein, 12 Pa. Co. Ct. 337, so holding in a case where the ancestor's lease reserved rent to himself and his heirs, with condition of a right of entry in case of non-payment. Nor can one of several heirs employ an agent to locate a land certificate belonging to all the heirs and bind the heirs to give him a certain portion of the land. Keen *v.* Casey, 22 Tex. 412. See, generally, PRINCIPAL AND AGENT.

Compromise.— Where one of three heirs, one being an infant, to whom land had descended subject to a deed of trust, compromised the trust claim by a conveyance of the land, in which the others did not join, it was held that they could not be compelled to join in the conveyance, although they received a proportionate benefit therefrom. Tracy *v.* Shumate, 22 W. Va. 474.

72. Dodge *v.* Stacy, 39 Vt. 558, holding that the question whether the heir was so authorized should be submitted to the jury.

73. Curtis *v.* Hubbel, 2 D. Chipm. (Vt.) 9, so holding where the co-heir from whom the property was received was also administrator.

in ejectment to each of the others on failure to pay over the proper share.[74] It has been held in Louisiana that heirs taking possession of a succession are responsible to the other heirs for the portion taken by each only and not *in solido* for the entire succession;[75] but that an heir who has taken possession of an entire estate after dismissing the administratrix before she has rendered any account is liable to the full value of her attorney's services.[76]

(II) *Liability For Rent or Hire.* It has been held that one of several co-heirs occupying land of their decedent pending a settlement of the estate is not liable to pay rent, where it does not appear that his occupation was against the will or objections of his co-heirs, or of a larger portion of the estate than he could equitably enjoy.[77] But where one of several heirs entitled to realty takes a conveyance of the whole estate to himself, holding it as a trustee for himself and the others, he will be charged with the use and occupation of the land from the date of such conveyance, with a deduction for improvements made and taxes paid by him.[78] Similarly a husband taking possession of personalty in right of his wife as distributee of an intestate's estate, with notice of the rights of an infant co-distributee, will be liable to such co-distributee for the hire of the property during his possession.[79] In Louisiana heirs occupying a portion of succession property are liable to the succession for its rents during their occupancy,[80] although an exception has been made under special circumstances in favor of a daughter of the intestate who occupied a house upon the premises with her minor children.[81] Heirs are not chargeable with the rents and revenues of the property which they have possessed and used as sole heirs in good faith, before notice was brought to them of the existence of another heir previously not heard of.[82] They can be charged for rents only after judicial demand, and are entitled to be reimbursed for improvements, price of materials, and workmanship, this being the measure, if enhanced value of the soil be not proved.[83]

d. Liability For Losses. Where, after a division of an estate has been made, property allotted to one of the distributees is lost before the distributee has taken possession of it, the loss should not fall solely on the distributee, but should be borne by the general estate.[84]

e. Subrogation to Rights of Unknown Heirs. It has been held in Louisiana that the heir present is subrogated to the rights of those absent, whose existence is not known, and entitled to the whole succession.[85]

f. Rights and Liabilities as Between Heirs and Legatees — (I) *In General.* In Louisiana since the claims of the constituted legatees against the heirs of a descent or succession may be enforced against the heirs as well after as before they have taken possession of the property, the mere consent of such legatees will warrant the court in letting into possession the heirs entitled.[86] On the other hand the universal legatee cannot be ordered to be let into possession as against heirs to whom a certain portion of the property is legally reserved, unless, as the code requires, the legatee first demands of the heirs delivery of the testamentary effects.[87] Failure of duty to invest on the part of a testamentary trustee and his insolvency give the beneficiary no right against the heirs, although

74. Eckels *v.* Stewart, 53 Pa. St. 460.
75. Longino *v.* Phipps, 47 La. Ann. 1430, 17 So. 827.
76. Gaiennie *v.* Thompson, 6 La. Ann. 475.
77. Bohrer *v.* Otterback, 21 D. C. 32.
78. Braxton *v.* Braxton, 20 D. C. 355.
79. Snowden *v.* Pope, Rice Eq. (S. C.) 174.
80. Bauman's Succession, 30 La. Ann. 1138.
81. It was held in Louisiana that a daughter of the intestate who occupied with her minor children a plantation dwelling-house should not be charged rent, where she had not contracted to pay it, and where the building was not needed for the administrator or a tenant, and was not required for the cultivation of the plantation. Sparrow's Succession, 40 La. Ann. 484, 4 So. 513.
82. Harrington *v.* Barfield, 30 La. Ann. 1297.
83. Hutchinson *v.* Jamison, 38 La. Ann. 150.
84. Jackson *v.* Jennings, 13 Rich. Eq. (S. C.) 172, 94 Am. Dec. 160.
85. Dupre *v.* Reggio, 6 La. 653.
86. Charmbury's Succession, 34 La. Ann. 21.
87. Bellocq's Succession, 28 La. Ann. 154.

the trustee has bought property of the succession, giving the executor for the price a receipt for the legacy; nor has the beneficiary any mortgage on the property so bought.[88] Where a testator dies domiciled abroad, having property abroad and also in Louisiana, which latter proves insufficient after payment of the debts to satisfy the legacies charged upon it, the deficiency of the debts must be made good by the foreign succession, and the legatees who are to be paid from the Louisiana property are entitled to be first satisfied therefrom.[89]

(II) *RIGHT OF HEIR TO CONTEST LEGACY.* It has been held in Louisiana that an heir cannot contest a legacy, after payment of which there remains his full interest in the succession.[90]

8. CLAIMS OF ESTATE AGAINST HEIRS AND DISTRIBUTEES — a. Right to Deduct Debts Due the Estate From the Debtor's Distributive Share — (I) *IN GENERAL.* In some jurisdictions, in the distribution of an estate among heirs, no deduction can be made from the share of any one of them on account of any debt due from him to the estate.[91] In Louisiana, although the title of the heir is in no manner affected by his indebtedness to the succession, however large,[92] yet in the partition of the succession of a father a child must collate the amount of his indebtedness to the succession.[93] In other jurisdictions the amount of the heir's indebtedness will be deducted from his share,[94] except where the heir has *bona fide* transferred

88. Carraby *v.* His Creditors, 3 La. Ann. 491.

89. Mourain *v.* Poydras, 6 La. Ann. 151, holding that the legatee, a minor residing in Louisiana, might arrest the funds there appropriated to her legacy until the heirs offered good security for its payment with interest.

90. Adams *v.* Routh, 8 La. Ann. 121.

91. Bondurant *v.* Thompson, 15 Ala. 202; Hancock *v.* Hubbard, 19 Pick. (Mass.) 167; Osgood *v.* Breed, 17 Mass. 356; Procter *v.* Newhall, 17 Mass. 81.

A decree of the probate court directing the distributive share of an heir who was indebted to the estate to be paid over by the administrator to the other heirs on the ground of such indebtedness is void. Hancock *v.* Hubbard, 19 Pick. (Mass.) 167.

92. Turner *v.* Turner, 7 La. Ann. 216, holding that a part of the heirs cannot claim to be put into possession of the entire estate to the exclusion of the other heirs, on the ground that the latter were indebted to the deceased at the time of his death to an amount exceeding their share of the succession.

93. Burns' Succession, 52 La. Ann. 1377, 27 So. 883; Tournillon's Succession, 15 La. Ann. 263. Debts of a child assumed by a father and paid by the succession must be collated. Tournillon's Succession, 15 La. Ann. 263. And necessary expenses paid for the child by the parent or by the administrator after the child's death will on partition be subtracted from the child's share. Montamat's Succession, 15 La. Ann. 332. See, also, *infra*, IV, B, 7.

94. *Indiana.*— Fiscus *v.* Fiscus, 127 Ind. 283, 26 N. E. 831; Fiscus *v.* Moore, 121 Ind. 547, 23 N. E. 362, 7 L. R. A. 235.

Kansas.— See Head *v.* Spier, 66 Kan. 386, 71 Pac. 833.

New York.— Smith *v.* Kearney, 2 Barb. Ch. 533.

Pennsylvania.— *In re* Donaldson, 158 Pa. St. 292, 27 Atl. 959.

South Carolina.— Sartor *v.* Beaty, 25 S. C. 293; Wilson *v.* Kelly, 16 S. C. 216.

Tennessee.— Towles *v.* Towles, 1 Head 601.

See also Fels *v.* Fels, 1 Ohio Cir. Ct. 420.

See 16 Cent. Dig. tit. "Descent and Distribution," § 288.

Advancement.— A sum advanced by a parent to a child may be deducted if intended as debt but not if intended as an advancement. Jones' Estate, 29 Pittsb. Leg. J. (Pa.) 89.

Advancements see *infra*, IV, B.

The fact that the debtor's entire property is less than his legal exemptions is no ground for not applying his distributive share to the payment of his debt. Fiscus *v.* Fiscus, 127 Ind. 283, 26 N. E. 831.

Where a testator was surety for his son in an amount greater than the value of the son's interest in the estate, the son is not entitled to recover his distributive share of the estate, although the executors do not pay off the surety debt until after action brought by the son. Ramsour *v.* Thompson, 65 N. C. 628.

Lien on lands of estate for debts thereto of a co-heir.— Where an heir is indebted to his ancestor while living, and continues indebted to his estate after his death, the other heirs of the ancestor have an equitable lien upon the lands of decedent for the debt which said heir owes the estate, which lien is superior in equity to any right the debtor heir, or persons claiming under or through him by operation of law or otherwise, would, but for his indebtedness, have had in the descended lands. Streety *v.* McCurdy, 104 Ala. 493, 16 So. 686.

Where one heir has bought the interest of some of the others in the decedent's land, the purchased portion cannot in partition be charged with a debt due from such heir to the decedent's estate, but only the portion inherited. Ruiz *v.* Campbell, 6 Tex. Civ. App. 714, 26 S. W. 295.

his interest to an innocent party.[95] In these jurisdictions the share of an insolvent distributee will be applied to the debt due the estate, and will not pass to the trustee in insolvency.[96] A debt repudiated by the debtor on the ground of legal incapacity to contract is in equity a part of the estate, and may be deducted from the debtor's distributive share.[97]

(II) *DEBTS FRAUDULENT OR BARRED.* No deduction can be made on account of any debt which is shown to be fraudulent,[98] but debts barred by the statute of limitations may be deducted.[99]

(III) *DEBT DUE FOR PROPERTY PURCHASED AT ADMINISTRATOR'S SALE.* Where a distributee is indebted to the estate for property purchased by him at the administrator's sale, the amount of his debt may be deducted by the court from his distributive share.[1] Conversely, where such debt against the distributee has been reduced to a judgment, he is entitled to have his distributive portion credited against the indebtedness,[2] or to enjoin the enforcement of the judgment altogether, if it be for a less amount than his distributive share.[3]

(IV) *DEBT DUE ADMINISTRATOR.* A distributee who is indebted to the administrator as such may be forced by the latter to take such debt in payment *pro tanto* of his distributive share, and if he assigns such share, the assignee takes it subject to the same equity.[4]

(V) *DEBT DUE FROM HUSBAND OF HEIR.* The court may order the distributive share of a son-in-law of the decedent, to which he would have been entitled in right of his wife, to be diminished by deducting a debt due from the son-in-law to the decedent,[5] or to be credited on a judgment obtained by the decedent against him, when he has no other property.[6]

(VI) *AGREEMENT BETWEEN DEBTOR AND DECEDENT AS TO DISCHARGE OF DEBT.* An agreement between the debtor and the decedent, by which the debt or a part thereof is to be discharged in a particular manner by the debtor, will bind the decedent's other heirs and legatees.[7]

(VII) *EFFECT OF DEBTOR'S DISCHARGE IN BANKRUPTCY.* A debt due the estate may be deducted from the debtor's distributive share, although the debtor has received a discharge in bankruptcy.[8]

(VIII) *LIABILITY OF ISSUE OF HEIR DECEASED BEFORE INTESTATE.* The right to deduct from the share of a child the debts due the estate from his deceased parent whose death preceded that of the owner of the estate depends upon whether the child is to be considered as taking in his own right or through the deceased parent.[9] In the former case no deduction can be made,[10] but in the

95. Towles *v.* Towles, 1 Head (Tenn.) 601. *Compare* Allen *v.* Smitherman, 41 N. C. 341.

96. Gosnell *v.* Flack, 76 Md. 423, 25 Atl. 411, 18 L. R. A. 158, holding also that debts incurred to the estate itself by the distributee as administrator after the decedent's death may be deducted.

97. Starr's Appeal, 136 Pa. St. 23, 19 Atl. 1069.

98. Rawlins *v.* Rawlins, 75 Ga. 632.

99. Thompson's Appeal, 42 Pa. St. 345; Courtenay *v.* Williams, 3 Hare 539, 13 L. J. Ch. 461, 25 Eng. Ch. 539. See also Wilson *v.* Kelly, 16 S. C. 216. But see Matter of Murray, 2 Pearson (Pa.) 473, holding that the rule is applicable only to cases where the debt is barred prior to the decedent's death. And in Louisiana prescription subsequent to the opening of the succession will not relieve an heir who is indebted to the estate from collating. Skipwith's Succession, 15 La. Ann. 209.

1. Mahon *v.* Bower, 1 How. (Miss.) 275.

2. McGee *v.* Ford, 5 Sm. & M. (Miss.) 769. See *infra*, IV, A, 8, b.

3. Parker *v.* Britt, 4 Heisk. (Tenn.) 243.

4. Allen *v.* Smitherman, 41 N. C. 341. See *infra*, IV, A, 12, e.

5. Yohe *v.* Barnet, 1 Binn. (Pa.) 358.

6. Barnet *v.* Yohe, 4 Yeates (Pa.) 74.

7. Bell *v.* Henshaw, 91 Ky. 430, 15 S. W. 3, 12 Ky. L. Rep. 674.

8. Wilson *v.* Kelly, 16 S. C. 216, holding that the discharge does not extinguish the debt but merely furnishes a bar to an action thereon.

9. Stokes *v.* Stokes, 62 S. C. 346, 40 S. E. 662.

10. Wells *v.* Wells, 6 Ky. L. Rep. 216; Kendall *v.* Mondell, 67 Md. 444, 10 Atl. 240; Powers *v.* Morrison, 88 Tex. 133, 30 S. W. 851, 53 Am. St. Rep. 738, 28 L. R. A. 521 [*reversing* (Civ. App. 1894) 30 S. W. 849]. A nephew is entitled to his share of an uncle's estate free from any deduction on account of

latter the child takes subject to the same deductions as the parent would have done.[11]

(IX) *Liability of Issue of Deceased Legatee.* In some jurisdictions the issue of a legatee who dies before the testator are considered as taking by virtue of the will, as if the devise or bequest had been directly to them, and so without any liability on account of the deceased parent's debts to the testator.[12] In others they are considered as taking by representation of the deceased parent and such debts may be deducted.[13]

b. Right of Debtor to Estate to Have Distributive Share Set Off Against His Indebtedness. When one who is indebted to the estate of a deceased person is entitled to a distributive share of the assets of the estate, he may set off his distributive share against his indebtedness,[14] at least with the consent of the administrator.[15] But the heir is entitled to have set off against his debt only the amount which would be due him from the estate after payment of all its debts.[16] In case of a set-off the indebtedness must be considered as part of the assets of the decedent's estate that go to make up the aggregate fund for distribution.[17] This rule applies to debts secured by mortgage,[18] or other conditional conveyance legally equivalent thereto.[19] Where the debtor is insolvent and the amount of the debt exceeds that of the distributive share to which he would have been entitled, the debt will be deemed assets of the decedent's estate to the extent of such share.[20] In Louisiana the rule is that an heir who owes a debt to the succession is entitled to collate it, and cannot be sued for the debt without proof of the insolvency or indebtedness of the succession and the necessity of his paying.[21]

9. Rights and Liabilities of Surviving Husband or Wife[22] — a. Rights and Liabilities of Widow — (I) *In General.* In Louisiana the shares accruing to the children are subject to the imperfect usufruct in favor of the mother, who must account for them at the expiration of the usufruct.[23] The widow may sue to set aside a judgment against the succession of her intestate husband if he has died without ascendants, whether there are collaterals or not, as she is either an heir or one having interest in the estate.[24] Where she has obtained a judgment against her husband in his lifetime for the conversion of property belonging to her, the right to such property is merged in the judgment, and she cannot claim it if found after his death among the effects of the succession.[25] It has been held in Ohio that where real property of an intestate is partially damaged by fire, and the

debts due the estate from his father whose death preceded that of the uncle. Stokes *v.* Stokes, 62 S. C. 346, 40 S. E. 662.

In Louisiana a collateral heir, although claiming as the representative of his deceased parent, need not collate a debt due by his parent to the decedent's estate. Morgan's Succession, 23 La. Ann. 290.

11. Batton *v.* Allen, 5 N. J. Eq. 99, 43 Am. Dec. 630; Earnest *v.* Earnest, 5 Rawle (Pa.) 213.

Under the Pennsylvania statute which provides that "the issue of a deceased child or grandchild shall take by representation of their parents," the share of a grandchild in a grandparent's estate must be taken subject to the debts due the estate by his deceased parent. Hughes' Appeal, 57 Pa. St. 179; McConkey *v.* McConkey, 9 Watts (Pa.) 352 [*overruling* Ilgenfritz's Appeal, 5 Watts (Pa.) 25].

12. Carson *v.* Carson, 1 Metc. (Ky.) 300.

13. Adams' Estate, 35 Pittsb. Leg. J. (Pa.) 285.

14. Anderson *v.* Gregg, 44 Miss. 170; Howland *v.* Heckscher, 3 Sandf. Ch. (N. Y.) 519. See also *supra*, IV, A, 8, a, (III).

An interest in a surplus fund for the payment of legacies may also be set off. Howland *v.* Heckscher, 3 Sandf. Ch. (N. Y.) 519.

15. Anderson *v.* Gregg, 44 Miss. 170.

16. Brunetti *v.* Barnabé, 7 Rob. (La.) 117.

17. Green *v.* Green, 14 S. W. 836, 12 Ky. L. Rep. 585; Anderson *v.* Gregg, 44 Miss. 170.

18. *In re* Willock, 24 Pittsb. Leg. J. N. S. 466.

19. Green *v.* Green, 14 S. W. 836, 12 Ky. L. Rep. 585.

20. Howland *v.* Heckscher, 3 Sandf. Ch. (N. Y.) 519.

21. Davis *v.* Davis, 5 La. Ann. 561.

Collation see *infra*, IV, B, 7.

22. **Rights of surviving spouse** see also *supra*, III, B.

23. *In re* Jones, 41 La. Ann. 620, 6 So. 180.

24. Gates *v.* Walker, 8 La. Ann. 277, holding that if there are no collaterals, the widow, not judicially separated in bed and board, is the heir; and if there are collaterals, she has an interest in the preservation and due administration of the estate, in view of her marital fourth thereof.

25. Martin's Succession, 7 La. Ann. 45.

insurance money is paid to the administrator, who applies it on a mortgage on the property, the widow, on electing to take her dower in money, is entitled to have the same calculated upon the total amount realized from the sale of the premises and the insurance money.[26] A widow cannot recover from the heirs what she has expended after her husband's death, and without authority or direction from the heirs, in the maintenance of property which belongs to him.[27] In Pennsylvania where an intestate is survived only by a widow and collateral heirs, leaving real estate with a mansion house thereon, to which the widow is entitled for life, and she petitions for an inquest to make partition of the estate, the inquest must include the mansion house in the valuation.[28]

(II) *RIGHTS OF WIDOW IN REAL PROPERTY.*[29] Where by statute the widow has a right to a certain portion of her husband's estate and is entitled to a partition of the property, or if it cannot be divided to have it appraised and sold, an heir cannot oust her from possession before proceedings for partition or appraisement have been begun.[30] The statutory rights of the widow in lands of which her husband died seized being complete at the moment of his death, if improvements are made by the heir or his vendee, after her title has thus attached, but before partition, she is entitled to share in the additional value resulting from the improvements.[31] Where by agreement land in which the widow had an interest has been sold and other land bought with the proceeds, she is liable for her share of the taxes paid by the purchaser upon the land so bought.[32] Where a widow makes an agreement with the heirs of her deceased husband for a sale of his land on condition of receiving a certain proportion of the proceeds, she may either enforce the agreement against the heirs who are of age in proportion to their interest in such proceeds or she may have an assignment of dower.[33] Where a widow makes no claim to homestead or dower she does not stand in such a relation to her deceased husband, by privity in blood or representation, as to entitle her to enforce a trust in lands in the husband's favor against an alleged fraudulent grantee.[34]

(III) *DOWER IN PERSONAL PROPERTY.* In some jurisdictions the widow is by statute allowed dower in her husband's personal estate.[35] Where there has been a failure to set off her dower interest in the personal estate within the time prescribed by statute, she is entitled to interest on the sum withheld after the expiration of such period,[36] and if an administrator applies the personalty to the payment of the debts of the estate without satisfying the widow's claim for dower, she is entitled to be subrogated to the rights of creditors whose demands have

26. Fleming *v.* Jordan, 11 Ohio Dec. (Reprint) 688, 28 Cinc. L. Bul. 332.

27. Potter *v.* Potter, 3 N. J. L. 415, widow suing to recover sums expended in the maintenance of an infirm slave.

28. Kline's Estate, 1 Leg. Gaz. (Pa.) 428, so holding even though the estate be not susceptible of partition, she being only entitled to one half of the estate in value, not in quantity.

29. See also *supra*, III, B, 6.

30. Gourley *v.* Kinley, 66 Pa. St. 270.

Where the widow's claim has been partially satisfied, and the remainder of the property, not being capable of partition, is sold and the proceeds divided, the portion she has received should not be deducted from one third of such residue, but from one third of the whole original property. Goodrich *v.* Myers, 25 Ind. 10.

31. Janney's Estate, 2 Pa. Dist. 408, 12 Pa. Co. Ct. 636.

32. Melvin *v.* Melvin, Wright (Ohio) 508, holding that where the purchase is made by one of the heirs and title taken in his name, he holds the land in trust for the widow and other heirs, who are liable for their proportion of the taxes paid by him.

33. Goodman *v.* Moore, 22 Ark. 191.

34. Langley *v.* Langley, 45 Ark. 392.

35. See Crouch *v.* Edwards, 52 Ark. 499, 12 S. W. 1070; Henderson *v.* Chaires, 35 Fla. 423, 17 So. 574; Straat *v.* O'Neil, 84 Mo. 68; Stone *v.* Stone, 18 Mo. 389; McLaughlin *v.* McLaughlin, 16 Mo. 242.

As to dower in slaves under the early statutes in some of the states see McReynolds *v.* Jones, 30 Ala. 101; Evans *v.* Gregory, 15 B. Mon. (Ky.) 317; Burtle *v.* Thomas, 6 B. Mon. (Ky.) 401; Smiley *v.* Smiley, 1 Dana (Ky.) 93; Gale *v.* Miller, 3 T. B. Mon. (Ky.) 416; Reese *v.* Holmes, 5 Rich. Eq. (S. C.) 531; Hickerson *v.* Helm, 2 Rob. (Va.) 628.

36. Henderson *v.* Chaires, 35 Fla. 423, 17 So. 574.

thus been paid, and to be reimbursed out of the real estate.[37] The widow's right of dower in the personalty is absolute, and an action for its conversion does not abate upon her death but survives to the personal representatives.[38] The husband may make a valid disposition of his personal property during his lifetime, provided it is not done in anticipation of death and with a view of defrauding the widow of her dower right.[39] The widow may have a conveyance in fraud of her rights set aside in equity,[40] but she cannot make the sum of which she has been deprived a charge against the husband's general estate.[41]

(IV) *Liabilities of Widow on Taking Possession of Husband's Estate.* A widow has no right, without taking out letters of administration, to take possession of the estate of her deceased husband and make such distributions and appropriations as to her seem right.[42] In Louisiana it has been held that a widow of a second marriage, contracted while the first wife was still living and undivorced, and who is in good faith in possession of the deceased husband's estate, is accountable only for such revenues of the property as were received by her after judicial demand therefor.[43]

(V) *Right to Take Land at Valuation.* The Pennsylvania statute providing that the land shall be allotted to one or more of the parties in interest who shall offer the highest price above the valuation does not apply to the widow but only to the heirs.[44]

(VI) *Right to Possession on Giving Bond.* A widow in possession of her deceased husband's estate as sole heir is entitled, on being subsequently sued by one claiming as a co-heir, to be allowed to give a bond to protect the petitioner's interest, and to remain in possession and control of the property.[45]

(VII) *Improvements Made by Widow on Dower Lands.* A widow is not entitled to compensation for improvements made at her own instance upon dower lands.[46]

(VIII) *Lien of Widow For Distributive Share.* The statutory interest of a widow in her deceased husband's estate constitutes a lien upon the property,[47] which can be discharged only by payment,[48] but which may be lost by the widow becoming an executor *de son tort* of the estate.[49]

37. Crouch *v.* Edwards, 52 Ark. 499, 12 S. W. 1070.

38. Clark *v.* Bramlett, (Ark. 1891) 16 S. W. 119.

39. Straat *v.* O'Neil, 84 Mo. 68; Stone *v.* Stone, 18 Mo. 389.

40. Tucker *v.* Tucker, 32 Mo. 464; Tucker *v.* Tucker, 29 Mo. 350.

41. Straat *v.* O'Neil, 84 Mo. 68.

42. Schaffner *v.* Grutzmacher, 6 Iowa 137.

The privilege of a widow in necessitous circumstances cannot be claimed where the widow, instead of subjecting the succession to a regular administration, takes possession of the property and applies the proceeds of all sales to the payment of ordinary debts and the continuation of her husband's business. Cousley's Succession, 39 La. Ann. 570, 2 So. 544.

Where a widow completes a contract of purchase on the real estate of her husband by appropriating a part of the money of the estate or rents and profits to such purpose, and takes title in her own name, she holds it in trust for the heirs at law. Schaffner *v.* Grutzmacher, 6 Iowa 137; Knolls *v.* Barnhart, 9 Hun (N. Y.) 443.

43. Jermann *v.* Tenneas, 39 La. Ann. 1021, 3 So. 229.

44. Geibler's Estate, 1 Leg. Gaz. (Pa.) 58.

45. Bivins *v.* Martin, 96 Ga. 268, 22 S. E. 923.

46. Sparks *v.* Ball, 91 Ky. 502, 16 S. W. 272, 13 Ky. L. Rep. 63, 34 Am. St. Rep. 236, holding that such improvements cannot be set up as a defense to a claim against the widow for payments due from her to equalize the allotment of dower.

47. Martin's Estate, 1 Chest. Co. Rep. (Pa.) 512, holding, however, that the rule applies only to the widow of the decedent whose estate is the subject of partition and not to the widow of an heir or distributee of such decedent.

Where the widow elects to take a portion of real estate which cannot be divided and set off to her and which is appraised at a sum exceeding the statutory limit, no title passes to the land and she has only a first lien thereon or a claim to such a proportion of its proceeds in case of sale. Pickett's Estate, 1 Susq. Leg. Chron. (Pa.) 39.

48. Hillbish's Appeal, 89 Pa. St. 490, holding that the lien is not affected by the fact that security is given for its payment and that it is not lost by or merged in a judgment.

49. Schaffner *v.* Grutzmacher, 6 Iowa 137.

(IX) *ASSUMPTION OF DEBTS BY WIDOW.* In Louisiana, where the widow opposes the administration of the succession as unnecessary and offers to assume the debts and furnish security, alleging the consent of the creditors thereto, the court may require, as a prerequisite to the exercise of her rights and to protect the heirs, that she advance sums sufficient to pay the debts or produce the alleged consent of the creditors, and the heirs should be wholly released from liability.[50]

(X) *LIABILITY OF WIDOW FOR LOSSES.* Where assets of the estate before distribution are lost pending litigation, the widow must bear a share of the loss proportionate to the part of the estate to which she is entitled.[51]

(XI) *RIGHTS AND LIABILITIES AS TO WIDOW'S SHARE ON DEATH OF WIDOW OR EXPIRATION OF TERM.* Where a widow agrees to the sale of her dower interest in lands and to accept a gross sum in lieu thereof, such sum may be claimed by her children unless her death occurred before any sale was made, in which case her estate would be determined by her death.[52] A statute providing that the court may settle an estate which cannot be divided upon one of the heirs, he paying to the others their proportion of the estate in money, does not authorize a similar disposition of the reversion of the widow's dower.[53] In New Hampshire where the widow of an intestate dies without releasing dower and homestead,[54] it will be held that she took dower and homestead instead of a distributive share, and her heirs at law have no title to the real estate of her husband.[55] In Pennsylvania, where the real estate of the decedent is not divided into a number of parts equaling the number of heirs, the principal of the widow's third at her decease is distributable *pro rata* among the heirs;[56] but this does not apply to cases where an equal division of the realty has been made among all the heirs, each taking his portion subject to a proportionate part of the widow's dower; and in such a case none of the heirs has any claim upon another on the decease of the widow, for any part of the principal of the widow's thirds.[57] In Louisiana the death of a widow before having made demand for her succession to the estate of her deceased husband does not impair the right of her heirs to inherit her share.[58] Where personal property, to which a wife is entitled jointly with the next of kin of a former husband, is taken possession of, and a portion thereof disposed of by her husband during her life, and without any division between her and the next of kin, her distributees are entitled to only so much as remained at her death, after deducting the shares of the next of kin of the former husband.[59]

b. Rights and Liabilities of Surviving Husband.[60] In Georgia a husband may take possession of and cultivate the land of his deceased wife, where no administrator has been appointed, and is entitled to the produce, but liable to the heir at law for rent.[61] In Pennsylvania a husband who administers on the estate of his deceased wife is not accountable to her heirs therefor, although he settles his account and the court decrees a balance in his hands.[62] Where the husband is legally entitled to a life-estate only in his deceased wife's personalty, he should be required to give security before the estate is placed in his possession.[63] Where a husband and wife join in a conveyance of the wife's property, and the renunciation of inheritance executed by the wife is void for non-compliance with the stat-

50. Pratt's Succession, 11 La. Ann. 201.
51. Elliot's Succession, 28 La. Ann. 183.
52. Mulford *v.* Hiers, 13 N. J. Eq. 13.
53. Sumner *v.* Parker, 7 Mass. 79; Hunt *v.* Hapgood, 4 Mass. 117.
54. See N. H. Gen. Laws, c. 202, § 10.
55. Nute *v.* York, 66 N. H. 541, 23 Atl. 429, holding that the rights of the parties were not affected by the fact that the heirs at law of the intestate and the heirs at law of the widow made by parol an equal division of the intestate's property.
56. Erb *v.* Huston, 18 Pa. St. 369.
57. Williams *v.* White, 35 Pa. St. 514.
58. Willis *v.* Elam, 28 La. Ann. 857.
59. Phælon *v.* Perman, 2 McCord Eq. (S. C.) 423.
60. **Rights of surviving husband** see also *supra*, IV, B.
61. Gibson *v.* Carreker, 82 Ga. 46, 9 S. E. 124.
62. Clay *v.* Irvine, 4 Watts & S. (Pa.) 232.
63. Manice *v.* Manice, 1 Lans. (N. Y.) 348.

ute, and the wife afterward dies intestate, the husband is liable to her heirs for their proportion of the proceeds of such sale received by him.[64]

c. **Conveyances by Surviving Spouse.** Where the widow is entitled to the entire personalty of the intestate, and there are no debts due from the estate, she may make a valid sale thereof and maintain assumpsit for the price, although no letters of administration are taken out on the estate;[65] and where the wife has an immediate joint interest in the personalty with the children as a tenant in common a sale made by the spouse is valid and passes her interest,[66] but the purchaser takes the property at his peril so far as concerns the interests of heirs jointly interested therein, not *sui juris*, or who have not expressly or impliedly authorized the sale.[67] Since before the division of the husband's estate, the power of the wife or that of her second husband to dispose of the property rests solely on her right as distributee, agreements made by her with third parties as to the property cannot affect the rights of co-distributees.[68] A surviving widow can make no conveyance of her husband's realty which will bar the rights of the heirs[69] or devisees,[70] and the purchaser of the widow's joint interest can hold only as a tenant in common with the heirs and not adversely to them.[71]

d. **Alienation of Land Inherited From Husband by Widow During Subsequent Coverture.** Under the former statute of descent in Indiana, which gave to the widow of an intestate husband one third of his land in fee, she could not convey such land during a subsequent coverture whether any children of the marriage by virtue of which she became entitled to the property survived or not.[72] The conveyance could not be validated by ratification by the child of the first marriage.[73] The restriction applied to absolute or contingent conveyances whether for life or in fee;[74] but if the widow before remarriage had conveyed by title bond she might after the subsequent marriage convey the legal title,[75] and in general conveyances in fulfilment of a contract made when a *feme sole* were held not within the intent of the statute.[76] If one of two pieces of land were to be sold on execution for the former husband's debts, she might direct which should be sold and might quitclaim to the sheriff's vendee.[77] The widow's incapacity to convey such property is preserved by the later statutes;[78] but the prohibition is

64. Hillegas *v.* Hartley, 1 Hill Eq. (S. C.) 106.

65. Cross *v.* Carey, 25 Ill. 562.

66. Graham *v.* Bettis, 1 B. Mon. (Ky.) 52.

67. Robertson *v.* Simmons, 4 Heisk. (Tenn.) 135.

Where a widow had a dower interest in slaves, a sale made by her before her specific share was set apart did not affect the title of the heirs. Burney *v.* Lamothe, 3 La. 195.

68. Harper *v.* Archer, 28 Miss. 212.

69. Lyman *v.* Hollister, 12 Vt. 407, holding that the fact that the widow's conveyance is by a deed of warranty is immaterial and will not prevent a recovery by the heir.

The widow cannot assign a bond held by the decedent for the conveyance to him of real estate on payment of a balance of purchase-money, so as to defeat the right of the heirs therein. Matthews *v.* Simmons, 49 Ark. 468, 5 S. W. 797.

70. Proctor *v.* Smith, 8 Bush (Ky.) 81, holding that if the widow conveys land to which under her husband's will she claims interest jointly with her children, the children are entitled to recover their shares in the land from the grantee, unless barred by having received estate from their mother, by descent, devise, or distribution, equivalent to their respective interests in the property.

71. Cain *v.* Young, 1 Utah 361.

72. Mickels *v.* Ellsesser, 149 Ind. 415, 49 N. E. 373; Bowers *v.* Van Winkle, 41 Ind. 432; Vinnedge *v.* Shaffer, 35 Ind. 341.

An action for the recovery of property attempted to be conveyed in violation of the statute may be maintained by the widow after a third marriage. Knight *v.* McDonald, 37 Ind. 463.

73. Horlacher *v.* Brafford, 141 Ind. 528, 40 N. E. 1078.

74. Bowers *v.* Van Winkle, 41 Ind. 432.

75. Newby *v.* Hinshaw, 22 Ind. 334.

76. Deweese *v.* Reagan, 40 Ind. 513.

77. Blackleach *v.* Harvey, 14 Ind. 564.

78. Avery *v.* Akins, 74 Ind. 283; Edmondson *v.* Corn, 62 Ind. 17.

Conveyances by widow during second coverture see also *supra*, III, B, 9, h, note 88.

The widow's share cannot be sold under execution so as to defeat the widow's or her children's interest (Wright *v.* Wright, 97 Ind. 444; Smith *v.* Beard, 73 Ind. 159), and where children of the former marriage survive, the widow's share is not on her death liable for her debts contracted during the subsequent marriage (Davis *v.* Kelly, 132 Ind. 309, 31 N. E. 942).

now limited to cases where children of the former marriage survive,[79] and does not apply where they join in the conveyance.[80] The rule does not apply to land which the widow has conveyed prior to her second marriage and which is reconveyed to her during such marriage, as she then holds by a new title.[81]

10. Division of Estate by Legal Proceedings — a. In General. The rights of election and preference given to heirs by the statutes of descent become vested on the death of the ancestor and may pass to grantees, and cannot be disregarded in a proceeding for a division of the estate.[82] Some of the provisions of the statutes are merely directory,[83] and irregularities in the proceedings may be waived or subsequently ratified by the heirs.[84] A partition proceeding which assigns portions of an estate to persons not then living is invalid.[85] A creditor has such an interest in the estate of a decedent that he may require the heirs, in proceedings for partition of the inheritance, to prove that the estate belonged to the decedent;[86] but this rule could apply only to such creditors as appeared and required such proof, since, after the lapse of a long period of time, the presumption arises that there are no outstanding debts against the estate of the decedent.[87]

b. Taking Estate at Valuation — (i) *In General.* In some jurisdictions in the settlement of a decedent's estate property not capable of division without injury may be assigned to one of the heirs, he paying to the other heirs their respective shares of its value.[88] Bonds given by heirs electing to take the estate

79. Ætna L. Ins. Co. *v.* Buck, 108 Ind. 174, 9 N. E. 153. See also McCullough *v.* Davis, 108 Ind. 292, 9 N. E. 276.

80. Fugate *v.* Payne, 130 Ind. 281, 29 N. E. 922.

81. Cook *v.* Henderson, 130 Ind. 599, 29 N. E. 484; Cook *v.* Armstrong, 130 Ind. 597, 29 N. E. 484; Cook *v.* Claybaugh, 130 Ind. 133, 29 N. E. 483.

82. Chaney *v.* Tipton, 11 Gill & J. (Md.) 253.

The reversionary interest of the heirs of a decedent in lands subject to the widow's dower may be divided among such heirs during the life of the widow. Webster *v.* Merriam, 9 Conn. 225.

The share of a wife must be decreed to her and her husband jointly, in the absence of a statute changing the common law as to married women, unless it is shown that she has a separate estate in the property to be divided. Mitchell *v.* Mitchell, 8 Ala. 414.

Where real estate is incapable of being divided equally, a part or the whole may be assigned to some of the heirs, to be held as tenants in common, if they consent to such assignment. Thayer *v.* Thayer, 7 Pick. (Mass.) 209; Gordon *v.* Pearson, 1 Mass. 323.

The Massachusetts statute providing that, where the wife's share of the husband's estate cannot be assigned to her without injury to the inheritance, an undivided part shall be set off to her is not a substitute for, but in addition to, the prior statute, providing that where real estate cannot be divided without injury to the owners the whole or a part may be set off to one or more of them on payment of the amount awarded by commissioners. Elliot *v.* Elliot, 137 Mass. 116.

After payment of the debts of the intestate and the discharge of the administrator, the assignment of the property to the heirs and next of kin is a mere formality, which it is the duty of the court to make, and which no one can contest. Dickison *v.* Reynolds, 48 Mich. 158, 12 N. W. 24.

83. Reynolds *v.* Reynolds, 11 Ala. 1023, holding that the statute directing the appointment of commissioners to make distribution within a prescribed time after the insolvency of the estate of the ancestor was not imperative.

84. Allen *v.* Raney, 19 Ala. 68, holding that where the parties adopt and act upon a division which the commissioners were unauthorized to make they will be bound thereby.

Partition by a guardian for a ward, although unequal, may be ratified by the ward after becoming of age. Hill *v.* Roderick, 2 Pa. L. J. Rep. 161.

Where the record fails to show that the estate is incapable of equal division without great prejudice to all of the heirs, the defect is not waived by a receipt of the money awarded to be paid. Thayer *v.* Thayer, 7 Pick. (Mass.) 209.

85. Wass *v.* Buckman, 38 Me. 356.

86. Simmons' Estate, 4 Pa. L. J. Rep. 204.

87. Anderson *v.* Smith, 3 Metc. (Ky.) 491.

88. See Whitman *v.* Watson, 16 Me. 461; Gibbs *v.* Clagett, 2 Gill & J. (Md.) 14; Hunt *v.* Hapgood, 4 Mass. 117; Stecker *v.* Shimer, 5 Whart. (Pa.) 452.

The object of these statutes is to prevent injury to all of the heirs by a minute division of lands, by which they would be worth little to any heir, and they should not be extended to suit the convenience of certain heirs where a division among all would not materially lessen the value of the property. Hunt *v.* Hapgood, 4 Mass. 117.

Death of heir pending proceedings for partition.— Where an heir who has elected to take real estate in proceedings for partition, paying his co-heirs therefor, dies intestate

at appraisement are liens upon the land.[89] The acceptance by one of the heirs of the payment of his share will be treated as a waiver of all objections on his part, and assent to the proceedings of the court, although the other heirs have not been paid.[90] In cases of plain mistake of fact or of law, or of fraudulent practices in obtaining an appraisal, the appraisal will be set aside.[91] Where the valuation is subsequently found to have been overestimated, by reason of their being less in quantity than was supposed, the heir who has taken the estate may recover back the payments made if they amount to more than the proceeds of the estate so taken.[92] If the heir is evicted by reason of an encumbrance created by the ancestor, he will be relieved from paying the appraised value to his co-heirs,[93] unless the equities in favor of such heirs are superior to his own;[94] but he will be liable to the other heirs for their proportion of the rents and profits received by him during his occupation of the premises.[95]

(II) *When Title Vests.* Where one of the heirs elects to take the real estate at valuation, agreeing to pay his co-heirs their respective shares; or where under decree of a probate court more than an equal share of such real estate is assigned to him, he being ordered to pay to the other heirs the sums of money found due them, the title to such estate does not vest in such heir until such money is paid, or such other conditions as may be prescribed are complied with,[96] unless the contrary is agreed upon, or such an intention is necessarily implied from the acts of the parties in interest.[97]

c. Writ For Partition and Return. The writ for partition of a decedent's real estate should be framed so as to strictly follow the statute authorizing such partition, and the return of the inquest thereon should show on its face that the writ has been executed according to the commands therein set forth.[98]

without issue before such proceedings are completed, leaving the amounts due from him unpaid, his heirs may perfect his title in such proceedings, but not in their capacity as administrators of his estate. Jenkins *v.* Simms, 45 Md. 532.

The eldest son of the eldest son of an intestate is entitled to an estate which cannot be divided, at the valuation, in the same manner as his father. Walton *v.* Willis, 1 Dall. (Pa.) 351, 1 L. ed. 171.

Where the recognizance of the heir electing to take the estate is defective he must be called on to remedy the defect before the order awarding the premises to him can be vacated, or an alias rule enforced that the other heirs come in and elect to take the estate. Gregg's Appeal, 20 Pa. St. 148.

Where a married woman is under age, probate courts, in the absence of a statute authorizing it, cannot receive her distributive share, and if without such statute her share is received by such courts, it will be held by them as a stakeholder merely. Goepp's Appeal, 15 Pa. St. 421.

89. Boyd *v.* Harris, 2 Md. Ch. 210, holding, however, that laches in the enforcement of such liens after breach of condition will bar the rights of the heirs whose claims remain unpaid.

The heir who takes the property becomes by its acceptance and the decree of the court the owner in fee simple of the premises, and since he cannot occupy the position of both creditor and debtor, the lien, so far as it affects his share of the premises, is extinguished. Stecker *v.* Shimer, 5 Whart. (Pa.) 452.

90. Whitman *v.* Watson, 16 Me. 461.

91. *In re* Kreider, 18 Pa. St. 374, holding that a valuation made by the jurors taking the average of their separate estimates is not invalid where there was no previous agreement to be bound by the result.

92. Gibbs *v.* Clagett, 2 Gill & J. (Md.) 14, holding that in such cases an auditor should be directed to state an account between the parties.

93. Seaton *v.* Barry, 4 Watts & S. (Pa.) 183; Com. *v.* Hantz, 2 Penr. & W. (Pa.) 333; Dauphin County Orphans' Ct. *v.* Groff, 14 Serg. & R. (Pa.) 181.

94. Knauss' Estate, 3 Pa. Co. Ct. 584. See also Com. *v.* McIntire, 8 Pa. St. 295, holding that a sheriff's sale on execution for the debts of the ancestor discharges lands held by an heir in partition proceedings, from the lien of recognizances given to secure to the other heirs their shares of the valuation, but that the debt so secured is not wholly discharged if the amount due on the recognizance was more than sufficient to pay the debts of the ancestor for which the land was liable; and that in such cases the heir accepting the estate is not entitled to participate in the surplus arising from the sale if insufficient to pay the amount secured by the recognizance.

95. Com. *v.* Hantz, 2 Penr. & W. (Pa.) 333.

96. Smith *v.* Scudder, 11 Serg. & R. (Pa.) 325; Walton *v.* Willis, 1 Dall. (Pa.) 351, 1 L. ed. 171.

97. Robbins *v.* Gleason, 47 Me. 259; Thayer *v.* Thayer, 7 Pick. (Mass.) 209.

98. Davis' Estate, 3 Leg. Gaz. (Pa.) 77.

d. Notice of Proceedings. Where it is required by statute that in the partition of a decedent's estate all the parties interested must be notified, a party who has had no notice of such proceedings will not be bound thereby;[99] but such proceedings are valid as to all parties who have had such notice, although void as to others.[1]

e. Necessity of Return of Division, and Acceptance by Court. The distribution of the real estate of a decedent, when completed, derives all of its force and effect from the decree of the court accepting and confirming the return of the distributers,[2] and therefore such return, acceptance, and confirmation are absolutely necessary to the validity of such a distribution.[3]

f. Setting Aside Division. A division of an intestate's property will be set aside where by mistake property not belonging to the estate has been included,[4] or where there has been fraud or collusion in the division.[5]

11. Conveyances and Other Transactions Between Heirs and Distributees — a. In General. The rule is well established that in the absence of fraud, accident, mistake, or prejudice to creditors, conveyances and other transactions between heirs and distributees will be sustained both at law and in equity.[6]

99. State *v.* St. Gemme, 31 Mo. 230; Proctor *v.* Newhall, 17 Mass. 81; Rice *v.* Smith, 14 Mass. 431; Smith *v.* Rice, 11 Mass. 507.

1. Rice *v.* Smith, 14 Mass. 431.

2. Gates *v.* Treat, 17 Conn. 388; Mellus *v.* Snowman, 21 Me. 201; Cogswell *v.* Reed, 12 Me. 198.

3. Cogswell *v.* Reed, 12 Me. 198.

Where different returns are made by commissioners, the court will not act on either, but will appoint a new commission. Watson *v.* Northumberland, 11 Ves. Jr. 153, 32 Eng. Reprint 1046.

4. State *v.* Judges Burlington County Orphans' Ct., 5 N. J. L. 554.

5. Clark *v.* Christine, 4 Rob. (La.) 196.

Where a creditor, in order to reach the property, sues to annul not merely the judgment but the partition itself on the ground of fraud and collusion, he must bring his action in the district court and not the probate court. Clark *v.* Christine, 12 La. 394.

6. *Alabama.*— Hamilton *v.* Clements, 17 Ala. 201.

Indiana.— Burgess *v.* Burgess, 2 Ind. 541.

Kentucky.— Bland *v.* Gaither, 11 S. W. 423, 10 Ky. L. Rep. 1033, holding that where part of the heirs of a decedent agreed to pay to the others specific sums of money for the purpose of equalizing advancements that had been made, and on the consideration that the promisees would not contest the will of the decedent, it would be presumed that the promisors did not agree to pay more than the value of the estate.

Maryland.— Willson *v.* Blount, 93 Md. 30, 48 Atl. 714, holding that specific performance of contract for the sale of lands of an intestate to an heir by his co-heirs, the purchase-money to be credited on the distributive share of the purchaser, would not be enforced where the assets had not been collected by the administrator, but the court in such case would direct an assignment of the funds in the hands of the administrator to the selling heirs, to the extent of the purchase-money to be paid on such sale.

Michigan.— Shafter *v.* Huntington, 53 Mich. 310, 19 N. W. 11, holding that a deed from a joint heir conveyed his undivided interest only.

Missouri.— Richardson *v.* Cole, 160 Mo. 372, 61 S. W. 182, holding that where an intestate left personalty and no debts, and his heirs, all of whom were of age, by written instrument assigned their interests in the property to one of their number, who took possession thereof, the public administrator, who obtained letters of administration twelve years afterward, could not recover the property from such heir.

New York.—Williams *v.* Whittell, 69 N. Y. App. Div. 340, 74 N. Y. Suppl. 820, holding that an agreement entered into between a father and his children that a letter written by the deceased wife on the day of her death directing the distribution of her property should be regarded as her last will was valid and binding in the absence of fraud, although such letter was invalid as a will. See also Chauvet *v.* Ives, 62 N. Y. App. Div. 339, 71 N. Y. Suppl. 29, agreement as to a will which was invalid as to real estate.

Pennsylvania.—Brenneman's Estate, 17 Pa. Super. Ct. 75, holding that a written agreement under seal between heirs, in the nature of a family settlement, for the purpose of equalizing distribution, and based on its own recitals of "valuable consideration," was a binding and enforceable obligation. See also Heller's Appeal, 116 Pa. St. 534, 8 Atl. 790 (agreement between children and widow entitled to dower); Ermold *v.* Newkirk, 16 Pa. St. 417; *In re* Goodbread's Estate, 9 Pa. Dist. 710, 24 Pa. Co. Ct. 427, holding that an agreement between a father and his sons in relation to his wife's estate, which the father understood at the time of execution, would be upheld, although one of the sons was a lawyer, where it did not appear that the father was his client, since it is the influence of a parent over his child and not of a child over his parent which requires the watchful care of the courts.

South Carolina.—*Ex p.* Yown, 17 S. C. 532, holding that where a widow, by agreement

b. Release of Rights to Co-Heirs and Agreements as to Division of Estate — (i) *In General.* In the absence of fraud or unfair dealing amounting to fraud, releases between co-heirs of their rights in real or personal property, and agreements entered into between them for a division of the estate, are valid and will be enforced.[7] If gross fraud can be shown a family settlement may be set aside,

with the children upon her husband's death, released her dower in the lands of the husband to the children, taking from them a deed of one sixth thereof in fee, on condition that they should support her if she became needy, and they did not perform the condition, although she became needy, they could not claim the land as against her heirs at law, whether the agreement and deed were construed together, or the deed alone considered.

Texas.— Williams *v.* Emberson, 22 Tex. Civ. App. 522, 55 S. W. 595, holding that a receipt from a son to his father, executed on consideration and acknowledging and relinquishing all of his interest in his estate inherited from his mother, was valid as a conveyance of such interest.

Wisconsin.—Barker *v.* Barker, 14 Wis. 131, purchase by widow of shares of some of the heirs, and payment with accounts of the estate against such heirs not accounted for to probate court.

See 16 Cent. Dig. tit. "Descent and Distribution," § 318.

7. *Alabama.*— Campbell *v.* Larmore, 84 Ala. 499, 4 So. 593, holding that an agreement by one of several heirs and her husband to accept from the other heirs a specified sum in full settlement of the question of advances was a sufficient consideration to support a promise by the other heirs to pay the same.

Connecticut.— Hurlbut *v.* Phelps, 30 Conn. 42, sustaining an agreement between a surviving partner and the heirs of the deceased partner for settlement of the partnership affairs and the estate of the deceased partner.

Georgia.— Fulton *v.* Smith, 27 Ga. 413, sustaining an agreement between all of the children of a family that certain advances made by the father to the sons when he was of infirm mind should be set aside and his whole estate divided, with an advantage to each son of one thousand dollars.

Illinois.— Comer *v.* Comer, 120 Ill. 420, 11 N. E. 848, sustaining a written agreement of a testamentary character between a widow and the children, providing for the disposal of property, but held void as a will for not conforming to the statute regulating wills.

Indiana.— Shuee *v.* Shuee, 100 Ind. 477 (holding that where a widow had received gifts from her husband during his lifetime, an agreement by her with the heirs to accept an amount less than her distributive share was valid in the absence of fraud); Biddle *v.* Pierce, 13 Ind. App. 239, 41 N. E. 475 (sustaining a compromise of a suit in which it was sought to revive advancements canceled by a decedent when he was alleged to have been of unsound mind, by agreeing to such revival upon the payment of money).

Iowa.—Sloan *v.* Moffatt, 41 Iowa 271, holding that if heirs or distributees agree to accept specific property as their share of an estate, the value of which is overestimated, they are still bound by such agreement. See also Roger *v.* Gillett, 56 Iowa 266, 9 N. W. 204, as to running of the statute of limitations against action for extra allowance upon final distribution under agreement between heirs.

Kentucky.— Sieve *v.* Steinride, 1 S. W. 672, 8 Ky. L. Rep. 347 (sustaining an agreement between a surviving husband and the heirs of the deceased wife to distribute real estate held by the wife in accordance with arrangements between the husband and wife during her lifetime); Newman *v.* Newman, 3 Ky. L. Rep. 534 (agreements between distributees with reference to distribution). See also Wakefield *v.* Gilliland, 18 S. W. 768, 13 Ky. L. Rep. 845 (division by children among themselves of notes of their father, with stipulation that the renewal of any of such notes, made payable to any one of them, should be treated as so much money received); Davis *v.* Davis, 13 Ky. L. Rep. 46 (compromise in writing by heir accepting certain property, with money, in lieu of other property claimed by him at appraisal as his individually, and permitting without protest an appraisal of all of the property not surrendered to him).

Louisiana.—Williams *v.* Drew, 47 La. Ann. 1622, 18 So. 623, sustaining an agreement by an heir of one of two joint owners of real estate with the widow and heirs of the other, relinquishing all his rights in the common property except as to a portion reserved, in consideration of their recognition of his rights in such reserved portion.

Michigan.— McDaniels *v.* Walker, 44 Mich. 83, 6 N. W. 112, holding that crops raised by an heir upon land taken by him in a division of the estate with his co-heirs pending administration belonged to him, although the land was subsequently sold by the administrator to pay the decedent's debts.

Missouri.— Carter *v.* Alexander, 71 Mo. 585, holding that in an agreement by heirs to "give" the widow of the decedent a certain sum of money and land as her portion, the word "give," as to the money, meant to pay, and as to land it meant to convey.

New Jersey.— Rowden *v.* Murphy, (Ch. 1890) 20 Atl. 379.

New York.— Sears *v.* Shafer, 1 Barb. 408 [*affirmed* in 6 N. Y. 268], setting aside release by one of the heirs during her last illness because of her mental condition and ignorance.

Ohio.— White *v.* Brocaw, 14 Ohio St. 339, sustaining compromise between heirs.

Pennsylvania.—Palethrop's Estate, 168 Pa. St. 98, 31 Atl. 885; Patterson's Appeal, 116 Pa. St. 8, 11 Atl. 70; Weaver *v.* Roth, 105 Pa. St. 408; Cocker's Estate, 1 Pa. Dist. 158, parol agreement between widow and chil-

even where it has been acquiesced in for a long period of time by the complaining party;[8] and in case of a release between heirs, the concealment of any material fact from the party making the release by the party to whom it is made, where the parties do not stand on equal terms, will be treated as unfairness amounting to fraud, for which the release may be set aside.[9] It has been held that an agreement between heirs to divide an estate, whereby one would lose a part of his inheritance by reason of a misconstruction of the law, if made without consideration, is not binding upon the heir who would thus lose thereby.[10] Written agreements entered into between heirs for a distribution of the property between them left by their ancestors are given a liberal construction by the courts.[11]

(II) *SETTLEMENT AND DISTRIBUTION WITHOUT ADMINISTRATION.* It has been said that agreements between heirs and distributees to divide the property of deceased persons without administration are not to be encouraged.[12] In most jurisdictions, however, it is held that where all of the parties in interest are of age they may make such a distribution of the estate as they choose, without administration, so long as they do not leave the decedent's debts unpaid.[13] The legal title to the personal estate of an intestate is vested in his administrator, but possession of the distributive shares obtained by distributees under voluntary distribution without administration confers an equitable title which will be enforced by the courts;[14] and by the weight of authority a promise made by a distributee to a co-distributee to pay a certain sum for his distributive share, under such a distribution, is supported by sufficient consideration to sustain action thereon.[15]

c. Rights of Minor Heirs. Minor heirs are not concluded by agreements among the other heirs that one of their number shall take temporary letters of administration to save expense to the estate,[16] or by voluntary distributions made during their minority, although they may ratify them upon becoming of age, in which case such distribution is effective as to all parties from the date of such ratification.[17]

dren of decedent that widow should have the personal property.

South Carolina.— Kennedy *v.* Badgett, 19 S. C. 591 (acceptance of a life-estate, in lieu of an absolute estate, in a valid family settlement, extinguishes such absolute estate); Barnes *v.* Cunningham, 9 Rich. Eq. 475.

Tennessee.— Buck *v.* Buck, 4 Baxt. 392, holding that a written agreement between the widow and heirs of an intestate to divide the personal estate of the intestate among them applied to the whole estate.

Vermont.— Hubbard *v.* Ricart, 3 Vt. 207, 23 Am. Dec. 198, sustaining a deed of real estate to one heir from all the others, made in the same year as the death of the decedent, as equivalent to a division by act of law.

See 16 Cent. Dig. tit. "Descent and Distributon," § 319.

8. Palethrop's Estate, 168 Pa. St. 98, 31 Atl. 885.

9. Sears *v.* Shafer, 1 Barb. (N. Y.) 408 [*affirmed* in 6 N. Y. 268].

10. Pegues *v.* Haden, 76 Tex. 94, 13 S. W. 17. See also Haven *v.* Foster, 9 Pick. (Mass.) 112, 19 Am. Dec. 353, holding that an heir who had lost part of her inheritance by reason of mistake of law could recover back her proportional share from her co-heirs after release and settlement.

11. Carter *v.* Alexander, 71 Mo. 585; Buck *v.* Buck, 4 Baxt. (Tenn.) 392.

12. Wright *v.* Wright, Mart. & Y. (Tenn.) 43.

13. *Alabama.*— McCaa *v.* Woolf, 42 Ala. 389.

Georgia.— Amis *v.* Cameron, 55 Ga. 449; Desverges *v.* Desverges, 31 Ga. 753.

Louisiana.— Ducloslange's Succession, 1 La. Ann. 181.

Michigan.— Foote *v.* Foote, 61 Mich. 181, 28 N. W. 90.

Mississippi.— Kilcrease *v.* Shelby, 23 Miss. 161, ratification by infants in legal proceedings after becoming of age.

New Hampshire.— Woodman *v.* Rowe, 59 N. H. 453; Clarke *v.* Clay, 31 N. H. 393.

South Carolina.— Glasgow *v.* Martin, 1 Strobh. 87.

Vermont.— Reed *v.* Reed, 56 Vt. 492; Taylor *v.* Phillips, 30 Vt. 238.

But see Munson *v.* Munson, 3 Day (Conn.) 260; Rousch *v.* Hundley, 2 Ohio Dec. (Reprint) 445, 3 West. L. Month. 126.

See 16 Cent. Dig. tit. "Descent and Distribution," § 320. See also *supra*, IV, A, 4, c, (II); IV, A, d, (I).

14. McCaa *v.* Woolf, 42 Ala. 389.

15. Glasgow *v.* Martin, 1 Strobh. (S. C.) 87; Reed *v.* Reed, 56 Vt. 492. But see Munson *v.* Munson, 3 Day (Conn.) 260, where the contrary was held.

16. Josey *v.* Rogers, 13 Ga. 478.

17. Kilcrease *v.* Shelby, 23 Miss. 161.

12. Conveyances and Assignments by Heirs and Distributees — a. In General. As a general rule, subject to the rights of the administrator and of creditors, heirs to real estate or distributees of personal estate can make valid conveyances, leases, or assignments of their interests in such property upon the death of their ancestor.[18]

18. *Alabama.*—Heirs may convey land subject to the statutory rights of the administrator. Cruikshank *v.* Luttrell, 67 Ala. 318; Bell *v.* Craig, 52 Ala. 215; Leavens *v.* Butler, 8 Port. 380.

Arkansas.— Winningham *v.* Holloway, 51 Ark. 385, 11 S. W. 579, personal property.

California.— Berry *v.* Eyraud, 134 Cal. 82, 66 Pac. 74 (lease of real estate); Spotts *v.* Hanley, 85 Cal. 155, 24 Pac. 738 (sale and conveyance of land subject to the administrator's right to take possession and sell under order of the court for the payment of debts).

Connecticut.— While it is true as a general proposition that the title to personal property vests in an executor or administrator, yet he is a mere trustee for creditors and for heirs or legatees; and where the property is not wanted for the payment of debts and is rightfully in the possession of the persons who have the equitable title to it by conveyance from heirs or distributees, the naked title of the executor or administrator is not sufficient in equity against such equitable title and rightful possession. Woodhouse *v.* Phelps, 51 Conn. 521.

Florida.— Stewart *v.* Mathews, 19 Fla. 752, conveyance of land by children of deceased owner, without administration.

Georgia.— Cross *v.* Johnson, 82 Ga. 67, 8 S. E. 56 (holding that heirs may lease real estate and collect rents until the administrator takes possession as authorized by the statute); Johnson *v.* Johnson, 80 Ga. 260, 5 S. E. 629 (sale of real estate leaving the same subject to administration for the payment of debts). Where there are no debts the heirs may agree that real estate shall not be administered but sold at private sale, and where they join in a deed directly conveying the same to a purchaser the purchaser acquires a good title. See Johnson *v.* Hall, 101 Ga. 687, 29 S. E. 37.

Illinois.— Vansyckle *v.* Richardson, 13 Ill. 171, real estate.

Indiana.— Mitchell *v.* Dickson, 53 Ind. 110, personal property.

Iowa.— Russell *v.* Smith, 115 Iowa 261, 88 N. W. 361, holding that the purchaser of an heir's interest in the decedent's lands takes subject to advancements made by decedent, although he purchases without notice; but that if he purchases pending administration he does not take subject to debts which the heir owed the decedent, the claim not being a lien until reduced to judgment.

Massachusetts.—Poor *v.* Robinson, 10 Mass. 131, real estate.

Michigan.— Huron Land Co. *v.* Robarge, 128 Mich. 686, 87 N. W. 1032, real estate. See also Flood *v.* Strong, 108 Mich. 561, 66 N. W. 473; Armstrong *v.* Loomis, 97 Mich. 577, 56 N. W. 938.

New Jersey.— Herbert *v.* Tuthill, 1 N. J. Eq. 141, real estate.

New York.— Gardner *v.* Barden, 34 N. Y. 433 (holding that an assignment by the heirs of one of the holders of a mortgage to the mortgagor is valid, and is a sufficient consideration to support a promise to pay therefor); Covell *v.* Weston, 20 Johns. 414 (real estate); Leyman *v.* Abeel, 16 Johns. 30 (holding that a right of common is an incorporeal hereditament descending jointly, and must be conveyed by all of the heirs to give a valid title). As to the rights of heirs of soldiers to military lands under letters patent issued after death of decedent see Jackson *v.* Howe, 14 Johns. 405; Jackson *v.* Winslow, 2 Johns. 80.

Pennsylvania.— Anderson *v.* Brinser, 129 Pa. St. 376, 11 Atl. 809, 18 Atl. 520, 6 L. R. A. 205, holding that a claimant of land under a parol contract with the heir must show authority from such heir to act for the others.

Tennessee.— Smith *v.* Thomas, 14 Lea 324; Towles *v.* Towles, 1 Head 601, both of which were conveyances of real estate.

Texas.— Ackerman *v.* Smiley, 37 Tex. 211, real and personal estate. See Morris *v.* Halbert, 36 Tex. 19, holding that heirs might take the property of their deceased ancestor, and pay his debts, without bringing the estate within the jurisdiction of the probate court; and if in pursuing this course they should sell portions of the property and make proper application of the proceeds to the payment of the debts, their acts would be entitled to full faith and credit, as though they acted in the capacity of administrators or executors.

Vermont.— Austin *v.* Bailey, 37 Vt. 219, 86 Am. Dec. 703; Hyde *v.* Barney, 17 Vt. 280, 44 Am. Dec. 335, both of which cases were conveyances of real estate.

Virginia.— Where under a marriage settlement the husband is entitled to the interest of his wife in lands of her father, he can convey such interest as against his children. Tabb *v.* Archer, 7 Gratt. (Va.) 408.

Canada.— Spafford *v.* Breakenridge, 1 U. C. C. P. 492, heir may convey before entry.

See 16 Cent. Dig. tit. "Descent and Distribution," § 322.

Prior to sale under power in will.— That an heir may sell and convey or mortgage land prior to a sale by executors under a naked power in his ancestor's will see Herbert *v.* Tuthill, 1 N. J. Eq. 141. See also *supra*, IV, A, 4, b, (II).

As to personal property some courts have held, contrary to some of the cases above cited, that the heirs or distributees cannot transfer title before administration. Pritchard *v.* Norwood, 155 Mass. 539, 30 N. E.

b. Conveyance by Presumptive Heir. The right of a presumptive heir which entitles him to enter into and enjoy a portion of the estate of an ancestor who has disappeared is a personal interest merely, not partaking of the realty; and therefore such interest, where the heir is a married woman, may be conveyed by her husband.[19] The title of an absent ancestor cannot be affected by a sale by his heirs without legal proceedings, although letters of administration on his estate may be granted after an absence of seven years.[20]

c. Construction and Operation of Conveyance. All deeds of conveyance by heirs[21] and all agreements therefor[22] are construed strictly in accordance with the language used therein, it being conclusively presumed that the parties have said what they meant in such instruments. In transactions relating to real estate the provisions of the statute of frauds must be complied with;[23] and in those relating to property generally, the distinctions between real and personal estate must be observed.[24] Such instruments are governed by the legal effect of the language used therein, and not by the supposed intent of the parties.[25] An heir

80; Lawrence *v.* Wright, 23 Pick. (Mass.) 128. See Gouldsmith *v.* Coleman, 57 Ga. 425, holding that, although a widow be the sole distributee of her intestate husband's estate, and although the whole estate be subject to be set apart to her for a year's support, she has no legal authority, before it is so set apart and before administration is granted, to deliver personal property of the estate to a creditor of the husband in payment of his debt, even if the debt be in part for the purchase-money of the same property. See also *supra*, IV, A, 4, c.

Assignment of note.— See Mitchell *v.* Dickson, 53 Ind. 110, holding that the widow of the deceased payee of a promissory note, the other heirs having assigned said note by indorsement to her, there being no debts of the decedent to be paid, and the estate having been settled without administration, may maintain an action in her own name on said note. On the other hand see Pritchard *v.* Norwood, 155 Mass. 539, 30 N. E. 80, holding that if the sole heir and distributee of an intestate estate free from debt, upon which no administration is taken out in his lifetime, takes possession of the entire estate including a promissory note, believing that he has a right to do so, and transfers the note upon a good consideration, the transferee gains no title to the note, legal or equitable, as against an administrator of the estate appointed after the distributee's death. See also *supra*, IV, A, 4, d; *infra*, IV, A, 13, a, (II).

Assignment of judgment.— In an Arkansas case it was held that a judgment recovered by an administrator belongs to the distributees of his intestate, subject to the payment of debts and expenses of administration; and where they assign it during the administration their assignee acquires such interest therein as they will be entitled to when the estate is fully settled and the administrator discharged. Winningham *v.* Holloway, 51 Ark. 385, 11 S. W. 579.

After a sale of land by an executor under power in a will a subsequent conveyance of the same by heirs of the testator is void, as the latter have no title. Herbemont *v.* Bostick, 2 Brev. (S. C.) 435.

Conveyances by surviving spouse see *supra*, IV, A, 9, c.

19. Westover *v.* Aime, 11 Mart. (La.) 443.

20. Mayhugh *v.* Rosenthal, 1 Cinc. Super. Ct. 492.

21. Where land has descended from a decedent to his daughter, and upon her death to a brother of the decedent, a conveyance from the brother of all interest in his brother's property does not pass title to such land. Allen *v.* Allen, 55 N. C. 235. A sale by the heir to a succession of "all movables and immovables," and "all rights he might have thereto," was held to pass articles of gold and precious stones in the tomb of the ancestor. Ternant *v.* Boudreau, 6 Rob. (La.) 488. Where one of the children of an intestate conveyed all his interest in the estate by a deed reciting that it did not embrace his interest that might accrue in the estate of his mother, widow of the intestate, it was held that the deed on its face conveyed all the grantor's interest in the estate, and that, as the mother's dower interest was for life only, and could not descend, the reservation did not apply to such interest, but to such estate in fee in the estate or in other lands as she might have acquired. Bottorff *v.* Lewis, (Iowa 1903) 95 N. W. 262.

22. An agreement by one of the heirs to sell all of his interest in the real estate of his father, "except so much" thereof as should be coming to another heir upon the death of the widow, was held to be an agreement to convey two thirds of his interest in the real estate of his father. Ludwig *v.* Leonard, 9 Watts & S. (Pa.) 44.

23. Fletcher *v.* Carter, 10 Cush. (Mass.) 81. See, generally, FRAUDS, STATUTE OF.

24. Life-insurance policies are for the benefit of those named as beneficiaries therein, and are no part of the estate of a decedent; and a conveyance by an heir of all demands against the estate does not convey his interest as one of such beneficiaries. Burwell *v.* Snow, 107 N. C. 82, 11 S. E. 1090.

25. A sale of realty by an heir, "subject to the payment of the widow's dower to the legal heirs" of the father, on the widow's

who loses by conveyance of real estate subject to encumbrances cannot have recourse to personalty for reimbursement.[26]

d. Assignment or Release of Distributive Share — (I) *In General.* The interest of an heir or distributee in the estate of a decedent who has died intestate may be assigned;[27] but the intent to make such an assignment, when not accompanied by delivery, should be clearly expressed in the instrument,[28] and the consideration must be legal[29] and adequate where the parties do not stand on equal terms, or the transaction may be impeached in equity for fraud.[30]

(II) *By Widow.* A widow may assign her interest in her deceased husband's estate, and such assignment is sufficient in equity to pass such interest to her assignees.[31]

(III) *To Legatee or Devisee.* Heirs or distributees may release or assign their rights in favor of devisees or legatees;[32] but a letter written by an heir at law of a decedent, offering to release any claim he may have upon the property which has been devised by will to one who is not an heir, in case the will is set

death, was held to entitle him to recover of the purchasers, against whom he had foreclosed a mortgage given to secure the purchase-money, his portion of the charge as one of his father's heirs. Lamm *v.* Rick, 1 Woodw. (Pa.) 458. See also Updegrove *v.* Updegrove, 1 Pa. St. 136. A conveyance by the heirs of the widow's dower in the lands of her husband during her lifetime, where there has been no division of the estate among them, describing such dower as real estate set off to them, does not convey their reversion expectant upon the termination of the estate in dower. Swift *v.* Prentice, 11 Metc. (Mass.) 464. But a conveyance by heirs of real estate, excepting the widow's right of dower, passes the reversion in the widow's portion. Canedy *v.* Marcy, 13 Gray (Mass.) 373.

26. A sale by an heir of mortgaged real estate, without application to the administrator to redeem, precludes him from subsequent recourse to the personal estate for assistance. Haven *v.* Foster, 9 Pick. (Mass.) 112, 19 Am. Dec. 353.

27. *Alabama.*— Spear *v.* Banks, 125 Ala. 227, 27 So. 979; Graham *v.* Abercrombie, 8 Ala. 552.

California.—Freeman *v.* Rahm, 58 Cal. 111.

Iowa.— Thornton *v.* Mulquinne, 12 Iowa 549, 79 Am. Dec. 548.

Kentucky.— Pirtle *v.* Cowan, 4 Dana (Ky.) 302.

Louisiana.— Sallier *v.* Rosteet, 108 La. 378, 32 So. 383.

Nebraska.— Chick *v.* Ives, (1902) 90 N. W. 751.

New York.— Stover *v.* Eycleshimer, 4 Abb. Dec. 309, 3 Keyes 620, 3 Transcr. App. 390 [*affirming* 46 Barb. 84]; *In re* Stephens, 64 N. Y. Suppl. 990.

United States.—Shaw *v.* Shaw, 20 Fed. Cas. No. 12,724, 4 Cranch C. C. 715.

See 16 Cent. Dig. tit. "Descent and Distribution," § 326.

Assignment by husband of distributee.— At common law a wife's distributive share of property may be assigned by her husband, so as to bind it, before division has been made, although it is not subject to execution until afterward. Dozier *v.* Muse, 9 N. C. 482.

Attack by creditors on assignment.— The validity of a distributee's assignment of his share cannot be contested by his creditors at the administrator's accounting. Duncan *v.* Guest, 5 Redf. Surr. (N. Y.) 440.

Jurisdiction to determine validity.— The validity of a widow's assignment of her distributive share, where it was made to the administrator and fraud is charged in procuring it, cannot be determined by the surrogate's court. Woodruff *v.* Woodruff, 3 Dem. Surr. (N. Y.) 505. See also *infra*, IV, A, 12, e, (VI).

28. Relinquishment by a father to his son's widow of his right to a share in the son's estate, without deed or delivery, will not prevent the father from recovering his distributive share in equity. Bullock *v.* Tinnen, 4 N. C. 251, 6 Am. Dec. 562.

A power of attorney given by an heir to receive his distributive share of an estate, to one who has purchased such share, does not constitute a transfer of the title thereto. Freeman *v.* Rahm, 58 Cal. 111.

A written instrument from an heir in favor of his creditor, acknowledging the indebtedness and transferring his interest in the estate to such creditor, is not valid as a conveyance, there being no price fixed or extinguishment of the debt. Forbes *v.* Burke, 24 La. Ann. 85.

29. A conveyance by heirs to secure payment for performance of an unlawful act is void. Simmons *v.* Kincaid, 5 Sneed (Tenn.) 450.

30. Releases from needy heirs who are just of age and who are ignorant of their rights, obtained on an inadequate consideration and by representations that their claims are worthless, are voidable in equity. Hallett *v.* Collins, 10 How. (U. S.) 174, 13 L. ed. 376.

31. Powell *v.* Powell, 10 Ala. 900.

Conveyances by surviving spouse see also *supra*, IV, A, 9, c.

32. Brooks *v.* Meadville First Presb. Church, 128 Pa. St. 408, 18 Atl. 506.

aside, is not sufficient to convey his interest to such person.[33] Nor is a written agreement of like character between such parties sufficient, where it is not under seal, unless there is proof of a consideration.[34] Where a formal release has been executed and the claim of fraud in its procurement is set up, its validity is a question for the jury.[35]

(IV) *To Executor or Administrator.* Assignments may be made by heirs and distributees to executors or administrators,[36] but they are strictly construed,[37] and must be free from fraud [38] or unfair dealing where the parties do not stand on equal terms, or they may be set aside in equity.[39] The compromise of a suit brought by heirs against executors or administrators by reason of a fraudulent transaction in relation to the estate is conclusive as against the heirs.[40]

e. Rights and Liabilities of Purchasers or Assignees — (I) *In General.* When an heir or distributee assigns his interest in an unsettled estate, the effect is to divest him of his title or right and vest the same in the assignee, who may maintain an action for such interest in his own name under the statutes allowing assignees to sue;[41] but the assignment cannot in any way affect the condition of the administrator or of the estate.[42] The purchaser or assignee occupies the same position that his assignor or grantor occupied, taking the interest granted, with all of the grantor's rights and subject to all of his liabilities.[43]

33. Patterson's Appeal, 116 Pa. St. 8, 11 Atl. 70.

34. Patterson's Appeal, 116 Pa. St. 8, 11 Atl. 70.

35. Brooks *v.* Meadville First Presb. Church, 128 Pa. St. 408, 18 Atl. 506.

36. **Effect of assignment as to indebtedness of assignor.**— Assignment of an interest in an intestate's estate to the administrator does not discharge the assignor from liability on notes given to the intestate. Rogers *v.* Squires, 98 N. Y. 49.

37. A release under seal from the heirs to the administrator of an intestate, upon receipt of their distributive shares, releasing all claims upon the estate, both real and personal, was held not to include a right of entry reserved by the intestate in land granted to a church, which was to be forfeited upon any change of creed or use for other purposes. Wilcoxon *v.* Harrison, 32 Ga. 480.

38. Where a sale had been made by an administrator to himself with consent of part of the heirs, a subsequent release from all of the heirs was held invalid as to those who did not authorize the original sale and had no knowledge thereof, it not appearing that they accepted any benefits therefrom. Latham *v.* Barney, 14 Fed. 433, 4 McCrary 587.

39. Where a large bequest for charitable purposes was void by law, and the heir of the testator, while young, needy, inefficient, unacquainted with business, and having no time before probate of the will to consult counsel, upon representations of the executors, men of experience and one of them a lawyer, that the bequest was valid, executed to them a release for an inadequate consideration, it was held that the release was invalid. Wheeler *v.* Smith, 9 How. (U. S.) 55, 13 L. ed. 44.

Jurisdiction of surrogate's court.— In Woodruff *v.* Woodruff, 3 Dem. Surr. (N. Y.) 505, it was held that the surrogate's court had no jurisdiction to determine the validity of an assignment from a widow to the administrator of her husband, alleged to have been procured by fraud.

40. Dunlap *v.* Petrie, 35 Miss. 590.

41. Graham *v.* Abercrombie, 8 Ala. 552.

Individual claims against the estate cannot be joined in such an action. Petty *v.* Wafford, 11 Ala. 143, holding that the claim due the assignee of a distributee cannot be joined with a claim due him in right of his wife in a suit against the estate.

42. Evans *v.* Robinson, 5 B. Mon. (Ky.) 589.

43. *Alabama.*— Cook *v.* Parham, 63 Ala. 456, holding that an assignment by the heirs or devisees of a mortgagee of the debt secured by the mortgage passes a valid equity against all but creditors of the estate, whose rights cannot be affected thereby.

Arkansas.— Wilson *v.* Slaughter, 53 Ark. 137, 13 S. W. 515, holding that where an intestate's property was mortgaged for one third of its value to secure the debt of one of his heirs who was insolvent, a purchaser of such heir's interest in the estate, with knowledge of the facts, acquired no right to the funds left after foreclosure and payment of the mortgage debt, as the said heir had no interest therein.

Connecticut.— Robbins *v.* Wolcott, 28 Conn. 396.

Indiana.— Miller *v.* Noble, 86 Ind. 527.

Kansas.— Head *v.* Speir, 66 Kan. 386, 71 Pac. 833.

Kentucky.— Evans *v.* Robinson, 5 B. Mon. 589, holding that if a distributee has been fully paid, his assignee acquires nothing by the assignment.

Louisiana.— Winn *v.* Dickson, 15 La. Ann. 273.

Maine.— Chandler *v.* Wilson, 77 Me. 76, one who succeeds to the title of a part of the heirs can recover their portion only.

Maryland.—Maccubbin *v.* Cromwell, 2 Harr. & G. 443.

Massachusetts.— Purchaser from heirs ex-

(II) *Right to Take Property at Valuation.* Under the Maryland statute directing the descent of property, a purchaser of the interest of one of the

pectant of three fourths of an estate in reversion upon the death of the widow and the termination of her estate in dower, may recover on a writ of entry *sur disseisin*, unless a good defense can be shown. Tilson *v.* Thompson, 10 Pick. 359. But a quitclaim deed from the heir of a mortgagee, made before a decree of distribution, and before foreclosure of the mortgage, does not give the grantee sufficient title to maintain a writ of entry against the heir in possession of the land. Taft *v.* Stevens, 3 Gray 504.

Mississippi.— A purchaser from heirs is entitled to make any defense that such heirs would be entitled to make. Turner *v.* Ellis, 24 Miss. 173. A purchaser from an administrator at private sale takes a valid title to the extent of such administrator's interest in the estate as distributee, and the remedy of the heirs in such a case is in equity. Cable *v.* Martin, 1 How. 558.

Missouri.— The assignee of the interest of an heir in an estate is in the same position that the heir would be in if he had not assigned, and he cannot object to acts of the administrator done at the request of his assignor. Vanhorn *v.* Walker, 27 Mo. App. 78, objection to compromise of widow's claim for dower, and allowance of attorney's fees by assignee.

North Carolina.— Allen *v.* Smitherman, 41 N. C. 341.

Pennsylvania.— Transfer by the heirs of a share of the estate of an ancestor gives a good title except as against creditors; distributees have at least an equitable interest that may be subject to sale or assignment. Trustees *v.* Grubb, 5 Phila. 41.

South Carolina.— A purchaser from one of several co-heirs may maintain trespass to try title without joining the other co-heirs. Perry *v.* Walker, 1 Brev. 103.

Texas.— Vaughan *v.* Greer, 38 Tex. 530.

Vermont.— Upon the death of his ancestor the heir may make a valid deed of his interest in lands of the decedent, the grantee holding subject to the lien of the administrator. Austin *v.* Bailey, 37 Vt. 219, 86 Am. Dec. 703.

West Virginia.— Tracey *v.* Shumate, 22 W. Va. 474.

United States.— McPherson *v.* Mississippi Valley Trust Co., 122 Fed. 367, 58 C. C. A. 455.

See 16 Cent. Dig. tit. "Descent and Distribution," § 330.

Assignment prima facie valid.— An assignment by an heir or distributee, without proof of execution, is *prima facie* valid, and will be received as *prima facie* evidence, unless full proof is required by the opposite party. Maccubbin *v.* Cromwell, 2 Harr. & G. (Md.) 443.

Effect of unrecorded deed of ancestor.— A *bona fide* purchaser from an heir takes the estate as against the holder of an unrecorded deed from the ancestor. Vaughan *v.* Greer, 38 Tex. 530.

Assignee bound by judgments and orders.—An assignee of the interest of a man in the estate of his deceased wife under an assignment made while the estate is in process of administration in a probate court is bound by the orders and judgments of such court to the same extent as the assignor. Such an assignee does not acquire title to any specific property by the assignment, but merely the right to such property or funds as may be awarded to the assignor in the final distribution of the estate. McPherson *v.* Mississippi Valley Trust Co., 122 Fed. 367, 58 C. C. A. 455.

Deed from heirs of mortgagee.— Where by statute unforeclosed mortgages belonging to the estates of decedents are made personal assets, the right of the mortgagee or his representative to take possession of the mortgaged property does not descend to the heirs of the mortgagee; and deeds of such heirs can have no effect to transfer the mortgaged interest of the decedent in the absence of proof that the estate had been settled, and the debts paid, and that the mortgage upon a final distribution had been assigned to them. Albright *v.* Cobb, 30 Mich. 355.

Notes belonging to intestates.— Where it was not shown that a decedent owed no debts and that there was no administrator, it was held that an action on a note that belonged to the estate could not be maintained by one claiming title thereto by transfer from heirs or distributees. Knight *v.* Knight, 103 Ala. 484, 15 So. 834. But where the payee of a note died leaving no debts, and there was no administration, it was held that his distributees could transfer the note so as to vest an equitable title thereto in the assignee. Wood *v.* Weimar, 104 U. S. 786, 26 L. ed. 779. Where a daughter died intestate, leaving a note to which her mother was entitled as distributee, and the mother sold the same in good faith for a good consideration, without administration on the daughter's estate, but after the mother's death an administrator was appointed for the daughter's estate, it was held in replevin by the administrator for the note that the mother had no legal or equitable interest therein, and that the purchaser acquired no such title thereto as entitled him to equitable relief in an action at law. Pritchard *v.* Norwood, 155 Mass. 539, 30 N. E. 80. See also *supra*, IV, A, a, (IV).

Bona fide purchasers.— As to when *bona fide* purchasers will be protected see Stevens *v.* Woolsey, 9 Johns. (N. Y.) 325; Vaughan *v.* Greer, 38 Tex. 530. A purchaser from an heir with notice of a will devising the property purchased away from such heir is not a *bona fide* purchaser within the meaning of the New York statute providing that the title of a *bona fide* purchaser, for value, from the heir of one who has died seized of lands, shall not be affected by a devise thereof, made by the latter, unless, within four years from the

heirs has a right to elect to take such heir's portion of the decedent's real estate at the valuation placed upon it by the commissioners;[44] but such an election does not vest in him the legal estate of such heir in fee, until he pays the other heirs their proportions of the value or executes bonds for that purpose.[45] When this is done he takes the estate in fee as purchaser, and not by descent from the ancestor.[46]

(III) *EQUITIES AND DEFENSES AGAINST PURCHASER OR ASSIGNEE.* An assignee of a distributee of an estate takes subject to the equities to which the distributee was liable.[47] Lands of an intestate descend to an heir who is indebted to the estate subject to the estate's equity of payment of the debt, and a purchaser of the lands at a sheriff's sale, expressly subject to the equities of the estate, takes no more.[48] It has been held, however, in the absence of a statute, that a *bona fide* purchaser from an heir who is indebted to the estate acquires a good title, and that the property cannot as against him be subjected to the heir's debt to the estate, the remedy of the creditor being against the heir.[49]

(IV) *DEBTS AND EXPENSES OF ADMINISTRATION.* Personal property of an intestate is subject, even in the hands of purchasers from distributees before distribution, to payment of the debts of the estate and expenses of administration;[50] and under most of the statutes purchasers of land from heirs of an estate, who make such purchase before administration, take subject to the debts and to expenses incurred in the administration.[51] At common law, however, and under the statutes of some states, a *bona fide* purchaser of land from an heir takes it

testator's death, the will is admitted to probate or established by the judgment of a court. Gilkinson *v.* Miller, 74 Fed. 131. *Compare*, as to effect of will, Markley *v.* Kramer, 66 Kan. 664, 72 Pac. 221. See also WILLS.

Lease by one of several heirs.— Where the decedent owned an undivided third interest in land, and one heir only joined with the other owners in a lease thereof as oil land, covenanting with the lessees not to build a saloon thereupon, it was held that the remaining heirs were entitled to be let into possession jointly with the lessees, who did not claim under the administrator, and that they might lease to third parties the right to build a saloon upon the premises, which did not directly disturb the operations of the first lessees. Berry *v.* Eyraud, 134 Cal. 82, 66 Pac. 74.

44. Jarrett *v.* Cooley, 6 Harr. & J. (Md.) 258.

45. Jarrett *v.* Cooley, 6 Harr. & J. (Md.) 258; Stevens *v.* Richardson, 6 Harr. & J. (Md.) 156.

46. Stevens *v.* Richardson, 6 Harr. & J. (Md.) 156.

47. Wilson *v.* Slaughter, 53 Ark. 137, 13 S. W. 515; Mullikin *v.* Mullikin, 1 Bland (Md.) 538; Smith *v.* Kearney, 2 Barb. Ch. (N. Y.) 533. And see Head *v.* Spier, 66 Kan. 386, 71 Pac. 833; Allen *v.* Smitherman, 41 N. C. 341; *In re* Donaldson, 23 Pittsb. Leg. J. N. S. 260.

48. *In re* Donaldson, 23 Pittsb. Leg. J. N. S. 260.

49. Towles *v.* Towles, 1 Head (Tenn.) 601. And see Smith *v.* Thomas, 14 Lea (Tenn.) 324.

50. Pritchard *v.* Norwood, 155 Mass. 539, 30 N. E. 80. And see *supra*, IV, A, 4, c.

51. *Alabama.*— Cruikshank *v.* Luttrell, 67 Ala. 318.

California.— Spotts *v.* Hanley, 85 Cal. 155, 24 Pac. 738.

Georgia.— Johnson *v.* Johnson, 80 Ga. 260, 5 S. E. 629.

Illinois.— Vansyckle *v.* Richardson, 13 Ill. 171.

Michigan.— Flood *v.* Strong, 108 Mich. 561, 66 N. W. 473; Armstrong *v.* Loomis, 97 Mich. 577, 589, 56 N. W. 938 [*citing* Winegar *v.* Newland, 44 Mich. 367, 6 N. W. 841; Burns *v.* Berry, 42 Mich. 176, 3 N. W. 924; Hill *v.* Mitchell, 40 Mich. 389].

Minnesota.— State *v.* Ramsey County Probate Ct., 25 Minn. 22.

New York.—See Covell *v.* Weston, 20 Johns. 414.

Vermont.— Austin *v.* Bailey, 37 Vt. 216, 86 Am. Dec. 703.

A purchaser of real estate under a judgment against the heir occupies no better position than he who purchases directly from the heir. Vansyckle *v.* Richardson, 13 Ill. 171.

Presumption of satisfaction of administrator's lien.— Although the grantee of an heir holds the land, as the heir did, subject to the administrator's lien, yet, even in a case where it is shown that administration was granted upon the estate, it will be presumed, after the lapse of a long time without any interference of the administrator, that his lien has been satisfied, especially when the party denying the right of the heir's grantee is a stranger to the title. Austin *v.* Bailey, 37 Vt. 216, 86 Am. Dec. 703.

Liability of heirs to refund purchase-money. — Purchasers of land from heirs before the estate is closed take it subject to the debts and expenses of administration, and the heirs are not liable to refund the money received

free from liability for the decedent's debts,[52] and the remedy of the creditor, if any, is against the heir personally.[53]

(v) *Taxes and Assessments.* And such purchasers also take title subject to taxes and assessments.[54]

(vi) *Determination and Enforcement of Rights in Proceedings For Distribution.* In California it is expressly provided by statute that upon the distribution of an estate, if any of the heirs, legatees, or devisees have conveyed their shares, such shares must be assigned to the persons holding them in the same manner as they otherwise would have been to such heirs, legatees, or devisees,[55] and that a judgment or final order in an action or special proceeding before a court having jurisdiction shall be conclusive.[56] There are more or less similar provisions in the statutes of other states.[57] Where the statutes authorize it, probate courts in apportioning the estate may inquire into and determine the validity of conveyances and assignments made by heirs or distributees;[58] but in the absence of a statute conferring such authority, in terms or by necessary intendment, such courts have no jurisdiction to pass upon such questions, but are restricted to distribution to the heirs and distributees.[59]

13. Actions by Heirs and Distributees[60] — a. Right of Action and Conditions Precedent — (i) *In General.* As a general rule the distributees or next of kin of an intestate can maintain no suit, either at law or in equity, for the mere purpose of distribution, until letters of administration have been duly granted upon the estate.[61] But it has been held in some states that administration may be dis-

on such sales to satisfy such claims. Armstrong *v.* Loomis, 97 Mich. 577, 56 N. W. 938.

52. Whittlesey *v.* Brohammer, 31 Mo. 98; Smith *v.* Thomas, 14 Lea (Tenn.) 324; Towles *v.* Towles, 1 Head (Tenn.) 601.

53. Liability of heirs see *infra*, IV, C.

54. Graham *v.* Dunnigan, 2 Bosw. (N. Y.) 516, holding that a widow in dower who had paid the whole taxes and assessments was entitled to recover from the grantees of the heirs their just proportion of the amount paid.

55. Freeman *v.* Rahm, 58 Cal. 111. See also *In re* Burton, 93 Cal. 459, 29 Pac. 36; Vaughn's Estate, 92 Cal. 192, 28 Pac. 221; *In re* Grider, 81 Cal. 571, 22 Pac. 908: *In re* Phillips, 71 Cal. 285, 12 Pac. 169. It has been held that the assignee of a deceased heir might have the assigned property distributed to him directly to pay a debt against such heir secured by such assignment, but that the court could not order the sale of real estate to pay such indebtedness, or distribute it for such a purpose where the assignment contained a defeasance in case of payment of the debt so secured. *In re* Hite, Myr. Prob. (Cal.) 232.

56. Freeman *v.* Rahm, 58 Cal. 111, holding that a decree of the probate court assigning to an heir his share of the estate was conclusive upon one who purchased it prior to the decree, as against an attaching creditor of the heir, it appearing that such purchaser had notice of the proceedings for distribution and failed to assert his rights therein.

57. See the statutes of the various states.

58. See *In re* Burton, 93 Cal. 459, 29 Pac. 36; Vaughn's Estate, 92 Cal. 192, 28 Pac. 221; Chever *v.* Ching Hong Poy, 82 Cal. 68, 22 Pac. 1081; *In re* Grider, 81 Cal. 571, 22 Pac. 908; Barnard *v.* Wilson, 74 Cal. 512, 16 Pac. 307; *In re* Phillips, 71 Cal. 285, 12 Pac. 169; Bath *v.* Valdez, 70 Cal. 350, 11 Pac. 724; Freeman *v.* Rahm, 58 Cal. 111; Theller *v.* Such, 57 Cal. 447; Sessions *v.* Mansfield, 33 Ga. Suppl. 9 (holding that in a suit by a guardian against an administrator for his ward's share of the estate it was held proper for the administrator to deposit the fund in court to abide the final decree); Balch *v.* Zentmeyer, 11 Gill & J. (Md.) 267; McGettrick's Appeal, 98 Pa. St. 9 (holding that the auditor appointed by the probate court to divide the proceeds of a sale of real estate, had authority to inquire into the validity of a deed of an heir conveying his interest therein).

59. *Connecticut.*—Holcomb *v.* Sherwood, 29 Conn. 418.

Maine.— Knowlton *v.* Johnson, 46 Me. 489.

Mississippi.—Read *v.* Brown, 36 Miss. 329; Locke *v.* Williams, 36 Miss. 187; Dixon *v.* Houston, 35 Miss. 636.

New Hampshire.— Wood *v.* Stone, 39 N. H. 572; Gage *v.* Gage, 29 N. H. 533.

New York.— Woodruff *v.* Woodruff, 3 Dem. Surr. 505.

Texas.— See Cox *v.* Cox, 77 Tex. 587, 14 S. W. 201.

Vermont.— Cox *v.* Ingleston, 30 Vt. 258.

See 16 Cent. Dig. tit. "Descent and Distribution," § 336.

60. Actions between heirs and distributees see *infra*, IV, A, 14.

Action against administrator see Executors and Administrators.

Action on administrator's bond see Executors and Administrators.

61. *Alabama.*— Sullivan *v.* Lawler, 72 Ala. 68; Fretwell *v.* McLemore, 52 Ala. 124; Lockhart *v.* Cameron, 29 Ala. 355; Plunkett *v.* Kelly, 22 Ala. 655; Gardner *v.* Gantt, 19 Ala. 666.

pensed with, and such a suit maintained, where there are no debts of the estate or they have been paid, and nothing remains but to reduce the assets to possession and distribute them among the heirs or next of kin.[62] In Louisiana heirs may maintain actions to establish their rights and to recover assets of the succession.[63]

(II) *ACTIONS RELATING TO REAL PROPERTY.* Where as in many states the right to possession as well as the title of an intestate's real property vests in the heirs, they are entitled to maintain actions in relation thereto before close of administration.[64] Under some statutes, however, because of express prohibition

Arkansas.— Lemon *v.* Rector, 15 Ark. 436.

Kentucky.— Robertson *v.* McDaniel, 5 J. J. Marsh. 11.

Maryland.— Hogthorp *v.* Hook, 1 Gill & J. 270.

Mississippi.— Marshall *v.* King, 24 Miss. 85; Browning *v.* Watkins, 10 Sm. & M. 482.

Tennessee.— Thurman *v.* Shelton, 10 Yerg. 383.

62. Teal *v.* Chancellor, 117 Ala. 612, 23 So. 651; Wright *v.* Robinson, 94 Ala. 479, 10 So. 319; Cooper *v.* Davison, 86 Ala. 367, 5 So. 650; Trawick *v.* Davis, 85 Ala. 342, 5 So. 83; Fretwell *v.* McLemore, 52 Ala. 124; Marshall *v.* Crow, 29 Ala. 278; Vanderveer *v.* Alston, 16 Ala. 494; Bethea *v.* McColl, 5 Ala. 308; Watson *v.* Byrd, 53 Miss. 480; Hurt *v.* Fisher, 96 Tenn. 570, 35 S. W. 1085. *Compare*, however, Robertson *v.* McDaniel, 5 J. J. Marsh. (Ky.) 11.

63. See Sallier *v.* Rosteet, 108 La. 378, 32 So. 383; McKenzie *v.* Bacon, 40 La. Ann. 157, 4 So. 65; Gillaspie *v.* Citizens' Bank, 30 La. Ann. 1315; Addison *v.* New Orleans Sav. Bank, 15 La. 527; Everett *v.* McKinney, 7 La. 375. An heir may sue to set aside the probate of a will and to obtain a judgment recognizing him as forced heir and vesting him with the seizin of the estate. Duperier *v.* Bervard, 107 La. 91, 31 So. 653. The forced heirs of a married woman have a legal right to sue the surviving husband for a specific amount of paraphernal funds of their deceased mother received by the father, if the latter has not been confirmed and qualified as their tutor during their minority. In such a case the father is their debtor under the rights of the mother, and they can enforce all her rights without recourse to an action for an account. Richardson *v.* Richardson, 38 La. Ann. 657.

Heir suing as administrator.—The fact that plaintiff in an hypothecary action to enforce a judgment which, as heir and administrator of his deceased mother, he had obtained against his father, fails to show that he was administrator of his mother does not prevent him from enforcing his rights as her heir. Cambre *v.* Grabert, 31 La. Ann. 533.

Estoppel by acts of deceased father.— Where a person dies leaving no descendants or ascendants, but a brother and children of a predeceased brother, the latter are called to the succession of their uncle by representation, the children representing their predeceased father; but, although thus representing their father, they do not derive their right to inherit from him, but from the law. Such right is not impaired or affected by any act of their father. Therefore they are not estopped from prosecuting a right of action derived the succession of their uncle, on account of acts or omissions of their father, although these acts or omissions might have estopped him (the father) had he survived the intestate from maintaining the action. McKenzie *v.* Bacon, 40 La. Ann. 157, 4 So. 65.

Community property.— Heirs of deceased wife are not bound to await liquidation of community property before resorting to proceedings to recover their share thereof. Ogden *v.* Leland University, 49 La. Ann. 190, 21 So. 685. *Compare* Daniel *v.* Ivy, 26 La. Ann. 639.

Suit to enforce provisions of will.—The heir who succeeds to the rights of his ancestor may after the executors are discharged enforce the provisions of the ancestor's will, and see that his intentions are carried into effect against purchasers, although he has no other interest in the matter. Poydras *v.* Mourain, 9 La. 492.

64. *Alabama.*— Shamblin *v.* Hall, 123 Ala. 541, 26 So. 285 (ejectment); Howison *v.* Oakley, 118 Ala. 215, 23 So. 810 (holding that an action for damages for failure of a purchaser of a decedent's land, sold under a decree of the probate court for partition among heirs, to complete the sale, may be properly brought in the name of the heirs); Louisville, etc., R. Co. *v.* Hill, 115 Ala. 334, 22 So. 163 (action for statutory penalty for wrongfully cutting trees, the statute requiring that the action shall be brought by the "owner"); Woods *v.* Legg, 91 Ala. 511, 8 So. 342; Hart *v.* Kendall, 82 Ala. 144, 3 So. 41; Leatherwood *v.* Sullivan, 81 Ala. 458, 1 So. 718 (trover for cutting and carrying away timber from land); Robertson *v.* Bradford, 70 Ala. 385; Tyson *v.* Brown, 64 Ala. 244. The heir may maintain an action at law for a trespass on lands descended to him, although the administrator had, prior to the commission of the trespass, obtained an order to sell them for the payment of debts, but had never sold them under the order, nor otherwise exercised any of his statutory powers over them, and had resigned his administration before the commencement of the action. Calhoun *v.* Fletcher, 63 Ala. 574.

California.— Soto *v.* Kroder, 19 Cal. 87, ejectment. As to the rule in this state see *infra*, note 65.

Florida.— Under the former statute an heir could not maintain ejectment before the close of administration as the right to possession was in the administrator. Doyle *v.* Wade, 23 Fla. 90, 1 So. 516, 11 Am. St. Rep. 334. It is otherwise, however, since the revision of 1892 (Rev. St. (1892) § 1917),

or because the administrator is given the right to possession, heirs cannot maintain ejectment, trespass, or other actions in relation to real estate, except under

which gives the heir the right to possession. Rose *v.* Withers, 39 Fla. 460, 22 So. 724.

Illinois.— McGillick *v.* McAllister, 10 Ill. App. 40.

Indiana.— Taylor *v.* Fickas, 64 Ind. 167, 31 Am. Rep. 114 (action to recover damages for overflowing land); Doe *v.* Mace, 7 Blackf. 2 (holding that heirs of a mortgagee could maintain ejectment against the mortgagor or his tenant under a lease made subsequent to the mortgage, and without demand for possession); Egbert *v.* Thomas, Smith 206.

Kentucky.— Mt. Sterling, etc., Turnpike Co. *v.* Barry, 38 S. W. 847, 18 Ky. L. Rep. 937, an action on a contract to convey realty to decedent where the breach occurred after his death.

Louisiana.— Ware *v.* Jones, 19 La. Ann. 428.

Maine.—Walsh *v.* Wheelwright, 96 Me. 174, 52 Atl. 649; Chadbourne *v.* Rackliff, 30 Me. 354, both of which were writs of entry.

Michigan.— Covert *v.* Morrison, 49 Mich. 133, 13 N. W. 390 (ejectment or trespass); Warren *v.* Tobey, 32 Mich. 45 (ejectment); Marvin *v.* Schilling, 12 Mich. 356 (ejectment).

Mississippi.— Cohea *v.* Jemison, 68 Miss. 510, 10 So. 46, ejectment.

Nebraska.— Lewon *v.* Heath, 53 Nebr. 707, 74 N. W. 274 (ejectment); Rakes *v.* Brown, 34 Nebr. 304, 51 N. W. 848 (action to set aside the deed of an ancestor and to quiet title).

New Hampshire.— Lane *v.* Thompson, 43 N. H. 320, trespass.

New Jersey.— Romaine *v.* Hendrickson, 24 N. J. Eq. 231 (suit to set aside conveyance by executors); Ware *v.* Ware, 6 N. J. Eq. 117 (suit to restrain the wrongful cutting of timber). See also Cozens *v.* Colson, 3 N. J. L. 877, ejectment.

New York.— Fosgate *v.* Herkimer Mfg., etc., Co., 9 Barb. 287 (ejectment); Smith *v.* Lorillard, 10 Johns. 338 (revesting of possession in heirs after they have been driven out of possession by the public enemy).

North Carolina.— Beam *v.* Jennings, 89 N. C. 451, ejectment.

Oregon.— King *v.* Boyd, 4 Oreg. 326, suit to set aside deed of ancestor.

Pennsylvania.— Webster *v.* Webster, 53 Pa. St. 161 (ejectment); Haslage *v.* Krugh, 25 Pa. St. 97; Caffrey *v.* McFarland, 1 Phila. 555 (ejectment).

Vermont.— Chipman *v.* Sawyer, 1 Tyler 83, ejectment.

Virginia.—Tapscott *v.* Cobbs, 11 Gratt. 172, ejectment.

Wisconsin.— Marsh *v.* Waupaca County, 38 Wis. 250 (action to set aside tax-sale of land and to restrain issue of deed thereon); Jones *v.* Billstein, 28 Wis. 221 (ejectment).

United States.— Lindenberger *v.* Matlock, 15 Fed. Cas. No. 8,360, 4 Wash. 278.

See 16 Cent. Dig. tit. "Descent and Distribution," § 243.

Title of heirs and right to possession see *supra*, IV, A, 4, b; IV, A, 5.

Pending petition for license to sell.— A writ of entry by an heir to recover land of his ancestor is not barred by the pendency of a petition in the probate court by the administrator for leave to sell the same for payment of debts. Chadbourne *v.* Rackliff, 30 Me. 354.

Before sale under will.— Since the title to land directed by a will to be sold, but not devised for such purpose, vests in the testator's heirs until sold, they may maintain ejectment therefor prior to a sale. Cohea *v.* Jemison, 68 Miss. 510, 10 So. 46; Beam *v.* Jennings, 89 N. C. 451; Haskell *v.* House, 1 Treadw. (S. C.) 106; Veal *v.* Fortson, 57 Tex. 482 (suit by heir to set aside conveyance by an ancestor who died before becoming of age); Lindenberger *v.* Matlock, 15 Fed. Cas. No. 8,360, 4 Wash. 278. See *supra*, IV, A, 4, b, (II).

Where the heir may bring ejectment, he need prove against an intruder only the prior possession of his ancestor. Covert *v.* Morrison, 49 Mich. 133, 13 N. W. 390; Caffrey *v.* McFarland, 1 Phila. (Pa.) 555; Tapscott *v.* Cobbs, 11 Gratt. (Va.) 172. See, generally, EJECTMENT.

After valid administrator's sale.— Heirs cannot maintain an action to recover land against a purchaser at a regular and legal administrator's sale, or his vendee, even though such purchaser may have agreed with them prior to the sale to convey the land to them on payment of a certain mortgage which he held against the intestate, and which has in fact been paid or satisfied, since his breach of such contract does not revest the title to the land in the heirs. Brown *v.* Brown, 96 Ga. 578, 23 S. E. 840.

After illegal administrator's sale.— If an administrator makes an illegal sale of lands of the estate, as where he sells at private sale or without authority, the heirs may recover the land in ejectment. Woods *v.* Legg, 91 Ala. 511, 8 So. 342; Robertson *v.* Bradford, 70 Ala. 385. To entitle heirs to recover in ejectment against the purchaser at an administrator's sale which is void for informality, they must refund to the purchaser the purchase-money and taxes paid by him, although the heirs were minors at the time of the sale. The equitable defense in such a case does not become stale, but is good against the heirs so long as a right of action remains in them. Schaefer *v.* Causey, 8 Mo. App. 142.

Heirs are not estopped to sue to recover lands of their intestate conveyed by void deeds of the executor or administrator because the latter, without any authority from the heirs, sued and recovered judgments for the purchase money, which were paid by the purchasers. McCown *v.* Terrell, (Tex. Civ. App. 1897) 40 S. W. 55.

special circumstances, until after close of administration.[65] Where the administrator is entitled to possession heirs cannot maintain ejectment against him.[66] But even where the statute gives the administrator the right to possession of real

Rents and profits.— Unless the rule has been changed by statute, the heir may sue for rents and profits accruing since the ancestor's death. Tyson *v.* Brown, 64 Ala. 244; McGillick *v.* McAllister, 10 Ill. App. 40 (heir may distrain for rent); Egbert *v.* Thomas, Smith (Ind.) 206; Jaques *v.* Gould, 4 Cush. (Mass.) 384; Clapp *v.* Stoughton, 10 Pick. (Mass.) 463; Haslage *v.* Krugh, 25 Pa. St. 97. And see *supra*, IV, A, 6. An heir may sue a tenant or his assignee for his share of the rent, upon the death of the ancestor and lessor and the descent of the property to the heirs, although the assignee of such tenant has acquired the interests of the co-heirs in the estate. Cole *v.* Patterson, 25 Wend. (N. Y.) 456. But where the heir purchased the interests of his co-heirs in the estate held by a tenant, upon the death of the ancestor and lessor, and the descent of the property, it was held that he could not sue in his own name for rent which had accrued and become payable after the death of the ancestor, and before he purchased the reversion. Allen *v.* Van Houton, 19 N. J. L. 49.

Heir's lien for purchase-money.— On sale of land of a decedent by commissioners, upon a petition of the heirs for distribution among them, the vendor's lien in the heirs remains unimpaired, and they may enforce the same by a bill in chancery. McIntosh *v.* Reid, 45 Ala. 456.

Warranty of ancestor.— Where heirs may be liable on their ancestor's warranty, they have a right *quia timet* to ask interposition in equity to restrain a sale of land which would subject them to liability. Peeble *v.* Estill, 7 J. J. Marsh. (Ky.) 408.

Insolvency of estate.— In a suit by the heir to recover possession of land sold by the executors, defendant cannot set up in defense that the estate of the testator was insolvent and should have gone to the creditors. Gaines *v.* New Orleans, 6 Wall. (U. S.) 642, 18 L. ed. 950.

Administration not closed.— In an action by heirs against a third party in possession to recover land, they cannot be required to show affirmatively that the administration has been closed, or that there are no debts. Such defense can be made only by creditors or by the administrator for them. Ware *v.* Jones, 19 La. Ann. 428.

Action on bond for title.— Where a bond for title shows that the title is in a third person, and that the obligor has never procured a conveyance of the title to the obligee nor obtained it himself, the heir of the obligee cannot take the land by descent, nor sue in his own name for a breach of the condition, whether the breach happened before or after the death of the obligee. Allen *v.* Greene, 19 Ala. 34.

Trespass in life-time of intestate.— Heirs cannot sue to recover damages for trespass on the lands of their ancestor committed in his life time. Conklin *v.* Alabama, etc., R. Co., 81 Miss. 152, 32 So. 920. See *infra*, IV, A, 13, a, (IV).

65. To maintain an action to recover real estate, heirs must allege and prove that there is no administrator, or that the administrator, if there is one, has assented to their bringing suit. Crummey *v.* Bentley, 114 Ga. 746, 40 S. E. 765; Greenfield *v.* McIntyre, 112 Ga. 691, 38 S. E. 44; Northcraft *v.* Oliver, 74 Tex. 162, 11 S. W. 1121 (trespass to try title); Lee *v.* Turner 71 Tex. 264, 9 S. W. 149 (holding that heirs cannot, pending administration, sue for damages for a nuisance affecting real estate); Giddings *v.* Steele, 28 Tex. 732, 91 Am. Dec. 336 (action to recover land fraudulently or illegally sold by administrator); Boardman *v.* Bartlett, 6 Vt. 631 (ejectment); Hazelton *v.* Bogardus, 8 Wash. 102, 35 Pac. 602; Lawrence *v.* Bellingham Bay, etc., R. Co., 4 Wash. 664, 30 Pac. 1099; Balch *v.* Smith, 4 Wash. 497, 30 Pac. 648; Dunn *v.* Peterson, 4 Wash. 170, 29 Pac. 998. *Compare* Veal *v.* Fortson, 57 Tex. 482, sustaining suit by an heir to set aside a conveyance by an ancestor who was a minor.

Under the California statute the administrator of an intestate is entitled to the possession of the real as well as the personal property of the intestate, but under the amendment of 1880 the heirs may themselves, or jointly with the administrator, maintain an action to recover possession of the real estate, or to quiet title to the same. Code Civ. Proc. § 1452. See Trubody *v.* Trubody, 137 Cal. 172, 69 Pac. 968; Kimball *v.* Tripp, 136 Cal. 631, 69 Pac. 428; Estep *v.* Armstrong, 91 Cal. 659, 27 Pac. 1091. Prior to the amendment of the statute the right to possession was exclusively in the administrator, and pending administration the heirs had no such right as would support an action of ejectment or to quiet title. Harper *v.* Strutz, 53 Cal. 655; Meeks *v.* Kirby, 47 Cal. 169; Chapman *v.* Hollister, 42 Cal. 462; Meeks *v.* Hahn, 20 Cal. 620. And see Crosby *v.* Dowd, 61 Cal. 557. The administrator was authorized to sue in ejectment to recover possession of land, and the judgment in such action was binding upon the heirs. Cunningham *v.* Ashley, 45 Cal. 485. Where there was no administration the heirs could maintain ejectment. Updegraff *v.* Trask, 18 Cal. 458. And where, after the death of the grantee of an unconfirmed Mexican grant, his heirs petitioned for and obtained a confirmation of the grant, and a patent was issued to them, it was held that they had the legal title and could maintain ejectment against purchasers from the administrator at a sale under an order of the probate court. Hartley *v.* Brown, 51 Cal. 465.

66. Barco *v.* Fennell, 24 Fla. 378, 5 So. 9.

property, it has been held that the heir, where there is no administrator, may maintain ejectment, trespass, and other actions in relation to real estate;[67] and that where there is an administrator they may maintain actions against strangers not claiming through him.[68] Heirs may maintain actions with respect to real property where there are no debts, or where all debts have been paid and the administration has been closed;[69] or after resignation or death of the administrator, and cessation of administration;[70] or even where there is an administrator, where there are no equities in favor of him, and no debts, and he refuses or neglects to sue.[71] They may maintain a suit to enforce a vendor's lien for purchase-money of land sold by their ancestor.[72]

(III) *Actions in Relation to Personal Property in General.* As a general rule, since the title to personal property of an intestate vests in his administrator, he is the proper person to sue to recover the same or for damages for injury thereto prior to the close of administration, and such action cannot be maintained by heirs or distributees.[73] In some states, however, it has been held

67. Updegraff *v.* Trask, 18 Cal. 458; Houston, etc., R. Co. *v.* Knapp, 51 Tex. 569; Giddings *v.* Steele, 28 Tex. 732, 91 Am. Dec. 336; Cochran *v.* Thompson, 18 Tex. 652; Buck *v.* Squiers, 22 Vt. 484. And see Baker *v.* Hamblen, (Tex. Civ. App. 1903) 75 S. W. 362.

68. Spotts *v.* Hanley, 85 Cal. 155, 24 Pac. 738; Marvin *v.* Schilling, 12 Mich. 356; Lewon *v.* Heath, 53 Nebr. 707, 74 N. W. 274.

69. *Arkansas.*— Organ *v.* Memphis, etc., R. Co., 51 Ark. 235, 11 S. W. 96, action to recover compensation or damages for wrongful appropriation of land by railroad company after death of ancestor.

New Hampshire.— Baker *v.* Haskell, 48 N. H. 426 (holding that one heir may maintain an action against another heir to recover damages for his exclusion from the realty during the time the ancestor's estate was in process of administration, if the administrator never had possession of the realty, and the debts have all been paid and the administrator's account settled); Plumer *v.* Plumer, 30 N. H. 558 (trover by heir for removing manure from the land).

New Jersey.— Cozen *v.* Colson, 3 N. J. L. 877.

South Carolina.— Grant *v.* Poyas, 62 S. C. 426, 40 S. E. 891, holding that where there are no debts a sole heir may maintain an action against one other than the administrator to recover assets of the estate and to enforce a resulting trust in real property in which the assets have been invested.

Washington.— Tucker *v.* Brown, 9 Wash. 357, 37 Pac. 456.

United States.—Bunnel *v.* Stoddard, 4 Fed. Cas. No. 2,135, suit by heir of beneficiary to set aside conveyances and enforce trust in respect to real estate.

70. Calhoun *v.* Fletcher, 63 Ala. 574 (trespass); Sanders *v.* Moore, 52 Ark. 376, 12 S. W. 783.

71. Gossage *v.* Crown Point Gold, etc., Min. Co., 14 Nev. 153; Bem *v.* Shoemaker, 10 S. D. 453, 74 N. W. 239. See also *infra*, IV, A, 13, a, (III).

72. Hanrick *v.* Walker, 50 Ala. 34; Sanders *v.* Moore, 52 Ark. 376, 12 S. W. 783; Reed *v.* Ash, 30 Ark. 775.

73. *Alabama.*— Davenport *v.* Brooks, 92 Ala. 627, 9 So. 153 (detinue); Huddleston *v.* Huey, 73 Ala. 215 (detinue); Costephens *v.* Dean, 69 Ala. 385; Miller *v.* Eatman, 11 Ala. 609 (detinue); Bell *v.* Hogan, 1 Stew. 536 (detinue).

Arkansas.— Pryor *v.* Ryburn, 16 Ark. 671 (suit in equity to recover for conversion of personalty); Lemon *v.* Rector, 15 Ark. 436.

Colorado.— Hall *v.* Cowles, 15 Colo. 343, 25 Pac. 705.

Connecticut.— Taber *v.* Packwood, 1 Day 150, trespass or trover.

Georgia.— Smith *v.* Turner, 112 Ga. 533, 37 S. E. 705; Thompson *v.* Fenn, 100 Ga. 234, 28 S. E. 39 (action for conversion); Morgan *v.* Woods, 69 Ga. 599; Murphy *v.* Pound, 12 Ga. 278; Worthy *v.* Johnson, 8 Ga. 236, 52 Am. Dec. 399.

Indiana.— Jewell *v.* Gaylor, 157 Ind. 188, 60 N. E. 1083; Humphries *v.* Davis, 100 Ind. 369; Pond *v.* Sweetser, 85 Ind. 144; Turner *v.* Campbell, 34 Ind. 317. And see Williams *v.* Williams, 125 Ind. 156, 25 N. E. 176.

Kentucky.— McChord *v.* Fisher, 13 B. Mon. 193; Emerson *v.* Staton, 3 T. B. Mon. 116; Loyd *v.* Loyd, 46 S. W. 485, 20 Ky. L. Rep. 347.

Maryland.— Schaub *v.* Griffin, 84 Md. 557, 36 Atl. 443; Neale *v.* Hagthrop, 3 Bland 551.

Mississippi.— Marshall *v.* King, 24 Miss. 85; Browning *v.* Watkins, 10 Sm. & M. 482, Miller *v.* Womack, Freem. 486.

Missouri.— Hellmann *v.* Wellenkamp, 71 Mo. 407; Adey *v.* Adey, 58 Mo. App. 408 (replevin); McMillan *v.* Wacker, 57 Mo. App. 220 (replevin); State *v.* Moore, 18 Mo. App. 406.

New Hampshire.— Champollion *v.* Corbin, 71 N. H. 78, 51 Atl. 674; Weeks *v.* Jewett, 45 N. H. 540.

New York.— Beecher *v.* Crouse, 19 Wend. 306 (trover); Woodin *v.* Bagley, 13 Wend. 453. And see Segelken *v.* Meyer, 94 N. Y. 473, recognizing the general rule.

North Carolina.— Varner *v.* Johnston, 112 N. C. 570, 17 S. E. 483; Davidson *v.* Potts, 42 N. C. 272; Nance *v.* Powell, 39 N. C. 297.

Ohio.— Davis *v.* Corwine, 25 Ohio St. 668.

that administration may be dispensed with and such actions may be maintained, where there are no debts against the estate and all that remains to be done is to collect the assets and distribute them among the heirs or next of kin;[74] and the lapse of a considerable time after the intestate's death will raise a presumption that there are no debts.[75] Heirs and distributees may maintain actions with respect to personalty after the administration has been closed and all debts paid;[76] and they may sue in their own names, without the appointment of an administrator *de bonis non* to recover administered assets, the administrator having paid all debts and settled his accounts.[77] It is also well settled that heirs or distributees may sue in equity to recover personal assets of the estate, where such a suit is necessary for their protection because of fraud, collusion, insolvency, or neglect or refusal to sue, on the part of the administrator, or other special circumstances.[78]

South Carolina.— Bradford *v.* Felder, 2 McCord Eq. 168 (suit in equity); Fripp *v.* Fripp, Rice Eq. 84 (action at law).

Tennessee.— Alexander *v.* Espy, 6 Humphr. 157; Thurman *v.* Shelton, 10 Yerg. 383; Upchurch *v.* Anderson, (Ch. App. 1900) 62 S. W. 1115.

Texas.— Bufford *v.* Holliman, 10 Tex. 560, 60 Am. Dec. 223.

United States.— Scruggs *v.* Scruggs, 105 Fed. 28 (action for conversion); Newman *v.* Schwerin, 61 Fed. 865, 10 C. C. A. 129; Chaplin *v.* U. S., 19 Ct. Cl. 424.

See 16 Cent. Dig. tit. "Descent and Distribution," § 252 *et seq.* See also *supra*, IV, A, 5.

Action against administrator.— Even after an order of distribution has been made by the probate court, declaring the respective interests of the distributees, an heir has no title to any specific property, and he cannot maintain an action against the administrator for its conversion; his remedy is on the administrator's bond. Scruggs *v.* Scruggs, 105 Fed. 28.

74. *Alabama.*— Teal *v.* Chancellor, 117 Ala. 612, 23 So. 651; Fretwell *v.* McLemore, 52 Ala. 124; Marshall *v.* Crow, 29 Ala. 278.

Indiana.— Humphries *v.* Davis, 100 Ind. 369.

Mississippi.— Ricks *v.* Hilliard, 45 Miss. 359; Andrews *v.* Brumfield, 32 Miss. 107. And see Watson *v.* Byrd, 53 Miss. 480.

New York.— Segelken *v.* Meyer, 94 N. Y. 473; Hyde *v.* Stone, 7 Wend. 354, 22 Am. Dec. 582.

Pennsylvania.— Roberts *v.* Messinger, 134 Pa. St. 298, 19 Atl. 625; Lee *v.* Gibbons, 14 Serg. & R. 105.

South Carolina.— Grant *v.* Poyas, 62 S. C. 426, 40 S. E. 891; Huson *v.* Wallace, 1 Rich. Eq. 1. But see Fripp *v.* Fripp, Rice Eq. 84.

Tennessee.— Hurt *v.* Fisher, 96 Tenn. 570, 35 S. W. 1085; Christian *v.* Clark, 10 Lea 630; Smith *v.* Gooch, 6 Lea 536.

Texas.— Bufford *v.* Holliman, 10 Tex. 560, 60 Am. Dec. 223; Ward *v.* Ward, 1 Tex. Unrep. Cas. 123, holding that where an estate became vacant by removal of the administrator, and all debts had been paid, the heirs might sue on the administrator's bond for property converted, and it was not necessary to appoint an administrator *de bonis non*.

Washington.— Where the decedent was a foreigner, never having been a resident of the United States or transacted business in the country, and owed no debts, it was held that his heirs could maintain actions without administration. Tucker *v.* Brown, 9 Wash. 357, 37 Pac. 456.

Contra.— Adey *v.* Adey, 58 Mo. App. 408; State *v.* Moore, 18 Mo. App. 406.

See 16 Cent. Dig. tit. "Descent and Distribution," § 252 *et seq.*

75. Bufford *v.* Holliman, 10 Tex. 560, 60 Am. Dec. 223.

76. Lacy *v.* Williams, 8 Tex. 182; Hubbard *v.* Urton, 67 Fed. 419; Bunnel *v.* Stoddard, 4 Fed. Cas. No. 2,135, holding that the heirs of a deceased beneficiary under a trust in respect to real estate may sue to set aside certain conveyances and enforce the trust, although the real estate has in equity been converted into personalty. *Compare*, however, Davis *v.* Corwine, 25 Ohio St. 668.

Action against administrator.— After the time has elapsed for the allowance of claims against an estate, or when all claims have been settled, and the sole remaining duty on the part of the administrator is to make distribution, and he fails to do so, the persons entitled as distributees may maintain an action against him for this breach of duty without waiting for an order of distribution by the probate court. Clarke *v.* Sinks, 144 Mo. 448, 46 S. W. 199. See also EXECUTORS AND ADMINISTRATORS.

Action on administrator's bond.— Or under such circumstances an action may be maintained on the administrator's bond. State *v.* Thornton, 56 Mo. 325; State *v.* Matson, 44 Mo. 305. And see EXECUTORS AND ADMINISTRATORS.

77. Suit *v.* Crawford, 100 Ky. 355, 38 S. W. 500, 18 Ky. L. Rep. 784.

78. *Georgia.*— Worthy *v.* Johnson, 8 Ga. 236, 52 Am. Dec. 399. When there are no debts unpaid, and the administrator of an estate illegally disposes of property of the estate and is insolvent, equity will entertain a bill filed by the heirs at law to recover the property so illegally disposed of or to decree an account of its proceeds. Southwestern R. Co. *v.* Thomason, 40 Ga. 408.

Kentucky.— McChord *v.* Fisher, 13 B. Mon. 193; Thomas *v.* White, 3 Litt. 177, 14 Am. Dec. 56.

New York.— Randel *v.* Dyett, 38 Hun 347.

North Carolina.— Fleming *v.* McKesson, 56 N. C. 316.

(IV) *CHOSES IN ACTION.* As a general rule the title to choses in action, which are personal assets, and the right to sue thereon, is in the administrator, so that actions thereon cannot be maintained by the heirs or distributees, either at law or in equity.[79] There are exceptions to this rule, however, where there

South Dakota.— Bem *v.* Shoemaker, 10 S. D. 453, 74 N. W. 239; Trotter *v.* Mutual Reserve Fund L. Assoc., 9 S. D. 596, 70 N. W. 843, 62 Am. St. Rep. 887.

Texas.— Patton *v.* Gregory, 21 Tex. 513.

Virginia.— Roberts *v.* King, 10 Gratt. 184.

See 16 Cent. Dig. tit. "Descent and Distribution," §§ 360, 361.

Suit against administrator.— A distributee may maintain a suit in equity against the administrator for his share of the estate. Schaub *v.* Griffin, 84 Md. 557, 36 Atl. 443.

The omission of an administrator to file an inventory of a "claim" or other interest belonging to the decedent's estate does not forfeit the right of the heirs to any portion of the estate. Neither is it necessary for the heirs to obtain authority from the probate court to prosecute an action for the recovery of an interest in their ancestor's estate. Stewart *v.* Chadwick, 8 Iowa 463.

79. *Alabama.*— Sullivan *v.* Lawler, 72 Ala. 68; Costephens *v.* Dean, 69 Ala. 385 (bill to enforce vendor's lien for purchase-money of land sold by intestate); Allen *v.* Greene, 19 Ala. 34 (bond for title).

Arkansas.— Purcelly *v.* Carter, 45 Ark. 299; Whelan *v.* Edwards, 31 Ark. 723; Anthony *v.* Peay, 18 Ark. 24; Lemon *v.* Rector, 15 Ark. 436 Johnson *v.* Pierce, 12 Ark. 599, action on covenant in a bond to pay money to a person "or his heirs or legal representatives." See also McCustian *v.* Ramey, 33 Ark. 141.

Colorado.— Hall *v.* Cowles, 15 Colo. 343, 25 Pac. 705.

Connecticut.— West *v.* Howard, 20 Conn. 581, holding that where a husband purchased land with funds claimed to be his wife's separate property, and sold and conveyed it to a purchaser having no notice of the trust, the heir of the wife, after her death, could not maintain a suit against the husband for relief, as the right of the wife vested in her administrator, and he alone could sue.

Illinois.— Leamon *v.* McCubbin, 82 Ill. 263.

Indiana.— Brunson *v.* Henry, 140 Ind. 455, 39 N. E. 256; Pond *v.* Sweetser, 85 Ind. 144; Begien *v.* Freeman, 75 Ind. 398; Ferguson *v.* Barnes, 58 Ind. 169; Frink *v.* Bellis, 33 Ind. 135, 5 Am. Rep. 193; Walpole *v.* Bishop, 31 Ind. 156 (action for money due); Hall *v.* Bramlee, 28 Ind. App. 178, 62 N. E. 457; Murray *v.* Cazier, 23 Ind. App. 600, 53 N. E. 476, 55 N. E. 880.

Iowa.— Baird *v.* Brooks, 65 Iowa 40, 21 N. W. 163; Haynes *v.* Harris, 33 Iowa 516; Rhodes *v.* Stout, 26 Iowa 313.

Kansas.— Presbury *v.* Pickett, 1 Kan. App. 631, 42 Pac. 405.

Kentucky.— McChord *v.* Fisher, 13 B. Mon. 193; Brunk *v.* Means, 11 B. Mon. 214; Loyd *v.* Loyd, 46 S. W. 485, 20 Ky. L. Rep. 347. See also Wiggins *v.* Cracraft, 40 S. W. 907, 19 Ky. L. Rep. 477, holding that a judgment ordering a sale of land to pay a debt due a decedent could not be revived by his heirs, as they had no right to collect debts due the decedent.

Maryland.— Schaub *v.* Griffin, 84 Md. 557, 36 Atl. 443; Hanson *v.* Hanson, 4 Gill 69.

Massachusetts.— Gale *v.* Nickerson, 151 Mass. 428, 24 N. E. 400, 9 L. R. A. 200; Smith *v.* Dyer, 16 Mass. 18, mortgage.

Michigan.— Bourget *v.* Monroe, 58 Mich. 563, 25 N. W. 514; Hollowell *v.* Cole, 25 Mich. 345.

Mississippi.— Kitchins *v.* Harrall, 54 Miss. 474; Miller *v.* Womack, Freem. 486. See also Conklin *v.* Alabama, etc., R. Co., 81 Miss. 152, 32 So. 920, holding that heirs could not sue for damages for trespass on lands of their ancestor committed in his lifetime.

Missouri.—Hellman *v.* Wellenkamp, 71 Mo. 407; Brueggeman *v.* Jurgensen, 24 Mo. 87; Jacobs *v.* Maloney, 64 Mo. App. 270; State *v.* Moore, 18 Mo. App. 406. See also Burford *v.* Aldridge, 165 Mo. 419, 63 S. W. 109, 65 S. W. 720.

Nebraska.— Cox *v.* Yeazel, 49 Nebr. 343, 68 N. W. 483, holding that discharge of an administrator before final settlement of the estate does not entitle the heirs to sue for debts due the intestate in their own names.

New Jersey.— Shaver *v.* Shaver, 1 N. J. Eq. 437.

New York.— Palmer *v.* Green, 63 Hun 6, 17 N. Y. Suppl. 441 (one next of kin cannot sue the other next of kin for his distributive share); Clason *v.* Lawrence, 3 Edw. 48.

North Carolina.— Nance *v.* Powell, 39 N. C. 297 (holding that suit against a debtor of a decedent by the next of kin cannot be maintained on the ground that the administrator could not prove the case if suit were brought by him, but that he could be a witness in a suit brought by others); Foster *v.* Cook, 8 N. C. 509.

Ohio.— Rousch *v.* Hundley, 2 Ohio Dec. (Reprint) 445, 3 West. L. Month. 126.

Pennsylvania.— Griffin *v.* Brower, 21 Pa. Co. Ct. 188, collection of mortgage.

South Carolina.—Darwin *v.* Moore, 58 S. C. 164, 36 S. E. 539 (mortgage); Kaminer *v.* Hope, 9 S. C. 253.

Tennessee.— Trafford *v.* Wilkinson, 3 Tenn. Ch. 449.

Texas.— Richardson *v.* Vaughn, 86 Tex. 93, 23 S. W. 640 [*affirming* (Civ. App. 1893) 22 S. W. 1112]; Webster *v.* Willis, 56 Tex. 468; Cochran *v.* Thompson, 18 Tex. 652. But see Spencer *v.* Millican, 31 Tex. 65.

United States.— Newman *v.* Schwerin, 61 Fed. 865, 10 C. C. A. 129; Chaplin *v.* U. S., 19 Ct. Cl. 424. See Dexter *v.* Arnold, 7 Fed. Cas. No. 3,857, 1 Sumn. 109.

See 16 Cent. Dig. tit. "Descent and Distribution," § 253 *et seq.* See also *supra*, IV, A, 4, c.

is no administration and where there are no debts of the estate or they have all been paid, and nothing remains but to reduce the assets to possession and distribute them to the heirs or next of kin;[80] where, there being no debts, the estate is divided by agreement among the heirs and distributees, and a distributee to whom a note, or note and mortgage, is allotted as part of his share sues thereon in his own name;[81] where the estate has been finally settled;[82] where the time for granting letters of administration has expired;[83] where administration has ceased by death or resignation of the administrator, and for a long time there has been no

Breach of contract to convey land.— Heirs can maintain an action for breach of a contract to convey real estate to their intestate where the breach occurred after his death, but not where it occurred before his death. Mt. Sterling, etc., Turnpike Co. *v.* Barry, 38 S. W. 847, 18 Ky. L. Rep. 937.

Action by heir for share of deceased distributee or legatee see *supra*, IV, A, 4, e.

Actions on covenants real see *supra*, IV, A, 4, d, (II).

80. *Alabama.*— McGhee *v.* Alexander, 104 Ala. 116, 16 So. 148; Wright *v.* Robinson, 94 Ala. 479, 10 So. 319 (suit to foreclose mortgage); Cooper *v.* Davison, 86 Ala. 367, 5 So. 650 (suit to foreclose mortgage); Sullivan *v.* Lawler, 72 Ala. 68; Vanzant *v.* Morris, 25 Ala. 285.

Arkansas.— Crane *v.* Crane, 51 Ark. 287, 11 S. W. 1, scire facias to revive judgment.

Indiana.— Robertson *v.* Robertson, 120 Ind. 333, 22 N. E. 310; Holzman *v.* Hibben, 100 Ind. 338; Salter *v.* Salter, 98 Ind. 522; Williams *v.* Riley, 88 Ind. 290; Begien *v.* Freeman, 75 Ind. 398 (action by widow who was sole heir); Moore *v.* Monroe County, 59 Ind. 516; Ferguson *v.* Barnes, 58 Ind. 169; Schneider *v.* Piessner, 54 Ind. 524; Mitchell *v.* Dickson, 53 Ind. 110; Martin *v.* Reed, 30 Ind. 218.

Mississippi.— Kitchins *v.* Harrall, 54 Miss. 474; Ricks *v.* Hilliard, 45 Miss. 359 (recovery of compensation for use of personal property); Hargroves *v.* Thompson, 31 Miss. 211.

Missouri.— McDowell *v.* Christian Church Orphan School, 87 Mo. App. 386, holding that where the ancestor had been dead for many years, without debts, assets, or administration, his heirs could maintain an action for a legacy accruing to him.

Nebraska.— Cox *v.* Yeazel, 49 Nebr. 343, 68 N. W. 483.

New York.— McDowl *v.* Charles, 6 Johns. Ch. 132, sustaining a suit in equity where plaintiff and defendant were the only heirs, and there were no debts against the estate, and defendant, who was indebted to the estate, would not administer, and there was no other person entitled to the administration.

Tennessee.— Hurt *v.* Fisher, 96 Tenn. 570, 35 S. W. 1085.

Texas.— Walker *v.* Abercrombie, 61 Tex. 69 (action of debt on judgment); America Sun L. Ins. Co. *v.* Phillips, (Civ. App. 1902) 70 S. W. 603 (action on life-insurance policy); Hynes *v.* Winston, (Civ. App. 1899) 54 S. W. 1069, holding also that the heirs could sue although an administration was pending in another state.

Vermont.— Babbitt *v.* Bowen, 32 Vt. 437, suit on note and to foreclose mortgage.

See 16 Cent. Dig. tit. "Descent and Distribution," § 255.

Contra.— Leamon *v.* McCubbin, 82 Ill. 263; Murphy *v.* Hanrahan, 50 Wis. 485, 7 N. W. 436. But *compare* People *v.* Abbott, 105 Ill. 588 [*affirming* 10 Ill. App. 62].

Where there is an administrator the heir cannot sue, even where there are no debts. Finnegan *v.* Finnegan, 125 Ind. 262, 25 N. E. 341 (holding that a complaint by an heir to recover a debt due the estate is fatally defective in not alleging that no letters of administration have been granted on the estate, and that it is not enough to allege merely that all debts have been paid); Cox *v.* Yeazel, 49 Nebr. 343, 68 N. W. 483.

81. Carter *v.* Owens, 41 Ala. 217; Martin *v.* Reed, 30 Ind. 218; Granger *v.* Harriman, 89 Minn. 303, 94 N. W. 869; Babbitt *v.* Bowen, 32 Vt. 437, suit on note and to foreclose mortgage. *Contra*, Rousch *v.* Hundley, 2 Ohio Dec. (Reprint) 445, 3 West. L. Month. 126. See also *supra*, IV, A, 4, c. Where there are no creditors of an estate, and the heirs are competent to, and do, consent to the transfer, by the administrator, of a mortgage belonging to the estate to one of the heirs in part satisfaction of his share of the estate, and such transfer is afterward ratified by the court in which the estate is being administered, such ratification relates back to the transfer, and is equivalent to a prior authorization, and such heir or his assignee may sue in his own name to foreclose the mortgage. Plummer *v.* Park, 62 Nebr. 665, 87 N. W. 534.

82. *Alabama.*— Wooten *v.* Steele, 98 Ala. 252, 13 So. 563.

Kansas.— Humphreys *v.* Keith, 11 Kan. 108.

Kentucky.— Suit *v.* Crawford, 100 Ky. 355, 38 S. W. 500, 18 Ky. L. Rep. 784, holding that when an administrator has paid all debts, settled his accounts, and turned a note of the estate over to the heirs, they may sue thereon in their own name without appointment of an administrator *de bonis non*.

Minnesota.— Pratt *v.* Pratt, 22 Minn. 148.

Texas.— Lacy *v.* Williams, 8 Tex. 182.

United States.— Hubbard *v.* Urton, 67 Fed. 419.

Compare, however, Davis *v.* Corwine, 25 Ohio St. 668.

83. Phinny *v.* Warren, 52 Iowa 332, 1 N. W. 522, 3 N. W. 157. *Contra*, Brown *v.* Bibb, 2 Coldw. (Tenn.) 434; Trafford *v.* Wilkinson, 3 Tenn. Ch. 449.

effort to renew it;[84] where the administrator dies pending an action by him, after the estate has been settled and all debts paid;[85] where, although the debts of the estate have not been paid, a long time has elapsed without any effort to administer;[86] or where, by reason of fraud, collusion, insolvency, or refusal to sue on the part of the administrator, or other special circumstances, it is necessary for distributees or heirs to sue in equity to enforce their rights.[87]

(v) *Recovery of Property Conveyed by Ancestor and Reduction of Donations.* Subject to the general exceptions stated in the preceding sections, heirs or distributees may sue to set aside conveyances or transfers of property and to recover the same on such grounds as infancy[88] or mental incapacity of the ancestor,[89] fraud, duress, or undue influence,[90] fraudulent alteration,[91] ille-

84. Sanders *v.* Moore, 52 Ark. 376, 12 S. W. 783. And see Clay *v.* Clay, 13 Tex. 195. But see Miller *v.* Womack, Freem. (Miss.) 486.

85. Crane *v.* Crane, 51 Ark. 287, 11 S. W. 1, death of administrator pending scire facias to revive judgment.

86. Graves *v.* Pinchback, 47 Ark. 470, 1 S. W. 682.

87. McChord *v.* Fisher, 13 B. Mon. (Ky.) 193; Loyd *v.* Loyd, 46 S. W. 485, 20 Ky. L. Rep. 347; Miller *v.* Womack, Freem. (Miss.) 486; Fleming *v.* McKesson, 56 N. C. 316 (administrator under influence of the debtor to the estate); Nance *v.* Powell, 39 N. C. 297; Trotter *v.* Mutual Reserve Fund L. Assoc., 9 S. D. 596, 70 N. W. 843, 62 Am. St. Rep. 887.

88. *Alabama.*—Sharp *v.* Robertson, 76 Ala. 343.

Arkansas.— See Bozeman *v.* Browning, 31 Ark. 364, purchase-money must be tendered back.

Illinois.— Illinois Land, etc., Co. *v.* Bonner, 75 Ill. 315.

Indiana.— Gillenwaters *v.* Campbell, 142 Ind. 529, 41 N. E. 1041.

Kentucky.— Breckenridge *v.* Ormsby, 1 J. J. Marsh. 236, 19 Am. Dec. 71.

Maryland.— Levering *v.* Heighe, 2 Md. Ch. 81.

Mississippi.— Harvey *v.* Briggs, 68 Miss. 60, 8 So. 274, 10 L. R. A. 62.

Missouri.— Harris *v.* Ross, 86 Mo. 89, 56 Am. Rep. 411; Ferguson *v.* Bell, 17 Mo. 347.

New York.— O'Rourke *v.* Hall, 38 N. Y. App. Div. 534, 56 N. Y. Suppl. 471.

Texas.— Searcy *v.* Hunter, 81 Tex. 644, 17 S. W. 372, 26 Am. St. Rep. 837; Veal *v.* Fortson, 57 Tex. 482.

England.—Whittingham's Case, 8 Coke 42*b*. And see Brown *v.* Brown, L. R. 2 Eq. 481, 14 L. T. Rep. N. S. 694.

See, generally, Infants.

Affirmance by ancestor.— If the ancestor has affirmed the conveyance after becoming of age, the heir is bound thereby. Ferguson *v.* Bell, 17 Mo. 347; O'Rourke *v.* Hall, 38 N. Y. App. Div. 534, 56 N. Y. Suppl. 471; Searcy *v.* Hunter, 81 Tex. 644, 17 S. W. 372, 26 Am. St. Rep. 837.

Heir may affirm infant ancestor's deed.— Illinois Land, etc., Co. *v.* Bonner, 75 Ill. 315.

What constitutes affirmance of deed by heir see Illinois Land, etc., Co. *v.* Bonner, 75 Ill. 315.

89. *Alabama.*—Kennedy *v.* Marrast, 46 Ala. 161.

Indiana.— Physio-Medical College *v.* Wilkinson, 108 Ind. 314, 9 N. E. 167 (also as to when consideration need not be restored); Northwestern Mut. F. Ins. Co. *v.* Blankenship, 94 Ind. 535, 48 Am. Rep. 185; Schuff *v.* Ransom, 79 Ind. 458; Somers *v.* Pumphrey, 24 Ind. 231.

Kentucky.— Wall *v.* Hill, 1 B. Mon. 290, 36 Am. Dec. 578.

Maine.— Hovey *v.* Hobson, 53 Me. 451, 89 Am. Dec. 705.

Maryland.— Evans *v.* Horan, 52 Md. 602, heir must sue in equity and not at law in ejectment.

Michigan.— Hunt *v.* Rabitoay, 125 Mich. 137, 84 N. W. 59, 84 Am. St. Rep. 563; Rogers *v.* Blackwell, 49 Mich. 192, 13 N. W. 512.

Missouri.— McAnaw *v.* Tiffin, 143 Mo. 667, 45 S. W. 656.

New Jersey.— Eaton *v.* Eaton, 37 N. J. L. 108, 18 Am. Rep. 716; Foth *v.* Ellenberger, (Ch. 1900) 47 Atl. 216; Hall *v.* Otterson, 52 N. J. Eq. 522, 28 Atl. 907.

Oregon.— King *v.* Boyd, 4 Oreg. 326.

Virginia.— Wigglesworth *v.* Steers, 1 Hen. & M. 70, 3 Am. Dec. 602, drunkenness.

United States.— Harding *v.* Handy, 11 Wheat. 103, 6 L. ed. 429; German Sav., etc., Soc. *v.* De Lashmutt, 67 Fed. 399.

England.— Beverley's Case, 4 Coke 123*b*, Fitzh. N. Br. 532.

See, generally, Insane Persons.

90. *California.*— Trubody *v.* Trubody, 137 Cal. 172, 69 Pac. 968.

District of Columbia.— Webb *v.* Janney, 9 App. Cas. 41.

Kansas.— Brown *v.* Brown, 62 Kan. 666, 64 Pac. 599.

Michigan.— See Snyder *v.* Snyder, 131 Mich. 658, 92 N. W. 353, holding that the heirs of a decedent could sue in equity to set aside a deed by the decedent, a mortgage back, and a subsequent assignment of the mortgage.

Mississippi.—Foxworth *v.* Bullock, 44 Miss. 457.

Nebraska.— Rakes *v.* Brown, 34 Nebr. 304, 51 N. W. 848.

New York.— Keenan *v.* Keenan, 12 N. Y. Suppl. 747.

United States.— Harding *v.* Handy, 11 Wheat. 103, 6 L. ed. 429.

91. Young *v.* Bilderback, 3 N. J. Eq. 206.

gality,[92] failure of consideration,[93] and the like.[94] Forced heirs[95] may sue to set aside conveyances, mortgages, and donations by their ancestor, which are invalid as against them, and to recover the property.[96]

b. Jurisdiction. Courts of ordinary jurisdiction have cognizance of such actions as may be maintained by heirs or distributees for injuries to the inheritance.[97] As a general rule such courts, and not probate courts, have jurisdiction of actions or suits by heirs or distributees to recover possession of real estate descended to them from ancestors,[98] or rents and profits,[99] or personal property.[1] Courts of chancery and not probate courts have jurisdiction of actions by forced heirs or other distributees to set aside conveyances or donations of property made by their ancestors.[2] Whether heirs and distributees must sue at law or in equity depends upon the relief sought and other considerations which determine whether the remedy in particular cases is at law or in equity.[3]

92. Mills *v.* Alexander, 21 Tex. 154, heir must restore price paid and place the grantee *in statu quo*.

93. Lane *v.* Lane, 106 Ky. 530, 50 S. W. 857, 21 Ky. L. Rep. 9. See also Rakes *v.* Brown, 34 Nebr. 304, 51 N. W. 848. *Compare* Hensley *v.* Hensley, 30 S. W. 613, 17 Ky. L. Rep. 122. Where children to whom land was conveyed by their father and mother in consideration of their agreement to support the mother during her life have refused to comply with the agreement the mother may have the deed canceled. Lane *v.* Lane, 106 Ky. 530, 50 S. W. 857, 21 Ky. L. Rep. 9.

94. **Inadequacy of consideration.**— Heirs cannot attack a conveyance by their ancestor solely on the ground of inadequacy of consideration. Chiles *v.* Coleman, 2 A. K. Marsh. (Ky.) 296, 12 Am. Dec. 396. And see McCalla *v.* Bane, 45 Fed. 828.

An heir who has alienated his inheritance cannot sue to set aside a conveyance by his ancestor. Martin *v.* Martin, 15 La. Ann. 585; McCalla *v.* Bane, 45 Fed. 828.

95. **Rights of forced heirs** see *supra*, III, A, 5.

96. Cox *v.* Von Ahlefeldt, 105 La. 543, 30 So. 175; Ball's Succession, 43 La. Ann. 342, 9 So. 45; Moore *v.* Wartelle, 39 La. Ann. 1067, 3 So. 384; Lazare *v.* Jacques, 15 La. Ann. 599; McQueen *v.* Sandel, 15 La. Ann. 140; Benoit *v.* Benoit, 3 La. 223; Becton *v.* Alexander, 27 Tex. 659; Crain *v.* Crain, 17 Tex. 80; Kerwin *v.* Hibernia Ins. Co., 25 Fed. 692, under Louisiana statute. Third possessors cannot be sued by a forced heir for his legitime until the donee's or legatee's property be discussed. Hodder *v.* Shepherd, 1 La. 505.

97. Lee *v.* Carter, 52 La. Ann. 1453, 27 So. 739 (action by children as heirs of mother against father for conversion of property belonging to mother's succession, which was opened in another parish twenty years before and never closed); Waters *v.* Mercier, 4 La. 14 (action against creditor for recording as a mortgage against heirs a judgment obtained against the succession). And see the cases cited *supra*, IV, A, 13, a, (I)-(V).

98. Donaldson *v.* Dorsey, 4 Mart. N. S. (La.) 509. And see the cases cited *supra*, IV, A, 13, a, (II).

Jurisdiction of probate courts see also *supra*, IV, A, 3, a. And see COURTS, 11 Cyc. 679, 791.

99. Stewart *v.* Pickard, 10 Rob. (La.) 18; Overton *v.* Overton, 10 La. 466; Donaldson *v.* Dorsey, 4 Mart. N. S. (La.) 509.

1. Le Page *v.* New Orleans Gas Light, etc., Co., 7 Rob. (La.) 183. And see the cases cited *supra*, IV, A, 13, a, (III), (IV). See also *supra*, IV, A, 3, a.

2. *Louisiana.*— Benoit *v.* Benoit, 3 La. 223, denying jurisdiction of probate court of action by heir to set aside conveyance by ancestor.

Missouri.— Davis *v.* Davis, 5 Mo. 183, holding court of equity to have jurisdiction of action by wife to set aside conveyance of slave from husband to son.

Pennsylvania.— Fretz's Appeal, 4 Watts & S. 433, denying jurisdiction of orphans' court of action by heir to recover personal property of ancestor held by trustee.

Texas.— Crain *v.* Crain, 17 Tex. 80, sustaining an action in the district court by heirs to recover property fraudulently conveyed by an ancestor.

United States.— Kerwin *v.* Hibernia Ins. Co., 25 Fed. 692, an action by heirs to recover real estate wrongfully placed in the name of ancestor's wife.

See 16 Cent. Dig. tit. "Descent and Distribution," § 369. And see *supra*, IV, A, 13, a, (V).

3. See the following cases:

Alabama.— Tyson *v.* Brown, 64 Ala. 244 (holding that heirs at law cannot maintain a bill in equity against a purchaser at a sale made under an order of the probate court, to recover the possession of lands, with an account of the rents and profits, when the order of sale is void on its face for want of jurisdiction, since, as their legal title is not divested by the sale, their remedy at law is adequate and complete); McIntosh *v.* Reid, 45 Ala. 456 (bill in equity to enforce a vendor's lien).

Indiana.— Egbert *v.* Thomas, Smith 206, holding that an action at law and not in equity was the remedy of heirs against the decedent's widow for an accounting as to the rents and profits of real estate of which she had retained possession.

Maryland.— Schaub *v.* Griffin, 84 Md. 557, 36 Atl. 443, holding that heirs or distributees

c. Limitations and Laches — (I) *IN GENERAL.* Where the statute expressly limits the right of action in favor of heirs or their assigns to a prescribed time, and declares that the rights of the heirs to the inheritance shall vest immediately upon the death of the ancestor, the rights of such heirs or their assignees will be barred by the limit of time so prescribed.[4] The statute of limitations does not run so as to bar the claims of the heirs of a deceased wife as against her husband or his representatives in possession of her property as trustees.[5] Nor does a decree of court recognizing a widow as heir of her husband, and placing her in possession, definitely fix her status as such heir, so as to bar the rights of the husband's heirs to recover as against the wife, under the statute limiting rights of action.[6]

(II) *ACTIONS RELATING TO REAL PROPERTY.* The statutes of limitation apply to actions by heirs or distributees to recover possession of real estate the same as in other actions;[7] and where there is administration, the same lapse of time by adverse holding that will bar the administrator from bringing action will also bar the heirs.[8]

(III) *ACTIONS RELATING TO PERSONAL PROPERTY.* Where heirs or distributees allow the administrator to remain in possession of personal property for a long period of time, treating it as his own, with their knowledge and approval, their laches will bar their right to recover it;[9] but the statute of limitations does

may sue the administrator in equity for their distributive shares.

Missouri.— Davis *v.* Davis, 5 Mo. 183, suit in equity to set aside conveyance by ancestor.

New Jersey.— Romaine *v.* Hendrickson, 24 N. J. Eq. 231 (suit in equity to set aside conveyance by executors); Ware *v.* Ware, 6 N. J. Eq. 117 (suit in equity by heir to restrain the cutting of timber on land of intestate).

United States.— Kerwin *v.* Hibernia Ins. Co., 25 Fed. 692, holding that equity courts have jurisdiction of a cause seeking to set aside mortgages or conveyances of real estate, brought by forced heirs to recover their legitime, in which the real estate is alleged to have been wrongfully placed in the name of the wife of their ancestor, and wrongfully declared to have been acquired by her separate and paraphernal funds, and where an account must be taken to ascertain the estate.

See also *supra*, IV, A, 13, a, (I)-(V), and cases there cited.

4. See, generally, LIMITATIONS OF ACTIONS.

Actions or proceedings to establish rights as heir or distributee see *supra*, III, A, 3, b.

Action by child of prior marriage of deceased husband see *supra*, III, B, 9, b, note 85.

Reduction of excessive donations.— Where one section of the statute provided that on the death of the donor the reduction, whether *inter vivos* or *mortis causa*, could be sued for only by the forced heirs or their assigns; and another provided that the reduction for excessive donations should be prescribed by five years; and another provided that a succession should be acquired by the legal heir immediately after the death of the person whom he succeeds, it was held that an excessive donation conferred a title as against a forced heir which could not be defeated after the lapse of five years. Cox *v.* Von Ahlefeldt, 105 La. 543, 30 So. 175.

5. Ord *v.* De la Guerra, 18 Cal. 67.

6. Nash's Succession, 48 La. Ann. 1573, 21 So. 254.

7. *Florida.*— Mathews *v.* Durkee, 34 Fla. 559, 16 So. 411, holding that an action of ejectment by heirs would not lie where the administrator had allowed time to lapse.

Indiana.— Grubbs *v.* Leyendecker, 153 Ind. 348, 53 N. E. 940, holding that the claim of a daughter in lands of her intestate father, which had been conveyed by the widow, was barred by the twenty years' limitation, although dower had never been assigned to the widow, since, by statute, the daughter might have asked that dower be assigned after one year's delay by the widow, or might have had her part of the land set off to her subject to the widow's dower.

New Hampshire.— Foster *v.* Marshall, 22 N. H. 491, holding that where a tenant by the curtesy initiate was disseized, his wife or her heirs had twenty years from his death within which to commence an action to recover possession.

Tennessee.— Burns *v.* Headerick, 85 Tenn. 102, 2 S. W. 259, holding that the lapse of seven years from the death of the widow of a vendor of land was a bar to an action by the heirs of the grantee and their privies, to recover that portion of the land assigned her as dower.

Texas.— Hudson *v.* Jurnigan, 39 Tex. 579, holding that claim of heirs was barred after the lapse of thirteen years.

See 16 Cent. Dig. tit. "Descent and Distribution," § 354.

8. Mathews *v.* Durkee, 34 Fla. 559, 16 So. 411.

9. Where the heirs of a wife allowed the husband, who was administrator of the wife, to use the wife's property as his own for a

not run as against infant heirs or distributees as to personal property in favor of co-heirs or distributees having possession of such property, where the possessor has knowledge of the infancy of his co-heirs or distributees.[10] Nor does the statute run as against heirs or distributees where it will run against an administrator, unless both parties stand in the same position for the purpose of bringing suit.[11]

(IV) *ACTIONS TO SET ASIDE DONATIONS OR CONVEYANCES BY ANCESTOR.* The statute of limitations will run against actions by heirs or distributees to set aside gifts or conveyances made by their ancestors, because of infancy or insanity of the ancestor, or because of fraud against him, or because the gifts or conveyances were in fraud of their rights.[12] In Louisiana a suit by heirs to revoke a sale of real estate by their ancestor, where they claim as forced heirs the rights of creditors, their rights will be prescribed by the same limit of time fixed by statute for creditors.[13] The right of action of forced heirs to sue for the reduction of donations accrues upon the death of the ancestor, but where the succession of the deceased is apparently insolvent an exception to the rule exists.[14]

d. Parties — (I) *IN GENERAL.* The right of heirs and distributees to maintain actions in their own names has been elsewhere considered.[15] Actions to recover shares of an estate or property belonging to the estate, whether at law or in equity, must be brought by the party or parties entitled;[16] and as a general rule all of the parties in interest must be made parties plaintiff or defendant, in order that all rights may be adjudicated, and that the judgment or decree rendered may be final.[17]

period of twenty-three years it was held that they were barred from claiming it. Allen *v.* Colburn, 65 N. H. 37, 17 Atl. 1060, 23 Am. St. Rep. 20.

10. Snowden *v.* Pope, Rice Eq. (S. C.) 174, holding that a husband taking possession of personalty of wife, with knowledge that there was an infant heir, was not entitled to plead the statute of limitations as against such heir.

11. Where property sold by an administrator had been removed from the state, it was held, in a suit by distributees for its recovery, that the statute could not be set up on the ground that the administrator might have sued for it in the state to which it was removed. Kilpatrick *v.* Bush, 23 Miss. 199.

12. In an action by heirs to set aside a deed of their ancestor on the ground of fraud, the cause of action will not be deemed to have accrued at the time of the delivery of the deed or of the death of the ancestor, but at the time of the discovery of the fraud by means of which the grantor was induced to execute and deliver the same. Brown *v.* Brown, 62 Kan. 666, 64 Pac. 599. See, generally, LIMITATIONS OF ACTIONS.

Laches see CANCELLATION OF INSTRUMENTS, 6 Cyc. 300.

Actions by heirs to set aside excessive and inofficious donations by ancestors are prescribed by five years, where plaintiff resides within the state, and by ten years as to non-residents. Lagrange *v.* Barré, 11 Rob. (La.) 302.

13. Moore *v.* Wartelle, 39 La. Ann. 1067, 3 So. 384.

14. Ball's Succession, 43 La. Ann. 342, 9 So. 45.

15. Heirs or distributees as proper parties to sue see *supra*, IV, A, 13.

16. *Indiana.*— Murray *v.* Cazier, 23 Ind. App. 600, 53 N. E. 476, 55 N. E. 880, holding that a widow could not maintain an action on a lease as the survivor of her husband, whatever right she might have to the rents as the owner of the land or a part of it.

Iowa.— Stewart *v.* Chadwick, 8 Iowa 463.

Kentucky.— Wiggins *v.* Cracraft, 40 S. W. 907, 19 Ky. L. Rep. 477, holding that a judgment ordering a sale of land to pay a debt due decedent could not be revived by his heirs, although no administrator had been appointed, as the heirs had no right to collect debts due the decedent.

Maryland.— Schaub *v.* Griffin, 84 Md. 557, 36 Atl. 443, suit by surviving distributees for distribution of share of deceased distributee.

Pennsylvania.— Gourley *v.* Kinley, 66 Pa. St. 270.

Texas.— Grayson *v.* Winnie, 13 Tex. 288, holding that the heirs of a decedent, after discharge of the administrator, might prosecute a suit commenced by the latter, although for the benefit of a third party who was the real owner of the original cause of action.

17. *Georgia.*— Henderson *v.* Napier, 107 Ga. 342, 33 S. E. 433 (holding that an equitable petition by heirs against the administrator and widow of the decedent to enforce parol agreement will not be sustained where the allegations therein show that other heirs who are not parties thereto have an interest in the property adverse to the interests of plaintiffs); Dennis *v.* Smith, 61 Ga. 269.

Iowa.— Phinny *v.* Warren, 52 Iowa 332, 1 N. W. 522, 3 N. W. 157.

Mississippi.—Foxworth *v.* Bullock, 44 Miss. 457.

Missouri.— Burford *v.* Aldridge, 165 Mo. 419, 63 S. W. 109, 65 S. W. 720, holding that

(II) *Actions Relating to Real Property.* Heirs or distributees who together take title by descent to real estate may join in an action for its recovery,[18] and they must be joined where the statute, in terms, or by intendment, requires it.[19] In some states by statute one may maintain an action for the benefit of the others.[20] In actions by heirs or distributees with respect to real property, the general rule is that all parties in interest must be joined or made parties;[21] but this does not require joinder of the administrators or the widow of the decedent unless it appears that they have some interest in the subject-matter in litigation.[22] The widow of an intestate may maintain an action of trespass to try title to the real estate of her intestate without joining her co-heirs;[23] and where she becomes vested with the powers of a guardian in socage of infant heirs, upon the death of the husband, she and not the heirs must sue for use and occupation, as well as for injury to the possession.[24] As a general rule, however, only the heirs can sue for rent, which becomes apportioned to them upon the death of the ancestor and descent of the property, and they may bring separate actions for their respective shares.[25] They may maintain separate actions of ejectment for their portions of the estate upon breach of the condition to pay rent in a lease of the ancestor.[26]

on a petition by heirs of a decedent to enforce a trust under the will of an ancestor of such decedent, plaintiffs should amend by making the administrator of the decedent a party, or by showing why they were entitled to sue in their own name.

New Jersey.— Young *v.* Bilderback, 3 N. J. Eq. 206.

South Dakota.— Trotter *v.* Mutual Reserve Fund L. Assoc., 9 S. D. 596, 70 N. W. 843, 62 Am. St. Rep. 887.

United States.— West *v.* Randall, 29 Fed. Cas. No. 17,424, 2 Mason 181.

18. Campbell *v.* Wallace, 12 N. H. 362, 37 Am. Dec. 219; Malcom *v.* Rogers, 5 Cow. (N. Y.) 188, 15 Am. Dec. 464, holding that co-heirs, who were tenants in common, might join or bring separate actions for their interests.

19. Daniels *v.* Daniels, 7 Mass. 135, holding that the statute of distribution required joinder of heirs in an action for destruction of title deeds.

20. Moulton *v.* McDermott, 80 Cal. 629, 22 Pac. 296, ejectment maintained by one of several co-distributees, as tenants in common, for the benefit of the others.

Action on contract.— Where part of a number of joint heirs to real estate made a contract with a third party to purchase at a foreclosure sale for their benefit, it was held that they had a right to sue in their own names for the enforcement of the contract, even if it did inure to the benefit of their co-heirs, and that it was not necessary to make the co-heirs parties defendant. Tinkler *v.* Swaynie, 71 Ind. 562.

21. McKay *v.* Mayes, 29 S. W. 327, 16 Ky. L. Rep. 862.

22. *Indiana.*— King *v.* Anderson, 20 Ind. 385, holding that in an action by heirs to recover rent accruing to the estate of the ancestor, the administrator may be made a party if it can be shown that such rents have been paid to him.

Iowa.— Stewart *v.* Chadwick, 8 Iowa 463, holding that a widow cannot join in a bill to enforce a trust in favor of heirs in lands of her husband, her remedy being to wait and apply to the heirs for dower.

New York.— Shepard *v.* Manhattan R. Co., 117 N. Y. 442, 23 N. E. 30, holding that before dower has been assigned a widow may join with the heirs of the deceased coöwner to enjoin injury to the land.

Pennsylvania.— A widow cannot join with the heirs in ejectment to recover lands of her deceased husband. Gourley *v.* Kinley, 66 Pa. St. 270; Dwyer *v.* Wright, 14 Pa. Co. Ct. 406.

Rhode Island.— Gorton *v.* Potter, 16 R. I. 493, 17 Atl. 909, holding that in ejectment by an heir to recover real estate leased by the widow as administratrix, the widow could not be joined where her interest was only her right of dower.

Tennessee.— Stockard *v.* Pinkard, 6 Humphr. 119, holding that, in a suit by heirs to set aside a conveyance of real estate of their ancestor, sold under execution, it was not their duty to make the administrator a party, but that the purchaser might do so by cross action if he so wished.

Compare Burford *v.* Aldridge, 165 Mo. 419, 63 S. W. 109, 65 S. W. 720.

See 16 Cent. Dig. tit. "Descent and Distribution," § 355.

23. McFadden *v.* Haley, 1 Brev. (S. C.) 96.

24. Sylvester *v.* Ralston, 31 Barb. (N. Y.) 286.

25. Cole *v.* Patterson, 25 Wend. (N. Y.) 456. See also Jones *v.* Felch, 3 Bosw. (N. Y.) 63, holding that a statute providing that all parties who are united in interest in the subject-matter of a suit must be joined therein as plaintiffs or defendants does not apply to actions for rent by the heirs.

Heirs who have received advancements and refused to come into hotchpot are not proper co-plaintiffs in actions for use and occupation against a tenant holding the estate. The other heirs may sue for and recover all the rents accrued both after the death of the ancestor and after partition. Clark *v.* Fox, 9 Dana (Ky.) 193.

26. Cruger *v.* McLaury, 41 N. Y. 219 [*affirming* 51 Barb. 642].

(III) *ACTIONS RELATING TO PERSONAL PROPERTY.* In actions by heirs or distributees to recover a distributive share of an estate, all of the other parties in interest, including the administrator where personal property is sued for, must be made parties,[27] unless it is shown that the case is within some exception to the rule requiring all persons materially interested in the suit to be made parties,[28] or unless the defect is waived by an answer to the merits.[29]

(IV) *ACTIONS TO SET ASIDE DONATIONS OR CONVEYANCES BY ANCESTOR.* In suits to set aside conveyances of land by an intestate because of infancy, mental incapacity, fraud, etc.,[30] all the heirs and devisees are proper and generally necessary parties.[31] Executors or administrators may properly join with forced heirs, in actions to set aside conveyances of real estate made by the ancestor on grounds of simulation;[32] but such representatives cannot maintain such an action alone.[33] Where, pending an action to set aside a deed of real estate, plaintiff dies intestate, the action may be revived and continued in the names of his heirs.[34]

e. **Pleading** — (I) *BILL, DECLARATION, OR COMPLAINT.* Persons suing as heirs or distributees must allege in their bill, declaration, or complaint all the facts necessary to establish their right as such,[35] and they must do so without

27. *Georgia.*— Dennis *v.* Smith, 61 Ga. 269.
Iowa.— Phinny *v.* Warren, 52 Iowa 332, 1 N. W. 522, 3 N. W. 157.
Kansas.— Humphreys *v.* Keith, 11 Kan. 108.
Minnesota.— Pratt *v.* Pratt, 22 Minn. 148.
South Dakota.— Trotter *v.* Mutual Reserve Fund L. Assoc., 9 S. D. 596, 70 N. W. 843, 62 Am. St. Rep. 887.
Tennessee.— Smith *v.* Gooch, 6 Lea 536; Alexander *v.* Espy, 6 Humphr. 157.
United States.— Cowan *v.* U. S., 5 Ct. Cl. 106; West *v.* Randall, 29 Fed. Cas. No. 17,424, 2 Mason 181.

28. Where joint claims of distributees become severed by consent of the parties one of such distributees may sue in his own name for the recovery of his share of the personal estate. Pratt *v.* Pratt, 22 Minn. 148, action on note given intestate.

29. In a suit by one distributee alone on a note given to the intestate, after final settlement of the estate, it was held that the defect of parties was waived by a plea to the merits. Humphreys *v.* Keith, 11 Kan. 108.

30. **Right to maintain such actions** see *supra*, IV, A, 13, a, (V).

31. *Kansas.*— Brown *v.* Brown, 62 Kan. 666, 64 Pac. 599.
Kentucky.— Lane *v.* Lane, 106 Ky. 530, 50 S. W. 857, 21 Ky. L. Rep. 9.
Mississippi.—Foxworth *v.* Bullock, 44 Miss. 457.
New Jersey.— Young *v.* Bilderback, 3 N. J. Eq. 206.
New York.— Keenan *v.* Keenan, 12 N. Y. Suppl. 747.

32. Guilbeau *v.* Thibodeau, 30 La. Ann. 1099, holding an executor a proper, but not a necessary, party in an action by heirs to set aside a conveyance of realty by their ancestor.

33. Ball *v.* Ball, 42 La. Ann. 204, 7 So. 567, denying the right of executors to demand a reduction of donations in behalf of the heirs.

34. Rakes *v.* Brown, 34 Nebr. 304, 51 N. W. 848. Where a suit in equity to rescind a conveyance of land abates by the death of complainant, the heirs at law or devisees of complainant are the proper parties complainant to a bill of revivor, and not his executor, unless the will creates in the executor a title to the land which authorizes him to prosecute the suit. Webb *v.* Janney, 9 App. Cas. (D. C.) 41.

35. **As to the sufficiency of the pleadings** in particular actions see the following cases:
Alabama.— Sullivan *v.* Lawler, 72 Ala. 74, holding that a bill by distributees for discovery of assets, removal of the administration into the chancery court, and collection of debts due the estate must allege that the administration is ready for settlement, that assets have come into the administrator's hands, and that plaintiffs are unable to prove facts alleged without defendant's answer.
Indiana.— Hall *v.* Brownlee, 28 Ind. App. 178, 62 N. E. 457 (holding that a complaint in an action by an heir for conversion of funds bequeathed by will to his ancestor, which fails to allege that the ancestor died intestate, and fails to state any facts showing that the ancestor ever acquired any vested estate in the funds sued for, is insufficient for want of averments material to the action for conversion, although the construction of the will on which plaintiffs' rights depend is a necessary incident to the suit); Physio-Medical College *v.* Wilkinson, 108 Ind. 314, 9 N. E. 167 (complaint to cancel deed by ancestor); Schuff *v.* Ransom, 79 Ind. 458 (holding that an action by heirs to set aside a deed by their ancestor when of unsound mind cannot be maintained unless some act disaffirming the deed has been done before commencing the suit, and, if the complaint fail to show this, it is bad on demurrer).
Kentucky.— Gayheart *v.* Sibley, 66 S. W. 1041, 23 Ky. L. Rep. 2307 (holding that plaintiffs asserting title to trees growing on land which they claim to have inherited from their father, and suing to enjoin their removal, must allege and prove that their ancestor owned the land and the trees at the

inconsistency,[36] and without multifariousness or misjoinder of causes of action.[37] It is not enough to allege the mere conclusion that they are the heirs or distributees of the intestate, but they must set forth their relationship,[38] and that there are no other persons entitled before them.[39] It is also necessary, where the

time of his death, and that they were his only children, or that they claim by conveyance from such of his children as are not joined as plaintiffs); Langston *v.* Edwards, 54 S. W. 833, 21 Ky. L. Rep. 1277; Nickell *v.* Fallen, 12 S. W. 767, 11 Ky. L. Rep. 621. See also Craig *v.* Welch-Hackly Coal, etc., Co., 73 S. W. 1035, 24 Ky. L. Rep. 2225, 74 S. W. 1097, 25 Ky. L. Rep. 232. Where husband and wife held realty jointly, and the husband conveyed the whole after the wife's death, it was held that allegations in a bill by the children to recover their mother's portion after the death of the husband and the termination of his estate by the curtesy, stating that the land was conveyed as their mother's portion of an estate, being deeded to their mother and father jointly, and that the conveyance was without her knowledge or consent, were sufficient to sustain the action. Berry *v.* Hall, 11 S. W. 474, 11 Ky. L. Rep. 30.

Louisiana.— McQueen *v.* Sandel, 15 La. Ann. 140, holding that allegations that defendant "tortiously detains from plaintiff, without legal right," will not take the place of an allegation of simulation in an action by a child to recover property alienated by his parent by simulated sales.

New York.— Mitchell *v.* Thorne, 134 N. Y. 536, 32 N. E. 10, 30 Am. St. Rep. 699 [*affirming* 57 Hun 405, 10 N. Y. Suppl. 682] (holding that, in an action by heirs of one of several deceased grantors to restrain spoliation of a burial-ground reserved in the deed, the complaint need not allege that they had succeeded to the interests of the other grantors, but that damages for prior injuries could not be recovered unless all the heirs were parties to the complaint; and holding further that allegations that the grantors died intestate were unnecessary, as that would be presumed); Radford *v.* Radford, 40 N. Y. App. Div. 10, 57 N. Y. Suppl. 481 (holding that a complaint by an heir to recover his share of the proceeds of the estate of his ancestor, which had been ordered sold by the court, brought against persons in possession of the premises, which did not show the relations of defendants to the ancestor, or any fraud or deceit in the acquisition of the premises by them, or any failure of the purchaser at the sale to pay the price stated no cause of action); Ellas *v.* Lockwood, Clarke 311 (holding that in a suit by coheirs for an account of the rents of the estate, it was not necessary to show in the bill that a demand made by one of them, before filing the bill, was made by authority of the other).

Ohio.— Pickaway *v.* Hall, 3 Ohio 225.

Texas.— Spaulding *v.* Anders, (Civ. App. 1896) 35 S. W. 407, sustaining a complaint in intervention by an heir to recover land, where the administrator's deed had not been delivered.

See 16 Cent. Dig. tit. "Descent and Distribution," §§ 350, 356, 365, 372. See also *supra*, III, A, 3, c.

36. Banks *v.* Galbraith, 149 Mo. 529, 51 S. W. 105, holding inconsistent, in suit for contribution by pretermitted heirs against a legatee in the ancestor's will, an averment that such will was procured by undue influence.

37. See Banks *v.* Galbraith, 149 Mo. 529, 51 S. W. 105, holding improper as a commingling of two different causes of action, in a suit for contribution by pretermitted heirs against a legatee in the ancestor's will, an averment that such will was procured by undue influence. But where the widow of one of the heirs to a tract of land, which she and her husband together with the other heirs united in conveying, sued to set aside the deed, alleging that herself and husband were induced to sign it by fraudulent representations, it was held that the fact that the complaint also contained all the allegations necessary to an action to recover dower did not make it an action for that purpose, and that there was no improper joinder of causes of action. Keenan *v.* Keenan, 12 N. Y. Suppl. 747.

38. Langston *v.* Edwards, 54 S. W. 833, 21 Ky. L. Rep. 1277; Radford *v.* Radford, 40 N. Y. App. Div. 10, 57 N. Y. Suppl. 481; Pickaway *v.* Hall, 3 Ohio 225. *Compare*, however, Howison *v.* Oakley, 118 Ala. 215, 23 So. 810; Physio-Medical College *v.* Wilkinson, 108 Ind. 314, 9 N. E. 167, both of which cases are referred to *infra*, note 39.

Different relationships.— In a suit by the heirs of a lessor to recover rents, where they are related in different degrees, the relationship of each must be set forth, in order that their respective interests in the estate may appear, and if it is not, the decree fixing the sums due the several plaintiffs will be set aside unless the defect is supplied by the proof. King *v.* Anderson, 20 Ind. 385.

39. Gayheart *v.* Sibley, 66 S. W. 1041, 23 Ky. L. Rep. 2307; Nickell *v.* Fallen, 12 S. W. 767, 11 Ky. L. Rep. 627, holding that in a suit by children to recover lands of their intestate mother, an averment that they were the "only heirs" was insufficient where the father if living was preferred. Montgomery *v.* White, 11 S. W. 10, 10 Ky. L. Rep. 905, holding that in an action by collateral relatives of an intestate for real property alleged to have descended to them, they must allege and prove, if denied, that there are no other relatives entitled to take it in preference to them, and that the allegation that they are the "only heirs" of the intestate is but a conclusion of the pleader, and is insufficient. In Indiana it has been held that a declaration

right is one which should ordinarily be enforced by the administrator,[40] to set forth the fact that there are no debts against the estate and no administrator, or other facts which are necessary in the particular state to bring the case within an exception to the rule requiring the administrator to sue.[41]

by an heir on a note due decedent, that he was the only heir at law, and that there were no debts and no administration, was insufficient in not alleging that there was no widow, or that she had waived her distributive share. Finnegan *v.* Finnegan, 125 Ind. 262, 25 N. E. 341; State *v.* Sanders, 90 Ind. 421; Williams *v.* Riley, 88 Ind. 290; Schneider *v.* Piessner, 54 Ind. 524. And see Jewell *v.* Gaylor, 157 Ind. 188, 60 N. E. 1083. *Compare*, however, Howison *v.* Oakley, 118 Ala. 215, 23 So. 810 (holding that a declaration alleging that plaintiffs were "the heirs at law of deceased" was sufficient on demurrer to show that they were all of such heirs); Castro *v.* Armesti, 14 Cal. 38 (holding that an averment that plaintiffs were sons of deceased, and had been in possession of the *locus* since his death, was a sufficient averment of heirship on demurrer); Physio-Medical College *v.* Wilkinson, 108 Ind. 314, 9 N. E. 167 (holding that an allegation in a complaint to cancel a deed and quiet title that plaintiffs were "the heirs and the only heirs of" the grantor, who, it was averred, died on a certain date, showed that plaintiffs had such an interest in the property as entitled them to maintain the action).

40. Rights which should be enforced by administrator see *supra*, IV, A, 13, a.

41. *Alabama.*— Morris *v.* Morris. 58 Ala. 443, holding that a bill by surviving heirs to recover the interests of their deceased coheirs must show that the deceased heirs died without debts, although they were under age. See also Sullivan *v.* Lawler, 72 Ala. 68 (holding that it must appear that the information that there are no debts comes from persons having knowledge of the decedent's affairs); Costephens *v.* Dean, 69 Ala. 385 (holding that, in an action by distributees to enforce a vendor's lien on lands sold by their ancestor, an averment that "he died about 13 years before the filing of the bill and no administration had ever been had" was insufficient).

Georgia.— Crummey *v.* Bentley, 114 Ga. 746, 40 S. E. 765, holding under the provisions of the code that in an order for the heirs of an intestate to maintain an action for land belonging to his estate they should allege and prove that there has been no administration thereon, or that if there has been administration the administrator has been discharged before the suit was brought, or else that the administrator, if in office when the suit was begun, consented to the bringing thereof. See also Greenfield *v.* McIntyre, 112 Ga. 691, 38 S. E. 44. In assumpsit by the distributee of an estate against a purchaser of personal property from the administratrix, a declaration alleging that payment was made fraudulently in worthless stock and that the administrator has refused to sue, is demurrable unless the administrator is made a party and his insolvency and that of his sureties alleged. Dennis *v.* Smith, 61 Ga. 269.

Indiana.— In an action by heirs or distributees to recover personal property of the estate, or on a chose in action belonging to the estate, as a note or mortgage, for example, it is necessary to allege that all debts have been paid and the estate settled, or that no letters of administration have been granted. Brunson *v.* Henry, 140 Ind. 455, 39 N. E. 256; Finnegan *v.* Finnegan, 125 Ind. 262, 25 N. E. 341; Williams *v.* Williams, 125 Ind. 156, 25 N. E. 176; Humphries *v.* Davis, 100 Ind. 369; Ferguson *v.* Barnes, 58 Ind. 169; Walpole *v.* Bishop, 31 Ind. 156; Hall *v.* Brownlee, 28 Ind. App. 178, 62 N. E. 457. See also Jewell *v.* Gaylor, 157 Ind. 188, 60 N. E. 1083. An averment that an intestate left no debts at the time of his death is insufficient on demurrer, as liability against an estate may be incurred after the intestate's death. Hall *v.* Brownlee, 28 Ind. App. 178, 62 N. E. 457.

Louisiana.— Robatham *v.* Tete, 8 La. Ann. 73, holding, however, that a plea to the merits by a third possessor was a waiver of the objection that heirs could not foreclose a mortgage until the final settlement of the estate.

Minnesota.— Granger *v.* Harriman, 89 Minn. 303, 94 N. W. 869, action by heir on note set apart to him on division of estate.

Mississippi.— Ricks *v.* Hilliard, 45 Miss. 359.

North Carolina.— Where the issue is fraud and collusion between the debtor of the estate and the personal representative, the facts necessary to sustain the charge must be set out in the bill. Nance *v.* Powell, 39 N. C. 297.

Tennessee.— In a suit by an heir to recover rents, a declaration which shows that a part of the rents accrued before and a part after the death of the ancestor is demurrable. Rowan *v.* Riley, 6 Baxt. 67.

Texas.— If the action is for a debt due the ancestor, or to recover personal property belonging to his estate, the pleadings must negative the existence or necessity of an administration; but this need not be done in actions to vacate an unauthorized will, or to set aside a conveyance of real estate of the ancestor. Veal *v.* Fortson, 57 Tex. 482. See Baker *v.* Hamblen, (Civ. App. 1903) 75 S. W. 362 (suit by heir to recover land); Hynes *v.* Winston, (Civ. App. 1899) 54 S. W. 1069 (action on notes).

Washington.— In an action to recover real estate, an averment that plaintiffs are the heirs at law of the deceased owner is insufficient, unless special circumstances are alleged and proved showing why administration is unnecessary. Balch *v.* Smith, 4 Wash. 497, 30 Pac. 648. But an averment that plaintiff's ancestor has never been a resident

(11) *ANSWER AND REPLY.* In an action by heirs or distributees all facts relied upon by the defense must be set up in the answer, and thus put in issue, or proof thereof will be excluded at the trial.[42] It is competent in such actions for plaintiffs to specify the nature of the claim under which defendants hold the property in dispute, and when the claim so specified is set up in defense, plaintiffs may allege its invalidity without departing from their original complaint.[43]

f. Evidence. In actions by heirs or distributees, in cases in which suit should ordinarily be brought by the administrator, they must prove the absence of debts and other facts entitling them to sue;[44] and in all cases they must affirmatively prove the facts necessary to entitle them to recover, including the death of the ancestor, their relationship to him, and the fact that there are no other persons entitled as heirs or distributees.[45] Delay by claimants to the estate of a deceased person in asserting their rights for a long period of time, if unexcused, casts a cloud upon the claim, and will be taken into consideration in determining their relationship to the deceased.[46] Proof of relationship is sufficient to require the court to determine the rights of the claimant, without showing recognition by the court.[47] In actions to set aside conveyances or donations by decedents, on the ground of fraud or simulation, upon the application of heirs or distributees, every species of evidence, both oral and written, is competent,[48] and the illegality of the transaction assailed extends to the entire estate.[49] The true character of the transaction can be inquired into,[50] and the consideration of sealed instruments of

of the United States, and that there is no possibility of an administration being obtained in the state, has been held sufficient. Tucker *v.* Brown, 9 Wash. 357, 37 Pac. 456.

See 16 Cent. Dig. tit. "Descent and Distribution," §§ 356, 365.

Facts necessary to enable heirs or distributees to sue see *supra*, IV, A, 13, a.

42. Where a bill by a distributee to recover personalty belonging to the estate of the decedent, without administration, alleged that there were no debts, and this fact was not denied in the answer, it was held that defendant could not offer in evidence at the trial judgments recovered by third persons against the decedent, the indebtedness of the decedent not being in issue. Ricks *v.* Hilliard, 45 Miss. 359.

43. Becton *v.* Alexander, 27 Tex. 659, action by forced heirs to set aside will.

44. Crummey *v.* Bentley, 114 Ga. 746, 40 S. E. 765; Greenfield *v.* McIntyre, 112 Ga. 691, 38 S. E. 44; Finnegan *v.* Finnegan, 125 Ind. 262, 25 N. E. 341; Hall *v.* Brownlee, 28 Ind. App. 178, 62 N. E. 457. See also *supra*, IV, A, 13, a.

45. Oldham *v.* Rowan, 3 Bibb (Ky.) 534. Where the title and possession of property was in a decedent at the time of his death, and a child claims the same by descent from her mother, who is alleged to have been the real owner under a resulting trust, the burden of proof is on the claimant. *In re* Ruchizky, 205 Pa. St. 105, 54 Atl. 492.

Proof of heirship.— In actions by heirs, or as assignees of co-heirs, to recover lands belonging to the estate of an ancestor, brought against persons claiming under an adverse title, the heirship of plaintiffs must be established by proof, unless it is admitted by the defense. Oldham *v.* Rowan, 3 Bibb (Ky.) 534. As to the sufficiency of proof of heirship see Seymour's Succession, 52 La. Ann. 120, 24 So. 818, 26 So. 783. Brothers and sisters of deceased brothers and sisters of an intestate are not *prima facie* heirs and distributees, and they must prove that there are no persons who would take before them, before they can obtain an order for distribution of the estate. Sorensen *v.* Sorensen, (Nebr. 1903) 94 N. W. 540.

Existence of will.— In a real action by the heirs of one who died seized, evidence that a will was left by the deceased, without any evidence of its contents, does not defeat the action. Walsh *v.* Wheelwright, 96 Me. 174, 52 Atl. 649. In ejectment by heirs they are not bound to produce the will of the ancestor, supposing it can be proved that a will was made, but defendant, if he intends to bar the title of the heirs, must show affirmatively a devise of the premises by will. Brant *v.* Livermore, 10 Johns. (N. Y.) 358.

Admissibility and sufficiency of evidence see also *supra*, IV, A, 3, e, f.

Presumption and burden of proof see also *supra*, IV, A, 3, d.

Presumption of intestacy see *supra*, II, A, 10, note 45.

46. Bruce *v.* Patterson, 102 Iowa 184, 71 N. W. 182, where a delay of eleven years by heirs to assert a claim was held a suspicious circumstance, unless explained.

47. Le Page *v.* New Orleans Gas Light, etc., Co., 7 Rob. (La.) 183, suit by an heir to compel the transfer of corporate stock.

48. Lazare *v.* Jacques, 15 La. Ann. 599, action to set aside donation to concubine of ancestor.

49. Cole *v.* Cole, 39 La. Ann. 878, 2 So. 794.

50. Apparent sales of property, upon application by forced heirs, may be shown to be

conveyance shown by parol.[51] The burden of proof is upon the attacking party,[52] and he cannot establish his case by showing suspicious circumstances merely.[53]

g. Verdict, Judgment, and Relief. In actions by heirs or distributees to recover their shares of property owned jointly by their ancestor and another at the time of his death, it is not necessary that the verdict shall specify the portion to which each plaintiff is entitled, as their respective shares are fixed by law.[54] Where plaintiffs, in actions by heirs or distributees, are entitled to less than the whole of the estate for which suit is brought, the court will give judgment for the portion to which they are entitled.[55] The court may order reimbursement in proper cases,[56] may stay execution until compliance with conditions imposed, as the payment of damages to the other side,[57] and may issue such other orders and decrees, where there has been fraud or collusion, as equity and justice may require.[58] Where the personal property sought to be recovered, in proceedings for distribution, is indivisible, the court will apportion its value between the adverse claimants as their interests may appear.[59] In an action to recover a distributive share in an estate it is error for the chancellor to direct a master to take an account, and after ascertaining the amount due complainant to apportion it among

but disguised donations. Leleu *v.* Dooley, 48 La. Ann. 508, 19 So. 470; Dohan *v.* Dohan, 42 La. Ann. 449, 7 So. 569; Landry *v.* Landry, 40 La. Ann. 229, 3 So. 728; Moore *v.* Wartelle, 39 La. Ann. 1067, 3 So. 384; Carter *v.* McManus, 15 La. Ann. 641.

51. Dohan *v.* Dohan, 42 La. Ann. 449, 7 So. 569 (joint mortgage to husband and wife, after foreclosure by grantees, shown by parol to have been a disguised donation from wife to husband, upon application of her heirs); Landry *v.* Landry, 40 La. Ann. 229, 3 So. 728 (consideration for conveyance from ancestor to an heir, shown by parol, on application by co-heirs, to have been an obligation undertaken by the grantee to support the ancestor).

52. Moore *v.* Wartelle, 39 La. Ann. 1067, 3 So. 384; Carter *v.* McManus, 15 La. Ann. 641; Louis *v.* Richard, 12 La. Ann. 684.

53. Leleu *v.* Dooley, 48 La. Ann. 508, 19 So. 470; Carter *v.* McManus, 15 La. Ann. 641.

Presumption created by statute.— Louis *v.* Richard, 12 La. Ann. 684.

54. Davies *v.* Thompson, (Tex. Civ. App. 1899) 50 S. W. 1062, action by heirs of married woman to recover property owned by her jointly with others at time of death.

55. In trespass by a distributee who sues for the whole of tract of land, where he was entitled to only a part, he may recover the portion to which he was entitled. Jones *v.* Owens, 5 Strobh. (S. C.) 134.

In setting aside a conveyance caused to be made by an agent to himself upon suit of the heirs, the court will relinquish to each his portion, taking into consideration advancements made. Sturdevant *v.* Pike, 1 Ind. 277.

Where a conveyance of personal property by an ancestor is set aside, upon application of distributees of his estate, the property can be decreed only to the personal representative of the decedent, or to the distributees if the representative is a party to the suit. Samuel *v.* Marshall, 3 Leigh (Va.) 567.

Measure of recovery by absent heir.— In an action by an absent heir to recover her share of the intestate estate, under Vt. Rev. Laws, § 2245, giving such action against "any one receiving the same under order of the court," brought against the purchaser of a half interest, to whom the probate court has distributed such interest, plaintiff is entitled to the increased value of the share, and rents and profits which might have been derived from it, and is chargeable with necessary expenditures and depreciation without the distributee's fault. Lenehan *v.* Spaulding, 57 Vt. 115.

56. Reimbursement was ordered in a suit by heirs to recover lands sold by the administrator as his own, to the extent of the purchase-money paid by the purchaser before notice. Uhrich *v.* Beck, 13 Pa. St. 639.

57. Where a widow having a life-estate in lands, with remainder over to her children in fee, sold the land in fee, and left no property in the state, although leaving the children assets, and the children were non-residents and insolvent, it was held in ejectment by them that the purchaser was entitled to have damages assessed for breach of the widow's covenants, and that execution in favor of the children would be stayed until such damages were paid. Foote *v.* Clark, 102 Mo. 394, 14 S. W. 681, 11 L. R. A. 861.

58. Where a purchaser, by agreement with adult heirs, having notice that there were infant heirs, purchased the legal title of all the heirs in land for a trifling sum, and conveyed to another purchaser without notice, it was held, on application of the infant heirs, that the land was not liable to the heirs for the value of their equities, but that the first purchaser was a trustee under a resulting trust for their benefit. Wilson *v.* Wilson, 9 B. Mon. (Ky.) 274.

Recovery by one fraudulent party as against another see McCampbell *v.* Durst, 73 Tex. 410, 11 S. W. 380.

59. Kerley *v.* Clay, 4 Bibb (Ky.) 241, value of slave apportioned between adverse claimants.

the several defendants, and if they do not pay on request, to issue execution, where the effect will be to deprive such defendants of the right of exception and appeal to the chancellor.[60] In ejectment by heirs to recover land conveyed by their ancestor while laboring under legal incapacity, the heirs are entitled to recover possession without restitution of the price paid to the ancestor. The right to restitution cannot be raised in ejectment.[61] If defendant in ejectment succeeds in establishing his title as against the heir suing, it does not follow that he is entitled to judgment vesting title in him as against the other heirs.[62]

14. Actions Between Heirs and Distributees — a. Right of Action and Form of Remedy. An heir or distributee may maintain a bill in equity against his co-heirs or co-distributees for an accounting, or for the purpose of obtaining his distributive share of an estate, where the administration has been closed or where there has been no administration and there are no creditors,[63] or where there has been a mistake as to the value of the property of the decedent[64] or fraud in settling the estate.[65] Where there is an administrator, an heir as a rule cannot maintain an action against his co-heir for conversion of personal property belonging to the estate.[66] Nor can an heir ignore a will as against a co-heir in possession under such will, and sue for his portion.[67] Ejectment may be maintained between co-heirs of lands where defendant as executor has purchased an outstanding title and claims to hold as against his co-tenants;[68] and an heir may maintain ejectment against co-heirs after a division by the probate court;[69] but ejectment by heirs does not lie as against a widow in possession of her husband's real estate, of which he died seized.[70]

b. Jurisdiction. The jurisdiction and mode of procedure to determine rights to the property of deceased persons, as between heirs and distributees, is governed by statute so far as probate courts are concerned, and rights not within their jurisdiction must be enforced in the ordinary courts of law and equity according to the relief sought.[71]

60. McCartney *v.* Calhoun, 11 Ala. 110.

61. Wall *v.* Hill, 1 B. Mon. (Ky.) 290, 36 Am. Dec. 578.

62. Harris *v.* Vinyard, 42 Mo. 568.

63. Teal *v.* Chancellor, 117 Ala. 612, 23 So. 651 (sustaining a bill by an heir against his co-heirs in possession for his distributive share, and for accounting as to waste, there being no creditors, administrator, or executor); Nichols *v.* King, 68 S. W. 133, 1114, 24 Ky. L. Rep. 124; Middleton *v.* Pipkin, (Tex. Civ. App. 1900) 56 S. W. 240. See also *supra*, IV, A, 13, a. If husband and wife receive in her right, in some informal distribution, not sanctioned by the county court on final distribution, or by the legal assent of the other heirs, an amount of property greater than her share of the estate, and retain it in such capacity, as her share, until the administration upon the estate is closed, they may be compelled to account for such surplus by those co-distributees who have not received their shares. Brinson *v.* Cunliff, 25 Tex. 760.

64. Gibbs *v.* Clagett, 2 Gill & J. (Md.) 14.

65. Jewell *v.* Gaylor, 157 Ind. 188, 60 N. E. 1083; Schwenck *v.* Schwenck, 52 La. Ann. 239, 26 So. 859; Schmidt *v.* Gatewood, 2 Rich. Eq. (S. C.) 162.

Minor heirs.— Division of property among heirs so as to give less than his share to a minor, which was made when he was so young as not to be able to comprehend what was being done, and which was without judicial sanction, does not prevent him, although he had a guardian, from maintaining an action within two years after attaining his majority to enforce his rights. Middleton *v.* Pipkin, (Tex. Civ. App. 1900) 56 S. W. 240. Where an estate in which a minor is interested as an heir is divided by the other heirs so as to give to the minor less than his share, he is not obliged, under the statutory rule of hotchpot, to account for what he received before bringing an action for the conversion. Middleton *v.* Pipkin, (Tex. Civ. App. 1900) 56 S. W. 240.

66. Thompson *v.* Fenn, 100 Ga. 234, 28 S. E. 39, holding that the remedy of an heir for conversion of personalty by a co-heir is against the administrator for permitting it to be done. See also *supra*, IV, A, 13, c.

67. Cox *v.* Von Ahlefeldt, 105 La. 543, 30 So. 175, holding that the remedy in such case is in an action for the legitime.

68. Keller *v.* Auble, 58 Pa. St. 410, 98 Am. Dec. 297.

69. Cozens *v.* Colson, 3 N. J. L. 877.

70. Gourley *v.* Kinley, 66 Pa. St. 270, holding partition proceedings for division of the estate to be proper remedy for the heirs against the widow.

71. See *supra*, IV, A, 14, a; and the following cases:

California.— McDonald *v.* McCoy, 121 Cal. 55, 53 Pac. 421, holding that the statute authorizing actions to determine heirship and

c. Limitations. The statutes of limitation apply to actions between heirs, devisees, or distributees to obtain their distributive shares of an estate, or to enforce a trust, the same as in other actions;[72] but such statutes must be pleaded in bar by those who rely upon them as defenses.[73]

d. Defenses. In actions between co-heirs who have taken by descent as tenants in common, the defense that the ancestor had no title cannot be set up.[74] Nor can an heir, in an action against him by co-heirs for the purchase-price of property sold him by such co-heirs, where the plaintiffs were of full age, plead informalities in the sale which would be confirmed by the judgment to be rendered by the court.[75]

e. Parties. As a general rule an action for the distribution of personal estate descended to heirs cannot be maintained until an administrator of a decedent having an interest therein at the time of his death has been appointed and made a party thereto; but if the time within which an administrator may be appointed expires, or sufficient time lapses to raise the presumption that there are no outstanding debts against the estate, an action for distribution of such property may be maintained without the appointment of an administrator.[76] Nor is it necessary, in actions by heirs to recover their distributive shares of an estate, that administrators of deceased heirs having an interest in the property be joined, until it is shown that there are assets coming to the estates of such deceased heirs,

ownership of the estates of decedents does not authorize the determination of adverse claims of third persons to such property.

Louisiana.— Probate courts have no jurisdiction of suit between heirs for indemnity where one has no legal title to land apportioned to him in partition proceedings. Palmer *v.* Palmer, 1 La. 99. See also Harrington *v.* Barfield, 30 La. Ann. 1297, holding that the district court had jurisdiction to determine questions of succession after the close of administration.

Maryland.— Jenkins *v.* Simms, 45 Md. 532, holding that where the heir of an intestate died without issue pending partition proceedings, the probate court had jurisdiction, on petition by his heirs, to perfect the inchoate title of the deceased heir, under a provision of the statute that in all cases where a person was entitled by purchase "or otherwise" to an undivided estate of an heir of an intestate, he should have the same right of election as the heir under whom he claimed if unable to agree with the other heirs.

Michigan.— Lorimer *v.* Wayne Cir. Judge, 116 Mich. 682, 75 N. W. 133, holding that decisions of probate courts, under the statute authorizing them to determine heirships and the legal representatives of estates of decedents, were not conclusive on any one, as the statute made such decisions *prima facie* evidence only.

Mississippi.— Gaines *v.* Smiley, 7 Sm. & M. 53, 45 Am. Dec. 295, holding that where the claim of a distributee had been disregarded by the probate court in the distribution courts of chancery had no jurisdiction to grant relief, the only remedy being in the probate court.

Ohio.— McGarry *v.* Smith, 22 Ohio St. 190, holding that a constitutional provision giving probate courts jurisdiction in "probate and testamentary matters" did not give them jurisdiction of an action by a child born after execution of a will of his deceased parent against the other heirs, to enforce the right of contribution given such child by the statute regulating wills.

Pennsylvania.— Dundas' Estate, 8 Phila. 598, holding that a statute giving the orphans' courts jurisdiction of cases in which "trustees may be possessed of, or are in any way accountable for any real or personal estate of a decedent," did not give such courts jurisdiction of actions where a trust arose between co-distributees by reason of fraud growing out of transactions between them. See also Eckles *v.* Stewart, 53 Pa. St. 460; Matter of Landis, 2 Phila. 217, holding that orphans' courts are not open for the establishment of ordinary contested claims.

See 16 Cent. Dig. tit. "Descent and Distribution," § 338; and *supra*, IV, A, 3, a.

72. See Martin *v.* Martin, 118 Ind. 227, 20 N. E. 763, holding that an action by an heir against devisees to enforce a trust was barred by the statute limiting all actions not otherwise provided for to fifteen years. See also *supra*, III, A, 3, b; and, generally, LIMITATIONS OF ACTIONS.

73. On a bill by distributees against heirs and representatives of a co-distributee to recover excess value paid by mistake, it was held that the statute of limitations was a defense only to those who pleaded it. Whitney *v.* Whitney, 5 Dana (Ky.) 327. The statute of limitations protecting purchasers from heirs or devisees, where the will is not recorded within a prescribed time after the testator's death, must be pleaded. Biggs *v.* McCarty, 86 Ind. 352, 44 Am. Rep. 320. And see, generally, LIMITATIONS OF ACTIONS.

74. Corwin *v.* Corwin, 9 Barb. (N. Y.) 219.

75. Ingrem *v.* Ingrem, 3 Mart. N. S. (La.) 369.

76. Anderson *v.* Smith, 3 Metc. (Ky.) 491. See also *supra*, IV, A, 13, a.

and the fact that children of the deceased heirs instead of administrators are joined in such actions is not a defense.[77]

f. Pleading.[78] A bill of complaint, in order to put defendants to answer, must clearly and definitely show that some right of plaintiff, for injury to which equity will grant relief, has been prejudiced by the acts complained of.[79] A complaint by certain heirs to recover the value of property belonging to the estate, alleged to have been obtained by other heirs from the decedent by fraudulent means, must not only allege that there are no debts, but must also allege that there is no executor, administrator, creditor, widow, or other person entitled to share in the claim on which plaintiff seeks to recover.[80] A bill of this character between heirs or distributees, although it alleges that the intestate owned large amounts of real and personal estate at his death, and its purpose is the recovery of a distributive share thereof, is not regarded as a bill for the partition of land, nor is it multifarious by reason of such allegations or purposes, even though it charges that the wife of one of the defendants claims, without having any interest therein, a part of the property sought to be recovered, and prays that her claim be canceled, and that she and her husband be charged with the property converted to the extent of plaintiff's claim.[81]

g. Evidence. In actions between heirs or distributees to recover distributive shares in the estates of deceased persons it is not necessary to prove that the debts of such persons have been paid, the presumption being that there were no debts, and the existence of such debt being a matter of defense to be alleged and proved by defendants.[82] Where a suit between heirs is based upon an alleged agreement between them, evidence is admissible to show a probability that the agreement was made.[83] Where forced heirs seek to avoid conveyances or donations by the ancestor as in fraud of their rights, they may prove fraud or simulation by parol evidence.[84]

h. Verdict and Judgment. Where a conveyance from an ancestor to an heir

77. Sullivan *v.* Andoe, 6 Fed. 641, 4 Hughes 290, sustaining an action by the sister of an intestate to recover her distributive share, alleged to have been withheld by fraud, without joinder of the administrator of her deceased brother, until it should appear that there were assets coming to his estate.

78. **Necessity to plead statute of limitations** see *supra*, IV, A, 14, c.

79. A complaint by children of an intestate after becoming of age, alleging that the intestate owed no debts, that there had been no administration, and that the intestate's widow had invested his personal estate in real estate, in the name of a second husband, who had knowledge of the facts, and that both of them until within a short time before had acknowledged plaintiffs' claim, and praying for an accounting and a lien on the real estate for the amount found due, was held sufficient to put defendants to answer. McClure *v.* Colyear, 80 Cal. 378, 33 Pac. 175. But a petition by an heir against his co-heirs for the appointment of an administrator in accordance with an agreement to cancel a family settlement, and to restrain collection of a judgment obtained against plaintiff for the amount promised in such settlement, after her note given therefor had been surrendered in such agreement for cancellation, was held to show no equity. McClung *v.* Amos, 97 Ga. 270, 22 S. E. 980. And a complaint by legatees and devisees against heirs and next of kin, the executor being dead and no successor appointed, praying for an accounting and settlement of the estate of the testator, the real estate being described as large tracts of land in different counties of great value, without other description, and alleging that plaintiffs' interest in the estate had been fraudulently obtained from them by the executor, by releases given, without describing such releases, was held demurrable, as being wholly "inartificial and insufficient." Netherton *v.* Candler, 78 N. C. 88.

Pleading in proceedings to establish heirship or rights as distributee see also *supra*, III, A, 3, c.

80. Jewell *v.* Gaylor, 157 Ind. 188, 60 N. E. 1083.

81. Teal *v.* Chancellor, 117 Ala. 612, 23 So. 651.

82. Brown *v.* Stockwell, 26 Ga. 380.

83. Where the existence of a contract, whereby certain heirs of a decedent promised to pay plaintiffs who were also heirs a certain sum by way of equalizing advancements that had been made, in consideration that plaintiff should cease to contest decedent's will, was in issue, testimony showing the financial condition of the decedent and of the promisors, and what advancements had been made to other heirs, was held competent as tending to show a probability that the agreement had been made. Bland *v.* Gaither, 11 S. W. 423, 10 Ky. L. Rep. 1033.

84. Hoggatt *v.* Gibbs, 15 La. Ann. 700. See also *supra*, IV, A, 13, f.

or distributee is set aside, the property conveyed reverts to the estate, subject to administration or distribution according to law;[85] and a judgment rendered on a verdict setting aside such a conveyance and directing the property conveyed to be distributed in a manner different from that prescribed by the statute of descent and distributions is invalid[86] and will be set aside unless the portion thereof making such a direction can be rejected as surplusage.[87]

i. Attorney's Fees. Heirs who resist a division of an estate according to law, claiming the property under a will necessarily invalid as a matter of law, are not entitled to counsel fees in making such resistance.[88]

15. Actions and Proceedings by Surviving Spouse — a. Right of Action and Conditions Precedent. An action by a widow to recover the portion of her husband's estate allowed her by statute cannot be maintained until after a liquidation and final settlement of the succession.[89] Where the widow's interest in her husband's estate is secured by a recognizance, her right of action on the recognizance is merely cumulative.[90] Notice, when required by statute, must be given, and the fact that it has been given must be affirmatively shown by the record.[91]

b. Jurisdiction. Probate courts have jurisdiction to assign to the widow her dower in the deceased husband's personal property,[92] or that portion of his real property to which she is entitled by statute;[93] but they have no jurisdiction to try title to the property claimed as dower, upon the presentation of adverse claims, in the proceedings for assignment.[94]

c. Limitations. Statutes of limitation do not run against a widow's claim for distribution in her husband's estate which is wholly devised to others by will until after a final settlement has been made by the executor.[95] Where a widow has remarried before her right of action accrues, the statutes of limitation will not run against her right to recover her proportion of her former husband's estate.[96]

d. Parties. In a suit by a widow for an assignment of dower in personal property any person having a lien or charge upon such property is a necessary party.[97] The heirs are necessary parties in an action by a husband to recover his marital portion of the estate of his deceased wife.[98]

e. Pleading. The petition, in an action by the widow to recover her dower in the personal estate of her deceased husband, must show in what the property consists, that the deceased died in the county in which the action is brought, and that the property is there.[99]

85. Smith *v.* Pate, 51 Ga. 246.

86. Smith *v.* Pate, 51 Ga. 246.

87. A direction in verdict in favor of heirs against co-heirs that a sum found due plaintiffs under a contract with defendants to equalize advancements be paid out of the estate of decedent was rejected as surplusage and an individual judgment rendered. Bland *v.* Gaither, 11 S. W. 423, 10 Ky. L. Rep. 1033.

88. Clayton *v.* Clayton, 12 S. W. 312, 11 Ky. L. Rep. 472. See also Nichols *v.* King, 68 S. W. 133, 1114, 24 Ky. L. Rep. 124, where, in an action by some of the heirs of a deceased person against the other heirs to set aside certain deeds executed by the decedent to defendants, and for a division of the decedent's lands, it was held error to require defendants to pay any part of the fees of plaintiff's attorneys, as the only controversy was as to the setting aside of the deeds, and defendants had attorneys employed who represented them.

89. Duriaux *v.* Doiron, 9 Rob. (La.) 101; Harrell *v.* Harrell, 17 La. 374.

A partial assignment of dower in personalty before the accounts of the executor are made up is irregular. Chaires *v.* Shepard, 7 Fla. 77.

90. Evans *v.* Ross, 107 Pa. St. 231.

91. Peake *v.* Redd, 14 Mo. 79.

Where the estate of the deceased is worth less than the amount allowed the widow, it is the duty of the probate court to declare the title vested in her, which is a proceeding *in rem* merely and requires no notice to heirs. Harrison *v.* Lamar, 33 Ark. 824.

92. Caillaret *v.* Bernard, 7 Sm. & M. (Miss.) 316; Holloman *v.* Holloman, 5 Sm. & M. (Miss.) 559; Woerther *v.* Miller, 13 Mo. App. 567.

93. Cote's Appeal, 79 Pa. St. 235.

94. Holloman *v.* Holloman, 5 Sm. & M. (Miss.) 559.

Jurisdiction of probate courts see also *supra*, III, A, 3, a.

95. Roberts *v.* Roberts, 34 Miss. 322.

96. Norton *v.* Thompson, 68 Mo. 143.

97. Hewitt *v.* Cox, 55 Ark. 225, 15 S. W. 1026, 17 S. W. 873.

98. Vasseur *v.* Dupre, 8 La. Ann. 488.

99. Caillaret *v.* Bernard, 7 Sm. & M. (Miss.) 316, holding also that the probate court should allow the petition to be amended.

f. Evidence and Burden of Proof. Where the answer of an administrator sets up an affirmative defense to a widow's petition for her dower in personal property, he must prove such allegations in order to deprive the widow of her right.[1]

g. Judgment and Relief. Before an assignment of dower in personal property can be made the court must ascertain the value of the property.[2] A judgment assigning a widow's dower in personal property should not make any allowance on account of personalty belonging to her deceased husband in the possession of an ancillary administrator in another state, where the value of such property is not shown and such action does not appear necessary to protect the widow's rights.[3] In assigning dower in personal property an allowance in money may be made to equalize the widow's share.[4] A judgment assigning a widow's dower in personal property, although erroneous, is binding upon the administrator until reversed, and she may recover in an action on the administrator's bond.[5]

16. Actions Against Heirs and Distributees — a. Rights of Action and Conditions Precedent. An action may be brought against heirs to subject lands inherited by them to the payment of a debt of the ancestor from whom they were inherited[6] or to the satisfaction of a judgment rendered against him in his lifetime,[7] or to enforce a vendor's lien for the purchase-money of the property in question.[8] No prior demand for payment is necessary to the bringing of an action to enforce a lien against the land of a decedent where there are no personal representatives.[9] It is not necessary that execution shall have been issued on a judgment obtained against the ancestor in his lifetime in order to maintain an action to subject land in the hands of his heirs to its payment.[10] Where heirs are proceeded against as unknown an affidavit must be filed by all the complainants that they are unknown to each of them.[11] Where the acknowledgment and recording of a deed are not essential to its validity between the parties, the grantee in an unacknowledged and unrecorded deed cannot maintain a bill against the heirs of the grantor for title.[12]

b. Time of Bringing Action. The time which must elapse before a suit may be maintained against the heirs alone for a debt of their ancestor is regulated by statute.[13]

c. Jurisdiction. Courts of ordinary jurisdiction and not probate courts have jurisdiction of actions against heirs and distributees to enforce, as against them, rights growing out of the estates of their ancestors.[14]

d. Defenses. Heirs and distributees are not regarded as purchasers, without notice, with respect to the distributive shares received by them of the estates of their ancestors, and are not entitled to this defense in actions brought against them by third persons with respect to such property.[15]

1. Welch *v.* Cole, 14 Ark. 400.
Where the administrator claims that the widow is estopped to claim dower in the personal estate on the ground that it had been offered to her and refused, the burden is upon him to establish the estoppel, and if the evidence is conflicting and evenly balanced a judgment assigning such dower will not be reversed. Clark *v.* Bramlett, (Ark. 1891) 16 S. W. 119.
2. Robertson *v.* McDaniel, 5 J. J. Marsh. (Ky.) 11.
3. Hewitt *v.* Cox, 55 Ark. 225, 15 S. W. 1026, 17 S. W. 873.
4. Taylor *v.* Lusk, 7 J. J. Marsh. (Ky.) 636.
5. Crowley *v.* Mellon, 52 Ark. 1, 11 S. W. 876.
6. Albertson *v.* Prewitt, 49 S. W. 196, 20 Ky. L. Rep. 1309.
7. Davis *v.* Whipp, 48 S. W. 984, 20 Ky. L. Rep. 1166.
8. Jackson *v.* Hill, 39 Tex. 493.
9. Albertson *v.* Prewitt, 49 S. W. 196, 20 Ky. L. Rep. 1309.
10. Davis *v.* Whipp, 48 S. W. 984, 20 Ky. L. Rep. 1166.
11. Thurston *v.* Masterson, 9 Dana (Ky.) 228.
12. Caldwell *v.* Head, 17 Mo. 561.
13. See Bowmans *v.* Mize, 3 B. Mon. (Ky.) 320, holding that an action on a promissory note against the heirs of the maker cannot be brought unless twelve months have elapsed from his death without administration upon his estate.
14. Martin *v.* Martin, 3 Mart. N. S. (La.) 48.
15. Snoddy *v.* Haskins, 12 Gratt. (Va.) 363. See *supra*, IV, A, 4, a.

e. Parties. In actions against heirs or distributees of an estate, all persons who have any interest in such estate must be made parties,[16] and no judgment can be rendered against heirs who are not before the court.[17] The administrator is not a necessary party where the action is of a purely personal nature against the heir,[18] or where its object is to enforce a vendor's lien against land inherited by him;[19] but if the object is to enforce a lien against funds belonging to an heir in the hands of the administrator the administrator is a necessary party.[20]

f. Pleading. The complaint must allege all the facts essential to show a cause of action against the heirs;[21] and any material averment in defendant's plea which is not controverted by plaintiff will be taken as admitted.[22] In an action upon a judgment rendered against the decedent in his lifetime an answer which merely denies that he was ever indebted to plaintiff states a mere conclusion of law and raises no issue as to the amount due.[23]

g. Judgment. The judgment in an action against heirs and distributees must conform to the pleadings and the proof.[24] On a bill to marshal assets brought against the heirs of the deceased debtor, the decree should allow the infant heirs a day in court to show cause against it after they shall become of age.[25]

B. Advancements — 1. DEFINITION. An advancement is an irrevocable gift *in præsenti* of money or property, real or personal, to a child by a parent to enable the donee to anticipate his inheritance to the extent of the gift.[26]

16. Gray *v.* Palmer, 9 Cal. 616.

17. Thruston *v.* Masterson, 9 Dana (Ky.) 228.

18. Foss *v.* Cobler, 105 Iowa 728, 75 N. W. 516.

19. Jackson *v.* Hill, 39 Tex. 493.

20. Foss *v.* Cobler, 105 Iowa 728, 75 N. W. 516.

21. Bowmans *v.* Mize, 3 B. Mon. (Ky.) 320, holding that in an action upon a promissory note against the heirs of the maker, the complaint must allege that twelve months have elapsed from his death without administration being granted on his estate.

22. Brinkerhoff *v.* Ransom, 57 N. J. Eq. 312, 41 Atl. 725 [*reversing* 56 N. J. Eq. 149, 38 Atl. 919], holding that in an action at law against heirs and devisees an averment in the plea that defendants had aliened their ancestor's estate before the action was commenced is material, and a failure on the part of plaintiff to reply thereto is an admission of a *bona fide* alienation.

23. Davis *v.* Whipp, 48 S. W. 984, 20 Ky. L. Rep. 1166, holding that defendant should have pleaded that there was no such judgment or put in issue its validity or alleged that it was paid.

24. Taylor *v.* Taylor, 43 N. Y. 578, holding that where a defendant dies *pendente lite* and his infant heirs are brought in by a supplemental complaint which merely alleges his death and their heirship a personal judgment against the heirs is unauthorized.

25. Tennant *v.* Pattons, 6 Leigh (Va.) 196.

26. *Alabama.*— Grey *v.* Grey, 22 Ala. 233.

California.— Faylor *v.* Faylor, 136 Cal. 92, 68 Pac. 482.

Illinois.— Gary *v.* Newton, 201 Ill. 170, 66 N. E. 267; Grattan *v.* Grattan, 18 Ill. 167, 65 Am. Dec. 726.

Iowa.— Bissell *v.* Bissell, 120 Iowa 127, 94 N. W. 465.

Kentucky.— Hamilton *v.* Moore, 70 S. W. 402, 24 Ky. L. Rep. 982; Nichols *v.* King, 68 S. W. 133, 1114, 24 Ky. L. Rep. 124.

Louisiana.— Clark *v.* Hedden, 109 La. 147, 33 So. 116.

Maryland.— Love *v.* Dilley, 64 Md. 238, 1 Atl. 59, 4 Atl. 290, 64 Md. 610, 6 Atl. 168.

Massachusetts.— Osgood *v.* Breed, 17 Mass. 356.

Michigan.— Sprague *v.* Moore, 130 Mich. 92, 89 N. W. 712.

Missouri.— *In re* Williams, 62 Mo. App. 339; Patton *v.* Williams, 1 Mo. App. Rep. 516.

New Hampshire.— Fellows *v.* Little, 46 N. H. 27.

New Jersey.—Grumley *v.* Grumley, 63 N. J. Eq. 567, 52 Atl. 381.

New York.— Messman *v.* Egenberger, 46 N. Y. App. Div. 46, 61 N. Y. Suppl. 556; Bruce *v.* Griscom, 9 Hun 280.

Ohio.— Burheck *v.* Spollen, 6 Obio Dec. (Reprint) 1118, 10 Am. L. Rev. 491; Woodruff *v.* Snowden, 10 Ohio S. & C. Pl. Dec. 123, 7 Ohio N. P. 520.

Pennsylvania.— Porter's Appeal, 94 Pa. St. 332; Hughes' Appeal, 57 Pa. St. 179; Miller's Appeal, 31 Pa. St. 337; High's Appeal, 21 Pa. St. 283; Yundt's Appeal, 13 Pa. St. 575, 53 Am. Dec. 496; Christy's Appeal, 1 Grant 369; Weaver's Estate, 5 Lanc. Bar 24; *In re* Kessinger, 1 Leg. Gaz. 83; Datt's Estate, 34 Pittsb. Leg. J. 349.

South Carolina.— Rickenbacker *v.* Zimmerman, 10 S. C. 110, 30 Am. Rep. 31.

Tennessee.— Yancy *v.* Yancy, 5 Heisk. 353, 13 Am. Rep. 5; Cawthon *v.* Coppedge, 1 Swan 487.

Virginia.— Chinn *v.* Murray, 4 Gratt. 348.

England.— Edwards *v.* Freeman, 2 P. Wms. 435, 24 Eng. Reprint 803; Kircudbright *v.* Kircudbright, 8 Ves. Jr. 51, 6 Rev. Rep. 216, 32 Eng. Reprint 269.

Canada.— *Re* Hall, 14 Ont. 557.

2. Essentials — a. Transfer or Payment — (i) *General Requisites.* To constitute an advancement the gift must have been made by the intestate,[27] and the payment or transfer must be absolute in the sense that the donor must part with all control over it.[28] It must be an irrevocable gift *in præsenti*.[29] There must ordinarily be an actual delivery or change of possession of the property.[30]

(ii) *Necessity of Writing.* In some jurisdictions it is provided by statute that no gift or grant shall be deemed to have been made in advancement unless expressed or charged as such in writing by the donor or acknowledged as such in writing by the donee,[31] in which case the advancement cannot be established by

See 16 Cent. Dig. tit. "Descent and Distribution," § 389.

Distinguished from ademption and satisfaction.— Advancement contemplates a state of intestacy, entire or partial, and is thus distinguishable from "ademption," which is the extinction of a specific legacy by the testator's parting with the subject of it during his lifetime, and from "satisfaction," which is the payment by the testator during his lifetime of a general legacy. See Wills.

27. Gavin *v.* Gaines, 5 Ky. L. Rep. 247; Flower *v.* Myrick, 49 La. Ann. 321, 21 So. 542; Christy's Appeal, 1 Grant (Pa.) 369, all holding that a gift to a child from any one except the intestate is not to be brought into hotchpot.

Community property.— Where community property has been advanced, it must be collated according to the proportion to which it was owned by the parents respectively. Benoit *v.* Benoit, 8 La. 228; Baillio *v.* Baillio, 5 Mart. N. S. (La.) 228. And see Banton *v.* Campbell, 9 B. Mon. (Ky.) 587; Cain *v.* Cain, 53 S. C. 350, 31 S. E. 278, 69 Am. St. Rep. 863. A conveyance of community property by a surviving husband to one of the children of his deceased wife and himself is presumed an advancement from the community and not from his separate estate. Adair *v.* Hare, 73 Tex. 273, 11 S. W. 320. The burden of showing that the property belonged to the community is on the party asserting that to be the fact. Montegut's Succession, 2 La. Ann. 630.

28. Crosby *v.* Covington, 24 Miss. 619; Callender *v.* McCreary, 4 How. (Miss.) 356.

Deposits in bank for children by a parent in his own name as trustee for them, he drawing no part of the principal or interest but retaining the deposit books, are not advancements. *In re* Atkinson, 16 R. I. 413, 16 Atl. 712, 27 Am. St. Rep. 745, 3 L. R. A. 392.

A loan of property is not an advancement. Hanner *v.* Winburn, 42 N. C. 142. And see *In re* Strickler, 182 Pa. St. 253, 37 Atl. 999. However, if it was the understanding of the parties that the property should not be reclaimed, it is an advancement, although a memorandum was made in which it was described as property lent; and the fact that the property was not reclaimed, the declarations of the donor that he had advanced the donee, and the donee's admission that he had been advanced, are sufficient proof that such was the understanding. Law *v.* Smith, 2 R. I. 244.

29. Herkimer *v.* McGregor, 126 Ind. 247, 25 N. E. 145, 26 N. E. 44.

Executory promise to pay.— It has been held that a note voluntarily executed by a parent to a child is not an advancement because it is a mere promise to pay in the future which may be avoided. Woodruff *v.* Snowden, 7 Ohio S. & C. Pl. Dec. 123, 7 Ohio N. P. 520. *Contra*, Shotwell *v.* Struble, 21 N. J. Eq. 31; Carter *v.* King, 11 Rich. (S. C.) 125, holding that a note given by a father to a child, payable one day after date but with the right of collection postponed until the donor's death, may be enforced against the donor's estate as an advancement.

Covenants in marriage settlements providing for future children are regarded as advancements. *In re* Knabb, 1 Leg. Chron. (Pa.) 311, 337; Edwards *v.* Freeman, 2 P. Wms. 435, 24 Eng. Reprint 803.

A testamentary provision in favor of a child is not an advancement. Edwards *v.* Freeman, 2 P. Wms. 435, 24 Eng. Reprint 803.

A contingent provision for a child may become effectual as an advancement upon the happening of the contingency, such as the donor's death. Grey *v.* Grey, 22 Ala. 233; Edwards *v.* Freeman, 2 P. Wms. 435, 24 Eng. Reprint 803.

A revocable gift may be treated as an advancement where the donor dies without having revoked it. Hughey *v.* Eichelberger, 11 S. C. 36.

30. *Alabama.*— Butler *v.* Merchants' Ins. Co., 14 Ala. 777; Mitchell *v.* Mitchell, 8 Ala. 414.

Indiana.— Joyce *v.* Hamilton, 111 Ind. 163, 12 N. E. 294.

North Carolina.— Melvin *v.* Bullard, 82 N. C. 33; James *v.* James, 76 N. C. 331; Harrington *v.* Moore, 48 N. C. 56; Meadows *v.* Meadows, 33 N. C. 148, parol gift.

Ohio.— Overholser *v.* Wright, 17 Ohio St. 157; Burbeck *v.* Spollen, 6 Ohio Dec. (Reprint) 1118, 10 Am. L. Rec. 491.

Pennsylvania.— Hummel *v.* Hummel, 80 Pa. St. 420; *In re* Lang's Estate, 33 Pittsb. Leg. J. 9; Jones' Estate, 29 Pittsb. Leg. J. 89.

Tennessee.— Mason *v.* Holman, 10 Lea 315.

Charges made by a parent against a child as for advancements without delivery of the property are ineffective. Sherwood *v.* Smith, 23 Conn. 516; Herkimer *v.* McGregor, 126 Ind. 247, 25 N. E. 145, 26 N. E. 44.

31. *Illinois.*— Gary *v.* Newton, 201 Ill. 170,

parol,[32] although parol advances are valid where the property has been delivered.[33] So advances of real estate accompanied by delivery of possession may be effected by parol[34] and may be enforced in equity, although ineffective at law under the statute of frauds.[35]

(III) *FORM OF WRITING.* No particular form of words is necessary to constitute an advancement under the statutes requiring it to be evidenced by a writing,[36] so long as it appears that there was an intent to make an advancement.[37]

(IV) *EXECUTION AND DELIVERY OF WRITING.*[38] Want of formality in the execution of a conveyance of property as an advancement is fatal,[39] and the effect is the same where the donor fails to deliver the instrument.[40]

b. Intent to Make Advancement. The donor must have intended the property as an advancement or it will not be effectual as such[41] in the absence of a statute

66 N. E. 267; Marshall *v.* Coleman, 187 Ill. 556, 58 N. E. 628.

Maine.— Porter *v.* Porter, 51 Me. 376.

Massachusetts.— Bulkeley *v.* Noble, 2 Pick. 337.

New Hampshire.— Fellows *v.* Little, 46 N. H. 27.

Rhode Island.— Law *v.* Smith, 2 R. I. 244.

Wisconsin.— Pomeroy *v.* Pomeroy, 93 Wis. 262, 67 N. W. 430.

Canada.— Filman *v.* Filman, 15 Grant Ch. (U. C.) 643.

See 16 Cent. Dig. tit. "Descent and Distribution," § 405.

Operation of statute.— A statute which requires advancements to be evidenced by writing applies to advancements made before its enactment where distribution is made after its enactment. Wallace *v.* Reddick, 119 Ill. 151, 8 N. E. 801. However, a statute requiring the purpose to make an advancement to be expressed in writing and repealing all prior acts relating to advancements does not defeat an advancement which was valid under a prior statute in force when it was made, although the instrument did not express a purpose to make an advancement. Whitman *v.* Hapgood, 10 Mass. 437.

Waiver of statute.— The distributees may as between themselves waive the statutory requirement of a writing. Long *v.* Long, 132 Ill. 72, 23 N. E. 591 [*affirming* 30 Ill. App. 559]. However, an agreement made between distributees in the lifetime of their father that certain debts owed by some of them to him shall be treated as advancements is not binding on the administrator, so as to relieve him from the duty of collecting the debt if necessary for the proper administration of the estate. Fitts *v.* Morse, 103 Mass. 164.

The acknowledgment by the donee of the receipt of property as an advancement must be made to the donor. An acknowledgment to the other distributees is not sufficient of itself to create an advancement. Fitts *v.* Morse, 103 Mass. 164.

32. *Illinois.*— May *v.* May, 36 Ill. App. 77, holding that insufficient written evidence of an advancement cannot be supplemented by parol.

Maine.— Porter *v.* Porter, 51 Me. 376, 379, holding that under a statute declaring that gifts to children or grandchildren "are deemed an advancement when so expressed therein, or charged as such by intestate, or acknowledged in writing to be such," advancements are not open to explanation by oral testimony.

Massachusetts.— Bulkeley *v.* Noble, 2 Pick. 337.

New Hampshire.— Fellows *v.* Little, 46 N. H. 27, holding that the original entries in the books of the donor are not to be controlled by subsequent parol declarations.

Rhode Island.— Law *v.* Smith, 2 R. I. 244.

Wisconsin.— Pomeroy *v.* Pomeroy, 93 Wis. 262, 67 N. W. 430, where it is held that a statute providing that all gifts shall be considered advancements if so expressed therein excludes parol evidence.

Superior evidence.— The statute is not intended to exclude other and higher proof of an advancement than is therein designated, but only inferior proof. Law *v.* Smith, 2 R. I. 244.

Parol evidence in general see *infra*, IV, B, 8, f, (I).

33. Hinton *v.* Hinton, 21 N. C. 587.

34. Parker *v.* McCluer, 3 Abb. Dec. (N. Y.) 454, 3 Keyes (N. Y.) 318, 1 Transcr. App. (N. Y.) 240, 5 Abb. Pr. N. S. (N. Y.) 97, 36 How. Pr. (N. Y.) 301; Credle *v.* Credle, 44 N. C. 225; O'Neal *v.* Breecheen, 5 Baxt. (Tenn.) 604.

35. Ford *v.* Ellingwood, 3 Metc. (Ky.) 359.

36. Brown *v.* Brown, 16 Vt. 197.

A receipt given by a child for articles delivered, promising to return them if called for, with an indorsement of the parent thereon that their return will not be exacted and that they will answer as a part of the child's portion, is a sufficient compliance with the statute. Ashley's Appeal, 4 Pick. (Mass.) 21.

37. Ashley's Appeal, 4 Pick. (Mass.) 21; Mowry *v.* Smith, 5 R. I. 255.

38. See, generally, DEEDS.

39. Cawthon *v.* Kimbell, 46 La. Ann. 750, 15 So. 101.

40. Miller's Appeal, 107 Pa. St. 221 (holding that a deed which has never been delivered is a nullity and affords no evidence of an advancement); Mason *v.* Holman, 10 Lea (Tenn.) 315.

41. Fitts *v.* Morse, 103 Mass. 164 (holding that whether a payment or transfer is an advancement depends upon the intention of the donor, manifested in a legal way, and no

to the contrary.[42] To charge the donee as with an advancement, however, it is not necessary that he shall have accepted the gift as such.[43]

c. Intestacy of Donor. The doctrine of advancements applies only in cases where the donor dies intestate as to all or a part of his property.[44]

3. Who May Make Advancements. The statutes of distribution generally apply to advancements made by mothers as well as fathers, so that the donees of a mother dying intestate must account for the gift if they claim as her distributees.[45]

4. Persons Chargeable With Advancements — a. Child or Grandchild as Donee. The term "children," as used in statutes regulating advancements, includes both children and grandchildren and all descendants of the donor, so that if any such receives an advancement he must account for it if he claims a share in the donor's estate.[46]

b. Wife as Donee. Statutes regulating advancements do not apply to the wife of a donor, and she is not chargeable with advances made to her by him on claiming her share in his estate.[47]

c. Indirect Donees — (i) *In General.* Ordinarily to constitute an advancement the gift must be made to the distributee sought to be charged with it as such or to a third person with his consent.[48]

(ii) *Child of Donee.* Where an intestate has made an advancement to one of several children who dies before him, the question whether surviving children of the donee are chargeable with the advancement in the distribution of the donor's estate depends upon whether the donor leaves grandchildren only or grandchildren and children also. If only grandchildren survive the donor, the children of the donee are not chargeable as against the other grandchildren with the advancement made to their parent;[49] but if the donor leaves both children and grandchildren the latter are so chargeable.[50]

agreement between the distributees to which he is not a party can affect the matter); Bulkeley *v.* Noble, 2 Pick. (Mass.) 337; Osgood *v.* Breed, 17 Mass. 356; Morr's Appeal, 80 Pa. St. 427 (holding that if a parent intended a charge against the child as a debt, it cannot be treated as an advancement, although because of the child's incapacity it is void as a debt); Rains *v.* Hays, 2 Tenn. Ch. 669.

Time of intent.— Ordinarily the intent to make an advancement must exist and be expressed at the time of the payment or transfer. Homiller's Estate, 17 Wkly. Notes Cas. (Pa.) 238. See, however, *infra*, IV, B, 6.

Nature of transaction as governed by intent see *infra*, IV, B, 5, c, (i).

42. Bailey *v.* Barclay, 109 Ky. 636, 60 S. W. 377, 22 Ky. L. Rep. 1244. See *infra*, IV, B, 5, c, (i).

43. Holliday *v.* Wingfield, 59 Ga. 206.

The intent of the donee does not govern the question of advancement. Fitts *v.* Morse, 103 Mass. 164.

44. Pole *v.* Simmons, 45 Md. 246; Christy's Appeal, 1 Grant (Pa.) 369; Cowper *v.* Scott, 3 P. Wms. 119; Walton *v.* Walton, 14 Ves. Jr. 318, 33 Eng. Reprint 543; Twisden *v.* Twisden, 9 Ves. Jr. 413, 7 Rev. Rep. 254, 32 Eng. Reprint 661.

45. Kintz *v.* Friday, 4 Dem. Surr. (N. Y.) 540; Rees *v.* Rees, 11 Rich. Eq. (S. C.) 86. *Contra*, Holt *v.* Frederick, 2 Eq. Rep. 446, 2 P. Wms. 356, 24 Eng. Reprint 763.

The words "any of his or her children," used in a statute requiring children to be charged with advancements, apply to the children of mothers as well as of fathers. Daves *v.* Haywood, 54 N. C. 253.

46. *In re* Williams, 62 Mo. App. 339; Patton *v.* Williams, 1 Mo. App. Rep. 516; Beebe *v.* Estabrook, 79 N. Y. 246 [*affirming* 11 Hun 523]; Storey's Appeal, 83 Pa. St. 89; Eshelman's Appeal, 1 Leg. Chron. (Pa.) 99, 224; Royle *v.* Hamilton, 4 Ves. Jr. 437, 31 Eng. Reprint 225. *Contra*, Daves *v.* Haywood, 54 N. C. 253. See also Children, 7 Cyc. 133.

Advancements to the eldest son, where they consist of personal property, must be brought into hotchpot under the statutes of distribution. Kircudbright *v.* Kircudbright, 8 Ves. Jr. 51, 6 Rev. Rep. 216, 32 Eng. Reprint 269.

47. Barnes *v.* Allen, 25 Ind. 222; *In re* Morgan, 104 N. Y. 74, 9 N. E. 861.

48. Rains *v.* Hays, 2 Tenn. Ch. 669.

49. Brown *v.* Taylor, 62 Ind. 295; Calhoun *v.* Crossgrove, 33 La. Ann. 1001; Skinner *v.* Wynne, 55 N. C. 41; Person's Appeal, 74 Pa. St. 121.

50. *Illinois.*— See Simpson *v.* Simpson, 114 Ill. 603, 4 N. E. 137, 7 N. E. 287.

Indiana.— Brown *v.* Taylor, 62 Ind. 295.

Kentucky.— Barber *v.* Taylor, 9 Dana 84. See Nelson *v.* Bush, 9 Dana 104.

Louisiana.— Meyer's Succession, 44 La. Ann. 871, 11 So. 532. See also King *v.* King, 107 La. 437, 31 So. 894.

(III) *PARENT OF DONEE.* Gifts to grandchildren are not chargeable to their parents as advancements to the latter upon distribution of the donor's estate.[51]

(IV) *WIFE OF DONEE.* A payment or transfer to the husband of a distributee as a gift to her is deemed an advancement and must be accounted for by her if she shares in the distribution of the donor's estate.[52] The question whether the gift was an advancement to the wife is one of intention[53] and is to be determined by the circumstances of the particular case.[54]

Missouri.— *In re* Williams, 62 Mo. App. 339.

New York.— See McRae *v.* McRae, 3 Bradf. Surr. 199.

North Carolina.— Headen *v.* Headen, 42 N. C. 159.

Ohio.— Parsons *v.* Parsons, 52 Ohio St. 470, 40 N. E. 165.

Pennsylvania.— Person's Appeal, 74 Pa. St. 121; Hughes' Appeal, 57 Pa. St. 179.

South Carolina.— McLure *v.* Steele, 14 Rich. Eq. 105.

West Virginia.— See Flesher *v.* Mitchell, 5 W. Va. 59.

England.— Proud *v.* Turner, 2 P. Wms. 560, 24 Eng. Reprint 862.

See 16 Cent. Dig. tit. "Descent and Distribution," § 400.

Gifts to a daughter-in-law are not chargeable to her children, although so intended by the donor. Boone *v.* Thornsbury, 51 S. W. 563, 21 Ky. L. Rep. 368.

51. Stevenson *v.* Martin, 11 Bush (Ky.) 485; McClellan *v.* Sharp, 11 Ky. L. Rep. 525; Shiver *v.* Brock, 55 N. C. 137; Cawthon *v.* Coppedge, 1 Swan (Tenn.) 487. However, a deed made to a grandchild at the request of the parent as an advancement to the latter is chargeable to the parent. Hamilton *v.* Moore, 70 S. W. 402, 24 Ky. L. Rep. 982.

52. *Alabama.*— Booth *v.* Foster, 111 Ala. 312, 20 So. 356, 56 Am. St. Rep. 52; Duckworth *v.* Butler, 31 Ala. 164; Wilson *v.* Wilson, 18 Ala. 176.

Florida.— Towles *v.* Roundtree, 10 Fla. 299; Lindsay *v.* Platt, 9 Fla. 150.

Kentucky.— Groom *v.* Thompson, 16 S. W. 369, 13 Ky. L. Rep. 223; Harber *v.* Green, 7 Ky. L. Rep. 587; Williams *v.* Barnes, 4 Ky. L. Rep. 727 [*affirmed* in 5 Ky. L. Rep. 925].

Louisiana.— Carroll *v.* Carroll, 48 La. Ann. 956, 20 So. 210.

Maryland.— Dilley *v.* Love, 61 Md. 603.

Massachusetts.— Hartwell *v.* Rice, 1 Gray 587.

New Jersey.— Wanamaker *v.* Van Buskirk, 1 N. J. Eq. 685, 23 Am. Dec. 748.

North Carolina.— Banks *v.* Shannonhouse, 61 N. C. 284; Dixon *v.* Coward, 57 N. C. 354; Bridgers *v.* Hutchins, 33 N. C. 68.

Ohio.— Dittoe *v.* Cluney, 22 Ohio St. 436.

Pennsylvania.— Knabb's Estate, 2 Woodw. 386; Park's Estate, 4 Pa. Co. Ct. 560; Kessinger's Estate, 1 Leg. Gaz. 83.

Virginia.— McDearman *v.* Hodnett, 83 Va. 281, 2 S. E. 643; Bruce *v.* Slemp, 82 Va. 352, 4 S. E. 692.

West Virginia.— Roberts *v.* Coleman, 37 W. Va. 143, 16 S. E. 482.

England.— Weyland *v.* Weyland, 2 Atk. 632, 26 Eng. Reprint 777.

See 16 Cent. Dig. tit. "Descent and Distribution," § 399.

53. Park's Estate, 4 Pa. Co. Ct. 560.

Presumption.— An intention of the donor to advance to his daughter will be presumed from the fact that he conveyed to her husband on the sole consideration of the existence of the marriage relation between them. Stevenson *v.* Martin, 11 Bush (Ky.) 485.

54. *Alabama.*— Booth *v.* Foster, 111 Ala. 312, 20 So. 356, 56 Am. St. Rep. 52 (the application of property to obtain the release of a son-in-law from prison was held not an advancement to the daughter, in the absence of proof that it was so intended); Duckworth *v.* Butler, 31 Ala. 164 (the redemption of a mortgage given by a son-in-law and settling the mortgaged property on the daughter on the promise of the son-in-law to repay was held not to be an advancement).

Kentucky.— Groom *v.* Thomson, 16 S. W. 369, 13 Ky. L. Rep. 223 (holding that a partnership between a decedent and his son-in-law, upon capital furnished by decedent, is not an advancement to his daughter, although her husband was an equal partner); Stevenson *v.* Martin, 11 Bush 485 (holding that if a daughter be dead at the time of a conveyance to her husband by her father, an advancement to her is not presumed as against her children).

Massachusetts.— Hartwell *v.* Rice, 1 Gray 587, holding that a written acknowledgment by a husband that he had received from his wife's father a certain sum for her support "as a part of her portion out of her father's estate" is sufficient proof of an advancement to the wife.

North Carolina.— Dixon *v.* Coward, 57 N. C. 354, holding that where a father conveyed land to his daughter and her husband jointly, only one half of the property was an advancement to her.

Ohio.— Boyer *v.* Boyer, 7 Ohio S. & C. Pl. Dec. 525, 7 Ohio N. P. 153, holding that where the wife had no knowledge of the gift and did not acquiesce in it, she was not chargeable with a gift to the husband.

Pennsylvania.— Kessinger's Estate, 1 Leg. Gaz. 83, holding that book entries made by decedent that a debt due him from his son-in-law should be deducted from his daughter's portion of his estate are not conclusive as evidence, unless executed as a will or consented to by the daughter.

Tennessee.— Rains *v.* Hays, 6 Lea 303, 40 Am. Rep. 39 [*affirming* 2 Tenn. Ch. 669], holding that a voluntary conveyance of land

5. What Constitutes Advancement — a. Voluntary Payment or Transfer — (I) *Presumption.* Substantial gifts of money or property by a parent to a child are ordinarily presumed to be advancements chargeable to the child in the distribution of the donor's estate, and the burden of showing the contrary rests accordingly on the party denying the advancement.[55] This presumption, however, is a presumption of fact which may be rebutted,[56] in the absence of a statute to the

from decedent to his daughter's husband and a payment as surety for him are not an advancement to the daughter, in the absence of proof that such was the intent.

Virginia.— McDearman *v.* Hodnett, 83 Va. 281, 2 S. E. 643, where a declaration by decedent, when making payment as surety on the bond of a son-in-law, that it was an advancement, and an indorsement thereon that the payment would "show as a receipt," were held to show an advancement.

England.— Fowkes *v.* Pascoe, L. R. 10 Ch. 343, 44 L. J. Ch. 367, 32 L. T. Rep. N. S. 545, 23 Wkly. Rep. 538; Williams *v.* Williams, 32 Beav. 370.

See 16 Cent. Dig. tit. "Descent and Distribution," § 399.

55. *Alabama.*— Clements *v.* Hood, 57 Ala. 459; Autrey *v.* Autrey, 37 Ala. 614; Smith *v.* Smith, 21 Ala. 761; Mitchell *v.* Mitchell, 8 Ala. 414.

Arkansas.— Goodwin *v.* Parnell, 69 Ark. 629, 65 S. W. 427; Culberhouse *v.* Culberhouse, 68 Ark. 405, 59 S. W. 38; Kemp *v.* Cossart, 47 Ark. 62, 14 S. W. 465.

California.— Faylor *v.* Faylor, 136 Cal. 92, 68 Pac. 482.

Connecticut.— Hatch *v.* Straight, 3 Conn. 31, 8 Am. Dec. 152.

Georgia.— Holliday *v.* Wingfield, 59 Ga. 206.

Illinois.— Grattan *v.* Grattan, 18 Ill. 167, 65 Am. Dec. 726.

Indiana.— Culp *v.* Wilson, 133 Ind. 294, 32 N. E. 928; Scott *v.* Harris, 127 Ind. 520, 27 N. E. 150; Higham *v.* Vanosdol, 125 Ind. 74, 25 N. E. 140; McCaw *v.* Burk, 31 Ind. 56; Woolery *v.* Woolery, 29 Ind. 249, 95 Am. Dec. 629.

Iowa.— Ellis *v.* Newell, 120 Iowa 71, 94 N. W. 463; Culp *v.* Price, 107 Iowa 133, 77 N. W. 848; Finch *v.* Garrett, 102 Iowa 381, 71 N. W. 429; Murphy *v.* Murphy, 95 Iowa 271, 63 N. W. 697; Phillips *v.* Phillips, 90 Iowa 541, 58 N. W. 879; Burton *v.* Baldwin, 61 Iowa 283, 16 N. W. 110; Ramsay *v.* Abrams, 58 Iowa 512, 12 N. W. 555.

Kentucky.— Bowles *v.* Winchester, 13 Bush 1; Clarke *v.* Clarke, 17 B. Mon. 698; Blackerby *v.* Holton, 5 Dana 520; Powell *v.* Powell, 5 Dana 168; Tye *v.* Tye, 69 S. W. 718, 24 Ky. L. Rep. 637; Nichols *v.* King, 68 S. W. 133, 1114, 24 Ky. L. Rep. 124.

Louisiana.— Clark *v.* Hedden, 109 La. 147, 33 So. 116; Lamotte *v.* Lamotte, 48 La. Ann. 572, 19 So. 570.

Maryland.—Graves *v.* Spedden, 46 Md. 527; Parks *v.* Parks, 19 Md. 323; Cecil *v.* Cecil, 19 Md. 72, 81 Am. Dec. 626; Stewart *v.* Pattison, 8 Gill 46.

Massachusetts.— Scott *v.* Scott, 1 Mass. 527.

Missouri.—Ray *v.* Loper, 65 Mo. 470; Waddell *v.* Waddell, 87 Mo. App. 216; McDonald *v.* McDonald, 86 Mo. App. 122.

New Jersey.— Gordon *v.* Barkelew, 6 N. J. Eq. 94. See Hattersley *v.* Bissett, 51 N. J. Eq. 597, 29 Atl. 187, 40 Am. St. Rep. 532.

New York.— Sanford *v.* Sanford, 5 Lans. 486, 61 Barb. 293; Alexander *v.* Alexander, 1 N. Y. St. 508.

North Carolina.— Hollister *v.* Attmore, 58 N. C. 373.

Pennsylvania.— Miller's Appeal, 107 Pa. St. 221; Dutch's Appeal, 57 Pa. St. 461; Kingsbury's Appeal, 44 Pa. St. 460.

South Carolina.— Heyward *v.* Middleton, 65 S. C. 493, 43 S. E. 956; Ison *v.* Ison, 5 Rich. Eq. 15.

Tennessee.— Johnson *v.* Patterson, 13 Lea 626; Morris *v.* Morris, 9 Heisk. 814.

England.— Christy *v.* Courtenay, 13 Beav. 96.

See 16 Cent. Dig. tit. "Descent and Distribution," § 394, 407, 426.

Small presents are not presumed to be advancements. Mitchell *v.* Mitchell, 8 Ala. 414; Griggs *v.* Love, 13 Ky. L. Rep. 175; Meadows *v.* Meadows, 33 N. C. 148; Taylor *v.* Taylor, L. R. 20 Eq. 155, 44 L. J. Ch. 718; Pusey *v.* Desbouvrie, 3 P. Wms. 316, 24 Eng. Reprint 1081.

Defense against criminal charge.— Collation is not due for an amount expended to defend a minor against a criminal charge. King *v.* King, 107 La. 437, 31 So. 894.

Advancement by mother.— There is no such presumption that money advanced by a widow to her child is intended as an advancement, as there is no legal obligation upon her to provide for her children. Bennet *v.* Bennet, 10 Ch. D. 474, 40 L. T. Rep. N. S. 378, 27 Wkly. Rep. 573.

Absolute gifts in general see Gifts.

Presumption as to character of: Expense of maintaining or educating distributee see *infra*, IV, B, 5, a, (IV). Gift of marriage portion to distributee see *infra*, IV, B, 5, a, (VI). Gift to husband of child see *supra*, IV, B, 4, c, (IV). Payment of debt of distributee see *infra*, IV, B, 5, a, (II). Payment or transfer for value see *infra*, IV, B, 5, b. Payment or transfer where evidence of debt is executed see *infra*, IV, B, 5, c, (II). Purchase in name of distributee see *infra*, IV, B, 5, a, (III).

56. *Alabama.*— Mitchell *v.* Mitchell, 8 Ala. 414.

Connecticut.— Hatch *v.* Straight, 3 Conn. 31, 8 Am. Dec. 152.

Louisiana.—Hamilton *v.* Hamilton, 6 Mart. N. S. 143.

Michigan.— Sprague *v.* Moore, 130 Mich. 92, 89 N. W. 712.

contrary,[57] and in determining whether the transaction constitutes an advancement the surrounding facts and circumstances will be considered.[58] The acts and declarations of the donor are admissible to repel the presumption that the gift was intended as an advancement.[59] The presumption may also be repelled

Pennsylvania.— Jones' Estate, 29 Pittsb. Leg. J. 89.

Virginia.— Watkins *v.* Young, 31 Gratt. 84.

57. Sayles *v.* Baker, 5 R. I. 457. See *infra*, IV, B, 5, c, (I).

58. *Alabama.*— Wheeler *v.* Glasgow, 97 Ala. 700, 11 So. 758.

Iowa.— O'Connell *v.* O'Connell, 73 Iowa 733, 36 N. W. 764.

Kentucky.— Ford *v.* Ellingwood, 3 Metc. 359.

Louisiana.—Haile's Succession, 40 La. Ann. 334, 2 So. 630.

Missouri.— McDonald *v.* McDonald, 86 Mo. App. 122.

New Jersey.— Peer *v.* Peer, 11 N. J. Eq. 432.

Pennsylvania.— Jones' Estate, 29 Pittsb. Leg. J. 89.

South Carolina.— Youngblood *v.* Norton, 1 Strobh. Eq. 122.

England.— Bennet *v.* Bennet, 10 Ch. D. 474, 40 L. T. Rep. N. S. 378, 27 Wkly. Rep. 573.

See 16 Cent. Dig. tit. "Descent and Distribution," § 428.

Moral obligation to make gift.—If the donor was under a moral obligation to make an absolute gift of the property to the donee the presumption of advancement is repelled. Grumley *v.* Grumley, 63 N. J. Eq. 568, 52 Atl. 381 (holding that property purchased by a father for a son with money belonging to his first wife's estate, the mother of the grantee, will not be treated as an advancement, in the absence of evidence showing that an advancement was intended); Hollister *v.* Attmore, 58 N. C. 373 (holding that a conveyance by a father to his children in accordance with the terms of the will of a sister, which was not executed from accident, is not an advancement). See, however, Thistlewaite *v.* Thistlewaite, 132 Ind. 355, 31 N. E. 946 (where evidence that the donor received the property from his first wife who was the mother of the donee was held too remote); Shaw *v.* Shaw, 6 Humphr. (Tenn.) 418 (where it was held that a son must account for a slave as an advancement from his father, although given in pursuance of a verbal promise by the father to his own father, who then owned it, that he would give the slave to the son as an extra portion, the slave having subsequently been bequeathed to the father by his father, since the promise conferred no right on the son).

Mere relationship of parent and child is not sufficient to show that the giving of property or money by the parent to the child was intended as an advancement. Johnson *v.* Belden, 20 Conn. 322.

The value of the gift in proportion to the donee's distributive share in the donor's estate may be an important factor in determining whether the gift constitutes an advancement. Tuggle *v.* Tuggle, 57 Ga. 520; Weaver's Appeal, 63 Pa. St. 309; *In re* King, 6 Whart. (Pa.) 370; *In re* Knabb, 2 Woodw. (Pa.) 386, 1 Leg. Chron. (Pa.) 311, 337; Murray's Estate, 2 Chest. Co. Rep. (Pa.) 300; McCaw *v.* Blewit, 2 McCord Eq. (S. C.) 90. However, the mere fact that a gift will produce inequality among the distributees unless it is treated as an advancement does not justify the court in treating it as such (Comer *v.* Comer, 119 Ill. 170, 8 N. E. 796), in the absence of a statute requiring equalization in distribution (Shawhan *v.* Shawhan, 10 Bush (Ky.) 600).

Gifts to other children.— To show that property given by a parent to a child was intended as an absolute gift, evidence of absolute gifts of the same amount to other children is admissible. Gunn *v.* Thruston, 130 Mo. 339, 32 S. W. 654. But the fact that a father furnished his son with money to pay for land, taking a note therefor which he took no steps to collect, the only other evidence that the sum was intended as an advancement being that the other children had received equal sums as such, does not show an advancement. Garner *v.* Taylor, (Tenn. Ch. App. 1900) 58 S. W. 758.

Circumstances of: Gift to husband of child see *supra*, IV, B, 4, c, (IV). Payment of debt of distributee see *infra*, IV, B, 5, a, (II).

59. *Alabama.*— Fennell *v.* Henry, 70 Ala. 484, 45 Am. Rep. 88; Autrey *v.* Autrey, 37 Ala. 614; Merrill *v.* Rhodes, 37 Ala. 449; Butler *v.* Merchants' Ins. Co., 14 Ala. 777; Mitchell *v.* Mitchell, 8 Ala. 414; O'Niel *v.* Teague, 8 Ala. 345.

Georgia.— Phillips *v.* Chappell, 16 Ga. 16.

Indiana.— Woolery *v.* Woolery, 29 Ind. 249, 95 Am. Dec. 629.

Maryland.— Graves *v.* Spedden, 46 Md. 527; Cecil *v.* Cecil, 20 Md. 153.

Michigan.— Power *v.* Power, 91 Mich. 587, 52 N. W. 60, contemporaneous writing by donor.

Missouri.— Nelson *v.* Nelson, 90 Mo. 460, 2 S. W. 413; Ray *v.* Loper, 65 Mo. 470; Lisles *v.* Huffman, 88 Mo. App. 143.

Pennsylvania.— Harris' Appeal, 2 Grant 304 (holding that where money is loaned to or paid out for a son and an account is stated by the father and interest charged, it constitutes a debt and not an advancement); *In re* King, 6 Whart. 370.

Subsequent declarations.— It has been held that the presumption that money given by a parent to a child is an advancement may be rebutted by subsequent declarations of the donor to third persons. Gunn *v.* Thruston, 130 Mo. 339, 32 S. W. 654. But declarations of the grantor subsequent to the delivery of a voluntary deed have been held inadmissible to

by parol evidence showing that the transaction was intended by the donor as a gift and not as an advancement.[60]

(II) *PAYMENT OF DEBT OF DISTRIBUTEE.* The voluntary payment of a debt of the child by a parent is presumed to be an advancement,[61] in the absence of circumstances showing that the payment was intended to create a debt between the parties.[62]

(III) *PURCHASE IN NAME OF DISTRIBUTEE.* Where a person purchases property and causes it to be conveyed to a child or grandchild, a trust does not result in favor of the purchaser, but the purchase is presumed to be an advancement to the grantee for which he must account if he desires to share in the purchaser's estate.[63] The question, however, is one of intention, and therefore the presump-

rebut the presumption of advancement. Hatch *v.* Straight, 3 Conn. 31, 8 Am. Dec. 152.

Weight of declarations.— The presumption that a voluntary conveyance from a parent to a child was an advancement is not rebutted by proof that the grantor spoke of the conveyance as a gift. Phillips *v.* Phillips, 90 Iowa 541, 58 N. W. 879. See also Hughey *v.* Eichelberger, 11 S. C. 36.

60. Phillips *v.* Chappell, 16 Ga. 16.

Parol evidence: As excluded by statute see *supra*, IV, B, 2, a, (II). Of consideration of transfer see *infra*, IV, B, 5, b. Of intent of donor see *infra*, IV, B, 5, c.

61. *Iowa.*— West *v.* Beck, 95 Iowa 520, 64 N. W. 599.

Kansas.— Johnson *v.* Eaton, 51 Kan. 708, 33 Pac. 597, holding that the payment of a mortgage on a daughter's land by a father who takes an assignment thereof in blank with the note secured thereby, retaining the same until his death, is an advancement.

Kentucky.— Reynolds *v.* Reynolds, 92 Ky. 556, 18 S. W. 517, 13 Ky. L. Rep. 793.

Louisiana.— Tournillon *v.* Tournillon, 15 La. Ann. 263.

Tennessee.— Steele *v.* Frierson, 85 Tenn. 430, 3 S. W. 649; Johnson *v.* Hoyle, 3 Head 56.

See 16 Cent. Dig. tit. "Descent and Distribution," § 409.

Contra.— Taylor *v.* Taylor, L. R. 20 Eq. 155, 44 L. J. Ch. 718.

62. Levering *v.* Rittenhouse, 4 Whart. (Pa.) 130. See also *In re* Dewees, 3 Brewst. (Pa.) 314, 7 Phila. 498.

Intent of parent.— Payment of a debt of a son by a father who refuses to accept a receipt calling the payment an "advancement" but accepts a receipt with that expression omitted creates a debt and not an advancement. Steele *v.* Frierson, 85 Tenn. 430, 3 S. W. 649.

63. *Alabama.*— Butler *v.* Merchants' Ins. Co., 14 Ala. 777.

Arkansas.— White *v.* White, 52 Ark. 188, 12 S. W. 201; Eastham *v.* Powell, 51 Ark. 530, 11 S. W. 832; Bogy *v.* Roberts, 48 Ark. 17, 2 S. W. 186, 3 Am. St. Rep. 211; James *v.* James, 41 Ark. 301.

Georgia.— Brown *v.* Burke, 22 Ga. 574.

Illinois.—Maxwell *v.* Maxwell, 109 Ill. 588; Bay *v.* Cook, 31 Ill. 336; Cartwright *v.* Wise, 14 Ill. 417; Taylor *v.* Taylor, 9 Ill. 303.

Indiana.— Hodgson *v.* Macy, 8 Ind. 121; Stanley *v.* Brannon, 6 Blackf. 193.

Iowa.— Culp *v.* Price, 107 Iowa 133, 77 N. W. 848.

Maryland.— Mutual F. Ins. Co. *v.* Deale, 18 Md. 26, 79 Am. Dec. 673; Hayden *v.* Burch, 9 Gill 79.

New York.— Sanford *v.* Sanford, 5 Lans. 486, 61 Barb. 293; Jackson *v.* Matsdorf, 11 Johns. 91, 6 Am. Dec. 355.

Ohio.— Creed *v.* Lancaster Bank, 1 Ohio St. 1; Tremper *v.* Barton, 18 Ohio 418; Fleming *v.* Donahoe, 5 Ohio 255.

Pennsylvania.— Dutch's Appeal, 57 Pa. St. 461; Murphy *v.* Nathans, 46 Pa. St. 508; Long *v.* Long, 2 Pennyp. 180.

South Carolina.— O'Neale *v.* Dunlap, 11 Rich. Eq. 405. See Catoe *v.* Catoe, 32 S. C. 595, 10 S. E. 1078.

Tennessee.—Dudley *v.* Bosworth, 10 Humphr. 9, 51 Am. Dec. 690; Thompson *v.* Thompson, 1 Yerg. 97; Hamilton *v.* Bradley, 5 Hayw. 127.

Texas.— Shepherd *v.* White, 11 Tex. 346.

England.— Taylor *v.* Taylor, 1 Atk. 386, 26 Eng. Reprint 247; Jeans *v.* Cooke, 24 Beav. 513, 4 Jur. N. S. 57, 27 L. J. Ch. 202, 6 Wkly. Rep. 175; Christy *v.* Courtenay, 13 Beav. 96; Sidmouth *v.* Sidmouth, 2 Beav. 447, 9 L. J. Ch. 282, 17 Eng. Ch. 447; Scroope *v.* Scroope, 1 Ch. Cas. 27, 22 Eng. Reprint 677; Grey *v.* Grey, 1 Ch. Cas. 296, 22 Eng. Reprint 809, Rep. t. Finch 338, 21 Eng. Reprint 185, 2 Swanst. 594, 36 Eng. Reprint 742, 9 Rev. Rep. 150; Dyer *v.* Dyer, 2 Cox Ch. 92, 2 Rev. Rep. 14, 30 Eng. Reprint 42; Matter of Collinson, 3 De G. M. & G. 409, 52 Eng. Ch. 319; Shales *v.* Shales, 2 Freem. 252, 22 Eng. Reprint 1191; Skeats *v.* Skeats, 6 Jur. 942, 12 L. J. Ch. 22, 2 Y. & Coll. 9, 20 Eng. Ch. 9; Beckford *v.* Beckford, Lofft. 490; Crabb *v.* Crabb, 1 Myl. & K. 511, 7 Eng. Ch. 511; Lamplugh *v.* Lamplugh, 1 P. Wms. 111, 24 Eng. Reprint 316; Mumma *v.* Mumma, 2 Vern. Ch. 19, 23 Eng. Reprint 622; Jennings *v.* Selleck, 1 Vern. Ch. 467, 23 Eng. Reprint 593.

See 16 Cent. Dig. tit. "Descent and Distribution," § 408.

Adopted child.— A purchase in the name of an adopted child is presumed to be an advancement. Astreen *v.* Flanagan, 3 Edw. (N. Y.) 279.

Illegitimate child.— A purchase in the name of an illegitimate son is presumed to be an advancement. Page *v.* Page, 8 N. H. 187.

tion of advancement may be rebutted by parol or other evidence showing a different intention on the part of the purchaser.[64]

(IV) *MAINTENANCE AND EDUCATION OF DISTRIBUTEE.* Money expended by a parent for the maintenance and education of a child is not presumed to be an advancement in the absence of proof that the parent intended it as such.[65]

(V) *ESTABLISHING DISTRIBUTEE IN BUSINESS.* Money or property furnished for the purpose of establishing a child in business is an advancement.[66]

(VI) *MARRIAGE PORTION OF DISTRIBUTEE.* A gift by a parent to a child as a marriage portion, unless intended as a mere present, will be treated as an advancement.[67]

(VII) *PREFERENCE OR EXTRA PORTION.* In some states if a father desires to prefer one child to another in the distribution of his property, he must state his desire expressly by declaring that the gift is intended as an advantage or

Purchase by child with parent's money.— Where children living with a parent and managing his estate purchase slaves with his money, taking the conveyance to themselves without his knowledge, and the parent by a will ineffectually executed attempts to bequeath the slaves to the children, it is sufficient to show an advancement to them of the slaves. Douglass *v.* Brice, 4 Rich. Eq. (S. C.) 322.

Gift as resulting trust see, generally, GIFTS; TRUSTS.

64. Butler *v.* Merchants' Ins. Co., 14 Ala. 777; Taylor *v.* Taylor, 9 Ill. 303; Hall *v.* Hall, 107 Mo. 101, 17 S. W. 811.

Where fraud on creditors is shown by a purchase of property by a parent in the name of his child, the presumption of an advancement is repelled. Bay *v.* Cook, 31 Ill. 336; Christ's Hospital *v.* Budgin, 2 Vern. Ch. 683, 23 Eng. Reprint 1043.

Intention.— Whether a purchase of land by a parent in the name of a child is an advancement is a question of intention. Culp *v.* Price, 107 Iowa 133, 77 N. W. 848.

65. *Alabama.*— Mitchell *v.* Mitchell, 8 Ala. 414.

Iowa.— Bissell *v.* Bissell, 120 Iowa 127, 94 N. W. 465, holding property transferred in trust to maintain a child not to be an advancement.

Kentucky.— Bowles *v.* Winchester, 13 Bush 1; Brannock *v.* Hamilton, 9 Bush 446; Griggs *v.* Love, 13 Ky. L. Rep. 175.

Louisiana.— King *v.* King, 107 La. 437, 31 So. 894, holding that an heir is not bound to collate for money expended to send him to school, although he did not avail himself of the opportunity.

North Carolina.— Bradsher *v.* Cannady, 76 N. C. 445; Daves *v.* Haywood, 54 N. C. 253; Meadows *v.* Meadows, 33 N. C. 148.

Pennsylvania.— Miller's Appeal, 40 Pa. St. 57, 80 Am. Dec. 555; *In re* Riddle, 19 Pa. St. 431.

South Carolina.— White *v.* Moore, 23 S. C. 456. See also Cooner *v.* May, 3 Strobh. Eq. 185.

England.— Taylor *v.* Taylor, L. R. 20 Eq. 155, 44 L. J. Ch. 718; Edwards *v.* Freeman, 2 P. Wms. 435, 24 Eng. Reprint 803.

Compare, however, Fellows *v.* Little, 46 N. H. 27.

See 16 Cent. Dig. tit. "Descent and Distribution," § 395.

Collation is due by grandchildren to grandparents for care and board and lodging. King *v.* King, 107 La. 437, 31 So. 894.

Board of adult children may constitute advancements. Daves *v.* Haywood, 54 N. C. 253.

Intent to make advancement.—Money given by a father to his sons for expenses at college, intending it as advancements, will be so regarded, although it would not be so regarded in the absence of such intent. Garrett *v.* Colvin, 77 Miss. 408, 26 So. 963.

Amount expended.— The character and value of the estate and the amount given the child for educational purposes will be considered in determining whether it comes within a statute providing that "the maintaining or educating or the giving of money to a child or grandchild, without any view to a portion or settlement in life, shall not be deemed an advancement." Bowles *v.* Winchester, 13 Bush (Ky.) 1.

Accounts kept by a father charging a son with sums paid for clothing, books, etc., while the son remained at home and unmarried, are insufficient to show advancements. Fels *v.* Fels, 1 Ohio Cir. Ct. 420, 1 Ohio Cir. Dec. 235.

66. *New Hampshire.*— Fellows *v.* Little, 46 N. H. 27.

New York.— Pearson *v.* Cuthbert, 58 N. Y. App. Div. 395, 68 N. Y. Suppl. 1031; Sanford *v.* Sanford, 5 Lans. 486, 61 Barb. 293.

North Carolina.— Shiver *v.* Brock, 55 N. C. 137; Meadows *v.* Meadows, 33 N. C. 148.

Pennsylvania.— Storey's Appeal, 83 Pa. St. 89.

England.— Boyd *v.* Boyd, L. R. 4 Eq. 305, 36 L. J. Ch. 877, 16 L. T. Rep. N. S. 660, 15 Wkly. Rep. 1071; Pusey *v.* Desbouvrie, 3 P. Wms. 315, 24 Eng. Reprint 1081.

67. Burnett *v.* Mobile Branch Bank, 22 Ala. 642; Whitfield *v.* Whitfield, 40 Miss. 352; Sherwood *v.* Wooster, 11 Paige (N. Y.) 441; Carter *v.* Rutland, 2 N. C. 97. See also Mitchell *v.* Mitchell, 8 Ala. 414; Kyle *v.* Conrad, 25 W. Va. 760.

extra portion or by using equivalent terms.[68] In the absence of this he can create the preference only by will.[69]

b. Consideration of Payment or Transfer. In determining whether a payment or transfer is an advancement the consideration upon which it was made is an important factor, and this may ordinarily be shown by parol.[70] If the payment or transfer was voluntary[71] or made upon a consideration of natural love and affection[72] a presumption of advancement arises. If on the other hand the payment or transfer was made upon a valuable consideration, the presumption is against an advancement;[73] but an advancement will be presumed where the consideration was nominal or very inadequate.[74]

68. Weber's Succession, 110 La. 674, 34 So. 731; Clark *v.* Hedden, 109 La. 147, 33 So. 116; Montgomery *v.* Chaney, 13 La. Ann. 207.

Form of preference.— A writing giving sums of money to children and declaring that they are "absolute gifts, and in any distribution to be made at my death, of my real and personal estate, in case I should die intestate, must be taken and considered as absolute gifts, and not advancements, and must not be abated or deducted out of the shares of my respective children above named in the distribution of my real and personal estate," sufficiently shows absolute gifts and not advancements. Pole *v.* Simmons, 45 Md. 246, 251.

69. Mitchell *v.* Mitchell, 8 Ala. 414; Clarke *v.* Clarke, 17 B. Mon. (Ky.) 698.

A parent by mere declaration cannot prevent that from being an advancement which the law declares to be such; his only remedy in such cases being disposition of the whole estate by will. Cleaver *v.* Kirk, 3 Metc. (Ky.) 270.

70. *California.*—Faylor *v.* Faylor, 136 Cal. 92, 68 Pac. 482.

Connecticut.— Meeker *v.* Meeker, 16 Conn. 383.

Kentucky.—Gordon *v.* Gordon, 1 Metc. 285; Powell *v.* Powell, 5 Dana 168; Wakefield *v.* Gilliland, 18 S. W. 768, 13 Ky. L. Rep. 845; Beatty *v.* Beatty, 5 S. W. 771, 10 Ky. L. Rep. 72.

Massachusetts.— Scott *v.* Scott, 1 Mass. 527.

New Jersey.— Hattersley *v.* Bissett, 51 N. J. Eq. 597, 29 Atl. 187, 40 Am. St. Rep. 532; Jakolete *v.* Danielson, (Ch. 1888) 13 Atl. 850; Speer *v.* Speer, 14 N. J. Eq. 240.

Ohio.— Williams *v.* Williams, 2 Ohio Dec. (Reprint) 478, 3 West. L. Month. 258.

Pennsylvania.— Kingsbury's Appeal, 44 Pa. St. 460.

Vermont.— Adams *v.* Adams, 22 Vt. 50.

West Virginia.— Roberts *v.* Coleman, 37 W. Va. 143, 16 S. E. 482; McClanahan *v.* McClanahan, 36 W. Va. 34, 14 S. E. 419.

See 16 Cent. Dig. tit. "Descent and Distribution," § 407.

Declarations.— Where, however, a transfer is in form a conveyance for full value, *ex parte* declarations of the grantor made in the absence of the grantee and not communicated to him are not competent to affect the grantee's interest. Miller's Appeal, 107 Pa. St. 221. See also Cleaver *v.* Kirk, 3 Metc. (Ky.) 270.

71. See *supra*, IV, B, 5, a.

72. *Connecticut.*— Hatch *v.* Straight, 3 Conn. 31, 8 Am. Dec. 152.

Massachusetts.—Bullard *v.* Bullard, 5 Pick. 527; Scott *v.* Scott, 1 Mass. 527.

New Jersey.— Hattersley *v.* Bissett, 51 N. J. Eq. 597, 29 Atl. 187, 40 Am. St. Rep. 532.

Rhode Island.— Sayles *v.* Baker, 5 R. I. 457.

Vermont.— Adams *v.* Adams, 22 Vt. 50.

73. Hattersley *v.* Bissett, 51 N. J. Eq. 597, 29 Atl. 187, 40 Am. St. Rep. 532.

Payment of debt.— Where a father who is indebted to his children gives them money or property at marriage or on becoming of age, payments and not advancements will be presumed, subject to rebuttal. Haglar *v.* McCombs, 66 N. C. 345. So if the donee had rendered greater services to the parent than the other children, and the parent had expressed an intent to repay him with a greater portion of the estate, a preference in favor of the child will not be treated as an advancement. Lisles *v.* Huffman, 88 Mo. App. 143; Beakhurst *v.* Crumby, 18 R. I. 689, 30 Atl. 453, 31 Atl. 753; Murrel *v.* Murrel, 2 Strobh. Eq. (S. C.) 148, 49 Am. Dec. 664. See also Murphy *v.* Murphy, 95 Iowa 271, 63 N. W. 697. However, vague declarations of the donor as to his intentions to give lands to his sons for their services and of his having given to his daughters their portions of his estate are not sufficient to show valuable considerations for deeds to the sons. Sayles *v.* Baker, 5 R. I. 457.

Recital of consideration.— If a valuable consideration is expressed in the deed, the conveyance will not be taken as an advancement. Kiger *v.* Terry, 119 N. C. 456, 26 S. E. 38; Miller's Appeal, 107 Pa. St. 221; Newell *v.* Newell, 13 Vt. 24.

74. *Connecticut.*— Hatch *v.* Straight, 3 Conn. 31, 8 Am. Dec. 152.

Louisiana.— Montgomery *v.* Chaney, 13 La. Ann. 207.

Rhode Island.— Sayles *v.* Baker, 5 R. I. 457.

Tennessee.—Merriman *v.* Lacefield, 4 Heisk. 209.

West Virginia.— McClanahan *v.* McClanahan, 36 W. Va. 34, 14 S. E. 419; Kyle *v.* Conrad, 25 W. Va. 760.

Contra, Scott *v.* Scott, 1 Mass. 527.

However, where a father, being guardian of his minor children, conveyed individually to himself as such guardian certain lands

c. Intent of Donor — (I) *In General.* Whether or not a gift is an advancement depends primarily on the intent of the donor at the time of the payment or transfer,[75] in the absence of a statute to the contrary.[76] The intention of the donor may ordinarily be shown by parol evidence,[77] and his declarations are admissible on the question.[78]

(II) *Evidence of Indebtedness.* If the donor takes an evidence of indebtedness from the donee the presumption of advancement is ordinarily repelled.[79]

purchased of himself individually with funds belonging to his wards, no part of the property conveyed can be treated as an advancement, although worth more than the fund belonging to his wards. Miller *v.* Miller, 105 Ga. 305, 31 S. E. 186.

Evidence of inadequacy.— Where a father sells property to his son, the fact that the latter after a lapse of years sells the property for a greater price than that which he paid for it is not sufficient to establish that the price he paid was below its real value. Bossier *v.* Vienne, 12 Mart. (La.) 421.

75. *Alabama.*—Wilks *v.* Greer, 14 Ala. 437.

Colorado.—Haines *v.* Christie, 28 Colo. 502, 66 Pac. 883.

Connecticut.— Johnson *v.* Belden, 20 Conn. 322; Meeker *v.* Meeker, 16 Conn. 383.

Indiana.— Brunson *v.* Henry, 140 Ind. 455, 39 N. E. 256; Woolery *v.* Woolery, 29 Ind. 249, 95 Am. Dec. 629; Dillman *v.* Cox, 23 Ind. 440.

Kentucky.— Hook *v.* Hook, 13 B. Mon. 526.

Maryland.— Graves *v.* Spedden, 46 Md. 527; Stewart *v.* Pattison, 8 Gill 46; State *v.* Jameson, 3 Gill & J. 442.

Mississippi.— Wilson *v.* Beauchamp, 50 Miss. 24.

New Jersey.— Gordon *v.* Barkelew, 6 N. J. Eq. 94.

New York.— *In re* Morgan, 104 N. Y. 74, 9 N. E. 861.

North Carolina.— Bradsher *v.* Cannady, 76 N. C. 445; Cowan *v.* Tucker, 27 N. C. 78.

Ohio.— Fels *v.* Fels, 1 Ohio Cir. Ct. 420, 1 Ohio Cir. Dec. 235; Burbeck *v.* Spollen, 6 Ohio Dec. (Reprint) 1118, 10 Am. L. Rec. 491.

Pennsylvania.— Frey *v.* Heydt, 116 Pa. St. 601, 11 Atl. 535; Kirby's Appeal, 109 Pa. St. 41; Miller's Appeal, 40 Pa. St. 57, 80 Am. Dec. 555; Lawson's Appeal, 23 Pa. St. 85; Harris' Appeal, 2 Grant 304; Christy's Appeal, 1 Grant 369; *In re* King, 6 Whart. 370; Lentz *v.* Hertzog, 4 Whart. 520; Homiller's Estate, 17 Wkly. Notes Cas. 238; *In re* Weaver, 5 Lanc. Bar 24; Knabb's Estate, 1 Leg. Chron. 337; Murray's Estate, 2 Chest. Co. Rep. 300.

Tennessee.— Jennings *v.* Jennings, 2 Heisk. 283; McCoy *v.* Pearce, 1 Tenn. Cas. 87, Thomps. Cas. 145.

Texas.— Holliday *v.* White, 33 Tex. 447.

West Virginia.— Diehl *v.* Cotts, 48 W. Va. 255, 37 S. E. 546; Kyle *v.* Conrad, 25 W. Va. 760.

England.— Loyd *v.* Read, 1 P. Wms. 607, 24 Eng. Reprint 537.

Canada.— Owen *v.* Kennedy, 20 Grant Ch. (U. C.) 163.

See 16 Cent. Dig. tit. "Descent and Distribution," § 402.

Presumption of continuance.—Where a parent has made advancements, the presumption is that he continues to intend that on his death they shall be brought into hotchpot. Oller *v.* Bonebrake, 65 Pa. St. 338.

Intention as element of advancement see *supra*, IV, B, 2, b. Intention as governing nature of: Expenses of maintaining and educating distributee see *supra*, IV, B, 5, a, (IV). Gift of marriage portion to distributee see *supra*, IV, B, 5, a, (VI). Gift to husband of donor's child see *supra*, IV, B, 4, c, (IV). Payment of debt of distributee see *supra*, IV, B, 5, a, (II). Payment or transfer where evidence of debt is executed see *infra*, IV, B, 5, c, (II). Purchase in name of distributee see *supra*, IV, B, 5, a, (III).

76. Bowles *v.* Winchester, 13 Bush (Ky.) 1; Cleaver *v.* Kirk, 3 Metc. (Ky.) 270; Ross *v.* Dimmit, 3 Ky. L. Rep. 685; Sayles *v.* Baker, 5 R. I. 457; Rees *v.* Rees, 11 Rich. Eq. (S. C.) 86; Youngblood *v.* Norton, 1 Strobh. Eq. (S. C.) 122.

77. Pole *v.* Simmons, 45 Md. 246.

78. Culp *v.* Price, 107 Iowa 133, 77 N. W. 848; Dobbins *v.* Humphreys, 171 Mo. 198, 70 S. W. 815; Oller *v.* Bonebrake, 65 Pa. St. 338; Christy's Appeal, 1 Grant (Pa.) 369; Watkins *v.* Young, 31 Gratt. (Va.) 84.

79. *Alabama.*— Fennell *v.* Henry, 70 Ala. 484, 45 Am. Rep. 88. See Grey *v.* Grey, 22 Ala. 233.

Colorado.— Haines *v.* Christie, 28 Colo. 502, 66 Pac. 883.

Georgia.— Cutliff *v.* Boyd, 72 Ga. 302.

Iowa.— Kinney *v.* Newbold, 115 Iowa 145, 88 N. W. 328.

Kentucky.— Gaston *v.* Robards, 9 Ky. L. Rep. 722.

Michigan.— Sprague *v.* Moore, 130 Mich. 92, 89 N. W. 712.

New Jersey.— Batton *v.* Allen, 5 N. J. Eq. 99, 43 Am. Dec. 630.

New York.— Bruce *v.* Griscom, 9 Hun 280.

Pennsylvania.— Roland *v.* Schrack, 29 Pa. St. 125; High's Appeal, 21 Pa. St. 283; Weaver's Estate, 5 Lanc. Bar 24 [*affirmed* in 6 Lanc. Bar 6]; Bittle *v.* Bittle, 2 Mona. 17; Lang's Estate, 33 Pittsb. Leg. J. 9; Jones' Estate, 29 Pittbs. Leg. J. 89; Murray's Estate, 2 Chest. Co. Rep. 300; Buchanan's Estate, 2 Chest. Co. Rep. 74.

South Carolina.— White *v.* Moore, 23 S. C. 456.

Tennessee.— Mann *v.* Mann, 12 Heisk. 245; House *v.* Woodard, 5 Coldw. 196; Vaden *v.* Hance, 1 Head 300.

Texas.— Ruiz *v.* Campbell, 6 Tex. Civ. App. 714, 26 S. W. 295.

An intention that the transaction shall constitute an advancement may nevertheless be shown.[80] It has been held that parol evidence is admissible to show that notes given by children to parents were intended as evidence of advancements merely,[81] and the acts and declarations of the parties may be shown.[82]

6. Rescission or Modification[83]— a. In General. An advancement may be revoked or rescinded by agreement of the parties in interest, in which case the donee will not be chargeable with the property upon final distribution of the donor's estate.[84]

b. Change of Absolute Gift or Debt to Advancement. An absolute gift may by consent of the parties in interest be changed to an advancement,[85] and a parent may convert a debt due from a child into an advancement in any mode clearly indicating an intention to do so.[86]

80. Sadler *v.* Huffheimer, 12 S. W. 715, 11 Ky. L. Rep. 670, holding that the failure of a father, who was ordinarily prompt about such matters to demand payment of the debt may show an advancement. See also Batton *v.* Allen, 5 N. J. Eq. 99, 43 Am. Dec. 630. Where, however, a son accepts a conveyance of land from his father and gives his notes therefor, he cannot after his father's death show that the transaction was intended as an advancement without precise proof by at least two witnesses. Doty *v.* Doty, 155 Pa. St. 285, 26 Atl. 548.

81. Conner *v.* Cruzan, 14 Ky. L. Rep. 859. See also Stovall *v.* Stovall, 14 Ky. L. Rep. 668. *Contra*, Fennell *v.* Henry, 70 Ala. 484, 45 Am. Rep. 88; Barton *v.* Rice, 22 Pick. (Mass.) 508.

82. Merkel's Appeal, 89 Pa. St. 340 (holding that if at the time of taking the note anything was said indicating an intent that the money given therefor should be considered an advancement, subsequent declarations and acts of the parties are admissible); Porter *v.* Allen, 3 Pa. St. 390 (holding that subsequent declarations of a parent that money for which a note or bond was executed by a child was intended as an advancement are admissible in evidence when part of the *res gestæ* but not otherwise).

83. See, generally, CONTRACTS.

84. Fulton *v.* Smith, 27 Ga. 413 (holding that an agreement between all the children of a family that certain advancements made by their father to the sons when he was infirm in mind shall be set aside and his whole property be divided among the children with an advantage to each son of one thousand dollars is not against public policy); Carroll *v.* Carroll, 48 La. Ann. 956, 20 So. 210.

Consent.— A gift by a father to a daughter as a marriage portion, accompanied by possession and known to her intended husband as such at the time, is irrevocable by the father without the husband's consent after the death of the daughter. Dugan *v.* Gittings, 3 Gill (Md.) 138, 43 Am. Dec. 306.

Evidence.— A donee cannot be relieved of a charge for an advancement by subsequent parol declarations of the donor. O'Neal *v.* Breecheen, 5 Baxt. (Tenn.) 604.

Revocation by guardian.— Where a father made a parol gift of slaves to a child which under the statute amounted to a mere bailment determinable at his pleasure, and afterward he became *non compos mentis* and died intestate without revoking the gift, the gift was treated as an advancement, although the guardian of the donor during the lifetime of his ward had demanded possession of the property. Largent *v.* Berry, 48 N. C. 531.

85. Stevenson *v.* Martin, 11 Bush (Ky.) 485; Montjoy *v.* Maginnis, 2 Duv. (Ky.) 186; McClellan *v.* Sharp, 11 Ky. L. Rep. 525; Bradsher *v.* Cannady, 76 N. C. 445; Roland *v.* Schrack, 29 Pa. St. 125; Lawson's Appeal, 23 Pa. St. 85; *In re* King, 6 Whart. (Pa.) 370; Dewees' Estate, 3 Brewst. (Pa.) 314, 7 Phila. (Pa.) 498; Hutman's Estate, 30 Pittsb. Leg. J. (Pa.) 385; Arnold *v.* Barrow, 2 Patt. & H. (Va.) 1.

Consent.— Without the consent of the child such change cannot be effected by the parent by any method short of a legally executed will. Sherwood *v.* Smith, 23 Conn. 516; McDonald *v.* McDonald, 86 Mo. App. 122; Bradsher *v.* Cannady, 76 N. C. 445.

86. Gaston *v.* Robards, 9 Ky. L. Rep. 722 (book entries); Le Blanc *v.* Bertant, 16 La. Ann. 294; Austin *v.* Palmer, 7 Mart. N. S. (La.) 20 (receipt); Kirby's Appeal, 109 Pa. St. 41; Murray's Estate, 2 Chest. Co. Rep. (Pa.) 300 (book entries).

Agreement for conversion of debt.— Parol evidence is admissible to show a subsequent agreement between parent and child whereby as an advancement the parent parted with his interest in the amount secured by a note due from the child. Grey *v.* Grey, 22 Ala. 233. So it is competent for heirs by agreement between them to allow a debt due from one of them to the estate to stand as an advancement; and the administrator will be bound thereby unless the claim is needed to pay debts (McCown *v.* Jennings, 2 Ky. L. Rep. 436); but an agreement made between the distributees in the lifetime of their father that certain debts owed by some of them to him shall be treated as advancements is not binding on the administrator so as to relieve him from the duty of collecting the debts if necessary for the proper administration of the estate (Fitts *v.* Morse, 103 Mass. 164).

Evidence of conversion of debt.— The conversion of a debt into an advancement cannot ordinarily be effected by oral declarations of the parent. Denman *v.* McMahin, 37

c. Change of Advancement to Absolute Gift. A gift by way of advancement may be changed by the donor to an absolute gift for which the donee need not account on distribution of the donor's estate.[87]

7. Collation and Hotchpot — a. Definition. Hotchpot is the bringing together of all the estate of an intestate with the advancements that he has made to his children in order that the same may be divided in accordance with the statutes of distribution.[88] Its equivalent in the civil law is collation.[89]

b. Election Between Advancement and Distributive Share — (I) *Right of Election.* A child who receives an advancement has on the donor's death intestate a right to elect whether he shall keep the property and relinquish *pro tanto* his distributive share in the donor's estate or whether he shall account to

Ind. 241 (declarations of father that he should not collect notes from son); Sadler *v.* Huffhines, 10 Ky. L. Rep. 1058 (statement by father that note of his son had "run out of date" and that he did not know what better he could do than tear it up and "make a charge of it"); Harley *v.* Harley, 57 Md. 340 (declarations of parent to a third person that he intended a debt due him from the child as an advancement); Miller's Appeal, 40 Pa. St. 57, 80 Am. Dec. 555; Yundt's Appeal, 13 Pa. St. 575, 53 Am. Dec. 496 (holding that subsequent declarations of the parent of an intention to treat debts as advancements do not produce that effect where they are not communicated to the child and are not accompanied by an act sufficient to obliterate the obligation as a debt); Weaver's Estate, 5 Lanc. Bar (Pa.) 24; Buchanan's Estate, 2 Chest. Co. Rep. (Pa.) 74; Hutman's Estate, 30 Pittsb. Leg. J. (Pa.) 385; Arnold *v.* Barrow, 2 Patt. & H. (Va.) 1 (declarations by parent that he intended an existing debt by bond due from child to be an advancement). While a debt cannot be changed into an advancement by subsequent verbal declarations of the parent, yet the circumstances and the admissions of the child may show that what appears to have been a debt was intended for an advancement. Murray's Estate, 2 Chest. Co. Rep. (Pa.) 300. However, debts due by the husband of a distributee cannot be changed into advances as against her merely by her admission that "this we owe to father honestly." Yundt's Appeal, 13 Pa. St. 575, 53 Am. Dec. 496. A loose memorandum of a parent who holds a bond of the son will not be held a release of the bond so as to convert the debt into an advancement. High's Appeal, 21 Pa. St. 283.

Surrender or cancellation by the parent of the evidence of indebtedness changes the transaction to an advancement. Hanner *v.* Winburn, 42 N. C. 142; *Ex p.* Glenn, 20 S. C. 64; Rees *v.* Rees, 11 Rich. Eq. (S. C.) 86.

Unenforceable debt.— A parent cannot convert a debt due him from a child into an advancement without the assent of the child, where it is barred by limitations. Levering *v.* Rittenhouse, 4 Whart. (Pa.) 130.

87. Sherwood *v.* Smith, 23 Conn. 516; Wallace *v.* Owen, 71 Ga. 544.

Change to gift for life.— Where a gift has been made as an advancement, the parties may subsequently change the terms of the transaction so as to make the gift one for life only. Harper *v.* Parks, 63 Ga. 705.

Evidence.— Declarations of the parent may establish the fact that advancements have been changed to absolute gifts. Wallace *v.* Owen, 71 Ga. 544; Wheeler *v.* Wheeler, 47 Vt. 637. A charge in the books of a parent against a son as for an advancement is not changed to an absolute gift by subsequent entries, "To the contrary, by a gift, I balance my son A's account," "The above account I discharge, by gift." Clark *v.* Warner, 6 Conn. 355.

88. See Cyclopedic L. Dict.

Other definitions are: "The blending and mixing property in order to divide it equally." 2 Blackstone Comm. 190. And see McLure *v.* Steele, 14 Rich Eq. (S. C.) 105; McCaw *v.* Blewit, 2 McCord Eq. (S. C.) 90.

"Hotchpot in the old common law meant that land given in frank marriage and descending in fee simple should be mixed and divided in proportion among all the daughters." *In re* Williams, 62 Mo. App. 339; Burrill L. Dict.

Accounting in kind.— Bringing into hotchpot or collation means, not that the property must in specie or in kind be thrown in with the property which has descended from the donor, but that the advancement shall be charged against the donee according to its value at the time the advancement was made without interest. Grattan *v.* Grattan, 18 Ill. 167, 65 Am. Dec. 726; Ray *v.* Loper, 65 Mo. 470. Consequently by bringing the property into hotchpot to ascertain whether it exceeds or falls short of the equal share to which he would be entitled if the advancement had not been made, the donee is not divested of his title thereto. Jackson *v.* Jackson, 28 Miss. 674, 64 Am. Dec. 114. If, however, a donee of immovables elects to collate in kind, the property belongs to the succession as of the date of the donor's death. Berthelot *v.* Fitch, 44 La. Ann. 503, 10 So. 867.

89. La. Rev. Civ. Code (Merrick ed.), art. 1227, defining collation as "the supposed or real return to the mass of the succession which an heir makes of property which he received in advance of his share or otherwise, in order that such property may be divided together with the other effects of the succession."

Collation in kind see *supra*, note 88.

the other distributees for the value of the property and receive his distributive portion.[90]

(II) *EFFECT OF ELECTION*—(A) *Election To Keep Advancement.* If the donee does not claim as distributee any portion of the estate left by the donor he cannot be compelled to bring the advancement into hotchpot on final distribution.[91] By keeping the advancement, however, and refusing to bring it into hotchpot, the donee relinquishes *pro tanto* his interest as a distributee in the donor's estate.[92]

(B) *Election to Share in Estate*—(1) GENERAL RULES. The purpose of the doctrine of advancements is to insure equality of distribution among those standing in equal relationship.[93] Consequently a donee who elects to take his distributive share waives his right to the advancement as an extra portion and must bring it into hotchpot.[94] The advancement operates as a payment *pro tanto*

90. Wilson *v.* Wilson, 18 Ala. 176; Grattan *v.* Grattan, 18 Ill. 167, 65 Am. Dec. 726. See, however, Law *v.* Smith, 2 R. I. 244; Allen *v.* Allen, Jeff. (Va.) 86.

Election by infants.— Infant distributees are incapable of electing between advancements and shares in the estate, although a guardian *ad litem* may make such an election for them. Wilson *v.* Wilson, 18 Ala. 176 [*overruling* Parks *v.* Stonum, 8 Ala. 752]. However the court will protect their interests in the matter whenever it is necessary to do so. Andrews *v.* Hall, 15 Ala. 85; Grattan *v.* Grattan, 18 Ill. 167, 65 Am. Dec. 726; Powell *v.* Powell, 5 Dana (Ky.) 168.

Time of election.— The donee must exercise his right of election within a reasonable time. Grattan *v.* Grattan, 18 Ill. 167, 65 Am. Dec. 726. A distributee who has been advanced is entitled, after the death of the donor's widow, to participate in the division of real estate which had been assigned to her in dower, although he had refused to bring his advancement into hotchpot in order to participate in a previous division of the estate which was not embraced in the assignment to the widow. Persinger *v.* Simmons, 25 Gratt. (Va.) 238; Knight *v.* Oliver, 12 Gratt. (Va.) 33. If, however, a donee elects not to come in on the first division, and his advancement with interest does not equal his distributive share on that division, he is not entitled to have the deficiency made up on claiming a share in the division of the dower property. Knight *v.* Oliver, *supra.*

Mode of election.— Whether a statutory mode of making such election precludes all others has not been decided; but such election, if it can arise by matters *in pais*, must be by clear, unequivocal acts, with a full knowledge of all the circumstances and the party's rights. Mere intention to elect, casual declarations, or loose conversations, will not suffice, especially when not acted on to the prejudice of another. Key *v.* Jones, 52 Ala. 238.

Evidence of election.— Verbal declarations of a distributee after the death of the intestate that he had received a full share which he would hold without further claim, and proof that he had made partial distributions as administrator in which he had made no claim to a share are not sufficient to show an election to waive his rights as distributee. Key *v.* Jones, 52 Ala. 238.

91. *Mississippi.*— Phillips *v.* McLaughlin, 26 Miss. 592.

New Jersey.— Gordon *v.* Barkelew, 6 N. J. Eq. 94.

New York.— Sanford *v.* Sanford, 5 Lans. 486, 61 Barb. 293, where it is held that a child born after the making of a will by its father cannot recover of any brother or sister born before the will is made any portion of any advancement made by the father in his lifetime to such brother or sister.

North Carolina.— Davis *v.* Brooks, 7 N. C. 133.

South Carolina.— Hamer *v.* Hamer, 4 Strobh. Eq. 124.

England.— Edwards *v.* Freeman, 2 P. Wms. 435, 24 Eng. Reprint 803.

In Louisiana the statute requires a donee to collate where the remaining portion of the estate is insufficient for the legal portions of the other heirs (Lamotte's Succession, 110 La. 42, 34 So. 122; Granschamps *v.* Delpeuch, 7 Rob. 429), but only in that event (Austin *v.* Palmer, 7 Mart. N. S. 20).

92. Taylor *v.* Reese, 4 Ala. 121; Haden *v.* Haden, 7 J. J. Marsh. (Ky.) 168; *In re* St. Vrain, 1 Mo. App. 294.

93. *Alabama.*—Green *v.* Speer, 37 Ala. 532.

Illinois.— Condell *v.* Glover, 56 Ill. App. 107.

Indiana.— Herkimer *v.* McGregor, 126 Ind. 247, 25 N. E. 145, 26 N. E. 44.

Iowa.— White *v.* Watts, 118 Iowa 549, 92 N. W. 660.

Kentucky.— Shawhan *v.* Shawhan, 10 Bush 600; Tye *v.* Tye, 69 S. W. 718, 24 Ky. L. Rep. 637.

Louisiana.—Berthelot *v.* Fitch, 44 La. Ann. 503, 10 So. 867; Grandchamps *v.* Delpeuch, 7 Rob. 429.

Maryland.— Clark *v.* Willson, 27 Md. 693.

Missouri.— Dobbins *v.* Humphreys, 171 Mo. 198, 70 S. W. 815.

Pennsylvania.— Dutch's Appeal, 57 Pa. St. 461.

England.— Boyd *v.* Boyd, L. R. 4 Eq. 305, 36 L. J. Ch. 877, 16 L. T. Rep. N. S. 660, 15 Wkly. Rep. 1071; Edwards *v.* Freeman, 2 P. Wms. 435, 24 Eng. Reprint 803.

94. *Alabama.*— Wilks *v.* Greer, 14 Ala. 437.

Georgia.— Andrews *v.* Halliday, 63 Ga. 263. holding that the donee must account, although the donor believed he had ad-

of the donee's distributive share in the donor's estate.[95] Consequently if its value equals or exceeds his distributive share he is entitled to nothing out of the estate.[96]

(2) RIGHTS OF WIDOW OF DONOR. The widow of a donor is not entitled, upon final distribution of his estate, to have advancements made by him in his lifetime brought into hotchpot or collated for her benefit,[97] in the absence of a statute giving her that right.[98]

vanced his distributees equally, if in fact he had not done so.

Illinois.— Simpson *v.* Simpson, 114 Ill. 603, 4 N. E. 137, 7 N. E. 287; Grattan *v.* Grattan, 18 Ill. 167, 65 Am. Dec. 726.

Iowa.— McMahill *v.* McMahill, 69 Iowa 115, 28 N. W. 470.

Kentucky.— Stone *v.* Halley, 1 Dana 197.

Louisiana.— Clark *v.* Hedden, 109 La. 147, 33 So. 116; Soules *v.* Soules, 104 La. 796, 29 So. 342; Dana *v.* Dana, 43 La. Ann. 354, 8 So. 917; Burton *v.* Burton, 14 La. 352.

Maryland.— State *v.* Jameson, 3 Gill & J. 442; *In re* Young, 3 Md. Ch. 461.

Missouri.— Ray *v.* Loper, 65 Mo. 470.

New Hampshire.— Marston *v.* Lord, 65 N. H. 4, 17 Atl. 980.

New Jersey.— Shotwell *v.* Struble, 21 N. J. Eq. 31.

New York.— Beebe *v.* Estabrook, 11 Hun 523; Sherwood *v.* Wooster, 11 Paige 441.

Texas.— Sparks *v.* Spence, 40 Tex. 693; Burleson *v.* Burleson, 28 Tex. 383.

England.— *In re* Blockley, 29 Ch. D. 250, 54 L. J. Ch. 722, 33 Wkly. Rep. 777; Walton *v.* Walton, 14 Ves. Jr. 318, 33 Eng. Reprint 543.

See 16 Cent. Dig. tit. "Descent and Distribution," §§ 416, 418.

Alienation of property by donee.— The right of the heirs to have the advancement brought into hotchpot is not defeated by an alienation or encumbrance of the property by the donee. *In re* Young, 3 Md. Ch. 461. See also Meadows *v.* Meadows, 33 N. C. 148.

Release of duty to account.— Where one distributee releases another from accountability for an advancement, whether with or without consideration, the release is operative as to all persons whose rights are not prejudiced by it and also as against the releasor until he repudiates it. Andrews *v.* Halliday, 63 Ga. 263.

Statutes.— A statute requiring advancements to be brought into hotchpot applies to advancements made before its enactment by a donor who dies subsequent thereto. Carter *v.* McCluer, 3 Abb. Dec. (N. Y.) 454, 3 Keyes (N. Y.) 318, 1 Transcr. App. (N. Y.) 240, 5 Abb. Pr. N. S. (N. Y.) 97, 36 How. Pr. (N. Y.) 301. In so operating the statute does not impair vested rights of the donee as distributee. Simpson *v.* Simpson, 114 Ill. 603, 4 N. E. 137, 7 N. E. 287. A statute referring to advancements in case there is no real estate of the intestate contemplates real estate located within the state. McRae *v.* McRae, 3 Bradf. Surr. (N. Y.) 199.

95. *District of Columbia.*—Patten *v.* Glover, 1 App. Cas. 466.

Indiana.— Nicholson *v.* Caress, 59 Ind. 39.

Kentucky.— Eckler *v.* Galbraith, 12 Bush 71; Tye *v.* Tye, 69 S. W. 718, 24 Ky. L. Rep. 637.

Nebraska.— McClave *v.* McClave, 60 Nebr. 464, 83 N. W. 668.

New Hampshire.— Nesmith *v.* Dinsmore, 17 N. H. 515.

North Carolina.—Scroggs *v.* Stevenson, 100 N. C. 354, 6 S. E. 111.

Pennsylvania.— *In re* Datts, 34 Pittsb. Leg. J. 349.

Texas.— Norwood *v.* Cobb, 37 Tex. 141.

Wisconsin.— Liginger *v.* Field, 78 Wis. 367, 47 N. W. 613.

See 16 Cent. Dig. tit. "Descent and Distribution," § 413.

96. Grattan *v.* Grattan, 18 Ill. 167, 65 Am. Dec. 726; Nicholson *v.* Caress, 59 Ind. 39; Carter *v.* McCluer, 3 Abb. Dec. (N. Y.) 454, 3 Keyes (N. Y.) 318, 1 Transcr. App. (N. Y.) 240, 5 Abb. Pr. N. S. (N. Y.) 97, 36 How. Pr. (N. Y.) 301; Scroggs *v.* Stevenson, 100 N. C. 354, 6 S. E. 111.

Creditors of the donee under an attachment or execution have no greater rights than the donee himself. Johnson *v.* Hoyle, 3 Head (Tenn.) 56; Liginger *v.* Field, 78 Wis. 367, 47 N. W. 613.

97. *Alabama.*— May *v.* May, 15 Ala. 177; Logan *v.* Logan, 13 Ala. 653.

Connecticut.— Porter *v.* Collins, 7 Conn. 1.

Georgia.— Beavors *v.* Winn, 9 Ga. 189; Wright *v.* Wright, Dudley 251.

Indiana.— Ruch *v.* Biery, 110 Ind. 444, 11 N. E. 312; Willetts *v.* Willetts, 19 Ind. 22.

Iowa.— *In re* Miller, 73 Iowa 118, 34 N. W. 769.

Massachusetts.— Stearns *v.* Stearns, 1 Pick. 157.

Mississippi.— Whitley *v.* Stephenson, 38 Miss. 113; Jackson *v.* Jackson, 28 Miss. 674, 64 Am. Dec. 114.

Ohio.— Young *v.* Roberts, 7 Ohio Cir. Ct. 105.

Pennsylvania.— Matter of Murray, 2 Pearson 473; Miller's Estate, 2 Brewst. 355.

South Carolina.— *Ex p.* Lawton, 3 Desauss. 199.

Tennessee.— Richards *v.* Richards, 11 Humphr. 429; Brunson *v.* Brunson, Meigs 630.

Virginia.— Knight *v.* Oliver, 12 Gratt. 33.

See 16 Cent. Dig. tit. "Descent and Distribution," § 414.

98. Headen *v.* Headen, 42 N. C. 159; Davis *v.* Duke, 1 N. C. 439, both holding that a widow is entitled to the benefit of advancements of personalty made to the children, but not to advancements of realty made to them.

c. What Must Be Brought Into Hotchpot. Any money or property which the donor has a legal right to convey may be made the subject of a gift by way of advancement, and must accordingly be brought into hotchpot if the donee elects to share as distributee.[99]

d. Amount Chargeable to Donee — (I) *VALUATION OF PROPERTY* **— (A)** *As of What Time.* Property that has been advanced to a distributee will ordinarily be estimated at its value at the time the advancement was made,[1] in the absence

Operation of statute.— A statute giving a widow the right to have advancements accounted for applies to advancements made to children by a prior marriage of the donor, where she married him before the time the statute took effect. Boyd *v.* White, 32 Ga. 530.

99. Edwards *v.* Freeman, 2 P. Wms. 435, 24 Eng. Reprint 803 (annuity); Jennings *v.* Selleck, 1 Vern. Ch. 467, 23 Eng. Reprint 593 (lease).

Contingent interests.— The law does not contemplate except in special cases the valuation and adjustment of contingent, uncertain, or expectant interests. Wipff *v.* Heder, 6 Tex. Civ. App. 685, 26 S. W. 118 (holding that where money is placed with a trustee for the benefit of a wife and child, and on the child's reaching his majority half of it is to be paid to him, and in case of the mother's death before the child the balance is to be paid to the child, only half the sum can be treated as an advancement to the child on the donor's dying intestate, since the child may never receive the balance); Knight *v.* Oliver, 12 Gratt. (Va.) 33. See, however, *supra*, IV, B, 2, note 29.

Life-insurance policies upon which the donee receives money must be accounted for. Vinson *v.* Vinson, 105 La. 30, 29 So. 701; Rickenbacker *v.* Zimmerman, 10 S. C. 110, 30 Am. Rep. 31; Cazassa *v.* Cazassa, 92 Tenn. 573, 22 S. W. 560, 36 Am. St. Rep. 112, 20 L. R. A. 178; *Re* Richardson, 47 L. T. Rep. N. S. 514. However, a life-insurance policy will inure to the benefit of only such distributees as are named therein and were *in esse* at the time of making the advancement. Vinson *v.* Vinson, *supra*.

Money secured by marriage settlement providing for future children must be accounted for. Knabb's Estate, 1 Leg. Chron. (Pa.) 311, 337; Edwards *v.* Freeman, 2 P. Wms. 435, 24 Eng. Reprint 803.

Real and personal property.— The word "property," as used in statutes regulating advancements, includes both real and personal property. West *v.* Beck, 95 Iowa 529, 64 N. W. 599. *Contra*, Putnam *v.* Putnam, 18 Ohio 347. However, the transfer of a mortgage of real estate is not a conveyance of real estate within R. I. Rev. St. c. 159, § 20, providing that real estate conveyed by deed or gift shall be deemed an advancement. Mowry *v.* Smith, 5 R. I. 255. The words "any real or personal estate" as used in such statutes include estates for life. Dixon *v.* Coward, 57 N. C. 354.

Rents and profits of the donor's land, if given to a child as an advancement, must be accounted for.

Kentucky.— Ford *v.* Thompson, 1 Metc. 580; Hamilton *v.* Moore, 70 S. W. 402, 24 Ky. L. Rep. 982; Wakefield *v.* Gilliland, 18 S. W. 768, 13 Ky. L. Rep. 845.

North Carolina.— Hanner *v.* Winburn, 42 N. C. 142.

Tennessee.— Robinson *v.* Robinson, 4 Humphr. 392.

Virginia.— Williams *v.* Stonestreet, 3 Rand. 559. But see Christian *v.* Coleman, 3 Leigh (Va.) 30.

England.— Edwards *v.* Freeman, 2 P. Wms. 435, 24 Eng. Reprint 803.

Reversionary interest or remainder if given as an advancement must be accounted for. Cain *v.* Cain, 53 S. C. 350, 31 S. E. 278, 69 Am. St. Rep. 863; Eales *v.* Drake, 1 Ch. D. 217, 45 L. J. Ch. 51, 24 Wkly. Rep. 184; Williamson *v.* Jeffreys, 18 Jur. 1071; Murless *v.* Franklin, 1 Swanst. 13, 18 Rev. Rep. 3, 36 Eng. Reprint 278; Finch *v.* Finch, 15 Ves. Jr. 43, 10 Rev. Rep. 12, 33 Eng. Reprint 671. The value of an advancement consisting of a vested remainder in real estate is, in the absence of extreme youth or old age of the life-tenant, one-half the value of the fee. Cain *v.* Cain, 53 S. C. 350, 31 S. E. 278, 69 Am. St. Rep. 863.

Property not owned by the intestate or owned by him only in part at the time of the transfer see *supra*, IV, B, 2.

1. *Illinois.*—Grattan *v.* Grattan, 18 Ill. 167, 65 Am. Dec. 726.

Iowa.— See White *v.* Watts, 118 Iowa 549, 92 N. W. 660.

Kentucky.— Bowles *v.* Winchester, 13 Bush 1; Stevenson *v.* Martin, 11 Bush 485; Barber *v.* Taylor, 9 Dana 84.

Louisiana.— Burton *v.* Burton, 14 La. 352.

Maryland.— Clark *v.* Wilson, 27 Md. 693; Warfield *v.* Warfield, 5 Harr. & J. 459.

Mississippi.— Jackson *v.* Jackson, 28 Miss. 674, 64 Am. Dec. 114.

Missouri.— Ray *v.* Loper, 65 Mo. 470.

New York.— Parker *v.* McCluer, 3 Abb. Dec. 454, 3 Keyes 318, 1 Transcr. App. 240, 5 Abb. Pr. N. S. 97, 36 How. Pr. 301.

North Carolina.— Shiver *v.* Brock, 55 N. C. 137; Raiford *v.* Raiford, 41 N. C. 490; Meadows *v.* Meadows, 33 N. C. 148; Lamb *v.* Carroll, 28 N. C. 4; Stallings *v.* Stallings, 16 N. C. 298; Toomer *v.* Toomer, 5 N. C. 93; King *v.* Worsley, 3 N. C. 366.

Pennsylvania.— Oyster *v.* Oyster, 1 Serg. & R. 422.

Rhode Island.— Law *v.* Smith, 2 R. I. 244.

Tennessee.— O'Neal *v.* Breecheen, 5 Baxt. 604; Haynes *v.* Jones, 2 Head 372; Burton *v.* Dickinson, 3 Yerg. 112.

Virginia.— Beckwith *v.* Butler, 1 Wash. 224; Isbell *v.* Butler, Jeff. 10.

of a statute to the contrary.[2] However if the gift when made was revocable or unenforceable, or if the donor remained in the possession and enjoyment of the property, then the value of the property is to be estimated as of the time when the gift became irrevocable or enforceable or when the donee acquired possession of it, regardless of the time when the formal transfer occurred.[3]

(B) *Loss or Depreciation.* In those jurisdictions where the value of the advancement is to be estimated as of the time when the gift became effective, any loss or depreciation in the value occurring in the interim between that time and the time of distribution falls on the donee.[4] In states where the property is valued as of the time of the donor's death a loss occurring before that time falls on the estate.[5]

West Virginia.— Kyle *v.* Conrad, 25 W. Va. 760.

See 16 Cent. Dig. tit. "Descent and Distribution," § 421.

2. Finch *v.* Garrett, 102 Iowa 381, 71 N. W. 429, holding that a statute providing that advancements should be taken at what they would "now" be worth requires them to be taken at their value at the time of distribution.

Date of donor's death.— In some states the statutes provide that the property shall be valued as of the date of the donor's death. Dixon *v.* Marston, 64 N. H. 433, 14 Atl. 728; Comings *v.* Wellman, 14 N. H. 287; Miller's Appeal, 31 Pa. St. 337; Rickenbacker *v.* Zimmerman, 10 S. C. 110, 30 Am. Rep. 31; Sinkler *v.* Sinkler, 2 Desauss. (S. C.) 127; Youngblood *v.* Norton, 1 Strobh. Eq. (S. C.) 122; Thomas *v.* Gage, 1 Harp. Eq. (S. C.) 197.

3. *Alabama.*— Wilks *v.* Greer, 14 Ala. 437, holding that an advancement with a reservation of a life-estate should be valued as of the date when possession was delivered.

Arkansas.—Culberhouse *v.* Culberhouse, 68 Ark. 405, 59 S. W. 38, holding that an advancement of a life-insurance policy should be valued as of the date of the death of the insured, where no receipt specifying its value had been given.

Illinois.— Pigg *v.* Carroll, 89 Ill. 205, holding that an advancement of real estate should be valued as of the date when possession was taken.

Kentucky.— Stevenson *v.* Martin, 11 Bush 485; Hook *v.* Hook, 13 B. Mon. 526 (both cases holding that the value of advancements of realty should be estimated as of the date when possession was taken); Barber *v.* Taylor, 9 Dana 84 (holding that where a father advances a child by verbal gift of land which cannot be enforced and may be revoked, and afterward confirms it by a conveyance, the value of the property at the time of the conveyance is the value at which it is to be brought into hotchpot, but that if the land is sold by the donee with the donor's consent, it should be estimated at the price for which it was sold).

North Carolina.— Hanner *v.* Winburn, 42 N. C. 142; Hicks *v.* Forrest, 41 N. C. 528; Meadows *v.* Meadows, 33 N. C. 148, all holding that advancements of slaves are to be valued as of the date of delivery of possession.

South Carolina.— Hughey *v.* Eichelberger, 11 S. C. 36, holding that where a donor in a revocable conveyance of land retained possession and received the rents and profits and died intestate without revoking the gift, it should be treated as an advancement only as of the date of his death, to be estimated at its then value according to its condition at that time.

Tennessee.— Cazassa *v.* Cazassa, 92 Tenn. 573, 22 S. W. 560, 36 Am. St. Rep. 112, 20 L. R. A. 178 (holding that a son receiving a life-insurance policy from the father as an advancement should be charged with the net amount received on the policy after the father's death); Moore *v.* Burrow, 89 Tenn. 101, 17 S. W. 1035; Keys *v.* Keys, 11 Heisk. 425 (both cases holding that a gift of land should be valued as of the date of delivery of possession).

See 16 Cent. Dig. tit. "Descent and Distribution," § 421.

See, however, Ware *v.* Welsh, 10 Mart. (La.) 430, holding that where a donee is put in possession of land under a parol gift and the donor dies intestate without revoking the gift, the value of the land at the time of the last inventory, independently of improvements, should be collated by him.

4. *Alabama.*— Fennell *v.* Henry, 70 Ala. 484, 45 Am. Rep. 88.

Georgia.— Sims *v.* Sims, 39 Ga. 108, 99 Am. Dec. 450.

Louisiana.— Cawthon *v.* Kimbell, 46 La. Ann. 750, 15 So. 101; Meyer's Succession, 44 La. Ann. 871, 11 So. 532; Berthelot *v.* Fitch, 44 La. Ann. 503, 10 So. 867; Haile's Succession, 40 La. Ann. 334, 3 So. 630; Ventress *v.* Brown, 34 La. Ann. 448 [*overruling* Guillory's Succession, 29 La. Ann. 495].

North Carolina.— Banks *v.* Shannonhouse, 61 N. C. 284; Walton *v.* Walton, 42 N. C. 138.

Tennessee.— Davis *v.* Garrett, 91 Tenn. 147, 18 S. W. 113.

Virginia.— West *v.* Jones, 85 Va. 616, 8 S. E. 468; Puryear *v.* Cabell, 24 Gratt. 260.

See 16 Cent. Dig. tit. "Descent and Distribution," § 412.

5. Wilson *v.* Kelly, 21 S. C. 535; Hughey *v.* Eichelberger, 11 S. C. 36.

Effect of loss on other donees.— Where a father, to equalize a gift of slaves to his son, gave property to his daughter, it must be charged to her as an advancement, although

(c) *Mode of Ascertaining Value.* In a suit for partition the court itself may ascertain the value of an advancement made to one of the parties.[6]

(d) *Evidence of Value.* An agreement between the parties in interest fixing the value of the property will be enforced on the distribution.[7] So a specific consideration expressed in a deed of gift as an advancement is conclusive of the value of the property.[8]

(e) *Right of Set-Off.* Certain claims of the donee with reference to the advancement may be set off by him against its value where the property is brought into hotchpot or collation.[9]

(ii) *Interest.* In the absence of a contract providing for interest,[10] advancements do not bear interest until after the death of the ancestor.[11] From the

the slaves, being of no value at the donor's death, could not be charged to the son. *Ex p.* Glenn, 20 S. C. 64.

A loss occurring after the donor's death, however, falls on the donee. McLure *v.* Steele, 14 Rich. Eq. (S. C.) 105.

6. Adair *v.* Hare, 73 Tex. 273, 11 S. W. 320, holding that the court need not cause the advancement to be appraised by the commissioners in partition as they are authorized to appraise only the land to be partitioned.

7. Wakefield *v.* Gilliland, 18 S. W. 768, 13 Ky. L. Rep. 845 (holding that where the rent of lands delivered to a son was to be paid in improvements, and afterward the father executed a receipt in full for the rent, the settlement was binding on the distributees, although the value of the improvements was less than the value of the use and occupation); Abert *v.* Lape, 15 S. W. 134, 12 Ky. L. Rep. 728 (holding conclusive as against a child his agreement with the parent fixing the amount to be charged against him as advances). See also Bason *v.* Harden, 72 N. C. 281.

8. Turner *v.* Kelly, 67 Ala. 173; Ladd *v.* Stephens, 147 Mo. 319, 48 S. W. 915; Palmer *v.* Culbertson, 143 N. Y. 213, 38 N. E. 199; Miller's Appeal, 31 Pa. St. 337.

9. King *v.* King, 107 La. 437, 31 So. 894, holding that grandchildren from whom collation is due to their grandparents for care and board and lodging are entitled to credit for work done by them for the grandparents.

Claim of husband of donee.— The value of medical services and board furnished by the husband of an heir to her father and minor brothers and sisters after her mother's death cannot be offset against advancements from the community estate of the father and mother made by the father to the h ir, since she has no interest in such demand. Adair *v.* Hare, 73 Tex. 273, 11 S. W. 320.

Rents and profits.— Where the donor in a revocable gift of land retained possession and received the rents and profits and died intestate without revoking it, his estate is not liable to the donee for the rents and profits. Hughey *v.* Eichelberger, 11 S. C. 36.

Breach of warranty of title.— Where land was conveyed to an heir by an ancestor with covenants of general warranty, and the title failed by reason of a prior encumbrance by the grantor discovered after his death, the heir was entitled to recover of the estate for breach of warranty, himself and his co-heirs bearing the burden thereof, although the land was conveyed voluntarily as an advancement. Polley *v.* Polley, 82 Ky. 64, 5 Ky. L. Rep. 801. See also Longshore *v.* Longshore, 200 Ill. 470, 65 N. E. 1081.

Insurance, repairs, and taxes.—Amounts expended by the donee in taxes, insurance, and maintenance are chargeable to revenues and are not to be deducted from the value of the property to be collated. Weber's Succession, 110 La. 674, 34 So. 731. If, however, the donee elects to collate in kind, he is entitled to the taxes and insurance premiums paid by him since the opening of the succession, and also to the expenses of repairs provided for by statute. Berthelot *v.* Fitch, 44 La. Ann. 503, 10 So. 867.

10. King *v.* King, 107 La. 437, 31 So. 894.

Capacity to contract.— If the donee is a married woman, a stipulation by her to pay interest from the date of the advancement is not binding. Roberson *v.* Nail, 85 Tenn. 124, 2 S. W. 19.

A release of interest indorsed on a note given for money advanced is inoperative if never delivered to the donee. Daves *v.* Haywood, 54 N. C. 253.

11. *Alabama.*— Comer *v.* Shehee, 128 Ala. 588, 30 So. 95, 87 Am. St. Rep. 78.

Florida.— Towles *v.* Roundtree, 10 Fla. 299.

Indiana.— Slaughter *v.* Slaughter, 21 Ind. App. 641, 52 N. E. 994 *semble.*

Kentucky.— Sadler *v.* Huffheimer, 12 S. W. 715, 11 Ky. L. Rep. 670.

Louisiana.— Weber's Succession, 110 La. 674, 34 So. 731.

Massachusetts.—Hall *v.* Davis, 3 Pick. 450; Osgood *v.* Breed, 17 Mass. 356.

Missouri.— Ray *v.* Loper, 65 Mo. 470; Nelson *v.* Wyan, 21 Mo. 347.

Pennsylvania.— Miller's Appeal, 31 Pa. St. 337.

Tennessee.— Morris *v.* Morris, 9 Heisk. 814; Wysong *v.* Rambo, (Ch. App. 1899) 56 S. W. 1053, 49 L. R. A. 766.

See 16 Cent. Dig. tit. "Descent and Distribution," § 422.

Advancement by note of donor.— A note given as an advancement by an ancestor to the husband of a distributee, payable one day after date with the right of collection postponed until the obligor's death, bears interest

death of the ancestor, however, interest may in some states be charged upon advancements that are brought into hotchpot.[12]

(III) *RENTS AND PROFITS AND INCREASE.* Rents and profits derived by the donee from the property advanced are not chargeable against him as distributee when the property is brought into hotchpot;[13] nor is the donee accountable for the increase of the property.[14]

(IV) *IMPROVEMENTS.* In estimating the value of an advancement of land, improvements made by the donee should be excluded, as he is not chargeable with their value.[15]

e. Property Chargeable With Advancements — (I) *REAL AND PERSONAL ESTATE.* The classes of property that are chargeable with advancements depend largely upon the statutes directing descents. In some states advancements of personal estate will first be charged against the personal estate of the intestate to which the donee is otherwise entitled, and advancements of real estate first be charged against his distributive share of the intestate's real estate.[16] If the statute excludes the blending of real and personal estate, then an advancement will be charged against his distributive share of only that class of the intestate's estate to which the advancement belongs, and he will not be excluded from receiving his distributive share in the other class of estate;[17] but where the statute does not show an intent to charge advancements first or altogether upon

from the day following its date. Carter *v.* King, 11 Rich. (S. C.) 125.

12. *Georgia.*— Boyd *v.* White, 32 Ga. 530; Harris *v.* Allen, 18 Ga. 177.

Louisiana.— Weber's Succession, 110 La. 674, 34 So. 731; Carroll *v.* Carroll, 48 La. Ann. 956, 20 So. 210.

Michigan.— See Sprague *v.* Moore, 130 Mich. 92, 89 N. W. 712.

South Carolina.— Rickenbacker *v.* Zimmerman, 10 S. C. 110, 30 Am. Rep. 37.

Tennessee.— Moore *v.* Burrow, 89 Tenn. 101, 17 S. W. 1035; Williams *v.* Williams, 15 Lea 438; Johnson *v.* Patterson, 13 Lea 626.

Virginia.— Puryear *v.* Cabell, 24 Gratt. 260.

West Virginia.— Kyle *v.* Conrad, 25 W. Va. 760.

See 16 Cent. Dig. tit. "Descent and Distribution," § 422.

On the contrary it is the rule in some states that interest runs only from the time when the estate should have been settled. Hanner *v.* Winburn, 42 N. C. 142; Yundt's Appeal, 13 Pa. St. 575, 53 Am. Dec. 496 (holding that advancements of all the heirs should be settled as of the same time after the death of the donor with interest from the time when the other heirs receive the balances due them respectively); Sharp's Estate, 13 Phila. (Pa.) 360; Thompson's Estate, 13 Phila. (Pa.) 292; Ford's Estate, 11 Phila. (Pa.) 97.

Interest after first division.— A child having received advancements and refusing to share in the first division but claiming a share in the division of the dower slaves is to be charged with interest on his advancements or their value from the death of the intestate to the date of the first division; and if the principal and interest of his advancements exceed the amount received by the other children, he is then to be charged with interest on such excess from that time to the period of the second division. Knight *v.* Oliver, 12 Gratt. (Va.) 33.

13. Ladd *v.* Stephens, 147 Mo. 319, 48 S. W. 915 (holding that dividends from stock given as an advancement are not to be brought into hotchpot); Ison *v.* Ison, 5 Rich. Eq. (S. C.) 15; Williams *v.* Stonestreet, 3 Rand. (Va.) 559; Kyle *v.* Conrad, 25 W. Va. 760.

Collation in kind.— If a donee elects to collate in kind, he will be charged rent for the property from the time of the opening of the succession by the death of the donor, and only from that time. Weber's Succession, 110 La. 674, 34 So. 731; Berthelot *v.* Fitch, 44 La. Ann. 503, 10 So. 867. See, however, Clark *v.* Hedden, 109 La. 147, 33 So. 116. If the rental value of the property has been increased by improvements, the rents of the improved property are not to be collated, but only the rental value of the property in the condition in which it was at the date of the donation. Weber's Succession, *supra.*

14. Sinkler *v.* Sinkler, 2 Desauss. (S. C.) 127; Thomas *v.* Gage, 1 Harp. Eq. (S. C.) 197; Hudson *v.* Hudson, 3 Rand. (Va.) 117.

15. Ware *v.* Welsh, 10 Mart. (La.) 430. See also Weber's Succession, 110 La. 674, 34 So. 731.

Reimbursement for improvements.— Improvements by a person on land ineffectively advanced to him are a charge for which he is entitled to reimbursement. Ross *v.* Dimmit, 3 Ky. L. Rep. 685.

16. Bemis *v.* Stearns, 16 Mass. 200; Terry *v.* Dayton, 31 Barb. (N. Y.) 519.

17. Stone *v.* Halley, 1 Dana (Ky.) 197; South *v.* Hoy, 3 T. B. Mon. (Ky.) 88; Quinn *v.* Stockton, 2 Litt. (Ky.) 343; Bemis *v.* Sterns, 16 Mass. 200; Havens *v.* Thompson, 23 N. J. Eq. 321; Lawrence *v.* Rayner, 44 N. C. 113; Wilson *v.* Hightower, 10 N. C. 76; Jones *v.* Jones, 6 N. C. 150; Davis *v.* Duke, 3 N. C. 224.

the class of property received, an advancement of realty will be charged against personal estate, or an advancement of personalty will be charged against real estate, so as not to allow the inheritance of any of the heirs to be diminished.[18]

(II) *Widow's Share.* The widow's share in personal estate and her dower in lands is taken regardless of advancements, and only the balance remaining after deducting her share is treated as the estate for distribution.[19]

8. Procedure[20] — a. Jurisdiction.[21] Jurisdiction to try and determine controversies arising in the distribution of estates with reference to advancements is conferred on probate courts.[22] However, a court of equitable jurisdiction may in a proper case,[23] such for instance as a suit for partition,[24] take cognizance of questions of advancement.

b. Pleading[25] — (I) *In General.* A bill filed by a distributee against an administrator and other distributees calling the latter to account in hotchpot need not allege notice to the administrator that complainant would assert that right; nor need it aver that complainant himself has not been advanced. If, however, the bill admits an advancement to complainant, it must allege his readiness to account for it in hotchpot.[26] If the release of a donee from liability to account for an advancement is set up to the disadvantage of the releasor and he elects not to be bound by it, the election and the grounds on which he resists the release must be alleged in his pleadings.[27]

(II) *Amendment.* If a donee called to account in hotchpot files an answer in misconception of his rights he may amend.[28]

18. *Illinois.*—Pigg *v.* Carroll, 89 Ill. 205.
Indiana.— Dyer *v.* Armstrong, 5 Ind. 437.
Maryland.— *In re* Young, 3 Md. Ch. 461.
Massachusetts.— Bemis *v.* Stearns, 16 Mass. 200.
Missouri.— *In re* Elliott, 98 Mo. 379, 11 S. W. 739.
North Carolina.— Shiver *v.* Brock, 55 N. C. 137; Headen *v.* Headen, 42 N. C. 159.
Pennsylvania.— Fleming's Appeal, 5 Phila. 351.
See 16 Cent. Dig. tit. "Descent and Distribution," § 419.

19. Grattan *v.* Grattan, 18 Ill. 167, 65 Am. Dec. 726; Knight *v.* Oliver, 12 Gratt. (Va.) 33.

20. Procedure as to valuation of advancement see *supra*, IV, B, 7, d, (I), (C).

21. See, generally, Courts.

22. *Alabama.*— Marshall *v.* Marshall, 86 Ala. 383, 5 So. 475.
Missouri.— *In re* Elliott, 98 Mo. 379, 11 S. W. 739.
New Hampshire.— State *v.* Concord R. Co., 59 N. H. 85.
Pennsylvania.— Springer's Appeal, 29 Pa. St. 208; Holliday *v.* Ward, 19 Pa. St. 485, 57 Am. Dec. 671; Earnest *v.* Earnest, 5 Rawle 213; Rittenhouse's Estate, 1 Pars. Eq. Cas. 313.
Vermont.— Adams *v.* Adams, 22 Vt. 50; Robinson *v.* Swift, 3 Vt. 283.
See 16 Cent. Dig. tit. "Descent and Distribution," § 423.

23. Key *v.* Jones, 52 Ala. 238 (holding that a court of chancery taking jurisdiction of an administration may, when a distribution becomes necessary, decree an account of advancements); Grattan *v.* Grattan, 18 Ill. 167, 65 Am. Dec. 726 (holding that courts of equity have paramount jurisdiction in cases of administration and settlement of estates, and may control courts of law in their action in reference thereto); Dyer *v.* Armstrong, 5 Ind. 437 (holding that, if a creditor of a donee levies on his undivided interest in land as to which the donor dies intestate, a coheir who asserts that the donee's advancement exceeds his distributive portion may file a bill to enjoin a sale of the land under the execution); Hayden *v.* Burch, 9 Gill (Md.) 79. Equity will not, however, assume jurisdiction of a suit to impress an equitable lien for advancements on the part of the undistributed shares of donees in lands admeasured as dower which have reverted to the estate and lands conveyed to all the heirs as tenants in common by another heir to whom advancements were made, since under Hill Anno. Laws, §§ 3104, 3105, a suit in partition is the only remedy. Belle *v.* Brown, 37 Oreg. 588, 61 Pac. 1024.

24. *Alabama.*— Marshall *v.* Marshall, 86 Ala. 383, 5 So. 475.
Indiana.— See Dyer *v.* Armstrong, 5 Ind. 437.
Mississippi.— Gowan *v.* Gowan, (1892) 12 So. 29.
Oregon.— Belle *v.* Brown, 37 Oreg. 588, 61 Pac. 1024.
Pennsylvania.— Summerville's Estate, 129 Pa. St. 631, 18 Atl. 554; Dutch's Appeal, 57 Pa. St. 461.

25. See, generally, Pleading.

26. Tison *v.* Tison, 12 Ga. 208.

27. Andrews *v.* Halliday, 63 Ga. 263.

28. Warfield *v.* Warfield, 5 Harr. & J. (Md.) 459, holding that where the answer to a bill filed by distributees against a donee calling on him to account in hotchpot does not elect to bring in the advancement or refuses to do so but insists on the donee's right to elect after the commissioners make their valuation, and the chancellor considers the

(III) *PLEADING AND PROOF.* Evidence of absolute gifts by a parent to certain children is admissible without being specially pleaded to show that gifts to other children were absolute gifts and not advancements.[29]

c. Parties.[30] On a bill by distributees against an administrator for their distributive shares, averring advances to the other distributees and calling them to account in hotchpot, the latter are proper parties defendant.[31]

d. Right to Jury.[32] In some states it is provided that trial by jury shall be allowed in the settlement of decedents' estates at the request of any party in all cases where there is an issue of fact.[33] There is no absolute right to trial by jury, however, in an action for partition, on an issue as to whether gifts were advancements.[34]

e. Defenses — (I) *LIMITATIONS AND LACHES.*[35] The statutes of limitations do not run against the right of a distributee to have advancements made to a co-distributee brought into hotchpot.[36] However the right to proceed against the donee for interest accruing after the donor's death may be lost by laches.[37]

(II) *RES JUDICATA.*[38] It has been held that a decree in partition between distributees concludes the question of advancements, and neither party may afterward assert a claim against the other on account of advancements made to the latter in excess of his distributive share.[39]

f. Evidence[40] — (I) *ADMISSIBILITY.* Declarations of the donor[41] and entries

answer as an election not to bring in the advancement and decrees partition of the lands of which the donor died seized, excluding the donee, the donee may amend his answer so as to elect to bring his advancement into hotchpot at its value at the time he received it and to share as distributee accordingly.

29. Gunn *v.* Thruston, 130 Mo. 339, 32 S. W. 654.

30. See, generally, PARTIES.

31. Tison *v.* Tison, 12 Ga. 208.

32. See, generally, JURIES.

33. Shaw *v.* Kent, 11 Ind. 80.

34. Gunn *v.* Thruston, 130 Mo. 339, 32 S. W. 654.

35. See, generally, EQUITY; LIMITATIONS OF ACTIONS.

36. Lindsay *v.* Platt, 9 Fla. 150; Barnes *v.* Hazleton, 50 Ill. 429; King *v.* King, 107 La. 437, 31 So. 894 (holding that an heir who admits that the amount represented by his note bearing interest is due as collation cannot sustain prescription as a bar to recovery of interest on the note); Hughes' Appeal, 57 Pa. St. 179.

Ignorance of rights.— Where a bill to collate and equalize advances among heirs had been disposed of without reference to a claim in favor of the estate, the parties then having no knowledge of its existence, a statute of limitation is no defense to a bill to reach and apply the claim, brought shortly after it became available. Daniels *v.* Pickett, (Tenn. Ch. App. 1900) 59 S. W. 148.

37. Wysong *v.* Rambo, (Tenn. Ch. App. 1899) 56 S. W. 1053, 49 L. R. A. 766, holding that where an heir could have had the estate divided at any time after the death of the ancestor but made no effort to have it done until after the lapse of twenty-two years, he is entitled to interest on advancements made to co-heirs only for two years, that being a reasonable time in which to have had the estate settled.

38. See, generally, JUDGMENTS.

39. Eckler *v.* Galbraith, 12 Bush (Ky.) 71. See also Tye *v.* Tye, 69 S. W. 718, 24 Ky. L. Rep. 637. *Contra*, Gowan *v.* Gowan, (Miss. 1892) 12 So. 29; Summerville's Estate, 129 Pa. St. 631, 18 Atl. 554; Dutch's Appeal, 57 Pa. St. 461.

Ignorance of rights.— The rule is the same, in the absence of fraud, although the complaining party had no knowledge of the advancements at the time of the partition. Belle *v.* Brown, 37 Oreg. 588, 61 Pac. 1024.

40. See, generally, EVIDENCE.

Evidence of: Nature of gift generally see *supra*, IV, B, 5, a, (I). Value of advancement see *supra*, IV, B, 7, d, (I), (D). Evidence of circumstances of: Gift in general see *supra*, IV, B, 5, a, (I). Gift to husband of child see *supra*, IV, B, 4, c, (IV). Payment of debt of distributee see *supra*, IV, B, 5, a, (II).

Presumption as to character of: Expenses of maintaining or educating distributee see *supra*, IV, B, 5, a, (IV). Gift of marriage portion to distributee see *supra*, IV, B, 5, a, (VI). Gift to husband of child see *supra*, IV, B, 4, c, (IV). Payment of debt of distributee see *supra*, IV, B, 5, a, (II). Payment or transfer for value see *supra*, IV, B, 5, b. Payment or transfer where evidence of debt is executed see *supra*, IV, B, 5, c, (II). Purchase in name of distributee see *supra*, IV, B, 5, a, (III). Voluntary gift generally see *supra*, IV, B, 5, a, (I).

41. Pole *v.* Simmons, 45 Md. 246, holding that declarations of a donor made prior to the transaction in question and accompanied by a writing are admissible. If not accompanied by a writing, however, they are not admissible. Frey *v.* Heydt, 116 Pa. St. 601, 11 Atl. 535. See, however, Bailey *v.* Barclay, 109 Ky. 636, 60 S. W. 377, 22 Ky. L. Rep. 1244. See also *supra*, IV, B, 5, a, (I); IV, B, 5, c.

in his books of account,[42] and acknowledgments or admissions of the donee[43] are ordinarily admissible in evidence on the question whether a payment or transfer constitutes an advancement. Parol evidence on the question is admitted or rejected according to the rules which govern the competency of that species of evidence in other cases.[44]

(II) *WEIGHT AND SUFFICIENCY.* An advancement may be established by a preponderance of the evidence;[45] and the evidence may consist of declarations of the donor[46] or entries in his books of account,[47] or of the oral acknowledgments

Contemporaneous declarations of the donor are competent on the question of advancement. Autrey *v.* Autrey, 37 Ala. 614; Bailey *v.* Barclay, 109 Ky. 636, 60 S. W. 377, 22 Ky. L. Rep. 1244.

Subsequent declarations of the donor are inadmissible on the question of advancement unless against his interest or part of the *res gestæ*. Bailey *v.* Barclay, 109 Ky. 636, 60 S. W. 377, 22 Ky. L. Rep. 1244. See, however, Autrey *v.* Autrey, 37 Ala. 614; Mitchell *v.* Mitchell, 8 Ala. 414; Johnson *v.* Belden, 20 Conn. 322 (holding that where a father advanced money to a son to establish him in business, subsequent declarations of the father as to the amount received by the son are admissible); Cline *v.* Jones, 111 Ill. 563 (holding that on a question of advancements in partition proceedings between heirs, evidence of declarations of the ancestor to the effect that he had given equal sums to all his children are admissible).

42. Mitchell *v.* Mitchell, 8 Ala. 414; Fellows *v.* Little, 46 N. H. 27; *In re* Hengst, 6 Watts (Pa.) 86; Weatherhead *v.* Field, 26 Vt. 665; Brown *v.* Brown, 16 Vt. 197, all holding that contemporaneous book entries made by the donor charging advancements are competent evidence against the donee.

Ex parte entries.— Book entries are competent although not known to the donee. *In re* Hengst, 6 Watts (Pa.) 86.

Subsequent entries.— Book entries will be rejected if they do not appear to have been made contemporaneously with the transactions to which they refer. Nelson *v.* Nelson, 90 Mo. 460, 2 S. W. 413.

43. French *v.* Strumberg, 52 Tex. 92 (holding that a written acknowledgment by a child of an advancement is competent evidence against him); Sheperd *v.* White, 11 Tex. 346 (holding that declarations of a donee in what purports to be his will concerning the nature of the conveyance are admissible against his wife and children). See also *supra*, IV, B, 5, c, (II).

Contemporaneous or subsequent admissions of the donee are admissible on the question of advancement. Graves *v.* Spedden, 46 Md. 527; Harris' Appeal, 2 Grant (Pa.) 304; Christy's Appeal, 1 Grant (Pa.) 369; *In re* King, 6 Whart. (Pa.) 370; Law *v.* Smith, 2 R. I. 244.

Admissions of father of donee.— Grandchildren claiming a distributive share of their maternal grandfather's estate are not bound by admissions of their father made after the grandfather's death. Nelson *v.* Bush, 9 Dana (Ky.) 104.

44. Porter *v.* Porter, 51 Me. 376 (holding that parol evidence is not admissible to explain the purposes of a deed from parent to child); Parks *v.* Parks, 19 Md. 323; Sayles *v.* Baker, 5 R. I. 457 (holding that where an instrument is silent as to its purpose, its character, consideration, and general subject-matter may be inquired into by parol); Newell *v.* Newell, 13 Vt. 24 (where parol evidence was admitted to show a conveyance of land from father to son to have been an advancement).

Parol evidence: As excluded by statute see *supra*, IV, B, 2, a, (II). Of consideration of transfer see *supra*, IV, B, 5, b. Of intent of donor see *supra*, IV, B, 5, c. Of nature of transaction in general see *supra*, IV, B, 5, a, (I).

45. Middleton *v.* Middleton, 31 Iowa 151. See also McElroy *v.* Barkley, (Tenn. Ch. App. 1899) 58 S. W. 406.

46. Blackerby *v.* Holton, 5 Dana (Ky.) 520; Parker *v.* Parker, 11 S. W. 91, 10 Ky. L. Rep. 929; Tompkins *v.* Carter, 15 Ky. L. 749; Stern's Estate, 3 Pa. Dist. 369; Law *v.* Smith, 2 R. I. 244; Keys *v.* Keys, 11 Heisk. (Tenn.) 425.

Declarations to third persons may not be sufficient to establish the advancement as against the donee. Ray *v.* Loper, 65 Mo. 470; Weatherwax *v.* Woodin, 20 Hun (N. Y.) 518; Homiller's Estate, 17 Wkly. Notes Cas. (Pa.) 238.

An absolute gift may on the other hand be established by the donor's declarations. Johnson *v.* Belden, 20 Conn. 322; *In re* Ward, 73 Mich. 220, 41 N. W. 431; Alexander *v.* Alexander, 1 N. Y. St. 508; Storey's Appeal, 83 Pa. St. 89; Lawson's Appeal, 23 Pa. St. 85; *In re* King, 6 Whart. (Pa.) 370; Watkins *v.* Young, 31 Gratt. (Va.) 84. To establish a gift by declarations, however, the evidence must be such as to make it reasonably certain that the witnesses are not mistaken in their recollections as to the declarations. Parker *v.* Parker, 11 S. W. 91, 10 Ky. L. Rep. 929.

47. Fels *v.* Fels, 1 Ohio Cir. Ct. 420; Yeich's Appeal, (Pa. 1889) 17 Atl. 32; Murray's Estate, 2 Chest. Co. Rep. (Pa.) 300; Brown *v.* Brown, 16 Vt. 197.

Book entries may control prior written instruments. Yeich's Appeal, (Pa. 1889) 17 Atl. 32; Murray's Estate, 2 Chest. Co. Rep. (Pa.) 300.

Entries by third persons in the donor's books, if made without his direction, are insufficient to charge heirs with advancements. Weatherwax *v.* Woodin, 20 Hun (N. Y.) 518.

or admissions of the donee, or acknowledgments or admissions contained in his receipts, letters, or other written instruments.[48]

g. Questions For Court and For Jury.[49] If the case is properly triable by a jury, the question whether the donor intended a gift as an advancement[50] and the question of the amount of an advancement[51] are for the jury. In a suit for partition of real estate, however, the question of the amount of an advancement is for the court.[52]

h. Verdict.[53] Where the issue is whether or not the distributees are to be charged with advancements, the jury in its verdict should state what sums if any have been advanced and to whom.[54]

i. Costs.[55] Where an issue is made up to ascertain the amounts each of several distributees have received from the estate, the costs of the proceeding should be charged jointly upon the estate.[56]

j. New Trial.[57] A memorandum of the donor tending to show that he had made advancements does not warrant the reopening of an estate after a decree finding that no advancements had been made, where it appears to have been made many years before the donor's death and it is not shown that he ever called the attention of any member of his family to it.[58]

C. Debts of Intestate and Encumbrances on Property — 1. In General — a. Liabilities of Heirs and Rights of Creditors in General. The assets of the estates of deceased persons are regarded as a trust fund for the payment of their debts, and may be followed in equity for that purpose into the hands of distributees,[59] their right to take as heirs or next of kin being subservient to the

Expunged entries are not sufficient to prove an advancement. Johnson *v.* Belden, 20 Conn. 332. Where entries of advancements were made in a parent's book, and afterward an inquest found that he had been a lunatic for five years before the finding, and when the book came into his committee's hands the entries were found to have been canceled, there is no presumption as to the time of cancellation, and the burden is on those resisting the advancements to show a change of intention of the parent when he was sane. Oller *v.* Bonebrake, 65 Pa. St. 338.

Entries consistent with debt.— The entries must exclude the idea of a debt else they are insufficient as evidence of advancements. Bigelow *v.* Poole, 10 Gray (Mass.) 104; Miller's Appeal, 40 Pa. St. 57, 80 Am. Dec. 555; Hogg's Estate, 5 Lanc. L. Rev. 169.

48. Bishop *v.* Davenport, 58 Ill. 105; Quarles *v.* Quarles, 4 Mass. 680; Bucknor's Estate, 7 Pa. Co. Ct. 361, all holding that a receipt or other written acknowledgment given by a distributee in part or in full acknowledgment of his share is conclusive as to him. However, an agreement by children with their father to account for proceeds of land given them by him is insufficient to establish an advancement. Woodward *v.* Little, 4 Ky. L. Rep. 990.

Oral admissions by the donee may be sufficient to prove or disprove an advancement. Law *v.* Smith, 2 R. I. 244; Scawin *v.* Scawin, 1 Y. & Coll. 65, 20 Eng. Ch. 65. See, however, Green *v.* Hathaway, 36 N. J. Eq. 471 (holding a statement of a son to a third person that he was indebted to his father for money which was to be deducted from his share insufficient to charge him with the money as an advancement); Shrady *v.* Shrady, 42 N. Y. App. Div. 9, 58 N. Y. Suppl. 546 (holding that conversations between heirs after the death of the ancestor are insufficient to prove advancements).

49. See, generally, TRIAL.

50. Robinson *v.* Robinson, 45 Ark. 481; Shaw *v.* Kent, 11 Ind. 80; Stewart *v.* State, 2 Harr. & G. (Md.) 114; Palmer *v.* Culbertson, 20 N. Y. Suppl, 391 [*affirmed* in 143 N. Y. 213, 38 N. E. 199].

51. State *v.* Jameson, 3 Gill & J. (Md.) 442.

52. Datt's Estate, 34 Pittsb. Leg. J. (Pa.) 349.

53. See, generally, TRIAL.

54. Andrews *v.* Halliday, 63 Ga. 263.

55. See, generally, COSTS.

56. Mitchell *v.* Mitchell, 8 Ala. 414, holding that the costs should not be charged against those most active in making objections.

57. See, generally, NEW TRIAL.

58. Hubbard *v.* Brooks, 86 Ga. 449, 12 S. E. 648.

59. McLaughlin *v.* Potomac Bank, 7 How. (U. S.) 220, 12 L. ed. 675; Telfair *v.* Stead, 2 Cranch (U. S.) 407, 2 L. ed. 320; Carey *v.* Roosevelt, 91 Fed. 567; Davies *v.* Davies, 1 Jur. 446, 2 Keen 534, 15 Eng. Ch. 534; Holland *v.* Prior, Coop. t. Brough. 426, 1 Myl. & K. 237, 7 Eng. Ch. 237; Newland *v.* Champion, 1 Ves. 105, 27 Eng. Reprint 920.

Executory title.— In Louisiana a creditor must have an executory title against the heir in order to seize property in his hands acquired from the estate of the ancestor. Hart *v.* Connolly, 49 La. Ann. 1587, 22 So. 809.

rights of the creditors of the decedent.[60] At common law an heir is not liable for the debts of the ancestor beyond the value of the property received from the ancestor's estate, and then only on such debts as were created by the specialties of the ancestor in which the heir is expressly named;[61] nor is he personally liable upon the ancestor's covenants, although he is named therein,[62] or for the ancestor's torts, unless committed in connection with property, the title to which has descended to him;[63] but the estate of the ancestor is liable for his contracts entered into during his lifetime.[64] As a general rule the remedy of a creditor of

60. *Connecticut.*— Winslow *v.* Parkhurst, 1 Root 268.

Iowa.— Security F. Ins. Co. *v.* Hansen, 104 Iowa 264, 73 N. W. 596.

Kansas.— Fletcher *v.* Wormington, 24 Kan. 259.

Louisiana.— Aronstein's Succession, 51 La. Ann. 1052, 25 So. 932.

Mississippi.— Savings, etc., Assoc. *v.* Tart, 81 Miss. 276, 32 So. 115.

New Jersey.— Northrup *v.* Roe, 16 N. J. L. J. 334.

Pennsylvania.— De Witt *v.* Lehigh Valley R. Co., 21 Pa. Super. Ct. 10.

England.—Batthyany *v.* Walford, 36 Ch. D. 269, 56 L. J. Ch. 881, 57 L. T. Rep. N. S. 206, 35 Wkly. Rep. 814; Bradbury *v.* Morgan, 1 H. & C. 249, 8 Jur. N. S. 918, 31 L. J. Exch. 462, 7 L. T. Rep. N. S. 104, 10 Wkly. Rep. 776; Wheatley *v.* Lane, 1 Saund. 216; Sollers *v.* Lawrence, Willes 413.

See 16 Cent. Dig. tit. "Descent and Distribution," § 433.

A widow who claims under her deceased husband must contribute ratably with other distributees to pay the debts of the estate. Atchison *v.* Atchison, 106 Ky. 190, 50 S. W. 26, 20 Ky. L. Rep. 1755. But a widow having custody of property alleged to belong to her deceased husband's estate cannot be proceeded against by his creditors, where she is neither an heir nor the husband's personal representative. McKenzie *v.* Havard, 12 Mart. (La.) 101.

61. *Connecticut.*— Phelps *v.* Miles, 1 Root 162.

New York.— The heirs or next of kin of a deceased person can only be made liable upon his contracts or for his debts, in the cases and in the manner prescribed by statute. Selover *v.* Coe, 63 N. Y. 438.

South Carolina.—The obligation of the heir to pay the debt of the ancestor rests on his possession of the ancestor's property, and not on contract. Martin *v.* Jennings, 52 S. C. 371, 29 S. E. 807.

Texas.— Under a statute making heirs and devisees liable for the ancestor's debts to the extent of property of the estate in their hands, such heirs and devisees are not liable to a personal judgment on suit of a creditor. Blinn *v.* McDonald, 92 Tex. 604, 46 S. W. 787, 48 S. W. 571, 50 S. W. 931.

United States.— Carey *v.* Roosevelt, 91 Fed. 567; Pyatt *v.* Waldo, 85 Fed. 399.

England.— Galton *v.* Hancock, 2 Atk. 424, 26 Eng. Reprint 656; Davies *v.* Churchman, 3 Lev. 189; Davy *v.* Pepys, Plowd. 438; Dyke *v.* Sweeting, Willes 585.

See 16 Cent. Dig. tit. "Descent and Distribution," § 433.

62. Gilchrist *v.* Filyan, 2 Fla. 94; Lansdale *v.* Cox, 7 T. B. Mon. (Ky.) 401; Ely *v.* McLain, 1 Tenn. Cas. 5, Thomps. Cas. (Tenn.) 21.

63. *Alabama.*— Coker *v.* Crozier, 5 Ala. 369.

Massachusetts.— Sturgis *v.* Slacum, 18 Pick. 36.

New Hampshire.— Vittum *v.* Gilman, 48 N. H. 416.

New York.— Haight *v.* Hayt, 19 N. Y. 464.

North Carolina.— Fellow *v.* Fulgham, 7 N. C. 254.

See 16 Cent. Dig. tit. "Descent and Distribution," § 433 *et seq.*

Fraud of ancestor.— So far as the heirs are concerned the fraud of the ancestor dies with him, unless it has descended to them with some property, the title to which was tainted with the fraud. Draper *v.* McFarland, 6 Ill. 310.

64. *Maryland.*— Steele *v.* Steele, 75 Md. 477, 23 Atl. 959.

Massachusetts.— Cox *v.* Maxwell, 151 Mass. 336, 24 N. E. 50. As to contracts terminable at will see Browne *v.* McDonald, 129 Mass. 66.

Michigan.— Frank *v.* Morley, 106 Mich. 637, 64 N. W. 577; Wilson *v.* Hotchkiss, 81 Mich. 172, 45 N. W. 838.

New York.— Hall *v.* Bennett, 48 N. Y. Super. Ct. 302.

Pennsylvania.— La Rue *v.* Gilkyson, 4 Pa. St. 375, 45 Am. Dec. 700.

Vermont.— State University *v.* Baxter, 43 Vt. 645.

England.— Skidmore *v.* Bradford, L. R. 8 Eq. 134, 21 L. T. Rep. N. S. 291, 17 Wkly. Rep. 1056; Cooper *v.* Jarman, L. R. 3 Eq. 98, 12 Jur. N. S. 956, 36 L. J. Ch. 85, 15 Wkly. Rep. 142; Wentworth *v.* Cock, 10 A. & E. 42, 3 Jur. 340, 8 L. J. Q. B. 230, 2 P. & D. 251, 37 E. C. L. 47; Collen *v.* Wright, 8 E. & B. 647, 4 Jur. N. S. 357, 27 L. J. Q. B. 215, 6 Wkly. Rep. 123, 92 E. C. L. 647; Bradbury *v.* Morgan, 1 H. & C. 249, 8 Jur. N. S. 918, 31 L. J. Exch. 462, 7 L. T. Rep. N. S. 104, 10 Wkly. Rep. 776; Sollers *v.* Lawrence, Willes 413.

See 16 Cent. Dig. tit. "Descent and Distribution," § 439; and, generally, EXECUTORS AND ADMINISTRATORS.

A personal representative is liable as such on the contracts of the decedent, although he is not named therein. Shultz *v.* Johnson, 5 B. Mon. (Ky.) 497; Drummond *v.* Crane, 159 Mass. 577, 35 N. E. 90, 38 Am. St. Rep. 460, 23 L. R. A. 707; Bradbury *v.* Morgan, 1 H. & C. 249, 8 Jur. N. S. 918, 31 L. J. Exch. 462, 7 L. T. Rep. N. S. 104, 10 Wkly. Rep. 776; Harwood *v.* Hilliard, 2 Mod. 268; Cavan

a deceased person is against the decedent's estate, and in the absence of a testamentary provision to the contrary the personal estate is the primary fund for the payment of the decedent's debts, so that a creditor who seeks to reach the real estate must first show that the personal estate has been exhausted.[65] Where the decedent leaves no personal estate, and administration is not taken out within a reasonable length of time after his death, a creditor may assert a lien against his real estate;[66] and for the purpose of enforcing such a lien, the creditor may follow such real estate into the hands of heirs or devisees.[67] Where the real estate of the ancestor is sold to pay his debts, upon suit of his creditors, the heirs and distributees are entitled to improvements thereon made by them; and other things being equal they will be held to keep down taxes and encumbrances, in consideration of rents and profits.[68] So also assessments for benefits caused by public improvements must be allowed to the heir.[69] So too of the usufruct.[70] But the land of a decedent, exclusive of such improvements and the usufruct, is chargeable with the ancestor's debts, for the payment of which it may be sold;[71] and a purchaser from an heir of land of his ancestor that is chargeable with the ancestor's debts, is not a *bona fide* purchaser, where the ancestor's liability is of record.[72] The creditor is not entitled to a personal judgment against an heir or devisee.[73]

b. Extent of Liability in General. The heirs are liable upon the contracts and for the debts of their ancestor only to the extent of their inheritance;[74] and as

v. Pulteney, 2 Ves. Jr. 544, 30 Eng. Reprint 768. See EXECUTORS AND ADMINISTRATORS.

65. McFarlane *v.* Golling, 76 Fed. 23, 22 C. C. A. 23.

Where there is unusual delay in settling the estate in the hands of the executor or administrator a creditor may proceed against the heirs or distributees. Rockwell *v.* Geery, 4 Hun (N. Y.) 606.

Where the heirs or distributees refuse to accept their inheritance to the prejudice of the creditors of the decedent, the creditors may, under the Louisiana statutes, be substituted in the place of the heirs or distributees, exercising all the rights that the decedent could have exercised, for the purpose of recovering his estate, in order to render it available for the payment of his debts. Sevier *v.* Gordon, 29 La. Ann. 440; Gardner *v.* Montague, 16 La. Ann. 299.

Creditors cannot be substituted in the place of the heirs with respect to claims due them as heirs, unless the creditors can show collusion between the debtor and the heirs. Turner *v.* Faucett, 41 N. C. 549.

66. Brandenburg *v.* Norwood, (Tex. Civ. App. 1901) 66 S. W. 587.

67. *Iowa.*— Hansen's Empire Fur Factory *v.* Teahout, 104 Iowa 360, 73 N. W. 875.

Kentucky.— Davis *v.* Whipp, 48 S. W. 984, 20 Ky. L. Rep. 1166.

Minnesota.— New Hampshire Sav. Bank *v.* Barrows, 77 Minn. 138, 79 N. W. 660; Johnson *v.* Minnesota L. & T. Co., 75 Minn. 4, 77 N. W. 421, 74 Am. St. Rep. 438.

New Jersey.— Ransom *v.* Brinkerhoff, 56 N. J. Eq. 149, 38 Atl. 919.

New York.— Felts *v.* Martin, 20 N. Y. App. Div. 60, 46 N. Y. Suppl. 741.

Pennsylvania.— McKibben's Estate, 7 Pa. Dist. 511.

South Carolina.—Jennings *v.* Parr, 62 S. C. 306, 40 S. E. 683.

Texas.— Devine *v.* U. S. Mortg. Co., (Civ. App. 1898) 48 S. W. 585; Brandenburg *v.* Norwood, (Civ. App. 1901) 66 S. W. 587.

See 16 Cent. Dig. tit. "Descent and Distribution," § 433 *et seq.*

68. Ransom *v.* Brinkerhoff, 56 N. J. Eq. 149, 38 Atl. 919.

69. Ransom *v.* Brinkerhoff, 56 N. J. Eq. 149, 38 Atl. 919.

70. Fitzwilliams' Succession, 3 La. Ann. 489.

71. But where persons take as grantees from their ancestor, and not as devisees or heirs, their title will be held valid, unless it can be shown that the conveyance was made by the ancestor with the intent to defeat his creditors. Where the intestate deeded her property to trustees, to be distributed among her heirs after her death, leaving an unpaid mortgage note, for which the security was insufficient, it was held that the conveyance could not be declared invalid, since the heirs took as grantees, it not being shown that the intestate had any reason to suppose such security was insufficient. Matteson *v.* Palser, 56 N. Y. App. Div. 91, 67 N. Y. Suppl. 612, 31 N. Y. Civ. Proc. 198.

72. Land of deceased surety on duly recorded guardian's bond was held liable for a breach thereof, and purchasers from heirs of such surety were held not to be *bona fide* purchasers. Savings Bldg., etc., Assoc. *v.* Tart, (Miss. 1902) 32 So. 115.

73. Brandenburg *v.* Norwood, (Tex. Civ. App. 1901) 66 S. W. 587.

74. *Indiana.*— Harrison Nat. Bank *v.* Culbertson, 147 Ind. 611, 45 N. E. 657, 47 N. E. 13.

Louisiana.— Changeur *v.* Gravier, 4 Mart. N. S. 68.

Minnesota.— Lake Phalan Land, etc., Co. *v.* Lindeke, 66 Minn. 209, 68 N. W. 974.

between themselves they are liable to contribution where some of them are or may be held to more than their share of liability.[75]

c. Acceptance and Renunciation of Succession[76] — (I) *In General.* In Louisiana and in other jurisdictions where the civil law is in force, no person is liable as heir, for the debts of the ancestor without an acceptance of the inheritance;[77] but where an heir accepts such inheritance unconditionally, he becomes bound to pay the debts of the ancestor, even though the assets are insufficient for that purpose,[78] and there is an administration.[79] If debts are not known to exist at the time of the acceptance, and are afterward discovered, the remedy of the creditors is against the heir accepting, and not against the estate, which has ceased to exist.[80]

(II) *Benefit of Inventory.* In Louisiana the heir has a right to abandon his ancestor's estate to the ancestor's creditors and hold himself discharged from the ancestor's liabilities, preserving the identity of his own property from that of the ancestor, and collecting his own dues from the ancestor's estate; but to do so, he must safeguard his acceptance of the succession by a clear and distinct reservation of the benefit of an inventory.[81] An heir who accepts the estate of his ancestor with the benefit of an inventory stands toward creditors and distributees rather in the capacity of an administrator than an owner, and is liable only to the extent of the assets belonging to the ancestor's estate;[82] but after such an acceptance, with the benefit of an inventory, he is bound to duly administer upon the estate as beneficiary heir, so far as creditors are concerned, or he will be personally liable to creditors for the ancestor's debts.[83] But equity will not hold heirs to

New Jersey.— Ransom *v.* Brinkerhoff, 56 N. J. Eq. 149, 38 Atl. 919.

New York.— Whitaker *v.* Young, 2 Cow. 569.

Utah.— Bacon *v.* Thornton, 16 Utah 138, 51 Pac. 153.

See 16 Cent. Dig. tit. "Descent and Distribution," § 434.

Each heir is severally liable for the debts of his ancestor for what he receives from the ancestor and not for what the other heirs receive. Haines *v.* Haines, (N. J. Sup. 1903) 54 Atl. 401.

If the estate of the ancestor is insufficient to pay his debts, the heirs cannot complain, their liability being only to the extent to which they have inherited from such ancestor. Changeur *v.* Gravier, 4 Mart. N. S. (La.) 68. And this rule is not changed, even where the statutes make heirs and devisees personally liable for debts of the ancestor, by reason of land descended or devised to them, so far as they have received rents or profits therefrom before alienating it, or considerations for such alienation, unless they answer falsely in disclosure or refuse to disclose. Ransom *v.* Brinkerhoff, 56 N. J. Eq. 149, 38 Atl. 919.

75. Whitaker *v.* Young, 2 Cow. (N. Y.) 569.

76. Nature and consequences of an acceptance of the estate see *supra*, III, A, 2, a.

77. Johnson *v.* Boon, 4 Mart. 380; Cresse *v.* Marigny, 4 Mart. 50.

An heir may disclaim acceptance in proceedings brought against him requiring him to accept or renounce, and thereby avoid liability. Penny *v.* Weston, 4 Rob. (La.) 165.

Where the heirship is denied the alleged heir cannot be made liable until it is shown that he has accepted the inheritance, although as executor and residuary legatee under a will he has interfered with the estate. Cotton *v.* Cullen, 2 La. 371.

78. Claudel *v.* Palao, 28 La. Ann. 872; Cole *v.* Reddick, 28 La. Ann. 843; Todd *v.* Place, 9 La. Ann. 517; McMasters *v.* Place, 8 La. Ann. 431; Blair *v.* Cisneros, 10 Tex. 34.

79. Wiley *v.* Hunter, 2 La. Ann. 806; Mudd *v.* Stille, 6 La. 18.

Where there is such an acceptance, the accepting heir stands in the place of the ancestor as to all of his rights and obligations. James *v.* Hynson, 21 La. Ann. 566; Louisiana State Bank *v.* Barrow, 2 La. Ann. 405.

Where creditors acquiesce in the taking of unconditional control of the estate by the accepting heir, without administration, they thereby lose their right to pursue such estate as distinct from their remedy against such heir. James *v.* Hynson, 21 La. Ann. 566.

80. Thibodeaux's Succession, 38 La. Ann. 716.

81. Murray's Succession, 41 La. Ann. 1109, 7 So. 126.

Benefit of inventory under civil law.—The heir obtains the privilege of being liable for the charges and debts of the succession only to the value of the effects of the succession by causing an inventory of these effects within the time and manner prescribed by law. La. Civ. Code, art. 1025; Pothier des Success. c. 3, § 3, art. 2.

82. Changeur *v.* Gravier, 4 Mart. N. S. (La.) 68; Cox *v.* Martin, 12 Mart. (La.) 361; Blair *v.* Cisneros, 10 Tex. 34.

Minor heirs.— Where some of the heirs are minors the estate cannot be accepted by them or on their behalf without the benefit of inventory. Watts *v.* Frazer, 5 La. 383.

83. **A mother accepting her son's succession with benefit of inventory** is bound to

the same liability for the debts of their ancestor as if they themselves had contracted them for neglecting to take the inventory, where the required inventory has been prepared under judicial authority and it does not appear that any of the rights of the complaining parties are impaired by the neglect.[84]

(III) *RENUNCIATION OF ESTATE.* A presumptive heir who is not shown to have accepted the succession of a decedent and who has subsequently renounced the succession is not liable for the debts of the decedent.[85]

d. Express Promise to Pay. Where the heirs are made liable by statute for the simple contract debts of their ancestors, the question of assets is not to be considered in suits against them, upon their express promise to pay the debts of the ancestor.[86] In the absence of such a statute, the extinguishing of an indebtedness of an intestate is considered a sufficient consideration to support the bond of distributees conditioned to pay the debts of such intestate.[87] And a promise by an heir to satisfy an indebtedness of the estate for a consideration is binding upon him.[88]

e. Debts and Liabilities Enforceable. At common law an heir is not bound by the contracts or fraudulent acts of the ancestor unless he is a party thereto;[89] but under statutes in some states he is liable to the extent of the property received by him from the ancestor's estate, both upon the contracts of the ancestor[90] and for his tortious acts.[91]

2. WHAT LAW GOVERNS — a. In General. Upon the death of a decedent his assets are to be collected and his estate administered according to the law of the

creditors to duly administer as beneficiary heir or to be personally liable as to creditors. Flower *v.* O'Connor, 7 La. 198.

Treating property as his own.— Where an heir accepted a succession, with the benefit of inventory, then offered to sell it, it was held that he had thereby made himself an unconditional heir, and was personally liable for the payment of the ancestor's debts. Benedict *v.* Bonnot, 39 La. Ann. 972, 3 So. 223.

84. New Orleans First Nat. Bank *v.* Bohne, 8 Fed. 115, 4 Woods 74.

85. Miltenberger *v.* Weems, 31 La. Ann. 259.

86. Elting *v.* Vanderlyn, 4 Johns. (N. Y.) 237.

87. Bissinger *v.* Lawson, 57 Miss. 36.

88. Where the heir promised the administrator that if he would deliver up to him the assets he would satisfy the claim of a creditor, promising the creditor at the same time to satisfy such claim if the creditor would assent to such delivery, which arrangement was effected, it was held that the heir was liable on his promise. Courtois *v.* Perquier, 1 Brev. (S. C.) 314.

89. *Indiana.*— Where an executor with the approval of the court paid money belonging to infant legatees to their guardian, who was insolvent, it was held that the successor of such guardian, who was a surety on his bond, could not maintain an action against the heirs of the executor, under a provision of statute making heirs, devisees, and distributees of decedents liable to the extent of property received by them, to any creditor whose claim remains unpaid, who six months prior to final settlement was an infant. Silvers *v.* Canary, 114 Ind. 129, 16 N. E. 166.

Kansas.— Heirs are not liable for damages caused by use and occupation during the life of their ancestor. Hillyer *v.* Douglass, 56 Kan. 97, 42 Pac. 329.

Kentucky.— As heirs at common law were not bound by the contracts or frauds of their ancestors, unless they were expressly named, a parol contract is insufficient to bind them. Moore *v.* Fauntleroy, 3 A. K. Marsh. 360.

Nebraska.— Children inheriting from insane parents are not liable to the county for their expense in an asylum, no claim therefor having been filed in the course of administration. Richardson County *v.* Smith, 25 Nebr. 767, 41 N. W. 774.

Virginia.— An heir was held not liable for clerk's fees and taxes due from the ancestor. Haydon *v.* Goode, 4 Hen. & M. 460.

See 16 Cent. Dig. tit. "Descent and Distribution" § 439.

90. **Action for medical services rendered to decedent** may be maintained against heirs of decedent to the extent of property received by them from the estate. Adams *v.* Hilliard, 59 Hun (N. Y.) 625, 14 N. Y. Suppl. 120 [*distinguishing* Wilson *v.* Harvey, 52 How. Pr. (N. Y.) 126].

A ratification by the administrator of a contract with decedent is binding as against the heirs, the administrator representing the deceased "more actually" than the heirs. Bullard *v.* Moor, 158 Mass. 418, 33 N. E. 928.

A debt by simple contract may be recovered of the heirs of the debtor where a debt by specialty can be. Robertson *v.* Maclin, 3 Hayw. (Tenn.) 70.

91. An indebtedness incurred by reason of an offense or quasi-offense may be transmitted to the heirs of the offender. Dirmeyer *v.* O'Hern, 39 La. Ann. 961, 3 So. 132; Noirette *v.* Digg, 9 La. 172.

country in which such estate happens to be at the time of his decease;[92] and his heirs and creditors, both foreign and domestic, must submit to the law of the place where his property was situated at the time of his decease.[93]

b. Real Property. Real estate is administered upon according to the laws of the state in which it is situated, and, if by the laws of such state, at the time of the death of the owner, it is regarded as assets, it is subject to the debts of the decedent, irrespective of the residence of his heirs or creditors;[94] but if it is not so regarded, it cannot be subjected to the debts of its deceased owner in the hands of his heirs.[95]

c. Personal Property or Distributive Shares. Personal property adheres to the person, and is to be distributed according to the laws of the country where the decedent was domiciled at the time of his death.[96] Where the laws of a decedent's domicile make his heirs and next of kin liable for his debts to the extent of the personal property received by them from his estate, such liability may be enforced, although the property of the decedent's estate was received by them in another state than that of the decedent's domicile.[97]

3. Statutory Provisions — a. Construction and Operation. The remedies given by the statute of frauds against heirs, distributees, or devisees for their ancestors' debts are in addition to the common-law remedies which are not abrogated,[98] unless the enactment provides a different remedy by which the same result may be accomplished, in which case the common law will be regarded as modified to the extent to which such remedy is given.[99] The English statutes upon this subject enacted during the colonial period were operative in America as well as in England, becoming a part of the common law, and are in force except in so far as they have been abrogated or repealed by subsequent statutes upon the same subject;[1] and therefore statutes designed to charge the estates of decedents with the payment of their debts assert a general principle of the common law, which is to be made effective by enactments providing the mode of

92. *In re* Miller, 3 Rawle (Pa.) 312, 24 Am. Dec. 345; Hamilton *v.* Dallas, 38 L. T. Rep. N. S. 215, 26 Wkly. Rep. 326.

93. Alexander *v.* Waller, 6 Bush (Ky.) 330, holding that a heritable bond charged upon an estate in a foreign country is payable according to the laws of such country, and refusing relief as against other property of the deceased in such country.

Rule as to interest.— Assets of decedents dying in England, and having a foreign domicile, are administered upon according to the law of the domicile; but interest will be governed by the practice in chancery. Hamilton *v.* Dallas, 38 L. T. Rep. N. S. 215, 26 Wkly. Rep. 326.

Foreign creditors.— In the administration of an estate in England, belonging to a decedent having a domicile in another country, foreign creditors have the same rights as English creditors. *In re* Klœbe, 28 Ch. D. 175, 54 L. J. Ch. 297, 52 L. T. Rep. N. S. 19, 33 Wkly. Rep. 391.

If an heir "pure and simple," or heir with benefit of inventory, or beneficiary heir, has not intermeddled with the estate of his ancestor dying in France so as to prevent his recovery as heir under the laws of that country he can recover from the ancestor's estate in this country under a contract made with the ancestor in France. De Sobry *v.* De Laistre, 2 Harr. & J. (Md.) 191, 3 Am. Dec. 555.

94. Where by the laws of Kentucky lands in that state were subject to the debts of the deceased owner, his heirs residing in Virginia were compelled in equity to account therefor as a trust for the payment of the decedent's debts. Dickinson *v.* Hoomes, 8 Gratt. (Va.) 353.

95. Where land in Ohio, which was not assets under the laws of that state, descended to an heir who was a resident of Kentucky, it was held that such heir was not liable therefor to the ancestor's creditors. Brown *v.* Bashford, 11 B. Mon. (Ky.) 67, 52 Am. Dec. 559. Real estate in the hands of the heir is not subject to debts due from its deceased owner to the United States, unless it has been made assets by the law of the state where situated. U. S. *v.* Crookshank, 1 Edw. (N. Y.) 233. Lands descending in another state are not assets in Massachusetts by which the heir of a covenantor may be there charged. Austin *v.* Gage, 9 Mass. 395.

96. De Sorby *v.* De Laistre, 2 Harr. & J. (Md.) 191, 3 Am. Dec. 555.

97. Bullard *v.* Perry, 66 Vt. 479, 29 Atl. 787; Hairston *v.* Medley, 1 Gratt. (Va.) 96; De Ende *v.* Wilkinson, 2 Patt. & H. (Va.) 663.

98. Crocker *v.* Smith, 10 Ill. App. 376.

99. Rex *v.* Creel, 22 W. Va. 373.

1. Ticknor *v.* Harris, 14 N. H. 272, 40 Am. Dec. 186; Suckley *v.* Rotchford, 12 Gratt. (Va.) 60, 65 Am. Dec. 240.

enforcing the remedy.[2] Such statutes do not operate retrospectively,[3] unless they affect the remedy only.[4] The statutes will be read and construed together as forming one body of laws.[5] With respect to the class of persons designated by a statute giving remedies in favor of creditors the statute will be strictly followed so far as actions against heirs on the contracts of their ancestors are concerned.[6]

b. Repeal. Where a statute or constitutional provision gives in place of existing remedies a clear and distinct remedy against heirs, legatees, or distributees, for the recovery of debts due from the estates of their ancestors, all such existing remedies for the same purpose will be held to be repealed by implication, by virtue of such statute,[7] or constitutional provision.[8]

4. Liabilities on Receipt of Personal Property or Distributive Shares — a. In General. After a final decree of distribution the property no longer belongs to the estate of the deceased, but is the property of the distributees therein named, and a creditor of the estate cannot thereafter make any claim against the fund as an estate.[9] It has been held in some cases that heirs are not liable for the debts of their ancestors on account of personal property received by them from their ancestors' estates, regular administration having been had and closed,[10] even in case of mistake of fact on the part of the administrator;[11] but in most states a creditor of the estate may pursue the fund in the hands of the heirs or distributees, and subject it to the payment of such claims as he can show to be justly and equitably due him therefrom.[12] Where the statutes authorize joint actions against

2. Ticknor *v.* Harris, 14 N. H. 272, 40 Am. Dec. 186.

3. A statute providing that judgments and decrees against personal representatives of decedents should be *prima facie* evidence against heirs or devisees of such decedents was held to apply only to judgments and decrees rendered after its passage. Staples *v.* Staples, 85 Va. 76, 7 S. E. 199.

4. Read *v.* Patterson, 134 N. Y. 128, 31 N. E. 445.

5. Forbes *v.* Harrington, 171 Mass. 386, 50 N. E. 641; Bryant *v.* Livermore, 20 Minn. 313; Reed *v.* Lozier, 48 Hun (N. Y.) 50; Anderson *v.* Clark, 2 Swan (Tenn.) 156.

Statutes in pari materia.—Where a statute made lands of decedents in the hands of their heirs or devisees liable for the decedent's debts, where the personalty was insufficient, and a subsequent provision subjected lands acquired by non-residents, by descent or devise, to the same liability, without any provision as to deficiency of the personalty, it was held that as such statutes were *in pari materia* the deficiency of the personal estate must be shown before the lands of non-residents acquired by descent or devise could be made liable for decedent's debts. Baltzell *v.* Foss, 1 Harr. & G. (Md.) 504.

6. A statute regulating proceedings against joint debtors, where all cannot be brought into court, was held not to apply in proceedings against heirs, where a part only were under arrest, in an action on a contract of their ancestor. Whitaker *v.* Young, 2 Cow. (N. Y.) 569. See also Allen *v.* Stovall, (Tex. Civ. App. 1901) 63 S. W. 863 [*reversing* (Civ. App. 1901) 62 S. W. 87].

7. A statute making real estate assets for payment of decedents' debts, in the order in which personal estate was applied for the same purpose, was held to repeal the common law making heirs liable in suits for breach of covenant of warranty by their ancestors expressly binding the heirs. Rex *v.* Creel, 22 W. Va. 373.

8. A constitutional provision vesting in probate courts exclusive jurisdiction of matters of administration of the estates of deceased persons was held to repeal by implication a statute limiting the time within which creditors of decedents, failing to prove their claims before commissioners appointed by the courts, might proceed directly against heirs, legatees, and distributees. Harris *v.* Watson, 56 Ark. 574, 20 S. W. 529.

9. *In re* Dall, Myr. Prob. (Cal.) 159.

10. People *v.* Brooks, 123 Ill. 246, 14 N. E. 39.

11. Where an administrator by mistake failed to credit an indorsement on a note due from a debtor to the estate of the intestate, and the mistake was not discovered until after the estate had been closed, it was held that the debtor had no cause of action against the heirs or distributees of such estate. Dickey *v.* Tyney, 85 Ind. 100.

12. *Georgia.*— In equity a creditor may follow the assets of his debtor into the hands of a distributee. Caldwell *v.* Montgomery, 8 Ga. 106. Where the administratrix is the sole distributee and heir of the intestate, her dismissal as such administratrix is no bar to maintaining an action against her by a creditor to reach and apply the estate in her hands. Crockett *v.* Mitchell, 88 Ga. 166, 14 S. E. 118.

Kentucky.— Heirs take property of an ancestor subject to its liability for omitted taxes, the collection of which is not barred by the statute of limitation. Com. *v.* Sweigart, 73 S. W. 758, 24 Ky. L. Rep. 2147.

Louisiana.— The remedy of a creditor is against the heir, where such heir has been put in possession of the estate, whether the executor has been discharged or not, the heir

the personal representatives and heirs of deceased persons, the assets in the hands of the representative will first be applied to the payment of the judgment recovered, although the personal estate is not sufficient for that purpose;[13] unless the statute authorizing the action limits the recovery to real estate descended to the heirs, in which case personal estate in their hands may be reached by a bill in equity.[14]

b. Distribution Without Administration. It is very generally held, as we have seen, that the heirs of an estate, when they are of full age, may distribute it among themselves as they may choose if there are no creditors;[15] but as against creditors who are not parties to such distribution they cannot depart from the due course of administration, whether at the time of distributing they know of the existence of creditors or not.[16] The remedy of a creditor of the estate for a debt due him is in an action against the personal representative of the decedent, and in some cases it has been held that such an action is the creditor's only remedy, and that he cannot sue the heirs directly where there has been no administration.[17] In some states, however, the contrary has been held in cases where the property of the decedent was in the possession of the heirs, either through voluntary distribution on their part,[18] or through voluntary conveyances made to them by the decedent before his death.[19] The creditor must show that there has been no administration, and that none can be had,[20] and then he may follow the property in equity, in the hands of the heirs or distributees, and obtain satisfaction of his claim.[21] But if he permits the heir to take unconditional control of the estate without causing administration to be taken out he loses the right to pursue the property as an estate as distinguished from the property of the heir.[22]

c. Persons Liable — (i) *In General.* Next of kin, within the meaning of the statutes allowing actions by creditors against those receiving assets of an estate from the personal representative, includes the widow of the decedent, and

and not the executor being liable in such a case. Sevier *v.* Sargent, 25 La. Ann. 220.

Mississippi.— Personal estate of a deceased debtor in the hands of distributees is liable to satisfy a judgment rendered against the administrator. Brooks *v.* Lewis, 1 How. 207.

New Hampshire.— Where by statute personalty descends as realty, the heir is liable on the contracts of the ancestor which could not have been proved while the estate was in the course of administration, to the extent of the personalty as well as of the realty descended. Hall *v.* Martin, 46 N. H. 337.

South Carolina.— Where the personal representative proves insolvent, creditors may follow the estate into the hands of legatees and distributees or those claiming under them, although the representative at the time of distribution retained sufficient for payment of the debts. Fripp *v.* Talbird, 1 Hill Eq. 142.

Texas.— In the suit against the heirs of a deceased person to recover a debt due to his estate, to establish their liability, it is necessary to show that they received the estate subsequent to the creation of the debt which they seek to recover. Gresham *v.* Steel, 1 Tex. App. Civ. Cas. § 555.

Virginia.—A decree against distributees of a non-resident intestate will not be reversed, on the ground that no account in the administration in the state of the residence of such intestate had been taken, where the administrator answered that he had no assets in his hands and knew of none that might come to his hands. Hairston *v.* Medley, 1 Gratt. 96. Where the property is insufficient to pay the debts of the ancestor, the heirs take only in subordination to the rights of creditors. Martin *v.* Columbian Paper Co., (1903) 44 S. E. 918.

See 16 Cent. Dig. tit. "Descent and Distribution," § 445.

13. Hoffman *v.* Wilding, 85 Ill. 453.

14. Peterson *v.* Poignard, 6 B. Mon. (Ky.) 570; Hefferman *v.* Forward, 6 B. Mon. (Ky.) 567.

15. Division of estate without administration see *supra*, IV, A, 4, b, (IV); IV, A, 4, c, (II); IV, A, 4, d, (I).

16. Amis *v.* Cameron, 55 Ga. 449.

17. King *v.* Snedeker, 137 Ind. 503, 37 N. E. 396; Leonard *v.* Blair, 59 Ind. 510; Wilson *v.* Davis, 37 Ind. 141; Roe *v.* Swezey, 10 Barb. (N. Y.) 247.

18. Wyatt *v.* McLane, 37 Tex. 311; Byrd *v.* Ellis, (Tex. Civ. App. 1896) 35 S. W. 1070; Buchanan *v.* Thompson, 4 Tex. Civ. App. 236, 23 S. W. 328; Peters *v.* Hood, 2 Tex. App. Civ. Cas. § 376; Bullard *v.* Perry, 66 Vt. 479, 29 Atl. 787; Adams *v.* Holcombe, 1 Harp. Eq. (S. C.) 202, 14 Am. Dec. 719.

19. Adams *v.* Holcombe, 1 Harp. Eq. (S. C.) 202, 14 Am. Dec. 719.

20. Turman *v.* Robertson, 3 Tex. App. Civ. Cas. § 215.

21. Bullard *v.* Perry, 66 Vt. 479, 29 Atl. 787; Carey *v.* Roosevelt, 91 Fed. 567.

22. Labitut *v.* Prewett, 14 Fed. Cas. No. 7,962, 1 Woods 144.

all others who are entitled to share in the estate under the statute of distributions, but not a subsequent husband of such widow.[23]

(II) *Liability of Pretermitted Heir.* Pretermitted heirs are liable for the debts of their ancestors to the extent of their distributive shares of the estate to the exclusion of legatees or devisees.[24]

(III) *Charges Against Widow's Share.*[25] The widow takes dower in the personal estate of the husband, subject to all liens existing thereon at her husband's death, and she has no right to call on the administrator to redeem it.[26] If she has entered into an antenuptial contract with the husband for a child's portion of his personal property in lieu of her dower she will acquire after the husband's death the rights of a distributee only, and can take no part of such property until the husband's debts are paid.[27] Statutes enlarging the widow's dower in personalty have been construed to mean subject to payment of the husband's debts.[28]

(IV) *Liability of Husband of Heir.*[29] A husband is liable to creditors of an estate for his wife's distributive share thereof received from the personal representative, unless he can show that he has not applied the property to his own use, the presumption being that he has so applied it.[30]

(V) *Payment of Share to Husband of Heir.*[31] Where the personal representative of the estate pays to the husband of an heir without her knowledge or consent her distributive share or a portion thereof and such payment cannot be traced to her she cannot be held liable to creditors of the estate by reason of such payment.[32]

d. Property Subject to Debts. Any property belonging to the estate of a decedent and subject to his debts at the time of his death may be reached by creditors in satisfaction of such debts, either in the hands of his personal representatives or his heirs or distributees;[33] but an action to reach and apply such property must be against those in whose hands the law makes it assets for payment of the decedent's debts.[34]

e. Debts Enforceable — (I) *In General.* Under statutes making heirs and distributees liable for the debts of their ancestors, to the extent of property received by them from their ancestors' estates, such actions may be maintained against the heirs or distributees that might have been brought against the personal representatives of the ancestor.[35] The personal estate of the ancestor is

23. Merchants' Ins. Co. *v.* Hinman, 34 Barb. (N. Y.) 410, 13 Abb. Pr. (N. Y.) 110, 4 Abb. Pr. (N. Y.) 312, 15 How. Pr. (N. Y.) 182.

Charges against widow's share see *infra*, IV, C, 4, c, (III).

Liability of husband of heir see *infra*, IV, C, 4, c, (IV), (V).

24. State *v.* Pohl, 30 Mo. App. 321, holding an heir not mentioned in the will of the testator liable for debt on testator's bond, to the exclusion of devisees.

25. **Liability of widow and of her subsequent husband** see *supra*, IV, C, 4, c, (I).

26. Hewitt *v.* Cox, 55 Ark. 225, 15 S. W. 1026, 17 S. W. 873; McDearman *v.* Martin, 38 Ark. 261; Chinn *v.* Stout, 10 Mo. 709.

27. McDearman *v.* Martin, 38 Ark. 261.

28. A statute giving the widow "the whole of the personal estate" means the residue of the personal estate after the payment of all debts. Sutherland *v.* Harrison, 86 Ill. 363.

29. **Liability of second husband of widow** see *supra*, IV, C, 4, c, (I).

30. Rubel *v.* Bushnell, 91 Ky. 251, 15 S. W. 520, 12 Ky. L. Rep. 816.

31. **Liability of second husband of widow** see *supra*, IV, C, 4, c, (I).

32. Jones *v.* Commercial Bank, 78 Ky. 413.

33. A claim allowed by the government in favor of a decedent and paid to his heirs instead of his administrators is subject to payment of his debts. Austin *v.* Tompkins, 3 Sandf. (N. Y.) 22. Money received by heirs in compromise of a suit brought by them to recover land of their father is liable to claims of creditors of the father. Cosby *v.* Wickliffe, 12 B. Mon. (Ky.) 202.

Advancements do not belong to the estate at the death of the decedent and are not subject to payment of his debts. Grandchamps *v.* Delpeuch, 7 Rob. (La.) 429.

34. Where a statute provided that slaves should descend to heirs, but made them assets in the hands of personal representatives, in whose hands only they could be reached by creditors, it was held that an estate in remainder in slaves could not be reached by creditors in a suit against the heirs. Wells *v.* Bowling, 2 Dana (Ky.) 41.

35. Shiel *v.* Muir, 4 N. Y. Suppl. 272.

liable for an unpaid balance due on the purchase-price of real estate, although such debt is secured by mortgage on the real estate purchased.[36] The taking of possession of the estate of the ancestor by the heirs under orders of the court after partial administration is an assumption of the liabilities of the estate not presented to the personal representative.[37]

(II) *Claims Proved, Discovered, or Accrued After Distribution or Settlement.* An heir is liable on the contracts or liabilities of his ancestor to the extent of both the real and personal estate received from the ancestor; and where the claims have not accrued until after the administration of the estate is closed a recovery may be had against the heir to the extent of the assets received by him from the estate of the ancestor.[38]

(III) *Debts Contracted by Administrator.* Where the statutes provide for charging the estates of deceased persons with their debts after distribution to the heirs, such estates cannot be charged with debts contracted by the personal representatives of the decedent, and resort must be had to equity in order to obtain relief where such debts have been contracted.[39] Agreements entered into by heirs for the charging of their shares with debts contracted by the personal representative, in conducting the business of the estate, do not bind them personally for such debts, or estop them from disputing the account; and even a judgment decreeing liability as against their shares for the debts so contracted does not conclude their right to dispute it or prevent them from showing that the liability has been extinguished.[40] Minor heirs cannot be charged jointly with the personal representative for debts accruing after the death of the ancestor.[41]

f. Extent of Liability. The heirs are liable for the debts of the ancestor only to the amount of the assets which they have received,[42] without reference to the value of the estate that may have vested in them,[43] and their liability is exclusive

36. A statute providing that mortgages shall be a charge upon land in the hands of heirs or devisees does not affect the rule that unpaid balances on contracts to buy real estate are a charge upon personalty. Lamport *v.* Beeman, 34 Barb. (N. Y.) 239.

37. Montgomery *v.* Jones, 18 Tex. 751; Montgomery *v.* Culton, 18 Tex. 736.

38. *Arkansas.*—Williams *v.* Ewing, 31 Ark. 229.

Georgia.— Long *v.* Mitchell, 63 Ga. 769.

Louisiana.— Where debts are discovered after final settlement of the succession, the creditors have recourse against the heirs, but cannot have such against the succession, which no longer exists. Thibodeaux's Succession, 38 La. Ann. 716.

Texas.— The administrator should retain in his hands sufficient to pay the claims against the estate presented to him, but when the heir takes all of the estate he assumes all of its debts, including those already allowed and proved as well as all others. Montgomery *v.* Jones, 18 Tex. 751; Montgomery *v.* Culton, 18 Tex. 736.

United States.— Davis *v.* Van Sands, 7 Fed. Cas. No. 3,655, 45 Conn. 600; Payson *v.* Hadduck, 19 Fed. Cas. No. 10,862, 8 Biss. 293.

See 16 Cent. Dig. tit. "Descent and Distribution," § 454.

39. Hayward *v.* McDonald, 7 N. Y. Civ. Proc. 100, 1 How. Pr. N. S. (N. Y.) 229.

40. Sparrow's Succession, 40 La. Ann. 484, 4 So. 513.

41. Rogers *v.* Heath, 48 Mich. 583, 12 N. W. 862.

Expenses of administration.— The personal representative is entitled to allowance for the expenses in administration, and may retain money of the estate to that amount. Gillies *v.* Smither, 2 Stark. 528, 3 E. C. L. 517.

42. *Alabama.*— Anderson *v.* Thomas, 54 Ala. 104.

Arkansas.— Purcelly *v.* Carter, 45 Ark. 299; Williams *v.* Ewing, 31 Ark. 229.

Illinois.— Vanmeter *v.* Love, 33 Ill. 260.

Indiana.— Leonard *v.* Blair, 59 Ind. 510; Bryan *v.* Blythe, 4 Blackf. 249.

Kansas.— Hamblin *v.* Rohrbaugh, 3 Kan. App. 131, 42 Pac. 834.

Kentucky.—Anderson *v.* Bellis, 2 Duv. 388; Davis *v.* Bentley, 2 Dana 247; Ellis *v.* Gosney, 7 J. J. Marsh. 109; Barnetts *v.* Hayden, 5 J. J. Marsh. 108; Humble *v.* Hinkson, 3 A. K. Marsh. 468, 13 Am. Dec. 195; Points *v.* Frank, 64 S. W. 637, 23 Ky. L. Rep. 975.

Massachusetts.— Bullard *v.* Moor, 158 Mass. 418, 33 N. E. 928.

Missouri.— Sauer *v.* Griffin, 67 Mo. 654.

New York.— Wood *v.* Wood, 26 Barb. 356.

Texas.— Yancy *v.* Batte, 48 Tex. 46; Green *v.* Rugely, 23 Tex. 539.

United States.— Goshorn *v.* Alexander, 10 Fed. Cas. No. 5,630, 2 Bond 158.

See 16 Cent. Dig. tit. "Descent and Distribution," § 456.

43. The liability of an heir upon the contract or covenant of his ancestor is measured by the amount of the ancestor's estate which

of interest on the value of the estate which they have received,[44] and also of such exemptions as may be allowed by the law in favor of heirs.[45]

5. Liabilities on Descent of Real Property — a. In General. Under the statutes of descent and distribution real estate of deceased persons is liable as a secondary fund, to the payment of their debts, and may be subjected to the payment of such debts in the hands of heirs or devisees;[46] but this liability is wholly dependent upon the statutory provisions in relation thereto,[47] since at common law lands were not liable for the debts of the decedent in the hands of devisees,[48] or of heirs in the case of simple contract debts.[49] In order to establish such liability in actions against heirs or devisees the mode of procedure pointed out by the statutes must be strictly pursued,[50] or resort to equity must be had.[51]

b. Fraudulent or Ineffectual Conveyance. Under such statutes all lands of decedents fraudulently[52] or ineffectually conveyed by them during their lifetime,

he has received, and not by the amount which has vested in him. Yancy *v.* Batte, 48 Tex. 46.

44. The liability of heirs is limited to the value of the estate descended to them, exclusive of interest thereon. Ellis *v.* Gosney, 7 J. J. Marsh. (Ky.) 109.

45. Where the estate of a decedent was sold without any reservation of the exemptions in favor of heirs allowed by law, it was held that the equities of minor heirs in the fund received from the sale were equal to those of creditors, and that equity would not allow the rights of such heirs to be disturbed except as to the surplus remaining after deducting the amount allowed in lieu of exemptions. Anderson *v.* Thomas, 54 Ala. 104.

46. *Alabama.*— Nelson *v.* Murfee, 69 Ala. 598; Turner *v.* Kelly, 67 Ala. 173; Tyson *v.* Brown, 64 Ala. 244; Cockrell *v.* Coleman, 55 Ala. 583.

Colorado.— Lathrop *v.* Pollard, 6 Colo. 424.

Georgia.— Johnson *v.* Johnson, 80 Ga. 260, 5 S. E. 629.

Illinois.— Branger *v.* Lucy, 82 Ill. 91; Walbridge *v.* Day, 31 Ill. 379, 83 Am. Dec. 227.

Iowa.— Laverty *v.* Woodward, 16 Iowa 1.

Kansas.— Cooper *v.* Ives, 62 Kan. 395, 63 Pac. 434; Fletcher *v.* Wormington, 24 Kan. 259.

Louisiana.— Ware *v.* Jones, 19 La. Ann. 428.

Minnesota.— Lake Phalen Land, etc., Co. *v.* Lindeke, 66 Minn. 209, 68 N. W. 974.

Mississippi.— Westbrook *v.* Munger, 64 Miss. 575, 1 So. 750.

Missouri.— Jackson *v.* Bowles, 67 Mo. 609.

New Hampshire.— Lucy *v.* Lucy, 55 N. H. 9.

New York.— Traud *v.* Magnes, 49 N. Y. Super. Ct. 309; Covell *v.* Weston, 20 Johns. 414.

North Carolina.— Baker *v.* Webb, 2 N. C. 43.

Ohio.— Keever *v.* Hunter, 62 Ohio St. 616, 57 N. E. 454; Overturf *v.* Dugan, 29 Ohio St. 230; Piatt *v.* St. Clair, Wright 261.

Pennsylvania.— Smith *v.* Seaton, 117 Pa. St. 382, 11 Atl. 661, 2 Am. St. Rep. 668; Leiper *v.* Irvine, 26 Pa. St. 54.

Virginia.— Martin *v.* Columbian Paper Co., 101 Va. 699, 44 S. E. 918; Menefee *v.* Marge, (1888) 4 S. E. 726; Trent *v.* Trent, Gilm. 174, 9 Am. Dec. 594. See also Harvey *v.* Steptoe, 17 Gratt. 289.

United States.—Watkins *v.* Holman, 16 Pet. 25, 10 L. ed. 873; Chewett *v.* Moran, 17 Fed. 820.

England.— Farquharson *v.* Floyer, 3 Ch. D. 109, 45 L. J. Ch. 750, 35 L. T. Rep. N. S. 355; Tomkins *v.* Colthurst, 1 Ch. D. 626, 33 L. T. Rep. N. S. 591, 24 Wkly. Rep. 267; Fleming *v.* Buchanan, 3 De G. M. & G. 976, 22 L. J. Ch. 886, 52 Eng. Ch. 758; Paterson *v.* Scott, 1 De G. M. & G. 531, 16 Jur. 898, 21 L. J. Ch. 346, 50 Eng. Ch. 408.

See 16 Cent. Dig. tit. "Descent and Distribution," § 457.

47. Springfield *v.* Hurt, 15 Fed. 307.

48. *Illinois.*— People *v.* Brooks, 123 Ill. 246, 14 N. E. 39.

Kentucky.— Rogers *v.* Farrar, 6 T. B. Mon. 421.

Massachusetts.— Hays *v.* Jackson, 6 Mass. 149.

Missouri.— State *v.* Pohl, 30 Mo. App. 321; State *v.* Miller, 18 Mo. App. 41.

New York.— Colson *v.* Brainard, 1 Redf. Surr. 324.

England.— Plunket *v.* Penson, 2 Atk. 290, 26 Eng. Reprint 577; Wilson *v.* Knubley, 7 East 128, 3 Smith K. B. 128; Plasket *v.* Beeby, 4 East 485, 1 Smith K. B. 264.

49. Williams *v.* Ewing, 31 Ark. 229; Mackin *v.* Haven, 187 Ill. 480, 491, 58 N. E. 448 (where the court said: "While this was so, yet, at common law, 'the ancestor might, by a specialty, bind the heir to the payment of the debt by expressly so declaring in the deed, and the heir was then bound to the extent of assets descended,— that is, to the extent of the value of the real estate coming from the ancestor to the heir by inheritance, for the word 'assets,' in this connection always meant real estate'"); People *v.* Brooks, 123 Ill. 246, 14 N. E. 39; Ryan *v.* Jones, 15 Ill. 1; Hall *v.* Martin, 46 N. H. 337; Ticknor *v.* Harris, 14 N. H. 272, 40 Am. Dec. 186.

50. Partee *v.* Kortrecht, 54 Miss. 66; Hargrove *v.* Baskin, 50 Miss. 194. See also Cooper *v.* Ives, 62 Kan. 395, 63 Pac. 434.

51. Partee *v.* Kortrecht, 54 Miss. 66; Chewett *v.* Moran, 17 Fed. 820; Springfield *v.* Hurt, 15 Fed. 307.

52. Scott *v.* Purcell, 7 Blackf. (Ind.) 66, 39 Am. Dec. 453, where land descending from

as well as such lands the title to which they hold of record at the time of their death, descend to their heirs, and may be subjected to the claims of the creditors of such decedents in the hands of the heirs.[53] And where the heirs take possession, without administration, of their ancestor's estate, whether real or personal, they will hold it as trustees for the benefit of the ancestor's creditors, except as to such portions thereof as by statute may be exempted in favor of the heirs.[54] However such heirs are entitled to have a trust, consisting of either real or personal estate descended from the ancestor, set aside on the payment of the ancestor's debts and expenses of administration, if any;[55] although part payment of such debts by them will not release the ancestor's property from the lien of the debt.[56]

c. Waste of Personal Estate. The general rule is that where there has been full administration and no fraud, subsequent waste of the personal estate in the hands of the personal representative or his insolvency, together with that of his sureties, will not subject the real estate descended to the heirs to liability for the decedent's debts.[57]

d. Necessity For Exhausting Personal Estate. Since the personal estate of the decedent, under the statutes of distribution, is made the primary fund for the payment of his debts, where there are assets in the hands of the personal representative of the decedent, a creditor of the estate must exhaust his remedy against such representative before proceeding to subject real estate in the hands of the heirs or devisees in satisfaction of his debt;[58] and where the statute directs the

a fraudulent grantee to his heirs was subjected in their hands to the claim of a creditor of the fraudulent grantor.

53. Flanders *v.* Davis, 19 N. H. 139; Menefee *v.* Marge, (Va. 1888) 4 S. E. 726.

54. Cameron *v.* Cameron, 82 Ala. 392, 3 So. 148.

Homestead exemption.— Under the Missouri statute (Wag. St. p. 698, § 5), land acquired by descent by an adult heir does not vest in him as a homestead, but is subject to the claims of the ancestor's creditors, which are not extinguished by the heir's assumption of the debts. Jackson *v.* Bowles, 67 Mo. 609. See also HOMESTEADS.

Express trust.— Where land was sold under a decree in favor of the estate of a decedent, his heirs buying the same and retaining the purchase-money, which was credited on the decree, on the condition that the amount should be accounted for by them on final settlement of the estate, it was held that the transaction created an express, direct, technical, and continuing trust, which could be enforced by creditors of the decedent against the land in the hands of his heirs. Westbrook *v.* Munger, 62 Miss. 316.

55. James *v.* Withers, 114 N. C. 474, 19 S. E. 367, where, on reconveyance of realty and personalty by the grantees of the decedent to the heirs and next of kin of the latter, on surrender of the bond to secure payment, the court directed that the order for sale of such property at the request of the public administrator be set aside on payment by the heirs of decedent's debts with expenses of administration.

56. Westbrook *v.* Munger, 64 Miss. 575, 1 So. 750.

Part payment by one heir.— Part payment, however, by one of the heirs will constitute him a purchaser in respect to so much of the ancestor's lands descended to him as will equal the payment made. Lynch *v.* Sanders, 9 Dana (Ky.) 59; Haines *v.* Haines, (N. J. Sup. 1903) 54 Atl. 401; Gibson *v.* Williams, 10 Fed. Cas. No. 5,403, Brunn. Col. Cas. 19, 2 Hayw. (N. C.) 281.

57. Buford *v.* McKee, 3 B. Mon. (Ky.) 224; Peck *v.* Wheaton, Mart. & Y. (Tenn.) 353 (where the plea of "fully administered" was found against an executor, and it was held that the lands in the hands of the heirs were not liable for the decedent's debts, even though there was subsequent waste of personalty in the executor's hands, and he and his sureties became insolvent); Boring *v.* Jobe, (Tenn. Ch. App. 1899) 53 S. W. 763 (where it was held that the personal estate of the decedent is first liable for the payment of debts and must be exhausted, and if there has been a waste and devastavit the remedy of the creditor is against the administrator and his bondsmen, and if he fails to avail himself of this remedy he cannot resort to the property belonging to the heirs). See, however, Smith *v.* Seaton, 117 Pa. St. 382, 11 Atl. 661, 2 Am. St. Rep. 668, holding that waste of personal property in the hands of a personal representative, where the original amount was sufficient to pay decedent's debts, will not operate as a discharge of decedent's real estate from liability for his debts.

Real estate enhanced by improvements.— It was held in Van Bibber *v.* Julian, 81 Mo. 618, that equity will not permit the heirs to hold possession of real estate, together with its enhanced value caused by improvements and expenditures made thereon in good faith by the administrators, and at the same time resist the application of creditors to subject such property to the payment of their debts on the technical ground that the improvements and expenditures constitute waste.

58. *Alabama.*— Darrington *v.* Borland, 3 Port. 9.

manner of descent and distribution of property, the courts have no power to change the mode prescribed, even though injustice may be done in individual cases.[59]

e. Insufficiency of Personal Estate. Where the personal estate of the decedent has been exhausted or is not sufficient for the payment of his debts the creditor of such decedent may subject his realty in the hands of the heir or devisee to the payment of his debts.[60]

f. Equitable Interests. Under the statutes of descent and distribution any interest of the ancestor in lands owned by him at the time of his decease may be reached in the hands of the heir, where the personalty is insufficient, by either legal or equitable process, according to the circumstances, and applied to the pay-

Illinois.— Sutherland *v.* Harrison, 86 Ill. 363; Hoffman *v.* Wilding, 85 Ill. 453; Guy *v.* Gericks, 85 Ill. 428; McLean *v.* McBean, 74 Ill. 134; Bishop *v.* O'Connor, 69 Ill. 431.

Kentucky.— McDowell *v.* Lawless, 6 T. B. Mon. 139.

Maryland.— Ellicott *v.* Welsh, 2 Bland 242.

Missouri.— Pearce *v.* Calhoun, 59 Mo. 271.

New York.— Selover *v.* Coe, 63 N. Y. 438; Mersereau *v.* Ryerss, 3 N. Y. 261; Armstrong *v.* Wing, 10 Hun 520; Stuart *v.* Kissam, 11 Barb. 271; Schermerhorn *v.* Barhydt, 9 Paige 28.

North Carolina.— Hinton *v.* Whitehurst, 68 N. C. 316; Robards *v.* Wortham, 17 N. C. 173, 22 Am. Dec. 738.

Tennessee.— Nix *v.* French, 10 Heisk. 377; Green *v.* Shaver, 3 Humphr. 139; Elliot *v.* Patton, 4 Yerg. 10; Woodfin *v.* Anderson, 2 Tenn. Ch. 331.

Virginia.— McLoud *v.* Roberts, 4 Hen. & M. 443.

United States.— Garnett *v.* Macon, 10 Fed. Cas. No. 5,245, 2 Brock. 185, 6 Call (Va.) 308.

England.— Ancaster *v.* Mayer, 1 Bro. Ch. 454, 1 White & T. Lead. Cas. Pt. II, 723, 28 Eng. Reprint 237; Farquharson *v.* Floyer, 3 Ch. D. 109, 45 L. J. Ch. 750, 35 L. T. Rep. N. S. 355; Tomkins *v.* Colthurst, 1 Ch. D. 626, 33 L. T. Rep. N. S. 591, 24 Wkly. Rep. 267; Paterson *v.* Scott, 1 De G. M. & G. 531, 16 Jur. 898, 21 L. J. Ch. 346, 50 Eng. Ch. 408.

See, however, Mobley *v.* Cureton, 6 S. C. 49, Vernon *v.* Erich, 2 Hill Eq. (S. C.) 257, holding that lands in the hands of the heir or devisee are liable for the debts of the deceased, whether the executor has assets or not, but that the heir or devisee has an equity against the executor to be reimbursed out of the personal assets.

See 16 Cent. Dig. tit. "Descent and Distribution," § 460.

Inventory as evidence of value.— Under a statute providing that the decedent's real estate could not be taken for his debts unless the personalty was insufficient at the time of granting letters testamentary, it was held that the value of the personalty at the time of granting such letters could not be shown by the price for which it was sold by the executor years afterward. Read *v.* Patterson, 55 Hun (N. Y.) 680, 8 N. Y. Suppl. 826.

Mortgage.— It has been held in Illinois that if a debt is secured by mortgage on real estate, the heirs or devisees may compel its payment from the personal estate, in order to relieve the real estate of the lien. Sutherland *v.* Harrison, 86 Ill. 363.

Bequests.— However real estate descended is liable for the debts of the ancestor in exoneration of personal property specifically bequeathed by him. Alexander *v.* Worthington, 5 Md. 471; Chase *v.* Lockerman, 11 Gill & J. (Md.) 185, 35 Am. Dec. 277; Warley *v.* Warley, Bailey Eq. (S. C.) 397; Tipping *v.* Tipping, 1 P. Wms. 729, 24 Eng. Reprint 589. See also Chitton *v.* Burt, Prec. Ch. 540, 24 Eng. Reprint 242, 1 P. Wms. 678, 24 Eng. Reprint 566.

59. Thompson *v.* Tappen, 5 Johns. Ch. (N. Y.) 518, where intestate died without issue, leaving real and personal estate, and, his only heirs being aliens, could share only in the distribution of the personal estate, which would be largely consumed in paying encumbrances on the real estate, leaving practically nothing to the heirs, and it was held that equity could not interfere with the law of descent, so as to charge the payment of debts on the real estate, to relieve such heirs.

60. *Colorado.*— Lathrop *v.* Pollard, 6 Colo. 424.

District of Columbia.— Wallach *v.* Van Riswick, 3 MacArthur 168.

Illinois.— Ryan *v.* Jones, 15 Ill. 1.

Maryland.— Gaither *v.* Welch, 3 Gill & J. 259; Tyson *v.* Hollingsworth, 1 Harr. & J. 469.

Mississippi.—Evans *v.* Fisher, 40 Miss. 643.

New Hampshire.—Lucy *v.* Lucy, 55 N. H. 9.

New York.— Blossom *v.* Hatfield, 24 Hun 275.

North Carolina.— Hinton *v.* Whitehurst, 71 N. C. 66.

South Carolina.— Gregory *v.* Forrester, 1 McCord Eq. 318.

Tennessee.— Robertson *v.* Maclin, 3 Hayw. 70.

United States.— Corbett *v.* Johnson, 6 Fed. Cas. No. 3,218, 1 Brock. 77, holding that where the personal funds of decedent's estate have passed into hands other than those of his legal personal representative, the bond creditor may proceed to subject the realty in the hands of the heir to payment, without pursuing the personal funds further.

See 16 Cent. Dig. tit. "Descent and Distribution," § 459.

ment of the ancestor's debts.[61] Where, however, the heir acquires the legal title to such land by purchase prior or subsequent to the ancestor's death, he will hold it released from the lien of the ancestor's creditors.[62]

g. Rents and Profits. According to the better doctrine, where an heir or devisee receives real estate from an ancestor, the rents and profits derived from such real estate, while in his possession, cannot be subjected to the payment of his ancestor's debts.[63] In some jurisdictions, however, by express statutory provision,[64] or by judicial construction of the statutes, such rents and profits may be subjected to the payment of the ancestor's debts to the extent that they are actually received by the heirs or devisees.[65]

h. Contracts. In the absence of personal estate, or where such estate is insufficient for the payment of the ancestor's debts, the heir or devisee is liable to the extent of the real estate received by him for debts incurred and contracts made by the ancestor for the benefit of the estate, either real or personal, such as taxes[66] and insurance.[67] He is likewise liable for the debts incurred by his ancestor as a stock-holder in a corporation,[68] and for obligations incurred by the ancestor by indorsement of commercial paper.[69] However an heir is not liable on contracts of the ancestor entered into with third persons for the benefit of the latter, by which the heir is not expressly bound,[70] or on contracts of the ancestor through whom he inherits,[71] or for expenditures of the personalty for the benefit of the realty,[72] or for debts incurred by the personal representative in the course of administration, as for money received by the administrator not belonging to the decedent, etc., since there is no privity between such representative and the heir.[73]

61. *Maryland.*—Newton *v.* Griffith, 1 Harr. & G. 111 (where an estate tail, converted into a fee simple by statute, was held to be subject to the payment of the debts of the tenant in tail on his death in the same manner as estates in fee); Robertson *v.* Parks, 3 Md. Ch. 65.

Massachusetts.— Whitney *v.* Whitney, 14 Mass. 88, where a reversion was held to be chargeable for the debts of the ancestor in the hands of the heir.

New York.— Wilber *v.* Collier, 3 Barb. Ch. 427.

Ohio.— Hawkins *v.* Hubburd, 10 Ohio 178.

Texas.— Peevy *v.* Hurt, 32 Tex. 146 (where a land patent issued to heirs under a certificate held by the ancestor was held to constitute a trust in the heirs for the benefit of the ancestor's creditors); Soye *v.* McCallister, 18 Tex. 80, 67 Am. Dec. 689.

See, however, Combs *v.* Young, 4 Yerg. (Tenn.) 218, 26 Am. Dec. 225.

62. Goodwin *v.* Nelin, 2 Abb. Dec. (N. Y.) 258, 4 Transcr. App. (N. Y.) 369, 35 How. Pr. (N. Y.) 402; Thompson *v.* Gotham, 9 Ohio 170.

63. Chambers *v.* Davis, 17 B. Mon. (Ky.) 526; Smith *v.* Thomas, 14 Lea (Tenn.) 342; Boyd *v.* Martin, 9 Heisk. (Tenn.) 382; Combs *v.* Young, 4 Yerg. (Tenn.) 218, 26 Am. Dec. 225; Blow *v.* Maynard, 2 Leigh (Va.) 29.

64. Tennant *v.* Neal, 20 Ill. App. 571.

65. Hinton *v.* Whitehurst, 71 N. C. 66; Moore *v.* Shields, 68 N. C. 327; Washington *v.* Sasser, 41 N. C. 336, holding that creditors whose debts remain unsatisfied have a right in equity to have satisfaction decreed out of the rents and profits derived from the land by the heirs, or at least of so much as remain in their hands unexpended. See also Noble *v.* Douglas, 56 Kan. 92, 42 Pac. 328, holding that heirs are not personally liable for rents received by their ancestor, in the absence of proof that such rents have come into their possession.

66. Henderson *v.* Whitinger, 56 Ind. 131 (holding that taxes accrued upon land during the lifetime of the owner should be paid by the administrator of the estate, and those subsequently accrued devolve upon the heirs); Com. *v.* Sweigart, 73 S. W. 758, 24 Ky. L. Rep. 2147; Piatt *v.* St. Clair, 6 Ohio 227, Wright (Ohio) 261; Nowler *v.* Coit, 1 Ohio 519, 13 Am. Dec. 640.

67. Columbia Ins. Co. *v.* Mullin, 4 Leg. Op. (Pa.) 572.

68. Cooper *v.* Ives, 62 Kan. 395, 63 Pac. 434; Lake Phalen Land, etc., Co. *v.* Lindeke, 66 Minn. 209, 68 N. W. 974; Payson *v.* Hadduck, 18 Fed. Cas. No. 10,826, 8 Biss. 293.

69. Dodson *v.* Taylor, 53 N. J. L. 200, 21 Atl. 293.

70. Moore *v.* Fauntleroy, 3 A. K. Marsh. (Ky.) 360, where it was held that the remedy should be sought against the personal representative of the ancestor and not against the heir.

71. Barnum *v.* Barnum, 119 Mo. 63, 24 S. W. 780, where heirs inherited interest in lands of their uncle that their deceased father would have inherited had he been living at the death of the uncle, and it was held that they were not liable for a claim of the uncle's estate against the estate of their father, since the father's estate had no interest in the uncle's lands.

72. Adams *v.* Smith, 20 Abb. N. Cas. (N. Y.) 60.

73. Clayton *v.* Boyce, 62 Miss. 390; Allen *v.* Poole, 54 Miss. 323; Porterfield *v.* Taliaferro, 9 Lea (Tenn.) 242.

And where land descends to an heir from his father, he is under no liability for the debts of his mother.[74]

i. Advances by Personal Representative. Where the personal representative pays debts of the decedent to an amount exceeding the personal assets in hand, he may subject the real estate in the hands of the heir or devisee to reimburse himself.[75] However debts incurred by the personal representative in the course of administration cannot be charged upon the lands descended in the hands of heirs or devisees, unless by express statutory provision.[76]

j. Specialties and Debts of Record. Both at common law[77] and under the statutes heirs are liable on specialties or sealed obligations of their ancestors, by which the heirs are expressly bound, to the extent of the real estate of the ancestor descending to them;[78] some of the courts holding that it is not necessary to show a deficiency in the personal estate of the decedent in order to enforce such a liability against the real estate in the hands of the heir or devisee,[79] while in other jurisdictions the rule is that personal estate must first be exhausted before recourse is had to the real estate, even upon a specialty.[80]

k. Encumbrances Upon Property — (i) *IN GENERAL.* The title of an heir to real estate by descent, or of a devisee to an estate under an unconditional devise, immediately vests, upon the death of the ancestor or devisor, leaving the title encumbered with all the liens created by such ancestor or devisor in his lifetime or by law at the time of his decease.[81]

Counsel fees.— Where the wife engaged an attorney to resist contest of her husband's will, it was held in an action by such attorney against the heirs to recover his fees therefor that the wife and not the heirs was liable. Gilroy *v.* Richards, 26 Tex. Civ. App. 355, 63 S. W. 664.

74. Breckinridge *v.* Floyd, 7 Dana (Ky.) 456.

75. Taylor *v.* Taylor, 47 Ky. 419, 48 Am. Dec. 400; Johnson *v.* Corbett, 11 Paige (N. Y.) 265; Pea *v.* Waggoner, 5 Hayw. (Tenn.) 1, 242.

Payment by surety.— Where a surety pays a debt and wrongfully takes possession of the principal debtor's land, he cannot require, as a condition precedent to yielding possession to the heir of such debtor, that the heir should reimburse him. Mavity *v.* Stover, (Nebr. 1903) 94 N. W. 834.

76. Allen *v.* Poole, 54 Miss. 323; Porterfield *v.* Taliaferro, 9 Lea (Tenn.) 242. See also Clayton *v.* Boyce, 62 Miss. 390 (holding that land descended to an heir is not chargeable with money received by the administrator and not belonging to the decedent, there being no privity between the heir and the administrator, the only liability being upon the latter as an individual); Nowler *v.* Coit, 1 Ohio 519, 13 Am. Dec. 640 (holding that purchase-money paid to an administrator upon a sale of intestate's land cannot be recovered of the heirs where the sale is inoperative and the heirs recover the land).

77. Mackin *v.* Haven, 187 Ill. 480, 58 N. E. 448 [*affirming* 88 Ill. App. 434]; Hall *v.* Martin, 46 N. H. 337; Colson *v.* Brainard, 1 Redf. Surr. (N. Y.) 324.

78. *Delaware.*— Garden *v.* Derrickson, 2 Del. Ch. 386, 95 Am. Dec. 286.

Illinois.— Mackin *v.* Haven, 187 Ill. 480, 58 N. E. 448 [*affirming* 88 Ill. App. 434].

New Hampshire.— Ticknor *v.* Harris, 14 N. H. 272, 40 Am. Dec. 186.

North Carolina.— Robards *v.* Wortham, 17 N. C. 173, 22 Am. Dec. 738. See Taylor *v.* Grace, 6 N. C. 66, holding that an action of debt will not lie against heirs upon a bond of the ancestor in which they are not expressly bound.

Virginia.— Alexander *v.* Byrd, 85 Va. 690, 8 S. E. 577; Harvey *v.* Steptoe, 17 Gratt. 289; Waller *v.* Ellis, 2 Munf. 88.

England.— *In re* Illidge, 24 Ch. D. 654, 27 Ch. D. 478, 53 L. J. Ch. 991, 51 L. T. Rep. N. S. 523, 33 Wkly. Rep. 18; Loomes *v.* Stotherd, 1 L. J. Ch. O. S. 220, 1 Sim. & St. 458, 1 Eng. Ch. 458; Hopton *v.* Dryden, Prec. Ch. 179, 24 Eng. Reprint 87; Solley *v.* Gower, 2 Vern. Ch. 61, 23 Eng. Reprint 649.

See 16 Cent. Dig. tit. "Descent and Distribution," § 470.

If the decedent was a surety, a complainant should first be required to exhaust his remedy against the principal, and where he was a principal recourse should first be had to the lands in the hands of his heirs. Thomas *v.* Adams, 30 Ill. 37.

79. Mackin *v.* Haven, 187 Ill. 480, 58 N. E. 448 [*affirming* 88 Ill. App. 434]; Long *v.* Baker, 3 N. C. 128.

80. Garden *v.* Derrickson, 2 Del. Ch. 386, 95 Am. Dec. 286.

81. *Illinois.*— Willis *v.* Watson, 5 Ill. 64.

New Jersey.— Mount *v.* Van Ness, 33 N. J. Eq. 262.

New York.— Hauselt *v.* Patterson, 124 N. Y. 349, 26 N. E. 937; Wright *v.* Holbrook, 32 N. Y. 587 [*affirming* 2 Rob. 516, 18 Abb. Pr. 202]; Brown *v.* Harris, 25 Barb. 134; Adams *v.* Smith, 20 Abb. N. Cas. 60; House *v.* House, 10 Paige 158.

Pennsylvania.—Walker *v.* Alexander, 9 Pa. Dist. 375, 24 Pa. Co. Ct. 345.

South Carolina.— See Singleton *v.* Singleton, 60 S. C. 216, 38 S. E. 462.

Texas.— Ker *v.* Paschal, 1 Tex. Unrep. Cas. 692.

(II) *MORTGAGES*— (A) *In General.* By the common law, and in the absence of express statutory provision upon the subject, a devisee or heir at law of a mortgagor may call upon the executor or administrator to discharge the mortgage upon the real out of the personal estate, on the ground that the personal estate had the benefit of the money for the security of which the mortgage was given.[82] This rule of the common law, however, was never extended to the mortgagee or alienee of the heir or devisee, such equity being recognized in favor of the heir or devisee alone and not in favor of his alienee.[83] Where land descends or is devised subject to a mortgage debt not created by the decedent, a different rule applies, and the heir or devisee takes the property *cum onere*, and is not entitled to have the debt paid out of the personal estate, and only the balance of the debt of each mortgagee which cannot be collected by foreclosure and sale of the mortgaged premises is entitled to be allowed as a claim to be paid *pro rata* out of the proceeds of the ancestor's or testator's personal estate;[84] although even this rule must be qualified to the extent that, where the decedent has expressly assumed the debt, intending to make it a charge on his personal estate, or has directly expressed by will that it shall be such a charge, the real estate is not liable till the personal estate is exhausted.[85] Now, by express statutory provision in England[86] and in some of the United States, heirs or devisees who take mortgaged estates by descent or devise, whether the original debt was that of the decedent or another, cannot call on the personal estate or other real estate to satisfy the mortgage debt, and each part of the land charged by mortgage bears its due proportion of the charge, unless the will by which the devisee takes directs otherwise.[87]

Virginia.— Max Meadows Land, etc., Co. *v.* McGavock, 96 Va. 131, 30 S. E. 460.

United States.— Wilkinson *v.* Leland, 2 Pet. 627, 7 L. ed. 542.

See 16 Cent. Dig. tit. "Descent and Distribution," § 471.

Resulting trust.— Where an agent purchases land with the money of his principal, taking title in his own name, such land on the agent's death descends to his heirs encumbered with a resulting trust. Williams *v.* Van Tuyl, 2 Ohio St. 336.

82. *Illinois.*— Sutherland *v.* Harrison, 86 Ill. 363.

Maryland.— Goodburn *v.* Stevens, 1 Md. Ch. 420.

Massachusetts.— Haven *v.* Foster, 9 Pick. 112, 19 Am. Dec. 353.

New Jersey.— Krueger *v.* Ferry, 41 N. J. Eq. 432, 5 Atl. 452; Keen *v.* Munn, 16 N. J. Eq. 398.

New York.— Cumberland *v.* Codrington, 3 Johns. Ch. 229, 8 Am. Dec. 492.

Texas.— Minter *v.* Burnett, 90 Tex. 245, 38 S. W. 350.

England.— Lancy *v.* Athol, 2 Atk. 444, 26 Eng. Reprint 668; Ancaster *v.* Mayer, 1 Bro. Ch. 454, 1 White & T. Lead. Cas. Pt. II, 723, 28 Eng. Reprint 1237; King *v.* King, Mosely 192, 3 P. Wms. 358, 24 Eng. Reprint 358; Cope *v.* Cope, 2 Salk. 449.

See 16 Cent. Dig. tit. "Descent and Distribution," § 471.

83. Haven *v.* Foster, 9 Pick. (Mass.) 112, 19 Am. Dec. 353; Keen *v.* Munn, 16 N. J. Eq. 398; Cumberland *v.* Codrington, 3 Johns. Ch. (N. Y.) 229, 8 Am. Dec. 492; Scott *v.* Beecher, 5 Madd. 96; Hamilton *v.* Worley, 2 Ves. Jr. 62, 30 Eng. Reprint 523.

84. Campbell *v.* Campbell, 30 N. J. Eq. 415; Crowell *v.* St. Barnabas' Hospital, 27 N. J. Eq. 650; McLenahan *v.* McLenahan, 18 N. J. Eq. 101; Cumberland *v.* Codrington, 3 Johns. Ch. (N. Y.) 229, 8 Am. Dec. 492. See also Reinig *v.* Hecht, 58 Wis. 212, 16 N. W. 548; Tweddell *v.* Tweddell, 2 Bro. Ch. 101, 29 Eng. Reprint 58; Ancaster *v.* Mayer, 1 Bro. Ch. 454, 1 White & T. Lead. Cas. Pt. II, 723, 28 Eng. Reprint 1237; Tankerville *v.* Fawcet, 1 Cox Ch. 237, 29 Eng. Reprint 1145, 2 Bro. Ch. 57, 29 Eng. Reprint 31.

85. Plimpton *v.* Fuller, 11 Allen (Mass.) 139; Hewes *v.* Dehon, 3 Gray (Mass.) 205; McLenahan *v.* McLenahan, 18 N. J. Eq. 101; Cumberland *v.* Codrington, 3 Johns. Ch. (N. Y.) 229, 8 Am. Dec. 492.

Realty and personalty covered by mortgage.— It was held in McLearn *v.* Wallace, 10 Pet. (U. S.) 625, 9 L. ed. 558, that, where both the real and personal estate have been charged with a mortgage debt, both funds must be applied to its extinguishment in proportion to their respective amounts.

86. Harding *v.* Harding, L. R. 13 Eq. 493, 41 L. J. Ch. 523, 26 L. T. Rep. N. S. 656 (holding, however, that a lien for unpaid purchase-money is not a charge by way of mortgage under 30 & 31 Vict. c. 69, where the purchaser dies intestate); Hood *v.* Hood, 3 Jur. N. S. 684, 26 L. J. Ch. 616, 5 Wkly. Rep. 747; 17 & 18 Vict. c. 118 (known as Locke King's Act), amended by 30 & 31 Vict. c. 69. See also note to Ancaster *v.* Mayer, 1 Bro. Ch. 454, 1 White & T. Lead. Cas. Pt. II, 723, 28 Eng. Reprint 1237.

87. Rapalye *v.* Rapalye, 27 Barb. (N. Y.) 610; Adams *v.* Smith, 20 Abb. N. Cas. (N. Y.) 60 (holding, however, that a misapplication

(B) *Mortgage For Purchase-Money.* The rule is well settled that the unpaid purchase-money for real estate is primarily chargeable upon the personal estate of the decedent and is to be paid by his personal representative for the benefit of his heirs or devisees.[88]

1. Extent of Liability. The whole of the real estate of decedents, to the extent to which their personal estate is insufficient, is liable for their debts, and the heirs and devisees are liable for the debts of their ancestor or testator to the extent to which they have received real estate from such ancestor or testator.[89] There is no personal liability upon the heir or devisee for any aliquot or other proportion of the ancestor's debts, but he is liable only by reason of assets received, and the value of the assets must be the measure of his liability.[90]

6. Covenants Relating to Land[91] — a. Covenants of Warranty — (I) *In General.* Heirs are bound by covenants of warranty of the ancestor only where they claim title by descent, and not by purchase, and an heir is never bound by a warranty of his ancestor unless the ancestor was also bound by it.[92] In case of a breach of a covenant of warranty by which the heirs are bound, they are liable to the extent of the property coming into their hands from their ancestor's estate.[93] In

of funds of the personal estate by the payment of the mortgage, if done in good faith, inures to the benefit of the heirs); Johnson *v.* Corbett, 11 Paige (N. Y.) 265; Taylor *v.* Wendel, 4 Bradf. Surr. (N. Y.) 324; Waldron *v.* Waldron, 4 Bradf. Surr. (N. Y.) 114. See also Wright *v.* Holbrook, 32 N. Y. 587 [*affirming* 2 Rob. 516, 18 Abb. Pr. 202].

88. Wright *v.* Holbrook, 32 N. Y. 587 [*affirming* 2 Rob. 516, 18 Abb. Pr. 202]; Johnson *v.* Corbett, 11 Paige (N. Y.) 265; O'Conner *v.* O'Conner, 88 Tenn. 76, 12 S. W. 447, 7 L. R. A. 33 (where it was held that the personal estate of the intestate is primarily liable for the discharge of encumbrances upon his lands for the purchase-money thereof, where such encumbrance was created by the intestate himself or by his grantor, when, in the latter case, he assumed its discharge as a part of the consideration of the grant to him); Minter *v.* Burnett, 90 Tex. 245, 38 S. W. 350; Ancaster *v.* Mayer, 1 Bro. Ch. 454, 1 White & T. Lead. Cas. Pt. II, 723, 28 Eng. Reprint 1237; Broome *v.* Monck, 10 Ves. Jr. 597, 8 Rev. Rep. 48, 32 Eng. Reprint 976 (holding that an estate contracted for after a general devise will pass by a republication and must be paid for out of the personal estate); Hood *v.* Hood, 3 Jur. (N. S.) 684, 26 L. J. Ch. 616, 5 Wkly. Rep. 747 (construing 17 & 18 Vict. c. 113).

89. *Illinois.*— Mackin *v.* Haven, 187 Ill. 480, 58 N. E. 448 [*affirming* 88 Ill. App. 434]; Tennant *v.* Neal, 20 Ill. App. 571.

Indiana.— Windell *v.* Trotter, 127 Ind. 332, 26 N. E. 823; Rinard *v.* West, 48 Ind. 159.

Kentucky.— Buford *v.* Pawling, 5 Dana 283; Roman *v.* Caldwell, 2 Dana 20.

New York.— Traud *v.* Magnes, 49 N. Y. Super. Ct. 309.

North Carolina.—Hinton *v.* Whitehurst, 71 N. C. 66, 73 N. C. 157, 75 N. C. 178.

United States.— Prime *v.* McRea, 19 Fed. Cas. No. 11,423, 1 Cranch C. C. 294, holding that by the laws of Virginia in 1801 a court of equity could decree a sale of one moiety of the fee simple of the debtor's land in the hands of the heir at law.

England.— Dyke *v.* Sweeting, Willes 585.

See 16 Cent. Dig. tit. "Descent and Distribution," § 461.

On scire facias against heirs to enforce a judgment recovered against the administrator, the amount of the judgment may be shown to be less than that recovered, and payment of the lesser sum releases the real estate in the hands of such heirs. Walthaur *v.* Gossar, 32 Pa. St. 259.

Partition of lands among the heirs of decedent does not affect the rights of creditors of deceased and they may satisfy their claims out of such lands as well after partition as before. Speer *v.* Speer, 14 N. J. Eq. 240; Hinton *v.* Whitehurst, 75 N. C. 178.

Insolvency of heir.— Where the land of a deceased debtor was divided among his heirs, some of whom disposed of their portions and became insolvent, it was held that the others were liable for the ancestor's debts to the extent of the real assets received by them. Ryan *v.* McLeod, 32 Gratt. (Va.) 367.

90. Branger *v.* Lucy, 82 Ill. 91; Hinton *v.* Whitehurst, 71 N. C. 66; Coulter *v.* Selby, 39 Pa. St. 358; Yancy *v.* Batte, 48 Tex. 46.

91. See, generally, Covenants, 11 Cyc. 1035.

92. *Kentucky.*—Rhodes *v.* Rhodes, 38 S. W. 706, 18 Ky. L. Rep. 916.

Louisiana.— Armorer *v.* Case, 9 La. Ann. 242; Blanchard *v.* Allain, 5 La. Ann. 367, 52 Am. Dec. 594.

Maryland.— Crisfield *v.* Storr, 36 Md. 129, 11 Am. Rep. 480.

Missouri.— Metcalf *v.* Larned, 40 Mo. 572.

North Carolina.—Carter *v.* Long, 114 N. C. 187, 19 S. E. 632.

Virginia.— Auld *v.* Alexander, 6 Rand. 98.

United States.— Oliver *v.* Piatt, 3 How. 333, 11 L. ed. 622 [*affirming* 19 Fed. Cas. No. 11,116, 3 McLean 27].

See 16 Cent. Dig. tit. "Descent and Distribution." § 474.

93. *Arkansas.*— Jones *v.* Franklin, 30 Ark. 631; Higgins *v.* Johnson, 14 Ark. 309, 60 Am. Dec. 544.

Indiana.— Blair *v.* Allen, 55 Ind. 409.

the absence of statutory provision heirs are not bound by covenants of the ancestor unless such ancestor expressly stipulated that they should be bound.[94] However, by statutory provision in most jurisdictions, heirs or their assigns are made jointly liable, on such covenants of the ancestor as run with the land which descends to them, for breaches of covenant of the ancestor occurring after his death;[95] but they are not liable for breaches occurring during his lifetime.[96]

(II) *COLLATERAL WARRANTIES.* At common law a conveyance of land with covenant of warranty bound the grantor and his heirs to warrant the title to the lands granted, and either upon voucher or upon judgment upon a writ of *warrantia chartæ*, in case of eviction of the grantee, to yield him other lands of equal value.[97] Such warranty was lineal when the title asserted by the heir was derived, or might by possibility have been derived, from the warranting ancestor; and collateral when it neither was nor could have been derived from him; and in both cases the heir was bound to yield other lands in case of eviction only if and so far as he had other lands by descent from the warrantor.[98] However, in England, by statute,[99] all warranties by a tenant for life were declared to be void as against those in remainder or reversion, and all collateral warranties of an ancestor who had no estate of inheritance in possession were declared to be void as against the heir.[1] This statute has been expressly enacted or received as part

Iowa.— McClure *v.* Dee, 115 Iowa 546, 88 N. W. 1093, 91 Am. St. Rep. 181.

Kansas.— Rohrbaugh *v.* Hamblin, 57 Kan. 393, 46 Pac. 705, 57 Am. St. Rep. 334 [*modifying* 3 Kan. App. 131, 42 Pac. 834].

Kentucky.— Logan *v.* Moore, 1 Dana 57; Ellis *v.* Gosney, 7 J. J. Marsh. 109.

Louisiana.— Stokes *v.* Shackleford, 12 La. 170; Walker *v.* Fort, 3 La. 535.

Missouri.— Walker *v.* Deaver, 79 Mo. 664; Miller *v.* Early, 64 Mo. 478; Miller *v.* McCune, 61 Mo. 248; Miller *v.* Bledsoe, 61 Mo. 96. See also Barlow *v.* Delaney, 86 Mo. 583.

New Hampshire.— Hall *v.* Martin, 46 N. H. 337.

New York.— Carpenter *v.* Schermerhorn, 2 Barb. Ch. 514.

See 16 Cent. Dig. tit. "Descent and Distribution," § 474.

A court of equity will subject to the payment of a claim for breach by resident heirs of their ancestor's covenant of warranty — by which they are bound — lands descending to them from their ancestor in another state, under whose laws lands descended are subject to the payment of the ancestor's debts. Dickinson *v.* Hoomes, 8 Gratt. (Va.) 353.

But at law land in another state cannot be treated as assets in the state of residence of the heir, and he will not be held liable on the covenants of a non-resident ancestor as to lands without the state. Austin *v.* Gage, 9 Mass. 395.

94. *California.*— Maynard *v.* Polhemus, 74 Cal. 141, 15 Pac. 451; McDonald *v.* McElroy, 60 Cal. 484.

Illinois.— Baker *v.* Hunt, 40 Ill. 264, 89 Am. Dec. 346; Ruffner *v.* McConnel, 14 Ill. 168.

Kansas.— Rohrbaugh *v.* Hamblin, 57 Kan. 393, 46 Pac. 705, 57 Am. St. Rep. 334.

Kentucky.— Lawrence *v.* Hayden, 4 Bibb 229.

New Hampshire.— Fowler *v.* Kent, 71 N. H. 388, 52 Atl. 554.

England.— Plasket *v.* Beeby, 4 East 485, 1 Smith K. B. 264. See also Plunket *v.* Penson, 2 Atk. 290, 26 Eng. Reprint 577.

See 16 Cent. Dig. tit. "Descent and Distribution," § 473.

Covenants made by an executor do not bind devisees. Cicalla *v.* Miller, 105 Tenn. 255, 58 S. W. 210.

95. Holder *v.* Mount, 2 J. J. Marsh. (Ky.) 187; Morse *v.* Aldrich, 1 Metc. (Mass.) 544; Hill *v.* Ressegieu, 17 Barb. (N. Y.) 162 (holding, however, that the heir will not be compelled to enter into personal covenant in pursuance of agreement made by the ancestor); Roosevelt *v.* Fulton, 7 Cow. (N. Y.) 71; Fields *v.* Squires, 9 Fed. Cas. No. 4,776, Deady 366.

96. Sawyer *v.* Jefts, 70 N. H. 393, 47 Atl. 416; Oliver *v.* Piatt, 3 How. (U. S.) 333, 11 L. ed. 622 [*affirming* 19 Fed. Cas. No. 11,116]. See also Woods *v.* Ely, 7 S. D. 471, 64 N. W. 531.

97. Jones *v.* Franklin, 30 Ark. 631; Russ *v.* Alpaugh, 118 Mass. 369, 19 Am. Rep. 464; 4 Coke Litt. 365*a*.

98. Jones *v.* Franklin, 30 Ark. 631; Russ *v.* Alpaugh, 118 Mass. 369, 19 Am. Rep. 464; 2 Blackstone Comm. 301, 302.

99. St. 4 & 5 Ann, c. 16, § 21.

1. See Jones *v.* Franklin, 30 Ark. 631; Russ *v.* Alpaugh, 118 Mass. 369, 19 Am. Rep. 464; Flynn *v.* Williams, 23 N. C. 509, holding that while, by the statute above referred to, all collateral warranties made by tenants for life and persons not having an estate of inheritance in possession are void against the heir, yet if A be tenant in tail in possession, remainder to B, his next brother, and A makes a feoffment or levies a fine with warranty from him and his heirs, and dies without issue, this is a collateral war-

of the common law of many of the United States.[2] However, in at least one jurisdiction, this statute was not formally enacted and has been held never to have been incorporated into its jurisprudence;[3] and in several jurisdictions by express statutory enactment collateral warranties of the ancestor will bind the heir to the extent of assets descending to him from such ancestor.[4]

b. Covenants of Seizin. The liability of heirs on covenants of seizin of the ancestor depends upon statute, and is generally made contingent upon the inability of the covenantee to obtain satisfaction from the personal representative.[5]

7. Liens For Debts as Against Heirs and Devisees — a. In General. Under some of the statutes of descent and distribution the estate of an ancestor or testator, both real and personal, descends to his heirs or devisees subject to the payment of the ancestor's or testator's debts existing at the time of his death;[6] but neither the debts of the ancestor or testator, nor advances made for the benefit of the estate, are regarded as a charge upon the land, and the heir or devisee takes an absolute title, subject to be defeated or to be charged with the debts of decedent by such legal proceedings as the statute directs.[7] The statutes must be strictly followed in order to enforce payment of the debts of the decedent as against his real estate in the hands of heirs or devisees.[8]

b. Judgment Lien — (i) *In General.* A judgment obtained during the lifetime of the ancestor or testator is a lien upon his lands in the hands of his heirs for the payment thereof, and is entitled to priority of payment out of the pro-

ranty which shall bar B, notwithstanding the statute, although no assets descend.

2. Russ *v.* Alpaugh, 118 Mass. 369, 19 Am. Rep. 464; Goodwin *v.* Kumm, 43 Minn. 403, 45 N. W. 853 (holding that the doctrine of rebuttal by collateral warranty is not a part of the common law of Minnesota); Sisson *v.* Seabury, 22 Fed. Cas. No. 12,913, 1 Sumn. 235.

The warranty deed of an heir apparent, by which he seeks to convey an estate in expectation, may under some circumstances operate by way of estoppel against him, but it cannot operate to the prejudice of those who upon his death prior to that of the ancestor through him become heirs of the latter in his stead. Jerauld *v.* Dodge, 127 Ind. 600, 25 N. E. 186; Habig *v.* Dodge, 127 Ind. 31, 25 N. E. 182.

3. Carson *v.* New Bellevue Cemetery Co., 104 Pa. St. 575; Jourdan *v.* Jourdan, 9 Serg. & R. (Pa.) 268, 11 Am. Dec. 724; Eshelman *v.* Hoke, 2 Yeates (Pa.) 509; Kesselman *v.* Old, 4 Dall. (Pa.) 168, 1 L. ed. 786.

4. Logan *v.* Moore, 1 Dana (Ky.) 57; Foote *v.* Clark, 102 Mo. 394, 14 S. W. 981, 11 L. R. A. 861; Barlow *v.* Delaney, 86 Mo. 583. See also Hart *v.* Thompson, 3 B. Mon. (Ky.) 482.

5. McDonald *v.* McElroy, 60 Cal. 484; Webber *v.* Webber, 6 Me. 127, holding that it is not necessary in order to bind the heir that he be named in the deed of conveyance.

Covenant against encumbrances. In New Jersey an action of covenant will by force of statute lie against heirs and devisees for the breach of a covenant against encumbrances contained in a conveyance of the ancestor. New Jersey Ins. Co. *v.* Meeker, 37 N. J. L. 282.

6. *California.* Brenham *v.* Story, 39 Cal. 179.

Kentucky. Slaughter *v.* Slaughter, 8 B. Mon. 482.

New York. Jewett *v.* Keenholts, 16 Barb. 193.

Ohio. Ramsdall *v.* Craighill, 9 Ohio 197.

Pennsylvania. Blank's Appeal, 3 Grant 192; Pepper's Estate, 1 Phila. 562, holding that heirs take real estate by descent *cum onere* and cannot claim to hold the property discharged from liens for ground-rent.

Virginia. See Sayres *v.* Wall, 26 Gratt. 354, 21 Am. Rep. 303.

See 16 Cent. Dig. tit. "Descent and Distribution," § 478.

Enforcement against minor heirs. A creditor's lien upon the lands of a deceased debtor may be enforced against minor heirs. Piatt *v.* St. Clair, 6 Ohio 227, Wright 261.

7. Harrison Nat. Bank *v.* Culbertson, 147 Ind. 611, 45 N. E. 657, 47 N. E. 13; Wilson *v.* Wilson, 13 Barb. (N. Y.) 252; Covell *v.* Weston, 20 Johns. (N. Y.) 414 (holding that a creditor of the ancestor, by bringing action against the heirs, does not acquire a lien on the land descended to them, and that his lien is merely on the heirs, in respect to the land, so that they cannot alienate it after action is brought, and defeat his claim); Black *v.* Scott, 24 Fed. Cas. No. 1,464, 2 Brock. 325.

Advances to pay debts. No lien is created upon lands of an intestate in the hands of his heirs by an advancement of money to his administrator to pay the debts of the intestate. Lieby *v.* Ludlow, 4 Ohio 469.

8. Ross *v.* Julian, 70 Mo. 209, holding that where the purchase-price of decedent's land remains unpaid, the vendor can enforce his claim against it only as prescribed by statute, and that the courts have no power to declare such a debt a lien and to order it to be paid first out of the land when sold.

ceeds of the sale thereof over a simple contract creditor who acquired no lien for his debt upon the realty during the life of the debtor.[9]

(II) *JUDGMENT AGAINST PERSONAL REPRESENTATIVE.* There is no privity between the personal representative and the heir or devisee, and a judgment obtained by a creditor against the personal representative on a debt due from the ancestor or testator does not create a lien on the real estate of such ancestor or testator in the hands of heirs or devisees.[10] Upon the question as to whether the real estate of the ancestor descended to heirs or passed to devisees can be subjected to a judgment against the personal representative where satisfaction cannot be obtained from the personal estate there is considerable conflict of authority. In some jurisdictions the rule is laid down that an execution issued on a judgment against the personal representative for a debt of the ancestor or testator remaining unsatisfied after final distribution of the estate may be levied on the land of such ancestor or testator in the hands of heirs or devisees;[11] but the better rule seems to be that the only remedy in such case is against the personal representative and his sureties.[12]

c. Duration of Lien. Debts of the decedent not secured by matter of record during his lifetime, such as mortgages or judgments, constitute a lien on his real estate in the hands of his heirs or devisees only for such period of time as may be fixed by the statute creating the lien;[13] and no admissions of the heirs, devisees, or personal representative will serve to prolong the term of such lien.[14]

See also Indiana Mut. F. Ins. Co. *v.* Chamberlain, 8 Blackf. (Ind.) 150.

9. Murchison *v.* Williams, 71 N. C. 135 (holding, however, that the lien of the judgment is subject to the right of the heir to have the debt paid by the personal property of the decedent if there is enough for that purpose); Laidley *v.* Kline, 8 W. Va. 218; Burton *v.* Smith, 13 Pet. (U. S.) 464, 10 L. ed. 248 (holding that in Virginia a judgment is a lien on a reversion after a life-estate in land which has descended to the heirs of the judgment debtor, and that equity will decree a sale of the reversionary estate to satisfy such judgment).

Where a widow, under the statute, takes her husband's whole estate of less than five hundred dollars, consisting in part of lands, she takes them free from the lien of judgments rendered against them. Quackenbush *v.* Taylor, 86 Ind. 270.

Attachment lien.— Where lands are attached and the debtor dies before judgment, such lands descend to his heirs subject to the attachment lien, but can only be subjected by first exhausting the personal assets and bringing the heirs before the court, both of which may be done by scire facias, first against the personal representative and then against the heirs. Perkins *v.* Norvell, 6 Humphr. (Tenn.) 151.

Loss of lien.— Where the lien of a debt of the decedent is lost before the adjudication of the executor's accounts, subsequent adjudication does not charge the decedent's land with such debt. *In re* Kurtz, 16 Lanc. L. Rev. 205.

10. *Georgia.*— Jones *v.* Parker, 55 Ga. 11.
Maryland.— Post *v.* Mackall, 3 Bland 486.
Mississippi.— McCoy *v.* Nichols, 4 How. 31.
North Carolina.— Williams *v.* Askew, 6 N. C. 28.
South Carolina.— Vernon *v.* Chrich, 2 Hill Eq. 257. *Contra,* De Urphey *v.* Nelson, 1 Brev. 289.
Tennessee.— Peck *v.* Wheaton, 8 Mart. & Y. 353.
Virginia.— Brewis *v.* Lawson, 76 Va. 36; Robertson *v.* Wright, 17 Gratt. 534; Shields *v.* Anderson, 3 Leigh 729; Chamberlayne *v.* Temple, 2 Rand. 384, 14 Am. Dec. 786; Foster *v.* Crenshaw, 3 Munf. 514; Mason *v.* Peters, 1 Munf. 437.
West Virginia.— Anderson *v.* Piercy, 20 W. Va. 282; Laidley *v.* Kline, 8 W. Va. 218.
See 16 Cent. Dig. tit. "Descent and Distribution," § 480.

11. Vanhouten *v.* Reily, 6 Sm. & M. (Miss.) 440 (where the administrators made a distribution of the estate without paying the judgment recovered against them for a debt of the decedent, and it was held that the judgment creditor might levy his execution on any of the property of decedent so distributed); Rogers *v.* Huggins, 6 S. C. 356; De Urphey *v.* Nelson, 1 Brev. (S. C.) 289; Blinn *v.* McDonald, (Tex. Civ. App. 1896) 38 S. W. 384. See also Jones *v.* Parker, 55 Ga. 11.

12. Park *v.* White, 4 Dana (Ky.) 552; Hare *v.* Bryant, 7 J. J. Marsh. (Ky.) 375; Bedell *v.* Keethley, 5 T. B. Mon. (Ky.) 598; Glenn *v.* Maguire, 3 Tenn. Ch. 695; McClaskey *v.* Barr, 79 Fed. 408.

13. Piatt *v.* St. Clair, 6 Ohio 227, Wright (Ohio) 261; Chapman's Appeal, 122 Pa. St. 331, 15 Atl. 460; Oliver's Appeal, 101 Pa. St. 299; Hope *v.* Marshall, 96 Pa. St. 395; Schwartz's Estate, 14 Pa. St. 42; Maus *v.* Hummell, 11 Pa. St. 228; Bailey *v.* Bowman, 6 Watts & S. (Pa.) 118; Quigley *v.* Beatty, 4 Watts (Pa.) 13.

14. Oliver's Appeal, 101 Pa. St. 299. See Shoop's Estate, 1 Leg. Gaz. (Pa.) 71, holding that an agreement made by all the heirs of the decedent that the lien of a debt due

d. Priorities. The debts of the decedent due at the time of his death are an equitable lien upon his estate in the hands of his heirs and devisees, and prior in time to judgments recovered against such heirs or devisees for their individual debts, and creditors of the estate of the same class who by diligence first reduce their claims to judgment are entitled to priority in payment out of the estate of the decedent.[15]

8. Conveyances and Encumbrances by Heirs and Devisees — a. Liability of Heirs and Devisees — (I) *Rule at Common Law.* By the common law, where the ancestor bound himself and his heirs in an obligation under seal and the heir aliened the assets before action was brought or the ancestor devised the land, the creditor was without remedy against the heir or devisee.[16]

(II) *By Statute.* To rectify the evils arising from this state of the law, the statute of 3 & 4 Wm. & Mary, c. 14, was enacted, giving a remedy to creditors by bond and specialty in an action of debt against the heir or devisees who had aliened real estate of the ancestor or devisor;[17] which remedy was extended to the colonies by the act of 5 Geo. II, § 3, and may be considered a part of our common law.[18] This statute, however, did not change the common-law rule in regard to simple contract creditors, and under it they did not have recourse to the decedent's real estate in the hands of heirs or devisees for the satisfaction of their claims. Now, however, by statutory enactment in practically every jurisdiction, the heirs or devisees who alien real estate of the ancestor or devisor before the bringing of suit against them by creditors of the estate, or within a prescribed time from the granting of administration or letters testamentary, are personally liable to such creditors for the value of the property so aliened, no distinction being made under these statutes between simple contract and specialty creditors.[19] The effect of these statutes is to make the heir or devisee personally liable to creditors of the decedent to the value of all lands of such decedent

by decedent should continue without suit or judgment beyond the five years fixed by law would be binding on their land so long as it remained in their hands unsold, while it is discharged in the hands of an alienee, even with notice of the agreement.

15. Green *v.* Allen, 45 Ga. 205; Dupree *v.* Adkin, 43 Ga. 475; Mead *v.* McFadden, 68 Ind. 340; Lemmon *v.* Lincoln, 68 Mo. App. 76 (holding that an allowance by the probate court against an estate is entitled to priority over a deed of trust executed by an heir); Morris *v.* Mowatt, 2 Paige (N. Y.) 586, 22 Am. Dec. 661. See also Mapes *v.* Coffin, 5 Paige (N. Y.) 296.

In England, by statute 32 & 33 Vict. c. 46, the distinction between "specialty" and "simple contract" debts in the administration of assets of the decedent is abolished; but a creditor who first takes legal proceedings against the personal representative and obtains judgment is entitled to be paid his debt in full in priority over all other creditors. *In re* Williams, L. R. 15 Eq. 270 [*following* Jennings *v.* Rigby, 33 Beav. 198, 33 L. J. Ch. 149, 10 L. T. Rep. N. S. 308, 12 Wkly. Rep. 32]; Ashley *v.* Pocock, 3 Atk. 208, 26 Eng. Reprint 921; Dollond *v.* Johnson, 18 Jur. 767 [*following* Morrice *v.* Bank of England, 3 Swanst. 573, 36 Eng. Reprint 980].

16. Hayes *v.* Jackson, 6 Mass. 149; Ticknor *v.* Harris, 14 N. H. 272, 40 Am. Dec. 186. Bac. Abr. tit. "Heirs," F, vol. 3, pp. 26, 27.

17. See Hayes *v.* Jackson, 6 Mass. 149; Ticknor *v.* Harris, 14 N. H. 272, 40 Am. Dec. 186; Hamilton *v.* Haynes, 1 N. C. 480.

18. Ticknor *v.* Harris, 14 N. H. 272, 40 Am. Dec. 186; Hamilton *v.* Haynes, 1 N. C. 480.

19. *New Jersey.*— Fredericks *v.* Isenman, 41 N. J. L. 212; New Jersey Ins. Co. *v.* Meeker, 37 N. J. L. 282.

New York.— Rogers *v.* Patterson, 79 Hun 483, 29 N. Y. Suppl. 963; Matter of Callahan, 69 Hun 161, 23 N. Y. Suppl. 378; Merchants' Ins. Co. *v.* Hinman, 34 Barb. 410.

North Carolina.— Hooker *v.* Yellowley, 128 N. C. 297, 38 S. E. 889; Camp Mfg. Co. *v.* Littleman, 128 N. C. 52, 38 S. E. 27; Bunn *v.* Todd, 115 N. C. 138, 20 S. E. 277; Miller *v.* Shoaf, 110 N. C. 319, 14 S. E. 800 (where some of the heirs at law had sold the lands descended to them, leaving an outstanding indebtedness against the estate of their ancestor, and it was held that payment might be enforced against any lands of the decedent remaining in the hands of the heirs); Hinton *v.* Whitehurst, 71 N. C. 66 73 N. C. 157; Tremble *v.* Jones, 7 N. C. 579; Spaight *v.* Wade, 6 N. C. 295.

Rhode Island.— Hopkins *v.* Ladd, 12 R. I. 279.

Tennessee.— Neilson *v.* Weber, 107 Tenn. 161, 64 S. W. 20; Maydwell *v.* Maydwell, 9 Heisk. 571.

Wisconsin.— Adkins *v.* Loucks, 107 Wis. 587, 83 N. W. 934.

See 16 Cent. Dig. tit. "Descent and Distribution," § 488.

aliened in violation of the statute,[20] and to entitle the creditor to have the consideration received therefor in the place of the land aliened.[21]

b. Rights and Liabilities of Alienees. In many jurisdictions, by statutory provision, creditors are given a quasi-lien on the real estate of a deceased person for the satisfaction of their debts which in the absence of sufficient personalty is superior to the rights of heirs, devisees, and their alienees, which lien may be enforced against the estate of the decedent even in the hands of a *bona fide* purchaser from the heirs or devisees.[22] However at the expiration of the statutory period during which the heir or devisee is prohibited from alienating real estate received from the ancestor or testator, a *bona fide* purchaser will take real property from such heir or devisee free from the lien of decedent's creditors.[23] In

20. *Kentucky.*— Parks *v.* Smoot, 105 Ky. 63, 48 S. W. 146, 20 Ky. L. Rep. 1043; Kelley *v.* Culver, 75 S. W. 272, 25 Ky. L. Rep. 443.

New York.— Rogers *v.* Patterson, 79 Hun 483, 29 N. Y. Suppl. 963; Merchants' Ins. Co. *v.* Hinman, 34 Barb. 410.

North Carolina.— Hinton *v.* Whitehurst, 71 N. C. 66, 73 N. C. 157; Tremble *v.* Jones, 7 N. C. 579; Hamilton *v.* Haynes, 1 N. C. 480.

Rhode Island.— Hopkins *v.* Ladd, 12 R. I. 279.

Tennessee.— Neilson *v.* Weber, 107 Tenn. 161, 64 S. W. 20; Maydwell *v.* Maydwell, 9 Heisk. 571.

See 16 Cent. Dig. tit. "Descent and Distribution," § 488.

The "value" of the property aliened, as used in such statutes, is the value of the lands in the condition in which they were at the time of the descent cast. Muldoon *v.* Moore, 55 N. J. L. 410, 26 Atl. 892, 21 L. R. A. 89; Fredericks *v.* Isenman, 41 N. J. L. 212; Haines *v.* Haines, (N. J. Sup. 1903) 54 Atl. 401.

21. Matter of Callaghan, 69 Hun (N. Y.) 161, 33 N. Y. Suppl. 378; Bunn *v.* Todd, 115 N. C. 138, 20 S. E. 277; Davis *v.* Perry, 96 N. C. 260, 1 S. E. 610; Badger *v.* Daniel, 79 N. C. 372; Hinton *v.* Whitehurst, 71 N. C. 66; Adkins *v.* Loucks, 107 Wis. 587, 83 N. W. 934. See also Arrington *v.* Arrington, 114 N. C. 151, 19 S. E. 351.

22. *Colorado.*— Nichols *v.* Lee, 16 Colo. 147, 26 Pac. 157; Burchinell *v.* Butters, 7 Colo. App. 294, 43 Pac. 459.

Georgia.— Seabrook *v.* Brady, 47 Ga. 650.

Illinois.— Myer *v.* McDougal, 47 Ill. 278; McCoy *v.* Morrow, 18 Ill. 519, 68 Am. Dec. 578; Vansyckle *v.* Richardson, 13 Ill. 171. See, however, Ryan *v.* Jones, 15 Ill. 1.

Indiana.— Weakley *v.* Conradt, 56 Ind. 430; Elliot *v.* Moore, 5 Blackf. 270.

Mississippi.— Allen *v.* Poole, 54 Miss. 323, holding that real estate is liable in the hands of a purchaser for debts of the ancestor accrued at the time of his death, but not for those accrued thereafter.

North Carolina.— Camp Mfg. Co. *v.* Liverman, 128 N. C. 52, 38 S. E. 27; Davis *v.* Perry, 96 N. C. 260, 1 S. E. 610; Winfield *v.* Burton, 79 N. C. 388. *Contra*, Spaight *v.* Wade, 6 N. C. 295.

Ohio.— Faran *v.* Robinson, 17 Ohio St. 242, 93 Am. Dec. 617; Hutchinson *v.* Hutchinson, 15 Ohio 301 (holding, however, that in all proceedings by scire facias by a judgment creditor of the ancestor to enforce the collection of his judgment, the alienee may defend the action by showing that the judgment was dormant at the time of the purchase or that it subsequently became so); Piatt *v.* St. Clair, 6 Ohio 227, Wright 261 (holding, however, that where a portion only of the land descended has been sold by the heir, equity will compel a creditor to pursue his remedy, first, out of the land still in the hands of the heirs, and second, to proceed against the land alienated in the inverse order in which it was sold, beginning with the last parcel conveyed).

Pennsylvania.— Horner *v.* Hasbrouck, 41 Pa. St. 169; *In re* Manifold, 5 Watts & S. 340; Morris *v.* Smith, 1 Yeates 328; Graff *v.* Smith, 1 Dall. 481, 1 L. ed. 232.

Rhode Island.— Hopkins *v.* Ladd, 12 R. I. 279.

South Carolina.—Adger *v.* Pringle, 11 S. C. 527. See also Mason *v.* Winsmith, 10 S. C. 314.

Tennessee.— Camp *v.* Sherley, 9 Lea 255; Maydwell *v.* Maydwell, 9 Heisk. 571. See also Buntyn *v.* Holmes, 9 Lea 319. *Compare*, however, Neilson *v.* Weber, 107 Tenn. 161, 64 S. W. 20.

Texas.— Chubb *v.* Johnson, 11 Tex. 469.

England.— Townshend *v.* Windham, 2 Ves. 1, 28 Eng. Reprint 1.

See 16 Cent. Dig. tit. "Descent and Distribution," § 488 *et seq.*

Sale by order of court.— It has been held in Louisiana that a sale of property of the ancestor by heirs in possession under judgment of court does not affect mortgages given by the ancestor, although standing against individual heirs. Freret *v.* Freret, 31 La. Ann. 506. See also Sevier *v.* Gordon, 29 La. Ann. 440; Zeringue's Succession, 21 La. Ann. 715.

23. Taylor *v.* Jones, 97 Ky. 201, 30 S. W. 595, 17 Ky. L. Rep. 85 (holding, however, that neither the assigns nor the creditors under a deed of assignment are *bona fide* purchasers for value within the meaning of the Kentucky statute (St. § 2087); Anderson *v.* Summers, 6 Bush (Ky.) 423; Kelley *v.* Culver, 75 S. W. 272, 25 Ky. L. Rep. 443 (upholding the above rule where action is not instituted within six months after the estate is devised or descended, to subject the same); Zeringue's Succession, 21 La. Ann. 715;

several jurisdictions, by special statutory provision, real estate *bona fide* aliened by heirs or devisees before action brought is not subject to sale on judgments rendered against them for the debts of the ancestor or devisor, but in such case the heirs or devisees are personally liable to the extent of the value of the lands so descended or devised.[24]

c. What Constitutes Alienation — (I) *GENERAL RULE.* Alienation comprises any method whereby estates are voluntarily resigned by one and accepted by another, whether that be effected by sale, gift, marriage settlement, devise, or other transmission of property by the mutual consent of the parties.[25] To constitute a valid alienation it is not necessary that the conveyance should be absolute, but where upon condition broken the mortgagee takes possession of the land under a power given in the mortgage, the mortgage thereupon operates as an alienation.[26]

(II) *TRANSFER OF TITLE BY OPERATION OF LAW.* To constitute a valid alienation of the real estate of the ancestor or testator by the heirs or devisees, it must be voluntary, and sale of such real estate on executions issued on judgments recovered against the heirs or devisees for their individual debts will not constitute an alienation within the meaning of the statutes.[27]

Hooker *v.* Yellowley, 128 N. C. 297, 39 S. E. 889 (holding, however, that real property conveyed by an heir after a lapse of two years from the death of the intestate is liable to the payment of the debts of the intestate, provided the purchaser has notice of the debts); Arrington *v.* Arrington, 114 N. C. 151, 19 S. E. 351; Davis *v.* Perry, 96 N. C. 260, 1 S. E. 610; Brandon *v.* Phelps, 77 N. C. 44 (holding that the time within which heirs or devisees are prohibited from alienating real estate of the decedent, within the meaning of the statutes, is reckoned from the date of the granting of the original letters of administration, and not from the date of the granting of administration *de bonis non*); Winfield *v.* Burton, 79 N. C. 388; Hopkins *v.* Ladd, 12 R. I. 279.

Under New York Code (Code Civ. Proc. § 2750), where decedent's personalty is insufficient to satisfy his debts and the heir or devisee aliens or mortgages his interest in the land in good faith, without notice of the debt, where an application for sale has not been made within three years after the granting of letters of administration, such alienee will take the property divested of the lien for the debt of the ancestor or testator. Fonda *v.* Chapman, 23 Hun 119; Salls *v.* Salls, 19 N. Y. Suppl. 246, 28 Abb. N. Cas. 117. See also Wambaugh *v.* Gates, 11 Paige 505.

24. Den *v.* Jaques, 10 N. J. L. 259; Ransom *v.* Brinkerhoff, 56 N. J. Eq. 149, 38 Atl. 919; Maxwell *v.* Smith, 86 Tenn. 539, 8 S. W. 340; Lewis *v.* Cole, 60 Tex. 341; Adkins *v.* Loucks, 107 Wis. 587, 83 N. W. 934, supporting the above rule where the alienee did not have actual or constructive notice of the debt.

25. Muldoon *v.* Moore, 55 N. J. L. 410, 26 Atl. 892, 21 L. R. A. 89 [*citing* with approval 2 Blackstone Comm. 287]. See also Hendrix *v.* Seaborn, 25 S. C. 481, 485, 60 Am. Rep. 520 [*quoting* Bouvier L. Dict.], where alienation is defined to be "the act by which the title to an estate is voluntarily resigned by one person and accepted by another in the forms prescribed by law." And see Boyd *v.* Cudderback, 31 Ill. 113, 119 (where alienation is defined to be "an act whereby one man transfers the property in possession of lands, tenements, or other things to another person"); Coughlin *v.* Coughlin, 26 Kan. 116, 118 (where the court gives practically the same definition); Ransom *v.* Brinkerhoff, 56 N. J. Eq. 149, 38 Atl. 919 (where, upon the facts stated in the opinion, it was held that the lands were not *bona fide* aliened by the executors and devisees of the testator, the whole arrangement being a family settlement). *Compare* Maydwell *v.* Maydwell, 9 Heisk. (Tenn.) 571.

Executory contract.— The sale of land under executory contract constitutes an alienation thereof under Ky. St. § 2087, providing that the estate alienated by an heir before suit brought to subject it to the ancestor's debts shall not be liable to the creditors in the hands of a *bona fide* purchaser, unless action is instituted within six months after the estate has descended. Parks *v.* Smoot, 105 Ky. 63, 48 S. W. 146, 20 Ky. L. Rep. 1043.

26. Den *v.* Jaques, 10 N. J. L. 259; Fonda *v.* Chapman, 23 Hun (N. Y.) 119; Warren *v.* Raymond, 12 S. C. 9. See also Simons *v.* Brice, 10 S. C. 354, holding that a mortgage given by a devisee in possession is not an alienation within the meaning of the statute of 3 & 4 Wm. & Mary.

27. Scobee *v.* Bridges, 87 Ky. 427, 9 S. W. 299, 10 Ky. L. Rep. 390; Muldoon *v.* Moore, 55 N. J. L. 410, 26 Atl. 892, 21 L. R. A. 89.

Assignment for benefit of creditors by an heir has been held in Kentucky not to be an alienation of the real estate of his ancestor within the meaning of the Kentucky statute, providing that such estate, when alienated by heirs or devisees before the bringing of suit by creditors of the estate, shall not be liable to creditors in the hands of a *bona fide* purchaser for value, unless suit is instituted

9. Apportionment of Debts — a. Liabilities of Heirs and Devisees. The extent of the liability of the heirs at law of the decedent or devisees under a will for the debts of the ancestor or devisor in both law and equity is the full value of the property they have received either by descent or devise.[28]

b. Liability of Widow. Under statutes giving a widow an estate in fee in the real estate of her deceased husband in lieu of dower, where there is no issue, the share to which she is entitled is subject to the payment of one half of the debts of her deceased husband, and the heirs are liable for the other half in proportion to the extent of their shares;[29] unless the terms of the statute limit her liability to less than that amount, and as her liability in this respect is purely statutory, the terms of the statute must be strictly followed in order to subject her full share of the estate to such liability.[30]

10. Deductions and Set-Offs. The interest of an heir or distributee in the estate of a deceased person is his distributive share therein after deducting whatever he may owe the estate, and the general rule is that such a debt may be set off against him, and those claiming under him, in suits brought to recover such distributive share.[31]

11. Actions Against Heirs, Distributees, or Purchasers — a. Nature and Form of Remedy. At common law no action can be maintained against an heir upon a

within six months. Taylor *v.* Jones, 97 Ky. 201, 30 S. W. 595, 17 Ky. L. Rep. 85.

28. *Illinois.*— Cutright *v.* Stanford, 81 Ill. 240 (holding likewise that a decree against the heirs should not be several but joint, requiring each to pay *pro rata*); Vanmeter *v.* Love, 33 Ill. 260; Ryan *v.* Jones, 15 Ill. 1.

Kentucky.— Atchison *v.* Atchison, 106 Ky. 190, 50 S. W. 26, 20 Ky. L. Rep. 1755; Smith *v.* McMillan, (1892) 20 S. W. 382; Rubell *v.* Bushnell, 91 Ky. 251, 15 S. W. 520, 12 Ky. L. Rep. 816; Stroud *v.* Barnett, 3 Dana 391; Cogwell *v.* Lyon, 3 J. J. Marsh. 38.

Louisiana.— State *v.* Second Recorder's Ct. Judge, 43 La. Ann. 1119, 10 So. 179; Dirmeyer *v.* O'Hern, 39 La. Ann. 961, 3 So. 132; Freret *v.* Freret, 31 La. Ann. 506; Francis *v.* Martin, 28 La. Ann. 403; Seiver *v.* Sargent, 25 La. Ann. 220; Dunford's Succession, 25 La. Ann. 56; Fowler *v.* Gordon, 24 La. Ann. 270; Lacey *v.* Ferguson, 1 McGloin 171.

Minnesota.— Lake Phalen Land, etc., Co. *v.* Lindeke, 66 Minn. 209, 68 N. W. 974.

Missouri.— Metcalf *v.* Smith, 40 Mo. 572.

New Jersey.— Haines *v.* Haines, 69 N. J. L. 39, 54 Atl. 401, holding that the liability of heirs and devisees was several and not joint, each heir or devisee being liable for what he receives from the ancestor, and not for what the other heirs or devisees receive.

New York.— Hauselt *v.* Patterson, 124 N. Y. 349, 26 N. E. 937 [*modifying* 57 Hun 562, 11 N. Y. Suppl. 105]; Kellogg *v.* Olmsted, 6 How. Pr. 487; Whitaker *v.* Young, 2 Cow. 569; Schermerhorn *v.* Barhydt, 9 Paige 28.

Rhode Island.— Jenks *v.* Steere, 23 R. I. 160, 49 Atl. 698.

Tennessee.— Maxwell *v.* Smith, 86 Tenn. 539, 8 S. W. 340.

Virginia.— Menefee *v.* Marge, (1888) 4 S. E. 726.

United States.— M'Learn *v.* Wallace, 10 Pet. 625, 9 L. ed. 559.

See 16 Cent. Dig. tit. "Descent and Distribution," § 492.

29. Dirmeyer *v.* O'Hern, 39 La. Ann. 961, 3 So. 132; Ealer *v.* Lodge, 36 La. Ann. 115; Edwards *v.* Ricks, 30 La. Ann. 926.

30. Matthews *v.* Pate, 93 Ind. 443 (where the statute provided that the widow's share should not be reduced unless it was necessary to pay the debts of her husband, and then only so far as might be required after exhausting the share descending to her husband's father, and it was held that the widow's share was not liable for taxes as against the share descending to the husband's father); Bridgeforth *v.* Maxwell, 42 Miss. 743 (decided under a statute providing that the widow, where there were no children, should have one half of the real estate in fee as dower, and it was held that the widow could not be required to contribute *pro rata* when in consequence of the insufficiency of the personalty the amount which descended to the heir at law was subjected to the payment of decedent's debts, unless the estate was insolvent).

31. *Georgia.*— Rawlins *v.* Rawlins, 75 Ga. 632, holding, however, that equity will not permit such set-off as against the wife of the heir or distributee seeking to reach and apply his interest in the estate in payment of alimony, unless the claim of the estate against the husband pleaded in set-off is an equitable claim.

Kentucky.— Kerley *v.* Clay, 4 Bibb 241.

Missouri.— Duffy *v.* Duffy, 155 Mo. 144, 55 S. W. 1002 (holding likewise that the heir's statutory exemption cannot come in ahead of the payment of the debt to the estate, nor can a judgment against such heir in favor of a general creditor be paid out of his distributive share before his debt to the estate is satisfied); Lietman *v.* Lietman, 149 Mo. 112, 50 S. W. 307, 73 Am. St. Rep. 374; Smith *v.* Isaac, 12 Mo. 106.

New Jersey.— Fredericks *v.* Isenman, 41 N. J. L. 212. See also Ransom *v.* Brinkerhoff, 56 N. J. Eq. 149, 38 Atl. 919.

contract made by his ancestor, unless it be a specialty in which the heir was expressly bound.[32] In the settlement of decedents' estates the rule is that existing claims against an estate, whether matured or not, must be exhibited within the time limited for presenting such demands or be barred; but it frequently happens that valid demands against estates come into existence by the happening of contingencies after the time limited for the exhibition of claims has expired or even after the administration is closed and the collection of these is the matter here under consideration.[33] It has been held that the proper course is to bring an action at law against the executor or administrator.[34] Where this is the rule, there being an adequate remedy at law, a suit in equity against the heirs to compel them to pay the debt cannot be maintained.[35] A court of equity has no original, inherent jurisdiction to decree a sale of lands descended; they are not assets at common law, and are liable to the payment of no other than debts due by specialty binding the heir.[36] Nor has it jurisdiction to reach lands devised, unless they were charged by the testator with the payment of debts.[37] But under modern statutes making the lands of a decedent assets for the payment of his debts, a creditor whose claim for adequate reason has not taken the due course of administration may in some jurisdictions file a bill in equity against the heirs and devisees to subject the decedent's real estate to payment of his demand.[38] Where

New York.— Smith *v.* Kearney, 2 Barb. Ch. 533.

South Carolina.— Bobo *v.* Vaiden, 20 S. C. 271; Wilson *v.* Kelly, 16 S. C. 216.

Texas.— Oxsheer *v.* Nave, 90 Tex. 568, 40 S. W. 7, 37 L. R. A. 98. See Guthrie *v.* Guthrie, 17 Tex. 541, holding that as a general rule an heir cannot, in a suit against him by the administrator to recover a debt due the estate, set up as a set-off the distributive share to which on final settlement he may be entitled.

England.— *In re* Akerman, [1891] 3 Ch. 212, 61 L. J. Ch. 34, 65 L. T. Rep. N. S. 194, 40 Wkly. Rep. 12; Courtnay *v.* Williams, 15 L. J. Ch. 204 [*confirming* 3 Hare 539, 8 Jur. 844, 13 L. J. Ch. 461, 25 Eng. Ch. 539] (holding that the executor is entitled to set off against a legacy, a debt due from the legatee to the testator, even though such debt may have been barred by the statute of limitations before the testator's death); Campbell *v.* Graham, 9 L. J. Ch. O. S. 234, 1 Russ. & M. 453, 5 Eng. Ch. 453; Jeffs *v.* Wood, 2 P. Wms. 128, 24 Eng. Reprint 668. See also Cherry *v.* Boultbee, 3 Jur. 1116, 9 L. J. Ch. 118, 4 Myl. & C. 442, 18 Eng. Ch. 442. See, however, Ballard *v.* Marsden, 14 Ch. D. 374, 49 L. J. Ch. 614, 42 L. T. Rep. N. S. 763, 28 Wkly. Rep. 914.

See 16 Cent. Dig. tit. "Descent and Distribution," § 494.

32. Hendricks *v.* Keesee, 32 Ark. 714; Estill *v.* Hoy, Hard. (Ky.) 88.

33. Hendricks *v.* Keesee, 32 Ark. 714; Bacon *v.* Thorp, 27 Conn. 251; Hawley *v.* Botsford, 27 Conn. 80.

34. Bacon *v.* Thorp, 27 Conn. 251; Hawley *v.* Botsford, 27 Conn. 80. Under a statute permitting a decedent's creditor to collect his debt from the decedent's land, the creditor should first obtain judgment against the personal representative and then obtain judgment *de terris* by scire facias against the heirs. Atherton *v.* Atherton, 2 Pa. St. 112.

35. Bacon *v.* Thorp, 27 Conn. 251; Hawley *v.* Botsford, 27 Conn. 80.

36. Scott *v.* Ware, 64 Ala. 174. Before a creditor can obtain the assistance of a court of equity, to subject lands descended, or lands devised, to the satisfaction of his demand, he must have established his debt by a judgment at law, and exhausted his legal remedies; and there must be averment and proof of a want of personal assets, and of the insolvency of the personal representative, and the sureties on his bond, if any he has given." Scott *v.* Ware, 64 Ala. 174, 181; Ledyard *v.* Johnston, 16 Ala. 548; Pyke *v.* Searcy, 4 Port. (Ala.) 52; Darrington *v.* Borland, 3 Port. (Ala.) 9.

37. Scott *v.* Ware, 64 Ala. 174.

38. Hefferman *v.* Forward, 6 B. Mon. (Ky.) 567; Cox *v.* Strode, 2 Bibb (Ky.) 273, 5 Am. Dec. 603; Lancaster *v.* Wolff, 62 S. W. 717, 23 Ky. L. Rep. 233. A suit may be maintained in equity against an heir to whom assets have descended or who has received a distributive share of the estate upon a cause of action which has arisen upon his ancestor's contract after the administration has been closed. Hendricks *v.* Keesee, 32 Ark. 714; Williams *v.* Ewing, 31 Ark. 229; Bennett *v.* Dawson, 15 Ark. 412, 18 Ark. 334; Walker *v.* Byers, 14 Ark. 246. Equity has jurisdiction to require the executors of the estate of a deceased guardian to account for funds of the ward fraudulently appropriated by the deceased, and to decree a sale of lands in the possession of his heirs and devisees to satisfy the amount found due, although the period within which the probate court might act in relation to the claim has expired. Allen *v.* Conklin, 112 Mich. 74, 70 N. W. 339. Where the statutes of a state permit a creditor to follow the lands of a decedent in the hands of his heirs or when conveyed to others than *bona fide* purchasers for value and it is shown that there are no debts of the estate other than the one sued on and that it has no

there has been no administration or an administrator has died and no administrator *de bonis non* has been appointed a bill in equity is an appropriate remedy to recover from the heirs to whom the estate has descended a debt due from the decedent.[39] Where the property of a deceased debtor real and personal exceeds the statutory exemptions both in value and extent and the widow and children take possession of it without administration on his estate, they hold it as a trust fund for the payment of debts and a creditor may maintain a bill in equity against them to enforce payment of his debt.[40] Under a statute providing that any creditor may maintain an action against the heirs of a deceased debtor on a simple contract or specialty, the liability of the heirs is purely statutory and legal and cannot be enforced by a bill in equity.[41] Where a statute rendering the lands of a decedent liable to pay his debts provides the mode by which they shall be so applied, that mode must be pursued when it can be done.[42] And it is only in a case where the statutory mode cannot be pursued that a bill in equity will lie for that purpose.[43] Again the statutory remedy may be in equity and in that case all conditions precedent to filing the bill must be fulfilled.[44] A creditor whose debt had accrued after the time limited by the probate court for the exhibition of claims, and who has obtained a judgment at law against the executor or administrator, may himself bring a bill in equity to compel the distributees to contribute to the extent of the personalty received by them.[45]

b. Right of Action. The remedy of a creditor against the heirs, devisees, and distributees of a deceased person is exceedingly limited. Their claim against the estate whether due or to fall due thereafter must be exhibited for administration by the executor or administrator within the time limited for filing claims or be barred. Thus it will be seen that the right of action against the heirs, devisees, and distributees is limited to that class of claims where the liability depends upon

property except lands which have been conveyed by the heirs to the widow of the decedent without consideration, a federal court may entertain a suit in equity by a creditor to establish his claim against the estate and enforce the same against such lands subject to such rights of dower or homestead as are given the widow therein by the state statutes. Kirtley *v.* Holmes, 107 Fed. 1, 46 C. C. A. 102, 52 L. R. A. 738. The creditor of a deceased debtor may proceed in equity against his heirs residing abroad as absent defendants to marshal the assets and thus subject the land or its proceeds in the state descended to them from the debtor. Carrington *v.* Didier, 8 Gratt. (Va.) 260.

39. Shannon *v.* Dillon, 8 B. Mon. (Ky.) 389, 48 Am. Dec. 394; Hefferman *v.* Forward, 6 B. Mon. (Ky.) 567; Ellis *v.* Gosney, 1 J. J. Marsh. (Ky.) 346.

40. Cameron *v.* Cameron, 82 Ala. 392, 3 So. 148; Shannon *v.* Dillon, 8 B. Mon. (Ky.) 389, 48 Am. Dec. 394; Hefferman *v.* Forward, 6 B. Mon. (Ky.) 567.

41. Schopper *v.* Hildebrandt, 14 Ill. App. 353; New Jersey Ins. Co. *v.* Meeker, 37 N. J. L. 282; Edwards *v.* McClave, 55 N. J. Eq. 151, 35 Atl. 829 [*affirmed* without opinion in 55 N. J. Eq. 822, 41 Atl. 1115]; Mutual L. Ins. Co. *v.* Hopper, 43 N. J. Eq. 387, 12 Atl. 528 [*affirmed* in 44 N. J. Eq. 604, 17 Atl. 1104].

In New Hampshire the statutory proceeding in the probate court upon the application of the administrator for license to sell the decedent's land for the payment of his debts is the proper procedure in such cases. Lebanon Sav. Bank *v.* Waterman, (1890) 19 Atl. 1000; Hatch *v.* Kelly, 63 N. H. 29; Joslin *v.* Wheeler, 62 N. H. 169.

Under the Texas statute providing that on the death of a sole defendant after judgment, execution shall not issue thereon, but the judgment may be proved and paid in course of administration, it was held that the holders of the judgment after the sole defendant's death should sue the heirs for their debt, or to revive the judgment where the time in which administration could be had has elapsed. Fleming *v.* Ball, 25 Tex. Civ. App. 209, 60 S. W. 985.

42. Partee *v.* Kortrecht, 54 Miss. 66; Springfield *v.* Hurt, 15 Fed. 307.

Not an action on contract.— An action to enforce the statutory liability of heirs for the debts of their decedent to the extent of property inherited by them from him is not an action on contract. Adkins *v.* Loucks, 107 Wis. 587, 83 N. W. 934.

43. Partee *v.* Kortrecht, 54 Miss. 66; Springfield *v.* Hurt, 15 Fed. 307. And a bill in equity which fails to show that the complainant has pursued the mode which the statute lays down to be followed before relief can be sought in equity is bad on demurrer. Springfield *v.* Hurt, 15 Fed. 307.

44. Butts *v.* Genung, 5 Paige (N. Y.) 254.

45. Davis *v.* Van Sands, 7 Fed. Cas. No. 3,655, 45 Conn. 600. A creditor may in equity follow the assets of an intestate debtor into the hands of his distributees. Glenn *v.* Sothoron, 4 App. Cas. (D. C.) 125.

some contingency not happening within the time limited for filing claims and which might never have happened at all.[46] No action can be maintained against the heirs where the ancestor if living could not be rendered liable on the specific claim.[47] A creditor who has presented his claim for allowance in the probate proceedings has no right of action against the heirs, devisees, or distributees.[48]

c. Time to Sue. It is not an unusual statutory provision that no action can be brought against the heirs, devisees, or legatees within a specified time after the death of the decedent,[49] or after the granting of letters testamentary or of administration.[50] But an heir who is expressly bound by the covenant of his ancestor, so that the ancestor or administrator need not be joined in the suit, may be sued

46. Bassett *v.* Drew, 176 Mass. 141, 57 N. E. 384; Hall *v.* Bumstead, 20 Pick. (Mass.) 2.

A promissory note maturing more than two years from the time of the giving of the executor's bond is a debt which should be exhibited for administration, and if the creditor does not present it to the probate court for that purpose he cannot maintain an action thereon against the legatees of the deceased. Pratt *v.* Lamson, 128 Mass. 528.

A creditor having a claim against the estate of a deceased person is barred of his right to recover against the heir, if he neglects to present his claim for allowance in the course of probate proceedings (Hill *v.* Nichols, 47 Minn. 382, 50 N. W. 367); and if having presented his claim it is disallowed and he takes no appeal he is likewise barred from proceeding against the heir. Bryant *v.* Livermore, 20 Minn. 313; Woods *v.* Ely, 7 S. D. 471, 64 N. W. 531.

Where the existence of a claim is known but the amount of it remains purely speculative and uncertain until after the estate is administered, the creditor may proceed against the heirs and next of kin, although he has not filed his claim for probate. Bullard *v.* Moor, 158 Mass. 418, 33 N. E. 928.

A person who, not being excused by any statutory disability, neglects to file his claim against a decedent's estate before final settlement, although it may not then be due, is barred of any right of action against the heirs, although they may have inherited property from the decedent. Cincinnati, etc., R. Co. *v.* Heaston, 43 Ind. 172.

Occurrence of contingency before administration taken out.— Where a contingent claim against a decedent's estate became absolute before administration was taken out on the estate, it cannot be enforced against the heirs after commissioners have been duly appointed and the administration has been closed. Bullard *v.* Perry, 66 Vt. 479, 29 Atl. 787.

Contingencies happening after time for filing claims.— A contingent claim arising on contract against the estate of a decedent which does not become absolute and capable of liquidation before the time limited for creditors to present their claims to the probate court for allowance is not barred because it was not so presented, and the holder of such a claim after it becomes absolute may maintain an action against the heirs, next of kin, legatees, or devisees to whom the residue of the estate has been distributed to recover such claim to the extent of the estate received by them. Hantzch *v.* Massolt, 61 Minn. 361, 63 N. W. 1069; Hall *v.* Martin, 46 N. H. 337.

The claim of surviving partners against the estate of a deceased partner for contribution for losses sustained by the firm is a contingent claim which does not become absolute until the business of the firm is settled, the assets converted and the debts paid, and which under the statute need not be presented for allowance until it becomes absolute, and if before such claim becomes absolute the estate of the deceased partner has become settled and the assets distributed, the claim is not barred, but the surviving partners may pursue their remedy against the heirs and distributees under the statute. Logan *v.* Dixon, 73 Wis. 533, 41 N. W. 713.

47. Haynes *v.* Colvin, 19 Ohio 392.

48. Busenbark *v.* Healey, 93 Ind. 450.

49. One year.—Bowmans *v.* Mize, 3 B. Mon. (Ky.) 320. Although the legal remedy against heirs for the debt of the decedent is postponed until the expiration of twelve months when there is no personal representative, yet the remedy in equity need not be delayed for twelve months where the just priority of the decedent's creditors must be defeated by the intervention of the creditors of the heir. Gillespie *v.* Walker, 3 B. Mon. (Ky.) 505. The heirs of a surety upon a guardian's bond are liable for a default of the guardian which occurred subsequent to the final settlement of the estate of the surety, where six months prior to such final settlement the ward was an infant and the suit against such heirs is commenced within one year after the ward's majority. Voris *v.* State, 47 Ind. 345.

Nine months.— Cleveland *v.* Mills, 9 S. C. 430.

50. Three years.— Roe *v.* Swezey, 10 Barb. (N. Y.) 247; Butts *v.* Genung, 5 Paige (N. Y.) 254. Before the creditors of a decedent can reach an equitable interest in real estate which he held under a contract purchased by suit against his heirs to whom it has descended, they must await the expiration of three years from the time of granting letters testamentary in addition to exhausting their remedy against the personal representative of the decedent, or showing by their bill that

immediately after the death of the ancestor.[51] A judgment creditor of a decedent cannot enforce payment of the judgment out of the decedent's real estate after the lien of the judgment has expired.[52]

d. Conditions Precedent. A creditor cannot proceed against the heirs, devisees, or distributees to collect his claim, until he has exhausted his remedy against the personal representative.[53] And where there has been a devastavit it has been held that he must first sue the personal representative and his sureties for the devastavit.[54] On the other hand it has been held that when both the heirs and personal representative are sued and there is a return of *nulla bona* as to the personal representative the creditor is not bound to investigate the correctness of the administration, but may at once have satisfaction out of the real estate.[55] A suit cannot be brought against the heirs of a deceased distributee until the estate has been finally settled.[56] It has been held that an action will not lie against the heirs unless administration has been taken out on the estate of the ancestor.[57]

there was no personal estate to pay the debts. Wilber *v.* Collier, 3 Barb. Ch. (N. Y.) 427.

51. Sneed *v.* Phillips, 2 J. J. Marsh. (Ky.) 131.

52. Hansen's Empire Fur Factory *v.* Teahout, 104 Iowa 360, 73 N. W. 875.

53. *Alabama.*— Ledyard *v.* Johnston, 16 Ala. 548; Pyke *v.* Searcy, 4 Port. 52.

Indiana.— Barnard *v.* Cox, 25 Ind. 251.

Iowa.— Reynolds *v.* May, 4 Greene 283.

Kentucky.— Mills *v.* Sale, 7 J. J. Marsh. 254; Teeter *v.* Anderson, 8 Ky. L. Rep. 108.

Maine.— Fowler *v.* True, 76 Me. 43.

Massachusetts.— Pratt *v.* Lamson, 128 Mass. 528.

Minnesota.—Bryant *v.* Livermore, 20 Minn. 313.

Missouri.— McAllister *v.* Williams, 23 Mo. App. 286.

New Hampshire.— Hutchinson *v.* Stiles, 3 N. H. 404.

New York.— Read *v.* Patterson, 134 N. Y. 128, 31 N. E. 445; Mersereau *v.* Ryerss, 3 N. Y. 261; Sanford *v.* Granger, 12 Barb. 392; Roe *v.* Swezey, 10 Barb. 247; Schermerhorn *v.* Barhydt, 9 Paige 28.

North Carolina.— Keais *v.* Sheppard, 3 N. C. 218.

Ohio.—Arbaugh *v.* Millett, 5 Ohio Cir. Ct. 295.

Oregon.— Grange Union *v.* Burkhart, 8 Oreg. 51.

South Dakota.—Woods *v.* Ely, 7 S. D. 471, 64 N. W. 531.

Tennessee.— Boyd *v.* Armstrong, 1 Yerg. 40.

Vermont.— Bullard *v.* Perry, 66 Vt. 479, 29 Atl. 787.

Virginia.— Scott *v.* Ashlin, 86 Va. 581, 10 S. E. 751.

See 16 Cent. Dig. tit. "Descent and Distribution," § 498.

Contra.—In South Carolina it has been held that it is unnecessary to have a return of *nulla bona* on a judgment recovered against the personal representative of an administrator before commencing action against his heirs and devisees on the demand. Ariail *v.* Ariail, 29 S. C. 84, 7 S. E. 35. And under the broad terms of the New Jersey statute providing that every creditor of a deceased person may have his action against the heirs, an action at law may be brought against heirs, although the claim has not been presented to the administrator and there is sufficient personal property to pay the debt. Stone *v.* Todd, 49 N. J. L. 274, 8 Atl. 300.

54. Pyke *v.* Searcy, 4 Port. (Ala.) 52; Tift *v.* Collier, 78 Ga. 194, 2 S. E. 943; Macgill *v.* Hyatt, 80 Md. 253, 30 Atl. 710; Wyse *v.* Smith, 4 Gill & J. (Md.) 295; Lee *v.* Beaman, 101 N. C. 294, 7 S. E. 887; Latham *v.* Bell, 69 N. C. 135; Bland *v.* Hartsoe, 65 N. C. 204. Where an administrator has paid the entire personalty over to the next of kin before paying all of the debts and he and the sureties on his administration bond are insolvent except one surety who is a non-resident, the creditors may subject the land in the hands of the heirs before they have exhausted their remedy against the non-resident surety. Lilly *v.* Wooley, 94 N. C. 412.

55. Litsey *v.* Smith, 10 B. Mon. (Ky.) 74, holding that the creditor is not driven to a bill of discovery or an action for a devastavit and that a devastavit is not a bar to his action against the heirs.

56. Rinard *v.* West, 92 Ind. 359; Arbaugh *v.* Millett, 5 Ohio Cir. Ct. 295.

In Massachusetts the liability of heirs for debts of their ancestor is now governed wholly by statute (Clark *v.* Holbrook, 146 Mass. 366, 16 N. E. 410; Grow *v.* Dobbins, 128 Mass. 271; Grow *v.* Dobbins, 124 Mass. 560; Hall *v.* Bumstead, 20 Pick. 2; Royce *v.* Burrell, 12 Mass. 395), but as at common law it is a liability upon the contract of their ancestor (Clark *v.* Holbrook, 146 Mass. 366, 16 N. E. 410; Russ *v.* Alpaugh, 118 Mass. 369, 19 Am. Rep. 464; Valentine *v.* Farnsworth, 21 Pick. 176); and an action on a debt of a deceased person cannot be maintained under the statute against his heirs without proof that his estate had been settled before the right of action accrued (Grow *v.* Dobbins, 124 Mass. 560).

57. Hall *v.* Bumstead, 20 Pick. (Mass.) 2; Royce *v.* Burrell, 12 Mass. 395.

A bill in equity cannot be maintained against the heirs in the absence of allegation or proof that the estate of the ancestor has been settled. Grow *v.* Dobbins, 128 Mass. 271.

But on the other hand it has been held that where an estate is partitioned and distributed by agreement among the heirs without administration, one who is the sole creditor of the estate and whose debt is a lien thereon may enforce the lien against the heirs without procuring administration.[58] And by statute where there has been no administration on the estate of the decedent, but his heirs have taken possession of his property and divided it among themselves, one to whom the decedent was indebted may sue the heirs without any administration.[59]

e. Defenses. The heirs or devisees as defendants to a creditor's bill may make any defense against the alleged debts which the decedent if living might have made, or which would have been available to the personal representative in an action at law, and may also set up defenses which the personal representative has by his own acts or laches precluded himself from making.[60] Thus a personal representative is not bound to plead the statute of limitation, but a judgment rendered against him founded on a debt barred by the statutes when the action was commenced is open to a plea of the statute by the heir or the devisee, and the judgment does not prevent the successful interposition of the plea.[61] When real estate devised or descended is sought to be charged with the debts of the deceased, the validity and existence of the debts are open to contest by the heirs or devisees in the proceedings and the decree of the surrogate or probate judge on the accounting does not conclude them and except in the case of a judgment on the merits is not even *prima facie* evidence of the existence of the debt.[62] The heirs may plead in bar a sale of the lands of the ancestor by

58. Patterson *v.* Allen, 50 Tex. 23.

59. Low *v.* Felton, 84 Tex. 378, 19 S. W. 693; Solomon *v.* Skinner, 82 Tex. 345, 18 S. W. 698; Schmidtke *v.* Miller, 71 Tex. 103, 8 S. W. 638; Mayes *v.* Jones, 62 Tex. 365; Webster *v.* Willis, 56 Tex. 468; McCampbell *v.* Henderson, 50 Tex. 601; Patterson *v.* Allen, 50 Tex. 23; Byrd *v.* Ellis, (Tex. Civ. App. 1896) 35 S. W. 1070; Frost *v.* Smith, (Tex. Civ. App. 1893) 24 S. W. 40; Buchanan *v.* Thompson, 4 Tex. Civ. App. 236, 23 S. W. 328.

60. Scott *v.* Ware, 64 Ala. 174; Payne *v.* Pusey, 8 Bush (Ky.) 564; Camp *v.* Bostwick, 20 Ohio St. 337, 5 Am. Rep. 669.

Decedent's money in possession of plaintiff. — Where in an action against the heirs to recover an amount claimed for services rendered to their ancestor during her last illness, etc., it is proved that plaintiff on being interrogated by the parish judge while making the inventory confessed that he had in his possession money belonging to the deceased, but refused to state the amount, he will be nonsuited. Hebert *v.* Mouton, 1 La. Ann. 229.

Where the heir is not bound expressly by the ancestor's covenant, if plaintiff in an action against the heir and administrator jointly is barred by the plea of the administrator, he must fail as to the heir also. Warfield *v.* Blue, 3 Dana (Ky.) 485.

Champerty. — Heirs sued to obtain from them a conveyance or better assurance for land sold by their ancestor may resist the decree by showing that the contract was champertous. Bryant *v.* Hill, 9 Dana (Ky.) 67.

61. Scott *v.* Ware, 64 Ala. 174; Teague *v.* Corbitt, 57 Ala. 529; Darrington *v.* Borland, 3 Port. (Ala.) 9; Mooers *v.* White, 6 Johns. Ch. (N. Y.) 360; Woodfin *v.* Anderson, 2 Tenn. Ch. 331; Alston *v.* Mumford, 1 Fed. Cas. No. 267, 1 Brock. 266.

62. Black *v.* Elliott, 63 Kan. 211, 65 Pac. 215, 88 Am. St. Rep. 239; Long *v.* Long, 142 N. Y. 545, 37 N. E. 486; O'Flynn *v.* Powers, 136 N. Y. 412, 32 N. E. 1085; Burnham *v.* Burnham, 27 Misc. (N. Y.) 106, 58 N. Y. Suppl. 196; Watts *v.* Taylor, 80 Va. 627.

Judgment against executor how far conclusive. — A judgment against an executor is conclusive upon the legatee so far as the personalty which comes to the executors is concerned, but is not conclusive upon them so far as their legacies are charged upon and payable out of realty. Hoboken First Baptist Church *v.* Syms, 51 N. J. Eq. 363, 28 Atl. 461. In New Hampshire upon a petition for license to sell real estate of a person deceased for payment of a debt, a judgment recovered against the administrator is not conclusive evidence of indebtedness against the heirs of the real estate. Such judgment may be impeached on the ground that it was recovered by fraud or collusion of the administrator; but if the heir, although not notified, has appeared and taken upon himself the defense of the action and been fully heard without interference of the administrator he will be bound by the judgment. Nichols *v.* Day, 32 N. H. 133, 64 Am. Dec. 358. In Pennsylvania upon the trial of a scire facias to charge land in the possession of the heirs of the decedent with a debt for which judgment has been obtained against the administrator defendants may make any defense which it would have been competent for them to have made in the original action if they had been parties thereto. The judgment while conclusive as to personal estate is *prima facie* evidence only as to the real

order of the court.[63] But the fact that the heir holds his share of the decedent's real estate under a partition decree assigning the different shares at fixed values is no defense to an action by the decedent's creditors to subject the land to the payment of his debts.[64] The pendency of a prior suit by another creditor by which the assets may be exhausted is no bar to a suit against the heirs.[65] Neither is an unsatisfied judgment recovered by plaintiff himself against the executor or administrator.[66]

f. Jurisdiction and Venue. A suit to subject land descended to the heir to the payment of a debt of the ancestor is in effect a proceeding *in rem* and must be prosecuted in the jurisdiction in which the property is situated.[67] In equity in a case of fraud, trust, or contract, the jurisdiction of a court of chancery is sustainable wherever the person may be found, although lands not within the jurisdiction of that court may be affected by the decree.[68] It has been held that this principle applies to an heir to whom lands of the ancestor in another state have descended as well upon the ground of trust as of contract, provided such lands are assets for the payment of the ancestor's debts under the laws of the state wherein they are situated, and that a court of equity may compel an heir residing within the jurisdiction to account for any lands in another state descended to him as heir as a trust subject to the payment of his ancestor's debts and enforce its decree by attachment for contempt, if necessary.[69] But in a recent case in another jurisdiction this has been denied on the ground that the heir does not hold the land in trust for the creditors of the ancestor, but simply holds it subject to the payment of his debts, and it is accordingly held that the creditors must seek relief in the courts of the state where the land is situated.[70] The personal liability of an heir may be enforced against him in the county in which he resides.[71] Where heirs have accepted the succession and are in possession of the property, an action against them by a creditor of the ancestor should be brought in a court of ordinary original jurisdiction and not in the probate court.[72] A statute giving the probate court exclusive original jurisdiction of the settlement of estates of deceased persons and of all matters of probate does not

estate and plaintiff's claim is open to contest on original grounds. Paul *v.* Grimm, 183 Pa. St. 330, 38 Atl. 1017; Sergeant *v.* Ewing, 36 Pa. St. 156. In South Carolina the heir is liable for the debts of the ancestor to the extent the lands descended, but such lands when in the exclusive possession of the heir cannot be sold under a judgment against the executor or administrator to which the heir was not a party. In such case the land if not alienated can be reached only by a direct action and judgment against the heir and a sale of the land thereunder. Wheeler *v.* Floyd, 24 S. C. 413. In West Virginia it is settled law that inasmuch as there is no privity between the personal representative and the heirs of a decedent, a judgment rendered against the former is not even *prima facie* evidence against the latter; that such judgment is not a lien on the real estate descended to the heir and does not prevent the statute of limitations from running in favor of the heir when the real estate descended is sought to be subjected for the debt on which such judgment was obtained. Saddler *v.* Kennedy, 26 W. Va. 636, 640; Merchants' Nat. Bank *v.* Good, 21 W. Va. 455; Custer *v.* Custer, 17 W. Va. 113; Laidley *v.* Kline, 8 W. Va. 218.

Judgment lien.— A judgment against the personal representative is not a direct lien on the land in the hands of the heir and cannot be enforced against it without further proceedings. Jones *v.* Parker, 55 Ga. 11.

63. Covell *v.* Weston, 20 Johns. (N. Y.) 414.

64. Mobley *v.* Cureton, 6 S. C. 49.

65. Wells *v.* Bowling, 2 Dana (Ky.) 41.

66. Couchman *v.* Slaughter, 1 A. K. Marsh. (Ky.) 388; Mobley *v.* Cureton, 6 S. C. 49.

67. Williams *v.* Ewing, 31 Ark. 229.

68. Marshall, C. J., in Massie *v.* Watts, 6 Cranch (U. S.) 148, 3 L. ed. 181.

69. Dickinson *v.* Hoomes, 8 Gratt. (Va.) 353, 413.

70. Robinson *v.* Johnson, (Tenn. Ch. App. 1899) 52 S. W. 704.

71. Lancaster *v.* Wolff, 110 Ky. 768, 62 S. W. 717, 23 Ky. L. Rep. 233.

72. Soye *v.* Price, 30 La. Ann. 93; De la Ferriere *v.* England, 27 La. Ann. 686; De Grehan's Succession, 25 La. Ann. 334; Martin *v.* Cannon, 25 La. Ann. 225; Cox *v.* Hunter, 10 La. 425; Watts *v.* Frazer, 5 La. 383. It has been said that probate courts are not wholly without jurisdiction, *ratione materiæ*, of a suit against heirs to enforce execution of a judgment against their ancestor; and if some be minors, although the others might perhaps be sued before the ordinary tribunals, the whole matter may well be submitted to the probate court. Skillman *v.* Lacy, 5 Mart. N. S. (La.) 50.

deprive the courts of ordinary general jurisdiction of their jurisdiction of actions by creditors of deceased persons against the heirs, legatees, and distributees.[73] The creditors must litigate their claims in the usual way. A court of equity has no jurisdiction on mere petition to order a fund in court resulting from a partition sale of a decedent's land to be paid out to his creditors.[74]

g. Limitations and Laches — (I) *STATUTE OF LIMITATIONS* — (A) *In General.* Creditors of a deceased person who seek a remedy against his heirs, devisees, legatees, or distributees must use due diligence in the prosecution of their demands and must sue thereon within the statutory term applicable to them. If they do not they will be barred unless there is a reply to the statute which will prevent its operation.[75] If the executor or administrator pay just debts without pleading the statute of limitations it is not a devastavit.[76] But in that case if he has paid out more than the amount of the assets in his hands, the heir, devisee, or distributee may plead the statute against him when he seeks reimbursement.[77] And a judgment against the personal representative in an action to which the heirs are not parties does not bar them from pleading the statute of limitations when the creditor seeks to subject descended real estate in their possession to the payment of his debt.[78] A promise by the personal representative will not take a case out of the statute as to the heirs.[79] The limitations against an action by a decedent's creditor for a personal judgment against a distributee for the amount of property received by him do not apply to a suit brought after distribution to foreclose a lien on the decedent's land.[80] Where a claim is barred by limitation it cannot be made the basis of an action against a fraudulent vendee of the decedent, since he stands in the same relation to the creditors as would the heirs.[81] Inasmuch as the liability of the heirs is several and not joint, payment by one heir on the debt of the ancestor does not take the case out of the statute of limitations as to the others.[82] Although the remedy against the heir is given by statute the cause of action is founded upon the obligation of the ancestor to pay his debt, and the statute of limitations is no more available to the heirs than it would have been to the ancestor.[83] If an action is brought by a creditor against

73. Horst *v.* McCormick Harvester Mach. Co., 30 Nebr. 558, 46 N. W. 717. Where an administrator distributed the estate without paying debts incurred by him in administering the estate, it was held that the surrogate had no power to compel the distributees to pay them. *In re* Keef, 43 Hun (N. Y.) 98.

74. Cassidy *v.* Cassidy, 1 Barb. Ch. (N. Y.) 467.

75. *Georgia.*— Caldwell *v.* Montgomery, 8 Ga. 106.

Illinois.— Ryan *v.* Jones, 15 Ill. 1.

Indiana.— Freeman *v.* State, 18 Ind. 484.

Louisiana.— White *v.* Blanchard, 19 La. Ann. 59.

Maine.— Fenderson *v.* Belcher, 68 Me. 59; Webber *v.* Webber, 6 Me. 127.

Massachusetts.— Hayward *v.* Hapgood, 4 Gray 437.

North Carolina.— Fraser *v.* Bean, 96 N. C. 327, 2 S. E. 159.

Rhode Island.— Fenner *v.* Manchester, 6 R. I. 140.

South Carolina.— Abercrombie *v.* Abercrombie, 25 S. C. 45; Cleveland *v.* Mills, 9 S. C. 430.

Tennessee.— Woolridge *v.* Page, 1 Lea 135; Grimmett *v.* Midgett, (Ch. App. 1899) 57 S. W. 399.

Texas.— Montgomery *v.* Culton, 18 Tex. 736.

See 16 Cent. Dig. tit. "Descent and Distribution," § 503.

Remedy in equity.— A demand against an estate barred by the statute of non-claim and regularly adjudged at law to be so cannot afterward be successfully prosecuted to recovery in equity, either against the representatives or the heirs and distributees to whom assets may have descended or been distributed. Bennett *v.* Dawson, 18 Ark. 334.

Suit against infant heirs.— Under an answer put in on behalf of minors by their guardian *ad litem* submitting their rights to the protection of the court, it is the duty of the court to give the minor defendants the benefit of the statute of limitations. White *v.* Miller, 158 U. S. 128, 15 S. Ct. 788, 39 L. ed. 921.

76. Pea *v.* Waggoner, 5 Hayw. (Tenn.) 242. See, generally, EXECUTORS AND ADMINISTRATORS.

77. Pea *v.* Waggoner, 5 Hayw. (Tenn.) 242.

78. Gilliland *v.* Caldwell, 1 S. C. 194.

79. Peck *v.* Wheaton, Mart. & Y. (Tenn.) 353.

80. Devine *v.* U. S. Mortgage Co., (Tex. Civ. App. 1898) 48 S. W. 585.

81. Grimmett *v.* Midgett, (Tenn. Ch. App. 1899) 57 S. W. 399.

82. Haines *v.* Haines, 69 N. J. L. 39, 54 Atl. 401.

83. Hauselt *v.* Patterson, 124 N. Y. 349, 26 N. E. 937; Colgan *v.* Dunne, 50 Hun

the personal representative of his deceased debtor within the statutory period, but judgment therein is not obtained until after it has expired, the real representative is not protected by the statute of limitations when it is sought to subject the decedent's lands to the payment of such debt.[84]

(B) *When Statute Begins to Run.* The statutes vary as to the time when the period of limitation begins to run. Thus we read that the heir or his alienees holds the lands descended discharged of the ancestor's debts if the creditors do not assert their claims within the statutory period after the death of the decedent,[85] after the final settlement of the estate,[86] or after they have exhausted their remedy against the estate of the ancestor.[87]

(II) *LACHES.* In equity the facts and circumstances of the case may be such where the creditor has been guilty of gross laches that he will not be permitted to proceed against the heirs, although the full period of the statute of limitations may not have elapsed.[88]

h. Parties — (I) *PLAINTIFFS.* At law every creditor must sue for himself and cannot join the case of another creditor, and therefore two or more creditors of a deceased ancestor cannot join in one action against the heir at law to subject the lands descended to the payment of debts of the ancestor.[89] But a creditor proceeding in equity to subject lands descended or devised for the payment of debts must sue on behalf of himself and all other creditors.[90] And, where a bill is filed by one creditor to subject assets in the hands of the heir, another creditor on his petition showing that he is such should be made a party as he has a right to participate in the distribution of the fund.[91] An indorsee of a promissory note indorsed after the maker's death is a creditor of the deceased within the statute and may sue the maker's heirs in his own name.[92]

(II) *DEFENDANTS* — (A) *The Personal Representative.* At common law a bond creditor has his election to proceed either against the heir or against the executor or administrator,[93] although if the heir be not expressly bound the personal representative must be joined with him.[94] If the creditor comes into a court of equity and proceeds against the heir or devisee he must join the executor or administrator, if there be one, in the suit; and for this rule two reasons

(N. Y.) 443, 3 N. Y. Suppl. 309; Pyatt *v.* Waldo, 85 Fed. 399.

84. Lee *v.* McKoy, 118 N. C. 518, 24 S. E. 210 [*overruling* Syme *v.* Badger, 96 N. C. 197, 2 S. E. 61].

85. Allen *v.* Krips, 125 Pa. St. 504, 17 Atl. 448.

86. Piatt *v.* St. Clair, 6 Ohio 227, Wright (Ohio) 261.

In New York it has been held that the time between the death of the decedent and the accounting by the executor or administrator cannot be taken as a part of the time limited in a case where a creditor brings proceedings for the sale of the real estate of a deceased person and the statute of limitations is set up as a bar. Mead *v.* Jenkins, 95 N. Y. 31 [*affirming* 29 Hun 253].

87. Jennings *v.* Parr, 62 S. C. 306, 40 S. E. 683; Brock *v.* Kirkpatrick, 60 S. C. 322, 38 S. E. 779, 85 Am. St. Rep. 847. The right of action against heirs to whom the ancestor's estate has been distributed under administration proceedings to compel a refunding to one claiming damages for breach of a covenant of warranty occurring after such distribution is not barred until five years after the breach. Wood *v.* Cross, 8 Kan. App. 42, 54 Pac. 12.

88. Goodhue *v.* Barnwell, Rice Eq. (S. C.) 198. See also Whelan *v.* Cook, 29 Md. 12. In Mobley *v.* Cureton, 2 S. C. 140, it appeared that real estate of an intestate was partitioned among his heirs in 1855, a large amount of assets being left in the hands of the administrators to pay the debts. On a sealed note of the intestate due in 1854, judgment by default was recovered against the administrators in 1860. Execution was issued and lodged with the sheriff, but nothing more was done to enforce payment until 1868 when a bill in equity was filed to subject the real estate in the possession of the heirs to the payment of the debt. Both the administrators had died insolvent not long before the bill was filed. It was held that plaintiff was barred by his laches of his remedy in equity and the bill was dismissed without prejudice to plaintiff's right to pursue the heirs by action at law.

89. Warren *v.* Raymond, 17 S. C. 163.

90. Scott *v.* Ware, 64 Ala. 174; Carr *v.* Huette, 73 Ind. 378.

91. Cosby *v.* Wickliffe, 7 B. Mon. (Ky.) 120.

92. Parsons *v.* Parsons, 5 Cow. (N. Y.) 476.

93. Tessier *v.* Wyse, 3 Bland (Md.) 28; Corbet *v.* Johnson, 6 Fed. Cas. No. 3,218, 1 Brock. 77.

94. Conley *v.* Boyle, 6 T. B. Mon. (Ky.) 637; Lawrence *v.* Hayden, 4 Bibb (Ky.) 229; Lawrence *v.* Buckman, 3 Bibb (Ky.) 23.

are assigned. First, that the personal representative may contest the claim; and second, that the personal fund out of which a reimbursement would be decreed to the heir may be applied in the first instance to the payment of the debt.[95] And as in a court of equity the effects of the testator may be pursued into the hands of every person whatever, if the executor must be brought into court, because among other reasons he would be responsible to the heir; so any other person possessing the personal fund who would be responsible to the heir and who can be brought into court, ought for the same reason to be associated with him in the suit. It is equitable and convenient that the person who must ultimately pay the debt be decreed to pay it in the first instance.[96] Since the law, however, does not require that which is impossible or nugatory, if there are no personal assets and no administrator has been appointed, suit may be brought against the heirs alone to subject real estate to the payment of the decedent's debts.[97] And when the realty is primarily liable and the creditor is authorized to look directly to that it is only necessary to make the heir or real representative a party.[98] By statute in some states the heirs and devisees may be sued jointly without joining the personal representative.[99]

(B) *Heirs.* Whether the proceeding to subject the decedent's land to the payment of his debts be at law or in equity all the heirs and devisees who are liable are necessary parties;[1] and the heirs of a deceased heir must be joined, or the non-joinder may be pleaded in abatement.[2] In a suit against heirs all must be

95. *District of Columbia.*— Plumb *v.* Bateman, 2 App. Cas. 156.

Illinois.— McDowell *v.* Cochran, 11 Ill. 31.

Indiana.— Whitney *v.* Kimball, 4 Ind. 546, 58 Am. Dec. 638; Bryer *v.* Chase, 8 Blackf. 508.

Iowa.— Postlewait *v.* Howes, 3 Iowa 365.

Kentucky.— Cox *v.* Strode, 2 Bibb 273, 5 Am. Dec. 603.

Maryland.— Macgill *v.* Hyatt, 80 Md. 253, 30 Atl. 710; Baltimore *v.* Chase, 2 Gill & J. 376; David *v.* Grahame, 2 Harr. & G. 94; Tyler *v.* Bowie, 4 Harr. & J. 333; Tessier *v.* Wyse, 3 Bland 28.

South Carolina.— Lowry *v.* Jackson, 27 S. C. 318, 3 S. E. 473; Vernon *v.* Ehrich, 2 Hill Eq. 257.

Tennessee.— Dulles *v.* Read, 6 Yerg. 53.

United States.— U. S. Bank *v.* Ritchie, 8 Pet. 128, 8 L. ed. 890; Allen *v.* Simons, 1 Fed. Cas. No. 237, 1 Curt. 122; Corbet *v.* Johnson, 6 Fed. Cas. No. 3,218, 1 Brock. 77.

England.— Madox *v.* Jackson, 3 Atk. 405, 26 Eng. Reprint 1034. So ruled in England as early as 1734 in Knight *v.* Knight, 3 P. Wms. 331, 24 Eng. Reprint 1088.

See 16 Cent. Dig. tit. "Descent and Distribution," § 505.

An administrator has a right to insist upon being made a party to a bill against the heir for discovery of assets and their application for the payment of debts. Cosby *v.* Wickliffe, 7 B. Mon. (Ky.) 120.

The death of the personal representative does not obviate the necessity of following this rule. An administrator *de bonis non* should be appointed. Macgill *v.* Hyatt, 80 Md. 253, 30 Atl. 710.

By statute in Kentucky the rule in equity is made applicable to actions in law. Hagan *v.* Patterson, 10 Bush 411.

96. Corbet *v.* Johnson, 6 Fed. Cas. No. 3,218, 1 Brock. 77.

97. Plumb *v.* Bateman, 2 App. Cas. (D. C.) 156; Birely *v.* Staley, 5 Gill & J. (Md.) 432, 25 Am. Dec. 303. If no administrator has been appointed it should be so alleged in the bill. Whitney *v.* Kimball, 4 Ind. 546, 58 Am. Dec. 638; Bryer *v.* Chase, 8 Blackf. (Ind.) 508. It has been held that the proper practice is to have an administrator appointed (Postlewait *v.* Howes, 3 Iowa 365); but this could not well be done in jurisdictions where no administrator can be appointed if there are no personal assets (see Plumb *v.* Bateman, 2 App. Cas. (D. C.) 156).

98. Gary *v.* May, 16 Ohio 66.

99. Mersereau *v.* Ryerss, 3 N. Y. 261; Hentz *v.* Phillips, 6 N. Y. Suppl. 16; Hayward *v.* McDonald, 7 N. Y. Civ. Proc. 100, 1 How. Pr. N. S. (N. Y.) 229; Parsons *v.* Bowne, 7 Paige (N. Y.) 354.

1. Bedell *v.* Lewis, 4 J. J. Marsh. (Ky.) 562; Morgan *v.* Morgan, 2 Bibb (Ky.) 388; Mersereau *v.* Ryerss, 3 N. Y. 261; Stuart *v.* Kissan, 11 Barb. (N. Y.) 271; Cassidy *v.* Cassidy, 1 Barb. Ch. (N. Y.) 467; Wambaugh *v.* Gates, 11 Paige (N. Y.) 505; Perkins *v.* Norvell, 6 Humphr. (Tenn.) 151; House *v.* Mitchell, Meigs (Tenn.) 138.

Purchasers under prior judicial sale.— Where a creditor of the estate of a decedent by specialty binding his heirs filed his bill in a state court to subject lands descended to the heirs and before the hearing the lands were sold under a decree of the federal court to satisfy a debt due to the United States from the ancestor as collector of customs, it was held that the purchasers under such a decree were necessary parties to the suit. King *v.* Ashley, 5 Leigh (Va.) 408.

2. Bedell *v.* Lewis, 4 J. J. Marsh. (Ky.) 562; St. Mary's Protestant Episcopal Church *v.* Wallace, 10 N. J. L. 311.

In a covenant of warranty binding the covenantor and his heirs the latter word comprehends the heirs of heirs *ad infinitum*. Crocker *v.* Smith, 10 Ill. App. 376.

joined, but if there be a return of *non est inventus* as to one or more, there may be an abatement as to those not served and judgment may be taken against those served.[3] The heirs of a deceased surety on a guardian's bond are not liable jointly with the principal on the bond, inasmuch as their liability is purely statutory and not contractual.[4]

(c) *Distributees.* So if the suit be against the distributees, it is necessary that they all be made parties;[5] and the personal representative should also be joined,[6] unless the estate has been fully settled and the final distribution made.[7]

i. Pleading — (i) *Complaint, Declaration, or Petition.* It is essential to a good declaration, complaint, or petition that the facts alleged bring the case clearly within the provisions of the statute.[8] Where the action is joint a complaint is bad which fails to show a cause of action in favor of all the plaintiffs.[9] With respect to the declaration against the heir it is necessary to observe that where the lands have descended from the obligor to another who has died seized and from him to defendant, the descent must be stated specially, otherwise the variance will be fatal upon a plea of *riens per descent* from the obligor.[10] In a bill to charge heirs and devisees with the debts of the decedent, the property received by them and which is sought to be reached should be specifically described, so as to enable the court to identify it in the decree.[11] In an action by a creditor against the heir, it is not necessary to aver that he has assets by descent; it devolves upon him to plead *riens per descent.*[12] In an action against heirs alone plaintiff must allege that they were bound by the deed of the ances-

3. Bedell *v.* Lewis, 4 J. J. Marsh. (Ky.) 562.

Alias and pluries writs.— In an action against heirs on their ancestor's covenant of warranty the original writ must be sent out against all, and if it be served on some and returned *non est inventus* as to others, plaintiff must sue out an alias and pluries against those not served before he can declare against those served. House *v.* Mitchell, Meigs (Tenn.) 138.

4. Strickland *v.* Holmes, 77 Me. 197.

5. Chapman *v.* Hamilton, 19 Ala. 121.

6. Hooper *v.* Royster, 1 Munf. (Va.) 119.

7. Williams *v.* Ewing, 31 Ark. 229; Hooper *v.* Royster, 1 Munf. (Va.) 119.

8. Kelley *v.* Adams, 120 Ind. 340, 22 N. E. 317; Rinard *v.* West, 92 Ind. 359; McCurdy *v.* Bowes, 88 Ind. 583; Gere *v.* Clarke, 6 Hill (N. Y.) 350; Hentz *v.* Phillips, 6 N. Y. Suppl. 16, complaint held good under the statute. Under the Indiana statute the complaint must allege that a final settlement of the estate has been made, and an allegation that the administrator has fully administered the estate is not sufficient. Rinard *v.* West, 48 Ind. 159. It must also be alleged that during the six months prior to the final settlement plaintiff was insane, an infant, or out of the state. Rinard *v.* West, 48 Ind. 159. In an action against an heir plaintiff must bring himself strictly within the statute and the declaration must show that administration has been taken out on the estate of the ancestor, that the demand was not due and payment of it could not have been claimed and enforced within four years after the grant of administration, and that the action was brought within one year after payment of the demand could by law be enforced. Hall *v.* Bumstead, 20 Pick. (Mass.) 2.

Insufficiency of personal estate.— In a declaration under the New Jersey statute against heirs and devisees it is not necessary to aver that the personal estate of the decedent is insufficient to pay his debts. Dodson *v.* Taylor, 53 N. J. L. 200, 21 Atl. 293.

9. Kelley *v.* Adams, 120 Ind. 340, 22 N. E. 317.

10. Jenks' Case, Cro. Car. 151; Kellow *v.* Rowden, 3 Mod. 253, 256 [*citing* 2 Rolle Abr. 709, pp. 1, 62].

11. Williams *v.* Ewing, 31 Ark. 229; Kentucky Female Orphan School *v.* Fleming, 10 Bush (Ky.) 234; Blinn *v.* McDonald, 92 Tex. 604, 46 S. W. 787, 48 S. W. 571, 50 S. W. 931.

Contra.— It has been held that it is not necessary that property received by an heir be particularly described in an action for an indebtedness of the intestate. Low *v.* Felton, 84 Tex. 378, 19 S. W. 693. The petition in an action against the heirs of one who died owing plaintiff is not subject to general demurrer, because it does not specifically allege the amount of the estate received by each heir where it alleges that the decedent's property exceeded his debt and that his heirs took his property and divided it among themselves without any administration on his estate. Byrd *v.* Ellis, (Tex. Civ. App. 1896) 35 S. W. 1070.

12. Crocker *v.* Descent, 10 Ill. App. 376; Gere *v.* Clark, 6 Hill (N. Y.) 350.

Under the Texas statute a suit by a creditor to enforce the payment of a debt against the estate of a deceased person upon which there has been no administration cannot be maintained against the heirs, unless it be averred and proved that the estate has descended to them. If the petition does not make such averment it is insufficient and a

tor,[13] and must allege those facts which under the statute will justify suing them without joining the personal representative.[14] Where a creditor of a deceased person sues the administrator and the heirs jointly for the debt of the ancestor, the declaration should show that the personal estate of the deceased debtor was not sufficient to discharge the just demands against his estate, or that there was no personal property left and that there was real estate which had descended to the heirs.[15] Where a creditor elects to proceed in a court of law against the assets of a deceased debtor in the hands of a distributee he must allege the same substantial facts that would entitle him to relief in a court of equity.[16] A bill in equity seeking to enforce against a decedent's estate a claim which is *prima facie* within the bar of the statute of non-claim is demurrable, if it fails to aver the due presentment of the claim, or facts excepting it from the operation of the statute;[17] and a bill praying for the sale of lands of a decedent must show by averment that the complainant has pursued his statutory remedy without avail.[18]

(II) *PLEAS, ANSWERS, AND DEMURRERS.* If it appears on the face of the pleadings that the necessary parties have not all been joined, the non-joinder may and should be pleaded in abatement.[19] A demurrer to bill will be sustained when the averments fail to show that the complainant has pursued the mode which the statute lays down to be followed before relief can be sought in a court of equity.[20] So if it appears on the face of plaintiff's pleadings that the statute of limitations has run against his cause of action and there is nothing stated to avoid it, the objection may be taken by demurrer.[21] If the fact that the suit is prematurely brought appears upon the face of the complainant's bill, defendants may demur, or they may insist upon that objection in their answer.[22] In an action against

demurrer to it will be sustained. State *v.* Lewellyn, 25 Tex. 797. See also Love *v.* Henderson, 42 Tex. 520.

13. Lawrence *v.* Buckman, 3 Bibb (Ky.) 23, where it is said that the defect may be taken advantage of on general demurrer, and is not cured by verdict.

14. Ryan *v.* Jones, 15 Ill. 1; Monroe *v.* Winlock, 4 Litt. (Ky.) 135. In an action by a creditor against the heirs of a deceased person on a note due from their ancestor, where the declaration after showing the indebtedness alleged in substance that the deceased left real and personal property to the value of twenty thousand dollars, that the personal property was insufficient to pay his debts, that the real estate had been sold and converted into money by the heirs before the commencement of the suit, that the note remained unpaid, and that defendants are the heirs and inherited the estate of the deceased, it was held that the declaration failed to show sufficient grounds for omitting to join the personal representative as a co-defendant with the heirs. Hoffman *v.* Wilding, 85 Ill. 453. Where a creditor brings an action under a statute permitting actions to be brought for the debts of a decedent against his heirs, where there is only a single creditor, an allegation of plaintiff that he is the sole creditor of the estate of defendant's decedent is put in issue by a general denial, and on a failure to establish such allegation the suit should be dismissed. Zwernerman *v.* Rosenberg, (Tex. Sup. 1889) 11 S. W. 150. In an action against the heirs of a deceased debtor where the petition alleged that plaintiff's debt was the only claim against the estate, that the land in possession of the heirs was the only property of the estate subject to debts, that no administration had been had and none was necessary, and prayed that such land be subjected to plaintiff's claim, the fact that the petition further prayed for a personal judgment against the heirs, a relief to which plaintiff was not entitled, was held no ground for general demurrer. Frost *v.* Smith, (Tex. Civ. App. 1893) 24 S. W. 40.

Allegation of agreement or promise.— In an action against an heir for the debt of the ancestor there is no necessity for any allegation of any promise, undertaking, contract, agreement, obligation, or liability expressed or implied on the part of the heir to pay the debt. The law imposes the liability to the extent of the real estate descended. Lowry *v.* Jackson, 27 S. C. 318, 3 S. E. 473.

Action on promise to pay ancestor's debt.— Where one of several heirs is sued on his promise to pay the debt of his ancestor the complaint need not allege that defendant or heirs have assets of the ancestor. Elting *v.* Vanderlyn, 4 Johns. (N. Y.) 237.

15. Guy *v.* Gericks, 85 Ill. 428.

16. Jones *v.* Parker, 55 Ga. 11.

17. Farris *v.* Stoutz, 78 Ala. 130; Grimball *v.* Mastin, 77 Ala. 553.

18. Springfield *v.* Hurt, 15 Fed. 307.

19. Bedell *v.* Lewis, 4 J. J. Marsh. (Ky.) 562; St. Mary's Protestant Episcopal Church *v.* Wallace, 10 N. J. L. 311.

20. Springfield *v.* Hurt, 15 Fed. 307.

21. Farris *v.* Stoutz, 78 Ala. 130; Grimball *v.* Mastin, 77 Ala. 553; Caldwell *v.* Montgomery, 8 Ga. 106. See, generally, LIMITATIONS OF ACTIONS.

22. Butts *v.* Genung, 5 Paige (N. Y.) 254.

heirs, if they would show nothing by descent, or insufficient assets by descent, they must plead this specially and cannot show it upon the general issue.[23] Where the heir is sued on the bond of his ancestor and pleads *non est factum* and the issue is found against him, this is not such a false plea as will render him liable *de bonis propriis*.[24] When suit has been brought against an infant he should be duly served with process and before plea the court should appoint a guardian *ad litem*.[25]

(III) *Replication or Reply.* If defendant pleads nothing by descent at the time the action was brought, plaintiff may reply that defendant after the ancestor's death and before suit brought had lands or tenements by descent or devise.[26] In an action against heirs on their ancestor's covenant of warranty, if defendants plead that there are other heirs not sued, a replication that they reside beyond the jurisdiction of the court and that those sued are the only heirs who had anything by descent is bad on general demurrer.[27]

j. Evidence — (I) *Presumptions and Burden of Proof.* In a creditor's bill against the heir and personal representative of a deceased debtor, plaintiff is not bound to establish the insufficiency of the personal assets to pay the debts in order to enable him to obtain satisfaction out of the real estate, the right to have the personal estate first applied to the payment of the decedent's debts being founded solely on an equity existing between his real and personal representatives. Consequently in all such cases if it be supposed that there are personal assets which may be applied in aid of the realty, the issue as to that fact, founded on this equity, must be presented by the heir and be made up between him and the executor or administrator alone, as it clearly lies with the heir only to allege and show that fact for his own benefit; and if he fails to do so, the creditor, whose legal rights cannot in any way be impaired or controlled by the court, must be allowed to obtain payment by a sale of the realty.[28] But where under the statute a decedent's creditor cannot recover against the heirs for his debt unless the personalty was insufficient at the time of granting letters testamentary to liquidate the debts, a creditor pursuing the heirs must show what the debts and personalty amounted to at that time.[29] In order to charge heirs with the payment of their ancestor's debt, it is incumbent on the creditor first to establish his demand against the ancestor, and then to make it appear that lands have descended which are chargeable with the payment of the debt.[30]

(II) *Admissibility.* Since there is no privity between the personal representative and the heir or devisee, a judgment against an executor or administrator is in most jurisdictions no evidence against an heir or devisee in a proceeding to

23. Van Deusen *v.* Brower, 6 Cow. (N. Y.) 50.

24. Jackson *v.* Rosevelt, 13 Johns. (N. Y.) 97.

25. Crocker *v.* Smith, 10 Ill. App. 376.

26. Bishop *v.* Hamilton, 4 J. J. Marsh. (Ky.) 548; Lahagh *v.* Cantine, 13 Johns. (N. Y.) 272; Redshaw *v.* Hesther, Carth. 353, Comb. 344, 5 Mod. 119.

27. House *v.* Mitchell, Meigs (Tenn.) 138.

28. Tessier *v.* Wyse, 3 Bland (Md.) 28; Walker *v.* Jackson, 2 Atk. 624, 26 Eng. Reprint 772; Stileman *v.* Ashdown, 2 Atk. 608, 26 Eng. Reprint 763; Galton *v.* Hancock, 2 Atk. 424, 26 Eng. Reprint 656; Aldridge *v.* Wallscourt, 1 Ball. & B. 312; Daniel *v.* Skipwith, 2 Bro. Ch. 155, 29 Eng. Reprint 89; Warwick *v.* Edwards, 1 Bro. P. C. 207, 1 Eng. Reprint 518, 2 P. Wms. 172, 24 Eng. Reprint 687; Lutkins *v.* Leigh, Cas. t. Talb. 53; Popley *v.* Popley, 2 Ch. Cas. 84, 21 Eng. Reprint 858; Anonymous, 2 Ch. Cas. 4, 22 Eng. Reprint 818; Rowe *v.* Bant, Dick. 150, 21 Eng. Reprint 226; Wolstam *v.* Aston, Hardres 511; Williams *v.* Williams, 9 Mod. 299; Anonymous, 9 Mod. 66; Knight *v.* Knight, 3 P. Wms. 331, 24 Eng. Reprint 1088; Tipping *v.* Tipping, 1 P. Wms. 729, 24 Eng. Reprint 589; Mead *v.* Hide, 2 Vern. Ch. 120, 23 Eng. Reprint 687; Hamilton *v.* Worley, 2 Ves. Jr. 62, 30 Eng. Reprint 523.

29. Read *v.* Patterson, 8 N. Y. Suppl. 826 [*affirmed* in 134 N. Y. 128, 31 N. E. 455].

30. Byrd *v.* Belding, 18 Ark. 118; Walker *v.* Byers, 15 Ark. 246; Bacon *v.* Thornton, 16 Utah 138, 51 Pac. 153.

Proof that there was little or no personal property and that what there was was expended for physician's bills, funeral expenses, and other debts, sufficiently shows the want of assets in an action to charge real estate with a decedent's debt. Mortimer *v.* Chambers, 63 Hun (N. Y.) 335, 72 N. Y. Suppl. 874.

The record of the judgment against the administrator and the return of nulla bona by the sheriff to an execution issued thereon is not sufficient evidence in an action against the heir to subject his real estate to the pay-

subject real estate descended or devised to the payment of the decedent's debts, and plaintiff must prove his original cause of action precisely the same as if no judgment had been rendered.[31]

k. Judgment or Decree — (i) *Whether Joint or Several.* Although the heirs must be sued jointly, their liability is several and not joint, each heir being liable for what he has received from the ancestor's estate and not for what the other heirs have received.[32] And in entering judgment against them it has been held that the court should ascertain what sum each one received from the ancestor's estate by descent, and render judgment against each for the amount so ascertained not to exceed the amount plaintiff is entitled to recover.[33] This rule works justly, for it places all of the ancestor's property which has passed by descent at the disposal of the court for the payment of his debts; but it has been carried a long and dangerous step in advance by holding that the judgment should be that each of defendants pay his *pro rata* share of the judgment and no more.[34] Under this latter rule it is easy to see how the creditor may lose a large part of his claim through the insolvency of heirs, although the ancestral property in the hands of solvent heirs is abundantly sufficient to pay the whole of it.[35] It is believed to be the best rule to enter the decree jointly against all the defendants for the full amount of the debt with the proviso that no defendant shall be subjected to a greater liability than the value of the property descended to him.[36]

(ii) *Judgment Not Personal.* In a suit against the heir for the debt of the ancestor, judgment cannot be rendered against him *de bonis propriis*, if he has not aliened the land descended; the judgment must be special to be levied on

ment of the ancestor's debt to show the want of assets. Jones *v.* Shields, 14 Ohio 359.

31. Scott *v.* Ware, 64 Ala. 174; Duvall *v.* Green, 4 Harr. & J. (Md.) 270; Harwood *v.* Rawlings, 4 Harr. & J. (Md.) 126; Dorsey *v.* Hammond, 1 Bland (Md.) 463; Gilliland *v.* Caldwell, 1 S. C. 194.

Allowance of claim by administrator.— Where a testator devised certain real estate to his son giving his executors control in trust for the benefit of the son and the son died leaving a wife and children, his debts exceeding the value of his personal property, it was held that the children of the son to whom his lands descended were bound by the action of the administrator in allowing debts so far as the personalty was concerned, but not as to the real estate, and the creditors must prove their claims to be chargeable on the father in order to collect them out of the land. Barnes *v.* Hathaway, 66 Barb. (N. Y.) 452.

Executor's or administrator's account.— Where a statute makes the executor's or administrator's account as rendered to and settled by the surrogate evidence of the amount of the personal estate and debts of the decedent, a mere list made by an executor or administrator of claims which have come to his knowledge, although annexed to his account filed with the surrogate, is no evidence of the amount of the estate's indebtedness where the validity of the claims was not passed on in any way by the surrogate. Read *v.* Patterson, 134 N. Y. 128, 31 N. E. 445.

32. Haines *v.* Haines, 69 N. J. L. 39, 54 Atl. 401.

33. Ransdell *v.* Threlkeld, 4 Bush (Ky.) 347; Stroud *v.* Barnett, 3 Dana (Ky.) 391; Mason *v.* Peter, 1 Munf. (Va.) 437.

Against distributees of community property.— In an action by a creditor of a decedent against his heirs, the petition alleging that the heirs took his property and divided it among themselves, although not specifying the proportion, the evidence showing that the property was community property, there being no evidence that it was divided other than the law would divide it, and the court having charged how the law would divide it, and the jury having returned a general verdict for plaintiff, a several judgment against defendants in proportion to the shares the law would give them was warranted. Byrd *v.* Ellis, (Tex. Civ. App. 1896) 35 S. W. 1070.

34. Walker *v.* Deaver, 79 Mo. 664; Thompson *v.* School Dist. No. 4, 71 Mo. 495; Pearce *v.* Calhoun, 59 Mo. 271; Metcalf *v.* Larned, 40 Mo. 572.

Leave to make further application.—Where a creditor of the estate of a deceased person brought suit against all the distributees to whom the property had been delivered and some of whom resided out of the state, for the payment of his debt, it was held that in order to prevent circuity of remedy each defendant should pay in proportion to what he had received with leave to the creditor to make further application on his failure to recover against any of defendants on account of insolvency or absence. Singleton *v.* Moore, Rice Eq. (S. C.) 110.

35. This danger was pointed out in Cogwell *v.* Lyon, 3 J. J. Marsh. (Ky.) 38, where it was held that the decree should be joint and not several, although the court has since adopted the rule first above stated.

36. Cutright *v.* Stanford, 81 Ill. 240; Vanmeter *v.* Love, 33 Ill. 260.

the lands.[37] If he has aliened the lands before suit is brought, the judgment will be personal, but the recovery will be only for the value of the lands in the condition in which they were at the time of the descent cast,[38] which value should be ascertained by having the lands assessed.[39] Formerly if the heir had in good faith aliened the lands which he had by descent before an action was commenced against him, he might discharge himself by pleading that he had nothing by descent at the time of suing out the writ or filing the bill, and the obligee had no remedy at law, although in equity the heir was responsible for the land.[40] But by statute in England an heir who has aliened the lands before any action is brought against him is made liable for the debts of the ancestor to the extent of the value of the lands descended.[41] Since that statute if defendant pleads nothing by descent at the time the writ was sued out plaintiff may reply that defendant had lands by descent after the decease of the obligor and before the suing out of the writ, and if he establishes this contention he may recover the value of the lands sold as found by the jury, be it what it may.[42] But the jury must find the value of the lands sold, and if they neglect to do so the verdict is incomplete and the court will award a *venire de novo*.[43] However, plaintiff, instead of replying according to the statute, may take issue on the plea of *riens per descent*, in which case the jury must not inquire of the value of the lands, but the same proceeding is to be pursued as at common law.[44]

(III) *UPON DEMURRER OR DEFAULT.* Some difference of opinion is

37. *Arkansas.*—Williams *v.* Ewing, 31 Ark. 229.

Illinois.— Branger *v.* Lucy, 82 Ill. 91.

Kentucky.— Davis *v.* Bentley, 2 Dana 247; Ready *v.* Stephenson, 7 J. J. Marsh. 351; Leathers *v.* Neglasson, 2 T. B. Mon. 63 [*overruling* Rece *v.* May, 2 A. K. Marsh. 23; Keizer *v.* Adams, 1 A. K. Marsh. 314]; Carneal *v.* Day, 2 Litt. 397. A judgment by default against an heir in an action on a bond executed by his ancestor and expressly binding on him as heir should be against the estate descended only. Phillips *v.* Munsell, 5 J. J. Marsh. 253.

Missouri.— Ward *v.* Sherman, 20 Mo. App. 319.

New Jersey.— Haines *v.* Haines, 69 N. J. L. 39, 54 Atl. 401; St. Mary's Protestant Episcopal Church *v.* Wallace, 10 N. J. L. 311.

New York.— Wood *v.* Wood, 26 Barb. 356; Jackson *v.* Rosevelt, 13 Johns. 97; Schermerhorn *v.* Barhydt, 9 Paige 28.

Texas.— Blinn *v.* McDonald, 92 Tex. 604, 46 S. W. 787, 48 S. W. 571, 50 S. W. 931; Schmidtke *v.* Miller, 71 Tex. 103, 8 S. W. 638. A judgment against an heir upon an indebtedness due from his ancestor should be limited by unequivocal and well-defined expressions in its recitals to the extent of the assets inherited by him from his ancestor. Ker *v.* Paschal, 1 Tex. Unrep. Cas. 692.

See 16 Cent. Dig. tit. "Descent and Distribution," § 517.

A decree against unknown heirs should be to be levied of the estate descended to them and not against them in their own right. Shirley *v.* Mitchell, 3 J. J. Marsh. (Ky.) 684.

No unconditional acceptance of succession. — Where the heirs have neither expressly nor tacitly accepted unconditionally the succession of their ancestor, but on the contrary, on being sued, expressly circumscribe their liability as they have a right to do to the value of their ancestor's estate, a judgment against them personally is erroneous. Banker *v.* Durand, 25 La. Ann. 511.

Decree against proceeds.—Where a creditor of a deceased debtor is entitled to maintain his suit against heirs to whom real estate has descended, he may have a decree against the proceeds of such real estate when paid into court under a decree. Van Wezel *v.* Wyckoff, 3 Sandf. Ch. (N. Y.) 528.

38. Haines *v.* Haines, 69 N. J. L. 39, 54 Atl. 401; Muldoon *v.* Moore, 55 N. J. L. 410, 26 Atl. 892, 21 L. R. A. 89; Fredericks *v.* Isenman, 41 N. J. L. 212. The liability of an heir for the debts of the person from whom he has inherited or taken land by devise is measured by the property which has descended to him. To that extent it is personal and if the property has been alienated before the commencement by a creditor of the deceased, of an action to acquire a statutory lien upon the same, such creditor may take a personal judgment against the heir for its value. Rogers *v.* Patterson, 79 Hun (N. Y.) 483, 29 N. Y. Suppl. 963 [*affirmed* on opinion below in 150 N. Y. 560, 44 N. E. 1128].

39. Bedell *v.* Lewis, 4 J. J. Marsh. (Ky.) 562.

40. Kinaston *v.* Clark, 2 Atk. 204, 26 Eng. Reprint 526; Gree *v.* Oliver, Carth. 245; Redshaw *v.* Hester, 5 Mod. 122; Coleman *v.* Wince, Prec. Ch. 511, 24 Eng. Reprint 229, 1 P. Wms. 775, 24 Eng. Reprint 229.

41. St. 3 Wm. & Mary, c. 14, § 5.

42. Redshaw *v.* Hesther, Carth. 353, Comb. 344, 5 Mod. 119.

Conclusion of replication.— Such a replication properly concludes with a verification and not to the country. See Labagh *v.* Cantine, 13 Johns. (N. Y.) 272.

43. Brown *v.* Shuker, 1 Cromp. & J. 583; Jeffry *v.* Barrow, 10 Mod. 18.

44. Mathews *v.* Lee, 1 Barnes Notes 329.

expressed in the early English cases as to the nature of the judgment when obtained against the heir on demurrer or by default. In one case it is laid down that, although the judgment against the heir be a general one when he pleads a false plea, yet if the judgment be by confession, *nil dicit* or *non est informatus*, it must be only of the assets descended.[45] But according to the weight of authority if the heir does not confess the action and show the certainty of the assets, but pleads that he has nothing by descent, or if judgment be given by default, or *nil dicit*, or confession, or on any other ground whatsoever, without confessing and showing the certainty of the assets, plaintiff is entitled to a personal judgment against him, and may take his other property upon execution.[46] Where the question has been raised in America it has been held that the heir is liable only to the value of the estate descended to him, and that he cannot by any failure to plead or make defense, or by any manner of pleading, be charged beyond that amount.[47] Where the bill does not allege that any estate has descended, taking it *pro confesso* is not an admission that any has descended.[48] But where alienations have been made by the heir the value of the estate descended should be assessed and judgment given against him for a sum not exceeding that value.[49]

l. **Execution and Enforcement of Judgment.** The legal title to a decedent's lands passes directly to the heirs and devisees and their interest therein may be taken on execution the same as any other legal estate.[50] Where the statute requires a delay of execution for a specified time against infant heirs, if a judgment is obtained against heirs, part of whom are infants and part adults, execution may go against the latter immediately.[51] Where there may be a personal judgment against the heir upon proof of his receipt of assets from the ancestor's estate, this may be satisfied out of any property of his liable to execution, and is not limited to the property received from the ancestor's estate.[52]

45. Bowyer *v.* Rivet, Poph. 153, W. Jones 87.

46. Kinaston *v.* Clark, 2 Atk. 204, 26 Eng. Reprint 526; Barker *v.* Bourn, Cro. Eliz. 692, Moore 522; Smith *v.* Angell, 2 Ld. Raym. 783, 7 Mod. 44, 1 Salk. 354, 2 Wm. Saund. 7 note 4.

47. Bedell *v.* Lewis, 4 J. J. Marsh. (Ky.) 562; Carneal *v.* Day, 2 Litt. (Ky.) 397.

Want of affidavit of defense.— No affidavit of defense is required to be made by an heir, executor, or administrator, when sued upon the contract of his decedent, and judgment cannot be taken for the want of one. Boas *v.* Birmingham, 2 Pearson (Pa.) 334.

48. Carneal *v.* Day, 2 Litt. (Ky.) 397.

49. Bedell *v.* Lewis, 4 J. J. Marsh. (Ky.) 562.

50. *Florida.*— McClellan *v.* Solomon, 23 Fla. 437, 2 So. 825, 11 Am. St. Rep. 381.

Georgia.— Wilkinson *v.* Chew. 54 Ga. 602.

Louisiana.— Mayo *v.* Stroud, 12 Rob. 105.

Massachusetts.— Proctor *v.* Newhall, 17 Mass. 81.

Ohio.— Douglass *v.* Massie, 16 Ohio 271, 47 Am. Dec. 375.

See 16 Cent. Dig. tit. "Descent and Distribution," § 519.

Sale of land under decree.— In an action against the heirs on a debt due by the decedent to have it satisfied out of land descended, a sale of the land had on the land itself under a decree ordering it to be made there is perfectly proper. Mitchell *v.* Berry, 1 Metc. (Ky.) 602.

Real estate of an infant which is converted into money is in New York deemed to remain as land until the infant reaches the full age of twenty-one years, and must be treated and applied as such in an action by a creditor against the heir to recover a debt of the ancestor from whom the real estate descended. Hentz *v.* Phillips, 6 N. Y. Suppl. 16.

Reduction of specific property to possession. — In order to a valid seizure and sale of an heir's undivided interest, it is not necessary to reduce to possession any specific property of the succession. Boisse *v.* Dickson, 31 La. Ann. 741.

Lands descended from both parents.— Where the heir has lands descended from both parents, the land descended from one cannot be sold under an execution issued on a judgment obtained upon a debt of the other. Trotter *v.* Selby, 14 N. C. 374.

51. Van Deusen *v.* Brower, 6 Cow. (N. Y.) 50; Shooke *v.* Phillips, 5 Cow. (N. Y.) 440; Newbern Bank *v.* Shanly, 13 N. C. 476.

Infant heirs — Supervision of chancellor.— Where it appears in an action against infant heirs to recover a debt of the decedent that the claim can be satisfied in no other way than by sale of the real estate of defendants, such sale should be made under the supervision of the chancellor and not by the sheriff under execution. Hagan *v.* Patterson, 10 Bush (Ky.) 441.

52. Mayes *v.* Jones, 62 Tex. 365; Webster *v.* Willis, 56 Tex. 468; State *v.* Lewellyn, 25 Tex. 799.

12. Contribution — a. Right of Contribution Among Heirs. Beneficiaries should be required to pay the liabilities against the estate *pro rata* according to the respective shares inherited by them;[53] and an heir who pays off a just debt of the ancestor has a right to contribution from his co-heirs, whether the payment was compulsory or voluntary.[54] Where land of an heir is sold under an order of the court for the payment of a debt of the ancestor, such heir is entitled to contribution from the other heirs *equali jure*.[55] Where a widow pays off a mortgage on the decedent's real estate and has her dowry assigned, she may compel the heirs to make contribution.[56]

b. Legatees. So where there is a deficiency of assets and legatees are paid before all the debts are ascertained, they may be compelled in equity to refund for the discharge of the unpaid debts at the instance of creditors.[57]

c. Purchasers From Heirs. It has been held that the purchaser of an adult heir's share of a decedent's land, after partition, holds it subject to contribution for the payment of the ancestor's debts. It is declared that it would be inequitable and unjust to permit an adult heir, by selling his land and wasting the purchase-money, to throw the whole burden of the ancestor's debts on the property of the minor heirs.[58] On the other hand it has been assumed that a *bona fide* purchaser of a share, after partition, takes it discharged of liability to contribute. The creditor may look to the remaining land for the payment of his debt and the remedy of the heirs is a marshaling of assets as among themselves.[59] However this may be, the legislature may fix a limit after which there can be no dispute as

53. Calhoun *v.* Tangany, 105 Ill. App. 23.

54. Taylor *v.* Taylor, 8 B. Mon. (Ky.) 419, 48 Am. Dec. 400; Schermerhorn *v.* Barhydt, 9 Paige (N. Y.) 28; Guier *v.* Kelly, 2 Binn. (Pa.) 294. Where one of the heirs in possession of property belonging to the estate pays off a charge against it the others cannot recover their proportion of it until they have contributed. Duke *v.* Reed, 64 Tex. 705. Where lands of a decedent whose personalty was insufficient to pay his debts have been partitioned among his heirs, and some of them have aliened their shares to *bona fide* purchasers, so that they are not liable, the shares unaliened are liable for the full amount of the debt and those whose lands are so subjected may compel contribution from the others. Maxwell *v.* Smith, 86 Tenn. 539, 8 S. W. 340. Where eight heirs sold land descended to them taking eight bills single, one for each heir, secured by an express lien on the land, and subsequently, under a decree on a bill by creditors of the ancestor, one who had purchased the bills single of seven of the heirs bought the land and paid off the creditors, it was held that the eighth heir who was not a party to the decree on subjecting the land to his bill single must repay one eighth of the debts. McPike *v.* Wells, 54 Miss. 136.

The widow of an intestate having agreed with a part of the heirs to disencumber the estate of her support and maintenance, a charge thereon by an antenuptial agreement, for a payment of a certain sum in gross, it was held that the heirs who paid the same were entitled to contribution from the other heirs to the extent that their shares in the estate were relieved. Law *v.* Smith, 2 R. I. 244.

Removal of lien by application of personal assets.— One who besides her special allowance as widow has received all the personal property and half the real estate, including that on which a vendor's lien is sought to be enforced against the heirs, will, if the amount of the personalty exceeds the amount of the lien, be compelled to pay off and remove the lien as between herself and the other heirs of the purchaser, without contribution from them. Sutherland *v.* Harrison, 86 Ill. 363.

Assumpsit.—An action of assumpsit against the co-heirs is not the proper remedy, as the judgment would necessarily be the same against all and by force of it any one of the defendants could be required to pay the whole of it and again be compelled to sue the co-defendants for contribution, thus perpetuating the litigation. Calhoun *v.* Tangany, 105 Ill. App. 23.

Statute of limitation.— An heir to a portion of certain property, having paid the mortgages which were on the property at her ancestor's death without taking an assignment, cannot, after the statute has run against her action at law for contribution, look to equity for relief. Rowden *v.* Murphy, (N. J. Ch. 1890) 20 Atl. 379.

55. Davis *v.* Vansands, 7 Fed. Cas. No. 3,655, 45 Conn. 600.

56. Picket *v.* Buckner, 45 Miss. 226.

57. Davis *v.* Vansands, 7 Fed. Cas. No. 3,655, 45 Conn. 600; Newman *v.* Barton, 2 Vern. Ch. 205, 23 Eng. Reprint 733; Anonymous, 1 Vern. Ch. 162, 23 Eng. Reprint 388; Noel *v.* Robinson, 1 Vern. Ch. 90, 23 Eng. Reprint 334; 1 Story Eq. Jur. 503.

58. Graff *v.* Smith, 1 Dall. (Pa.) 481, 1 L. ed. 232.

59. Maxwell *v.* Smith, 86 Tenn. 539, 8 S. W. 340; Jordan *v.* Maney, 10 Lea (Tenn.) 135.

to the titles of purchasers from the heirs, although the purchase-money will still remain liable in their hands to contribute to the payment of the ancestor's debts.[60]

D. Rights and Remedies of Creditors of Heirs and Distributees — **1. In General.** An heir who inherits directly from his grandfather is not chargeable with any debts his deceased father may have owed his grandfather,[61] for an heir who takes *per stirpes* takes directly from the intestate and in his own right and not through and in right of his immediate ancestor.[62] The grantee of an heir takes the estate subject to the payment of the ancestor's debts, but not the debts of the heir.[63]

2. Heir's Interest May Be Taken For His Debts. The interest of an heir in a decedent's estate, whatever it may be, may be taken by his creditors for the payment of his debts, subject to the prior rights of the creditors of the ancestor.[64]

3. Where Heir Is Indebted to Estate. The indebtedness of heirs, legatees, and distributees to the estate is assets to be deducted from their shares in preference to payment of their other creditors. This right to have the debt of a distributee or legatee charged to him in the adjustment of his distributive share or legacy is called the right of "set-off" or "retainer."[65] The use of those words, however, has been criticized as inaccurate and misleading, and it has been declared that the right rests not so much upon any rule of set-off or retainer as upon the broad principles of equity.[66] Where advancements have been made to

60. Hinton *v.* Whitehurst, 71 N. C. 66, two years after grant of administration.

61. Powers *v.* Morrison, 88 Tex. 133, 30 S. W. 851, 53 Am. St. Rep. 738, 28 L. R. A. 521.

62. Valentine *v.* Borden, 100 Mass. 273; Sedgwick *v.* Minot, 6 Allen (Mass.) 171; Howland *v.* Howland, 11 Gray (Mass.) 469; Powers *v.* Morrison, 88 Tex. 133, 30 S. W. 851, 53 Am. St. Rep. 738, 28 L. R. A. 521.

63. Jackson *v.* Wilson, 76 Md. 567, 25 Atl. 580.

64. *Alabama.*— Lang *v.* Brown, 21 Ala. 179, 56 Am. Dec. 244; Brashear *v.* Williams, 10 Ala. 630.

Illinois.— Gary *v.* Newton, 201 Ill. 170, 66 N. E. 267.

Iowa.— Cassady *v.* Grimmelman, 108 Iowa 695, 77 N. W. 1067.

Kentucky.— Greer *v.* Simrall, 59 S. W. 759, 22 Ky. L. Rep. 1037.

Louisiana.— St. Charles St. R. Co. *v.* Fairex, 48 La. Ann. 743, 19 So. 740.

Massachusetts.— Hunt *v.* Hapgood, 4 Mass. 117.

Missouri.— Crawford *v.* Dixon, 97 Mo. App. 558.

Ohio.— Douglas *v.* Massie, 16 Ohio 271, 47 Am. Dec. 375.

Pennsylvania.— Del Valle's Appeal, (1886) 5 Atl. 441; Hageman's Estate, 5 Pa. Co. Ct. 576.

South Carolina.— Saunders *v.* Strobel, 64 S. C. 489, 42 S. E. 429; Hendrix *v.* Holden, 58 S. C. 495, 36 S. E. 1010; Payton *v.* Monroe, (1899) 34 S. E. 305.

Texas.— Garrett *v.* McMahan, 34 Tex. 307.

See 16 Cent. Dig. tit. "Descent and Distribution," § 523 *et seq.*

No relief sought against heirs in the pleadings.— In a suit against a decedent's representatives to charge his land with a debt where the pleadings contained no allegation of debts against his heirs, and asked as to their debts no relief against the land, a decree charging the land in the hands of heirs with their debts is a nullity. Fowler *v.* Lewis, 36 W. Va. 112, 14 S. E. 447.

65. *Alabama.*— Nelson *v.* Murfee, 69 Ala. 598; Brown *v.* Lang, 14 Ala. 719.

Indiana.— Fiscus *v.* Fiscus, 127 Ind. 283, 26 N. E. 831.

Kentucky.— Taylor *v.* Jones, 97 Ky. 201, 30 S. W. 595, 17 Ky. L. Rep. 85; Brown *v.* Mattingly, 91 Ky. 275, 15 S. W. 353, 12 Ky. L. Rep. 869.

Massachusetts.— Jones *v.* Treadwell, 169 Mass. 430, 48 N. E. 339.

Missouri.— Ayers *v.* King, 168 Mo. 244, 67 S. W. 558; Duffy *v.* Duffy, 155 Mo. 144, 55 S. W. 1002; Lietman *v.* Lietman, 149 Mo. 112, 50 S. W. 307, 73 Am. St. Rep. 374; Hopkins *v.* Thompson, 73 Mo. App. 401.

New York.— Smith *v.* Kearney, 2 Barb. Ch. 533.

Pennsylvania.—Dickinson's Estate, 148 Pa. St. 142, 23 Atl. 1053; Thompson's Appeal, 42 Pa. St. 345.

Texas.— Oxsheer *v.* Nave, 90 Tex. 568, 40 S. W. 7, 37 L. R. A. 98.

See 16 Cent. Dig. tit. "Descent and Distribution," § 529.

66. Dickinson's Estate, 148 Pa. St. 142, 23 Atl. 1053; Oxsheer *v.* Mave, 90 Tex. 568, 40 S. W. 7, 37 L. R. A. 98. In Cherry *v.* Boultbee, 3 Jur. 1116, 9 L. J. Ch. 118, 4 Myl. & C. 442, 447, 18 Eng. Ch. 442, Lord Cottenham said: "It must be observed, that the term 'set-off' is very inaccurately used in cases of this kind. In its proper use, it is applicable only to mutual demands, debts and credits. The right of an executor of a creditor to retain a sufficient part of a legacy given by the creditor to the debtor, to pay a debt due from him to the creditor's estate, is rather a right to pay out of the fund in hand, than a right of set-off."

an heir or distributee, these must be deducted from his share before his creditors can have satisfaction for their demands;[67] and an heir who has received advancements which have been accepted as in full of his share has thereafter no attachable interest in the ancestor's estate.[68] But where the law requires an advancement to be evidenced by writing, the rights of judgment creditors in the interest of an heir in land acquired by descent cannot be defeated by setting up an alleged verbal agreement by the heir to release his expectancy in consideration of an advancement not expressed in writing by the donor.[69] In making the deduction in the adjustment of the personal estate it is wholly immaterial whether the debt is barred by the statute of limitations or not.[70] The equitable doctrine of retainer for barred debts due to the estate by a distributee does not apply to the interest of such distributee in the real estate of an intestate, or in the proceeds of the sale of the same.[71] In some jurisdictions this rule as to the set-off or retainer of the heir's debt to the estate applies to real estate descended as well as to the personal assets of the decedent's estate.[72] But in other jurisdictions it is held that the right to set off the debt against the distributive share continues only so long as the share remains the property of the distributee, and that if it be aliened by voluntary or involuntary conveyance the right is lost.[73] Where this rule obtains the personal representative is regarded as an ordinary creditor of the heir or distributee, and so far at least as the real estate is concerned it becomes a race of diligence between him and the other creditors.[74] Inasmuch as the debt of an heir to the ancestor's estate is not a lien on his share, his existing judgment creditors have the advantage of the race, for upon the death of the ancestor the liens of their judgments immediately attach to the lands descended.[75]

4. Actions and Other Proceedings. A creditor's bill will lie to reach the

67. McClave *v.* McClave, 60 Nebr. 464, 83 N. W. 668; Johnson *v.* Hoyle, 3 Head (Tenn.) 56; Franke *v.* Lone Star Brewing Co., 17 Tex. Civ. App. 9, 42 S. W. 861.

Bill to subject share to payment of advancements.—The heirs at law of an intestate can maintain a bill in equity against another heir at law to whom advancements have been made by the intestate to have his share or portion of the lands subjected to the payment of the advancements made to him and to have the lien of a creditor acquired by the levy of an attachment upon the undivided interest in said lands of the heir to whom advancements have been made declared subordinate to their equity. Comer *v.* Shehee, 129 Ala. 588, 30 So. 95, 87 Am. St. Rep. 78.

68. Security Invest. Co. *v.* Lottridge, (Nebr. 1902) 89 N. W. 298. Where an heir has received advancements to the full amount of his share, a judgment obtained by his creditors does not become a lien on the ancestor's death on any part of the estate. Liginger *v.* Field, 78 Wis. 357, 47 N. W. 613.

69. Gary *v.* Newton, 201 Ill. 170, 66 N. E. 267.

70. Lietman *v.* Lietman, 149 Mo. 112, 50 S. W. 307, 73 Am. St. Rep. 374; *In re* Akerman, [1891] 3 Ch. 212, 61 L. J. Ch. 34, 65 L. T. Rep. N. S. 194, 40 Wkly. Rep. 12.

71. Sartor *v.* Beaty, 25 S. C. 293. It has been held that a note of one of the devisees barred by the statute of limitations cannot be set off against his devise, but that his interest in the personal estate should be retained to that extent. *In re* Covin, 20 S. C. 471.

72. Fiscus *v.* Fiscus, 127 Ind. 283, 26 N. E. 831; Fiscus *v.* Moore, 121 Ind. 547, 23 N. E. 362, 7 L. R. A. 235; Duffy *v.* Duffy, 155 Mo. 144, 55 S. W. 1002; Hopkins *v.* Thompson, 73 Mo. App. 401; Dickinson's Estate, 148 Pa. St. 142, 23 Atl. 1053.

An administrator has the right to subject lands of his intestate to the payment of a debt due by an heir of the decedent to the estate in priority and in preference to the claims of the purchasers from said heir and likewise in preference to the lien of a judgment creditor of said heir which attached to said lands on the death of the ancestor. Streety *v.* McCurdy, 104 Ala. 493, 16 So. 686.

73. Thompson *v.* Myers, 95 Ky. 597, 26 S. W. 1014, 16 Ky. L. Rep. 139; Scobee *v.* Bridges, 87 Ky. 427, 9 S. W. 299, 10 Ky. L. Rep. 390; Steele *v.* Frierson, 85 Tenn. 430, 3 S. W. 649.

In Rhode Island the heir's power of alienation is suspended by statute for the period of three years and six months after the probate of the will or grant of administration. Dawley *v.* New Shoreham Probate Ct., 16 R. I. 694, 19 Atl. 248; Hopkins *v.* Ladd, 12 R. I. 279.

74. Thompson *v.* Myers, 95 Ky. 597, 26 S. W. 1014, 16 Ky. L. Rep. 139; Scobee *v.* Bridges, 87 Ky. 427, 9 S. W. 299, 10 Ky. L. Rep. 390; Steele *v.* Frierson, 85 Tenn. 430, 3 S. W. 649; Mann *v.* Mann, 12 Heisk. (Tenn.) 245; Towles *v.* Towles, 1 Head (Tenn.) 601.

75. Manning *v.* Brown, (N. J. Ch. 1890) 20 Atl. 381; Franke *v.* Lone Star Brewing Co., 17 Tex. Civ. App. 9, 42 S. W. 861.

interest of a debtor in an undistributed estate;[76] but the interest of a distributee cannot be reached by his creditor before he would be entitled to receive it himself;[77] and it is error to decree the sale of the interest of one of several heirs in his ancestor's lands to pay the debts of the heir before directing a settlement of the accounts of the ancestor's administrator.[78] A statute requiring notice to heirs of a decedent by creditors intending to charge the estate in the hands of such heirs does not apply to an action to recover ground-rent accruing after the death of the ancestor, for as it is a charge on the land itself created by the decedent his heirs take subject to it.[79] Courts of probate jurisdiction are not open to ordinary claimants and creditors of distributees whose debts have not been established for the allowance of their claims against the shares of the distributees in an estate.[80]

DESCRIBE. To delineate or mark the form or figure of; trace out; outline.[1] (See Description.)

DESCRIPTION. A sketch or account of anything in words; a portraiture or representation in language;[2] representation by visible lines, marks, colors, etc.; the act of representing a thing by words or signs, or the account or writing containing such representation; a statement designed to make known the appearance, nature, attributes, accidents, or incidents of anything;[3] the language which depicts the thing under consideration;[4] a delineation or account of a particular subject by the recital of its characteristic accidents and qualities; a written enumeration of items composing an estate, or of its condition, or of titles or documents; like an inventory, but with more particularity, and without involving the idea of an appraisement; an exact written account of an article, mechanical device, or process which is the subject of an application for a patent; a method of pointing out a particular person by referring to his relationship to some other person or his character as an officer, trustee, executor, etc.; that part of a conveyance, advertisement of sale, etc., which identifies the land intended to be affected.[5] (Description: Name of Individual, see Names. Of Affiant, see

76. Lang *v.* Brown, 21 Ala. 179, 56 Am. Dec. 244; Brown *v.* Lang, 14 Ala. 719; Lawson *v.* Virgin, 21 Ga. 356; Sayre *v.* Flournoy, 3 Ga. 541; Bennick *v.* Bennick, 62 N. C. 45; Carlton *v.* Felder, 6 Rich. Eq. (S. C.) 58. See, generally, Creditors' Suits, 12 Cyc. 1.

77. Selman *v.* Milliken, 28 Ga. 366.

78. Bowden *v.* Parrish, 86 Va. 67, 9 S. E. 616, 19 Am. St. Rep. 873.

79. Rushton *v.* Lippincott, 119 Pa. St. 12, 12 Atl. 761.

80. *In re* Landis, 2 Phila. (Pa.) 217. An execution purchaser of a distributee's share of the realty but not of the personalty cannot have a decree in his own name for that share upon a final sale and distribution, since the probate court has no power to render a decree in favor of an assignee, unless he is a purchaser of the entire interest of the distributee's share of the estate. Simmons *v.* Knight, 35 Ala. 105. Although the surrogate has power to order the investment of the surplus remaining of the amount derived from the sale of a wife's property who dies intestate, after payment of her debts, on the ground that the husband is entitled to an estate for life therein, he has no power to direct that such property be applied in payment of the husband's debts. Arrowsmith *v.* Arrowsmith, 8 Hun (N. Y.) 606. Where a judgment creditor of the heir who has entered his claim before the auditor, who found that as nothing would be due to the heir out of the land the creditor had no standing, and the report having been recommitted the creditor at execution sale purchased his debtor's interest in all the land except one piece sold before the entry of judgment, it was held that as the owner of the undivided interest of one of the heirs under title acquired before final decree awarding the lands, the judgment creditor could on the second hearing before the auditor raise an objection to the jurisdiction. Small's Appeal, (Pa. 1888) 15 Atl. 767.

1. Century Dict.

"Described in any printed publication" as used in the patent laws see Downton *v.* Yaeger Milling Co., 108 U. S. 466, 471, 3 S. Ct. 10, 27 L. ed. 789.

"Described with sufficient certainty" see Gorman *v.* Steed, 1 W. Va. 1, 14 [*quoted* in Board of Education *v.* Crawford, 14 W. Va. 790, 799].

"Describing a way" see Hayford *v.* Aroostook County, 78 Me. 153, 156, 3 Atl. 51; and, generally, Streets and Highways.

2. Webster Int. Dict. [*quoted* in McCowan *v.* Maclay, 16 Mont. 234, 237, 40 Pac. 602, where it is said: "The same authority gives among the synonyms of this word: 'Account;' 'definition;' 'recital;' 'narration;' 'explanation;' 'representation.'"].

3. Century Dict. [*quoted* in McCowan *v.* Maclay, 16 Mont. 234, 237, 40 Pac. 602].

4. McCowan *v.* Maclay, 16 Mont. 234, 237, 40 Pac. 602 [*citing* Anderson L. Dict.].

5. Black L. Dict. [*quoted* in McCowan *v.*

AFFIDAVITS. Of Bond, see BAIL; BONDS. Of Court, see BAIL. Of Debt Secured by Mortgage, see CHATTEL MORTGAGES; MORTGAGES. Of Devisee or Legatee, see WILLS. Of Draft, see COMMERCIAL PAPER. Of Instrument and Parties, see COMMERCIAL PAPER. Of Invention, see PATENTS. Of Materials Furnished or Work Done, see MECHANICS' LIENS. Of Mining Claim, see MINES AND MINERALS. Of Offense, see BAIL. Of Officer Taking Affidavits, see AFFIDAVITS. Of Parties — In Action, see PARTIES; In Deed, see DEEDS; In Judgment, see JUDGMENTS; In Mortgage, see MORTGAGES; In Verdict, see TRIAL; To Writ of Attachment, see ATTACHMENT. Of Person, see DESCRIPTIO PERSONÆ; INDICTMENTS AND INFORMATIONS; TAXATION. Of Premises, see BURGLARY. Of Property — Burned, see ARSON; Conveyed in General, see BOUNDARIES; DEEDS; Conveyed as Color of Title, see ADVERSE POSSESSION; Conveyed by Assignment, see ASSIGNMENTS FOR BENEFIT OF CREDITORS; Demised, see LANDLORD AND TENANT; Devised or Bequeathed, see WILLS; In Assessment, see TAXATION; In Declaration in Action For Wrongful Attachment, see ATTACHMENT; In Indictment, see INDICTMENTS AND INFORMATIONS; In Insurance Policy, see FIRE INSURANCE; MARINE INSURANCE; In Judgment, see JUDGMENTS; In Memorandum, see AUCTIONS AND AUCTIONEERS; In Publication of Notice, see ATTACHMENT; In Return in Attachment, see ATTACHMENT; In Sheriff's Deed, see EXECUTIONS; In Writ of Attachment, see ATTACHMENT; Levied on, see ATTACHMENT; EXECUTIONS; Mortgaged, see CHATTEL MORTGAGES; MORTGAGES; Of Decedent, see EXECUTORS AND ADMINISTRATORS; Sold, see VENDOR AND PURCHASER; Sold For Taxes, see TAXATION; Subject of Action For Partition, see PARTITION; Subject of Action For Specific Performance, see SPECIFIC PERFORMANCE; Subject of Action of Ejectment, see EJECTMENT; Subject to Mechanic's Lien, see MECHANICS' LIENS; Within Statute of Frauds, see FRAUDS, STATUTE OF.)

DESCRIPTIO PERSONÆ. Description of the person.[6] (See DESCRIPTION.)

DESECRATION. See CEMETERIES; DEAD BODIES.

DESERT. To abandon, to forsake.[7] (See DESERTION.)

DESERTION.[8] In general, the act by which a person abandons and forsakes, without justification, or unauthorized, a station or condition of public or social life, renouncing its responsibilities and evading its duties.[9] In law maritime, an unlawful and wilful abandonment of a vessel, during her voyage, by her crew, without an intention of returning to their duty;[10] a quitting of the ship and her

Maclay, 16 Mont. 234, 237, 40 Pac. 602]. See also Lowe *v.* Harris, 112 N. C. 472, 496, 17 S. E. 539, 22 L. R. A. 379.

"Descriptions do not identify of themselves; they only furnish the means of identification. They give us certain marks or characteristics,— perhaps historical data or incidents,— by the aid of which we may single out the thing intended from all others; not by the description alone, but by that explained and applied." Willey *v.* Snyder, 34 Mich. 60, 62 [*quoted* in Hoffman *v.* Port Huron, 102 Mich. 417, 433, 60 N. W. 831].

"Descriptive averment" defined in reference to an indictment see Warrington *v.* State, 1 Tex. App. 168, 174 [*quoting* Wharton Am. Cr. L. § 629].

6. Anderson L. Dict.

7. Pidge *v.* Pidge, 3 Metc. (Mass.) 257, 264 [*quoting* Johnson [Dict.]. See also Anonymous, 52 N. J. Eq. 349, 350, 28 Atl. 467.

Mr. Crabbe, in his book on Synonymes, says: "To desert is to withdraw ourselves at certain times, when our assistance and coöperation are required, or to separate ourselves from that to which we ought to be attached." Pidge *v.* Pidge, 3 Metc. (Mass.) 257, 265.

Distinguished from "abandon" and "forsake" in Pidge *v.* Pidge, 3 Metc. (Mass.) 257, 264 [*quoting* Crabbe Synonymes].

8. **As synonymous with "absence"** see Elzas *v.* Elzas, 171 Ill. 632, 639, 49 N. E. 717 [*citing* Fritz *v.* Fritz, 138 Ill. 436, 28 N. E. 1058, 32 Am. St. Rep. 156, 14 L. R. A. 685; Carter *v.* Carter, 62 Ill. 439].

"Deserted her" as used in respect to the mother of a pauper see Pittsford *v.* Chittenden, 58 Vt. 49, 52, 3 Atl. 323.

"You are a deserter" as used in an action for slander see Hollingsworth *v.* Shaw, 19 Ohio St. 430, 432, 2 Am. Rep. 411.

9. Black L. Dict. See also Lea *v.* Lea, 8 Allen (Mass.) 418, 419, where it is said: "A soldier is said to desert his post, a sailor his ship, an apprentice his master, when they depart from the service to which they are bound, without permission or contrary to orders."

10. The Union, 24 Fed. Cas. No. 14,347, Blatchf. & H. 545.

service, not only without leave, and against the duty of the party, but with an intent not again to return to the ship's duty.[11] In domestic relations, the act of forsaking, deserting, or abandoning a person with whom one is legally bound to live, or for whom one is legally bound to provide, as a wife or husband.[12] (Desertion: From Army or Navy, see ARMY AND NAVY.[13] Ground For Divorce, see DIVORCE. Of Child, see PARENT AND CHILD. Of Seaman, see SEAMEN. Of Wife, see DIVORCE; HUSBAND AND WIFE. Right of Deserter to Bounty, see BOUNTIES.)

DESERVING.[14] The term denotes worth or merit.[15]

DESIGN.[16] Purpose or intention,[17] combined with plan, or implying a plan in the mind;[18] aim;[19] purpose; object; end in view;[20] intent;[21] a plan, scheme, intention, carried into effect.[22] As a term of art, the giving of a visible form to the conceptions of the mind, or in other words to the invention.[23] In patent law, that characteristic of a physical substance which, by means of lines, images, configuration,[24] and the like, taken as a whole, makes an impression, through the eye, upon the mind of the observer.[25] In the law of evidence, purpose or inten-

11. Cloutman *v.* Tunison, 5 Fed. Cas. No. 2,907, 1 Sumn. 373.

In the sense of the maritime law by desertion is meant not a mere unauthorized absence from the ship without leave, but an unauthorized leaving or absence from the ship, with an intention not to return to her service. Coffin *v.* Jenkins, 5 Fed. Cas. No. 2,948, 3 Story 108, 113. See also The Union, 24 Fed. Cas. No. 14,347, Blatchf. & H. 545 [*citing* Abbott Shipp. (ed. 1829) 134, 135; 3 Kent Comm. 198].

12. Black L. Dict.

13. **"Wilful desertion" by a soldier** under the articles of war see Hanson *v.* South Scituate, 115 Mass. 336, 342.

14. **"Deserving aged"** as used in a bequest see Fay *v.* Howe, 136 Cal. 599, 601, 69 Pac. 423.

"Worthy and deserving" as distinguished from "pious" see Beardsley *v.* Bridgeport, 53 Conn. 489, 492, 3 Atl. 557, 55 Am. Rep. 152 [*citing* White *v.* Fisk, 22 Conn. 31].

15. Nichols *v.* Allen, 130 Mass. 211, 218, 39 Am. Rep. 445, where it is said: "'Deserving' denotes worth or merit, without regard to condition or circumstances, and is in no sense of the word limited to persons in need of assistance, or to objects which come within the class of charitable uses."

When the term indicates charitable bequests see Nichols *v.* Allen, 130 Mass. 211, 218, 39 Am. Rep. 445. See also CHARITIES, 6 Cyc. 895.

16. **Distinguished from neglect** see The Strathdon, 89 Fed. 374, 378.

"Designed by him" as used in an indictment for counterfeiting see Com. *v.* Morse, 2 Mass. 128, 131. See COUNTERFEITING.

"Designed for this trade" as applied to a vessel see Foster *v.* Goddard, 9 Fed. Cas. No. 4,970, 1 Cliff. 158.

Designed or intended for the prevention of conception or procuring abortion see U. S. *v.* Bott, 24 Fed. Cas. No. 14,626, 11 Blatchf. 346. See ABORTION.

Designed to distinguish ballot see Wyman *v.* Lemon, 51 Cal. 273, 274. See ELECTIONS.

"Designed to mislead the voter" as used in a statute relative to elections see Turner *v.* Drake, 71 Mo. 285, 287. See ELECTIONS.

"Designedly and unlawfully" embraced within the term "knowingly" see State *v.* Halida, 28 W. Va. 499, 503.

17. Black L. Dict.; Webster Dict. [*quoted* in State *v.* Grant, 86 Iowa 216, 222, 53 N. W. 120].

18. Black L. Dict. [*quoted* in State *v.* Grant, 86 Iowa 216, 222, 53 N. W. 120].

"Design of buildings" see Peabody Heights Co. *v.* Willson, 82 Md. 186, 200, 206, 32 Atl. 386, 1077, 36 L. R. A. 393.

19. Anderson L. Dict.; Webster Dict. [*quoted* in State *v.* Grant, 86 Iowa 216, 222, 53 N. W. 120].

20. Anderson L. Dict. [*quoted* in State *v.* Grant, 86 Iowa 216, 222, 53 N. W. 120].

21. Hogan *v.* State, 36 Wis. 226, 244 (where it is said: "Both words [design and intent] essentially imply premeditation"); Anderson L. Dict. [*quoted* in State *v.* Grant, 86 Iowa 216, 222, 53 N. W. 120].

Compared with "premeditate."—In People *v.* Clark, 11 N. Y. Leg. Obs. 4, 13, Rosevelt, J., said: "The words premeditate and design both import forethought, careful reflection, deliberately arranged purpose; ideas all involving, in their structure, the essential element of time."

22. Catlin *v.* Springfield F. Ins. Co., 5 Fed. Cas. No. 2,522, 1 Sumn. 434, used in a fire-insurance policy.

The word "design" contemplates a causative act or omission done or suffered wilfully or knowingly. The Strathdon, 89 Fed. 374, 378.

Death by "design" as used in an insurance policy see Utter *v.* Travelers' Ins. Co., 65 Mich. 545, 551, 32 N. W. 812, 8 Am. St. Rep. 913.

23. Binns *v.* Woodruff, 3 Fed. Cas. No. 1,424, 4 Wash. 48, 52.

24. "The word 'design' imports configuration." Harrison *v.* Taylor, 4 H. & N. 815, 821, 5 Jur. N. S. 1219, 29 L. J. Exch. 3, per Byles, J.

25. Pelouze Scale, etc., Co. *v.* American Cutlery Co., 102 Fed. 916, 918, 43 C. C. A. 52.

"A 'design' means something in the nature of a drawing, picture, or diagram, applicable to the ornamentation of some article of manu-

tion, combined with plan, or implying a plan in the mind.[26] (Design: Criminal Intent, see CRIMINAL LAW; HOMICIDE. Patent, see PATENTS.)

DESIGNATE. To call by a distinctive title; to point out by distinguishing from others;[27] to express or declare;[28] to indicate by description or by something known and determinate;[29] to point out, or mark by some particular token;[30] to show; to point out; to specify.[31] (See DESIGNATED; DESIGNATION.)

DESIGNATED. Particularly described.[32] (See DESIGNATE; DESIGNATION.)

DESIGNATIO JUSTICIARIORUM EST À REGE; JURISDICTIO VERO ORDINARIA À LEGE. A maxim meaning "The appointment of justices is by the King but their ordinary jurisdiction by the law."[33]

DESIGNATION. That which designates; distinctive title; appellation;[34] that which serves to distinguish;[35] selection and appointment for a purpose, allotment,

facture, such as pottery were [ware], linen or woollen fabrics, paper-hangings, carpets, &c. When we look at a picture or drawing we can say whether it is an original design or the same as one which has been already painted or drawn." Harrison *v.* Taylor, 4 H. & N. 815, 820, 5 Jur. N. S. 1219, 29 L. J. Exch. 3, per Crompton, J.

Applied to patents.— See Gorham Mfg. Co. *v.* White, 14 Wall. (U. S.) 511, 527, 20 L. ed. 731 [*citing* McCrea *v.* Holdsworth, L. R. 6 Ch. 418, 23 L. T. Rep. N. S. 444, 19 Wkly. Rep. 36, and *cited* in Smith *v.* Whitman Saddle Co., 148 U. S. 674, 679, 13 S. Ct. 768, 37 L. ed. 606; Jennings *v.* Kibbe, 10 Fed. 669, 670, 20 Blatchf. 353]; Henderson *v.* Tompkins, 60 Fed. 758, 764 [*citing* Smith *v.* Whitman Saddle Co., 148 U. S. 674, 13 S. Ct. 768, 37 L. ed. 606]; Harrison *v.* Taylor, 4 H. & N. 815, 820, 5 Jur. N. S. 1219, 29 L. J. Exch. 3, per Crompton, J.

Applied to copyright see Hanfstaengl *v.* Baines, [1895] A. C. 20, 27.

26. Black L. Dict. [*citing* Burrill Circ. Ev. 331].

27. Lowry *v.* Davis, 101 Iowa 236, 239, 70 N. W. 190.

28. People *v.* Campbell, 40 Cal. 129, 139 [*quoted* in McLane *v.* Territory, (Ariz. 1903) 71 Pac. 938, 939], where it is said: "The word 'designate,' . . . does not imply that it will be sufficient for the jury to intimate or give some vague hint as to the degree of murder of which the defendant is found guilty; but it is equivalent to the words 'express' or 'declare,' and it was evidently intended that the jury should expressly state the degree of murder in the verdict so that nothing should be left to implication on that point."

29. Matter of Election of Prothonotary, 3 Pa. L. J. 160, 163.

To "designate land" see Wilkin *v.* First Div. St. Paul, etc., R. Co., 16 Minn. 271; Interstate Land Co. *v.* Maxwell Land Grant Co., 41 Fed. 275, 281 [*affirmed* in 139 U. S. 569, 587, 11 S. Ct. 656, 35 L. ed. 278].

30. State *v.* Green, 18 N. J. L. 179, 181, where it is said: "Now, a stake where none exists, is no sign or mark, and of course it cannot designate the place where it stands, when it don't stand any where."

31. State *v.* School-Dist. No. 10, 52 N. J. L. 104, 18 Atl. 683, not "to select or determine upon." But see People *v.* Fitzsimmons, 68 N. Y. 514, 519, where Earl, J., said: "The fact that the mayor used the word 'nominations' instead of 'appointments,' is of no moment. The words 'nominate,' 'select,' 'designate,' 'choose,' would, either of them, answer the purpose, in such case, if used in the sense of appoint."

32. Wilkin *v.* First Div. St. Paul, etc., R. Co., 16 Minn. 271.

"Designated" used in reference to a statutory provision as "to mark and stake out" oyster beds see White *v.* Petty, 57 Conn. 576, 579, 18 Atl. 253.

33. Wharton L. Lex.

34. Webster Dict. [*quoted* in State *v.* Saxon, 30 Fla. 668, 695, 12 So. 218, 32 Am. St. Rep. 46, 18 L. R. A. 721].

Applied to partners.— A firm-name composed of the surnames of all the partners is a "designation showing the names of the persons interested as partners," and not a "fictitious name," within the meaning of section 2466 of the Civil Code. The court said: "We do not think that the case before us falls within this provision. The name of one partner was Pendleton and that of the other Williams. The firm name of Pendleton & Williams, therefore, was certainly not fictitious. It was true as far as it went. The only thing that can be said is, that it did not go far enough; that it was not a 'designation showing the names of the persons interested as partners.' But we think that if the legislature had meant so unusual a thing as a firm name showing the full names of all the partners, it would have been more natural to have said so explicitly, — just as it did do in speaking of the names to be inserted in the certificate. . . . Nor is there any opposition or contrast between the phrase 'a fictitious name,' and the phrase 'a designation not showing the names of the persons interested.' The latter is supplementary to the former." Pendleton *v.* Cline, 85 Cal. 142, 144, 24 Pac. 659.

35. Worcester Dict. [*quoted* in State *v.* Saxon, 30 Fla. 668, 695, 12 So. 218, 18 L. R. A. 721, 32 Am. St. Rep. 46, where it is said: "But the distinctive title, or name, or appellation, definition, as distinguished from the meaning of distinguishing by marks, is not within the meaning of the word as it is here used. This is shown by the use of the words, ornaments, mutilation, symbol, and particularly, in conjunction with them,

the act of designating or pointing out.[36] Also, the expression used by a testator to denote a person or thing, instead of the name itself.[37] (See DESIGNATE; DESIGNATED.)

DESIGNATIO PERSONÆ. The description of a person or a party to a deed or contract.[38] (See DESCRIPTIO PERSONÆ.)

DESIGNATIO UNIUS EST EXCLUSIO ALTERIUS, ET EXPRESSUM FACIT CESSARE TACITUM. A maxim meaning "The specifying of one is the exclusion of another, and that which is expressed makes that which is understood to cease."[39]

DESIGNATIO UNIUS PERSONÆ EST EXCLUSIO ALTERIUS. A maxim meaning "The specification of one person is [or implies] the exclusion of another."[40]

DE SIMILIBUS AD SIMILIA EADEM RATIONE PROCEDENDUM EST. A maxim meaning "Concerning like things to like things, we are to proceed by the same rule or reason."[41]

DE SIMILIBUS IDEM EST JUDICANDUM. A maxim meaning "In like cases or matters the judgment is to be the same."[42]

DESIRABLE. Worthy to be desired; that is to be wished for; fitted to excite a wish to possess.[43] The word may be construed to mean necessary.[44]

DESIRE. To wish or long for; be solicitous for; have a wish for the possession, enjoyment, or being of; crave or covet.[45]

DE SON TORT. Of his own wrong.[46] (See, generally, EXECUTORS AND ADMINISTRATORS.)

those of 'or mark of any kind whatsoever.' Ornaments, mutilations, and symbols are marks as distinguished from words or sentences, or appellations, or distinctive titles, and not only do they indicate that it is in this character the term 'designation' is used, but the terminal expression, 'or mark of any kind whatsoever,' shows both that the Legislature understood itself as meaning, by the associated use of each and all the preceding terms, including that of 'designation,' things in the nature of marks as distinguished from words or writings, and as intending by these terminal words to prohibit any other thing in the like nature of a mark."]

36. Webster Dict. [*quoted* in Kimball *v.* Salisbury, 19 Utah 161, 171, 56 Pac. 973].

Applied to benefit insurance.—"By the 'designation' of a beneficiary, the by-laws evidently refer to the express act of the member specifying and naming some particular person, and by 'changing' beneficiaries they refer to the act of naming and specifying some other person or persons in place of those previously designated." Hanson *v.* Minnesota Scandinavian Relief Assoc., 59 Minn. 123, 128, 60 N. W. 1091.

37. Bouvier L. Dict.

38. Black L. Dict.

39. Wharton L. Lex. [*citing* Coke Litt. 210].

40. Burrill L. Dict.

Applied in *Ex p.* Belcher, 4 Deac. & C. 703, 4 L. J. Bankr. 29, 2 Mont. & A. 160, 169.

41. Adams Gloss. [*citing* Branch Principia].

42. Adams Gloss. [*citing* Calvin's Case, 7 Coke 1, 18*b*].

43. Century. Dict.

44. As in a statute authorizing a railroad to acquire land with all "desirable appendages." Prather *v.* Jeffersonville, etc., R. Co., 52 Ind. 16, 37.

45. Century Dict.

"Desire" as used in a will see the following cases:

Arkansas.— Cockrill *v.* Armstrong, 31 Ark. 580, 589.

California.— *In re* Marti, 132 Cal. 666, 671, 61 Pac. 964, 64 Pac. 1071.

Massachusetts.— Weber *v.* Bryant, 161 Mass. 400, 403, 37 N. E. 203.

New York.— Meehan *v.* Brennan, 16 N. Y. App. Div. 395, 398, 45 N. Y. Suppl. 57.

Ohio.— Brasher *v.* Marsh, 15 Ohio St. 103, 111.

Pennsylvania.— Philadelphia's Appeal, 112 Pa. St. 470, 474, 4 Atl. 4.

England.— Harding *v.* Glyn, 1 Atk. 469, 470.

See also, generally, TRUSTS; WILLS.

"Desired and required."—"That the words 'desired and required' were intended to express rather a legislative wish and permission than a mandate, is indicated, too, in the discordancy of the natural meanings of the words themselves. As words of legislative command, they are singularly inappropriate and inconsistent. It is difficult to understand how it can be made a penal offense to violate simply a legislative desire. The word 'desired' cannot be ignored in the construction of the act any more than the word 'required,' and the former is at least as forcible in its expression of a request as the latter is in its expression of a command." *Ex p.* Kohler, 74 Cal. 38, 43, 15 Pac. 436.

"Desiring to prosecute" information in the nature of a quo warranto see State *v.* Boal, 46 Mo. 528, 531; Com. *v.* Cluley, 56 Pa. St. 270, 272, 94 Am. Dec. 75 [*quoted* Com. *v.* Allegheny Bridge Co., 20 Pa. St. 185, 190]. See, generally, QUO WARRANTO.

46. Black L. Dict. [*citing* 2 Blackstone Comm. 507; 2 Stephen Comm. 244].

DESPATCH or DISPATCH. See TELEGRAPHS AND TELEPHONES.

DESPATCH or DISPATCH COMPANIES. See CARRIERS.

DESPERATE DEBT. See EXECUTORS AND ADMINISTRATORS.

DESPOIL. A word which involves in its signification, violence or clandestine means, by which one is deprived of that which he possesses.[47]

DESPOJAR. In Mexican law, an action to recover personal property of which one has been deprived by fraud or violence.[48]

DE STAPULIS. The title of a statute passed 27 Edw. III, st. 2.[49]

DE STATUTO MERCATORIO. The writ of statute merchant.[50]

DE STATUTO STAPULÆ. The writ of statute staple.[51]

DESTINAMOS Y APROPIAMOS. To grant and deliver as property.[52]

DESTINATION. The purpose to which it is intended an article or a fund shall be applied.[53] (Destination: Of Vessel, see INSURANCE; SHIPPING.)

DESTINE. To set, ordain, or appoint to a use, purpose, estate or place; to fix unalterably by a divine decree, to appoint unalterably.[54]

DESTROY.[55] To pull down; unbuild (that which has been built or constructed); demolish; to kill, slay, extirpate.[56]

47. Sunol *v.* Hepburn, 1 Cal. 254, 268.

48. English L. Dict.

It is brought to recover possession of immovable property, of which one has been despoiled (*despojado*) by another. Sunol *v.* Hepburn, 1 Cal. 254, 268.

49. Burrill L. Dict.

50. Black L. Dict.

51. Black L. Dict.

52. U. S. *v.* Philadelphia, 11 How. (U. S.) 609, 659, 13 L. ed. 834.

53. Black L. Dict.

"Place of destination is the ultimate destination of the goods." Ayres *v.* Western R. Corp., 2 Fed. Cas. No. 689, 14 Blatchf. 9.

Port of destination is "the port at which a ship is to end her voyage." Black L. Dict.

54. U. S. *v.* Philadelphia, 11 How. (U. S.) 609, 659, 13 L. ed. 834.

55. **Compared with "damage."**— Where a contract of lease contained a stipulation "If damage be done to company's property, the subscriber shall pay to the company the value of the property so damaged or destroyed, or the cost of repairing the same," Greenbaum, J., in dissenting opinion, said: "The word 'destroyed' was evidently merely intended as an amplification of the word 'damaged' and should be construed in conjunction with the preceding words. Construing the language of the instrument in its popular sense, did not plaintiff mean, when it said 'if damages be done to the company's property,' damages done by defendant or his agents?" Rapid Safety Fire Extinguisher Co. *v.* Hay-Budden Mfg. Co., 37 Misc. (N. Y.) 556, 561, 75 N. Y. Suppl. 1008.

More comprehensive than "disable."— In Tully *v.* People, 67 N. Y. 15, 20, the court said: "The word 'destroy' used in the indictment is more comprehensive than the word 'disable,' and includes what is signified by it, and the indictment is not defective by reason of the substitution."

56. Century Dict.

"The word 'destroy' is also somewhat a maritime word, and is used, as will be seen by other sections of this chapter of the Revised Statutes, to denote any kind of deprivation of the owner by demolishing, making way with, or other subversion of his property." U. S. *v.* Stone, 8 Fed. 232, 249.

Destroy a vessel.— In U. S. *v.* Johns, 26 Fed. Cas. No. 15,481, 1 Wash. 363, 372, 4 Dall. 412, the court charged the jury: "We are of opinion, that to 'destroy a vessel' is to unfit her for service, beyond the hopes of recovery by ordinary means. This, as to the extent of the injury, is synonymous with 'cast away;' it is the general term. Casting away is, like burning, a species of destruction. Both of them mean such an act as causes the vessel to perish; to be lost; to be irrecoverable by ordinary means."

"Break or destroy."— In State *v.* McBeth, 49 Kan. 584, 588, 31 Pac. 145, the court said: "We think that the words 'break or destroy,' as used in this section of the crimes act, mean to destroy the completeness of anything."

"Destroyed" compared with "taken" and "injured" see Jones *v.* Erie, etc., R. Co., 151 Pa. St. 30, 46, 25 Atl. 134, 31 Am. St. Rep. 722, 17 L. R. A. 758.

Destroyed or injured by the elements.— In Suydam *v.* Jackson, 54 N. Y. 450, 454 [*quoted* in Hilliard *v.* New York, etc., Gas Coal Co., 41 Ohio St. 662, 669], Earl, J., said: "The statute provides for two alternatives, when the premises are 'destroyed' or 'injured.' The first alternative, evidently, has reference to a sudden and total destruction by the elements, acting with unusual power, or by human agency."

Wholly destroyed.— "What is the meaning of the words 'wholly destroyed' when applied to a building? The words when applied to a building mean totally destroyed as a building; that is, that the walls, although standing, are unsafe to use for the purpose of rebuilding and must be torn down and a new building erected throughout." German Ins. Co. *v.* Eddy, 36 Nebr. 461, 465, 54 N. W. 856, 19 L. R. A. 707. See also State *v.* De Bruhl, 10 Rich. (S. C.) 23, 26, where "destroyed" in a statute was interpreted to mean totally destroyed.

DESTRUCTION.[57] A pulling down, waste, extinction.[58] (Destruction: Of Insured Property, see INSURANCE. Of Landmark, see BOUNDARIES. Of Mark or Brand of Animal, see ANIMALS. Of Property—Criminal Responsibility, see ARSON; FIRES; MALICIOUS MISCHIEF; Liability For Acts of Mob, see COUNTIES; MUNICIPAL CORPORATIONS; Taking For Public Use, see EMINENT DOMAIN. Of Record, see RECORDS. Of Vessel or Ship, see SHIPPING. Of Will, see WILLS.)

DESTRUCTIVE. Causing destruction; having a tendency to destroy or the quality of destroying; ruinous; mischievous; pernicious; hurtful.[59] (See DESTROY; DESTRUCTION.)

DE STURGIONE OBSERVETUR, QUOD REX ILLUM HABEBIT INTEGRUM: DE BALÆNA VERO SUFFICIT SI REX HABEAT CAPUT, ET REGINA CAUDAM. A maxim meaning "As to the sturgeon, it may be observed that the king shall have it whole; but of the whale it is sufficient, if the king have the head and the queen the tail."[60]

DE SUPERSEDENDO. Writ of supersedeas.[61]

DETACHABLE. Capable of being detached or separated.[62]

DETACHED. Disjoined or dissociated; not united or not contiguous; being or becoming separate; unattached;[63] isolated.[64]

DETAIL. As a verb, to set apart for a particular service.[65] As a noun, a minute account; a narrative or report of particulars.[66] In military law, one who

57. **"Complete destruction"** see McCabe's License, 11 Pa. Super. Ct. 560, 563.

"Partial destruction" see McCabe's License, 11 Pa. Super. Ct. 560, 563.

Loss may not constitute destruction. Allen *v.* State Bank, 21 N. C. 3, 11.

58. English L. Dict. But *compare* McCabe's License, 11 Pa. Super. Ct. 560, 563, where it is said: "We are unable to go to the extent of holding that the word 'destruction' must necessarily be construed as synonymous with 'demolition,' 'breaking up in parts,' 'pulling down.'"

"Destruction of premises" as used in a lease see Spalding *v.* Munford, 37 Mo. App. 281, 283. See also LANDLORD AND TENANT.

59. Century Dict.

"Destructive matter."—Where defendant was convicted of pouring boiling water on her husband, Rolfe, B., thought it doubtful whether boiling water is a "destructive matter" within 1 Vict. c. 85, § 5. Reg. *v.* Crawford, 2 C. & K. 129, 130, 1 Den. C. C. 100, 61 E. C. L. 129.

"The noxious or destructive substance or liquid mentioned in the statute is not merely such as might, when administered, be hurtful and injurious, but, like a poison, it must be capable of destroying life." People *v.* Van Deleer, 53 Cal. 147, 149. See also Dougherty *v.* People, 1 Colo. 514, 516.

60. Tayler L. Gloss.

61. Burrill L. Dict.

62. Century Dict.

Applied to patents.—In Strobridge *v.* Lindsay, 2 Fed. 692, 693, where the defendants insisted that the phrase, as mentioned in the patent, "detachable hopper and grinding shell" meant a hopper and shell separate and detachable from the top of the box, the court said: "I do not think the word 'detachable,' as used in this claim, necessarily implies that the hopper must possess the capacity of being detached from the top of the box. The object contemplated seems rather to be to have a hopper easily detachable from the box." And see Bennett *v.* Schooley, 75 Fed. 392, 394, where the court said: "We are of opinion that by the term 'detachable clip,' found in the foregoing claims, was meant a removable clip, or one which was not positively attached to and virtually made a part of the torpedo shell by riveting or soldering; that such an attachment was meant which, while it accomplished connection, did not create union."

63. Century Dict.

"Detached building" see Burleigh *v.* Gebhard F. Ins. Co., 90 N. Y. 220, 224.

"Detached" from each other or from other buildings as used in an insurance policy see Broadwater *v.* Lion F. Ins. Co., 34 Minn. 465, 466, 26 N. W. 455.

"Standing detached" as applied to a building insured see Hill *v.* Hibernia Ins. Co., 10 Hun (N. Y.) 26, 30.

64. Reg. *v.* Brecon, 5 Q. B. 813, 825, 15 Jur. 351, 19 L. J. M. C. 203, 69 E. C. L. 813.

65. Century Dict. [*quoted* in Upshur *v.* Baltimore, 94 Md. 743, 748, 51 Atl. 953, where the court also said: "These words 'to detail from time to time' are not technical words. They are the words of common speech, and as such their interpretation is within the judicial knowledge, 'and, therefore, matter of law.' Marvel *v.* Merritt, 116 U. S. 11, 6 S. Ct. 207, 29 L. ed. 550. . . . Giving to the language employed its accepted meaning, the section merely provides that the Park Board may request the Police Board to 'set apart' 'occasionally' or 'at intervals' or 'now and then,' a certain number of patrolmen 'for a particular service,' and, therefore, it does not mean that the Police Board shall detail the men permanently, or for the definite period of a year"].

"Detailed fireman" see People *v.* Brooklyn, 103 N. Y. 370, 372, 8 N. E. 730.

66. Century Dict.

"The words ["details" and "particulars"] are, in fact, synonymous, and in ordinary parlance convey the same meaning." City Pass. R. Co. *v.* Knee, 83 Md. 77, 82, 34 Atl.

belongs to the army, but is only detached, or set apart, for the time to some particular duty or service, and who is liable at any time, to be recalled to his place in the ranks.[67]

DETAIN.[68] To stop, to delay, to restrain from proceeding.[69] (See DETENTION.)

DETAINER. See FORCIBLE ENTRY AND DETAINER.

DETAINMENTS. See MARINE INSURANCE.

DETECT. To uncover; to find out; to bring to light.[70]

252. In United Water Works Co. *v.* Omaha Water Co., 164 N. Y. 41, 53, 58 N. E. 58, Parker, C. J., in speaking of the "details of the plan of reorganization" of a corporation said: "The word 'detail,' as used in this agreement, means minor particulars necessary to complete a reorganization, but consistent with the original plan, and lawful and honest. In matters of substance nothing may be done under the detailed plan that could not have been done under the original agreement. That was the idea conveyed by the use of the word 'detail' in the connection in which it appears."

"**Matters of detail**" see Lehigh Coal, etc., Co. *v.* Central R. Co., 34 N. J. Eq. 88, 90.

67. *In re* Strawbridge, 39 Ala. 367, 379.

68. "**'Detain' is susceptible of many shades of meaning.** The idea of force or even duress, threat or menace, can all be easily excluded, and the word still be pregnant of meaning. State *v.* Maloney, 105 Mo. 10, 17, 16 S. W. 519.

"**Detaining and withholding**, are substantially synonymous terms, as applied to real estate." Merritt *v.* Carpenter, 3 Abb. Dec. (N. Y.) 285, 2 Keyes (N. Y.) 462, 3 Keyes (N. Y.) 142, 33 How. Pr. (N. Y.) 428, 434, per Peckham, J., in dissenting opinion.

Detaining letters see U. S. *v.* Pearce, 27 Fed. Cas. No. 16,020, 2 McLean 14.

69. Paynter *v.* Com., 55 S. W. 687, 688, 21 Ky. L. Rep. 1562.

70. "As to detect a crime, a criminal, or his hiding place. Its synonyms are 'to discover, to find out, lay open, expose.'" Webster Dict. [*quoted* in Byrnes *v.* Mathews, 12 N. Y. St. 74, 81].

DETECTIVES

By Frank E. Jennings

I. DEFINITION, 234

II. AUTHORITY TO ACT, 234

III. COMPENSATION, 235

CROSS-REFERENCES

For Matters Relating to:

Authority of Detective to Arrest Without Warrant, see ARREST.

Credibility of Detective as Witness, see WITNESSES.

Detective as Accomplice, see CRIMINAL LAW.

Entrapment by Detective, see BURGLARY; CRIMINAL LAW; INTOXICATING LIQUORS; LARCENY.

Injunction Against Employing Detective, see INJUNCTIONS.

Municipal Police Officers, see MUNICIPAL CORPORATIONS.

Public Officers Generally, see OFFICERS.

I. DEFINITION.

A detective has been defined as a person fitted for or skilled in detecting; employed in detecting, as detective police; a policeman whose business is to detect rogues by adroitly investigating their haunts and habits.[1] A private detective is a person engaged unofficially[2] in obtaining secret information for or guarding the private interests of those who employ him.[3]

II. AUTHORITY TO ACT.

That a private detective may exercise the duties of a public official it is necessary that he be lawfully authorized to perform such functions.[4] It is also usually made unlawful for a person to act in the capacity of a private detective without having first obtained a license therefor.[5] It has been held that a person making

1. Webster Dict. [*quoted* in Byrnes *v.* Mathews, 12 N. Y. St. 74, 81].

2. And a statute granting such person the power and authority to serve warrants in criminal cases, without making it his duty so to do, does not make him a public officer. Kerschner *v.* Berks County, 8 Pa. Co. Ct. 347. See also Penny *v.* New York Cent., etc., R. Co., 34 N. Y. App. Div. 10, 53 N. Y. Suppl. 1043, holding that there is no such settled significance attached to the term "detective" as of necessity imports authority to arrest criminals or persons charged or suspected of committing criminal acts.

3. Century Dict.

4. A legislative act authorizing the voluntary incorporation of detective agencies, and providing that the members thereof should have the same rights and privileges as constables, when engaged in arresting offenders, but which provides no supervision by any public authority of the proceedings to incorporate such agencies, would be in derogation of a state constitution which contemplates that the persons clothed with such powers should be elected by the people in regular elections. Ables *v.* Ingham County Sup'rs, 42 Mich. 526, 4 N. W. 206.

5. State *v.* Bennett, 102 Mo. 356, 14 S. W. 865, 10 L. R. A. 717; Smith's Petition, 5 Pa. Dist. 465 (where it appears that before the act of 1877 a license was unnecessary in that state); Burnett's Application, 17 Pa. Co. Ct. 394; McClain *v.* Lawrence County, 14 Pa. Co. Ct. 273.

Operation and effect of license.— Under the Pennsylvania statute any good citizen making the necessary proof and filing a bond in the sum of two thousand dollars and paying a fee of twenty-five dollars for the use of the county may receive a license to act as a detective for hire or reward for a period of three years. This authorizes him to do business as a private detective just the same as the license of a storekeeper authorizes him to keep store. He offers his services to the public for hire or reward and his fee depends upon the contract he makes with his employer. He is not paid out of the public fund, but out of the purse of the person hiring him. He is not a sworn officer, and makes no official returns; he is merely a licensee. Kerschner *v.* Berks County, 8 Pa. Co. Ct. 347.

In a prosecution for acting without having first obtained a license, an information alleging the offense in the words of the statute, and that defendant held himself out to the public as a private detective, and in various instances acted as such at the request of cer-

the statutory application for a license as a detective should show the existence of an emergency or state of affairs requiring such appointment,[6] although under the same statute the opposite view is also held.[7] It is agreed, however, that the applicant must furnish satisfactory proof of his competency and integrity.[8]

III. COMPENSATION.

Generally speaking a private detective must look to his employer for his compensation,[9] and his performance of acts or duties usually performed by public officials does not entitle him to tax his charges against the public as costs;[10] but he is entitled to compensation for the performance of services which might be rendered by any citizen.[11]

DETENTION. The act of keeping back or withholding, either accidentally or by design, a person or thing.[1] (Detention : Duress, see CONTRACTS. Of Female, see ABDUCTION. Of Goods by Carrier, see CARRIERS. Of Person — Arrested, see ARREST; FALSE IMPRISONMENT; In Reformatory, see REFORMATORIES. Of Vessel, see MARINE INSURANCE.)

DETER. To discourage or to stop by fear, to stop or prevent from acting or proceeding by danger, difficulty, or other consideration which disheartens or countervails the motive for an act.[2]

tain named parties, alleges with sufficient definiteness both the time of the offense and the offense itself. State *v.* Bennett, 102 Mo. 356, 14 S. W. 865, 10 L. R. A. 717.

For form of information for acting as private detective without license see State *v.* Bennett, 102 Mo. 356, 14 S. W. 865, 10 L. R. A. 717.

Sufficient proof of offense.— Where the act forbidden is the "acting as a private detective" without license, the mere holding out of one's self as such, although admissible as tending to show that he was in fact acting as a detective, would not of itself be sufficient proof of the offense within the meaning of the law. State *v.* Bennett, 102 Mo. 356, 14 S. W. 865, 10 L. R. A. 717.

6. Burnett's Application, 17 Pa. Co. Ct. 394.

7. Smith's Petition, 5 Pa. Dist. 465.

8. Burnett's Application, 17 Pa. Co. Ct. 394, where a petition signed by twelve persons certifying as to the competency of the applicant was held by the court to be insufficient.

Relicensing detectives.— There is no provision in the Pennsylvania statute permitting the relicensing of detectives without inquiry. And therefore every applicant is a new one so far as the necessity of furnishing proof of his competency and integrity is concerned. Smith's Petition, 5 Pa. Dist. 465, 467, where the court say that the proof should show that "he is a person experienced in the essentials of the business he proposes to engage in, acquainted with the methods and habits of criminals, familiar with the privileges and duties of officers charged with their pursuit and arrest, possessed of the requisite courage, moderation, coolness, and integrity to act judicially and efficiently in trying situations, mindful of the rights of citizens and of the extent and limitation of the powers of peace officers, and that he is a person of unblemished character, free from objectionable habits and degrading associations, above the suspicion of having been, or becoming implicated in blackmailing schemes or the bringing of prosecutions for the purpose of settlement and extortion; discreet, honest, truthful and reliable."

9. Hamlin *v.* Berks County, 8 Pa. Co. Ct. 462, holding that a policeman commissioned by the governor of the state by virtue of a statute authorizing a corporation using a railroad within the state to apply to the governor to commission such a person, and who acts as a policeman for the corporation, and who may be dismissed by the corporation when his services are no longer needed, is not a public officer and must look to the corporation for his compensation.

10. Abels *v.* Ingham County Sup'rs, 42 Mich. 526, 4 N. W. 206; Hamlin *v.* Berks County, 8 Pa. Co. Ct. 462; Kerschner *v.* Berks County, 8 Pa. Co. Ct. 347.

Where the compensation is to be fixed by the court in pursuance of statutory provisions, the mere fact that the statute also provides that such special detectives shall have all the powers that are conferred on constables so far as such powers relate to crimes or criminal procedure, does not give such detectives the right to claim the compensation of constables, but they can receive only such pay as the court sees fit to allow them. Wunch *v.* Berks County, 8 Pa. Co. Ct. 465.

For necessity of statutory authority for claiming costs generally see COSTS.

11. McClain *v.* Lawrence County, 14 Pa. Super. Ct. 273; Hamlin *v.* Berks County, 8 Pa. Co. Ct. 462; Kerschner *v.* Berks County, 8 Pa. Co. Ct. 347.

1. Black L. Dict.

2. Webster Dict. [*quoted* in Printup *v.* Alexander, 69 Ga. 553, 556].

DETERGENT. Cleansing.[3]

DETERGENT SOAP. A cleansing soap.[4]

DETERMINABLE. That which may cease or determine upon the happening of a certain contingency.[5] (Determinable: Fee, see DEEDS; ESTATES; WILLS. Freehold, see ESTATES.)

DETERMINATION. According to legal as well as to ordinary use, the coming to an end in any way whatever;[6] expiration — end;[7] the decision of a court of justice; the ending or expiration of an estate or interest in property, or of a right, power, or authority.[8] (Determination: Of Cause — In General, see JUDGMENT; Appealability of Judgment, see APPEAL AND ERROR; CRIMINAL LAW; In Appellate Court, see APPEAL AND ERROR; CRIMINAL LAW. See also DETERMINE.

DETERMINE.[9] To decide;[10] to settle;[11] to end;[12] to bring to an end;[13]

3. Buckan *v.* McKesson, 7 Fed. 100, 103, 18 Blatchf. 485.

4. Buckan *v.* McKesson, 7 Fed. 100, 103, 18 Blatchf. 485, where it is said: "It is the nature of a soap to be detergent or cleansing. If the article is a soap, it is detergent. If it is not detergent, it is not a soap. Whatever is a soap, is a detergent soap."

5. Black L. Dict. [*citing* 2 Blackstone Comm. 121].

6. St. Aubyn *v.* St. Aubyn, 1 Dr. & Sm. 611, 619, 30 L. J. Ch. 517, 5 L. T. Rep. N. S. 519, 9 Wkly. Rep. 922, where it is said: "That appears to me to be the honest mode of construing the word."

7. Johnson Dict. (Todd ed.) [*quoted* in St. Aubyn *v.* St. Aubyn, 1 Dr. & Sm. 611, 618, 30 L. J. Ch. 917, 5 L. T. Rep. N. S. 519, 9 Wkly. Rep. 922].

8. Black L. Dict.

"Judgment or determination."— Where in an action on a foreign judgment the defendant claimed that in pleading such a judgment under the code, it is now only necessary to state that "such judgment or determination" was duly given or made, the court said: "This we think a mistake. The 'judgment or determination' spoken of in that section is clearly that of a 'court or officer of special jurisdiction,' and none other." Karns *v.* Kunkle, 2 Minn. 313, 317.

"The expression, 'a determination in the trial court,' obviously includes 'a decision of the court upon a trial without a jury,' but, according to common parlance and general understanding, would not include the verdict of a jury. (Code Civ. Proc. § 3343.) It would be a peculiar, if not an unprecedented definition, to describe the verdict of a jury as a determination in a trial court." Henavie *v.* New York Cent., etc., R. Co., 154 N. Y. 278, 280, 282, 48 N. E. 525.

9. "'Determine' cannot be given the meaning 'to abolish.'" People *v.* Ham, 32 Misc. (N. Y.) 517, 520, 66 N. Y. Suppl. 264.

"The words 'adjudge,' 'determine,' 'award,' when used by the arbitrators, do not necessarily carry with them the idea of a judgment according to law." Patton *v.* Garrett, 116 N. C. 847, 856, 21 S. E. 679.

10. McCormick *v.* State, 42 Nebr. 866, 868, 61 N. W. 99 [*quoting* Webster Int. Dict.]; People *v.* Ham, 32 Misc. (N. Y.) 517, 520, 66 N. Y. Suppl. 264 [*quoting* Webster Dict.]; Atlantic, etc., R. Co. *v.* U. S., 76 Fed. 186, 191 [*quoting* Anderson L. Dict.; Stormouth Dict.; Webster Unabr. Dict.].

"The power 'to hear and determine,' is an essential ingredient of original jurisdiction, and the authority 'to examine and correct errors,' is the distinguishing characteristic of appellate power. To 'hear and determine' a criminal case, is 'to proceed after bill found, and to try the issues of fact and pass sentence.'" Com. *v.* Simpson, 2 Grant (Pa.) 438, 439.

11. McCormick *v.* State, 42 Nebr. 866, 868, 61 N. W. 99 [*quoting* Webster Int. Dict.]; People *v.* Ham, 32 Misc. (N. Y.) 517, 520, 66 N. Y. Suppl. 264 [*quoting* Webster Dict.]; Atlantic, etc., R. Co. *v.* U. S., 76 Fed. 186, 191 [*quoting* Anderson L. Dict.; Century Dict.].

Applied to tenure of policemen.— Where a statute authorizing the equipment of a municipal police force provided that they shall be appointed by the board for such time as the board shall determine, and be subject to removal by the board for cause, the court said: "If it were the actual service which the board is empowered to 'determine,' there might be some propriety in attaching to the word used a signification of closing, concluding, or ending, instead of that one more commonly understood, which implies a fixing, settling, or deciding upon. But the time, which 'the board shall determine,' is coupled with the appointment, and not with the service. To determine this 'time' as directed, is to fix, settle, or decide what it shall be, as an addendum qualifying the effect of the appointment. In this relation, it becomes a time necessarily prospective and future. The clear intent of the command is, that the board shall annex to the appointment a time, term, or period, through whose duration the consequent duties, privileges, and emoluments are to remain with the appointee. This is the obvious and only English meaning of the words themselves." State *v.* Police Com'rs, 14 Mo. App. 297, 303.

12. McCormick *v.* State, 42 Nebr. 866, 868, 61 N. W. 99 [*quoting* Webster Int. Dict.]; Atlantic, etc., R. Co. *v.* U. S., 76 Fed. 186, 191 [*quoting* Anderson L. Dict.; Stormouth Dict.].

13. Atlantic, etc., R. Co. *v.* U. S., 76 Fed. 186, 191 [*quoting* Soule Synonyms; Webster Unabr. and Int. Dicts.].

resolve; to come to a decision;[14] to ascertain or state definitely; to decide upon, as after consideration or investigation; to bring to a conclusion, to put an end to;[15] to fix the determination of, to limit, to finish, to ascertain definitely, to bring to a conclusion, as a question of controversy; to settle by authoritative or judicial sentence, as the court determined the cause; to come to a decision, to conclude;[16] to fix or settle definitely; make specific or certain; decide the state or character of;[17] to terminate;[18] to fix the form or character of; to shape; to prescribe imperatively; to regulate;[19] to fix the boundaries of; to mark off and separate; to set bounds to; to fix the determination of; to limit; to bound; to finish; to ascertain definitely; to bring to a conclusion, as a question of controversy; to settle by authoritative or judicial sentence.[20] And the word may be synonymous with "finish," "resolve," "conclude."[21] (See DETERMINATION; DETERMINED.)

14. Stormouth Dict. [*quoted* in Atlantic, etc., R. Co. *v.* U. S., 76 Fed. 186, 191].

Applied to a tax levy.— Where a statute provided "The board of trustees [of a town] shall, . . . determine the amount of general tax for the current year," the court said: "As we construe the provision to which we have referred, the words 'determine the amount of general tax for the current year,' mean the final determination of the board as to the amount, assessment, and levy of taxes for the current year." Williamsport *v.* Kent, 14 Ind. 306, 309 [*quoted* in Kratli *v.* Larrew, 104 Ind. 363, 366, 3 N. E. 267].

15. Century Dict. [*quoted* in Atlantic, etc., R. Co. *v.* U. S., 76 Fed. 186, 191].

"To 'determine by ballot' is to ascertain the result of balloting upon a proposition by those entitled to cast the ballots." Smith *v.* San Francisco, etc., R. Co., 115 Cal. 584, 598, 47 Pac. 582, 56 Am. St. Rep. 119, 35 L. R. A. 309.

Where a statute provided "Each board of education shall determine the studies to be pursued, and the text-books to be used, in the schools under their control," the court said: "What is the meaning of the word determine, as here used, or what operation and effect ought to be given to it? When taken in connection with the purpose of the law, . . . and the subject-matter to which it relates, . . . it is manifest that the word 'determine' must mean something more than investigating and arriving at a conclusion by mental processes, although these are embraced. Official action is contemplated and required to give a practical effect to the word, and the injunction to do this is mandatory upon the board; and in order that those who must obey may know the will of the board, it is necessary that it should be declared in such a way that it may be known." State *v.* Board of Education, 35 Ohio St. 368, 385 [*quoted* in State *v.* Board of Education, 18 Nev. 173, 178, 1 Pac. 844].

16. Webster Unabr. Dict. [*quoted* in Atlantic, etc., R. Co. *v.* U. S., 76 Fed. 186, 191].

Applied to appeals.— Where a statute declared "that the circuit court or courts are hereby authorized and required to receive, hear, and determine such appeals;" and in precisely the same words delegates the same authority to the supreme court in the exercise of their appellate jurisdiction, Story, C. J., said: "In these words I can discern nothing that alludes to a new trial by a jury. The court (not the jury) are to receive, hear, and determine the appeal; that is, the whole cause brought up by appeal. In many, nay, in a majority of cases, there is nothing to try but facts, and these, when decided, leave nothing for the court to determine. It is certain that these words delegate no authority to the supreme court, to try the facts by a jury in causes coming by appeal before that court." U. S. *v.* Wonson, 28 Fed. Cas. No. 16,750, 1 Gall. 5, 16.

As used in condemnation proceedings.— In New Jersey R., etc., Co. *v.* Suydam, 17 N. J. L. 25, 47, Ford, J., in speaking of a statute for the appointment of commissioners in condemnation proceedings, said: "It (the statute) says they shall be appointed to determine the compensation and damages which the owner of said real estate has sustained. To determine, is to perform a judicial act."

17. Century Dict. [*quoted* in People *v.* Ham, 32 Misc. (N. Y.) 517, 520, 66 N. Y. Suppl. 264].

"'To determine what is a reasonable compensation,' and 'to find what is justly due,' are expressions we think of equivalent import." Fulkerth *v.* Stanislaus County, 67 Cal. 334, 336, 7 Pac. 754.

Applied to railroad fares.— "The word 'determine,' as used in plaintiff's charter, means a greater power than that granted by the word 'fix' and different from the word 'regulate.'" "The word 'determine' is properly and usually used in conferring upon executive, administrative, and judicial officers the power to finally settle and conclude controversies. To say that the word 'determine,' in this statute, means only the same thing as the words 'fix' and 'regulate,' is to discard from the statute a word placed there by the legislature, and to say that the legislature intended nothing by the use of such a word." Atlantic, etc., R. Co. *v.* U. S., 76 Fed. 186, 191.

18. Anderson L. Dict. [*quoted* in Atlantic, etc., R. Co. *v.* U. S., 76 Fed. 186, 191].

19. McCormick *v.* State, 42 Nebr. 866, 868, 61 N. W. 99 [*quoting* Webster Int. Dict.]; People *v.* Ham, 32 Misc. (N. Y.) 517, 520, 66 N. Y. Suppl. 264 [*quoting* Webster Dict.].

20. Webster Int. Dict. [*quoted* in McCormick *v.* State, 42 Nebr. 866, 868, 61 N. W. 99].

21. Stormouth Dict. [*quoted* in Atlantic, etc., R. Co. *v.* U. S., 76 Fed. 186, 191].

DETERMINED.[22] Fixed permanently; settled; adjusted; set down authoritatively.[23]

DE TESTAMENTIS. Literally, "of testaments." The title of the fifth part of the Digests or Pandects; comprising the twenty-eighth to the thirty-sixth books, both inclusive.[24]

DETINET. Literally, "he detains." In pleading and practice, a term anciently used (as the English equivalent still is,) in declaring in certain actions of debt, as against executors and administrators, &c., and which has given name to the mode of declaring in such cases; the declaration being said to be "in the *detinet*."[25] (Detinet: Debt in Detinet, see DEBT, ACTION OF. Replevin in Detinet, see REPLEVIN.)

22. **"Determined" not synonymous with "become void."**—"We do not mean to say that 'to become void' and 'to be determined,' are convertible phrases. The former, however, differs from the latter only as a species differs from its genus, and must therefore be included in it: for to say that a thing 'has become void,' necessarily implies that it has in effect been terminated or brought to an end; but the expression applies only to its end or termination in one specific mode; whereas to say that a thing 'has been determined,' though it clearly imports simply that the thing bas been terminated or brought to an end, yet the expression is generic in its nature, and comprehends every mode of terminating or bringing a thing to an end." Sharp *v.* Curds, 4 Bibb (Ky.) 547, 548.

23. Worcester Dict. [*quoted* in Field *v.* Auditor, 83 Va. 882, 887, 3 S. E. 707].

Applied to taxation.— Where a statute provided that the amount of general taxes shall be determined by incorporated towns before a certain date, the court said: "The word 'determined,' as used in act of 1852, means to assess and levy the tax." Worley *v.* Harris, 82 Ind. 493, 497 [*citing* Williamsport *v.* Kent, 14 Ind. 306].

24. Black L. Dict.

25. Burrill L. Dict. See also Pierce *v.* Van Dyke, 6 Hill (N. Y.) 613, 615; Anonymous, 4 Hill (N. Y.) 603; Cummings *v.* Vorck, 3 Hill (N. Y.) 282, 283.

DETINUE

By Herbert B. Hawes

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I. PRESENT STATUS OF REMEDY.

The common-law action of detinue has been superseded almost entirely in the United States by statutory actions for the recovery of specific personal property, or by the actions of trover and replevin as modified by statute,[1] and has fallen into disuse in England;[2] but the principles underlying the common-law action

1. See REPLEVIN; TROVER. See also the statutes of the several states.

California.— Notwithstanding Code Civ. Proc. §§ 509–520, provide an auxiliary remedy to one suing to recover specific property by which he may secure possession before trial, an action analogous to the common-law action of detinue may be maintained against a bailee who has wrongfully delivered plaintiff's property to a third person, without invoking the auxiliary remedy. Faulkner *v.* Santa Barbara First Nat. Bank, 130 Cal. 258, 62 Pac. 463.

Illinois.— The repeal of Ill. Rev. St. (1845) c. 32, providing that in actions of detinue, upon plaintiffs filing an affidavit as therein prescribed, the clerk should issue a capias against defendant, and, regulating the proceedings thereon, did not abolish the common-law right of action in detinue. Robinson *v.* Peterson, 40 Ill. App. 132.

Minnesota.—Replevin has been substituted for detinue when the detention only and not the taking is wrongful. Coit *v.* Waples, 1 Minn. 134.

Missouri.— The New Code of Practice went into effect July 4, 1849, and since then there is no longer any action in detinue. Moore *v.* Chamberlin, 15 Mo. 238.

West Virginia.— In this state the action of replevin having been abolished, a replevy bond and counter forthcoming bond have been made a part of the proceedings in the action of detinue, and the scope of this action as a remedy has been enlarged and advanced by chapter 102 of the code. Robinson *v.* Woodford, 37 W. Va. 377, 16 S. E. 602.

2. Danley *v.* Edwards, 1 Ark. 437. "The authorities to be found in the English books, on the subject of the action of detinue, are very few, both in treatises on first principles, as well as on decided cases. The wager of

are still of considerable importance, even in those states where the form of action has been abolished, the statutory actions being to a considerable extent governed by the same fundamental principles as was the common-law action.[3]

II. NATURE AND SCOPE OF REMEDY.

A. Nature and Basis. There has been some doubt as to whether detinue is founded on tort or on contract;[4] but however this may be, it is well settled that detinue is a personal action,[5] the gist of which is the wrongful detention of personal property, regardless of the manner in which defendant acquired the possession of such property.[6]

law to which this action was subject, as well as the defects in its final process, in the completion and perfection of the object for which it seems to have been framed, together with the transitory nature of personal property, upon which alone it could operate, appear among the leading causes that have thrown this action into disuse in the country where it had its origin, and to which we are to look for the principles upon which it was founded." Jennings *v.* Gibson, Walk. (Miss.) 234, 238.

3. The Alabama statutory action for the recovery of property in specie (Code (1876), §§ 2942–2947) corresponds with the common-law action of detinue, and lies only when that action could have been maintained, and is governed by the same rules, except as otherwise provided by statute, which govern the common-law action. Rich *v.* Lowenthal, 99 Ala. 487, 13 So. 220; Johnson *v.* McLeod, 80 Ala. 433, 2 So. 145; Cooper *v.* Watson, 73 Ala. 252; Harris *v.* Hillman, 26 Ala. 380. The purpose of Md. Acts (1856), c. 112, was to simplify the forms of pleading and practice, and while it classifies and provides forms for actions of contract and tort, yet the distinctive nature of actions still remains, although the old forms have been abolished and new ones adopted. Under this statute the action for the recovery of specific property and damages for the detention thereof is practically the same as the common-law action of detinue. Stirling *v.* Garritee, 18 Md. 468. "Although we do not acknowledge the common-law forms of action, yet, when property is sued for, the principles of law defining and governing that action [detinue] must be resorted to." O'Shea *v.* Twohig, 9 Tex. 336, 342.

4. Oliver *v.* McClellan, 21 Ala. 675 (where it was held that detinue, especially when founded on conversion and detention, is an action *ex delicto* seeking redress for a tort); Luke *v.* Marshall, 5 J. J. Marsh. (Ky.) 353 (where it was held that detinue resembles debt more than it does trespass); Whitfield *v.* Whitfield, 44 Miss. 254 (where it was held that detinue is now considered as being more in the nature of an action *ex delicto* than of an action *ex contractu*); Bryant *v.* Herbert, 3 C. P. D. 389, 47 L. J. C. P. 670, 39 L. T. Rep. N. S. 17, 26 Wkly. Rep. 898 (where detinue was held to be founded on tort).

Distinction between detinue ex contractu and detinue ex delicto.— The action of detinue was originally nothing but debt in the *detinet*, or detinue on a bailment. It is in such a form that a count in detinue may be joined with a money count for debt; and it is in such form also that detinue is an action *ex contractu*. Detinue *ex delicto* is of a more modern origin, although now it is the more common form of action. The form of action, however, is immaterial, the modern form *ex delicto* being applicable both to a tortious detention and a detention constituting a breach of contract. Rucker *v.* Hamilton, 3 Dana (Ky.) 36. See also Jones *v.* Littlefield, 3 Yerg. (Tenn.) 133. Notwithstanding the artificial words in a declaration of detinue, if the action be grounded on a tortious seizure by defendant of the property mentioned, it will not be held contrary to the fact in an action on contract. Elgee *v.* Lovell, 8 Fed. Cas. No. 4,344, Woolw. 102.

5. Crossfield *v.* Such, 8 Exch. 159, 22 L. J. Exch. 65, 1 Wkly. Rep. 82. In Lucas *v.* Elliott, 9 Can. L. J. 147, it was held that detinue is a personal action within U. C. Cons. St. c. 19, § 55, and that therefore the division courts of Upper Canada have jurisdiction thereof.

6. *Alabama.*— Jesse French Piano, etc., Co. *v.* Bradley, 138 Ala. 177, 35 So. 44; Berlin Mach. Works *v.* Alabama City Furniture Co., 112 Ala. 488, 20 So. 418; Henderson *v.* Felts, 58 Ala. 590; Fenner *v.* Kirkman, 26 Ala. 650; Oliver *v.* McClellan, 21 Ala. 675; Peirce *v.* Hill, 9 Port. 151, 33 Am. Dec. 306.

Arkansas.— Danley *v.* Edwards, 1 Ark. 437.

Kentucky.— Gentry *v.* McKehen, 5 Dana 34; Owings *v.* Frier, 2 A. K. Marsh. 268, 12 Am. Dec. 393; Mansell *v.* Israel, 3 Bibb 510.

Mississippi.— Whitfield *v.* Whitfield, 44 Miss. 254.

Missouri.— Schulenberg *v.* Campbell, 14 Mo. 491; Melton *v.* McDonald, 2 Mo. 45, 22 Am. Dec. 437; Overfield *v.* Bullitt, 1 Mo. 749.

New Hampshire.— See Dame *v.* Dame, 43 N. H. 37, where it was held that detinue will lie to recover personal property in specie, where the property rightfully came into defendant's possession. *Quære*, whether it might be maintained regardless of the manner in which defendant acquired possession.

North Carolina.— Johnston *v.* Pasteur, 3 N. C. 187, 1 N. C. 582.

United States.— Bernard *v.* Herbert, 3 Fed. Cas. No. 1,347, 3 Cranch C. C. 346.

England.— Whitehead *v.* Harrison, 6 Q. B.

B. Property Recoverable. The action of detinue has been held to lie, and to lie only, for the recovery of personal property,[7] which has

423, 2 D. & L. 122, 8 Jur. 894, 13 L. J. Q. B. 312, 51 E. C. L. 423; Mills *v.* Graham, 1 B. & P. N. R. 140, 8 Rev. Rep. 767; Gledstane *v.* Hewitt, 1 Cromp. & J. 565, 9 L. J. Exch. O. S. 145, 1 Tyrw. 445; Clements *v.* Flight, 4 D. & L. 261, 16 L. J. Exch. 11, 16 M. & W. 42; Kettle *v.* Bromsall, Willes 118.

See 16 Cent. Dig. tit. "Detinue," §§ 4, 10, 11.

Effect of original tortious taking by defendant see *infra*, IV, C, 2.

One of the effects of the doctrine that the gist of the action is the wrongful detainer is that where two parties take the property of another and divide it between them, the owner has not a joint cause of action against both of such parties, but has a separate cause of action against each of them. Slade *v.* Washburn, 24 N. C. 414. But see *infra*, IV, C, 2.

Consent to detention by defendant is fatal to the owner's cause of action, the gist of detinue being wrongful detention. Benje *v.* Creagh, 21 Ala. 151. As to what does not constitute consent to detention see Peruvian Guano Co. *v.* Dreyfus, [1892] A. C. 166, 7 Aspin. 225, 61 L. J. Ch. 749, 66 L. T. Rep. N. S. 536; Williams *v.* Peel River Land, etc., Co., 55 L. T. Rep. N. S. 689, both cases holding that a consent order allowing defendant to retain possession of the property, without prejudice, however, to any question between the parties, and defendant to keep proper accounts and to abide by the order of the court, was not such a consent as would render such detention lawful. Neither of these cases, however, was in detinue proper, but both were for injunction and damages.

Detention of note after payment.— Where one of several joint makers of a promissory note is sued by the payee, and thereupon pays the money into court, the failure of the payee to deliver the note to defendant forthwith, and before the lapse of a reasonable time for obtaining the money from the court, does not constitute such a detention as will render the payee liable in detinue. Norton *v.* Blackie, 13 Wkly. Rep. 80.

Where property is "lodged" with another, who undertakes to redeliver the same on request, a wrongful detention by such party renders him liable in detinue, the term "lodged" indicating that the contract was a bailment, and that the identical property was to be returned. Archer *v.* Williams, 2 C. & K. 26, 61 E. C. L. 26.

Detinue and other actions distinguished.— Detinue, replevin, and trover. Dame *v.* Dame, 43 N. H. 37. Detinue, trover, and trespass. Luke *v.* Marshall, 5 J. J. Marsh. (Ky.) 353. Detinue and trover. O'Shea *v.* Twohig, 9 Tex. 336. One who receives goods as a warehouseman from one who obtained them by the commission of a trespass, and on demand refuses to deliver them to the owner, is not liable to be sued in trespass. Trover or detinue is the appropriate action. Prince *v.* Puckett, 12 Ala. 832. There is a strong resemblance between trespass, trover, and detinue, but not an identity. Trespass and trover are founded on a single act, which is indivisible; detinue on the detention of the property, in whatever way it may have come into the possession of defendant. Traun *v.* Wittick, 27 Ala. 570; Wittick *v.* Traun, 27 Ala. 562, 62 Am. Dec. 778.

Detinue not an action on contract within statute relating to venue.— Under Ala. Code, § 2640, providing that all personal actions other than actions on contract may be brought in the county of defendant's residence or in any county in which the act or omission complained of was done or occurred, an action of detinue may be brought in any county where the property sued for is found in the hands of defendant, regardless of whether such county be also defendant's residence. Rand *v.* Gibson, 109 Ala. 266, 19 So. 533.

Bill in equity to recover specific property. —Where the value of property which is wrongfully detained cannot be estimated by damages, a court of equity may order the restoration of the specific property. North *v.* Great Northern R. Co., 2 Giff. 64, 6 Jur. N. S. 244, 29 L. J. Ch. 301, 1 L. T. Rep. N. S. 510; Gibson *v.* Ingo, 6 Hare 112, 31 Eng. Ch. 112; Dowling *v.* Betjemann, 2 Johns. & H. 544, 8 Jur. N. S. 538, 6 L. T. Rep. N. S. 512, 10 Wkly. Rep. 574; Somerset *v.* Cookson, 3 P. Wms. 390, 24 Eng. Reprint 1114; Macclesfield *v.* Davis, 3 Ves. & B. 16, 35 Eng. Reprint 385; Lowther *v.* Lowther, 13 Ves. Jr. 95, 33 Eng. Reprint 230; Nutbrown *v.* Thornton, 10 Ves. Jr. 160, 32 Eng. Reprint 805; Lloyd *v.* Loaring, 6 Ves. Jr. 773, 31 Eng. Reprint 1302; Fells *v.* Read, 3 Ves. Jr. 70, 30 Eng. Reprint 899. The jurisdiction of equity to decree restoration of specific chattels extends also to any case where the possession has been acquired through an alleged breach of the fiduciary relations. Wood *v.* Rowcliffe, 6 Hare 187, 11 Jur. 915, 17 L. J. Ch. 83, 2 Phil. 382, 31 Eng. Ch. 183. See, generally, EQUITY.

7. Cooper *v.* Watson, 73 Ala. 252.

Deeds and other writings.— Detinue lies to recover a deed. Lewis *v.* Hoover, 1 J. J. Marsh. (Ky.) 500, 19 Am. Dec. 120; Goodman *v.* Boycott, 2 B. & S. 1, 8 Jur. N. S. 763, 31 L. J. Q. B. 69, 6 L. T. Rep. N. S. 25, 110 E. C. L. 1. See also Stoker *v.* Yerby, 11 Ala. 322; Reeve *v.* Palmer, 5 C. B. N. S. 84, 5 Jur. N. S. 916, 28 L. J. C. P. 168, 7 Wkly. Rep. 325, 94 E. C. L. 84. It lies to recover a lease. See Chilton *v.* Carrington, 15 C. B. 95, 3 C. L. R. 138, 1 Jur. N. S. 89, 24 L. J. C. P. 10, 3 Wkly. Rep. 17, 80 E. C. L. 95. It lies to recover a note or any other evidence of debt. Lewis *v.* Hoover, 1 J. J. Marsh. (Ky.) 500, 19 Am. Dec. 120. It lies to recover an abstract of title. Robb *v.* Cherry, 98 Tenn. 72, 38 S. W. 412. It lies to recover any muniment of title. Lewis

some value,[8] and is capable of being identified so as to be recoverable in specie.[9]

III. RIGHT TO MAINTAIN DETINUE.

A. In General. Plaintiff in detinue must, in order to maintain the action, have such a legal interest in the property sought to be recovered as entitles him to the immediate possession thereof.[10]

B. As Dependent Upon Interest in Property — 1. In General. The interest of a party in personal property essential to the maintenance of an action of detinue by him for the recovery thereof may be either general[11] or special;

v. Hoover, 1 J. J. Marsh. (Ky.) 500, 19 Am. Dec. 120. It lies to recover a patent to land. See Cummings *v.* Tindall, 4 Stew. & P. (Ala.) 357. It lies to recover legal papers. See Anderson *v.* Passman, 7 C. & P. 193, 32 E. C. L. 568. It lies to recover a letter. See Oliver *v.* Oliver, 11 C. B. N. S. 139, 8 Jur. N. S. 512, 31 L. J. C. P. 4, 5 L. T. Rep. N. S. 287, 10 Wkly. Rep. 18, 103 E. C. L. 139. It lies to recover a bank check. See Brown *v.* Livingstone, 21 U. C. Q. B. 438.

Things severed from realty become personal chattels and belong to the owner of the land, who is entitled to maintain detinue for them, unless defendant is in possession of the land from which they were severed, holding it adversely to plaintiff and disputing his title. Adler *v.* Prestwood, 122 Ala. 367, 24 So. 999; Leatherwood *v.* Sullivan, 81 Ala. 458, 1 So. 718; Street *v.* Nelson, 80 Ala. 230; Cooper *v.* Watson, 73 Ala. 252; Carpenter *v.* Lewis, 6 Ala. 682. But where an attachment is levied on fixtures and they are sold as personalty, the purchaser cannot maintain detinue to recover them. McFadden *v.* Crawford, 36 W. Va. 671, 15 S. E. 408, 32 Am. St. Rep. 894.

Slaves that had been freed were not recoverable in detinue, since they were not subject to ownership. Bush *v.* White, 3 T. B. Mon. (Ky.) 100.

8. Whitfield *v.* Whitfield, 44 Miss. 254.

A note after payment by the maker to the person entitled to receive payment, a receipt being given to the maker, has no such value to the maker as will sustain an action of detinue by him therefor. Todd *v.* Crookshanks, 3 Johns. (N. Y.) 432.

9. Cooper *v.* Watson, 73 Ala. 252; Wright *v.* Ross, 2 Greene (Iowa) 266; Whitfield *v.* Whitfield, 44 Miss. 254.

Where property has been exchanged with the owners' consent, the property received in exchange may be recovered in detinue by the owner of the property given in exchange. McGinnis *v.* Savage, 29 W. Va. 362, 1 S. E. 746.

Money may be recovered in detinue where it is in such shape as to be capable of identification. Spence *v.* McMillan, 10 Ala. 583; Morgan *v.* Lewis, 7 B. Mon. (Ky.) 243; 5 Comyns Dig. 379, tit. "Detinue," B, C; Buller N. P. 50. But detinue does not lie to recover money under a general allegation that defendant owes it to plaintiff and unjustly detains it from him. Brown *v.* Ellison, 55 N. H. 556.

10. *Alabama.*— Jesse French Piano, etc., Co. *v.* Bradley, 138 Ala. 177, 35 So. 44; Bolton *v.* Cuthbert, 132 Ala. 403, 31 So. 358; Graham *v.* Myers, 74 Ala. 432; Russell *v.* Walker, 73 Ala. 315; Seals *v.* Edmondson, 73 Ala. 295, 49 Am. Rep. 51; Cooper *v.* Watson, 73 Ala. 252; Foster *v.* Chamberlain, 41 Ala. 158; Humphries *v.* Dawson, 38 Ala. 199; Reese *v.* Harris, 27 Ala. 301; Parsons *v.* Boyd, 20 Ala. 112; Traylor *v.* Marshall, 11 Ala. 458.

Kentucky.— Miller *v.* Phillips, etc., Co., 44 S. W. 430, 19 Ky. L. Rep. 1805.

Mississippi.— Whitfield *v.* Whitfield, 44 Miss. 254.

Missouri.— Ramsay *v.* Barcroft, 2 Mo. 151; Melton *v.* McDonald, 2 Mo. 45, 22 Am. Dec. 437.

Nebraska.— Grand Island Banking Co. *v.* Grand Island First Nat. Bank, 34 Nebr. 93, 51 N. W. 596.

North Carolina.— O'Neal *v.* Baker, 47 N. C. 168; Huntly *v.* Ratliff, 27 N. C. 542.

Tennessee.— Robb *v.* Cherry, 98 Tenn. 72, 38 S. W. 412.

West Virginia.— Robinson *v.* Woodford, 37 W. Va. 377, 16 S. E. 602; Burn *v.* Morrison, 36 W. Va. 423, 15 S. E. 62.

See 16 Cent. Dig. tit. "Detinue," § 5.

Loss of interest and right of possession pending action is fatal to plaintiff's right to recover the property. He must have a legal interest and the right of possession at the time of the trial. Whitfield *v.* Whitfield, 44 Miss. 254; Sheppard *v.* Edwards, 3 N. C. 186. See also Cole *v.* Conolly, 16 Ala. 271. But see Rotten *v.* Collier, 105 Ala. 581, 16 So. 921, where it was held that the fact that plaintiff has sold the property, after having obtained it by giving bond, does not deprive him of the right to maintain the action, and any recovery which he may make will inure to the benefit of his vendee.

A married man could at common law maintain detinue to recover his wife's personal property from a third person without joining his wife. Gibson *v.* Land, 27 Ala. 117.

A married woman may bring an action of detinue to recover her separate personal property, and join her husband as co-plaintiff. Robinson *v.* Woodford, 37 W. Va. 377, 16 S. E. 602.

11. *Alabama.*— Bolton *v.* Cuthbert, 132 Ala. 403, 31 So. 358; Russell *v.* Walker, 73 Ala. 315; Cooper *v.* Watson, 73 Ala. 252; Reese *v.* Harris, 27 Ala. 301.

Mississippi.— Whitfield *v.* Whitfield, 44 Miss. 254.

plaintiff must have the absolute property with the right to immediate possession or a special property, as in the case of a bailee..[12]

2. Legal Title — a. In General. The legal title to personal property usually carries with it the right to the possession of the property, and hence is sufficient to sustain detinue for the recovery thereof,[13] unless someone else has a special

Missouri.— Ramsay *v.* Barcroft, 2 Mo. 151.

Tennessee.— Robb *v.* Cherry, 98 Tenn. 72, 38 S. W. 412.

West Virginia.— Robinson *v.* Woodford, 37 W. Va. 377, 16 S. E. 602.

See 16 Cent. Dig. tit. "Detinue," § 5.

12. *Alabama.*— Bolton *v.* Cuthbert, 132 Ala. 403, 31 So. 358; Russell *v.* Walker, 73 Ala. 315; Cooper *v.* Watson, 73 Ala. 252; Noles *v.* Marable, 50 Ala. 366; Reese *v.* Harris, 27 Ala. 301; Traylor *v.* Marshall, 11 Ala. 458; Stoker *v.* Yerby, 11 Ala. 322.

Kentucky.— Glascock *v.* Hays, 4 Dana 58.

Mississippi.— Whitfield *v.* Whitfield, 44 Miss. 254.

Missouri.— Schulenberg *v.* Campbell, 14 Mo. 491; Ramsay *v.* Barcroft, 2 Mo. 151.

North Carolina.— Wade *v.* Edwards, 1 N. C. 546.

Tennessee.— Robb *v.* Cherry, 98 Tenn. 72, 38 S. W. 412.

West Virginia.— Robinson *v.* Woodford, 37 W. Va. 377, 16 S. E. 602.

England.— Nyberg *v.* Handelaar, [1892] 2 Q. B. 202, 56 J. P. 694, 61 L. J. Q. B. 709, 67 L. T. Rep. N. S. 361, 40 Wkly. Rep. 545.

See 16 Cent. Dig. tit. "Detinue," § 5.

An agent may sue his principal in detinue where the principal obtains from the agent documents in a cause which are in the custody of the court and which have been intrusted by the court to the agent on the condition that he would return them. Craig *v.* Shedden, 1 F. & F. 553.

A trespasser on land cannot, by taking actual possession thereof and planting crops thereon, acquire such a title to the crops as will sustain an action of detinue by him against the owner of the land, if the latter in the course of husbandry harvest and remove such crops. Stewart *v.* Tucker, 106 Ala. 319, 17 So. 385.

An incoming officer has no such interest in the property pertaining to his office as will sustain an action by him against his predecessor for the recovery of such property. Sinclair *v.* Young, 100 Va. 284, 40 S. E. 907. See Mandamus.

A bailee has a sufficient interest in the property constituting the subject of the bailment to sustain an action of detinue for the recovery of such property. Noles *v.* Marable, 50 Ala. 366; Traylor *v.* Marshall, 11 Ala. 458; Stoker *v.* Yerby, 11 Ala. 322; Boyle *v.* Townes, 9 Leigh (Va.) 158. But see Fowler *v.* Norman, 1 Humphr. (Tenn.) 384, holding that where slaves that had been committed to a jailer as runaways made their escape before the lapse of the twelve months necessary to give him a lien on them, he could not sustain detinue for their recovery from one who had obtained possession of them.

One holding property under order of court has a sufficient special interest therein to maintain detinue therefor. Wade *v.* Edwards, 1 N. C. 549.

A levy by a sheriff on a fixture which cannot be removed without injury to the premises is not such a severance from the realty as will give him a special property in it, such as will support an action of detinue for its possession. Pemberton *v.* King, 13 N. C. 376.

13. Moore *v.* Parks, 61 Ala. 409. See also *infra*, III, C, 1.

A conditional vendor who has reserved title in himself until payment may maintain detinue for the property where such contract is void by reason of the vendor's failure to comply with a state statute authorizing him to do business in the state; the reason being that any one having a legal title may maintain detinue unless someone else has a superior right of possession, and the contract of sale being void, defendant cannot claim right of possession thereunder. Boulden *v.* Estey Organ Co., 92 Ala. 182, 9 So. 283. A conditional vendor may likewise maintain detinue against the vendee as soon as any of the conditions of the sale are violated. McGinnis *v.* Savage, 29 W. Va. 362, 1 S. E. 746.

A wrongful levy of an attachment does not divest the owner of the property levied on of his title thereto, and he may recover such property in detinue against the officer. Owings *v.* Frier, 2 A. K. Marsh. (Ky.) 268, 12 Am. Dec. 393.

The owner of land on which personalty is found may maintain detinue against the finder for the recovery of such property. South Staffordshire Water Co. *v.* Sharman, [1896] 2 Q. B. 44, 65 L. J. Q. B. 460, 74 L. T. Rep. N. S. 761, 44 Wkly. Rep. 656.

The recipient of a letter acquires a sufficient property therein to sustain an action of detinue against the writer, where the latter regains possession of such letter, even though such possession be regained by lawful means. Oliver *v.* Oliver, 11 C. B. N. S. 139, 8 Jur. N. S. 512, 31 L. J. C. P. 4, 5 L. T. Rep. N. S. 287, 10 Wkly. Rep. 18, 103 E. C. L. 139.

The right to the possession of muniments of title usually follows the title to the property. Cummings *v.* Tindall, 4 Stew. & P. (Ala.) 357; Towle *v.* Lovet, 6 Mass. 394; Robb *v.* Cherry, 98 Tenn. 72, 38 S. W. 412 (holding that where a mortgagor furnished the mortgagee with an abstract of title to the property, and thereafter, having purchased a portion of the property at the mortgage sale, but the mortgagee having purchased the greater portion, borrowed the abstract from the mortgagee, the latter could

interest entitling him to possession.[14] Since the right of possession may arise from a special interest in the property,[15] it follows that the legal title is not always essential to the maintenance of detinue; but where plaintiff has no such special interest he must have the legal title.[16]

maintain detinue therefor); Hall *v.* White, 3 C. & P. 136, 14 E. C. L. 490.

An executory contract of sale, reserving legal title in the seller, does not pass the title of the property to the buyer, although the property be delivered to the buyer, and hence the seller may recover such property in detinue against the buyer or any one claiming under him. Love *v.* Crook, 27 Ala. 624. See also Ervine *v.* Dotton, 6 Munf. (Va.) 231.

Property taken from thief.—Where one arrested for theft of goods other than money turned over to the sheriff a bag of money, admitting that it belonged to a certain person, and consenting to the delivery thereof to him, it was held that such person had a sufficient title to maintain detinue against the sheriff who had no better title. Spence *v.* McMillan, 10 Ala. 583.

Bailor.— Where the hirer of a slave is deprived of his possession during the term by a third person, and thereupon notifies the party of whom he hired and requests said party to sue for the slave in his stead, the latter may maintain detinue against such third person, even before the expiration of the term of the bailment. Sims *v.* Boynton, 32 Ala. 353, 70 Am. Dec. 540.

An heir may maintain detinue for the recovery of muniments of title to real estate which has descended to him. Cummings *v.* Tindall, 4 Stew. & P. (Ala.) 357; Towle *v.* Lovet, 6 Mass. 394. See also Hall *v.* White, 3 C. & P. 136, 14 E. C. L. 490.

A remainder-man may maintain detinue for the property after the termination of the particular estate therein. Miles *v.* Allen, 28 N. C. 88.

A reversioner may maintain detinue after the termination of the particular estate, but must show a valid title in the grantor of the reversion. Dunn *v.* Choate, 4 Tex. 14.

Things severed from realty.— In Leatherwood *v.* Sullivan, 81 Ala. 458, 1 So. 718, it was held that where the executors fail to sue in detinue for timber cut from wild and uncultivated lands belonging to the estate, the heirs or devisees might maintain the action.

One who had lost property in gambling might, under Ky. Acts (1833), § 20, recover it in an action of detinue. Morgan *v.* Lewis, 7 B. Mon. (Ky.) 243.

Where a sale has been induced by fraud, the seller may sue the purchaser in detinue; but if the property has passed to an innocent purchaser for value without notice, the first seller cannot recover it in detinue unless the first sale was absolutely void *ab initio*. Mansell *v.* Israel, 3 Bibb (Ky.) 510.

Where one surrenders property under mistake of fact, he may recover it in detinue from the person to whom it was so surrendered. Goff *v.* Golt, 5 Sneed (Tenn.) 562.

14. Boulden *v.* Estey Organ Co., 92 Ala. 182, 9 So. 283. See also Craig *v.* Shedden, 1 F. & F. 553.

A life-estate in personal property, derived under a trust whereby the trustee holds the legal title for the benefit of remainder-men, subject to the right of use and enjoyment by the life-tenants, is sufficient to deprive the trustee of the right to immediate possession of the property, and hence he cannot, in the lifetime of the life-tenants at least, maintain detinue against a purchaser from the life-tenants. Humphries *v.* Dawson, 38 Ala. 199.

15. See *supra*, III, B, 1; *infra*, III, C, 2.

16. Greene *v.* Lewis, 85 Ala. 221, 4 So. 740, 7 Am. St. Rep. 42; Jackson *v.* Rutherford, 73 Ala. 155; Huntley *v.* Ratliff, 27 N. C. 542; Burns *v.* Morrison, 36 W. Va. 423, 15 S. E. 62.

Where plaintiff has not had possession he must have legal title. Russell *v.* Walker, 73 Ala. 315; Foster *v.* Chamberlain, 41 Ala. 158; Reese *v.* Harris, 27 Ala. 301; Parsons *v.* Boyd, 20 Ala. 112; Peck *v.* Webber, 7 How. (Miss.) 658.

Title in third party see *infra*, III, B, 2, e.

Adverse possession see *infra*, III, B, 2, d.

Equitable interest see *infra*, III, B, 4.

A joint interest acquired by a third person pending action will defeat the action, as where plaintiff sued in detinue for a slave, under a right derived from one who had a life-interest in it, and pending the suit such person died, and plaintiff and defendant and others thereupon became joint owners of the slave, it was a good defense to the action. Whitfield *v.* Whitfield, 44 Miss. 254.

Where plaintiff acquires his coowner's interest before the action is brought, he may maintain detinue against the bailee of the latter. Freeman *v.* Speegle, 83 Ala. 191, 3 So. 620.

One having a joint interest in a deed cannot maintain detinue against any of the other parties in interest who may have possession of the deed. The title to the deed is ambulatory between those who may have an interest in, and may have occasion to use it, and each is entitled to keep the deed from the other so long only as he actually retains it in his custody. Foster *v.* Crabb, 12 C. B. 136, 16 Jur. 835, 21 L. J. C. P. 189, 74 E. C. L. 136.

Joint owners of grant of arms.— Where a party obtained a grant of arms for himself and the descendants of his brother, and thereafter died, bequeathing all his property to his wife, it was held that the descendants of the brother could not maintain detinue against the widow for the recovery of the

b. Persons Holding Legal Title For Special Purposes — (i) *MORTGAGEES*[17] *AND TRUSTEES.*[18] A chattel mortgagee may, after default on the part of the mortgagor, maintain detinue for the recovery of the mortgaged property.[19] As against a third person he may maintain the action even before conditions broken.[20] A trustee may maintain detinue to recover the trust property,[21] whether the property be conveyed to him as security for a debt,[22] or for the use of another.[23] After the debt has become due he may maintain the action even against the grantor.[24]

(ii) *EXECUTORS AND ADMINISTRATORS.*[25] An executor or administrator has a

grant of arms, such grant being a sort of family document in which every member of the family was interested, and whoever was in possession thereof being entitled to keep it. Stubs *v.* Stubs, 1 H. & C. 257, 31 L. J. Exch. 510.

Joint devisees cannot maintain detinue for the bequest after one of them dies, and before an administrator has been appointed for his estate. Miller *v.* Eatman, 11 Ala. 609. See also Bell *v.* Hogan, 1 Stew. (Ala.) 536.

In a petitory action, plaintiff must recover on the strength of his own title, and cannot recover on the weakness of that of his adversary. Brack *v.* Wood, 11 La. Ann. 512.

Sufficiency of evidence.— In Clem *v.* Wise, 133 Ala. 403, 31 So. 986, it was held that, it appearing that the mortgage under which plaintiff claimed had been lost, the minutes of the corporation of which plaintiff claimed to be the assignee showing a sale of the mortgage to plaintiff and authorizing him as president of such corporation to transfer the mortgage to himself, taken in connection with plaintiff's testimony that he made such transfer, although he had not entered it on the back of the mortgage until after suit was brought, was sufficient to carry to the jury the question as to whether plaintiff was the legal owner of the mortgage.

17. Mortgagees generally see CHATTEL MORTGAGES.

18. Trustees generally see TRUSTS.

19. Mervine *v.* White, 50 Ala. 388; Morrison *v.* Judge, 14 Ala. 182; Hopkins *v.* Thompson, 2 Port. (Ala.) 433; Spaulding *v.* Scanland, 4 B. Mon. (Ky.) 365.

The fact that the mortgage has been assigned as collateral security for a debt does not affect the mortgagee's right to maintain detinue, where the mortgage is in his hands when the action is brought. Rotten *v.* Collier, 105 Ala. 581, 16 So. 921.

An assignee of a chattel mortgage may maintain detinue in his own name against a third party who has taken the property out of the possession of the mortgagee. Clem *v.* Wise, 133 Ala. 403, 31 So. 986; Graham *v.* Newman, 21 Ala. 497.

Mortgagee of crops.— A mortgagee of a growing crop may maintain detinue therefor; and the crop will be considered as growing from the time the seeds are in the ground. Wilkinson *v.* Ketler, 69 Ala. 435. A mortgagee of unplanted crops cannot maintain the action until after the crops have been delivered or some other act in confirmation of the mortgage has been done after the crops have come into existence. See *infra*, III, B, 4.

Sufficiency of evidence of title under mortgage.— In Buffkin *v.* Eason, 110 N. C. 264, 14 S. E. 749, it was held that the lower court erred in instructing the jury, in an action to recover possession of a lot of corn, to find that plaintiff was entitled to possession of the same under a certain chattel mortgage, and that the property was unlawfully detained, although the mortgage was put in evidence, and the subscribing witness testified to its execution, when defendant testified to facts inconsistent with it and its provisions, did not admit its execution and denied that possession of the corn had been demanded.

20. A stipulation allowing the mortgagor to retain possession being personal to the mortgagor and not assignable, the mortgagee may notwithstanding such a condition maintain detinue before conditions broken to recover the mortgaged property from a third person. Levi *v.* Legg, 23 S. C. 282.

21. Chambers *v.* Mandlin, 4 Ala. 477; Baker *v.* Washington, 5 Stew. & P. (Ala.) 142; Hundley *v.* Calloway, 45 W. Va. 516, 31 S. E. 937.

22. Brock *v.* Headen, 13 Ala. 370.

Evidence.— Where a trustee, to whom a slave has been conveyed as a security for a debt, institutes an action of detinue against a person not a party to the deed, for the recovery of such slave, the recital in the deed of trust and the production of the note to secure which the negro was conveyed, will be *prima facie* evidence of the *bona fides* of the debt thus secured. Hundley *v.* Buckner, 6 Sm. & M. (Miss.) 70.

23. O'Neill *v.* Henderson, 15 Ark. 235, 60 Am. Dec. 568; Hundley *v.* Buckner, 6 Sm. & M. (Miss.) 70. See also Crenshaw *v.* Anthony, Mart. & Y. (Tenn.) 102.

24. After the law day and before the extinguishment of the demand secured, the trustee may recover in detinue the property conveyed by the deed from the grantor or parties claiming under him, without being required to account for such property as he may have sold or disposed of. If defendant alleges a satisfaction of the deed by sales of other property or otherwise he must prove it. Brock *v.* Headen, 13 Ala. 370.

25. Executors and administrators generally see EXECUTORS AND ADMINISTRATORS.

sufficient special property in the personalty belonging to the estate to maintain detinue for the recovery thereof.[26] Where he has had actual possession of the property, he may maintain the action in his individual right.[27] And he must sue in his own name where the detention complained of is after the death of his testator or intestate;[28] but where he has never had actual possession, he must rely on his right to the property in his representative capacity.[29]

c. Estoppel.[30] Plaintiff in detinue may be estopped by his previous conduct to assert title to the property.[31] Likewise defendant may be estopped to deny plaintiff's title.[32]

26. Wade *v.* Edwards, 1 N. C. 549. See also Green *v.* Kornegay, 49 N. C. 66, 67 Am. Dec. 261.

Detinue for muniments of title.— Although the heir is entitled to the possession of muniments of title to real estate which has descended to him, and may, in the absence of statutory provision to the contrary, sue the executor or administrator therefor, the executor or administrator may sue a stranger for muniments of title, especially where there is a statute making the decedent's real estate liable, in the event of a deficiency of personal property, to pay debts. Cummings *v.* Tindall, 4 Stew. & P. (Ala.) 357; Towle *v.* Lovet, 6 Mass. 394. See also Hall *v.* White, 3 C. & P. 136, 14 E. C. L. 490.

Detinue for slaves could be maintained by an executor, although slaves were made realty by statute, there being also a statute making them liable for the testator's debts. Cox *v.* Robertson, 1 Bibb (Ky.) 604.

Things severed from realty.— In Leatherwood *v.* Sullivan, 81 Ala. 458, 1 So. 718, it was held that an executor may maintain detinue for timber cut from wild and uncultivated lands.

Where an administrator lends property to another, in violation of his duty as administrator, he cannot on account of such violation sue the lender in detinue. Lawson *v.* Lay, 24 Ala. 184.

Where one of several joint owners dies before action in detinue for the detention of the joint property, it seems that his administrators may be joined with the survivors; but where one of the owners dies pending action, there should not be a revival of the action as to the decedent, but the action should proceed in the name of the survivors. Rose *v.* Burgess, 10 Leigh (Va.) 186.

27. Ikelheimer *v.* Chapman, 32 Ala. 676; Cox *v.* McKinney, 32 Ala. 461; Sims *v.* Boynton, 32 Ala. 353, 70 Am. Dec. 540; Walker *v.* Lauderdale, 17 Ala. 359; Thomas *v.* Tanner, 6 T. B. Mon. (Ky.) 52.

28. Melton *v.* McDonald, 2 Mo. 45, 22 Am. Dec. 437.

29. Ikelheimer *v.* Chapman, 32 Ala. 676; Cox *v.* McKinney, 32 Ala. 461.

Proof of fiduciary capacity is not necessary unless it is denied by a plea. Willis *v.* Willis, 6 Dana (Ky.) 48.

30. Estoppel generally see ESTOPPEL.

31. Where an owner of personal property holds out another as authorized to pledge such property, the owner is estopped to maintain detinue against the pledgor and pledgee. Garth *v.* Howard, 5 C. & P. 346, 24 E. C. L. 599. A plaintiff in detinue is estopped from recovery by an executory agreement to release the property sued for. Franklin *v.* Hart, 7 J. J. Marsh. (Ky.) 338.

Plaintiff held not estopped.— Huth & Co. employed Thompson to convey by boat certain ore to Lewis, Lewis assuming the risk of transportation. The boat sunk and Thompson asked Huth & Co. whether he should raise the ore, and was told to go to see Lewis about the matter. Thompson asked Lewis about it and Lewis told him that he was insured with Langton and that he, Thompson, should go to see Langton. Langton told Thompson to raise the ore. It was held that Huth & Co. were not estopped to maintain detinue for the ore as the owners thereof, there being nothing to show that either Huth & Co. or Lewis told Thompson that Langton was the owner, or that if Lewis did make such statement he had any authority so to do. Castellain *v.* Thompson, 13 C. B. N. S. 105, 32 L. J. C. P. 79, 7 L. T. Rep. N. S. 424, 11 Wkly. Rep. 147, 106 E. C. L. 105.

32. Where one who has possession of property disclaims the title thereto and holds it out as belonging to the estate of another, he is estopped, in an action by the administrator of such estate, to deny plaintiff's title and right of possession. Miller *v.* Jones, 26 Ala. 247.

Mere silence upon which no action has been predicated, no liability incurred, and from which no loss has been sustained, will estop defendant from denying plaintiff's title. Traun *v.* Keiffer, 31 Ala. 136.

The surrender of the property to the sheriff and the payment to him in money of the assessed value of other property, in obedience to an execution issued upon a judgment in detinue, which judgment is thereafter reversed, is no admission or acknowledgment of plaintiff's title. Traun *v.* Keiffer, 31 Ala. 136.

In detinue by mortgagee against mortgagor.— Under Acts (1882–1883), p. 31, providing that in suits where plaintiff's title is derived from a mortgage, defendant may put in issue the amount due thereon, and that should the verdict be for plaintiff then on payment of such amount and costs defendant may retain the property, a suggestion by defendant that plaintiffs derive title from a mortgage admits that plaintiffs have title, unless it has been divested by payment of the debt, leaving as the only issue what amount, if any, is due on such debt. Thompson *v.* Greene, 85 Ala. 240, 4 So. 735.

d. Adverse Possession by Defendant. Since adverse possession of personal property for the period prescribed by the statute of limitations as a bar to an action to recover personal property operates as a transfer of the title to the property, it is manifest that where defendant in detinue has had such possession for such period, plaintiff cannot maintain his action unless he relies on some special possessory interest superior to the right of possession incident to the ownership of legal title.[33]

e. Title in Third Party. It has been held that defendant in detinue may always defeat the action by showing that the title to the property is outstanding in a third person.[34] This doctrine seems to follow necessarily from the doctrine already noted, as to when plaintiff must rely on the legal title to the property;[35] but since prior possession alone is sufficient to give plaintiff a possessory interest sufficient to sustain the action as against any one not having a superior interest or right,[36] the doctrine above stated is too broad. The better rule seems to be that where plaintiff, never having had the possession of the property, relies solely on the legal title thereto as giving him the right of present possession, defendant may show that the legal title is outstanding in a third person, and this without connecting himself with such title;[37] but where plaintiff has had prior possession of the property, defendant cannot show title in a third person without connecting himself therewith.[38]

Where defendant claims under the same person under whom plaintiff claims title and sets up no other title, he is thereby estopped from asserting a paramount outstanding title in a third person with which he is in no way connected. Gardner *v.* Boothe, 31 Ala. 186.

33. See *infra*, IV, B, 1, b.

34. "Were this not the true doctrine of the law, that rule would be false which vests the property in the defendant on payment of the assessed damages; for no better title than that which the plaintiff had could be transferred to the defendant by operation of law; and the plaintiff having no title, the defendant could, by paying the damages, acquire none; and therefore, were there no other reason, he may defeat the plaintiff's action, by proving that he has no right." Tanner *v.* Allison, 3 Dana (Ky.) 422, 424. See also Robb *v.* Cherry, 98 Tenn. 72, 38 S. W. 412; Clossman *v.* White, 7 C. B. 43, 6 D. & L. 563, 18 L. J. C. P. 151, 62 E. C. L. 43.

35. See *supra*, III, B, 2, a.

36. See *infra*, III, C, 2.

37. McIntosh *v.* Parker, 82 Ala. 238, 3 So. 19; Foster *v.* Chamberlain, 41 Ala. 158; Gardner *v.* Booth, 31 Ala. 186; Miller *v.* Jones, 26 Ala. 247; McCurry *v.* Hooper, 12 Ala. 823, 46 Am. Dec. 280; Dozier *v.* Joyce, 8 Port. (Ala.) 303.

Where defendant acquired possession as administrator, and the action was against him in person, it was held that he might defend by showing title in the estate. Gamble *v.* Gamble, 11 Ala. 966.

Estoppel.—A distributee of an estate holding possession of property for the estate is estopped to deny the right of possession to be in the estate, and a purchaser at an execution sale against such person is likewise estopped, as against the administrator of the estate, from setting up title in a third person, without connecting himself therewith. Miller *v.* Jones, 26 Ala. 247.

Fraud in plaintiff's title is not available by defendant, unless he have a sufficient connection with such fraud as will entitle him to complain thereof. McGuire *v.* Shelby, 20 Ala. 456; Dunklin *v.* Wilkins, 5 Ala. 199.

38. Behr *v.* Gerson, 95 Ala. 438, 11 So. 115; Gafford *v.* Stearns, 51 Ala. 434; Hall *v.* Chapman, 35 Ala. 553; Sims *v.* Boynton, 32 Ala. 353, 70 Am. Dec. 540; Miller *v.* Jones, 26 Ala. 247; Dozier *v.* Joyce, 8 Port. (Ala.) 303; Whitfield *v.* Whitfield, 44 Miss. 254; Horton *v.* Reynolds, 8 Tex. 284.

Sufficiency of connection with outstanding title.—A boarding-house keeper is sufficiently connected with the title to property belonging to his boarders, and situated in his house, to entitle him to set up such title in an action of detinue by an outsider against him for the recovery of such property. Behr *v.* Gerson, 95 Ala. 438, 11 So. 115. In detinue for a slave, by a surviving husband against one of his sons-in-law, it was held that defendant might set up an outstanding title in a trustee, to whom the slave was conveyed in trust for plaintiff's deceased wife for life, with remainder to her children. Lucas *v.* Daniels, 34 Ala. 188.

As between bailor and bailee the fact that the title to the property is in a third person is immaterial. Unless the bailee has a superior title under such third party, he must redeliver the goods to the bailor regardless of the question as to whom they belong. Saville *v.* Tancred, 3 Swanst. 141.

Possession of goods as trustee.—Where one is sued individually in detinue, he may defend by showing that he holds the goods as trustee in bankruptcy under the order of the federal court. Turrentine *v.* Blackwood, 125 Ala. 436, 28 So. 95, 82 Am. St. Rep. 254. It was further held in this case that it was not error to refuse to allow proof showing that at the time the trustee took possession plaintiff notified him that the property sued for be-

3. Joint Title or Interest. Whether the interest upon which plaintiff relies be the legal title or a special property or interest, his interest must be entire and exclusive, a joint interest being insufficient to enable him to maintain detinue without the joinder of the other parties in interest.[39] Where, however, one of several joint owners has a special property entitling him to the possession of the property, he may maintain detinue for the recovery thereof, notwithstanding the interest of his coöwners in the legal title.[40]

4. Equitable Interest. An equitable interest in personalty is not alone sufficient to sustain detinue for the recovery thereof.[41]

longed to him, plaintiff, and that it was his property at the time the bankrupt court ordered the trustee to take charge thereof.

Estoppel.— The fact that defendant acquired possession tortiously does not estop him from setting up title in a third person, provided he connect himself therewith. Lucas *v.* Daniels, 34 Ala. 188.

39. Thomason *v.* Silvey, 123 Ala. 694, 26 So. 644; Sloan *v.* Wilson, 117 Ala. 583, 23 So. 145; Vinson *v.* Ardis, 81 Ala. 271, 6 So. 879; Graham *v.* Myers, 74 Ala. 432; Frierson *v.* Frierson, 21 Ala. 549; Parsons *v.* Boyd, 20 Ala. 112; Price *v.* Talley, 18 Ala. 21; Carlyle *v.* Patterson, 3 Bibb (Ky.) 93. But see Morning Star *v.* Stratton, 121 Ala. 437, 25 So. 573, where plaintiff was allowed to recover a bicycle, although a third party owned the tires on such bicycle, defendant having no interest whatever in the machine. No recovery can be had in an action of detinue by several plaintiffs, where it appears that one of the plaintiffs has been divested of his interest before suit was brought. Lewis *v.* Night, 3 Litt. (Ky.) 223; Nyberg *v.* Handelaar, [1892] 2 Q. B. 202, 56 J. P. 694, 61 L. J. Q. B. 709, 67 L. T. Rep. N. S. 361, 40 Wkly. Rep. 545; Atwood *v.* Ernest, 13 C. B. 881, 1 C. L. R. 738, 17 Jur. 603, 22 L. J. C. P. 225, 1 Wkly. Rep. 436, 76 E. C. L. 881. See Joint Tenancy; Tenants in Common.

40. Joint owners may by special agreement invest one of them with a special possessory interest sufficient to sustain detinue. Pierce *v.* Jackson, 56 Ala. 599; Nyberg *v.* Handelaar, [1892] 2 Q. B. 202, 56 J. P. 694, 61 L. J. Q. B. 709, 67 L. T. Rep. N. S. 361, 40 Wkly. Rep. 545.

Action between joint owners.— Where one of two joint owners of a stallion, which was purchased under an agreement whereby each owner was to have control of him during alternate years, has kept him longer than the terms of the contract allow, the other owner may maintain an action of detinue to recover possession. Raybourne *v.* Shakers' Soc., 30 S. W. 622, 17 Ky. L. Rep. 143.

41. *Alabama.*— Wetzler *v.* Kelly, 83 Ala. 440, 3 So. 747; Alabama State Bank *v.* Barnes, 82 Ala. 607, 2 So. 349; Gluck *v.* Cox, 75 Ala. 310; Jackson *v.* Rutherford, 73 Ala. 155; Columbus Iron Works Co. *v.* Renfo, 71 Ala. 577; Wilkinson *v.* Ketler, 69 Ala. 435; Grant *v.* Steiner, 65 Ala. 499; Rees *v.* Coats, 65 Ala. 256.

Iowa.— Berry *v.* Berry, 31 Iowa 415.

Kentucky.— Martin *v.* Poague, 4 B. Mon. 524.

Mississippi.— Hundley *v.* Buckner, 6 Sm. & M. 70.

North Carolina.— Jones *v.* Strong, 28 N. C. 367.

Tennessee.— Smith *v.* Mabry, 6 Yerg. 313.

England.— Barton *v.* Gainer, 3 H. & N. 387, 4 Jur. N. S. 715, 27 L. J. Exch. 390, 6 Wkly. Rep. 624, which was an action by an executor to recover railway debentures, and defendant was allowed to defend on the ground that the testator had given her the debentures, although the gift was ineffectual under the railway act to transfer the beneficiary interest in such debentures. Where a son insured his life and delivered the policy and premium receipts to his mother with the intention that she should obtain the benefit of the insurance, his administrator could not maintain detinue against the mother for the insurance policy, although the gift thereof to her was insufficient to transfer to her the beneficial interest therein. Rummens *v.* Hare, 1 Ex. D. 169, 46 L. J. Exch. 30, 34 L. T. Rep. N. S. 407, 24 Wkly. Rep. 385 [*following* Barton *v.* Gainer, 3 H. & N. 387, 4 Jur. N. S. 715, 27 L. J. Exch. 390, 6 Wkly. Rep. 624].

See 16 Cent. Dig. tit. "Detinue," §§ 7, 8.

A cestui que trust cannot maintain detinue for a deed under which he claims against one to whom the trustee has delivered the deed to be kept for him. Foster *v.* Crabb, 12 C. B. 136, 16 Jur. 835, 21 L. J. C. P. 189, 74 E. C. L. 136. But see Robinson *v.* Brock, 1 Hen. & M. (Va.) 212, holding that where property is conveyed to a trustee for the use of a certain person, such person may after the death of the trustee maintain detinue for the property.

Equitable liens.— Reservation of a lien on personalty gives only an equitable title, not sufficient to support a statutory action in the nature of detinue. Jones *v.* Anderson, 76 Ala. 427.

An executor empowered to sell slaves could not, where slaves were made realty by statute, maintain detinue to recover them from the heirs. Dean *v.* Dean, 7 T. B. Mon. (Ky.) 304.

A mortgagee of unplanted crops has only an equitable title to the crops, and hence cannot by virtue of the mortgage alone maintain detinue for the recovery thereof after they have come into existence. Wetzler *v.* Kelly, 83 Ala. 440, 3 So. 747; Columbus Iron Works Co. *v.* Renfo, 71 Ala. 577; Wilkinson *v.* Ketler, 69 Ala. 435; Grant *v.* Steiner, 65 Ala. 499; Rees *v.* Coats, 65 Ala. 256 [*overruling dictum* to the contrary in Brown *v.* Coats, 56 Ala.

5. Evidence[42] — **a. Burden of Proof.** The burden of proof is on plaintiff to prove the legal title or other interest in the property upon which he relies as giving him the right of possession;[43] but having proved such a title or interest in himself he need not go further and disprove a superior interest in defendant.[44]

b. Admissibility. The admissibility of evidence of plaintiff's title is governed by the rules of evidence applicable to proof of title in general.[45]

C. As Dependent Upon Prior Possession — 1. Necessity of Prior Possession. Prior possession of personal property is not essential to the right to maintain detinue for the recovery thereof. Any one having a legal interest in the

439]. But after the crop has been delivered, the mortgagee has the legal title and may maintain the action. Wilkinson *v.* Ketler, 69 Ala. 435. Likewise where, after the crop has come into existence, the mortgagor does some new act in confirmation of the mortgage, as for example delivering the crop to a carrier for transportation to the mortgagee, the mortgagee obtains the legal title and may maintain detinue. Columbus Iron Works Co. *v.* Renfo, 71 Ala. 577.

A legatee cannot, in the absence of statutory provisions to the contrary, maintain detinue for his legacy, where he has never had possession thereof. Worten *v.* Howard, 2 Sm. & M. (Miss.) 527, 41 Am. Dec. 607, holding that the rule had been changed by Howard & H. Miss. St. p. 412.

The devisee of slaves may maintain detinue therefor against a party taking them from his possession without showing that he had obtained possession of them with consent of the executor, slaves being made realty by statute. Grimes *v.* Grimes, 2 Bibb (Ky.) 594.

A distributee of a decedent could not at common law maintain detinue for the recovery of his distribution share, where he had never had possession thereof. Huddleston *v.* Huey, 73 Ala. 215; Reese *v.* Harris, 27 Ala. 301.

42. Evidence generally see Evidence.

43. Parsons *v.* Boyd, 20 Ala. 112; McCurry *v.* Hooper, 12 Ala. 823, 46 Am. Dec. 280; Traylor *v.* Marshall, 11 Ala. 458; Brewer *v.* Strong, 10 Ala. 961, 44 Am. Dec. 514; Tanner *v.* Allison, 3 Dana (Ky.) 422; Burns *v.* Morrison, 36 W. Va. 423, 15 S. E. 62.

Where plaintiff claims as assignee of a mortgage, and the execution of the mortgage is denied, he must prove such execution. Russell *v.* Walker, 73 Ala. 315.

Where plaintiff claims under a succession, he must prove not only the manner in which he acquired the title of the succession but also that the title was in the succession. Brown *v.* Brown, 15 La. Ann. 169.

44. Request to charge that "it is incumbent on plaintiff to prove to your satisfaction that the cattle sued for belonged to her when the suit was brought, and that defendant had no title or interest in the cattle, and no right to detain them," was properly refused, as placing on plaintiff the burden of proving more than was required to entitle her to a recovery. Bruce *v.* Bruce, 95 Ala. 563, 11 So. 197.

45. See Evidence.

Evidence that plaintiff did or did not include the property in a tax-assessment list furnished by him is admissible upon the question of his title to such property; and where plaintiff has shown that certain property, seemingly the same as that in controversy, was assessed to him, defendant may show that plaintiff had other property of the same character. Rowan *v.* Hutchinson, 27 Ala. 328.

Declarations in favor of plaintiff's title made by one under whom defendant claims, at a time when such person was in possession of the property, are admissible to prove title in plaintiff. Fralick *v.* Presley, 29 Ala. 457, 65 Am. Dec. 413. See also Spence *v.* McMillan, 10 Ala. 583. Likewise declarations by plaintiff in disparagement of his own title, while the property was in his possession, are admissible to disprove such title. Boatright *v.* Meggs, 4 Munf. (Va.) 145. But declarations of plaintiff in favor of his own ownership of the property in controversy, made while the property was not in his possession, are inadmissible. Rowan *v.* Hutchisson, 27 Ala. 328.

Admissions of defendant.— In detinue for slaves, against the wife of a decedent to whom plaintiff had hired the slaves under the charge of his overseer, plaintiff, to show the circumstances under which his property went into the possession of decedent, might prove a request made of him by the wife in the lifetime of her husband that the slaves might be taken from under the charge of the overseer to another place, and that he complied therewith. Rochelle *v.* Harrison, 8 Port. (Ala.) 351.

Evidence rebutting admission implied from silence.— Where defendant has proved that the property in controversy was appraised as a part of his intestate's estate in plaintiff's presence, and that plaintiff then asserted no title to the property, evidence of plaintiff's private assertions of title to one of the appraisers before the completion of the appraisement is admissible to rebut the admission implied from his silence. Wittick *v.* Keiffer, 31 Ala. 199; Traun *v.* Keiffer, 31 Ala. 136.

In detinue by a purchaser of a chattel at a constable's sale, the bill of sale by the constable is admissible to show title in plaintiff and the fact of sale, without first showing that a judgment and execution had been obtained against defendant in execution; but the sale cannot be shown by general notoriety. Steel *v.* Worthington, 7 Port. (Ala.) 266.

property which entitles him to the present possession may maintain the action.[46]

2. EFFECT OF PRIOR POSSESSION. Where one person wrongfully dispossesses another of personal property, the prior possession of the party whose possession is disturbed is sufficient to entitle him to maintain detinue against the wrong-doer.[47] Prior possession is sufficient furthermore to sustain detinue by the prior possessor against any one who cannot show a superior right of possession.[48] The

46. Cox *v.* McKinney, 32 Ala. 461; Hinton *v.* Nelms, 13 Ala. 222; Haynes *v.* Crutchfield, 7 Ala. 189; Pool *v.* Adkisson, 1 Dana (Ky.) 110; Meriwether *v.* Booker, 5 Litt. (Ky.) 254; Smart *v.* Clift, 4 Bibb (Ky.) 518; McDowell *v.* Hall, 2 Bibb (Ky.) 610; Tunstall *v.* McClelland, 1 Bibb (Ky.) 186; Goodman *v.* Boycott, 2 B. & S. 1, 8 Jur. N. S. 763, 31 L. J. Q. B. 69, 6 L. T. Rep. N. S. 25, 110 E. C. L. 1. See also *supra*, III, B, 2, a.

Detinue for deed to mortgaged property.— Where a mortgagor, pursuant to the surrender clause in the mortgage, delivered to the mortgagee a paper purporting to be the deed to the mortgagor, but which was in fact a mere forgery, and afterward delivered the true deed to a third party as security for an advance, it was held that the mortgagee might maintain detinue against such third party for the recovery of the deed, although the third party had no notice of the previous transaction. Newton *v.* Beck, 3 H. & N. 220, 4 Jur. N. S. 340, 27 L. J. Exch. 272, 6 Wkly. Rep. 443.

Insurance policy detained by agent.— An action of detinue may be maintained by the assured for the recovery of a policy of fire insurance, the premium for which has been paid, and which is wrongfully withheld by the agent who wrote it. Robinson *v.* Peterson, 40 Ill. App. 132.

An escrow may it seems be recovered in detinue by the party contingently entitled thereto, when his contingent right has become absolute. Carter *v.* Turner, 5 Sneed (Tenn.) 178.

Right of possession under stipulation between parties.— A dispute having arisen between plaintiff and defendant as to the right to certain personal property, a compromise was made by which defendant gave his note to plaintiff, which stipulated that the title to the property should vest in plaintiff until the payment of the note, whereupon the property was to go to defendant. It was held that the stipulation to the note gave plaintiff the right of possession and was sufficient to authorize him to maintain detinue for the property. Jones *v.* Pullen, 66 Ala. 306.

Where goods are delivered to one for delivery to another, the former may maintain detinue for them. Robinson *v.* Peterson, 40 Ill. App. 132.

47. *Alabama.*— Miller *v.* Jones, 26 Ala. 247; Shomo *v.* Caldwell, 21 Ala. 448; Phillips *v.* McGrew, 13 Ala. 255.

Kentucky.— Tanner *v.* Allison, 3 Dana 422; Townsend *v.* Burton, 24 S. W. 1069, 15 Ky. L. Rep. 648.

Mississippi.— Berry *v.* Hale, 1 How. 315.

Nebraska.— Grand Island Banking Co. *v.* Grand Island First Nat. Bank, 34 Nebr. 93, 51 N. W. 596.

Texas.— Calvit *v.* Cloud, 14 Tex. 53.

See 16 Cent. Dig. tit. "Detinue," § 5.

Compare O'Neal *v.* Baker, 47 N. C. 168, where it was held that plaintiff must have right of property as well as right of present possession, even as against a wrong-doer.

In a possessory action plaintiff may recover on the weakness of the title of his adversary. Brack *v.* Wood, 11 La. Ann. 512.

Possession by virtue of wrongful sale by administrator.— Although an administrator cannot sell the personal estate of his intestate at private sale, and without an order of the orphans' court, yet if he thus sells without authority and the property is delivered to the purchaser, and afterward taken from his possession wrongfully by one claiming to be a creditor of the intestate, the purchaser may maintain an action of detinue against the wrong-doer. Traylor *v.* Marshall, 11 Ala. 458.

Instruction.— In an action for cattle claimed by plaintiff to have been rightfully in its possession by virtue of a chattel mortgage, and to have been taken off and converted to its own use by defendant, who also claimed the right to their possession under a chattel mortgage, an instruction that when a person is in the rightful and peaceful possession of property, and a person not the owner, general or special, or entitled to the possession, wrongfully takes it from him and converts it to his own use, then the person who was so in possession can recover the full value of the property, for the wrong done, his possession being sufficient evidence of title in him against a wrong-doer, or one showing no right or title to the property, is correct. Grand Island Banking Co. *v.* Grand Island First Nat. Bank, 34 Nebr. 93, 51 N. W. 596.

Possession of infant.— In detinue brought in behalf of an infant for a slave, it appeared that the slave had been given to the infant, and left by the donor with the infant's mother for his benefit, the father being dead. It was held that the possession by the mother was to be considered the possession of the infant. Mortimer *v.* Brumfield, 3 Munf. (Va.) 122.

The burden of proof is on plaintiff to show his prior possession and the wrongful disturbance thereof by defendant. Tanner *v.* Allison, 3 Dana (Ky.) 422.

48. Jones *v.* Anderson, 76 Ala. 427; Huddleston *v.* Huey, 73 Ala. 215; Folmar *v.* Copeland, 57 Ala. 588; Miller *v.* Jones, 26 Ala. 247.

Possession by a lienor, having also the

reason of this rule seems to be that possession of personalty raises a *prima facie* presumption of ownership.[49]

D. Necessity of Demand. Originally the action of detinue was commenced by the issuance of a præcipe, commanding defendant to show cause why the property sued for should not be delivered to plaintiff. This præcipe was a demand for the property, and defendant could avoid all liability by delivering the property, and no other demand was necessary, a summons or capias being issued in the event of defendant's failure to return the property. After the practice of issuing a præcipe ceased, the rule as to the necessity of a demand was still adhered to, and hence the rule that a previous demand is not essential to the right to maintain detinue.[50] The rule therefore as generally announced is that no previous demand upon the party in possession is necessary,[51] except in certain cases to entitle plaintiff to damages for the detention prior to the action.[52] This rule, however, is subject to qualification. Certainly no demand is necessary where the prospective plaintiff has an absolute right to immediate possession;[53] nor is it necessary as against one who sets up an adverse claim to the property;[54] but where a demand is necessary to perfect the right of present possession, it is likewise a condition precedent to the right to maintain detinue.[55]

right of possession by virtue of his lien, entitles him to maintain detinue against any one disturbing his possession (Gafford *v.* Stearns, 51 Ala. 434); as for example against a sheriff who levies on the property under an attachment by the creditors of the owner of the property (Bryan *v.* Smith, 22 Ala. 534).

Action between mortgagees claiming same property.— In detinue for cattle claimed by plaintiff, while rightfully in its possession by virtue of a chattel mortgage, to have been wrongfully taken and converted by defendant, who also claimed under a chattel mortgage, an instruction that plaintiff to recover must show by a preponderance of the evidence that the right to possession which it claims by virtue of its mortgage was stronger and superior to the right of defendant to possession under his mortgage, is proper. Grand Island Banking Co. *v.* Grand Island First Nat. Bank, 34 Nebr. 93, 51 N. W. 596.

Adverse possession for the period prescribed by the statute of limitations as a bar to an action for the recovery of personalty gives the adverse possessor sufficient title to sustain detinue against any one who wrongfully detains the property. Stanley *v.* Earl, 5 Litt. (Ky.) 281, 15 Am. Dec. 66; Newby *v.* Blakey, 3 Hen. & M. (Va.) 57; Shelby *v.* Guy, 11 Wheat. (U. S.) 361, 6 L. ed. 495.

As against a claimant setting up a *bona fide* claim to the property, proof of a wrongful prior possession on the part of plaintiff is not sufficient to sustain the action. O'Donnell *v.* Burbridge, 20 La. Ann. 37.

49. Traylor *v.* Marshall, 11 Ala. 458; Grand Island Banking Co. *v.* Grand Island First Nat. Bank, 34 Nebr. 93, 51 N. W. 595.

The presumption may be rebutted by the circumstances attending the prior possession. Grand Island Banking Co. *v.* Grand Island First Nat. Bank, 34 Nebr. 93, 51 N. W. 596.

50. Marr *v.* Kübel, 4 Mackey (D. C.) 577; Cole *v.* Cole, 4 Bibb (Ky.) 340; Tunstall *v.* McClelland, 1 Bibb (Ky.) 186.

51. *Alabama.*— Dunn *v.* Davis, 12 Ala. 135; Vaughn *v.* Wood, 5 Ala. 304.

Kentucky.— Gentry *v.* McKeben, 5 Dana 34; Jones *v.* Henry, 3 Litt. 46; Cox *v.* Robertson, 1 Bibb 604; Tunstall *v.* McClelland, 1 Bibb 186 [*overruling* Cobb *v.* Gorden, decided in 1807].

Mississippi.— Carraway *v.* McNeice, Walk. 538.

Missouri.— Schulenberg *v.* Campbell, 14 Mo. 491.

North Carolina.— Sheppard *v.* Edwards, 3 N. C. 186; Anonymous, 3 N. C. 136. *Contra,* Elwick *v.* Rush, 1 Hayw. 28.

Texas.— Dunn *v.* Choate, 4 Tex. 14.

See 16 Cent. Dig. tit. "Detinue," § 12.

Contra.— Morton *v.* Stone, 30 U. C. Q. B. 158.

The fact that defendant is not in possession does not necessitate a demand. Easley *v.* Easley, 18 B. Mon. (Ky.) 86.

52. See *infra,* V.

53. Brock *v.* Headen, 13 Ala. 370; Jones *v.* Green, 20 N. C. 488.

Where possession is acquired tortiously, no demand is necessary to entitle the owner to maintain detinue against the tort feasor. O'Neill *v.* Henderson, 15 Ark. 235, 60 Am. Dec. 568; Robinson *v.* Keith, 25 Iowa 321; Irwin *v.* Wells, 1 Mo. 9.

54. Grice *v.* Jones, 1 Stew. (Ala. 254; Miles *v.* Allen, 28 N. C. 88; Jones *v.* Green, 20 N. C. 488; Knight *v.* Wall, 19 N. C. 125.

55. Oden *v.* Stubblefield, 2 Ala. 684; Grice *v.* Jones, 1 Stew. (Ala.) 254; Jones *v.* Green, 20 N. C. 488; Hunter *v.* Sevier, 7 Yerg. (Tenn.) 127.

Detinue for property levied on in attachment proceedings cannot be maintained against the attachment plaintiff without a previous demand upon him by the claimant, showing the nature of such claimant's claim to the property. Clark *v.* Orr, 11 U. C. Q. B. 436.

Who may make demand.—Where a demand is necessary, it may be made by an agent of the party entitled to possession of the property, and the agent need not produce his authority where such authority is not ques-

IV. LIABILITY IN DETINUE.

A. In General. Any one who wrongfully detains the personal property of another is liable to the latter in detinue.[56] This rule arises from the very nature of the cause of action in detinue and is settled beyond dispute.[57] There is, however, some confusion, and even conflict, as to what is a detention within the rule, as for example where defendant is not in possession of the property when the action is brought, or where the property has been lost or has perished.[58] The detention furthermore must be as above indicated detention of the property of another, that is, of plaintiff,[59] and must be wrongful.[60]

B. As Affected by Interest in the Property — 1. Legal Title — a. In General. Since plaintiff in detinue must have the legal title to the property, unless

tioned by the party upon whom the demand is made. Barlow *v.* Brock, 25 Iowa 308. The demand may be made by one of two persons jointly entitled to possession. Knight *v.* Wall, 19 N. C. 125. It may be made by the guardian of an insane person. Tolson *v.* Garner, 15 Mo. 494.

Evidence of demand.— A note addressed by plaintiff to defendant before the commencement of the action, requiring defendant to deliver to the bearer the chattel for the recovery of which the action is brought, may be read to the jury to show a demand and refusal. Haynes *v.* Crutchfield, 7 Ala. 189.

56. *Alabama.*— Jesse French Piano, etc., Co. *v.* Bradley, 138 Ala. 177, 35 So. 44; Oliver *v.* McClellan, 21 Ala. 675: Peirce *v.* Hill, 9 Port. 151, 33 Am. Dec. 306; Bettis *v.* Taylor, 8 Port. 564.

Arkansas.— Danley *v.* Edwards, 1 Ark. 437.

Kentucky.— Owings *v.* Frier, 2 A. K. Marsh. 268, 12 Am. Dec. 393; Mansell *v.* Israel, 3 Bibb 510.

Missouri.— Schulenberg *v.* Campbell, 14 Mo. 491; Overfield *v.* Bullitt, 1 Mo. 749.

New Hampshire.— Dame *v.* Dame, 43 N. H. 37, *quære* as to effect of tortious possession.

United States.— Bernard *v.* Herbert, 3 Fed. Cas. No. 1,347, 3 Cranch C. C. 346.

England.— Kettle *v.* Bromsall, Willes 118.

Infants.— In Oliver *v.* McClellan, 21 Ala. 675, it was held that an infant may be sued in detinue. This decision was based on the ground that the action of detinue, especially when based on a conversion and detention, is an action *ex delicto*.

A sheriff may render himself liable in detinue by wrongfully seizing and detaining property under legal process. Governor *v.* Gibson, 14 Ala. 326; Easly *v.* Dye, 14 Ala. 158, holding that detention by a deputy sheriff is detention by the sheriff. But see *infra*, IV, B, 2.

Attaching creditors may render themselves liable in detinue by appearing in the action against them and the sheriff, and justifying under the sheriff, although they had no actual knowledge of the wrongful seizure complained of. Robinson *v.* Keith, 25 Iowa 321.

A United States marshal is liable in detinue for the recovery of property wrongfully seized by him under an execution. Bissell *v.* Lindsay, 9 Ala. 162.

Detention from an administrator furnishes a cause of action in detinue in favor of the administrator personally, and not in his representative capacity. Melton *v.* McDonald, 2 Mo. 45, 22 Am. Dec. 437. See *supra*, III, B, 2, b, (II).

Persons having no control over property.— Where the maker and indorser of promissory notes placed them in the hands of stakeholders to be delivered to the maker's creditors upon certain conditions, it was held that by ordering the stakeholders not to deliver the notes, the indorser did not render himself liable in detinue to the creditors, the case being different from one where property is in the hands of defendant's servant. Latter *v.* White, L. R. 5 H. L. 578, 41 L. J. Q. B. 342.

Executors and administrators are liable as such in detinue when, and only when, the property sought to be recovered has been detained by the decedent and has come into the actual possession of the administrator or executor. Brewer *v.* Strong, 10 Ala. 961, 44 Am. Dec. 514; Gentry *v.* McKehen, 5 Dana (Ky.) 34; Mobley *v.* Runnels, 14 N. C. 303; Catlett *v.* Russell, 6 Leigh (Va.) 344; Allen *v.* Harlan, 6 Leigh (Va.) 42, 29 Am. Dec. 205. But see Jones *v.* Littlefield, 3 Yerg. (Tenn.) 133, holding that executors and administrators are never liable as such in detinue. An executor or administrator is liable individually where the property sought to be recovered has come into his possession and is detained by him. Bettis *v.* Taylor, 8 Port. (Ala.) 564; Mansell *v.* Israel, 3 Bibb (Ky.) 510; Denny *v.* Booker, 2 Bibb (Ky.) 427; Clapp *v.* Walters, 2 Tex. 130; Royall *v.* Eppes, 2 Munf. (Va.) 479. The fact that an administrator as such detains property jointly with his co-administrator does not affect his individual liability, where the property is in his actual possession. Smith *v.* Wiggins, 3 Stew. (Ala.) 221. An administrator or executor who has acted in good faith in detaining the property is entitled to reimbursement for the estate where a personal judgment is rendered against him. Bettis *v.* Taylor, 8 Port. (Ala.) 564.

57. See *supra*, II, A.

58. See *infra*, IV, C.

59. See *supra*, III; *infra*, IV, B.

60. See *infra*, IV, B.

he have a special possessory interest,[61] where he has no such special interest defendant may always escape liability by showing title in himself.[62]

b. Title by Adverse Possession. Adverse possession of personal property for the period prescribed by the statute of limitations as a bar to an action for the

61. See *supra*, III, B, 2.

62. Slaughter *v.* Cunningham, 24 Ala. 260, 60 Am. Dec. 463.

Where the owner forcibly takes possession of his property from one not having the right to the possession thereof, he is not thereby rendered liable in detinue to the party dispossessed. Carroll *v.* Pathkiller, 3 Port. (Ala.) 279; Neely *v.* Lyon, 10 Yerg. (Tenn.) 473.

A title based on mistake of law and fact is not available in detinue against the party who parted with his title by reason of such mistake. Goff *v.* Gott, 5 Sneed (Tenn.) 562.

One who wins money in gambling acquires no title thereto as against the party who lost it. Morgan *v.* Lewis, 7 B. Mon. (Ky.) 243.

A fraudulent title in defendant will not relieve him from liability in detinue to the party from whom the title was obtained (Mansell *v.* Israel, 3 Bibb (Ky.) 510); or to persons claiming under such party (Hinton *v.* Nelms, 13 Ala. 222).

A release from a stranger, or a transfer of all his interest in the property, is admissible evidence for defendant in detinue, as tending to show title in himself. Slaughter *v.* Cunningham, 24 Ala. 260, 60 Am. Dec. 463.

Trustee for use of another — Right to deed. —In Stoker *v.* Yerby, 11 Ala. 322, it was held that a trustee seized of realty for the use of a religious society, did not have such an interest in the land as would entitle him to defend in detinue for the deed, as against the acting trustees of the society, who were entitled to its possession.

An innocent purchaser for value and without notice, from one in possession, and who has been vested by the owner with apparent ownership, as for example by a conditional or merely voidable but not void sale, is not liable in detinue to the former owner. Sumner *v.* Woods, 52 Ala. 94; Mansell *v.* Israel, 3 Bibb (Ky.) 510. But a purchaser from a mere trespasser acquires no title and is liable to the owner of the property, although the purchase was without notice of the seller's lack of title. Justice *v.* Mendell, 14 B. Mon. (Ky.) 12. See, generally, SALES.

A purchaser from an agent duly authorized in the premises acquires a sufficient title to defeat detinue by the principal, although the agent does not report the sale to the principal. Miller *v.* Phillips, etc., Co., 44 S. W. 430, 19 Ky. L. Rep. 1805. But where the purchaser knows that the agent is selling the property as his own, with a view to appropriating the proceeds, he acquires no such title as will defeat detinue by the principal. Case *v.* Jennings, 17 Tex. 661. See AGENCY; SALES.

A mortgagor of chattels in Alabama may defend an action in detinue by the mortgagee for the recovery of the mortgaged property by showing full payment of the mortgage debt, there being a statute (Ala. Code, § 1870) which provides that "the payment of a mortgage debt, whether of real or personal property, divests the title passing by the mortgage." Lampley *v.* Knox, 92 Ala. 625, 8 So. 822; Dryer *v.* Lewis, 57 Ala. 551. But part payment will not prevent a recovery of all the property. Lampley *v.* Knox, 92 Ala. 625, 8 So. 822; Morrison *v.* Judge, 14 Ala. 182. The mortgagor is also allowed by statute to plead usury in the mortgage debt. Bates *v.* Crowell, 122 Ala. 611, 25 So. 217.

One tenant in common is not liable in detinue against the other tenant, unless there has been a destruction of the particular chattel or something equivalent to it. Morgan *v.* Marquis, 2 C. L. R. 276, 9 Exch. 145, 23 L. J. Exch. 21, holding that detinue would not lie by the assignee in bankruptcy of one of two tenants in common against a party who sold the common property after the bankruptcy under the direction of the solvent tenant. See, generally, TENANCY IN COMMON.

Fraud revesting title in defendant.—Where, in detinue by a chattel mortgagee against a mortgagor, defendant answers that the mortgage was void because procured by plaintiff's fraud, plaintiff may reply that the mortgage was given in consideration of the surrender of a former mortgage, and that defendant has not tendered return of the old mortgage, although he had knowledge of the fraud. Henderson *v.* Boyett, 126 Ala. 172, 28 So. 86.

Detinue for title deeds to mortgaged property cannot be maintained by the mortgagor against the mortgagee until there has been an actual payment of the mortgage debt. Tender of payment by the mortgagor and wrongful refusal by the mortgagee is insufficient. In such case the mortgagor's remedy is by an action to redeem or by a summary application on the terms of substituting for the security a sum of money equal to the mortgage debt, with interest and probable costs. The reason of this rule is that in the case of a mortgage the mortgagee receives the entire title, and not a mere special property, as in the case of a pledge. New South Wales Bank *v.* O'Connor, 14 App. Cas. 273, 58 L. J. P. C. 82, 60 L. T. Rep. N. S. 467, 38 Wkly. Rep. 465.

In detinue to recover crops planted on defendant's land by plaintiff and gathered by defendant, defendant may put in evidence his title to the land in order to show constructive possession by him of all that portion of the land not in plaintiff's actual possession, and thus to limit plaintiff's right of recovery

recovery thereof gives the party holding such possession a sufficient title to defeat an action of detinue by the former owner of the property [63]

2. Special Interest Justifying Detention. One who has a special interest in personal property which entitles him to the possession thereof is not liable in detinue, even to the holder of the legal title.[64] An officer who has seized prop-

to the crop raised on land in his actual possession. Stewart *v.* Tucker, 106 Ala. 319, 17 So. 385.

63. *Alabama.*— Benje *v.* Creagh, 21 Ala. 151; Brown *v.* Brown, 5 Ala. 508.

Kentucky.— Duckett *v.* Crider, 11 B. Mon. 188; Birney *v.* Richardson, 5 Dana 424.

North Carolina.— White *v.* White, 18 N. C. 260.

Texas.— Young *v.* Epperson, 14 Tex. 618.

Virginia.— Elam *v.* Bass, 4 Munf. 301.

See, generally, Limitations of Actions.

Conflict of laws.— In computing the time of adverse possession necessary to constitute a defense the law of the state in which the possession was had controls. Brown *v.* Brown, 5 Ala. 508.

When the statute begins to run.— In Elwick *v.* Rush, 2 N. C. 28, it was held that the statute of limitations begins to run from the time when the owner of the property acquires knowledge that the property is being held adversely. In Young *v.* Epperson, 14 Tex. 618, it was held that the statute runs from demand for and refusal to deliver possession. In Spackman *v.* Foster, 11 Q. B. D. 99, 47 J. P. 455, 52 L. J. Q. B. 418, 48 L. T. Rep. N. S. 670, 31 Wkly. Rep. 548, it was held that the statute of limitations does not begin to run till demand and refusal to give up the property; as where plaintiff's title deeds were fraudulently taken from him and pledged to a third person who had no knowledge of the fraud, it was held that the mere holding by the pledgee did not amount to a conversion, and hence that the statute of limitations did not begin to run against an action of detinue by the owner until he had demanded the deeds and the pledgee had refused to give them up. In Miller *v.* Dell, [1891] 1 Q. B. 468, 60 L. J. Q. B. 404, 63 L. T. Rep. N. S. 693, 39 Wkly. Rep. 342, the decision was almost identical with that in Spackman *v.* Foster, 11 Q. B. D. 99, 47 J. P. 455, 52 L. J. Q. B. 418, 48 L. T. Rep. N. S. 670, 31 Wkly. Rep. 548, and Wilkinson *v.* Verity, L. R. 6 C. P. 206, 40 L. J. C. P. 141, 24 L. T. Rep. N. S. 32, 19 Wkly. Rep. 604, was explained, attention being called to the fact that in Spackman *v.* Foster, and in the case under consideration, the first conversion was by one party, and the conversion arising from demand and wrongful refusal to deliver was by another party. In Wilkinson *v.* Verity, L. R. 6 C. P. 206, 40 L. J. C. P. 141, 24 L. T. Rep. N. S. 32, 19 Wkly. Rep. 604, it was held that where the action is founded on conversion only, as it needs must be when there is a bare taking and withholding under circumstances which do not show a trust for the owner, the statute of limitations runs from the time when the property was first wrongfully dealt with; but that where the property is delivered to a person for safe custody and such person converts it, the owner may elect to consider as his cause of action either the conversion or the bailee's refusal to deliver the property upon demand, and that therefore, after such demand and refusal, defendant cannot set up the statute of limitations as running from the first conversion of the property. In Marr *v.* Kübel, 4 Mackey (D. C.) 577, it was held that the statute of limitations does not begin to run in favor of a bailee until he asserts an adverse claim to the property.

Purpose of adverse holding immaterial.— In White *v.* White, 18 N. C. 260, it was held that the possession of slaves for more than three years, by trustees of a religious society, for its exclusive benefit, and against the rights of others, is a bar to an action of detinue for the slaves, notwithstanding that the society considered slavery sinful, and held the slaves for the purpose of giving them the advantages of free men.

64. Clossman *v.* White, 7 C. B. 43, 6 D. & L. 563, 18 L. J. C. P. 151, 62 E. C. L. 43. The gist of the action of detinue is the wrongful detention of property, and therefore it cannot be maintained where the detention is permissive, so long as that kind of possession continues. Benje *v.* Creagh, 21 Ala. 151.

A stakeholder who holds property for the purpose of delivering it to another upon the performance of certain conditions is not liable in detinue to such other person until the conditions have been performed. Reynolds *v.* Waddell, 12 U. C. Q. B. 9.

An agent or servant in possession of property which is entirely subject to the control of his principal or master is not liable in detinue to a third party claiming such property. Parker *v.* Stevens, 12 U. C. C. P. 81. But see Pool *v.* Adkisson, 1 Dana (Ky.) 110; and *infra*, note 78.

A bailee who has no control over the property except to keep it for the bailor, and who is obliged under the terms of the bailment to redeliver it to the bailor is not liable in detinue to any one other than the bailor. Kyle *v.* Swem, 99 Ala. 573, 12 So. 410, where the bailor was the sheriff who had levied upon the property under a writ of attachment. Where the property has been previously levied by the sheriff and delivered to defendant as bailee, the giving of a forthcoming bond by defendant does not terminate the bailment so as to preclude the defendant from denying possession in his own right. Kyle *v.* Swem, 99 Ala. 573, 12 So. 410.

Set-off or recoupment of damages cannot be set up as a defense in an action of detinue. Brock *v.* Forbes, 126 Ala. 319, 28 So. 590; Chilton *v.* Carrington, 15 C. B. 95, 3

erty under a valid legal process against the owner is not liable in detinue to the owner, or to any one claiming under him.[65] Likewise a lienor in possession of property subject to his lien is not liable in detinue to the owner until the lien has been discharged.[66] Nor is a pledgee liable in detinue to the owner of the pledged

C. L. R. 138, 1 Jur. N. S. 89, 24 L. J. C. P. 10, 3 Wkly. Rep. 17, 80 E. C. L. 95.

Plaintiff's refusal to give a receipt to defendant when demanding the goods from defendant is no defense, where defendant knew that the goods belonged to plaintiff. Barnett *v.* Crystal Palace Co., 2 F. & F. 443, 4 L. T. Rep. N. S. 403.

Usury cannot be pleaded as a defense in an action of detinue based on a contract under which plaintiff claims the property from defendant. By statute in Alabama, however, usury may be pleaded in an action of detinue based on a mortgage, but not where such action is based on conditional sale. Bates *v.* Crowell, 122 Ala. 611, 25 So. 217.

A verbal **mortgage** being void under the statute of frauds, where the vendor in a verbal contract of sale retakes the property after having delivered it to the vendee, he cannot, in an action of detinue by the vendee, defend on the ground that it was stipulated in the contract of sale that the property should stand good for itself until it was paid for. Barnhill *v.* Howard, 104 Ala. 412, 16 So. 1.

Equitable defenses under Iowa statute.— In an action by a husband against his wife for the possession of a stock of goods, an answer alleging that plaintiff is indebted to defendant on long and complicated accounts; that defendant is liable for the price of part of said goods, and for money received for investment by plaintiff as her agent; that defendant put money into the business; and that plaintiff is insolvent, and has fraudulently confessed judgment in favor of his mother, shows no such equitable defense as is allowable by Iowa Code (1873), § 2635. Such defenses are counter-claims forbidden by section 3226. Palmer *v.* Palmer, 90 Iowa 17, 57 N. W. 645.

Where a seller reserves title in himself until payment, and the buyer thereafter for sufficient cause offers to rescind and to return the property provided the seller will refund the amount paid thereon, until such payment has been refunded by the seller the buyer has a sufficient possessory interest in the property to defeat detinue by the seller. Jesse French Piano, etc., Co. *v.* Bradley, 138 Ala. 177, 35 So. 44.

Interest in patent.— In *In re* Casey's Patents, [1892] 1 Ch. 104, 65 L. T. Rep. N. S. 40, it was held that the original patentees of a certain invention might maintain detinue, to recover the letters patent, against one to whom they had assigned a one-third interest in such patents, and to whom they had delivered the letters patent in order that he might sell the patents, he, however, having failed to effect a sale.

Where a landlord distrains his tenant's property for rent, the tenant may, after a sufficient tender made before impounding, maintain detinue for the recovery of such property. Loring *v.* Warburton, E. B. & E. 507, 4 Jur. N. S. 634, 28 L. J. Q. B. 31, 6 Wkly. Rep. 602, 96 E. C. L. 507.

65. Thompson *v.* Jones, 84 Ala. 279, 4 So. 169; McBrayer *v.* Dillard, 49 Ala. 174.

Ohio statute.— Where the levy is at the instance of a claimant of the property in proceedings before a justice of the peace the sheriff is not liable in detinue. Ralston *v.* Oursler, 12 Ohio St. 105.

Excessiveness of the levy cannot be considered where the process was lawful and the property was subject to the levy. Thompson *v.* Jones, 84 Ala. 279, 4 So. 169.

Justification in nature of set-off.— Where plaintiff sued for corn which he claimed to have purchased from an execution defendant, and to have reduced to possession by stacking it in a certain portion of such defendant's field, it was held that defendant sheriff, who had levied on all the corn in the field, might justify the detention of the portion sued for by showing that plaintiff had taken an equal quantity of corn from another portion of the field. Hanna *v.* Hawks, 31 Iowa 146.

Act of parliament relating to stolen goods. — Under 2 & 3 Vict. c. 71, § 29, where a person was arrested for larceny, and the goods charged to have been stolen came into the hands of an officer by virtue of his office, such officer could protect himself from an action of detinue by the accused by obtaining an order from a police magistrate directing the disposition of the goods. Bullock *v.* Dunlap, 13 Cox C. C. 367, 2 Ex. D. 43, 46 L. J. Exch. 150, 35 L. T. Rep. N. S. 633, 25 Wkly. Rep. 98.

66. Seals *v.* Edmondson, 73 Ala. 295, 49 Am. Rep. 51; Castellain *v.* Thompson, 13 C. B. N. S. 105, 32 L. J. C. P. 79, 7 L. T. Rep. N. S. 424, 11 Wkly. Rep. 147, 106 E. C. L. 105 (where it was held that the defendant had no lien); Dirks *v.* Richards, C. & M. 626, 6 Jur. 562, 4 M. & G. 574, 5 Scott N. R. 534, 41 E. C. L. 340; Mecklenburgh *v.* Gloyn, 13 Wkly. Rep. 291; Riorden *v.* Brown, 1 U. C. C. P. 199. See also Reed *v.* Harrison, 189 Pa. St. 614, 42 Atl. 301.

Waiver of lien.— Where, upon demand for the property by the owner, the lienor does not insist on his lien, he thereby waives it so far as his right to detain the property on account thereof is concerned. Spence *v.* McMillan, 10 Ala. 583. Likewise where the lienor, upon demand of the owner for delivery, claims a lien on the property on account of a debt due by a third person, the lienor thereby waives his lien for the debt due from the owner, and the latter may maintain detinue without tendering the amount of such lien. Dirks *v.* Richards, C. & M. 626, 6 Jur. 562, 4 M. & G. 574, 5

property, until the amount secured by the pledge has been paid, or the lien of the pledge has otherwise been discharged.[67]

3. EVIDENCE.[68] The burden of proving title or possessory interest in himself is upon defendant.[69] Admissibility of evidence to prove title or interest in defendant in detinue is controlled by the general principles applicable to the admissibility of evidence to prove title.[70]

Scott N. R. 534, 41 E. C. L. 340. But see Scarfe *v.* Morgan, 1 H. & H. 292, 7 L. J. Exch. 324, 4 M. & W. 270, where it was held that where a bailee, having a lien under the terms of the bailment, refuses to deliver the property to the bailor, claiming not only the particular lien but also a lien for the general balance between the parties, the particular lien was not thereby waived.

A lien in favor of an agent against his principal on property in the agent's possession does not justify the principal in detaining the property as against the party entitled to the possession thereof. Anderson *v.* Passman, 7 C. & P. 193, 32 E. C. L. 568.

One who by fraud has secured possession of goods from a carrier cannot withhold the property from the carrier on account of freight which he has paid, when he is unable to place the carrier *in statu quo*, on account of having disposed of some of the property. Louisville, etc., R. Co. *v.* Walker, 128 Ala. 368, 30 So. 738.

Where a sheriff wrongfully seizes property under legal process and pays freight thereon in order to obtain it from the railroad company, the owner of the property may sue the purchaser at the sale made by the sheriff, without paying or tendering payment of the freight charges. Gluck *v.* Cox, 90 Ala. 331, 8 So. 161.

Where one has sold another's property without authority, the owner may maintain detinue against the purchaser without tendering the consideration paid by such purchaser. Morton *v.* Stone, 30 U. C. Q. B. 158.

67. Payment or tender is a condition precedent to the right of the pledgor to maintain detinue against the pledgee for the property. Halliday *v.* Holgate, L. R. 3 Exch. 299, 37 L. J. Exch. 174, 18 L. T. Rep. N. S. 656, 17 Wkly. Rep. 13; Donald *v.* Suckling, L. R. 1 Q. B. 585, 7 B. & S. 783, 12 Jur. N. S. 795, 35 L. J. Q. B. 232, 14 L. T. Rep. N. S. 772, 15 Wkly. Rep. 13; Yungmann *v.* Briesemann, 67 L. T. Rep. N. S. 642, 4 Reports 119, 41 Wkly. Rep. 148.

Waiver of tender or payment.— A subpledge by the pledgee is not a waiver of payment or tender as a condition precedent, etc. Donald *v.* Suckling, L. R. 1 Q. B. 585, 7 B. & S. 783, 12 Jur. N. S. 795, 35 L. J. Q. B. 232, 14 L. T. Rep. N. S. 772, 15 Wkly. Rep. 13. Nor is payment or tender waived by the pledgee's refusal to deliver the goods to the pledgor on demand on the ground that the goods had been sold to him. Yungmann *v.* Briesemann, 67 L. T. Rep. N. S. 642, 4 Reports 119, 41 Wkly. Rep. 148.

Collateral claims by the pledgee against the pledgor will not justify the former in detaining the property after payment or tender of the pledge debt. Chilton *v.* Carrington, 15 C. B. 95, 3 C. L. R. 138, 1 Jur. N. S. 89, 24 L. J. C. P. 10, 3 Wkly. Rep. 17, 80 E. C. L. 95.

68. Evidence generally see EVIDENCE.

69. Bruce *v.* Bruce, 95 Ala. 563, 11 So. 197.

Where defendant relies on adverse possession the burden is on him to prove its length. Darden *v.* Allen, 12 N. C. 466.

70. See EVIDENCE. See also *supra*, III, B, 5, b.

Declarations by defendant in disparagement of his own title are admissible where he relies upon such title as a defense. Miller *v.* Jones, 26 Ala. 247. See also Spence *v.* McMillan, 10 Ala. 583. Declarations by one under whom defendant claims, made while the property was in the possession of such person, and in disparagement of his title, are likewise admissible against defendant. Fralick *v.* Presley, 29 Ala. 457, 65 Am. Dec. 413; Miller *v.* Jones, 29 Ala. 174; Carrel *v.* Early, 4 Bibb (Ky.) 270. But declarations of defendant while in possession in his own favor are not admissible to prove his title. Brown *v.* Brown, 5 Ala. 508, where defendant sought to sustain his title to the property by evidence of his own declarations made when demand for such property was made upon him.

Where a plea in abatement has been sustained, evidence that defendant is not, but that his wife is, the owner of the goods is inadmissible on the trial of the issue as to the value of the goods which are in plaintiff's hands. Rand *v.* Gibson, 109 Ala. 266, 19 So. 533.

Character of defendant's possession, whether adverse or not, cannot be proved by general reputation nor by the opinion of witnesses as to the actual condition of the property. Benje *v.* Creagh, 21 Ala. 151.

Where defendant claims under a will, and plaintiff claims under a parol gift from the testator, evidence of the testator's insanity when he executed the will is admissible, since if plaintiff's title under the gift is good he may recover regardless of the will, and if such title is not valid he cannot recover in any event. Bryant *v.* Ingraham, 16 Ala. 116.

Where plaintiff claims under a bill of sale, and defendant claims under the will of the seller, defendant may show that the testator had adverse possession as against plaintiff, and the will is admissible to show defendant's connection with the possession of the testator. Williams *v.* Haney, 3 Ala. 371.

Rebuttal of admission implied from failure to include property in tax-list.— In an action of detinue for slaves, plaintiff proved that defendant was present when a tax schedule, in-

C. As Dependent Upon Defendant's Possession — 1. In General. Liability in detinue cannot arise except on account of actual possession of the property, either at the time of the action or at some time prior thereto.[71]

2. Transfer of Possession. There seems to be some confusion as to the effect

cluding the slaves in controversy as the property of plaintiff, was handed to the tax assessor, and that defendant made no return of the slaves as taxable property belonging to him. It was held that defendant could not show that afterward on the same day he corrected his list so as to include the slaves, although it appeared that he remarked at the time that he had intended to give in the slaves, but plaintiff relieved him of that, and he asked permission to correct any mistake, and spoke of getting advice. McGehee *v.* Mahone, 37 Ala. 258.

71. Berlin Mach. Works *v.* Alabama City Furniture Co., 112 Ala. 488, 20 So. 418; Gilbreath *v.* Jones, 66 Ala. 129; Hall *v.* Amos, 5 T. B. Mon. (Ky.) 89, 17 Am. Dec. 42; Burton *v.* Brashear, 3 A. K. Marsh. (Ky.) 276; Jones *v.* Dowle, 1 Dowl. P. C. N. S. 391, 11 L. J. Exch. 52, 9 M. & W. 19; Clark *v.* Orr, 11 U. C. Q. B. 436.

Constructive possession by reason of a contract for the purchase of the property from one who has actual possession is insufficient to render the purchaser liable in detinue to the owner. Burns *v.* Morrison, 36 W. Va. 423, 15 S. E. 62.

Possession by a deputy sheriff under a levy is possession by the sheriff. Easly *v.* Dye, 14 Ala. 158.

The possession must continue until plaintiff's right of possession accrues. Goodman *v.* Boycott, 2 B. & S. 1, 8 Jur. N. S. 763, 31 L. J. Q. B. 69, 6 L. T. Rep. N. S. 25, 110 E. C. L. 1; Crossfield *v.* Such, 8 Exch. 825, 22 L. J. Exch. 325, 1 Wkly. Rep. 470, holding that an administrator cannot maintain detinue against a party who, prior to the granting of the letters of administration, was in possession of property belonging to the estate, but who parted with such property before such letters were granted.

Presumption of continuance of possession. Proof that the articles detained were in defendant's possession three days before the action was brought raises the presumption that they were in his possession at the time of the action. Downs *v.* Bailey, 135 Ala. 329, 33 So. 151. See also Street *v.* McClerkin, 77 Ala. 580, where it was held that proof of defendant's prior possession was, in the absence of evidence to the contrary, sufficient to sustain a finding of the jury that defendant had possession when the action was brought.

A boarding-house keeper into whose house a boarder carries property which is recognized by the boarding-house keeper to be wholly the property of the boarder and subject only to his control, no claim of right or possession being made thereto by the boarding-house keeper, is not liable in detinue at the suit of a third party claiming such property. Behr *v.* Gerson, 95 Ala. 438, 11 So. 115.

Where a process which has been levied on property is released, the sheriff who seized the property under such process holds it as the mere bailee of the owner, and the possession of the former is the possession of the latter, and hence detinue may be maintained against the latter, although the property has not come back to his actual possession. Henderson *v.* Felts, 58 Ala. 590; McArthur *v.* Carrie, 32 Ala. 75, 70 Am. Dec. 529.

Whether one holds the property for himself or for his firm is immaterial, possession by one partner not being inconsistent with possession by the firm. Nelson *v.* Howison, 122 Ala. 573, 25 So. 211.

Possession by an agent is possession by the principal. Anderson *v.* Passman, 7 C. & P. 193, 32 E. C. L. 568.

The presumption as to the possession of a slave child only eighteen months old was held, in King *v.* Mims, 7 Dana (Ky.) 267, to be that the child was in the possession of the person having possession of its mother.

The method of acquiring possession is immaterial (see *supra*, II, A), except where the property has been lost or destroyed (see *infra*, IV, C, 2, 3, 4).

Sufficiency of possession a question for the jury.— In Nelson *v.* Howison, 122 Ala. 573, 25 So. 211, it appearing that the property, an engine and boiler, was claimed by a firm of which defendant was the only male member, the engine and boiler being operated by a general manager employed by the firm, defendant being present on occasions and giving orders in connection with such operation, it was held that the sufficiency of defendant's possession was a question for the jury. Where it appeared merely that defendant had, before the suit brought, "put the slave in question in the possession of his brother-in-law," but without any written transfer and without consideration, it was held that it was proper to be left to the jury to say how the possession was — whether in defendant or his brother-in-law — and that plaintiff could not be nonsuited upon the ground that there was no evidence of his possession at the time the suit was brought. Jones *v.* Green, 20 N. C. 488.

Estoppel to deny possession.— Where a party represents to another that he has certain property in his possession, and thereby induces such other party to bring an action of detinue to recover such property, plaintiff will be allowed to recover notwithstanding that such representations were false. Hall *v.* White, 3 C. & P. 136, 14 E. C. L. 490.

Instructions.—In detinue, where the property was claimed by a firm and was in possession of one of the members who alone was sued, a charge that if the jury believe that the partnership was in the possession at the commencement of the suit, and that

of a transfer of the property. It is settled that a transfer by defendant pending action will not relieve him from liability,[72] unless the dispossession be by virtue of legal process.[73] It is likewise settled that dispossession under valid legal process relieves the former possessor from liability in all cases.[74] The only conflict therefore is between the authorities which seem to hold that no voluntary, unauthorized transfer can relieve one from liability who has been in possession of the property of another,[75] and the authorities which seem to hold that possession at the time of the action is essential to liability in all cases.[76] The doctrine, however, which seems to be supported upon principle and by the weight of authority is that where a party lawfully acquires possession of personal property, and thereafter in good faith transfers it to another, thereby losing all control over it, he is not liable in detinue;[77] but that where one in possession wrongfully transfers the property to a

defendant was not in possession, or that, since the action can only be brought against one in possession of the property because the gist of it is the unlawful detention, if the partnership and not defendant was in possession, or if it was defendant's possession in behalf of the partnership, to find for defendant, is argumentative. Nelson *v.* Howison, 122 Ala. 573, 25 So. 211.

72. Lynch *v.* Thomas, 3 Leigh (Va.) 682; Burnley *v.* Lambert, 1 Wash. (Va.) 308.

Assignment for benefit of creditors.— In an action for the recovery of specific personal property, where the order of delivery is issued and served with the summons, by taking and delivering the property to plaintiff, plaintiff's right to proceed to final trial and judgment cannot be defeated by an assignment of the property by defendant, for the benefit of his creditors, after the commencement of the action and before the service of the order of delivery. Collier *v.* Bickley, 33 Ohio St. 523.

73. Lynch *v.* Thomas, 3 Leigh (Va.) 682.

74. *Alabama.*— McArthur *v.* Carrie, 32 Ala. 75, 70 Am. Dec. 529; Cole *v.* Conolly, 16 Ala. 271.

Kentucky.— Pool *v.* Adkisson, 1 Dana 110.

Mississippi.— Lowry *v.* Houston, 3 How. 394.

North Carolina.— Foscue *v.* Eubank, 32 N. C. 424.

South Carolina.— Ford *v.* Caldwell, 3 Hill 242, Riley 277.

Virginia.— Burnley *v.* Lambert, 1 Wash. 308.

United States.— Woodruff *v.* Bentley, 30 Fed. Cas. No. 17,986*a*, Hempst. 111.

See 16 Cent. Dig. tit. "Detinue," § 15.

Burden of proof is on defendant to show legal dispossession, where plaintiff has shown prior possession by defendant. Burnley *v.* Lambert, 1 Wash. (Va.) 308.

Where cattle are distrained damage feasant, the owner cannot maintain detinue for their recovery after they have been impounded, even though he has tendered payment of damages, the reason being that the property after impounding is in the custody of the law, and defendant therefore does not detain it. Singleton *v.* Williamson, 7 H. & N. 747, 8 Jur. N. S. 157, 31 L. J. Exch. 387, 5 L. T. Rep. N. S. 645, 10 Wkly. Rep. 301.

75. Pool *v.* Adkisson, 1 Dana (Ky.) 110; Bush *v.* White, 3 T. B. Mon. (Ky.) 100; Whitfield *v.* Whitfield, 44 Miss. 254; Lowry *v.* Houston, 3 How. (Miss.) 394; Burnley *v.* Lambert, 1 Wash. (Va.) 308; Brinsmead *v.* Harrison, L. R. 7 C. P. 547, 41 L. J. C. P. 190, 27 L. T. Rep. N. S. 99, 20 Wkly. Rep. 784.

76. Berlin Mach. Works *v.* Alabama City Furniture Co., 112 Ala. 488, 20 So. 418; Bolling *v.* Fannin, 97 Ala. 619, 12 So. 59; Graham *v.* Myers, 74 Ala. 432; Gilbreath *v.* Jones, 66 Ala. 129; Henderson *v.* Felts, 58 Ala. 590; Walker *v.* Fenner, 20 Ala. 192; Davis *v.* Herndon, 39 Miss. 484; Haughton *v.* Newberry, 69 N. C. 456; Foscue *v.* Eubank, 32 N. C. 424; Charles *v.* Elliott, 20 N. C. 606.

77. Lightfoot *v.* Jordan, 63 Ala. 224; Foster *v.* Chamberlain, 41 Ala. 158; Fenner *v.* Kirkman, 26 Ala. 650 (distinguishing cases based on bailment and finding which are cited in Comyns Dig. tit. "Detinue"); Harris *v.* Hillman, 26 Ala. 380; Walker *v.* Fenner, 20 Ala. 192; Lindsey *v.* Perry, 1 Ala. 203; Foscue *v.* Eubank, 32 N. C. 424; Charles *v.* Elliott, 20 N. C. 606; Robb *v.* Cherry, 98 Tenn. 72, 38 S. W. 412.

A bailee who has returned the property to the bailor before action is not liable in detinue to the party entitled to the possession of the property, although the return be made after a demand by such party. Woodruff *v.* Bentley, 30 Fed. Cas. No. 17,986*a*, Hempst. 111. *Contra,* Merrit *v.* Warmouth, 2 N. C. 12.

Possession of a bailee at will is possession of the bailor and renders the bailor liable. Jones *v.* Green, 20 N. C. 488; Ford *v.* Caldwell, Riley (S. C.) 277, 3 Hill (S. C.) 242.

An administrator who has come to the possession of property as administrator and has sold it in due course of administration without any intended derogation of the owner's rights is not liable in detinue to the owner. Ford *v.* Caldwell, Riley (S. C.) 277, 3 Hill (S. C.) 242.

Estoppel to deny possession.— The fact that defendant in detinue executes a delivery bond does not estop him from showing in defense that he did not have possession of the property at the commencement of the action, where such bond does not recite any fact showing his possession of the property.

third person, he will still be deemed to detain it from the party entitled to the possession, and hence will be liable in detinue to such party, notwithstanding the transfer.[78]

3. Loss of Property. Where one who has been sued in detinue loses the property pending the action, he is not thereby relieved from liability.[79] But where one who has the possession of another's property loses it before he has been sued therefor, he will not be liable in detinue if his former possession was lawful and the loss occurred without his fault;[80] but if the loss be due to his fault, he will be liable.[81]

4. Destruction of Property. It seems that detinue cannot be maintained

Miller *v.* Hampton, 37 Ala. 342; Wallis *v.* Long, 16 Ala. 738. But where in addition to filing such bond he has notified plaintiffs before the suit that if they want the property they will have to get it "out of his possession," he is estopped to claim that it was not in his possession at the beginning of the suit. Savage *v.* Russell, 84 Ala. 103, 4 So. 235.

78. *Alabama.*— Foster *v.* Chamberlain, 41 Ala. 158; Fenner *v.* Kirkman, 26 Ala. 650; Walker *v.* Fenner, 20 Ala. 192.

California.— Faulkner *v.* Santa Barbara First Nat. Bank, 130 Cal. 258, 62 Pac. 463.

Kentucky.— Easley *v.* Easley, 18 B. Mon. 86; Rucker *v.* Hamilton, 3 Dana 36; Bush *v.* White, 3 T. B. Mon. 100.

Nebraska.— Grand Island Banking Co. *v.* Grand Island First Nat. Bank, 34 Nebr. 93, 51 N. W. 596.

North Carolina.— Foscue *v.* Eubank, 32 N. C. 424; Charles *v.* Elliott, 20 N. C. 606; Flowers *v.* Glasgow, 2 N. C. 122. *Compare* Haughton *v.* Newberry, 69 N. C. 456.

South Carolina.— Ford *v.* Caldwell, 3 Hill 242, Riley 277; Kershaw *v.* Boykin, 1 Brev. 301.

Tennessee.— Hunter *v.* Sevier, 7 Yerg. 127; Haley *v.* Rowan, 5 Yerg. 301, 26 Am. Dec. 268.

Texas.— O'Shea *v.* Twohig, 9 Tex. 336.

Virginia.— Burnley *v.* Lambert, 1 Wash. 308.

England.— Jones *v.* Dowle, 1 Dowl. P. C. N. S. 391, 11 L. J. Exch. 52, 9 M. & W. 19.

Canada.— Clark *v.* Orr, 11 U. C. Q. B. 436.

Compare Davis *v.* Herndon, 39 Miss. 484.

See 16 Cent. Dig. tit. "Detinue," § 15.

The principle on which the doctrine stated in the text is based is that no one will be allowed to derive benefit from his own wrong. Faulkner *v.* Santa Barbara First Nat. Bank, 130 Cal. 258, 62 Pac. 463.

Motive of transfer immaterial.— In Pool *v.* Adkisson, 1 Dana (Ky.) 110, it was held that since nearly every assumption of dominion over the property of another is a tort, regardless of the motive inspiring such act, where one not having the right to transfer property does transfer it, he assumes the risk of being held responsible by the owner of the property.

A transfer in order to evade the rights of the party entitled to the possession is a wrongful transfer. Foster *v.* Chamberlain, 41 Ala. 158; Fenner *v.* Kirkman, 26 Ala. 650; Foscue *v.* Eubank, 32 N. C. 424.

Where property has been lent to a person, an unauthorized transfer by such person is a wrongful transfer. Haley *v.* Rowan, 5 Yerg. (Tenn.) 301, 26 Am. Dec. 268.

An agent of one not having the right of possession, who, notwithstanding that he has notice of the claim of the party entitled to possession, disposes of the property and cooperates to defeat such claim is guilty of a wrongful transfer and is still liable in detinue to the party entitled to the possession. Pool *v.* Adkisson, 1 Dana (Ky.) 110. But see *supra*, note 64.

Transfer after demand by the owner or the party entitled to possession is a wrongful transfer. Faulkner *v.* Santa Barbara First Nat. Bank, 130 Cal. 258, 62 Pac. 463.

An unauthorized transfer by a bailee is a wrongful transfer as against the bailor, and will sustain detinue by the latter against the former. Easley *v.* Easley, 18 B. Mon. (Ky.) 86; Rucker *v.* Hamilton, 3 Dana (Ky.) 36.

An administrator who has delivered up property which was not assets, to be taken on execution against him as administrator, is guilty of a wrongful dispossession, and is liable in detinue to the parties entitled to such property. Lowry *v.* Houston, 3 How. (Miss.) 394.

One holding under a trespasser cannot escape liability in detinue to the owner or party entitled to the possession of the property, by transferring such property, although he be ignorant of the manner in which the person under whom he holds acquired possession, the rule being different from that applicable to liability for trespass. Justice *v.* Mendell, 14 B. Mon. (Ky.) 12.

Where one pledges the property of another without authority, real or apparent, the owner may maintain detinue against the pledgor and pledgee jointly. Garth *v.* Howard, 5 C. & P. 346, 24 E. C. L. 599.

79. Barksdale *v.* Appleberry, 23 Mo. 389.

80. Brown *v.* Livingstone, 21 U. C. Q. B. 438.

81. Goodman *v.* Boycott, 2 B. & S. 1, 8 Jur. N. S. 763, 31 L. J. Q. B. 69, 6 L. T. Rep. N. S. 25, 110 E. C. L. 1; Reeve *v.* Palmer, 5 C. B. N. S. 84, 5 Jur. N. S. 916, 28 L. J. C. P. 168, 7 Wkly. Rep. 325, 94 E. C. L. 84; Gledstane *v.* Hewitt, 1 Cromp. & J. 565, 9 L. J. Exch. O. S. 145, 1 Tyrw. 445.

The burden of proof is on defendant to show that the loss was not through his fault, especially if defendant be plaintiff's bailee.

for property which has been destroyed or ceased to exist before the action is brought;[82] but according to the weight of authority destruction of the property pending action does not relieve defendant from liability for the value thereof.[83] There is, however, very respectable authority to the effect that where the destruction occurs without fault on the part of defendant, he is thereby relieved from liability for the value of the property, at least in an action of detinue.[84]

5. RESTORATION OF PROPERTY. If all or any of the goods are delivered up after suit, plaintiff can have no judgment to recover them or their value, but may recover damages for their detention; and for the residue plaintiff may have the usual judgment to recover them or their value, and damages for their detention.[85]

6. EVIDENCE.[86] The burden of proof is on plaintiff to show defendant's possession.[87] Whether, after having shown possession in defendant prior to the action, plaintiff has the additional burden of showing that such possession continued up to the time of the action, seems to be involved in the same confusion as is the question of the effect of a transfer by defendant.[88] The weight of authority, however, seems to be that plaintiff need not show continuance of possession up

Reeve *v.* Palmer, 5 C. B. N. S. 91, 28 L. J. C. P. 168, 5 Jur. N. S. 916, 7 Wkly. Rep. 325.

A bailee of property covered by a devise in a will, who loses such property before the death of the testator, is not liable in detinue. Per Blackburn, J., in Goodman *v.* Boycott, 2 B. & S. 1, 8 Jur. N. S. 763, 31 L. J. Q. B. 69, 6 L. T. Rep. N. S. 25, 110 E. C. L. 1. *Contra,* per Wightman, J., in same case.

Failure to find and seize the property sued for is no defense. Morgan *v.* Wing, 58 Ala. 301.

82. Lindsey *v.* Perry, 1 Ala. 203; Caldwell *v.* Fenwick, 2 Dana (Ky.) 332.

83. *Alabama.*— Wilkerson *v.* McDougal, 48 Ala. 517; Feagin *v.* Pearson, 42 Ala. 332; Rose *v.* Pearson, 41 Ala. 687; Johnson *v.* Marshall, 34 Ala. 522; Lay *v.* Lawson, 23 Ala. 377; Bell *v.* Pharr, 7 Ala. 807; Bettis *v.* Taylor, 8 Port. 564; White *v.* Ross, 5 Stew. & P. 123.

Kentucky.— Caldwell *v.* Fenwick, 2 Dana 332; Gentry *v.* Barnett, 6 T. B. Mon. 113; Carrel *v.* Early, 4 Bibb 270. *Contra,* Dorsey *v.* Sands, 5 J. J. Marsh. 37.

Missouri.—Barksdale *v.* Appleberry, 23 Mo. 389.

North Carolina.— Skipper *v.* Hargrove, 1 N. C. 27. *Compare* Bethea *v.* McLennon, 23 N. C. 523.

Virginia.— Austin *v.* Jones, Gilm. 341.

See 16 Cent. Dig. tit. "Detinue," § 15.

Emancipation of a slave pending action for its recovery did not relieve defendant from liability for its value. Wilkerson *v.* McDougal, 48 Ala. 517; Rose *v.* Pearson, 41 Ala. 687. *Contra,* Whitfield *v.* Whitfield, 44 Miss. 254.

84. Whitfield *v.* Whitfield, 44 Miss. 254; Bethea *v.* McLennon, 23 N. C. 523. See also Dorsey *v.* Sands, 5 J. J. Marsh. (Ky.) 37.

85. Williams *v.* Archer, 5 C. B. 318, 17 L. J. C. P. 82, 5 R. & Can. Cas. 289, 57 E. C. L. 318; Crossfield *v.* Such, 8 Exch. 159, 22 L. J. Exch. 65, 1 Wkly. Rep. 82. Phillips *v.* Hayward, 3 Dowl. P. C. 362, 363, 1 Hurl. & W. 108, was an action of detinue for several deeds. Defendant offered to return some of the deeds, whereupon the court made the following order: "That the defendant shall be at liberty to deliver up the deed in question, on payment of costs up to the time of such delivery; and that the proceedings in the action shall be stayed, provided the plaintiff will accept of such discharge of such action; otherwise, such deed is to be struck out of the declaration, and the plaintiff shall be subject to the costs of the action, unless he obtains a verdict for some of the other deeds in the declaration mentioned, or damages, beyond nominal damages, for the detention of the deed in question. The defendant, however, at all events to pay the costs of this application, and not to plead *non detinet* as to the other deeds." See also *infra,* VI, C, 2. *Compare* Morgan *v.* Cone, 18 N. C. 234.

Arrest of judgment.— Where, after verdict for the full value of the articles, it appears by affidavits filed on defendant's application that the property has been restored to plaintiff, the action should not be proceeded in; certainly not with any view to obtaining a judgment for the delivery of the articles or the payment of their value. Johnson *v.* Lamb, 13 U. C. Q. B. 508, where the judgment was that unless plaintiff would consent to reduce his verdict to nominal damages, a new trial would be granted, and that plaintiff would have to pay the costs of the application.

Where no special damages are alleged, the court will compel plaintiff to elect whether he will stay all proceedings on restoration of the property in litigation and payment by defendant of nominal damages and costs, or whether he will proceed for greater damages at the risk of all costs. Lyons *v.* Keller, Ir. R. 15 C. L. 1.

Plaintiff may show that the goods were damaged when returned by defendant pending the action. McGrath *v.* Bourne, Ir. R. 10 C. L. 160.

86. Evidence generally see EVIDENCE.

87. McCurry *v.* Hooper, 12 Ala. 823, 46 Am. Dec. 280; Brewer *v.* Strong, 10 Ala. 961, 44 Am. Dec. 514; Anderson *v.* Passman, 7 C. & P. 193, 32 E. C. L. 568.

88. See *supra,* IV, C, 2.

to the time of the action, and that if defendant relies on a transfer of possession he has the burden of proving it, and also of proving that the transfer was such as will relieve him of liability;[89] but there is respectable authority which seems to place upon plaintiff the burden of proving defendant's possession at the time of the action, or otherwise of showing that having had possession he has lost it through his own fault or wrong.[90] Admissibility of evidence to prove possession is controlled by the principles applicable to admissibility of evidence in general.[91]

V. DAMAGES.[92]

A. Right and Basis of Recovery. Where plaintiff recovers either the property or its alternative value, he is entitled to damages for the wrongful detention of the property.[93] There is a strong line of authority holding that a prior demand upon defendant is essential to the recovery of damages for the detention of the property prior to the beginning of the action.[94] This doctrine probably originated from the cases where defendant was not chargeable with any wrong, that is, where a demand was necessary to make his detention unlawful;[95] and the better rule seems to be that plaintiff may recover damages for the detention from the commencement of defendant's unlawful possession, whether such possession be unlawful on account of defendant's refusal to deliver the prop-

89. *Kentucky.*— Pool *v.* Adkisson, 1 Dana 110; Burton *v.* Brashear, 3 A. K. Marsh. 276.

South Carolina.— Kershaw *v.* Boykin, 1 Brev. 301.

Tennessee.— Haley *v.* Rowan, 5 Yerg. 301, 26 Am. Dec. 268.

Texas.— O'Shea *v.* Twohig, 9 Tex. 336.

Virginia.— Burnly *v.* Lambert, 1 Wash. 308.

West Virginia.— Burns *v.* Morrison, 36 W. Va. 423, 15 S. E. 62.

United States.— Woodruff *v.* Bentley, 30 Fed. Cas. No. 17,986*a*, Hempst. 111.

Where defendant has apparent control over the property, as where he has hired it out, but it does not appear that he cannot resume possession, he cannot escape liability without showing that he cannot obtain possession. Gaines *v.* Garvin, 19 Ala. 491.

90. Downs *v.* Bailey, 135 Ala. 329, 33 So. 151; Berlin Mach. Works *v.* Alabama City Furniture Co., 112 Ala. 488, 20 So. 418; Bolling *v.* Fannin, 97 Ala. 619, 12 So. 59; Behr *v.* Gerson, 95 Ala. 438, 11 So. 115; Graham *v.* Myers, 74 Ala. 432; Gilbreath *v.* Jones, 66 Ala. 129; Foster *v.* Chamberlain, 41 Ala. 158; Miller *v.* Hampton, 37 Ala. 342; Fenner *v.* Kirkman, 26 Ala. 650; Walker *v.* Fenner, 20 Ala. 192; Davis *v.* Herndon, 39 Miss. 484; Foscue *v.* Eubank, 32 N. C. 424.

91. See EVIDENCE.

Book entries.— Defendant's cash-book containing an original entry made by his cashier in the regular course of business, showing a sale of the property sued for on a day prior to the bringing of the action, taken in connection with the testimony of the cashier that the entry was made by him, is admissible to show that defendant was not in possession of the property when the action was brought, and hence that the action cannot be maintained. Bolling *v.* Fannin, 97 Ala. 619, 12 So. 59.

92. **Damages** generally see DAMAGES, 13 Cyc. 1.

93. Robinson *v.* Richards, 45 Ala. 354.

Where plaintiff regains possession of the property pending action, it has been held that he cannot recover damages. Morgan *v.* Cone, 18 N. C. 234. But see *supra*, IV, C, 5; *infra*, VI, C, 2.

Tender of damages.— Under 3 & 4 Wm. IV, c. 42, § 21, defendant may pay into court such damages as he thinks plaintiff has sustained by reason of the detention of the goods. Crossfield *v.* Such, 8 Exch. 159, 22 L. J. Exch. 65, 1 Wkly. Rep. 82.

94. *Alabama.*— Vaughn *v.* Wood, 5 Ala. 304; Carroll *v.* Pathkiller, 3 Port. 279.

Kentucky.— Gentry *v.* McKehen, 5 Dana 34; Jones *v.* Henry, 3 Litt. 46; Cole *v.* Cole, 4 Bibb 340; Cox *v.* Robertson, 1 Bibb 604; Tunstall *v.* McClelland, 1 Bibb 186.

Mississippi.— Carraway *v.* McNeiee, Walk. 538.

Missouri.— Irwin *v.* Wells, 1 Mo. 9.

North Carolina.— Sheppard *v.* Edwards, 3 N. C. 186; Anonymous, 3 N. C. 136.

Texas.— Calvit *v.* Cloud, 14 Tex. 53; Dunn *v.* Choate, 4 Tex. 14; Clapp *v.* Walters, 2 Tex. 130.

See 16 Cent. Dig. tit. "Detinue," § 12.

One who owns a house on another's land cannot recover damages of the latter for withholding possession, without first making demand to be allowed to enter and remove it. Eastman *v.* Burke County, 114 N. C. 524, 19 S. E. 599.

Detention after date of writ.— In Leader *v.* Rhys, 2 F. & F. 399, it was held that damages for the detention of the property after the date of the writ are not recoverable except in a new action.

Where plaintiff's title is divested before trial, he can recover damages for the detention of the property only up to the time of its divestiture, and the costs of the action. Cole *v.* Conolly, 16 Ala. 271.

95. Calvit *v.* Cloud, 14 Tex. 53, holding that for the sake of uniformity this rule has been adopted in all cases.

erty on demand or on account of any other circumstances.[96] In the absence of statutory provision it seems that there is no remedy for the recovery of damages for the detention of the property after judgment.[97]

B. Measure of Damages. The measure of damages is the value of the use or hire of the property during the period of unlawful detention.[98]

96. Hall *v.* Chapman, 35 Ala. 553; Gardner *v.* Boothe, 31 Ala. 186; Whitfield *v.* Whitfield, 44 Miss. 254; Gillies *v.* Wofford, 26 Tex. 76; Nichols *v.* Campbell, 10 Gratt. (Va.) 560.

An executor or administrator is liable for the detention of his intestate and also for his own detention. English *v.* McNair, 34 Ala. 40; Lawson *v.* Lay, 24 Ala. 184. See also Hunt *v.* Martin, 8 Gratt. (Va.) 578.

In detinue against a subsequent purchaser, it is error to instruct the jury that defendant is liable for damages for the unlawful detention from the time of his purchase, where his possession is not clearly shown to have commenced at the time of his purchase. Gardner *v.* Boothe, 31 Ala. 186.

97. Ellis *v.* Gosney, 7 J. J. Marsh. (Ky.) 109; Moore *v.* Howe, 7 J. J. Marsh. (Ky.) 64; Dorsey *v.* Sands, 5 J. J. Marsh. (Ky.) 37.

In Kentucky, under statute, where a judgment against defendant in an action of detinue was affirmed on appeal, plaintiff could recover damages for the detention of the property from the time of the first judgment to the time of the delivery of the property to him. Hall *v.* Edrington, 8 B. Mon. (Ky.) 47.

In Virginia it has been held that there is no remedy in equity to recover damages for the detention of the property pending an appeal from a judgment in detinue, it being held that the remedy, if any exist, is at law. Alderson *v.* Biggars, 4 Hen. & M. 470.

98. Fralick *v.* Presley, 29 Ala. 457, 65 Am. Dec. 413; Glascock *v.* Hays, 4 Dana (Ky.) 58; Horton *v.* Reynolds, 8 Tex. 284.

Where defendant has sold the property prior to the beginning of the action, it has been held that this amounts to a wrongful conversion of the property, and that plaintiff's damages should be assessed at the value of the possession of the property to him. Grand Island Banking Co. *v.* Grand Island First Nat. Bank, 34 Nebr. 93, 51 N. W. 596.

Depreciation in value of the property caused by use during its wrongful detention may be recovered in addition to the rental value. Freer *v.* Cowles, 44 Ala. 314; Williams *v.* Archer, 5 C. B. 318, 5 Ry. Cas. 289, 17 L. J. C. P. 82. But see White *v.* Sheffield, etc., R. Co., 90 Ala. 253, 7 So. 910.

In detinue for property sold on conditions, and withheld from the seller after breach of conditions and demand for its return, the measure of damages for the unlawful detention would ordinarily be the value of the use of the property from the time of the demand and refusal to the rendition of the verdict, excluding any compensation for the use of the property while the buyer held it legally, and abating nothing from the damages because of payments in work or otherwise made by the buyer pursuant to the contract. McGinnis *v.* Savage, 29 W. Va. 362, 1 S. E. 746.

The owner of a house on another's land cannot recover, as damages for its detention by the landowner, the rental value of such house while on defendant's land, but only the actual damages caused by the detention. Eastman *v.* Burke County, 114 N. C. 524, 19 S. E. 599.

Where the property perishes before judgment, the measure of damages is the rental value of such property up to the time of its destruction. Haile *v.* Hill, 13 Mo. 612.

The amount laid in the declaration cannot be exceeded. Goodman *v.* Floyd, 2 Humphr. (Tenn.) 59. See also Laborde *v.* Rumph, 1 McCord (S. C.) 15.

The value of the property cannot be considered as constituting any part of the damages. Laborde *v.* Rumph, 1 McCord (S. C.) 15.

Conjectural damages are not allowable. Means *v.* Hyde, 19 La. Ann. 478.

Damages in excess of the value of the property, although unusual, are not necessarily excessive. Washburn *v.* Roberts, 72 Ind. 213.

Rule the same in all forms of action.—"It is to be observed, that, as to the measure of damages, there is a strong tendency, by legislative action as well as judicial decisions, everywhere, to abolish the distinctions resulting from the forms of action invented to recover the possession of personal property, or damages for its conversion, or detention, or wrongful appropriation, or for the breach of contract in relation thereto, and to adopt general rules upon the subject of damages susceptible of universal application. Hence, the text writers, as well as the late decisions, in discussing this rule of damages, seem to disregard the form of action, whether trover, detinue, trespass or replevin, and to agree, no matter what the form of remedy, that plaintiff, where the property is not restored upon proof of his right, is entitled to recover full compensation or indemnity for the wrong or injury complained of." Whitfield *v.* Whitfield, 40 Miss. 352, 358.

In detinue to recover a deed the measure of damages is not necessarily the value of the land, but depends upon all the circumstances of the case. Even where defendant has parted with the deed and cannot restore it, plaintiff is not necessarily entitled to recover the value of the land. Reynolds *v.* Waddell, 12 U. C. Q. B. 9, where it was held that defendant having in good faith and with a desire to do the right thing, put it out of his power to restore the deed, the question as to whether plaintiff should be allowed to recover the value of the land was for the jury.

After a receiver has been appointed, the unlawful detention ceases, the property being in the hands of the court, and no damages for the detention after such appointment can

VI. PROCEDURE.

A. Process and Seizure of Property. By making an affidavit of ownership, and executing a statutory bond for the payment of such costs and damages as defendant may sustain by reason of a wrongful action, plaintiff may maintain an order directing the officer executing the summons to seize the property.[99] The officer is required to hold the property for a certain time, during which plaintiff may take possession of the property by giving another bond conditioned to return the property to defendant in the event of a judgment in his favor;[1] but if he do not give such bond within the specified period, it is the duty of the sheriff to release the property, and failure to release it at the expiration of the specified period renders him liable to defendant as a trespasser *ab initio*.[2] Jurisdiction of defendant, however, is not acquired by the seizure of the property, but by the service of a summons, as in other personal actions.[3] After the officer has

be recovered. Peruvian Guano Co. *v.* Dreyfus, [1892] A. C. 166, 7 Aspin. 225, 61 L. J. Ch. 749, 66 L. T. Rep. N. S. 536.

99. Ala. Code (1876), § 2942, providing that when an action of detinue is instituted in the circuit court, plaintiff, upon making affidavit that the property sued for belongs to him, and the execution of a bond with surety for the payment of such costs and damages as defendant may sustain from the wrongful suit, can obtain an order directing the officer executing the summons to take possession of the property, applies to an action of detinue in justice's court. Jacobs *v.* State, 61 Ala. 448. See also W. Va. Code, c. 102; Robinson *v.* Woodford, 37 W. Va. 377, 16 S. E. 602.

Sufficiency of affidavit.— Under Ala. Code (1876), §§ 2942, 2943, relating to suits for the recovery of personal chattels in specie, and requiring an affidavit by "the plaintiff, his agent or attorney," that the property sued for belongs to plaintiff, and the giving by plaintiff of a bond for costs and damages as prerequisites to the making of an order for the seizure of the property, an affidavit in such a suit by the United States in the federal circuit court, made by a special agent of the general land-office, in which he swears, "to the best of his knowledge, information and belief," that the property sued for belongs to the United States is sufficient. U. S. *v.* Bryant, 111 U. S. 499, 4 S. Ct. 601, 28 L. ed. 496.

United States need not give bond.— Ala. Code (1876), §§ 2942, 2943, relating to suits for the recovery of personal property in specie, provide for the giving by plaintiff of a bond for costs and damages as a prerequisite to the making of an order for the seizure of the property. It was held that under Rev. St. § 1001, providing that whenever any process issues from a circuit court by the United States, no bond or other security shall be required from the United States, the giving of the bond provided for by such provisions of the Alabama code is not a condition precedent to the right of the United States to avail themselves of said provisions. U. S. *v.* Bryant, 111 U. S. 499, 4 S. Ct. 601, 28 L. ed. 496.

Estoppel by recitals of bond.—Where plaintiff gives a redelivery bond reciting the sheriff's seizure of the property under the writ, and conditioned for the delivery of such property to defendant in the event that the action fails, he is estopped to show that the property was not seized by the sheriff or that it did not come to his, plaintiff's, possession under the bond. Hill *v.* Nelms, 86 Ala. 442, 5 So. 796.

A recognizance of special bail was required of plaintiff by 1 Va. Rev. Code, c. 128, § 53. Cloud *v.* Catlett, 4 Leigh (Va.) 462.

1. Gay *v.* Burgess, 59 Ala. 575; Ala. Code (1876), §§ 2942, 2943; Hall *v.* Perryman, 42 Ala. 122; Ala. Rev. Code, §§ 2593, 2594.

2. Gay *v.* Burgess, 59 Ala. 575. See also Hall *v.* Perryman, 42 Ala. 122.

3. An indorsement by the sheriff on a writ in detinue that by virtue of the writ he had taken the property therein described, and five days having elapsed and defendant failing and refusing to put in bond, and plaintiff having put in bond within five days, that the property had been delivered to plaintiff, is not sufficient to show that he had executed the writ on defendant, and will not support a judgment by default. Fowler *v.* Banks, 21 Ala. 679.

Failure to find and seize the property does not prevent the acquisition of full jurisdiction to hear and determine the case by service of a summons on defendant. Morgan *v.* Wing, 58 Ala. 301.

Waiver of summons.—Where no complaint is filed or summons issued until after the property is seized, the defect is cured where defendant, being orally notified, appears and consents to the filing of the complaint, and upon the filing thereof issue is joined thereon and trial is had. Hammer *v.* Holman, 116 Ala. 368, 22 So. 286. The giving of a replevy bond in an action of detinue does not waive a defective writ. Nabors *v.* Nabors, 2 Port. (Ala.) 162.

Amendment of writ.— Upon excuse shown for the error, leave was given to amend a writ of replevin, by changing it from *cepit* and *detinet* to *detinet* alone, after its execution and an appearance by defendant. Smith *v.* Frizell, 1 How. Pr. (N. Y.) 148.

seized the property, defendant may retain the property by giving a forthcoming or redelivery bond.[4]

B. Parties[5] — **1. PLAINTIFF.** All persons having a legal possessory interest in the property must be made parties plaintiff.[6]

2. DEFENDANT. The action should be brought against the party in possession or chargeable with the wrongful detention, regardless of the number that may be interested in the property;[7] but where the property is jointly detained by several all should be joined as defendants.[8]

C. Pleading[9] — **1. DECLARATION, PETITION, OR COMPLAINT.** The declaration, petition, or complaint should aver plaintiff's title to or possessory interest in the property sued for[10] and defendant's possession and wrongful detainer of the prop-

4. Under Ala. Code, § 2192, the bond to be given by defendant in detinue, in order that he may retain possession of the property, should be conditioned that if cast in the suit he will within thirty days thereafter deliver the property to plaintiff and pay all costs and damages which may accrue from the detention thereof. Rose *v.* Pearson, 41 Ala. 253. See Robinson *v.* Woodford, 37 W. Va. 377, 16 S. E. 602; W. Va. Code, c. 102.

Where a sheriff is sued in detinue for the recovery of property in his possession under a levy, he is not obliged to give a forthcoming bond, but may notify the execution creditor, who is thereupon charged with the responsibility of protecting his own interests. Governor *v.* Gibson, 14 Ala. 326.

A bond executed by one of several defendants who alone has possession of the property is sufficient. Rich *v.* Lowenthal, 99 Ala. 487, 13 So. 220.

Failure to seize part of the property covered by the forthcoming bond does not affect the validity of the bond. Rich *v.* Lowenthal, 99 Ala. 487, 13 So. 220.

Including articles not sued for in the forthcoming bond does not affect the validity of the bond. Rich *v.* Lowenthal, 99 Ala. 487, 13 So. 220.

5. Parties generally see PARTIES.

6. Bolton *v.* Cuthbert, 132 Ala. 403, 31 So. 358; Price *v.* Talley, 18 Ala. 21; Luke *v.* Marshall, 5 J. J. Marsh. (Ky.) 353.

Failure to join a necessary party plaintiff is ground for a nonsuit. Luke *v.* Marshall, 5 J. J. Marsh. (Ky.) 353.

Misjoinder.— An agreement between two creditors of defendant, whose claims are separate and distinct, to make a common cause in obtaining what they can in satisfaction of their claims, and to divide the recovery between them in proportion to their respective debts, does not authorize a joint suit by them to recover specific property mortgaged by defendant to one of them, as security for his claim. Freer *v.* Cowles, 44 Ala. 314.

7. Where two persons take a quantity of personal property at the same time, and one of them detains a portion thereof and the other detains the remainder, the owner cannot maintain a joint action of detinue against them, since the gist of the action is not the original taking, but the wrongful detainer. Slade *v.* Washburn, 24 N. C. 414.

Where there are several executors or administrators, and only one is in possession, the one in possession alone is the proper party defendant. Bettis *v.* Taylor, 8 Port. (Ala.) 564; Smith *v.* Wiggins, 3 Stew. (Ala.) 221. *Compare* Nichols *v.* Michael, 23 N. Y. 264, 80 Am. Dec. 259. And see *supra*, IV, C, 2.

8. Under the New York code, one who has fraudulently obtained personal property, and one who has taken an assignment thereof in trust to pay the assignor's debts, are both properly made defendants in an action to recover the goods (detinue or replevin). Nichols *v.* Michael, 23 N. Y. 264, 80 Am. Dec. 259. See also *supra*, IV, C, 2. *Compare* Bettis *v.* Taylor, 8 Port. (Ala.) 564.

Bringing in new parties defendant.— Under Ala. Code, § 2833, it is error for the court to refuse to allow plaintiff to amend his complaint by adding the names of new parties defendant where it does not appear that such parties were not jointly liable with defendant at the commencement of the suit. Rand *v.* Gibson, 109 Ala. 266, 19 So. 533.

9. Pleading generally see PLEADING.

Forms of declaration see Dame *v.* Dame, 43 N. H. 37; Martin Civ. Proc. 371 [*citing* Warren L. Stud. 583].

Form of writ see Martin Civ. Proc. 371 [*citing* Fitzherbert Nat. Brev. 323].

10. Price *v.* Israel, 3 Bibb (Ky.) 516; Binn *v.* Waddill, 32 Gratt. (Va.) 588; Kent *v.* Armistead, 4 Munf. (Va.) 72.

A general allegation of ownership is sufficient. Griswold *v.* Manning, 67 N. Y. App. Div. 372, 73 N. Y. Suppl. 702.

Averments not inconsistent with right of possession in defendant are insufficient. Herring Safe Co. *v.* Baker County, 77 Ga. 535, 3 S. E. 154. But special possessory interest on the part of defendant need not be negatived. Griswold *v.* Manning, 67 N. Y. App. Div. 372, 73 N. Y. Suppl. 702; Macon *v.* Ownes, 1 Brev. (S. C.) 69.

Averment of right to immediate possession is unnecessary where absolute ownership is alleged. Griswold *v.* Manning, 67 N. Y. App. Div. 372, 73 N. Y. Suppl. 702.

Where there are two counts in the declaration, one only of which avers property in plaintiff, the declaration is good. Binns *v.* Waddill, 32 Gratt. (Va.) 588.

Averment of title held sufficient.— A petition in a suit to recover a horse discloses a good cause of action when it states that de-

erty.[11] The declaration, petition, or complaint should also make a demand for

fendant purchased a horse belonging to plaintiff from plaintiff's minor son; that plaintiff never received the consideration paid for the horse; that defendant knew that plaintiff did not suffer said son to trade in his property; and that the son was a minor and under parental control. Ice *v.* Lockridge, 21 Tex. 461.

In an action by a curator or receiver plaintiff should not allege his right of possession as being dependent upon his fiduciary capacity, but if he does so it will be mere surplusage. Boyle *v.* Townes, 9 Leigh (Va.) 158.

A trustee for the use of another should not declare upon such use as giving him the right of possession, but if he does so declare, the declaration will not thereby be rendered defective, the averment as to the use being mere surplusage. Holly *v.* Flournoy, 54 Ala. 99; Hundley *v.* Buckner, 6 Sm. & M. (Miss.) 70.

In detinue by a husband and wife to recover property, an allegation that plaintiffs claim the property as a separate estate of the wife is sufficiently certain and definite, although it does not allege whether the wife's separate estate was created by contract or statute, or whether the husband has ever had possession of the slaves during coverture. Pickens *v.* Oliver, 29 Ala. 528.

In detinue by an executor or administrator plaintiff must declare in his representative capacity where he has never had possession of the property. Ikelheimer *v.* Chapman, 32 Ala. 676; Cox *v.* McKinney, 32 Ala. 461. In such case an averment that plaintiff claims as administrator is sufficient to show his representative capacity. Crimm *v.* Crawford, 29 Ala. 623. Where he has had possession of the property he may declare in his own right. Ikelheimer *v.* Chapman, 32 Ala. 676; Cox *v.* McKinney, 32 Ala. 461; Sims *v.* Boynton, 32 Ala. 353, 70 Am. Dec. 540; Walker *v.* Lauderdale, 17 Ala. 359. He must sue in his own name where the detention complained of is after the death of the testator or intestate. Melton *v.* McDonald, 2 Mo. 45, 22 Am. Dec. 437.

Variance between declaration and writ.— A plaintiff in detinue, in his writ and in the commencement of his declaration, described himself as suing "as trustee for his wife." The indorsement on the writ described the property sued for as the separate property of his wife, while the declaration averred that the plaintiff "was possessed as of his own property." It was held that there was not such variance as defendant can take advantage of, either by moving to strike the declaration from the file or by craving oyer of the writ and indorsement, and demurring to the declaration, the phrase "as trustee for his wife" being treated as surplusage or as *descriptio personæ*. Gibson *v.* Land, 27 Ala. 117.

Variance between declaration and proof.— Whenever a complaint pursues the form given in the code for the recovery of chattels in specie, it must be understood as claiming and asserting such an interest in the property sued for as may be recovered in that action by plaintiff, and is stated in the margin. If on the trial the proof fail to show such an interest, it becomes a question of variance between the allegations and proof. If there be a substantial variance, and the defect be either not amendable or if amendable be not in fact amended in the court below, plaintiff must fail in his suit. Pickens *v.* Oliver, 29 Ala. 528.

11. A complaint averring that defendant is in possession of property owned by plaintiff, which he refuses after demand made to deliver, sufficiently avers that the detention is wrongful. Griswold *v.* Manning, 67 N. Y. App. Div. 372, 73 N. Y. Suppl. 702. A petition alleging that property sued for is on the premises of defendant corporation, that it is there held under a written acknowledgment given by an officer of the corporation, and that the corporation refuses to deliver, presents a sufficient charge of possession in defendant to sustain an action for restoration of the property. Kellar *v.* Victoria Lumber Co., 45 La. Ann. 476, 12 So. 511. A declaration alleging that property came into possession of defendant and still is in his possession and charging that he refused to deliver it on request is sufficient, being tantamount to an express allegation that defendant detained the property. Tunstall *v.* McClelland, 1 Bibb (Ky.) 186.

The declaration need not negative any special possessory interest which defendant may have in the property. Griswold *v.* Manning, 67 N. Y. App. Div. 372, 73 N. Y. Suppl. 702.

The manner of taking is usually laid as a bailment or finding, but it is immaterial and need not be alleged. Otero *v.* Bullard, 3 Cal. 188. See *supra*, II, A. If the manner of taking be laid, it is mere surplusage, and the declaration will be sustained by any proof showing possession and wrongful detainer by the defendant. Gentry *v.* McKehen, 5 Dana (Ky.) 34; Mills *v.* Graham, 1 B. & P. N. R. 140, 8 Rev. Rep. 767; Whitehead *v.* Harrison, 6 Q. B. 423, 2 D. & L. 122, 8 Jur. 894, 13 L. J. Q. B. 312, 51 E. C. L. 423. The purpose for which defendant received the goods is immaterial, but if alleged it is surplusage. Griswold *v.* Manning, 67 N. Y. App. Div. 372, 73 N. Y. Suppl. 702. But a tortious taking should not be alleged, since in such case damages might be assessed for the tort in the taking, which is not an element of the action; and such an allegation is ground for reversal. Price *v.* Israel, 3 Bibb (Ky.) 516; Mansell *v.* Israel, 3 Bibb (Ky.) 510.

In an action against an executor or administrator, an averment that the property came into his possession by finding and that he detains it is sufficient. Gentry *v.* McKehen, 5 Dana (Ky.) 34.

Where the complaint was not filed until after the seizure of the property under the writ, an averment referring to such property

the property.[12] Facts showing proper venue must be alleged.[13] The property must be particularly and specifically described,[14] and the value thereof

as being in the possession of the constable instead of that of defendant may be treated as surplusage. Hamner *v.* Holman, 116 Ala. 368, 22 So. 286.

12. The failure of a declaration in detinue to contain a "demand" for the property does not warrant the arrest of judgment after verdict on a plea of *non detinet*. Boggess *v.* Boggess, 6 Munf. (Va.) 486.

13. Stiles *v.* James, 2 Wash Terr. 194, 2 Pac. 188.

Where the sheriff's return shows that the venue is the proper one, as where it shows that the property is within the jurisdiction of the court, the failure to allege the venue is cured. Stiles *v.* James, 2 Wash. Terr. 194, 2 Pac. 188.

14. Felt *v.* Williams, 2 Ill. 206; Boggs *v.* Newton, 2 Bibb (Ky.) 221; Robinson *v.* Woodford, 37 W. Va. 377, 16 S. E. 602; Friedel *v.* Castlereagh, Ir. R. 11 C. L. 93.

Waiver of indefiniteness of description.— Where a bill in detinue describes generally the articles sought to be recovered, and avers that they belong to the estate of the complainant's intestate, an answer alleging that the property in defendant's possession was not the property of the estate waives any exceptions to the bill because of indefiniteness in description of the articles sought to be recovered. Young *v.* Young, (Tenn. Ch. App. 1900) 64 S. W. 319.

After a verdict for the recovery of a negro woman and her issue, the names of the issue being given, it was held in Holladay *v.* Littlepage, 2 Munf. (Va.) 539, that the failure to allege the names of the issue in the declaration was cured.

Description as to locality is not always necessary. Mills *v.* King, 14 U. C. C. P. 223.

Money cannot be recovered under a general allegation that defendant owes it to plaintiff. Brown *v.* Ellison, 55 N. H. 556.

Grain.— In Richardson *v.* Gray, 29 U. C. Q. B. 360, it was held that a count in detinue for six hundred bushels of rye was sufficiently definite after verdict.

Books, papers, and written instruments.— A declaration for "certain books, papers, and documents of the plaintiff, that is to say, a purser's cost-book, a merchant's ledger, an invoice-ledger, diverse merchant's accounts, vouchers," etc., has been held sufficient. Atwood *v.* Ernest, 13 C. B. 881, 1 C. L. R. 738, 17 Jur. 603, 22 L. J. C. P. 225, 1 Wkly. Rep. 436, 76 E. C. L. 881. A declaration for "a box of writings" has been held sufficient, without setting forth any writings in particular. Thorneton *v.* Bernard, 2 Ld. Raym. 991. A declaration for "a certain bill of exchange for 85*l.*" has been held sufficient. Graham *v.* Gracie, 13 Q. B. 548, 66 E. C. L. 548. A declaration describing the property as a certain writing or writings, signed by A B, or by someone in his behalf, and at his instance and request, relating to a lot of ground of four acres, at or near a certain place, and belonging to the estate of said A B, is insufficient. Rementa *v.* Erwin, 2 Pennyp. (Pa.) 407, 11 Wkly. Notes Cas. (Pa.) 194. A complaint describing the property as bonds to the amount of two thousand one hundred dollars, issued by the county of Wilson, state of Tennessee, and known as "Wilson county bonds," followed by a further allegation that the property consists of two bonds of one thousand dollars each, is sufficient. David *v.* David, 66 Ala. 139.

Machinery.— A complaint in detinue for one engine and one boiler is sufficient. Nelson *v.* Howison, 122 Ala. 573, 25 So. 211.

In detinue for a pistol the words, "a six barrelled pistol, called a six shooter or revolver," are a sufficient description of the property. Wright *v.* Ross, 2 Greene (Iowa) 266.

Tools.— In a complaint in detinue, the property is sufficiently described by an averment that it consists of one chest of tools containing a complete set of carpenter tools, embracing all tools used in the carpenter's trade, and one set of carving tools, embracing all tools used in carving, and two complete sets of drawing tools, used by architects for drawing plans of buildings. Thompson *v.* Pearce, 49 Ala. 210. A declaration for "a set of turner's tools" is too indefinite; but if there be added the words "being the same formerly owned by one Burkett," the description becomes sufficiently specific and capable of being identified. March *v.* Leckie, 35 N. C. 172, 55 Am. Dec. 431.

Slaves.— In Haynes *v.* Crutchfield, 7 Ala. 189, it was held that it was sufficient to declare in detinue for a negro woman by name without stating her complexion, age, etc.; or for a cow without describing her color, etc.; or for a certain number of knives and forks without a particular description. Where slaves were described in the declaration, some by name and age, some by name and complexion, and some by name, age, and complexion, and mules by their color, or by their sex, color, and age, the description was held to be sufficient. Whitfield *v.* Whitfield, 44 Miss. 254. In Bass *v.* Bass, 4 Hen. & M. (Va.) 478, it was held that detinue would lie for an infant negro child and its mother, naming her, without naming the child.

In an action by an executor or administrator to recover property of which he has never had possession, less particularity is required than is generally necessary, the presumption being that knowledge of the property is more peculiarly with defendant than with plaintiff. David *v.* David, 66 Ala. 139.

Unnecessary particularity in describing the property must be supported by proof. Stewart *v.* Tucker, 106 Ala. 319, 17 So. 385, holding that where plaintiff in an action of detinue to recover severed crops describes the land from which the crops were severed with unnecessary particularity he must prove his case as alleged.

alleged,[15] giving the separate value of each article sued for.[16] Where a demand is a condition precedent to the right to maintain the action it must be alleged.[17] No allegation of special damages is essential to the recovery of damages for the detention of the property.[18] Counts in debt and detinue may be joined in the same declaration.[19]

2. PLEA OR ANSWER. Defendant in detinue may plead the general issue which is *non detinet*,[20] and which puts in issue plaintiff's title to or interest in the prop-

Variance.— A declaration in detinue to recover a red cow with a white face is not supported by proof that the cow was yellow or sorrel. Felt *v.* Williams, 2 Ill. 206. Where the declaration alleges the detention of an indenture of bargain and sale and the evidence shows that the instrument detained is in escrow there is a variance. Reynolds *v.* Waddell, 12 U. C. Q. B. 9.

Arrest of judgment.— Insufficiency in description of the property in the declaration is ground for arrest of judgment. Richardson *v.* Gray, 29 U. C. Q. B. 360, where it was held, however, that a count in detinue for six hundred bushels of rye was sufficient after verdict.

Bill in equity.— Where a bill in detinue seeks the recovery of property without particularly describing it as belonging to a decedent's estate, and alleged to be in the widow's possession, and the answer avers that defendant had possession of no such property, and what she had belonged to her, such pleading does not justify a decree allowing recovery for the value of all the personalty on the premises of the decedent, except the exempt articles, and including articles on the premises in the possession of and owned by the decedent's daughters. Young *v.* Young, (Tenn. Ch. App. 1900) 64 S. W. 319.

15. *Alabama.*— Haynes *v.* Crutchfield, 7 Ala. 189.

Indiana.— Hawkins *v.* Johnson, 3 Blackf. 46.

North Carolina.— Hutchins *v.* McLean, 1 N. C. 327.

Texas.— Gillies *v.* Wofford, 26 Tex. 76.

Virginia.— Bates *v.* Gordon, 3 Call 555.

See 16 Cent. Dig. tit. "Detinue," § 26.

After verdict an objection for failure of the declaration to allege the value of the property cannot be sustained. Such objection must be presented by a demurrer. Hutchins *v.* McLean, 1 N. C. 327; Gillies *v.* Wofford, 26 Tex. 76; Bates *v.* Gordon, 3 Call (Va.) 555.

The recovery of the alternative value of the property is limited by the value averred in the declaration. Young *v.* Young, (Tenn. Ch. App. 1900) 64 S. W. 319.

16. Haynes *v.* Crutchfield, 7 Ala. 189; Jordan *v.* Thomas, 31 Miss. 557; Holladay *v.* Littlepage, 2 Munf. (Va.) 539.

After a verdict for plaintiff, a defect in failing to state the separate value of each article is not ground for objection. Jordan *v.* Thomas, 31 Miss. 557; Holladay *v.* Littlepage, 2 Munf. (Va.) 539.

17. A complaint averring that defendant refuses "after demand made" to deliver possession of chattels sufficiently avers a demand by plaintiff or by an authorized agent. Griswold *v.* Manning, 67 N. Y. App. Div. 372, 73 N. Y. Suppl. 702. In detinue a general charge "that the defendant, though often requested," etc., is sufficient, without stating a special demand and refusal. Mortimer *v.* Brumfield, 3 Munf. (Va.) 122.

As to when a demand is necessary see *supra*, III, D.

18. Levi *v.* Legg, 23 S. C. 282; Gardin *v.* Neily, 31 Nova Scotia 89.

19. Calvert *v.* Marlow, 18 Ala. 67; Rucker *v.* Hamilton, 3 Dana (Ky.) 36.

Detinue and trover cannot be joined. Hood *v.* Hanning, 4 Dana (Ky.) 21.

20. *Alabama.*— Berlin Mach. Works *v.* Alabama City Furniture Co., 112 Ala. 488, 20 So. 418; Lucas *v.* Pittman, 94 Ala. 616, 10 So. 603.

Illinois.— Robinson *v.* Peterson, 40 Ill. App. 132.

Kentucky.— Cromwell *v.* Clay, 1 Dana 578, 25 Am. Dec. 165.

Mississippi.— Whitfield *v.* Whitfield, 44 Miss. 254.

Virginia.— Stratton *v.* Minnis, 2 Munf. 329.

Canada.— Morton *v.* Stone 30 U. C. Q. B. 158.

See 16 Cent. Dig. tit. "Detinue," §§ 28, 29.

Form of plea see Martin Civ. Proc. 386 [*citing* 2 Chitty Pl. 495].

Not guilty is not a proper plea in detinue. Berlin Mach. Works *v.* Alabama City Furniture Co., 112 Ala. 488, 23 So. 418; Lucas *v.* Pittman, 94 Ala. 616, 10 So. 603; Robinson *v.* Peterson, 40 Ill. App. 132. But where defendant pleads "not guilty" and no objection is made at the trial, the appellate court may treat such plea as the general issue, the plea having been so treated throughout the trial. Berlin Mach. Works *v.* Alabama City Furniture Co., 112 Ala. 488, 20 So. 418. In Florida it seems that "not guilty" is the proper general issue in the statutory action for taking and detaining personalty. Stewart *v.* Mills, 18 Fla. 57.

Statutory general issue in Alabama.—The plea of the general issue in detinue prescribed by Ala. Code (1896), § 3295, is equivalent to a plea of *non detinet* at the common law, and puts in issue the right of plaintiff to recover. Carlisle *v.* People's Bank, 122 Ala. 446, 26 So. 115; Foster *v.* Chamberlain, 41 Ala. 158. An averment under this section that "the allegations of the complaint are untrue" is a plea of the general issue. Berlin Mach. Works *v.* Alabama City Furniture Co., 112 Ala. 488, 20 So. 418.

erty,[21] and defendant's possession or detention thereof;[22] or he may plead in justification of the detention that he has the title to the property,[23] or some special interest therein which entitles him to the possession thereof;[24] or he may plead

In detinue by a conditional vendor to recover the property for breach of conditions as to payment, the plea of payment is the only plea available to defendant. Brandon *v.* Montgomery Iron Works, 96 Ala. 506, 11 So. 540.

21. Brown *v.* Brown, 13 Ala. 208, 48 Am. Dec. 52; Robinson *v.* Peterson, 40 Ill. App. 132; Whitfield *v.* Whitfield, 44 Miss. 254; Berry *v.* Hale, 1 How. (Miss.) 315; Philips *v.* Robinson, 4 Bing. 106, 5 L. J. C. P. O. S. 111, 29 Rev. Rep. 518, 13 E. C. L. 422.

Fraud, rendering plaintiff's title void, is provable under the general issue. Stratton *v.* Minnis, 2 Munf. (Va.) 329.

Adverse possession for the time prescribed as a bar by the statute of limitations may be given in evidence under the plea of general issue, the reason being that the statute of limitations acts upon the title of personal property not merely as a bar to the remedy, but destroys the right itself. Traun *v.* Keiffer, 31 Ala. 136; Lay *v.* Lawson, 23 Ala. 377; Duckett *v.* Crider, 11 B. Mon. (Ky.) 188; Smart *v.* Johnson, 3 J. J. Marsh. (Ky.) 373; Elam *v.* Bass, 4 Munf. (Va.) 301; Stratton *v.* Minnis, 2 Munf. (Va.) 329.

In England and Canada the common-law rule, which still prevails in the United States, was changed by the "Recent Rules." Under these rules *non detinet* puts in issue only the detention of the property by defendant, not plaintiff's title or right of possession. Robinson *v.* Peterson, 40 Ill. App. 132; Broadbent *v.* Ledward, 11 A. & E. 209, 3 P. & D. 45, 39 E. C. L. 132; Morgan *v.* Marquis, 2 C. L. R. 276, 9 Exch. 145, 23 L. J. Exch. 21; Mason *v.* Farnell, 1 D. & L. 576, 13 L. J. Exch. 142, 12 M. & W. 674; Richardson *v.* Frankum, 8 Dowl. P. C. 346, 9 L. J. Exch. 162, 6 M. & W. 420; Morton *v.* Stone, 30 U. C. Q. B. 158; Reynolds *v.* Waddell, 12 U. C. Q. B. 9.

In Florida the general issue in the statutory action for taking and detaining personal property puts in issue the taking and detention, but not plaintiff's right of property and possession. Stewart *v.* Mills, 18 Fla. 57.

Leave and license is provable under the general issue. Bain *v.* McDonald, 32 U. C. Q. B. 190.

Non-joinder of joint owner as a co-plaintiff is available as a defense under the general issue. Bolton *v.* Cuthbert, 132 Ala. 403, 31 So. 358. In England and Canada, however, under the "Recent Rules," which limit the general issue to defendant's detention, a joint interest held by a third person in the property sued for is not provable under the general issue. Broadbent *v.* Ledward, 11 A. & E. 209, 3 P. & D. 45, 39 E. C. L. 132. Nor is a joint interest held by defendant provable under the general issue. Mason *v.* Farnell, 1 D. & L. 576, 13 L. J. Exch. 142, 12 M. & W. 674. But see Morgan *v.* Marquis, 2 C. L. R. 276, 9 Exch. 145, 23 L. J. Exch. 21, where it was held that the decision in Mason *v.* Farnell, 1 D. & L. 576, 13 L. J. Exch. 142, 12 M. & W. 674, was no authority for the proposition that a sale by one of two tenants in common cannot be given in evidence under the plea of *non detinet*. The question, however, was not directly passed upon, although the evidence was allowed.

In detinue by a mortgagee against the mortgagor, defendant cannot in the absence of statutory authorization set up payment as a defense under the general issue, nor can he set up an offset growing out of the mortgagee's failure to furnish the full consideration of the mortgage debt. Harper *v.* Weeks, 89 Ala. 577, 8 So. 39. But where by statute payment of the mortgage debt revests the title to the property in the mortgagor such payment may be proved under the general issue. Carlisle *v.* People's Bank, 122 Ala. 446, 26 So. 115.

22. Downs *v.* Bailey, 135 Ala. 329, 33 So. 151; Brown *v.* Brown, 13 Ala. 208, 48 Am. Dec. 52; Stewart *v.* Mills, 18 Fla. 57; Whitfield *v.* Whitfield, 44 Miss. 254.

23. A plea which only shows that the title was in defendant on a specified day before the commencement of the action is bad on demurrer, but can be made good by additional averment that plaintiff has not since such date acquired any title in the slave. Patton *v.* Hamner, 28 Ala. 618; Wittick *v.* Traun, 25 Ala. 317.

24. McBrayer *v.* Dillard, 49 Ala. 174; Mason *v.* Farnell, 1 D. & L. 576, 13 L. J. Exch. 142, 12 M. & W. 674 [*disapproving* Lane *v.* Tewson, 12 A. & E. 116 note, 1 G. & D. 584, 40 E. C. L. 66, where it was held that such matters need not be specially pleaded], holding that such matters must be specially pleaded.

A lien held by defendant must be specially pleaded. Philips *v.* Robinson, 4 Bing. 106, 5 L. J. C. P. O. S. 111, 29 Rev. Rep. 518, 13 E. C. L. 422; Riorden *v.* Brown, 1 U. C. C. P. 199; Morton *v.* Stone, 30 U. C. Q. B. 158; Stephens *v.* Cousins, 16 U. C. Q. B. 329.

A pledge of the property to defendant must be specially pleaded. Bettis *v.* Taylor, 8 Port. (Ala.) 564.

Justification under legal process must be specially pleaded. Cromwell *v.* Clay, 1 Dana (Ky.) 578, 25 Am. Dec. 165.

Special plea — Goods deposited as security against liability on guaranty. — A plea stating that the property sued for was deposited with defendant to secure him against a liability which he has undertaken at plaintiff's request by guaranteeing to a third party the amount of a debt due such party by plaintiff, is good on demurrer, although it does not state that any present liability has been incurred under the guaranty. Mecklenburgh *v.* Gloyn, 13 Wkly. Rep. 291.

Argumentative plea amounting to general issue. — Where the declaration alleges that defendant, having possession of plaintiff's

the loss of the property prior to the action,[25] or that the title to and right to the possession of the property has already been adjudicated in his favor,[26] or that by reason of something which has happened since the beginning of the action judgment should not be rendered against him.[27] Other special pleas allowable are the plea of not possessed,[28] title in a third party,[29] or fraud in plaintiff's title.[30] Where a special plea purports to answer the whole action, it must cover the question of damages for the detention.[31] The allegation of bailment in the declaration is not traversable.[32]

goods, "detains" the same, a plea that they were deposited as security for an advance and that on the payment of that sum defendant offered to return the goods to plaintiff, who then refused to receive them, is bad as denying the detention argumentatively, and as being a special plea amounting to *non detinet*. Clements *v.* Flight, 4 D. & L. 261, 16 L. J. Exch. 11, 16 M. & W. 42.

25. A plea that defendant has lost the property must show that the loss was not due to defendant's fault. Goodman *v.* Boycott, 2 B. & S. 1, 8 Jur. N. S. 763, 31 L. J. Q. B. 69, 6 L. T. Rep. N. S. 25, 110 E. C. L. 1.

26. A plea of a former judgment in favor of defendant is nothing more in effect than that the title to the slave was in defendant at a day certain before the commencement of the suit. It is therefore defective on demurrer. Wittick *v.* Traun, 25 Ala. 317.

A plea of former recovery in a statutory claim suit, averring that plaintiff has not since acquired any title, is a bar. Patton *v.* Hamner, 33 Ala. 307.

27. Such matters must be specially pleaded. They are not provable under the general issue. Brown *v.* Brown, 13 Ala. 208, 48 Am. Dec. 52; Whitfield *v.* Whitfield, 44 Miss. 254.

The plea of puis darrein continuance is proper where the matter of defense arises after issue joined, but not where it arises after the beginning of the action but before issue joined. Dryer *v.* Lewis, 57 Ala. 551; Whitfield *v.* Whitfield, 44 Miss. 254; Bethea *v.* McLennon, 23 N. C. 523; Morgan *v.* Cone, 18 N. C. 234. Such a plea may be received at any time before verdict. Bethea *v.* McLennon, 23 N. C. 523. See, generally, PLEADING.

Interest acquired by defendant pending action must be specially pleaded. Brown *v.* Brown, 13 Ala. 208, 48 Am. Dec. 52.

Loss or destruction of the property pending action must be pleaded specially. Bethea *v.* McLennon, 23 N. C. 523; Austin *v.* Jones, Gilm. (Va.) 341; Arthur *v.* Ingels, 34 W. Va. 639, 12 S. E. 872, 11 L. R. A. 557. *Compare* Williams *v.* Archer, 5 C. B. 318, 17 L. J. C. P. 82, 5 R. & Can. Cas. 289, 57 E. C. L. 318, and Leader *v.* Rhys, 10 C. B. N. S. 369, 7 Jur. N. S. 1199, 30 L. J. C. P. 345, 4 L. T. Rep. N. S. 330, 9 Wkly. Rep. 704, 100 E. C. L. 369, both cases holding that the jury may, even under a plea of *non detinet*, make a special finding of the destruction of the property, and confine their verdict to an assessment of damages.

Plea of restoration.— Defendant may plead that after the commencement of the suit he delivered the goods to plaintiff, who accepted and received them. Such a plea is not subject to the objection that it merely goes to damages and does not answer the subject-matter of the action. Crossfield *v.* Such, 8 Exch. 159, 22 L. J. Exch. 65, 1 Wkly. Rep. 82. Restoration pending action is pleadable in abatement, but not in bar. Morgan *v.* Cone, 18 N. C. 234; Johnson *v.* Lamb, 13 U. C. Q. B. 508. Under order of court all further proceedings in the case will be confined to an assessment of damages for the detention. Williams *v.* Archer, 5 C. B. 318, 17 L. J. C. P. 82, 5 R. & Can. Cas. 289, 57 E. C. L. 318. And see Williams *v.* Archer, 5 C. B. 318, 17 L. J. C. P. 82, 5 R. & Can. Cas. 289, 57 E. C. L. 318; Leader *v.* Rhys, 10 C. B. N. S. 369, 7 Jur. N. S. 1199, 30 L. J. C. P. 345, 4 L. T. Rep. N. S. 330, 9 Wkly. Rep. 704, 100 E. C. L. 369, both cases holding that where the property is restored to plaintiff pending action, the jury may find the facts specially, even on the issue raised by *non detinet*, and may confine themselves to an assessment of damages. But see Morgan *v.* Cone, 18 N. C. 234 [*disapproving* Merritt *v.* Merritt, 1 N. C. 17, and *distinguishing* Merrit *v.* Warmouth, 2 N. C. 12], holding that when plaintiff in detinue gets possession of the property pending action, he cannot recover damages.

28. Under the plea of "not possessed" defendant cannot show that he is a tenant in common with plaintiff as to the property sought to be recovered. This plea puts in issue only plaintiff's title or property in the goods sought to be recovered. Mason *v.* Farnell, 1 D. & L. 576, 13 L. J. Exch. 142, 12 M. & W. 674.

29. A plea in detinue is bad where, although it avers general ownership in another, it does not exclude the idea of a special property in plaintiff, with present right of possession. Elgee *v.* Lovell, 8 Fed. Cas. No. 4,344, Woolw. 102.

30. A plea which seeks to present the defense that plaintiff's title is dependent upon a mortgage secured by fraud must show that plaintiff's title to or right to recover the property depends upon or is affected by the fraud charged. If the plea does not show this it is bad. Elston *v.* Roop, 133 Ala. 331, 32 So. 129. See also Dunklin *v.* Wilkins, 5 Ala. 199.

31. Hunt *v.* Martin, 8 Gratt. (Va.) 578.

32. Whitehead *v.* Harrison, 6 Q. B. 423, 2 D. & L. 122, 8 Jur. 894, 13 L. J. Q. B. 312, 51 E. C. L. 423; Clossman *v.* White, 7 C. B. 43,

3. REPLICATION OR REPLY AND SUBSEQUENT PLEADINGS. Plaintiff may reply either generally or specially.[33] In some cases the issue is not made up by the reply, and defendant files a rejoinder.[34]

D. Revival of Action. An action of detinue survives at the death of either plaintiff or defendant, and may be revived against the personal representative of the decedent.[35]

E. Intervention by Third Parties. A third party against whom defendant may recover in the event of a judgment in favor of plaintiff may by leave of court appear and defend the action;[36] and in Alabama there is a special statute providing for intervention by a third party claiming the property in litigation.[37]

6 D. & L. 563, 18 L. J. C. P. 151, 62 E. C. L. 43; Gledstane *v.* Hewitt, 1 Cromp. & J. 565, 9 L. J. Exch. O. S. 145, 1 Tyrw. 445.

33. Plaintiff may reply by alleging that the license was revoked before the detention complained of. Plaintiff may make this reply specially, although he need not do so. Adams *v.* Andrews, 15 Q. B. 284, 15 Jur. 149, 20 L. J. Q. B. 33, 69 E. C. L. 284; Bain *v.* McDonald, 32 U. C. Q. B. 190.

A replication to plea denying possession, which avers that defendant had possession but wrongfully parted therewith, is insufficient, since it does not aver that defendant parted with possession with a fraudulent intent. Lightfoot *v.* Jordan, 63 Ala. 224. But see *supra*, IV, C, 2.

Departure.— The allegation of bailment in the declaration not being traversable, where defendant sets up a special bailment, plaintiff may reply to such special bailment without departing from his declaration. Gledstane *v.* Hewitt, 1 Cromp. & J. 565, 9 L. J. Exch. O. S. 145, 1 Tyrw. 445.

New assignment.— Where defendant pleads leave and license, a replication that defendant, as sheriff, entered plaintiff's house with his consent to levy a fieri facias against plaintiff's goods, having first obtained the keys to the house for that purpose, but that in excess of his duty as sheriff defendant detained the keys from plaintiff and locked him out of his house for several days, was held to be an informal new assignment. Bain *v.* McDonald, 32 U. C. Q. B. 190.

34. Where defendant has pleaded leave and license and plaintiff has replied with a revocation of the license, defendant may rejoin by alleging that within a reasonable time after revocation and after he had notice thereof he redelivered the property to plaintiff. Bain *v.* McDonald, 32 U. C. Q. B. 190.

35. See ABATEMENT AND REVIVAL, 1 Cyc. 52. *Contra*, Jones *v.* Littlefield, 3 Yerg. (Tenn.) 133.

On scire facias to revive an action against the personal representative of the deceased defendant, it must either be suggested in the scire facias or alleged in the declaration thereon that the property has come into the possession of such representative. Hunt *v.* Martin, 8 Gratt. (Va.) 578; Catlett *v.* Russell, 6 Leigh (Va.) 344; Allen *v.* Harlan, 6 Leigh (Va.) 42, 29 Am. Dec. 205. See also Easly *v.* Boyd, 12 Ala. 684. Where, however, the executor or administrator consents that the cause shall stand revived against him, such consent places the cause in the same situation that it would be in after the service of a scire facias against the administrator, alleging that the property had come to his possession and was detained by him. Greenlee *v.* Bailey, 9 Leigh (Va.) 526.

Failure of the administrator to plead anew after the action has been revived against him is not available to him as an objection after a verdict has been rendered against him. Greenlee *v.* Bailey, 9 Leigh (Va.) 526.

36. The defense should be conducted in the name of the original defendant, and no judgment can be rendered against the intervener. Cleaveland *v.* McAdams, 21 Ala. 321.

37. Such claim can be interposed only where there has been a preliminary seizure of the property before trial and judgment in such detinue suit, and after the rendition of judgment no claim to the property can be interposed under the statute. McGlathery *v.* Williams, 129 Ala. 247, 29 So. 858.

Premature filing of claim.— Under the provision of the statute that the claim shall not be filed within five days from the time of the levy, a claim is not prematurely filed where the property is levied on on the thirty-first day of one month and the claim is filed on the fifth day of the succeeding month. Wright *v.* New England Mortg. Security Co., 127 Ala. 213, 28 So. 573. This provision is for the benefit of defendant, and plaintiff cannot raise the question as to whether the claim was prematurely filed. Wright *v.* New England Mortg. Security Co., 127 Ala. 213, 28 So. 573.

Claimant's bond.— An objection that a claimant's bond was approved by the justice of the peace before whom the action was pending, instead of by the officer levying the writ as required by Ala. Code, §§ 1484, 4141, must be made on the trial before the justice, and cannot be raised for the first time on appeal. Wright *v.* New England Mortg. Security Co., 127 Ala. 213, 28 So. 573.

Mode of trial.— Under Pamphlet Acts Ala. (1888, 1889), pp. 57, 58, requiring intervening claimants in actions of detinue to make affidavit and execute bond as in trials of right of property when levied on under fieri facias, and that the sheriff shall return to the court the summons, affidavit, and bond, upon which the same proceedings must be had as in other trials of the right of property, and under Ala. Code, §§ 3004, 3007, relating to trials of the right of property and requiring an issue to be

F. Verdict. The verdict in detinue need not be wholly in favor of either party;[38] but it must dispose of all the property sued for,[39] and must likewise be responsive to all the issues.[40] The usual form of verdict in favor of plaintiff is simply a finding "for the plaintiff,"[41] followed by an assessment of the value of the property and damages for the detention thereof.[42] As a general rule a ver-

made up between plaintiff in execution and claimant, in intervention proceedings by claimant in an action of detinue, there must be a separate contestation between plaintiff in detinue and the intervening claimant, as in proceedings in the trial of the right of property levied on by execution. Plaintiff must allege that he has a legal title to the property in litigation and the right to the immediate possession thereof, and the burden of proving such allegations is upon him. Plaintiff may give all evidence in support of his claim which has any tendency to support it, but must rely upon the strength of his own title and not the weakness of plaintiff's. The issue in such proceedings is determined by the statute and the court has no right to frame it. The court can only decide whether the issue tendered or formed corresponds to the laws. Keyser *v.* Maas, 111 Ala. 390, 21 So. 346; Warren *v.* Liddell, 110 Ala. 232, 20 So. 89, holding further that the formal pleadings are unnecessary and improper and that the only proper issue is affirmation by plaintiff in detinue that the property levied on is subject to the process in detinue and a denial of that affirmation by the claimant. See also White *v.* Sheffield, etc., St. R. Co., 90 Ala. 253, 7 So. 910.

The only question in issue is the question of title between plaintiff and claimant; and hence the claimant cannot raise the question as to whether the parties who caused the action to be instituted were the rightful officers of plaintiff corporation; nor can he raise the question whether plaintiff made a demand for the property before bringing the action. White *v.* Sheffield, etc., St. R. Co., 90 Ala. 253, 7 So. 910.

Where the claimant claimed under a mortgage, proof of a mortgage to a firm of which he is a member, without any proof that he is the sole member thereof, or that he has received an assignment of the mortgage, is insufficient to sustain the claim. Shows *v.* Brantley, 127 Ala. 352, 28 So. 716.

Jury question.— Where in intervention proceedings it appeared that the property was shipped to one M, over defendant's railroad, and that while on the tracks the president of plaintiff corporation and the consignee of the property gave claimant an order to take possession of the property, and that the claimant thereupon paid the freight and took some steps toward the removal of the property, but it did not appear whether the claimant paid the freight with his own money or with money furnished him by plaintiff, or whether he was one of plaintiff's officers, it was held that it was a question for the jury whether the claimant obtained possession of the engine at plaintiff's request and whether he paid the freight with his own money so as to entitle him to the possession of the property until such money was refunded to him. White *v.* Sheffield, etc., St. R. Co., 90 Ala. 253, 7 So. 910.

38. Glass *v.* Pinckard, 56 Ala. 592.

A verdict in detinue for a part of the things demanded is good for plaintiff, as to those found for him, and for defendant as to the remainder. Thomas *v.* Tanner, 6 T. B. Mon. (Ky.) 52.

In detinue for different articles a verdict for plaintiff as to some of them and silence as to others is a verdict for defendant as to the articles not mentioned. Talbot *v.* Talbot, 2 J. J. Marsh. (Ky.) 3.

39. Butler *v.* Parks, 1 Wash. (Va.) 76.

40. Where defendant pleads *non detinet*, and a special plea in bar to which there is a general replication, a general verdict for plaintiff is sufficiently responsive to the issues. Garland *v.* Bugg, 1 Hen. & M. (Va.) 374. A verdict in detinue in these words: "We find all the issues for the plaintiff, and that the slaves named in the proceedings [specifying them by name] are the property of the plaintiff, and that the said slaves are in value worth as follows," etc., "and, as the plaintiff releases all damages for hire, we assess the value of said slaves, to wit, $3,450, as damages for the plaintiff, to be discharged upon delivery of said slaves by the defendant to him"— is substantially correct and proper in form. Rambo *v.* Wyatt, 32 Ala. 363, 70 Am. Dec. 544. In detinue a verdict fixing a separate value for each item sued for, finding the detention of the property by defendants, and awarding damages therefor, is sufficient. Lenox *v.* Pike, 2 Ark. 14.

In West Virginia the form of the verdict is prescribed by the code. Robinson *v.* Woodford, 37 W. Va. 377, 16 S. E. 602.

The finding as to defendant's possession should specifically show whether or not it was wrongful. A finding that "as far as there was any evidence to the contrary" defendant's possession was rightful is insufficient. Barksdale *v.* Appleberry, 23 Mo. 389. A verdict that plaintiff is the owner of the property sued for and fixing its value is insufficient, there being no finding of an unlawful detainer of the property. Crouch *v.* Martin, 3 Blackf. (Ind.) 256.

A verdict of "not guilty" is improper in form, but such a verdict, followed by a proper assessment of value and damages, is sufficient upon an issue joined on the pleas of *non detinet* and justification under legal process. Rowan *v.* Hutchisson, 27 Ala. 328.

41. This finding is made definite as to the property by reference to the declaration or petition. Wilson *v.* Barnes, 49 Ala. 134; Avery *v.* Avery, 12 Tex. 54, 62 Am. Dec. 513; Boatright *v.* Meggs, 4 Munf. (Va.) 145.

42. Williams *v.* Archer, 5 C. B. 318, 17 L. J. C. P. 82, 5 R. & Can. Cas. 289, 57 E. C. L. 318.

dict in detinue which does not assess the value of the property is fatally defective;[43] and where more than one article is sued for, and such articles are of

Damages should not be assessed severally as to each article sued for but should be assessed in gross. Thomas *v.* Blunt, Litt. Sel. Cas. (Ky.) 114.

Failure to find damages is not fatal to the validity of the verdict, but precludes recovery thereof in any other action. Trimble *v.* Stipe, 5 T. B. Mon. (Ky.) 264.

43. Averett *v.* Milner, 75 Ala. 505; Bell *v.* Pharr, 7 Ala. 807; Cummings *v.* Tindall, 4 Stew. & P. (Ala.) 357; Stirling *v.* Garritee, 18 Md. 468, holding that failure to assess value is sufficient ground for arrest of judgment.

The value laid in the declaration is not a maximum limit, and the jury may assess the value in a larger sum. Goodman *v.* Floyd, 2 Humphr. (Tenn.) 59; Biggers *v.* Alderson, 1 Hen. & M. (Va.) 54.

Jury question.— The value of the property is a question for the jury. Smith *v.* Wiggins, 3 Stew. (Ala.) 221. There must, however, be some evidence of value, or the assessment cannot stand. Gerson *v.* Norman, 111 Ala. 433, 20 So. 453; Parr *v.* Gibbons, 27 Miss. 375. In Smith *v.* Wiggins, 3 Stew. (Ala.) 221, it was held that evidence of the value of the hire of the property — a slave — was sufficient to sustain an assessment of value. In Jennings *v.* Gibson, Walk. (Miss.) 234, it was held that the description of the property in the declaration was sufficient to sustain an assessment of value. See also Parr *v.* Gibbons, 27 Miss. 375.

The measure of value seems to be involved in some confusion. In White *v.* Ross, 5 Stew. & P. (Ala.) 123, and in Clapp *v.* Walters, 2 Tex. 130, it was held that the assessment of value must be made as of the time of demand made or action begun. In Johnson *v.* Marshall, 34 Ala. 522, it was held that the value to be assessed is the value at any time between demand and trial. In Holly *v.* Flournoy, 54 Ala. 99; Freer *v.* Cowles, 44 Ala. 314; Johnson *v.* Marshall, 34 Ala. 522, it was held that the jury may but need not assess the highest value at any time between the beginning of the action and the trial. In Whitfield *v.* Whitfield, 40 Miss. 352, it was held that where no question of fraud, malice, or wilful wrong intervenes, the measure of damages is the value of the property at the time of the taking, with interest to the time of trial; but where the taking is attended by circumstances of malice, fraud, or wilful wrong, the measure of damages is a matter to be determined by the jury from the evidence. In Penny *v.* Davis, 3 B. Mon. (Ky.) 313; Freeman *v.* Luckett, 2 J. J. Marsh. (Ky.) 390, it was held that the value must be assessed as of the time of the verdict. In Anderson *v.* Passman, 7 C. & P. 193, 32 E. C. L. 568, it was held that where plaintiff fails to prove the value it will be assessed at the lowest possible amount.

Where plaintiff's interest is limited or special.— In Oden *v.* Stubblefield, 2 Ala. 684, it was held that the primary object of an action in detinue being to effect the recovery of specific property, where plaintiff in such action proves a life-estate only, the jury may nevertheless assess the value of the absolute property because, if the damages were limited to the value of the life-estate, defendant might defeat the object of the action by paying the damages and refusing to restore the property. On the other hand, it was held in Glascock *v.* Hays, 4 Dana (Ky.) 58, that while a bailee may recover the full value of the property, one holding only a life-estate can recover only the value of his separate interest, the reason being that in such case the payment by defendant of the value of the life-estate would operate as a transfer of the life-estate only, leaving the remainder-man's rights untouched.

Where the property is subject to a life-estate, and, pending action by the trustee for the remainder-man, the life-tenant dies, plaintiff is entitled to recover the full value of the property. Murphy *v.* Moore, 39 N. C. 118.

Defendant cannot complain of the failure of the jury, in rendering a verdict for plaintiff, to assess the value of the property, where plaintiff was in possession of the property sued for under the necessary statutory bond, defendant having failed to give bond and take possession. Barnhill *v.* Howard, 104 Ala. 412, 16 So. 1; Dykes *v.* Clarke, 98 Ala. 657, 13 So. 690; Jones *v.* Pullen, 66 Ala. 306. See also Rose *v.* Pearson, 41 Ala. 687; Lucas *v.* Daniels, 34 Ala. 188; Rambo *v.* Wyatt, 32 Ala. 363, 70 Am. Dec. 544; Miller *v.* Jones, 29 Ala. 174.

Plaintiff cannot complain of a failure to assess value, where the judgment is against him, and he has not the possession of the property. Shepherd *v.* Story, 62 Ala. 336.

The value need not be assessed where the property is in the possession of plaintiff (Dykes *v.* Clarke, 98 Ala. 657, 13 So. 690), or where it is in the hands of the court (Avery *v.* Avery, 12 Tex. 54, 62 Am. Dec. 513). Likewise, in an action by a trustee in a deed of trust to secure a debt, the value of the property need not be assessed, since by payment of the amount of such debt defendant could relieve himself from liability (Hundley *v.* Calloway, 45 W. Va. 516, 31 S. E. 937); and the same rule obtains in Alabama in an action by a mortgagee against the mortgagor, since under the Alabama acts payment of the mortgage debt relieves defendant of the duty of restoring the property (Thompson *v.* Greene, 85 Ala. 240, 4 So. 735). But see Morrison *v.* Judge, 14 Ala. 182.

A writ of inquiry may be awarded to assess the value of the property, where the trial jury has failed to do so. Key *v.* Allen, 7 N. C. 523; Hundley *v.* Calloway, 43 W. Va. 516, 31 S. E. 937. Under the Ala. Code, § 2749, providing that if the court determines the issue for plaintiff a jury must be immedately impaneled to ascertain the damages, if unliquidated, or the jury if one has been impaneled may be required to assess

different kind and quality, the value of each article must be assessed separately whenever such an assessment is practicable.[44]

G. Judgment — 1. **Form and Sufficiency.** The judgment in detinue follows the verdict, and if it be for plaintiff it must be in the alternative for the recovery of the specific property sued for, describing it, or its value as assessed by the jury, and damages for the detention of the property, and costs.[45] Where plaintiff has

such damages conditionally previous to their discharge, it is within the discretion of the trial court whether the damages shall be conditional by the jury first impaneled or by the jury impaneled after the determination of the issue for plaintiff. Gluck *v.* Cox, 90 Ala. 331, 8 So. 161.

Ancient method of ascertaining value.— There appear to be two modes in the old books by which the value of the property might be ascertained: one by which such value was found by the jury who tried the issue in giving the verdict, and if there were no issue by the jury who assessed the damages; the other, according to which the sheriff was directed to ascertain the value if plaintiff did not deliver up the goods, and on the sheriff's return judgment absolute was given for the value. Phillips *v.* Jones, 15 Q. B. 859, 14 Jur. 1065, 19 L. J. Q. B. 374, 69 E. C. L. 859.

44. *Alabama.*— Southern Warehouse Co. *v.* Johnson, 85 Ala. 178, 4 So. 643; Savage *v.* Russell, 84 Ala. 103, 4 So. 235; Jones *v.* Anderson, 82 Ala. 302, 2 So. 911; Tait *v.* Murphy, 80 Ala. 440, 2 So. 317; Johnson *v.* McLeod, 80 Ala. 433, 2 So. 145; Jones *v.* Anderson, 76 Ala. 427; Townsend *v.* Brooks, 76 Ala. 308; Bell *v.* Pharr, 7 Ala. 807; Haynes *v.* Crutchfield, 7 Ala. 189; Cummings *v.* Tindall, 4 Stew. & P. 357.

Kentucky.— Buckner *v.* Haggin, 2 T. B. Mon. 59.

Mississippi.— Carraway *v.* McNeice, Walk. 538.

Tennessee.— Baker *v.* Beasly, 4 Yerg. 570.

Texas.— Rowlett *v.* Fulton, 5 Tex. 458; Blakely *v.* Duncan, 4 Tex. 184.

Virginia.—Higgenbotham *v.* Rucker, 2 Call 313.

See 16 Cent. Dig. tit. "Detinue," § 44.

Articles of the same class and similar in quality, color, etc., may be valued in the lump. Downs *v.* Bailey, 135 Ala. 329, 33 So. 151. The value of a cow and her calf may be assessed in gross. Haynes *v.* Crutchfield, 7 Ala. 189.

Presumption as to practicability of separate assessment.— Unless it is manfestly apparent that it is impracticable to assess the value of several articles separately, the presumption is that it was practicable to make the separate assessment, and that a verdict which does not make such assessment is erroneous. Southern Warehouse Co. *v.* Johnson, 85 Ala. 178, 4 So. 643 [*distinguishing* Eslava *v.* Dillihunt, 46 Ala. 698, where the impracticability of a separate assessment was manifestly apparent].

Failure to assess the value of one article out of several, the other articles being valued, will render the verdict erroneous. Traun *v.* Wittick, 27 Ala. 570; Wittick *v.* Traun, 27 Ala. 562, 62 Am. Dec. 778.

Waiver of objection.— Where the property sued for has been delivered to plaintiff, and the jury on finding for defendant assesses its value in gross without separately finding the value of the different articles, plaintiff, by failing to object when the verdict was returned, waives the error. Eslava *v.* Dillihunt, 46 Ala. 698. Likewise where the jury find that it is impracticable to make a separate assessment and defendant makes no objection to such finding he will be deemed to have acquiesced in the correctness thereof. Wilson *v.* Barnes, 49 Ala. 134.

Where defendant is unable to return any portion of the property, failure to separately assess the value of the separate items is harmless error, since the reason for the requirement of separate assessment is to fix the amount necessary to pay the value of any of the several articles of property in discharge of the judgment *pro tanto*. Rose *v.* Pearson, 41 Ala. 687.

Excessive valuation is not ground for objection by defendant, unless it appear that he cannot restore the property. Glascock *v.* Hays, 4 Dana (Ky.) 58; Thompson *v.* Porter, 4 Bibb (Ky.) 70; Jennings *v.* Gibson, Walk. (Miss.) 234; Clapp *v.* Walters, 2 Tex. 130; Mirick *v.* Hemphill, 17 Fed. Cas. No. 9,647*a*, Hempst. 179. Where defendant knows during the trial that it will be impossible for him to return the property, he should, if he thinks that the assessment of value is excessive, apply for a reassessment. McDowell *v.* Gray, 5 J. J. Marsh. (Ky.) 1. An excessive valuation may be cured by a remittitur of the excess. Clapp *v.* Walters, 2 Tex. 130.

A writ of inquiry may be awarded to ascertain the separate values of several articles sued for, where the verdict assesses such values in gross. Buckner *v.* Haggin, 3 T. B. Mon. (Ky.) 59; Carraway *v.* McNeice, Walk. (Miss.) 538; Baker *v.* Beasly, 4 Yerg. 570; Cornwall *v.* Truss, 2 Munf. (Va.) 195.

45. *Alabama.*— McCullough *v.* Flood, 103 Ala. 448, 15 So. 848; Greene *v.* Lewis, 85 Ala. 221, 4 So. 740, 7 Am. St. Rep. 42; Auerbach *v.* Blackman, 57 Ala. 616; Robinson *v.* Richards, 45 Ala. 354; Wittick *v.* Keiffer, 31 Ala. 199.

Arkansas.— Lenox *v.* Pike, 2 Ark. 14.

Tennessee.— Waite *v.* Dolby, 8 Humphr. 406.

Virginia.—Higgenbotham *v.* Rucker, 2 Call 313.

West Virginia.— Robinson *v.* Woodford, 37 W. Va. 377, 16 S. E. 602.

England.— Chilton *v.* Carrington, 15 C. B. 730, 3 C. L. R. 392, 1 Jur. N. S. 477, 24 L. J. C. P. 78, 3 Wkly. Rep. 248, 80 E. C. L. 730;

not taken possession of the property, no judgment can be rendered against him

Winfield *v.* Boothroyd, 54 L. T. Rep. N. S. 574, 34 Wkly. Rep. 501; Comyns Dig. tit. "Pleader."

See 16 Cent. Dig. tit. "Detinue," § 47.

Assessment of value is as essential to the validity of the judgment as it is to the verdict. Greene *v.* Lewis, 85 Ala. 221, 4 So. 740, 7 Am. St. Rep. 42; Auerbach *v.* Blackman, 57 Ala. 616; Robinson *v.* Richards, 45 Ala. 354; Wittick *v.* Keiffer, 31 Ala. 199; Thomas *v.* Tanner, 6 T. B. Mon. (Ky.) 52; Mulliken *v.* Greer, 5 Mo. 489; Phillips *v.* Jones, 15 Q. B. 859, 14 Jur. 1065, 19 L. J. Q. B. 374, 69 E. C. L. 859. Where the verdict assesses separately the values of several articles sued for, the judgment must likewise fix such values separately. Townsend *v.* Brooks, 76 Ala. 308; Whitfield *v.* Whitfield, 40 Miss. 352; Higgenbotham *v.* Rucker, 2 Call (Va.) 313.

A judgment by default without the assessment of the value of the property by a jury is usually improper. McCullough *v.* Floyd, 103 Ala. 448, 15 So. 848; Chandler *v.* Jones, 56 Ala. 595; Brown *v.* Brown, 5 Ala. 508; Studdert *v.* Hassell, 6 Humphr. (Tenn.) 137. Where, however, the property is in plaintiff's possession, a judgment by default may be rendered without the assessment of value by a jury. Dykes *v.* Clarke, 98 Ala. 657, 13 So. 690.

Where the verdict finds for value only, a judgment for the property or value does not conform to the verdict, but defendant cannot complain. Horton *v.* Reynolds, 8 Tex. 284.

Statute of jeofails.— The omission of the words "if so to be had" from the judgment for the recovery of the property is cured by the statute of jeofails. Berry *v.* Hale, 1 How. (Miss.) 315.

Failure to specify the articles recovered cannot be made a ground of objection by defendant. Wilson *v.* Barnes, 49 Ala. 134; Haynes *v.* Crutchfield, 7 Ala. 189.

A judgment for damages only cannot be attcked by defendant. Miller *v.* Jones, 29 Ala. 174. See also Williams *v.* Archer, 5 C. B. 318, 17 L. J. C. P. 82, 5 R. & Can. Cas. 289, 57 E. C. L. 318; Leader *v.* Rhys, 10 C. B. N. S. 369, 7 Jur. N. S. 1199, 30 L. J. C. P. 345, 4 L. T. Rep. N. S. 330, 9 Wkly. Rep. 704, 100 E. C. L. 369.

A judgment for value only cannot be objected to by defendant, where it appears that the property cannot be restored to plaintiff. Faulkner *v.* Santa Barbara First Nat. Bank, 130 Cal. 258, 62 Pac. 463; Riciotto *v.* Clement, 94 Cal. 105, 29 Pac. 414; Burke *v.* Koch, 75 Cal. 356, 17 Pac. 228; De Thomas *v.* Witherby, 61 Cal. 92, 44 Am. Rep. 542; Brown *v.* Johnson, 45 Cal. 76.

Damages are not essential to the validity of the judgment, where the verdict does not assess damages. Daniel *v.* Prather, 1 Bibb (Ky.) 484.

Plaintiff may recover part of the property sued for and fail as to the rest, and in such case the judgment is for plaintiff for the part recovered and for defendant as to the remainder. Louisville, etc., R. Co. *v.* Walker, 128 Ala. 368, 30 So. 738; Glass *v.* Pinckard, 56 Ala. 592; Wittick *v.* Traun, 25 Ala. 317, 27 Ala. 562, 62 Am. Dec. 778.

Where the property has been attached, the judgment in detinue should recognize the attachment and provide that the property be condemned to the satisfaction of any judgment that may be rendered in the attachment proceedings. Townsend *v.* Brooks, 76 Ala. 308.

Where a judgment is rendered against one of several defendants, it will be presumed, in the absence of anything in the record to the contrary, that the detention was tortious, and hence that the failure to find against both defendants was not improper. Salter *v.* Pearce, 4 Ala. 669.

Judgment against sureties.— Under Ala. Code, § 1476, providing that in detinue the judgment against either party must be for the property sued for or its alternate value, a judgment against a defendant and the sureties on his replevy bond is irregular, but it is not ground for reversal where not assigned as error. Clem *v.* Wise, 133 Ala. 403, 31 So. 986.

Where the action is revived against an executor or administrator, the judgment should be *de bonis propriis* as to the value of the property, and *de bonis testatoris* as to damages and costs. Hunt *v.* Martin, 8 Gratt. (Va.) 578; Greenlee *v.* Bailey, 9 Leigh (Va.) 526; Allen *v.* Harlan, 6 Leigh (Va.) 42, 29 Am. Dec. 205.

Against an intervening claimant.—Where, after the property involved in an action of detinue has been delivered to an intervening claimant upon his giving bond, the claim suit is thereafter dismissed on plaintiff's motion, with the claimant's consent, and in the main action the jury finds for plaintiff, a judgment reciting that plaintiff recover of the claimant the property or its alternate value and the costs of the claim suit is irregular, the proper judgment in such case being against the claimant for a dismissal of his suit and for the costs thereof, plaintiff's remedy as to the property being by execution on the claimant's bond. The proper procedure in such case is as follows: The sheriff returns the bond forfeited, whereupon the clerk, after judgment has been entered for plaintiff in the main action, and such judgment being still unsatisfied, issues execution against all the obligors on the bond for the assessed value of the property and for the costs of the claim suit. Kennon *v.* Adams, 100 Ala. 288, 14 So. 15.

In detinue by the vendor in a conditional sale a judgment permitting defendant to deliver the article sought to be recovered and pay the damages for its detention, or to pay the balance of the purchase-price, and which provides that no execution shall issue if such purchase-price be paid within the time prescribed by Ala. Code, § 1477, authorizing conditional judgments for the return of goods or for the value thereof, and that

except for costs;[46] but when plaintiff has given bond and taken possession of the property, the judgment in favor of defendant should be for the property or its alternative value.[47]

2. Conclusiveness and Effect. The judgment in detinue is conclusive, and conclusive only between the parties and their privies,[48] and as to the title or interest upon which plaintiff based his right of possession, and the title or interest relied on by defendant as a defense, as of the date of the action and the rendition of the judgment;[49] but a nonsuit or a judgment of dismissal is not conclusive

execution will not issue thereon for thirty days in actions of detinue by the seller of personal property when the title has not passed, is in proper form. Brock *v.* Forbes, 126 Ala. 319, 28 So. 590.

In an action by a mortgagee against the mortgagor, a provision in the judgment for a writ of possession, if defendant fail to pay the amount due on a mortgage on the property, is mere surplusage, not prejudicial to defendant. Thompson *v.* Greene, 85 Ala. 240, 4 So. 735.

A judgment for a female slave was held to include her issue born pending action. Jordan *v.* Thomas, 31 Miss. 557; Morris *v.* Peregoy, 7 Gratt. (Va.) 373.

Statutes relating to costs.— It has been held that detinue is an action founded on tort within a statute relating to costs which classified actions as actions founded on contract and actions founded on tort. Bryant *v.* Herbert, 3 C. P. D. 389, 47 L. J. C. P. 670, 39 L. T. Rep. N. S. 17, 26 Wkly. Rep. 898. But detinue was not considered as an action "for an alleged wrong" and "brought merely to recover damages for a wrong" within the common-law procedure act of 1860, giving the judge power to deprive plaintiff of costs where he recovers a verdict for less than £5 in an action "for an alleged wrong, etc." Danby *v.* Lamb, 11 C. B. N. S. 423, 31 L. J. C. P. 17, 5 L. T. Rep. N. S. 353, 10 Wkly. Rep. 43, 103 E. C. L. 423. Under 13 & 14 Vict. § 13, forbidding the allowing of costs to plaintiff where he recovered less than £5, and 14 & 15 Vict. c. 53, § 4, providing that plaintiff might recover costs where his claim was beyond the jurisdiction of the county court, it was held in Leader *v.* Rhys, 10 C. B. N. S. 369, 7 Jur. N. S. 1199, 30 L. J. C. P. 345, 4 L. T. Rep. N. S. 330, 9 Wkly. Rep. 704, 100 E. C. L. 369, that where an action was brought for the detention of goods exceeding the value of £50, the jurisdiction of the county court was ousted and plaintiff was entitled to his costs, although in consequence of the goods being returned in the course of the cause he obtained a verdict for nominal damages only.

46. Lucas *v.* Daniels, 34 Ala. 188.

47. Johnson *v.* Montgomery Furniture Co., 117 Ala. 656, 23 So. 802; Henry *v.* Powell, 90 Ala. 440, 9 So. 817; Wittick *v.* Keiffer, 31 Ala. 199.

Upon a nonsuit no judgment could be rendered, in the absence of statutory provision to the contrary, except for costs, since there were no data upon which to assess the alternative value. Savage *v.* Gunter, 32 Ala. 467. But under Ala. Code (1896), § 1482, defendant may, upon a nonsuit or dismissal, have the alternate value of the property assessed by the jury, and also the value of the use thereof while in plaintiff's possession; and the court will thereupon render judgment for defendant for the recovery of the property or its alternate value, etc. Defendant must invoke this remedy, however, at the same term at which the nonsuit is taken, or at which dismissal occurs, or must ask a continuance of the cause in order that he may invoke the remedy at a later date. If he fails to take these steps he waives the remedy. *Ex p.* Bolton, 136 Ala. 147, 34 So. 226.

A judgment against the sureties on the detinue bond is improper. The proper practice in such case is prescribed by statute. Rand *v.* Gibson, 109 Ala. 266, 19 So. 533. See also *infra*, VII. But where a judgment of nonsuit entered in an action of detinue with plaintiff's consent is against plaintiff's surety as well as himself, it will be considered a clerical error, which may be corrected on defendant's motion at a subsequent term. Harvey *v.* Jeter, 7 Ala. 688.

48. Briley *v.* Cherry, 13 N. C. 2, 18 Am. Dec. 561.

49. Ernst *v.* Hogue, 86 Ala. 502, 5 So. 738; Hall *v.* Edrington, 8 B. Mon. (Ky.) 47; Hughes *v.* Jones, 2 Md. Ch. 178.

Persons acquiring possession pending action is prima facie presumed to claim under defendant, and to be bound by a judgment for plaintiff. Mitchell *v.* Rainey, 20 N. C. 56.

In detinue by a life-tenant, a judgment for defendant is no bar to a subsequent suit after the death of the life-tenant by the remainder-man for the recovery of the *corpus* of the property. Haile *v.* Hill, 13 Mo. 612.

A judgment against one of several defendants is a bar to an action against any of the others as long as such judgment remains in force, although it has not been satisfied. Brinsmead *v.* Harrison, L. R. 7 C. P. 547, 41 L. J. C. P. 190, 27 L. T. Rep. N. S. 99, 20 Wkly. Rep. 784.

In detinue for a female slave the judgment was conclusive as to the title to or right of possession of any of her children born between the commencement of the action and the rendition of judgment. Bernard *v.* Chiles, 7 Dana (Ky.) 18; Cates *v.* Whitfield, 53 N. C. 266. Any children *en ventre sa mere* at the time of the judgment were likewise covered thereby. Bernard *v.* Chiles, 7 Dana (Ky.) 18; Vines *v.* Brownrigg, 18 N. C. 239. Children born after judgment

as to such title or interest.[50] There seems to be some conflict as to whether an unsatisfied judgment for plaintiff precludes another action of detinue by him for the recovery of the same property.[51] The judgment does not *per se* operate as a transfer of title from plaintiff to defendant, and the title remains in plaintiff until he has accepted the alternate value or an execution has issued therefor.[52]

H. Satisfaction of Judgment and Execution. The alternative character of the judgment is for the sole benefit of plaintiff, and defendant has no right, except with plaintiff's consent, to pay the assessed value and keep the property, except in case of destruction of the property.[53] The execution upon a judgment

and who were not *en ventre sa mere* at the rendition of the judgment were not covered thereby. Bernard *v.* Chiles, 7 Dana (Ky.) 18; Vines *v.* Brownrigg, 18 N. C. 239. But see Jennings *v.* Gibson, Walk. (Miss.) 234, where it was held that a child born after judgment could not, after satisfaction of the judgment for the mother, be recovered by the original plaintiff in a subsequent action of detinue where his right to the child was based on his original right to the mother.

A judgment in detinue against a vendor, which is unsatisfied, is no bar to an action of detinue against the vendee of the defendant in the first judgment. Sharp *v.* Gray, 5 B. Mon. (Ky.) 4.

50. Ernst *v.* Hogue, 86 Ala. 502, 5 So. 738; Savage *v.* Gunter, 32 Ala. 467.

51. In Dorsey *v.* Sands, 5 J. J. Marsh. (Ky.) 37, and Foster *v.* Smoot, 1 A. K. Marsh. (Ky.) 394, it was held that detinue cannot be maintained upon a judgment in a former action of detinue. In Withers *v.* Withers, 6 Munf. (Va.) 10, it was held that a new action of detinue against the same defendant for the same property cannot be maintained where the former judgment is not declared on; and it was questioned whether any action or proceeding other than scire facias will lie. In Murrell *v.* Johnson, 1 Hen. & M. (Va.) 450, it was held that a judgment in favor of plaintiff is a bar to an action by plaintiff against a party claiming under the first defendant, notwithstanding that such judgment is unsatisfied. In Briley *v.* Cherry, 13 N. C. 2, 18 Am. Dec. 561, it was declared by Henderson, J., that a second action of detinue may be brought against any one, including defendant, while the judgment in the first action remains unsatisfied. In Jennings *v.* Gibson, Walk. (Miss.) 234, it was intimated that an action might be maintained to recover the alternative values and damages awarded in an action of detinue.

52. Sharp *v.* Gray, 5 B. Mon. (Ky.) 4; Kennedy *v.* Kloppenberg, 6 La. Ann. 32; *In re* Scarth, L. R. 10 Ch. 234, 44 L. J. Bankr. 29, 31 L. T. Rep. N. S. 737, 23 Wkly. Rep. 153; Brinsmead *v.* Harrison, L. R. 7 C. P. 547, 41 L. J. C. P. 190, 27 L. T. Rep. N. S. 991, 20 Wkly. Rep. 784.

Where plaintiff elects to take the assessed value and damages for the detention defendant will be considered as the owner of the property, and the judgment will be considered as a money judgment. Ellis *v.* Gosney, 7 J. J. Marsh. (Ky.) 109. But see McDowell *v.* Gray, 5 J. J. Marsh. (Ky.) I, where it was held that an election to take the assessed value, issue of execution therefor, and a tender thereof by defendant did not defeat plaintiff's right to the property.

53. Robinson *v.* Richards, 45 Ala. 354 (holding that Ala. Rev. Code, §§ 2595, 2596, did not change the common-law rule); Wittick *v.* Keiffer, 31 Ala. 199; Keith *v.* Johnson, 1 Dana (Ky.) 604, 25 Am. Dec. 167; Jordan *v.* Thompson, 34 Miss. 72, 69 Am. Dec. 387; Henry *v.* Moore, 1 Tex. App. Civ. Cas. § 880. *Compare* Jones *v.* Muse, 1 Brev. (S. C.) 67.

By eloigning the property it seems that defendant may force plaintiff to elect to take the assessed value. Wittick *v.* Keiffer, 31 Ala. 199.

Election to take the assessed value operates as a discharge of the judgment for the property, and transfers plaintiff's interest therein to defendant. Ellis *v.* Gosney, 7 J. J. Marsh. (Ky.) 109. But see McDowell *v.* Gray, 5 J. J. Marsh. (Ky.) 1.

Destruction of the property after judgment does not discharge the judgment (May *v.* Jameson, 11 Ark. 368); but defendant may in such case satisfy the judgment by paying the assessed value (Heard *v.* Hicks, 101 Ala. 102, 13 So. 256; Robinson *v.* Richards, 45 Ala. 354).

Property in a damaged condition need not be accepted by plaintiff, without compensation for depreciation in value. Heard *v.* Hicks, 101 Ala. 102, 13 So. 256.

A release of the assessed value, made under a mistake of law, operates as a satisfaction of the judgment, where the property cannot be restored. Jennings *v.* Gibson, Walk. (Miss.) 234.

Order of restoration.— Under the common-law procedure act of 1854 the court may in an action of detinue make an order for the delivery or restoration of the specific chattel sued for without giving defendant the option of paying its assessed value as an alternative. Chilton *v.* Carrington, 15 C. B. 730, 3 C. L. R. 392, 1 Jur. N. S. 477, 24 L. J. C. P. 78, 3 Wkly. Rep. 248, 80 E. C. L. 730; Winfield *v.* Boothroyd, 54 L. T. Rep. N. S. 574, 34 Wkly. Rep. 501. Such an order cannot be made where by agreement of the parties the jury are discharged from finding the value of the chattel. Chilton *v.* Carrington, 15 C. B. 730, 3 C. L. R. 392, 1 Jur. N. S. 477, 24 L. J. C. P. 78, 3 Wkly. Rep. 248, 80 E. C. L. 730; Corbett *v.* Lewin, [1884] W. N. 62. See also Winfield *v.* Boothroyd, 54 L. T. Rep. N. S. 574, 34 Wkly. Rep. 501, where a payment into court of the estimated value of the property, damages, etc., was held sufficient to sustain the order.

in detinue is a distringas for the property recovered in the first instance,[54] and upon the return thereof unsatisfied a fieri facias issues for the assessed value.[55]

I. Appeal and Error. Most of the questions relating to appeal and error in actions of detinue may be determined by the principles applicable to appeal and error in general, which principles have been treated of elsewhere.[56]

54. Boyd *v.* Williams, 5 J. J. Marsh. (Ky.) 56; Vines *v.* Brownrigg, 18 N. C. 239; Waite *v.* Dolby, 8 Humphr. (Tenn.) 406; Garland *v.* Bugg, 5 Munf. (Va.) 166.

In Kentucky, under the statute of 1827, plaintiff might release the assessed value and have an absolute execution for the property. Shadhurn *v.* Jinnings, 1 A. K. Marsh. (Ky.) 179.

In Kentucky the officer may make a forcible entry into defendant's house to execute the distringas. Ky. St. (1828) p. 159; Keith *v.* Johnson, 1 Dana 604, 25 Am. Dec. 167.

In whose hands property subject to seizure under writ of restoration.— Under Ala. Code (1896), §§ 1483, 1880, providing that judgment for plaintiff in detinue shall be that he have and recover "of defendant" the property sued for, a writ following such judgment authorizes a seizure only from defendant or his privies. West *v.* Hayes, 120 Ala. 92, 23 So. 727, 74 Am. St. Rep. 24.

Where a fieri facias is issued in the first instance defendant may satisfy it by returning the property. Boyd *v.* Williams, 5 J. J. Marsh. (Ky.) 56.

55. Vines *v.* Brownrigg, 18 N. C. 239; Waite *v.* Dolby, 8 Humphr. (Tenn.) 406; Molloy *v.* McDaniel, 1 Overt. (Tenn.) 222; Garland *v.* Bugg, 5 Munf. (Va.) 166, holding that no notice of a motion to supersede the distringas and to issue a fieri facias is necessary.

56. See APPEAL AND ERROR, 2 Cyc. 474 *et seq.*

Appealable orders.— An order made in an action of detinue entered under the authority of the common-law procedure act of 1854 for the delivery of the specific chattel in litigation is appealable. Chilton *v.* Carrington, 15 C. B. 730, 3 C. L. R. 392, 1 Jur. N. S. 477, 24 L. J. C. P. 78, 3 Wkly. Rep. 248, 80 E. C. L. 730.

A supersedeas bond filed on an appeal from a judgment for plaintiff in detinue should be in a sum sufficient to secure the return of the property or the payment of the assessed value thereof, with damages for detention and costs. Boulden *v.* Estey Organ Co., 92 Ala. 182, 9 So. 283.

Clerical errors in the form of the verdict may be corrected on appeal. Rambo *v.* Wyatt, 32 Ala. 363, 70 Am. Dec. 544. Where by reason of a clerical error the judgment is rendered only for the value of the property instead of for the property or its value, the error may be corrected on appeal and the judgment as thus corrected be affirmed. McCullough *v.* Floyd, 103 Ala. 448, 15 So. 848.

Cure of error by remittitur.— Where the judgment fails to ascertain the value of the property, but awards damages for the detention thereof, plaintiff cannot in the appellate court cure the error by remitting the recovery of the property or its value. Phillips *v.* Jones, 15 Q. B. 859, 14 Jur. 1065, 19 L. J. Q. B. 374, 69 E. C. L. 859.

Objections to jurisdiction of a justice on account of the amount in controversy must be taken at the trial and are not available for the first time on appeal. Clem *v.* Wise, 133 Ala. 403, 31 So. 986.

Presumption as to approval of detinue bond see *infra*, note 58.

Presumption as to pleading.— A scire facias to revive the action of detinue against an administrator should suggest that the property had come into the hands of the administrator since the death of the testator, and the scire facias not being in the record, nor in the clerk's office of the court below, and no objection appearing to have been taken to it in that court, the court will presume that it was in all respects regular. Hunt *v.* Martin, 8 Gratt. (Va.) 578.

Presumption as to evidence.— In detinue, by a husband and wife jointly, where the record on appeal shows such title in the wife as would vest a chose in action absolutely in the husband, and is silent as to the time of the wrongful taking and detainer by defendant, the appellate court will presume that the proof showed the unlawful taking and detainer to have been before the marriage. Mitchell *v.* Cowsert, 20 Ala. 186. Where judgment is rendered against only one of two defendants, it will be presumed on appeal that the detention of defendants was shown to be tortious, and therefore that the judgment against one only was not erroneous. Salter *v.* Pearce, 4 Ala. 669.

Presumption as to assessment of value.— Where the verdict assesses the value of the property in gross, it will be presumed on appeal in the absence of a contrary showing that no evidence of separate value was introduced. Eslava *v.* Dillihunt, 46 Ala. 698. *Compare* Southern Warehouse Co. *v.* Johnson, 85 Ala. 178, 4 So. 643. See *supra*, VI, F, G.

Error in assessment of damages requires reversal as to the damages only. McAllister *v.* McAllister, 34 N. C. 184.

Error in correcting at a subsequent term a judgment against plaintiff and his surety for costs by striking out the name of the surety is harmless as to plaintiff. Harvey *v.* Jeter, 7 Ala. 688.

Error in omitting to assess the value of the property is harmless to defendant where the action is for a single chattel, and the judgment is only for damages for detention. Miller *v.* Jones, 29 Ala. 174. See also *supra*, VI, F, G.

An instruction as to assessment of value that the jury are bound to assess the highest value of the property at any time between the

VII. LIABILITY ON BONDS[57] GIVEN IN ACTIONS OF DETINUE.

A. Detinue Bonds. If plaintiff in detinue fail in his action he will be liable to defendant in an action on the detinue bond.[58] In such an action all damages actually sustained by defendant by reason of the seizure of the property are recoverable.[59] The action must be brought in the court in which the action of

commencement of the suit and the trial is harmless, where the value actually assessed was not the highest value warranted by the evidence. Holly *v.* Flournoy, 54 Ala. 99. See also *supra*, VI, F, G.

Surplusage in judgment see *supra*, VI, F, G.

Condition precedent to new trial after reversal.— Where defendant has secured a reversal of the judgment after the property has been delivered to plaintiff under execution, plaintiff will not be required to return the property to defendant as a condition precedent to the right to proceed with a new trial. Traun *v.* Keiffer, 31 Ala. 136.

57. Bonds generally see BONDS.

58. Ferguson *v.* Baber, 24 Ala. 402.

A voluntary nonsuit in an action of detinue is sufficient to sustain an action on the detinue bond, even though plaintiff in detinue actually owned the property. Savage *v.* Gunter, 32 Ala. 467.

The dismissal of the action of detinue raises only the *prima facie* presumption that the action was wrongful. Copeland *v.* Leonard, 113 Ala. 605, 20 So. 980, holding that the *prima facie* presumption was rebutted by the fact that the dismissal was made with the consent of defendant, he returning a part of the property to plaintiff, and by other facts and circumstances appearing in the case.

Variance between the affidavit and the declaration in the action of detinue, as to the description of the property sued for, is not available to defendants in an action on the detinue bond. McDermott *v.* Doyle, 11 Mo. 443.

The sureties cannot set off a demand of the principal against plaintiff for the purchase-price of the property, for the recovery of which the action in detinue was brought. McCreary *v.* Jones, 96 Ala. 592, 11 So. 600.

Presumption as to approval of bond.—That the clerk approved of the bond executed by plaintiff in an action of detinue will be presumed from the clerk's official indorsement on the writ "that the sheriff is required to take the property mentioned in the complaint into his possession." Baker *v.* Pope, 49 Ala. 415.

A bond given after levy, the same being required before the levy, is valid as a common-law bond. Reed *v.* Brashers, 3 Port. (Ala.) 378.

Effect of omission of statutory condition.— Where a bond was given by plaintiff in detinue, conditioned that he should pay all costs and damages which might be awarded against him or sustained by any person by reason of his suing out the action of detinue, instead of all costs awarded against him and all damages which might accrue to defendant or any other person by reason of the seizure of the property, as required by Va. Code, § 2707, it was held that the omission of the condition prescribed by statute did not render the bond wholly void, but that it might be sued on, so far as the conditions were good, as a statutory bond. Jackson *v.* Hopkins, 92 Va. 601, 24 S. E. 234.

Action on bond a money demand.— The statute (Ala. Rev. Code, § 2678) requiring a nonsuit to be entered against a plaintiff recovering less than five hundred dollars, unless he makes the prescribed affidavit, extends to every suit on a money demand, including an action for damages for a breach of a detinue bond. Mills *v.* Long, 58 Ala. 458.

Judgment for defendant in detinue for the assessed value of the property, the same having been delivered to plaintiff, and damages for its detention, as provided by Ala. Code (1886), p. 603, does not preclude an action on the detinue bond. Johnson *v.* Montgomery Furniture Co., 117 Ala. 656, 23 So. 802.

Parties plaintiff.— In an action on a detinue bond all the obligees who have sustained injuries are proper parties plaintiff, although their injuries are several and distinct; and if two of them are husband and wife the wife may be joined with the husband. Miller *v.* Garrett, 35 Ala. 96. But a third person cannot recover on a detinue bond executed in accordance with Va. Code, § 2907, although the bond contains a condition not required by the code, to pay all damages which may accrue to any person by reason of the seizure of the property. Jackson *v.* Hopkins, 92 Va. 601, 24 S. E. 234.

Election of remedies.— When a plaintiff in detinue suffers a voluntary nonsuit defendant may at his election pursue the summary remedy under Ala. Rev. Code, § 2596, or sue on the bond. Wood *v.* Coman, 56 Ala. 283.

A summary judgment for costs cannot be rendered against the sureties on a detinue bond when the principal dismisses his suit. Garrott *v.* Fuller, 36 Ala. 179.

Admissibility of evidence.— On a joinder of issue on the breaches assigned in an action on a detinue bond, evidence is irrelevant which shows the taking and detention of the property in the action of detinue, or what plaintiff therein told the sheriff as to his getting possession, and why he detained the property. Baker *v.* Pope, 49 Ala. 415.

59. Foster *v.* Napier, 74 Ala. 393; Ferguson *v.* Baber, 24 Ala. 402.

Costs and attorney fees in the action of detinue may be recovered. Foster *v.* Napier, 74 Ala. 393. In Ferguson *v.* Baber, 24 Ala. 402, it was held that counsel fees for defending the action of detinue in the circuit court might be recovered, but not the fees

detinue was brought.[60] The declaration should set out the bond and allege a breach thereof, but need not allege anything admitted by the bond itself.[61]

B. Redelivery, Forthcoming, and Appeal-Bonds.[62] Where plaintiff takes possession of the property under a redelivery bond, and then fails in his action and does not redeliver the property, defendant may maintain an action on such bond to recover such damages as are provided for therein.[63] Where defendant

for defending it in the supreme court, to which plaintiff in such action carried it on writ of error. Counsel fees incurred in the action on the bond are not recoverable as a part of the damages sustained by the wrongful action in detinue. Mills *v.* Long, 58 Ala. 458. An officer who has levied on property after receiving an indemnifying bond cannot, after an action of detinue has been brought against him and has resulted in his favor, sue on the detinue bond to recover attorney's fees, when he has neither paid such fees nor is under any obligation to pay them. Schaefer *v.* Austin, 109 Ala. 373, 19 So. 427. Where plaintiff, who was defendant in the action of detinue, seeks to recover only such costs as were adjudged against him in such action, he cannot recover where the proof shows without conflict that no costs were adjudged against him, but that all costs were adjudged against plaintiff in the action of detinue. Schaefer *v.* Austin, 109 Ala. 373, 19 So. 427. Where the condition of a detinue bond is to pay such costs and damages as defendant may sustain, and the action of detinue has been dismissed at the costs of plaintiff therein, plaintiff's costs constitute no part of the damages sustained by defendant, and consequently cannot be recovered in an action on the bond. Miller *v.* Garrett, 35 Ala. 96. Where defendant in detinue has recovered costs and counsel fees in the original action, in a subsequent action on the detinue bond, the damages alleged being costs and counsel fees in the action of detinue, the former recovery is available, if at all, only by the principal defendant, and cannot be set up in a joint plea by him and his sureties. McCreary *v.* Jones, 96 Ala. 592, 11 So. 600. Actual payment of the costs is not a condition precedent to the right to recover them. Miller *v.* Garret, 35 Ala. 96; Garrett *v.* Logan, 19 Ala. 344.

Under a special allegation for value of the hire of the property, a recovery may be had for the entire time that defendant was deprived of the use of the property, including the time during which plaintiff in detinue was in possession under a forthcoming bond which made no provision for the damages claimed. Hudson *v.* Young, 25 Ala. 376.

Loss of time and hotel bills incidental to defendant's efforts in securing securities on his replevin bond, and his attendance at the trial of the original action, are too remote to be considered in estimating the damages. Foster *v.* Napier, 74 Ala. 393.

Evidence of rental value.—The value of the hire of the property during the time that defendant was deprived of its use may be proved by evidence of the value of the use of the property per day, over and above expenses, during the time it was in plaintiff's possession. Hudson *v.* Young, 25 Ala. 376.

Evidence in mitigation of damages.—Where plaintiff in detinue suffers a voluntary nonsuit, in an action on the detinue bond evidence of such plaintiff's ownership of the property is admissible in mitigation of damages. Savage *v.* Gunter, 32 Ala. 467.

60. McDermott *v.* Doyle, 11 Mo. 443.

Where the action of detinue was in a federal court, defendant may, a voluntary nonsuit having been taken by plaintiff, sue on the bond either in the federal court or in a state court. Wood *v.* Coman, 56 Ala. 283.

61. In an action on a bond given in detinue, it is not necessary that plaintiff assign, as a breach of the condition of the bond, any fact which is admitted by the bond itself, but only to allege the existence of those facts, upon the happening of which, by the condition of the bond, the penalty of the bond attached. It is not necessary therefore to allege when and where the action of detinue was commenced, nor that a writ had been sued out at a particular time, nor when and where it was returnable, as these facts are recited in the bond. Baker *v.* Pope, 49 Ala. 415; Anderson *v.* Dickson, 8 Ala. 733.

An allegation that plaintiff failed in his suit is a sufficient allegation of breach of the bond. Anderson *v.* Dickson, 8 Ala. 733.

No allegation of wrong or malice in suing out the writ of detinue is necessary. Baker *v.* Pope, 49 Ala. 415; Anderson *v.* Dickson, 8 Ala. 733.

Want of probable cause in bringing the action of detinue need not be alleged. Baker *v.* Pope, 49 Ala. 415.

The affidavit in the action of detinue need not be noticed in the declaration on the detinue bond. Baker *v.* Pope, 49 Ala. 415; Anderson *v.* Dickson, 8 Ala. 733.

62. **Liability on appeal-bond** generally see APPEAL AND ERROR, 2 Cyc. 916 *et seq.*

63. The measure of recovery is controlled by the terms of the bond. Attorney's fees are not recoverable where they are not provided for in the bond. Heard *v.* Hicks, 101 Ala. 102, 13 So. 256.

A voluntary nonsuit or judgment of dismissal renders plaintiff in detinue and his sureties liable on the redelivery bond. Savage *v.* Gunter, 32 Ala. 467; Altizer *v.* Buskirk, 44 W. Va. 256, 28 S. E. 789.

Conditions precedent.—Ala. Acts (1886–1887), p. 131, provide that in detinue, when the property is in plaintiff's possession at the termination of the cause, and the cause is dismissed, the court, on motion or plea in abatement, shall impanel a jury to assess the value of the property and value of its use, and shall render judgment for such property or value and damages. It was held that on dismissal the summary judgment is not requisite to the right of defendant to sue on the

retains possession of the property under a forthcoming bond, plaintiff, if he succeed in his action, has a cause of action on such bond if defendant fail to deliver the property.[64] The nature and extent of liability of the parties on an

redelivery bond. Ernst *v.* Hogue, 86 Ala. 502, 5 So. 738.

Conclusiveness of judgment in detinue as to ownership of property.— In detinue, or the statutory action in the nature thereof, a judgment against plaintiff on the merits is conclusive as to the ownership of the property in a subsequent action on his replevin bond; but a voluntary nonsuit or judgment of dismissal, not followed by a summary judgment for the assessed value of the property, does not conclude the obligors on the replevin bond, when sued on the bond, from proving plaintiff's ownership of the property in mitigation of damages, although not in bar of the action. Ernst *v.* Hogue, 86 Ala. 502, 5 So. 738.

Special bail in detinue were liable only after the distringas issued on the judgment in detinue had been superseded and a fieri facias had been issued for the alternative value of the property, and a capias ad satisfaciendum had been returned unsatisfied. The omission of such proceedings, however, was a matter of defense to be specially pleaded. Cloud *v.* Catlett, 4 Leigh (Va.) 462. See also Bernard *v.* McKenna, 3 Fed. Cas. No. 1,348, 4 Cranch C. C. 130.

In action by a mortgagee against mortgagor.— Under Ala. Code, § 2718, providing that a plaintiff in detinue must before taking possession of the property give a bond conditioned to deliver the property to defendant in the event of the failure of the suit, and sections 2720 and 2721, providing that if the action be by a mortgagee defendant may have the amount of the mortgage debt ascertained by the jury and shall upon the payment of such amount be entitled to a return of the property within thirty days after judgment, and in default of such return the bond to have the effect of a judgment, where the mortgagee takes possession of the property under a bond, before the trial, and sells such property, he himself being the purchaser, the mortgagor is entitled to have the amount realized from such sale applied on the mortgage debt; but if after being credited with such amount the jury ascertains the balance still due and he pays it he will be estopped to demand a return of the property or to enforce the bond. Woodruff *v.* Stough, 107 Ala. 314, 18 So. 258.

The declaration must allege that the property was taken from defendant in detinue, under the process therein, and was delivered to plaintiff in detinue. Altizer *v.* Buskirk, 44 W. Va. 256, 28 S. E. 789; Bratt *v.* Marum, 24 W. Va. 652. See also Copeland *v.* Leonard, 113 Ala. 605, 20 So. 980. But where the action of detinue was dismissed or a nonsuit was suffered by plaintiff therein, it is not necessary to allege that there was a judgment for defendant in detinue settling his right to the property. Altizer *v.* Buskirk, 44 W. Va. 256, 28 S. E. 789.

64. The code provision that a forthcoming bond in detinue when properly indorsed and returned forfeited has the force and effect of a judgment is merely cumulative, and an action lies on the bond. Masterson *v.* Matthews, 60 Ala. 260.

Where the property has been damaged plaintiff need not accept it in discharge of the forthcoming bond, without compensation for the depreciation in value, and it is a question for the jury whether, after the tender of property by defendant, plaintiff, by exercising control over such property, received it and thereby waived all claim for damages by fire while in defendant's possession. Heard *v.* Hicks, 101 Ala. 102, 13 So. 256.

Where plaintiff receives other property in lieu of that for which he sued and for which defendants gave a forthcoming bond, and after being informed of the substitution retains the substituted property, he is estopped to insist on a forfeiture of the bond. Heard *v.* Hicks, 101 Ala. 102, 13 So. 256.

The fact that the penalty of the bond is for less than the value of the property as assessed by the jury does not prevent its enforcement by summary execution to the extent of the penalty. Rich *v.* Lowenthal, 99 Ala. 487, 13 So. 220.

Omission in the sheriff's return of seizure of a part of the property sued for and included in defendant's forthcoming bond, and the fact that articles not sued for are included in such bond, does not affect its validity so as to render it unenforceable by summary process, since defendant is required to deliver only the property sued for, replevied, and recovered by plaintiff. Rich *v.* Lowenthal, 99 Ala. 487, 13 So. 220.

Bond by mortgagee.— The Alabama act of Feb. 8, 1861, provides a mode of recovering possession by a trustee or mortgagee having a power of sale, when the grantor on demand fails to deliver possession of the mortgaged property after making default, and that if the property be personal and plaintiff make affidavit of title, the sheriff shall take possession unless the grantor shall give bonds as in detinue cases. It was held that where, in an action of detinue instituted in April, 1861, the complaint is in the form prescribed by code, p. 352, "for the recovery of chattels in specie," but the forthcoming bond was conformable to section 3 of the act of 1861, instead of being conditioned as required by Ala. Code, § 2192 (providing that a bond, to be given by defendant in detinue in order that he may retain possession of the property, shall be conditioned that if cast in the suit he will within, etc., deliver the property to plaintiff and pay all costs and damages which may accrue from detention thereof), the bond, when returned "forfeited," did not have the effect of a judgment or authorize the levy of execution on it. Rose *v.* Pearson, 41 Ala. 253.

appeal-bond where an appeal is taken from a judgment in detinue must necessarily be determined by the terms and conditions of the bond itself.[65]

DETRIMENT. A loss or harm suffered in person or property.[1]

DETUR DIGNIORI. A maxim meaning "Let it be given to the more worthy."[2]

DEUS SOLUS HÆREDEM FACERE POTEST, NON HOMO. A maxim meaning "God alone, and not man, can make an heir."[3]

DEVASTAVIT. A mismanagement of the estate and effects of a deceased person, in the squandering and misapplying the assets contrary to the trust and confidence reposed in the executors or administrators;[4] a wasting of the assets;[5] a wasting of the estate — a misapplication of the assets;[6] a failure to apply the funds as the law directs.[7] At common law, a violation of duty by the executor or administrator, such as renders him personally responsible for mischievous consequences.[8] (Devastavit: By Executor or Administrator, see EXECUTORS AND ADMINISTRATORS. By Guardian, see GUARDIAN AND WARD. By Trustee, see TRUSTS. See also, generally, WASTE.)

DE VENTRE INSPICIENDO. Literally, "of inspecting the belly." A writ to inspect the body where a woman feigns to be pregnant, to see whether she is with child.[9] (De Ventre Inspiciendo: On Conviction of Crime, see CRIMINAL LAW.)

DEVIATION.[10] In general, a departure from a way or course, not departure simply.[11] In navigation, a voluntary departure, without necessity or reasonable

Forthcoming bond executed by claimant.— Where under a mutual misapprehension of the law a claimant in a detinue proceeding executed a forthcoming bond, and the sheriff accepted it and delivered the property to her, it was held that plaintiff, although not consenting thereto, might ratify the sheriff's act, and upon judgment in the detinue suit and return of *nulla bona*, and allegation of proof and failure to prosecute the claim to effect, might recover upon the bond. Munter *v.* Reese, 61 Ala. 395.

65. Hence where a supersedeas bond is conditioned only for the payment of costs detinue can be allowed for damages, although the bond be for double the damages assessed for the detention. Boulden *v.* Estey Organ Co., 92 Ala. 182, 9 So. 283.

1. Mont. Civ. Code (1895), § 4271.

Applied to diversion of water see Coffin *v.* Left Hand Ditch Co., 6 Colo. 443, 451.

2. Adams Gloss. [*citing* Broom Leg. Max. 69].

Applied in Fletcher *v.* Sondes, 3 Bing. 501, 11 E. C. L. 247, 1 Bligh N. S. 144, 238, 4 Eng. Reprint 826.

3. Bouvier L. Dict. [*citing* Broom Leg. Max. 516].

4. *Indiana.*— See Beardsley *v.* Marsteller, 120 Ind. 319, 320, 22 N. E. 315 [*citing* Ayers *v.* Lawrence, 59 N. Y. 192, 197].

Missouri.— Ridgway *v.* Kerfoot, 22 Mo. App. 661, 664 [*citing* Williams Ex. 1796].

New York.— Clift *v.* White, 12 N. Y. 519, 531 [*citing* Williams Ex. 1104]; Matter of Oosterhoudt, 15 Misc. 566, 569, 38 N. Y. Suppl. 179 [*citing* Williams Ex. 1796].

Oregon.— Steel *v.* Holladay, 20 Oreg. 70, 77, 25 Pac. 69, 10 L. R. A. 670.

West Virginia.—McGlaughlin *v.* McGlaughlin, 43 W. Va. 226, 238, 27 S. E. 378 [*citing* Kippen *v.* Carr, 4 Munf. (Va.) 119; 2 Lomax Ex. 457].

5. Ayers *v.* Lawrence, 59 N. Y. 192, 197 [*citing* 2 Williams Ex. 1629 *et seq.*]; Steel *v.* Holladay, 20 Oreg. 70, 77, 25 Pac. 69, 10 L. R. A. 670. See also Sanderson's Estate, 74 Cal. 199, 212, 15 Pac. 753 [*citing* Bouvier L. Dict.].

6. Howe *v.* People, 7 Colo. App. 535, 44 Pac. 512, 514.

7. Whitfield *v.* Evans, 56 Miss. 488, 494.

8. Steel *v.* Holladay, 20 Oreg. 70, 77, 25 Pac. 69, 10 L. R. A. 670.

9. Bouvier L. Dict. [*citing* 1 Blackstone Comm. 456].

10. Distinguished from "barratry" in Ross *v.* Hunter, 4 T. R. 33, 37, 2 Rev. Rep. 319 [*quoted* in Atkinson *v.* Great Western Ins. Co., 4 Daly (N. Y.) 1, 21].

11. Herron *v.* Rathmines, etc., Imp. Com'rs, [1892] A. C. 498, 526, 67 L. T. Rep. N. S. 658.

Applied to a road.—"It [deviation] is used in the Act as meaning a departure from the allotted road allowance in the boundary line where that is necessary, as Sir John Robinson observes in the case of Brant County v. Waterloo County, 19 U. C. Q. B. 450, 457, for the purpose of obtaining a good line of road." Victoria County *v.* Peterborough County, 15 Ont. App. 617, 627. See also Murphy *v.* Kingston, etc., R. Co., 11 Ont. 302, 306, where it is said: "In effect, therefore, 'deviation' is a term not to be restricted to a lateral variance on either side of such line, but may mean a change *de via* in any direction within the prescribed limits, whether at right angles to, or deflecting from, or extending beyond that line."

Used in connection with a railway law, "deviation" is defined as "a lateral altera-

cause, from the regular and usual course of the voyage;[12] the increasing or varying of the risks insured against, without necessity or reasonable cause;[13] a varying from the route insured against without necessity or just cause after the risk has begun;[14] a voluntary and inexcusable departure from the usual course;[15] a departure from some other course or way which might have been pursued at more or less inconvenience.[16] As defined by statute, a departure from the course of the voyage or an unreasonable delay in pursuing the voyage; or the commencement of an entirely different voyage.[17] In contracts, a change made in the progress of a work from the original terms or design or method agreed upon.[18] (Deviation: In Marine Insurance, see INSURANCE. Liability of Carrier, see CARRIERS; SHIPPING.)

DEVICE.[19] That which is devised or formed by design;[20] a contrivance;[21] an artificial contrivance.[22] So also the term has been variously defined as meaning an

tion of the line of a railway." Sweet L. Dict. [*quoted* in Murphy *v.* Kingston, etc., R. Co., 11 Ont. 302, 305, where it is said that this definition as used in railway law is "too narrow." It is that, no doubt, but it embraces more than that. His is a more restricted definition than is warranted by the language of Patteson, J., in Armistead *v.* North Staffordshire R. Co., 16 Q. B. 526, 537, 15 Jur. 944, 20 L. J. Q. B. 249, 71 E. C. L. 526]. And see Herron *v.* Rathmines, etc., Imp. Com'rs, [1892] A. C. 498, 505, 67 L. T. Rep. N. S. 658.

12. *Maryland.*— Riggin *v.* Patapsco Ins. Co., 7 Harr. & J. 279, 288, 16 Am. Dec. 302.

Massachusetts.— Coffin *v.* Newburyport Mar. Ins. Co., 9 Mass. 436, 447.

New York.— Lawrence *v.* Ocean Ins. Co., 11 Johns. 241, 265, dissenting opinion.

South Carolina.— Murden *v.* South Carolina Ins. Co., 1 Mill 200, 211.

United States.— Hostetter *v.* Park, 137 U. S. 30, 40, 11 S. Ct. 1, 34 L. ed. 568 (where it is said: "But it is no deviation, in respect to such a voyage, to touch and stay at a port out of its course, if such departure is within the usage of the trade"); The Iroquois, 118 Fed. 1003, 1005, 55 C. C. A. 497; Hostetter *v.* Gray, 11 Fed. 179, 181 [*citing* Coffin *v.* Newburyport Mar. Ins. Co., 9 Mass. 436, 447]; Bond *v.* The Cora, 3 Fed. Cas. No. 1,621, 2 Wash. 80, 84, 2 Pet. Adm. 373.

Original and present use of term.— In Wilkins *v.* Tobacco Ins. Co., 30 Ohio St. 317, 341, 27 Am. Rep. 455 [*citing* 2 Parsons Mar. Ins. 1], it is said: "Strictly speaking, a 'deviation' originally meant only a departure from the course of the voyage, but now it is always understood in the sense of a material departure from or change in the risk insured against, without just cause."

13. Bell *v.* Western M. & F. Ins. Co., 5 Rob. (La.) 423, 445, 39 Am. Dec. 542; Child *v.* Sun Mut. Ins. Co., 3 Sandf. (N. Y.) 26, 35.

14. Andenreid *v.* Mercantile Mut. Ins. Co., 60 N. Y. 482, 484, 19 Am. Rep. 204, where it is said: "It is not confined to a departure from or going out of the direct or usual course of the voyage, but it comprehends unusual or unnecessary delay, or any act of the assured or his agents, which, without necessity or just cause, increases or changes the risks included in the policy."

15. Theband *v.* Great Western Ins. Co., 155 N. Y. 516, 522, 50 N. E. 284, where it is said: "And whether the departure amounts to a deviation must be determined by the motive, consequences and circumstances of the act."

16. Victoria County *v.* Peterborough County, 15 Ont. App. 617, 627, where it is said: "And [it] is inappropriate where there is none such to follow or deviate from."

17. Cal. Civ. Code (1899), § 2694; N. D. Civ. Code (1899), § 4561; S. D. Civ. Code (1899), § 4561.

18. Black L. Dict.

19. "The word comes 'from the Latin *dividere*, to separate, to distinguish.'" Webster Dict. [*quoted* in Baxter *v.* Ellis, 111 N. C. 124, 127, 15 S. E. 938, 17 L. R. A. 382].

Distinguished from "substitute" as used in the phrase "with cards or dice, or some device or substitute for cards or dice" see Henderson *v.* State, 59 Ala. 89, 91.

20. Portis *v.* State, 27 Ark. 360, 362 (where it is said: "And [it] has reference to something worked out for exhibition or show"); Webster Dict. [*quoted* in Henderson *v.* State, 59 Ala. 89, 91; State *v.* Smith, 82 Minn. 342, 345, 85 N. W. 12].

21. Webster Dict. [*quoted* in Henderson *v.* State, 59 Ala. 89, 91; State *v.* Smith, 82 Minn. 342, 345, 85 N. W. 12; State *v.* Blackstone, 115 Mo. 424, 427, 22 S. W. 370].

Applied to fishing tackle.—"The term 'device' may be broad enough to cover hook and line, but when read in connection with the other words of the section, it must be construed to mean a device of a like kind." *In re* Yell, 107 Mich. 228, 229, 65 N. W. 97.

22. Webster Dict. [*cited* in Crow *v.* State, 6 Tex. 334, 336].

Applied to election ballots.—"The 'device' denounced [in the statute] is any distinguishing mark reasonably intended as such. It is true 'device' sometimes means an emblem or pictorial representation, though in the Bible and by Shakespeare it is almost always used in the sense of contrivance, plan or trick. But these are all secondary and derivative meanings." Baxter *v.* Ellis, 111 N. C. 124, 127, 15 S. E. 938, 17 L. R. A. 382. In State *v.* Phillips, 63 Tex. 390, 393, 51 Am. Rep. 646 [*cited* in Hanscom *v.* State, 10 Tex. Civ. App. 638, 643, 31 S. W. 547], where election ballots were objected to because they were "diamond shaped," and it was alleged

invention;[23] a stratagem;[24] a project; a scheme,—often a scheme to deceive; an artifice.[25] (Device: For Gaming, see GAMING. For Trade-Mark, see TRADE-MARKS AND TRADE-NAMES.)

DEVIL ON THE NECK. An instrument of torture, formerly used to extort confessions, etc.[26]

DEVISABLE. Capable of being devised.[27]

DEVISAVIT VEL NON. In practice, the name of an issue sent out of a court of chancery, or one which exercises chancery jurisdiction, to a court of law, to try the validity of a paper asserted and denied to be a will, to ascertain whether or not the testator did devise, or whether or not that paper was his will.[28] (See WILLS.)

DEVISE.[29] Primarily, a dividing or division.[30] In the law of wills, as a noun, a gift of real property by will;[31] a disposition by will;[32] an instrument by which lands are conveyed;[33] a conveyance of land, and not under the same jurisdiction as a testament;[34] the direction of a testator of sound mind as to the disposition of his property after his death;[35] but it may mean any gift by will whether it consists of real property or personalty;[36] as a verb, to give or dispose

that this shape was given them as a "device" in violation of the election law of 1879, the court said: "By the word 'device,' as used in the statute, was doubtless meant a figure, mark or ornament of a similar character, with the pictures, signs, etc., enumerated in the same connection, and placed upon the ticket in a like manner. This is the natural and legal construction to be placed upon the word in the connection in which it is used."

23. Portis *v.* State, 27 Ark. 360, 362.

24. Webster Dict. [*quoted* in State *v.* Smith, 82 Minn. 342, 345, 85 N. W. 12, and *cited* in Crow *v.* State, 6 Tex. 334, 336, where it is said: "'He disappointeth the devices of the crafty.' Job, v. 'They imagined a mischievous device. Psalms, xxi.'"].

25. Webster Dict. [*quoted* in State *v.* Smith, 82 Minn. 342, 345, 85 N. W. 12].

26. It was made of several irons, which were fastened to the neck and legs, and wrenched together so as to break the back. Wharton L. Lex.

27. Black L. Dict. [*citing* 2 Blackstone Comm. 373; 1 Powell Dev. 165].

28. Black L. Dict.

29. **"The word . . . has a well-defined legal meaning."** People's Trust Co. *v.* Smith, 30 N. Y. Suppl. 342, 343, 31 Abb. N. Cas. (N. Y.) 422 [*citing* Bouvier L. Dict.]. And "there is no magic in the word." Barrington *v.* Liddell, 2 De G. M. & G. 480, 500, 17 Jur. 291, 22 L. J. Ch. 1, 51 Eng. Ch. 375, 17 Eng. L. & Eq. 188.

30. Clark *v.* Hornthal, 47 Miss. 434, 486.

31. *California.*— *In re* Pfuelb, Myr. Prob. 38, 39.

Colorado.— Logan *v.* Logan, 11 Colo. 44, 47, 17 Pac. 99.

Illinois.— Evans *v.* Price, 118 Ill. 593, 599, 8 N. E. 854.

Indiana.— Rountree *v.* Pursell, 11 Ind. App. 522, 39 N. E. 747, 749.

New York.— Orton *v.* Orton, 3 Abb. Dec. 411, 414, 3 Keyes 486, 3 Transcr. App. 18; Kibler *v.* Miller, 57 Hun 14, 17, 10 N. Y. Suppl. 375; People's Trust Co. *v.* Smith, 30 N. Y. Suppl. 342, 343, 31 Abb. N. Cas. 422 [*citing* Bouvier L. Dict.].

South Carolina.— Pratt *v.* McGhee, 17 S. C. 428, 432.

England.— Hope *v.* Taylor, 2 Ld. Ken. 9, 13; Sheppard Touchst. 400 [*quoted* in Matter of Karr, 2 How. Pr. N. S. (N. Y.) 405, 409].

"Devise" is the appropriate term to pass real estate. Lasher *v.* Lasher, 13 Barb. (N. Y.) 106, 109. See 9 Cyc. 72 note 45.

The term is inapplicable to gifts of personal property. Lasher *v.* Lasher, 13 Barb. (N. Y.) 106, 109. But see 5 Cyc. 683 note 27.

32. *In re* Fetrow, 58 Pa. St. 424, 427; *In re* Davis, 103 Wis. 455, 457, 79 N. W. 761 [*citing* Anderson L. Dict.; Century Dict.]; Barrington *v.* Liddell, 2 De G. M. & G. 480, 500, 17 Jur. 291, 22 L. J. Ch. 1, 51 Eng. Ch. 375, 17 Eng. L. & Eq. 188.

33. Clark *v.* Hornthal, 47 Miss. 434, 486, where it is said: "Thus showing the testamentary power over acquisitions . . . to be as old as the method of disposition itself, while 'will and testament' had not at first precisely the same meaning as 'devise;' but, in course of time, these words have come to be applied indifferently to a disposition of land or goods, which are now continually distributed, at the same time by the same instrument."

34. Conklin *v.* Egerton, 21 Wend. (N. Y.) 430, 436 [*citing* 2 Blackstone Comm. 501]; Clapp *v.* Brown, 4 Redf. Surr. (N. Y.) 200, 201.

35. Jenkins *v.* Tobin, 31 Ark. 306, 309.

36. *In re* Pfuelb, Myr. Prob. (Cal.) 38, 39; People's Trust Co. *v.* Smith, 82 Hun (N. Y.) 494, 31 N. Y. Suppl. 519; Kibler *v.* Miller, 57 Hun (N. Y.) 14, 17, 10 N. Y. Suppl. 375; Freme *v.* Clement, 18 Ch. D. 499, 509, 50 L. J. Ch. 801, 44 L. T. Rep. N. S. 398, 30 Wkly. Rep. 1.

"Among unprofessional persons [devise may apply] to all kinds of property, real, personal and mixed." Kibler *v.* Miller, 57 Hun (N. Y.) 14, 17, 10 N. Y. Suppl. 375.

of land or hereditaments by will; to make a will of land.[37] Sometimes, as a verb, to draw an instrument.[38] (See BEQUEATH; BEQUEST; LEGACY; and, generally, CHARITIES; PERPETUITIES; TRUSTS; WILLS.)

DEVISEE. One who takes by will;[39] he to whom property is given by will.[40] In its technical sense, one to whom lands or other real estate are devised;[41] the party getting real estate by will.[42] The word is sometimes used as meaning separated; designated.[43] (See DEVISE; and, generally, WILLS.)

DEVISOR. A giver of lands or real estate by will; the maker of a will of lands; a testator.[44] (See DEVISE; DEVISEE; and, generally, WILLS.)

DEVOLUTION. The act of transferring or transmitting to another. In ecclesiastical law, the forfeiture of a right by non user as a right of presentation.[45] (Devolution: Of Liability as Ground For Abatement, see ABATEMENT AND REVIVAL. See also, generally, DESCENT AND DISTRIBUTION.)

DEVOLVE. A term used where an estate devolves upon another by opera-

Compared with and distinguished from "bequest" see the following cases:

Colorado.— Logan *v.* Logan, 11 Colo. 44, 47, 17 Pac. 99.

New Hampshire.—Ladd *v.* Harvey, 21 N. H. 514, 522.

New York.— Lasher *v.* Lasher, 13 Barb. 106, 109.

Pennsylvania.— *In re* Fetrow, 58 Pa. St. 424, 427.

South Carolina.—Pratt *v.* McGhee, 17 S. C. 428, 432.

Wisconsin.— *In re* Davis, 103 Wis. 455, 457, 79 N. W. 761 [*citing* Anderson L. Dict.; Century Dict.].

Compared with and distinguished from "legacy" see Logan *v.* Logan, 11 Colo. 44, 47, 17 Pac. 99; Orton *v.* Orton, 3 Abb. Dec. (N. Y.) 411, 414, 3 Keyes (N. Y.) 486, 3 Transcr. App. (N. Y.) 18; Roth's Appeal, 94 Pa. St. 186, 191; *In re* Fetrow, 58 Pa. St. 424, 427; Pratt *v.* McGhee, 17 S. C. 428, 432; Sheppard Touchst. 400 [*quoted* in Matter of Karr, 2 How. Pr. N. S. (N. Y.) 405, 409].

"Devise" and "bequest" are sometimes used as convertible terms. Evans *v.* Price, 118 Ill. 593, 599, 8 N. E. 854.

"In accurate language, the word 'devise' applies to land only. It is, however, sometimes inaccurately applied to personal property." Oothout *v.* Rogers, 59 Hun (N. Y.) 97, 100, 13 N. Y. Suppl. 120 [*citing* Bouvier L. Dict.]. See also McCorkle *v.* Sherrill, 41 N. C. 173, 176 (where it is said: "The word devise is properly applied to gifts of real property by will, but may be extended to embrace personal property to execute the intention of the testator"); Fosdick *v.* Hempstead, 8 N. Y. Suppl. 772, 774 (where it is said: "The term 'devise' is applicable to real estate only, and the use of the two words 'estate' and 'property' seems to contemplate and include real as well as personal property").

"Lands devised" is an artistic phrase and is distinguished from "legacies given." Roth's Appeal, 94 Pa. St. 186, 191.

37. Burrill L. Dict. [*citing* 2 Blackstone Comm. 373 *et seq.*].

Compared with and distinguished from "bequeath" see Lasher *v.* Lasher, 13 Barb. (N. Y.) 106, 109; *In re* Davis, 103 Wis. 455, 457, 79 N. W. 761 [*citing* Anderson L. Dict.; Century Dict.]. See 9 Cyc. 859 note 16.

Devise is apt to cover real estate. *In re* Marten, [1902] 1 Ch. 314, 322, 71 L. J. Ch. 203, 85 L. T. Rep. N. S. 704, 50 Wkly. Rep. 209.

"Devise" may include "bequeath." Kibler *v.* Miller, 57 Hun (N. Y.) 14, 17, 10 N. Y. Suppl. 375.

Distinguished from "appoint" see *In re* Marten, [1902] 1 Ch. 314, 322, 71 L. J. Ch. 203, 85 L. T. Rep. N. S. 704, 50 Wkly. Rep. 209.

38. As a conveyance or assurance, by counsel. This word is used in Rosewel's case, (5 Coke 19*b*,) as advise is in Higginbottom's case, which follows, (5 Coke 19*b*,) both being treated in some degree as synonymous. The phrase, "shall be reasonably devised, advised or required," continues to be used in covenants in deeds for further assurances. Burrill L. Dict. [*citing* More *v.* Roswell, Cro. Eliz. 297, 298; Dyer 31*b*].

39. Elliott *v.* Spinney, 69 Me. 31, 32.

40. Logan *v.* Logan, 11 Colo. 44, 46, 17 Pac. 99.

In Kentucky, by statute, "devisee" is synonymous with "legatee." Ky. St. (1903) § 467.

"The term devisee accompanying a bequest of personalty will be held to mean legatee." Wright *v.* New York City M. E. Church, 1 Hoffm. (N. Y.) 201, 211 [*citing* Coope *v.* Banning, 2 L. J. Ch. O. S. 11, 1 Sim. & St. 534, 1 Eng. Ch. 534]. See also People *v.* Petrie, 191 Ill. 497, 510, 61 N. E. 499, 85 Am. St. Rep. 268.

41. Rogers *v.* Farrar, 6 T. B. Mon. (Ky.) 421, 424.

42. Brown *v.* Merchants' Bank, 66 Mo. App. 427, 431.

43. Lamont *v.* Grand Lodge I. L. of H., 31 Fed. 177, 179 [*quoted* in Nye *v.* Grand Lodge, A. O. U. W., 9 Ind. App. 131, 36 N. E. 429, 436], where it is said: "It is clear that this word cannot be intended to bear the technical meaning of one to whom real estate is given by the last will of another. . . . The word 'devisee,' therefore, is used in its primary sense of one 'separated' or 'designated.'"

44. Burrill L. Dict. [*citing* 1 Powell Dev. c. 5; 1 Stephen New Comm. 544].

45. English L. Dict.

tion of law, and without any voluntary act of the previous owner, passes from one person to another.[46] (See DEVOLUTION; and, generally, DESCENT AND DISTRIBUTION.)

DE WARRANTIA CHARTÆ. Literally, "of warranty of charter." A writ which lieth properly where a man doth enfeoff another by deed and bindeth himself and heirs to warranty.[47] (See, generally, COVENANTS.)

DHOLL. A round skein of yarn, wound together and tied up, about thirty inches long and five in diameter, thick at one end and narrow at the other.[48]

DIADUCTION. A connection in life, or between living bodies and inanimate things, congenerous to the connection between electrified bodies.[49]

DIAGRAM. An illustrative figure giving only the outlines or a general scheme (not an exact representation) of the object; a figure for ascertaining or exhibiting certain relations between objects under discussion by means of analogous relations between the parts of the figure.[50] (Diagram: As Evidence — In Civil Action, see EVIDENCE; In Criminal Prosecution, see CRIMINAL LAW.)

DIAZOTIZE. To unite two nitrogen atoms to a hydrocarbon radical, and to form a diazo compound.[51]

DICE. See GAMING.

DICTATE. To tell another what to write; to indite; to teach; to show another something with authority; to declare with confidence.[52]

DICTATION. As used in a technical sense to pronounce orally what is destined to be written at the same time by another.[53] (Dictation: Of Will, see WILLS.)

DICTATOR. One whose credit or authority enables him to direct the opinion or conduct of another.[54]

DICTIONARY. A lexicon; a vocabulary; a wordbook.[55]

DICTUM.[56] An opinion expressed by a court, but which, not being necessarily

46. Francisco *v.* Aguirre, 94 Cal. 180, 185, 29 Pac. 495 [*cited* in San Jose First. Nat. Bank *v.* Menke, 128 Cal. 103, 106, 60 Pac. 675], where it is said: "The word is itself of intransitive signification, and does not include the result of an act which is intended to produce a particular effect. It implies a result without the intervention of any voluntary actor."

47. Bouvier L. Dict.

48. The Dunbritton, 73 Fed. 352, 355, 19 C. C. A. 449.

49. Animarium Co. *v.* Filloon, 98 Fed. 103, 105.

50. Century Dict.

51. Matheson *v.* Campbell, 69 Fed. 597, 600, where it is said: "A repetition of the process, or rediazotization, forms a diazo compound."

52. Marshall *v.* Flinn, 49 N. C. 199, 205.

53. Prendergast *v.* Prendergast, 16 La. Ann. 219, 220, 79 Am. Dec. 575, where it is said: "Such is the settled definition of this term under our jurisprudence."

54. Marshall *v.* Flinn, 49 N. C. 199, 205.

55. Webster Int. Dict.

"The dictionary definition of a term is frequently the mere air of the music which the accused has attempted to execute with variations. Frequently, too, the variations are so luxuriant and ingenious, that the air is much disguised, and to hum it over from the bench is but little assistance to the jury in following the real performance. It is something easier for an offender to baffle the dictionary than the penal code, for the former is perplexed with verbal niceties and shades of meaning, while the latter grasps in a broad, practical way at the substantial transactions of men." Minor *v.* State, 63 Ga. 318, 321 [*quoted* in Williams *v.* State, 100 Ga. 511, 527, 28 S. E. 624, 39 L. R. A. 269].

56. The word is generally used as an abbreviated form of *obiter dictum*, "a remark by the way." Black L. Dict.

Compared with or distinguished from "obiter dictum."— "An *obiter dictum* is an opinion expressed by a Judge in giving judgment which was unnecessary for the determination of the case, and upon which such determination did not rest. I do not understand that if a Judge rest his decision upon two different grounds, either of which is sufficient to support the decision, either of the grounds taken can be said to be but an expression of an opinion which was unnecessary for the determination of the case, and hence a *dictum* or *obiter dictum*, that is a *dictum* uttered in passing or merely incidental and unnecessary." Landreville *v.* Gouin, 6 Ont. 455, 464 [*citing* Bouvier L. Dict.]. See also Kane *v.* McCown, 55 Mo. 181, 199 (where it was said that in a certain case a question was presented and discussed "and the opinion of the court, or a majority of the court, was expressed on it. The question was, in that case, presented by the instructions, and though its decision might have been avoided, the opinion was not therefore an *obiter dictum*"); Rohrbach *v.* Germania F. Ins. Co., 62 N. Y. 47, 58, 20 Am. Rep. 451; Buchner *v.* Chicago, etc., R. Co., 60 Wis. 264, 268, 19 N. W. 56 (where the court said: "Such *dictum*, if *dictum* it is, should, it would seem, be regarded as 'judicial *dictum*,' in contradis-

involved in the case, lacks the force of an adjudication;[57] an opinion expressed by a judge on a point not necessarily arising in a case;[58] an opinion of a judge which does not embody the resolution or determination of the court, and made without argument, or full consideration of the point; not the professed deliberate determination of the judge himself.[59] In old English law, an arbitrament, or the award of arbitrators.[60] In French law, the report of a judgment made by one of the judges who has given it.[61] (See, generally, COURTS.)

DIEM CLAUSIT EXTREMUM. A writ awarded out of the exchequer after the death of a crown debtor.[62] (See, generally, ESCHEAT.)

DIES DOMINICUS NON EST JURIDICUS. A maxim meaning "Sunday is not a day for judicial or legal proceedings."[63] (See DAY; and, generally, SUNDAY.)

DIES INCEPTUS PRO COMPLETO HABETUR. A maxim meaning "A day begun is held as complete."[64]

DIES INCERTUS PRO CONDITIONE HABETUR. A maxim meaning "An uncertain day is held as a condition."[65]

tinction to mere *obiter dictum*,— that is, an expression originating with the judge alone, while passing, by the way, in writing his opinion, as an argument or illustration drawn from some collateral question").

57. Rush *v.* French, 1 Ariz. 99, 134, 25 Pac. 816 [*quoting* Bouvier L. Dict.], where it is said: "It frequently happens that in assigning its opinion upon a question before it, the court discusses collateral questions, and expresses a decided opinion upon them. Such opinions, however, are frequently given without much reflection and without previous argument at the bar, and as, moreover, they do not enter in the adjudication of the point before the court, they have only that authority which may be accorded to the opinion, more or less deliberate, of the individual judge who announces it." See also *In re* Woodruff, 96 Fed. 317, 321, 2 Am. Bankr. Rep. 678 [*citing* Carroll *v.* Carroll, 16 How. (U. S.) 275, 287, 14 L. ed. 936], where it is said: "The supreme court of the United States has held that, in order to make an opinion a decision, there must have been an application of the judicial mind to the precise question necessary to be determined to fix the rights of the parties; and, therefore, said the learned judge delivering this opinion, 'this court has never held itself bound by any part of an opinion which was not needful to the ascertainment of the question between the parties."

Authority of opinions limited to questions decided.— In Cohens *v.* Virginia, 6 Wheat. (U. S.) 264, 399, 5 L. ed. 257 [*quoted* in Mayer *v.* Erhardt, 88 Ill. 452, 457], Marshall, C. J., said: "It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated." See 3 Cyc. 494.

58. State *v.* Clarke, 3 Nev. 566, 572. See also Love *v.* Miller, 53 Ind. 294, 299, 21 Am. Rep. 192 (where it is said: "The *dictum* of a judge is very different from the decision of a court, although the judge and the court may be the same person, and the *dictum* and decision in the same case. There is nothing authoritative in a case, except what is required to be decided to reach the final judgment, and what by the judgment becomes *res adjudicata* between the parties as to the subject-matter of the suit"); Buchner *v.* Chicago, etc., R. Co., 60 Wis. 264, 268, 19 N. W. 56 [*quoting* Bouvier L. Dict.], where it is said: "According to the more rigid rule, an expression of opinion, however deliberate, upon a question, however fully argued, if not essential to the disposition that was made of the case, may be regarded as a *dictum*."

59. Rohrbach *v.* Germania F. Ins. Co., 62 N. Y. 47, 58, 20 Am. Rep. 451 [*citing* Saunderson *v.* Rowles, 4 Burr. 2064, 2068].

Effect of dicta as authority see COURTS, 11 Cyc. 755.

That a decision might have been put upon a different ground does not place it in the category of a *dictum* see 11 Cyc. 755 note 17.

60. Black L. Dict.

61. Black L. Dict. [*citing* Pothier Proc. Civ. pt. 1, c. 5, art. 2].

62. Burrill L. Dict. [*citing* Termes de la Ley].

63. Broom Leg. Max. [*citing* Coke Litt. 135*a*].

Applied or quoted in the following cases:

Massachusetts.— Johnson *v.* Day, 17 Pick. 106, 109; Pearce *v.* Atwood, 13 Mass. 324, 347.

Missouri.— State *v.* Green, 37 Mo. 466, 470.

New Jersey.— McEvoy *v.* Hudson County School Dist. No. 8, 38 N. J. Eq. 420, 422.

North Carolina.— State *v.* Ricketts, 74 N. C. 187, 193.

England.— Dakin's Case, 2 Saund. 290*a*, 291*a*.

64. Wharton L. Lex.

Applied in Bemis *v.* Leonard, 118 Mass. 502, 505, 19 Am. Rep. 470.

65. Wharton L. Lex.

DIES INTERPELLAT PRO HOMINE. A maxim meaning "The arrival of the day of payment is a sufficient demand from the person owing." [66]

DIES JURIDICUS. A term employed by the civilians to denote the days for legal purposes or judicial proceedings.[67] (See DAY.)

DIES NON. An abbreviation of DIES NON JURIDICUS,[68] *q. v.*

DIES NON JURIDICUS. A term employed by the civilians to designate the days in which judicial proceedings are prohibited.[69] (See, generally, HOLIDAYS; SUNDAY.)

DIETING. Providing and furnishing daily food.[70]

DIFFERENCE.[71] The act of distinguishing; discrimination, distinction.[72] Sometimes defined as disagreement or dispute.[73] (See CONTROVERSY.)

DIFFERENTIAL DUTIES. See CUSTOMS DUTIES.

DIFFICILE EST UT UNUS HOMO VICEM DUORUM SUSTINEAT. A maxim meaning "It is difficult that one man should sustain the place of two." [74]

DIFFICILEM OPORTET AURUM HABERE AD CRIMINA. A maxim meaning "One should not lend an easy ear to criminal charges." [75]

DIFFICULT AND EXTRAORDINARY CASE.[76] See COSTS.

DIG. To make a ditch or excavation; turn up or throw out earth.[77] And sometimes used as an abbreviation of DIGEST,[78] *q. v.*

DIGEST. A collection or compilation, embodying the chief matter of numerous books in one, disposed under proper heads or titles, and usually by an alphabetical arrangement, for facility in reference.[79] (See ABRIDGMENT; COMPENDIUM; COMPILATION; EPITOME; INDEX; SUMMARY; TREATISE; and, generally, COPYRIGHT; LITERARY PROPERTY.)

DIGESTUM or **DIGESTA.** The Digest or Pandects in the Justinian collections of the civil law.[80]

DIGGING GOLD. A term susceptible of a figurative meaning, and sometimes

66. Morgan Leg. Max. [*citing* Trayner Leg. Max.].

67. Didsbury *v.* Van Tassell, 56 Hun (N. Y.) 423, 425, 10 N. Y. Suppl. 32.

68. Black L. Dict.

69. Didsbury *v.* Van Tassell, 56 Hun (N. Y.) 423, 425, 10 N. Y. Suppl. 32.

70. Cook County *v.* Gilbert, 146 Ill. 268, 273, 33 N. E. 761, as used in Ill. Rev. St. c. 53, § 19, relating to prisoners.

71. That "difference in judicial opinion" is not synonymous with "abuse of judicial discretion" see Day *v.* Donohue, 62 N. J. L. 380, 383, 41 Atl. 934.

72. Century Dict.

73. Fravert *v.* Fesler, 11 Colo. App. 387, 53 Pac. 288, 290.

74. Wharton L. Lex. [*citing* Acton's Case, 4 Coke 117*a*, 118*a*].

75. Adams Gloss.

76. The term "difficult or extraordinary," seems to be used in contradistinction to "common or ordinary," as used in a statute relative to an allowance of extra costs. . . . "All litigated trials can not be considered 'difficult,' within the meaning of the section, because such a construction would completely nullify the words 'difficult or extraordinary,' as used, and contravene the plain intent of the legislature. . . . Effect can be given to these words, in connection and consistent with the rest of the section, and can not, therefore, be disregarded. It seems to me that the word 'difficult' should be applied to questions of law involved in the action. 'Extraordinary' may apply to any other feature or circumstance, distinguishing the base from ordinary litigations." Fox *v.* Gould, 5 How. Pr. (N. Y.) 278, 279 [*criticising* Dyckman *v.* McDonald, 5 How. Pr. (N. Y.) 121].

77. Century Dict.

Dig a canal.— Where a liberty was granted in a deed "to dig a canal through the grantor's land," the court said: "The words are, 'with liberty to dig a canal through the grantor's land,' and it is afterwards spoken of as a 'privilege.' A reasonable interpretation of this language must be, that the liberty to dig the canal includes the right to use it, when dug; for without such right, there could be no improvement of the privilege, or any benefit to the grantees." Lyman *v.* Arnold, 15 Fed. Cas. No. 8,626, 5 Mason 195, 200.

"The right and privilege to dig 'all the ore on his place and lands,'" as used in a contract, was considered in Fairchild *v.* Dunbar Furnace Co., 128 Pa. St. 485, 497, 18 Atl. 443, 444.

"The term 'for executing the digging,' in the paragraph [of the contract] describing the rate of compensation, is plainly used as synonymous with the term excavation in the paragraph immediately preceding it, and the same term is used in the specification showing the manner in which the work was to be done." Sherman *v.* New York, 1 N. Y. 316, 320.

78. Black L. Dict.

79. Black L. Dict. See also 1 Cyc. 197 note 25.

80. Black L. Dict.

used in this manner to signify generally any mode by which wealth or property is obtained.[81]

DIGNITAS SUPPONIT OFFICIUM ET CURAM, ET NON EST PARTIBILIS. A maxim meaning "Dignity supposes office and charge, and is not divisible." [82]

DIGNITATES REX DAT, VIRTUS CONSERVAT, DELICTA AUFERUNT. A maxim meaning "The king confers honors, virtue preserves them, transgressions take them away." [83]

DIGNITY. In English law, an honor; a title, station, or distinction of honor.[84]

DIGNUS MERCEDE OPERARIUS. A maxim meaning "The laborer is worthy of his hire." [85]

DIKE. A DAM,[86] *q. v.* (See DRAINS; LEVEES.)

DILATIONES IN LEGE SUNT ODIOSÆ. A maxim meaning "Delays in law are odious." [87]

DILATIO QUÆ PRO JUSTITIA FACIAT ACCEPTISSIMA; QUÆ CONTRA JUSTITIAM MAXIME INVISA. A maxim meaning "Delay or suspension for justice's sake is very acceptable; but delay contrary to justice is very odious." [88]

DILATORY DEFENSE. See EQUITY.

DILATORY EXCEPTIONS. Such exceptions as do not tend to defeat the action, but only to retard its progress.[89] (See, generally, PLEADING.)

DILATORY PLEA. See PLEADING.

DILIGENCE. Steady application to business of any kind, constant effort to accomplish any undertaking.[90] In Scotch law and practice, process of law, by which persons, lands, or effects are seized in execution or in security for debt; also process for enforcing the attendance of witnesses, or the production of writings.[91] (Diligence: Avoidance of Estoppel by, see ESTOPPEL. In Procuring Absent Witness or Evidence as Ground of Continuance, see CONTINUANCES IN CIVIL ACTIONS; CONTINUANCES IN CRIMINAL CASES. In Procuring Execution, see BAIL. In Procuring Newly Discovered Evidence as Ground of New Trial, see CRIMINAL LAW; NEW TRIAL. Of Agent, see PRINCIPAL AND AGENT. Of Assignee, see ASSIGNMENTS. Of Assignee or Holder—Of Bill or Note, see COMMERCIAL PAPER; Of Bond to Charge Assignor, see BONDS. Of Attorney, see ATTORNEY AND CLIENT. Of Bailee, see BAILMENTS. Of Carrier, see CARRIERS. Of Creditor, see CREDITORS' SUITS. Of Master or Servant, see MASTER AND SERVANT. Of Party Seeking Equity, see EQUITY; SPECIFIC PERFORMANCE. And see, generally, NEGLIGENCE.)

DILIGENT INQUIRY. Such inquiry as a diligent man, intent upon ascertaining a fact, would usually and ordinarily make,—inquiry with diligence and in good faith to ascertain the truth.[92]

DILIGENT SEARCH. Reasonable effort to find.[93]

DILUTION. The act of making thin, weak, or more liquid; the thinning or

81. Hoyt *v.* Smith, 27 Conn. 63, 67, where it is said: "A fine illustration is given by the great lyrical poet of England in his version of the thirty-ninth Psalm: 'Some walk in honor's gaudy show, Some dig for golden ore.'"

82. Morgan Leg. Max. [*citing* Halkerstine 37].

83. Morgan Leg. Max. [*citing* Halkerstine 38].

84. Dignities are a species of incorporeal hereditaments, in which a person may have a property or estate. Black L. Dict. [*citing* 2 Blackstone Comm. 37; 1 Blackstone Comm. 396; 1 Crabb Real Prop. 468 *et seq.*].

85. Morgan Leg. Max. [*citing* Lofft 262].

86. Com. *v.* Tolmer, 149 Mass. 229, 232, 21 N. E. 377, 14 Am. St. Rep. 414, 3 L. R. A. 747.

87. Tayler L. Gloss.

88. Morgan Leg. Max. [*citing* Halkerstine 38].

89. Garland Code Pr. La. (2d ed.) § 332.

90. Ophir Silver Min. Co. *v.* Carpenter, 4 Nev. 534, 546, 97 Am. Dec. 550.

Diligence when the law imposes it as a duty, implies that we shall do those things we ought to do, and leave undone those things which we ought not to do. Grant *v.* Moseley, 29 Ala. 302, 305.

91. Black L. Dict.

92. Van Matre *v.* Sankey, 148 Ill. 536, 562, 36 N. E. 628, 39 Am. St. Rep. 196, 23 L. R. A. 665.

93. *In re* Bayley, 132 Mass. 457, 461, as used in a statute requiring an officer to give to a debtor notice of the sale of property taken on execution.

weakening of a fluid by mixture; the state of being diluted.[94] (See Adulteration; Food; Intoxicating Liquors.)

DIMINISH. To make less, not to utterly wipe out.[95]

DIMINUTION. Incompleteness; a word signifying that the record sent up from an inferior to a superior court for review is incomplete, or not fully certified.[96] (Diminution: Of Record, see Appeal and Error.)

DIMISSORIÆ LITTERÆ. Apostles,[97] *q. v.*

DIOCESAN COURTS. In English law the consistorial courts of each diocese, exercising general jurisdiction of all matters arising locally within their respective limits, with the exception of places subject to peculiar jurisdiction; deciding all matters of spiritual discipline,—suspending or depriving clergymen,—and administering the other branches of the ecclesiastical law.[98]

DIOCESE. The circuit or extent of a bishop's jurisdiction; the district in which a bishop exercises his ecclesiastical authority.[99] (See, generally, Religious Societies.)

DIP.[1] As used in mining, the direction of a vein of ore, quartz, or mineral-bearing substance, as it goes downward into the earth;[2] a vein.[3] (See, generally, Mines and Minerals.)

DIPLOMA. An instrument, usually under seal, conferring some privilege, honor, or authority; now almost wholly restricted to certificates of degrees conferred by universities and colleges;[4] a document bearing record of a degree conferred by a literary society or educational institution.[5] In the civil law, a royal charter; letters patent granted by a prince or sovereign.[6] (See, generally, Colleges and Universities.)

DIPLOMATIC OFFICERS. See Ambassadors and Consuls.

DIPSOMANIA. An irresistible impulse to indulge in intoxication, either alcohol or other drugs—opiums,[7] alcoholism.[8] (Dipsomania: Affecting Responsibility For Crime, see Criminal Law. See also, generally, Drunkards; Insane Persons.)

DIRECT.[9] As an adjective, immediate, express, unambiguous, confessed, abso-

94. Century Dict.

95. State *v.* Kinkead, 14 Nev. 117, 123.

96. In such case the party may suggest a "diminution of the record," which may be rectified by a certiorari. Black L. Dict. [*citing* 2 Tidd Pr. 1109].

97. Black L. Dict.

98. Black L. Dict. [*citing* 2 Stephen Comm. 672].

99. Mannix *v.* Purcell, 46 Ohio St. 102, 146, 19 N. E. 572, 15 Am. St. Rep. 562, 2 L. R. A. 753.

1. Compared with "depth."—In Duggan *v.* Davey, 4 Dak. 110, 26 N. W. 887, 901, the court said: "'Dip' and 'depth' are of the same origin,—'dip' is the direction or inclination towards the 'depth,'—and it is 'throughout their depth' that veins may be followed, and that is surely their downward course."

2. King *v.* Amy, etc., Consol. Min. Co., 9 Mont. 543, 565, 24 Pac. 200, where it is said: "The dip, in different veins, and in the same vein sometimes, varies from a perpendicular to the earth's surface to an angle, perhaps, only a few degrees below the horizon. . . . Let us call the dip from the first point of view the inclination dip, the second the compass dip, and the third the practical dip; for this is the practical idea of the miner when he speaks of following his dip."

3. Duggan *v.* Davey, 4 Dak. 110, 26 N. W. 887, 901.

4. Worcester Dict. [*cited* in Halliday *v.* Butt, 40 Ala. 178, 183, where it is said: "Such an instrument, generally, if not universally, on parchment, is not easily fabricated"].

5. State *v.* Gregory, 83 Mo. 123, 130, 53 Am. Rep. 565 [*quoting* Webster Dict.], where it is said: "In short, a statement in writing, under the seal of the institution, setting forth that the student therein named has attained a certain rank, grade or degree in the studies he has pursued."

6. Black L. Dict. [*citing* Calvini Lex.]

7. Ballard *v.* State, 19 Nebr. 609, 614, 28 N. W. 271, where it is said: "This mania or disease is classed as one of the minor forms of insanity." See also State *v.* Potts, 100 N. C. 457, 464, 6 S. E. 657.

8. State *v.* Reidell, 9 Houst. (Del.) 470, 473, 14 Atl. 550, where it is said: "Men who are addicted to drink, from excessive indulgence become subjects of a disease which medical men designate or speak of as dypsomania or alcoholism. It oftentimes develops into what is called by them *mania a potu*, wherein the patient becomes a madman, wholly deprived of all sane reason while the fit is upon him."

9. "The word 'direct' is of large use in the language, and it has been adopted into the law in many relations. We have direct descent, direct taxes, direct interest, direct route, and so on, until we have come now to

lute;[10] immediate or proximate, as distinguished from remote;[11] straightforward, not crooked, not winding, not circuitous, not sideways, not oblique;[12] straight; not circuitous; immediate, the first or original;[13] also, an epithet for the line of ascendants and descendants in genealogical succession, opposed to collateral.[14] As a verb, to guide, to show, to regulate;[15] to point out with authority, or direct as a superior;[16] to order; to instruct; to point out a course of proceeding with authority; to command.[17] (Direct: Contempt, see CONTEMPT. Evidence, see EVIDENCE. Examination, see WITNESSES. Interrogatories, see DEPOSITIONS. See also DIRECTED; DIRECTION; DIRECTLY.)

DIRECT CONTEMPT. See CONTEMPT.

DIRECT DAMAGES. Such damages as follow immediately upon the act done.[18] (See, generally, DAMAGES.)

DIRECTED. Ordered.[19] (See COMPELLED; DIRECT.)

DIRECT EVIDENCE. See EVIDENCE.

DIRECT EXAMINATION. See WITNESSES.

DIRECTING. Requiring.[20] A word which imports an order to another.[21] (See DIRECT; DIRECTION.)

DIRECT INTEREST. With reference to the competency of a witness, an interest which is certain and not contingent or doubtful;[22] the opposite of an indirect interest, and excludes the idea of contingency.[23]

DIRECT INTERROGATORIES. See DEPOSITIONS.

DIRECTION.[24] An order prescribed, either verbally or written; instructions in what manner to proceed;[25] also applied to the rule of law in a case given to a

direct payment." Colorado *v.* Boylan, 25 Fed. 594, 595.

Distinguished from "collateral" see Lyons *v.* Roach, 84 Cal. 27, 30, 23 Pac. 1026 [*quoted* in Sichler *v.* Look, 93 Cal. 600, 606, 29 Pac. 220]; Smith *v.* Morrill, 12 Colo. App. 233, 55 Pac. 824, 826; Walker *v.* Goldsmith, 14 Oreg. 125, 142, 12 Pac. 537; Crawford *v.* McDonald, 88 Tex. 626, 630, 33 S. W. 325 [*quoted* in Schneider *v.* Sellers, 25 Tex. Civ. App. 226, 228, 61 S. W. 541].

"Direct attack" as used in an appeal from a judgment see Sichler *v.* Look, 93 Cal. 600, 606, 29 Pac. 220 [*quoted* in Eichhoff *v.* Eichhoff, 107 Cal. 42, 47, 40 Pac. 24, 48 Am. St. Rep. 110].

10. Webster Dict. [*quoted* in Anaconda A. O. of H. Div. No. 1 *v.* Sparrow, (Mont. 1903) 74 Pac. 197, 199; Colorado *v.* Boylan, 25 Fed. 594, 596].

11. Ermentrout *v.* Girard F. & M. Ins. Co., 63 Minn. 305, 308, 65 N. W. 635, 56 Am. St. Rep. 481, 30 L. R. A. 346, as used in an insurance policy.

"Direct loss or damage by fire" see Hustace *v.* Phenix Ins. Co., 175 N. Y. 292, 298, 67 N. E. 592.

12. Hathaway *v.* Davis, 33 Cal. 161, 166; Bouvier L. Dict. [*quoted* in State *v.* Conley, 22 R. I. 397, 401, 48 Atl. 200].

13. Anderson L. Dict. [*quoted* in State *v.* Conley, 22 R. I. 397, 401, 48 Atl. 200].

"Direct and immediate result" of drunkenness see State *v.* Haab, 105 La. 230, 238, 29 So. 725.

"Direct and proximate cause" in a negligence case defined see McKeon *v.* Chicago, etc., R. Co., 94 Wis. 477, 483, 69 N. W. 175, 59 Am. St. Rep. 909, 35 L. R. A. 252. See, generally, NEGLIGENCE.

"The most direct route of travel" as used with reference to official mileage see Maynard *v.* Cedar County, 51 Iowa 430, 431, 1 N. W. 701.

14. Wharton L. Lex. See, generally, DESCENT AND DISTRIBUTION.

15. "'Direct,' as used in this connection, is synonymous with the words 'to point out.'" Webster Int. Dict. [*quoted* in Hinds *v.* Kellogg, 13 N. Y. Suppl. 922, 923].

16. Davis *v.* Chase, 159 Ind. 242, 245, 64 N. E. 88, 853, 95 Am. St. Rep. 294.

17. Webster Dict. [*quoted* in Calder *v.* Curry, 17 R. I. 610, 615, 24 Atl. 103].

18. Ga. Civ. Code (1895), § 3911.

19. People *v.* Guggenheimer, 28 Misc. (N. Y.) 735, 747, 59 N. Y. Suppl. 913.

Distinguished from "authorized" in Spring Garden *v.* Wistar, 18 Pa. St. 195, 198.

"Directed to be sold" as used in a will relative to real estate considered in reference to a stamp act see Atty.-Gen. *v.* Simcox, 1 Exch. 749, 765.

20. Pelzer Mfg. Co. *v.* Cely, 40 S. C. 430, 433, 18 S. E. 790.

21. Potter *v.* Adriance, 44 N. J. Eq. 14, 17, 14 Atl. 16.

22. Lewis *v.* Post, 1 Ala. 65, 72 [*citing* Rex *v.* Bray, Hardre 360]; *In re* Van Alstine, 26 Utah 193, 197, 72 Pac. 942 [*quoting* Winfield Words and Phrases].

23. *In re* Van Alstine, 26 Utah 193, 197, 72 Pac. 942.

24. **"By express direction"** as used in a will defined see Barr *v.* Graybill, 13 Pa. St. 396, 399.

25. Webster Dict. [*quoted* in Northern Pac. R. Co. *v.* Barnes, 2 N. D. 310, 367, 51 N. W. 386, where it is said: "The employer gives direction to his workmen; the physician to his patient"]. See also Berkshire Woollen Co. *v.* Day, 12 Cush. (Mass.) 128, 130, where it is said: "'Direction' means

jury.[26] The term is sometimes used to denote the body of persons (called "directors") who are charged with the management and administration of a corporation or institution; also as the name of the clause of a bill in equity containing the address of the bill to the court.[27] (Direction: In Writs, see ATTACHMENT; CERTIORARI; EXECUTIONS; GARNISHMENT; HABEAS CORPUS; INJUNCTIONS; MANDAMUS; PROCESS; PROHIBITION; QUO WARRANTO; REPLEVIN; SCIRE FACIAS; etc. Of Verdict, see CRIMINAL LAW; TRIAL.)

DIRECT LINE. See DESCENT AND DISTRIBUTION.

DIRECTLY.[28] In a direct manner; in a straight line or course;[29] without curving, swerving, or deviation;[30] in a straight line or course, literally or figuratively; in a direct manner without the intervention of any medium;[31] in a straightforward way, without anything intervening;[32] immediately;[33] rectilinearly.[34] Sometimes used in the sense of proximately;[35] speedily.[36] (See DIRECT.)

DIRECTOR. See CORPORATIONS.

DIRECTORY STATUTE. See STATUTES.

DIRECTORY TRUST. See TRUSTS.

DIRECT PAYMENT. A payment which is absolute and unconditional as to time, amount, and the persons by whom and to whom it is to be made.[37]

DIRECT TAX.[38] A tax which is demanded from the very person, who, it is

general instructions as to the manner of doing it."

"The word 'direction' in the clause, 'under the direction of the judges,' is to be taken in the sense of authority to direct as circumstances may require, and not as requiring direction in order to confer authority upon the clerk to act." *In re* Durant, 60 Vt. 176, 182, 12 Atl. 650.

"Under the direction of the Secretary of the Interior" as used in the statutes relative to public lands see Knight *v.* United Land Assoc., 142 U. S. 161, 177, 12 S. Ct. 258, 35 L. ed. 974 [*quoted* in Orchard *v.* Alexander, 157 U. S. 372, 381, 15 S. Ct. 635, 39 L. ed. 737]. See also Northern Pac. R. Co. *v.* Barnes, 2 N. D. 310, 367, 51 N. W. 386, where it is said: "To make selections [of land] 'under the direction of the secretary of the interior' is to make them in accordance with the rules and regulations prescribed by him."

26. Wharton L. Lex.

27. Black L. Dict.

28. "The word 'directly' is derived from the Latin '*directus*,' straight, p. p. of '*dirigere*,' to set in a straight line. The primary idea is of space, in a straight line, rectilinearly, undeviating, etc. All the secondary meanings are analogous to the idea of straightness in space." State *v.* Conley, 22 R. I. 397, 401, 48 Atl. 200.

"Directly and indirectly" construed in a covenant not to engage in any other business of the same character within a period of five years after selling out a certain business see Nelson *v.* Johnson, 38 Minn. 255, 259, 36 N. W. 868.

"Directly injured" as used in reference to damages in a statute relative to the construction of internal improvements see Lyons *v.* U. S., 26 Ct. Cl. 31, 43.

29. State *v.* Van Camp, 36 Nebr. 9, 13, 54 N. W. 113 [*quoting* Webster Dict.]; State *v.* Conley, 22 R. I. 397, 401, 48 Atl. 200 [*quoting* Century Dict.; Webster Int. Dict.].

30. State *v.* Van Camp, 36 Nebr. 9, 13, 54 N. W. 113 [*quoting* Webster Dict.].

"Coming directly from some foreign port or place," [as used in a statute relative to paupers], means coming from some port or place out of the United States, without passing through either of the sister states, into this state." Chatham *v.* Middlefield, 19 Johns. (N. Y.) 56, 57.

31. Century Dict. [*quoted* in State *v.* Conley, 22 R. I. 397, 401, 48 Atl. 200].

32. Webster Int. Dict. [*quoted* in State *v.* Conley, 22 R. I. 397, 401, 48 Atl. 200].

33. Missouri, etc., R. Co. *v.* Lyons, (Tex. Civ. App. 1899) 53 S. W. 96, 97.

34. Worcester Dict. [*quoted* in State *v.* Conley, 22 R. I. 397, 401, 48 Atl. 200].

35. McLean *v.* Burbank, 11 Minn. 277 [*citing* Lockhart *v.* Lichtenthaler, 46 Pa. St. 151, 164].

"Directly" distinguished from "proximately" in respect to the cause of an injury see Davis *v.* Spicer, 27 Mo. App. 279, 301.

36. Duncan *v.* Topham, 8 C. B. 225, 18 L. J. C. P. 310, 65 E. C. L. 225 [*cited* in Lewis *v.* Hojer, 16 N. Y. Suppl. 534, 536; The Onrust, 18 Fed. Cas. No. 10,539, 1 Ben. 431, where it was held, "that where a contract was to be performed 'directly,' it meant something more than a reasonable time, and that the word 'directly' imported 'speedily,' or, at least, 'as soon as practicable'"]. See also Tobias *v.* Lissberger, 105 N. Y. 404, 12 N. E. 13, 59 Am. Rep. 509 [*cited* in Metropolitan Land Co. *v.* Manning, 98 Mo. App. 248, 260, 71 S. W. 696].

37. Colorado *v.* Boylan, 25 Fed. 594, 595.

38. Distinguished from "indirect tax" in Pollock *v.* Farmers' L. & T. Co., 157 U. S. 429, 470, 15 S. Ct. 673, 39 L. ed. 759 [*citing* 3 Gallatin Writings (Adams ed.) 74, 75]; Toronto Bank *v.* Lambe, 12 App. Cas. 575, 582, 4 Cartwr. Cas. (Can.) 7; Reg. *v.* Taylor, 36 U. C. Q. B. 183, 193.

May include a land or poll tax. Hylton *v.* U. S., 3 Dall. (U. S.) 171, 183, 1 L. ed. 556 [*quoted* in Pollock *v.* Farmers' L. & T. Co., 157 U. S. 429, 570, 15 S. Ct. 673, 39 L. ed. 759].

intended or desired, shall pay it;[39] a tax which the legislator intends should be paid at once and immediately by him who bears its burden;[40] a tax taken directly from property or income;[41] a tax which is assessed upon the property, person, business, income, etc., of those who are to pay it;[42] a tax paid directly from and falling immediately on the revenue.[43] (Direct Tax: In General, see TAXATION. Imposed by United States, see INTERNAL REVENUE.)

DISABILITY. The want of legal capacity to do a thing;[44] a deprivation of ability, state of being disabled, incapacity;[45] the want of legal ability or capacity to exercise legal rights either special or ordinary, or to do certain acts with proper legal effect, or to enjoy certain privileges or powers of free action;[46] the absence of legal ability to do certain acts or enjoy certain benefits; such as the disability to sue, take lands by descent, to enter into contracts, to alien property, etc.;[47] incapacity for action under the law; incapacity to do a legal act.[48] (Disability: As Ground For Abatement, see ABATEMENT AND REVIVAL. Contributory Negligence of Person Under, see NEGLIGENCE. Effect of — On Adverse Possession, see ADVERSE POSSESSION; On Limitation of Action, see LIMITATIONS OF ACTIONS; On Time For Taking Appeal or Suing Out Writ of Error, see APPEAL AND ERROR. Of Alien, see ALIENS. Of Attorney, see ATTORNEY AND CLIENT. Of Convict, see CONVICTS. Of Drunkard, see DRUNKARDS. Of Indian, see INDIANS. Of Infant, see INFANTS. Of Insane Person, see INSANE PERSONS. Of Married Woman, see HUSBAND AND WIFE. Of Spendthrift, see SPENDTHRIFTS.)

DISABLE. In its ordinary sense, to cause a disability.[49] (See DISABILITY; and, generally, MAYHEM.)

DISAGREEMENT. A want of unanimity;[50] the refusal by a grantee, lessee, etc., to accept an estate, lease, etc., made to him; the annulling of a thing that had essence before.[51] (Disagreement: As Affecting Contract, see CONTRACTS. Of Judges, see APPEAL AND ERROR; COURTS; TRIAL. Of Jury, see CRIMINAL LAW; TRIAL.)

DISBARMENT. See ATTORNEY AND CLIENT.

DISBURSEMENTS. Money expended by an executor, guardian, trustee, etc., for the benefit of the estate in his hands, or in connection with its administration. Under the codes of civil procedure, the expenditures necessarily made by a party in the progress of an action, aside from the fees of officers and court costs, which are allowed, *eo nomine*, together with costs.[52] The term is often

39. Street R. Co. *v.* Morrow, 87 Tenn. 406, 416, 11 S. W. 348, 2 L. R. A. 853; Toronto Bank *v.* Lambe, 12 App. Cas. 575, 582, 4 Cartwr. Cas. (Can.) 7; Severn *v.* Reg., 1 Cartwr. Cas. (Can.) 414, 457; Atty.-Gen. *v.* Queen Ins. Co., 1 Cartwr. Cas. (Can.) 117, 140; Hastings County *v.* Ponton, 5 Ont. App. 543, 548; Lamonde *v.* Lavergne, 3 Quebec Q. B. 303, 306, 312; Mill Pol. Econ. [*quoted* in Dulmage *v.* Douglas, 3 Manitoba L. Rep. 562, 564, and *citing* Atty.-Gen. *v.* Reed, 10 App. Cas. 141, 143, 3 Cartwr. Cas. (Can.) 190].

40. Lamonde *v.* Lavergne, 3 Quebec Q. B. 303, 311.

41. Atty.-Gen. *v.* Reed, 10 App. Cas. 141, 143, 3 Cartwr. Cas. (Can.) 90.

42. Wilson *v.* Chicago Sanitary Dist., 133 Ill. 443, 493, 27 N. E. 203 [*citing* Cooley Tax. (2d ed.) 6].

43. Pollock *v.* Farmers' L. & T. Co., 157 U. S. 429, 570, 15 S. Ct. 673, 39 L. ed. 759 [*citing* 3 Gallatin Writings (Adams ed.) 74, 75].

44. Bouvier L. Dict. [*quoted* in Berkin *v.* Marsh, 18 Mont. 152, 160, 44 Pac. 528, 56 Am. St. Rep. 565; Meeks *v.* Vassault, 16 Fed. Cas. No. 9,393, 3 Sawy. 206]. See also Valle *v.* Obenhause, 62 Mo. 81, 89.

45. Miller *v.* American Mut. Acc. Ins. Co., 92 Tenn. 167, 173, 21 S. W. 39, 20 L. R. A. 765.

"Disability implies want of power, not want of inclination. It refers to incapacity, and not to disinclination. It is founded upon a want of authority arising out of some circumstance or other, notwithstanding the presence of any amount or degree of willingness or disposition to act." People *v.* Ulster County, 32 Barb. (N. Y.) 473, 480, construing 3 N. Y. Rev. St. (5th ed.) 475, § 29.

As used in a statute relative to infancy, imprisonment, coverture, etc., see Wiesner *v.* Zaun, 39 Wis. 188, 206.

46. Black L. Dict. [*quoted* in Berkin *v.* Marsh, 18 Mont. 152, 161, 44 Pac. 528, 56 Am. St. Rep. 565].

47. Rapalje & L. L. Dict. [*quoted* in Berkin *v.* Marsh, 18 Mont. 152, 161, 44 Pac. 528, 56 Am. St. Rep. 565].

48. Anderson L. Dict. [*quoted* in Berkin *v.* Marsh, 18 Mont. 152, 162, 44 Pac. 528, 56 Am. St. Rep. 565].

49. Black L. Dict.

50. Darnell *v.* Lyon, 85 Tex. 455, 465, 466, 22 S. W. 304, 960.

51. Wharton L. Lex.

52. Black L. Dict.

used as synonymous with "expenditures."[53] (Disbursements: By Administrator, see Executors and Administrators. By Agent, see Principal and Agent. By Assignee, see Assignments For Benefit of Creditors. By Auctioneer, see Auctions and Auctioneers. By Executor, see Executors and Administrators. By Guardian, see Guardian and Ward. By Marshal, see Admiralty. By Trustee, see Trusts. See also, generally, Costs.)

DISBURSING OFFICER. See Army and Navy.

DISCHARGE. To send away, as a creditor, by payment, to set free; release; absolve or acquit, as of an obligation, claim, accusation, or service due; to exonerate; to relieve; to clear.[54] In bankruptcy practice, the release of the bankrupt; the step which regularly follows the adjudication of bankruptcy and the administration of his estate. In civil practice, to discharge a rule, an order, an injunction, a certificate, process of execution, or in general any proceeding in a court, to cancel or annul it, or to revoke it, or to refuse to confirm its original provisional force.[55] In criminal practice, the act by which a person in confinement, held on an accusation of some crime or misdemeanor, is set at liberty.[56] In equity practice, in the process of accounting before a master in chancery, a statement of expenses and counter-claims brought in and filed, by way of set-off, by the accounting defendant; which follows the charge in order. In the law of contracts, as a verb, to cancel or unloose the obligation of a contract; to make an agreement or contract null and inoperative; as a noun, the act or instrument by which the binding force of a contract is terminated, irrespective of whether the contract is carried out to the full extent contemplated (in which case the discharge is the result of performance) or is broken off before complete execution.[57] Used with reference to a cargo, to unlade it from the ship.[58] (Discharge: By Accord and Satisfaction, see Accord and Satisfaction. By Bequest, see Wills. By Composition, see Compositions With Creditors. By Compromise, see Compromise and Settlement. By Devise, see Wills. By Payment, see Payment. By Release, see Release. By Tender, see Tender. From Imprisonment, see Executions. From Service as Juror, see Grand Juries; Juries. In Bankruptcy, see Bankruptcy. In Criminal Prosecution, see Bail. In Insolvency, see Insolvency. Of Accepter, see Commercial Paper. Of Accused, see Criminal Law. Of Administrator, see Executors and Administrators. Of Assignee, see Assignments For Benefit of Creditors; Bankruptcy; Insolvency. Of Assignor, see Assignments; Assignments For Benefit of Creditors. Of Attachment, see Attachment. Of Attorney, see Attorney and Client. Of Attorney's Lien, see Attorney and Client. Of Bail, see Bail. Of Bond, see Bonds. Of Cargo, see Shipping. Of Carrier's Lien, see Carriers. Of Chattel Mortgage, see Chattel Mortgages. Of Contract, see Contracts. Of Covenant, see Covenants. Of Defendant From Arrest, see Arrest. Of Drawer, see Commercial Paper. Of Enlisted Person, see Army and Navy. Of Execution, see Executions. Of Executor, see Executors and Administrators. Of Garnishee, see Garnishment. Of Guarantor, see Guaranty. Of Indemnitor, see Indemnity. Of Indorser, see Commercial Paper. Of Insurer, see Insurance. Of Judgment, see Judgments. Of Jury, see Criminal Law; Trial. Of Levy or Lien of Attachment, see Attachment. Of Lien in General, see Liens. Of Maker, see Commercial Paper. Of Maritime Lien, see Maritime Liens. Of Mechanic's Lien, see Mechanics' Liens. Of Mortgage,

53. Whyte *v.* Dimmock, 55 Md. 452, 456, where it is said: "That the word disbursement is used as meaning expenditure, or rather as synonymous with that term, may not only be seen by reference to the dictionary, but to the case of Winder *v.* Diffenderffer, 2 Bland 166, 208, and same case on appeal, 3 Gill & J. 311, 348. See 11 Cyc. 24 note 1.

54. Webster Dict. [*quoted* in Rivers *v.* Blom, 163 Mo. 442, 446, 63 S. W. 812].

55. Black L. Dict.

56. Black L. Dict.

The writing containing the order for his being so set at liberty is also called a "discharge." Black L. Dict.

57. Black L. Dict.

58. *In re* Certain Logs of Mahogany, 5 Fed. Cas. No. 2,559, 2 Sumn. 589, 600 [*citing* Johnson Dict.; Falconer Mar. Dict.], thus used in a general sense as well as in a nautical sense.

see CHATTEL MORTGAGES. Of Negotiable Instrument, see COMMERCIAL PAPER. Of Officer, see ARMY AND NAVY. Of Receiptor, see ATTACHMENT. Of Receiver, see RECEIVERS. Of Res by Giving a Bond, see ADMIRALTY. Of Servant, see MASTER AND SERVANT. Of Surety — In General, see PRINCIPAL AND SURETY; On Appeal-Bond, see APPEAL AND ERROR; On Assignee's Bond, see ASSIGNMENTS FOR BENEFIT OF CREDITORS; On Auctioneer's Bond, see AUCTIONS AND AUCTIONEERS; On Bail-Bond, see ARREST; BAIL; On Bond of Executor or Administrator, see EXECUTORS AND ADMINISTRATORS; On Bond of Public Officer, see OFFICERS; On Forthcoming or Claimant's Bond, see ATTACHMENT. Of Teacher, see SCHOOLS AND SCHOOL-DISTRICTS. On Subscription, see SUBSCRIPTIONS.)

DISCHARGE BY OPERATION OF LAW. A discharge which takes place, whether it was intended by the parties or not.[59] (See DISCHARGE.)

DISCHARGED. Paid; released, acquitted, freed from debt, performed, executed.[60] (See COMMITTED; DISCHARGE; and, generally, BAIL; CRIMINAL LAW.)

DISCLAIMER. A denial of the insistence upon any claim or right in the thing demanded, and a renunciation of all claim thereto;[61] a renunciation or denial by a tenant of his landlord's title, either by refusing to pay rent, denying any obligation to pay, or by setting up a title in himself or a third person, and this is a distinct ground of forfeiture of the lease or other tenancy, whether of land or tithe;[62] a mode of defence.[63] (Disclaimer: As to Claim of Patent, see PATENTS. Ground of Estoppel, see ESTOPPEL. In Answer in General, see PLEADING. In Ejectment, see EJECTMENT. Of Estate, see DEEDS.)

DISCLOSURE. The act of uncovering, or discovering; revealing; opening; making known; telling that which has been kept concealed.[64] (Disclosure: In General, see DISCOVERY. Of Defense — On Application to Open Judgment, see JUDGMENTS; On the Merits, see PLEADING. Of Knowledge in Affidavit for Attachment, see ATTACHMENT. Of Principal, see PRINCIPAL AND AGENT.)

DISCONTINUANCE. In practice, dismissal.[65] (Discontinuance: Of Action — In General, see DISMISSAL AND NONSUIT; By Submission to Arbitration, see ARBITRATION AND AWARD; Effect on Its Operation, see ABATEMENT AND REVIVAL; In Admiralty, see ADMIRALTY; Mutual Discontinuance as Accord and Satisfaction, see ACCORD AND SATISFACTION. Of Assignment Proceeding, see ASSIGNMENTS FOR BENEFIT OF CREDITORS. Of Bankruptcy Proceeding, see BANKRUPTCY. Of Criminal Prosecution, see CRIMINAL LAW. Of Estate, see ESTATES. Of Highway or Street, see STREETS AND HIGHWAYS. Of Insolvency Proceeding, see INSOLVENCY. Waiver of Previous Discontinuance by Appearance, see APPEARANCES. See, generally, DISMISSAL AND NONSUIT.)

DISCONTINUANCE NIHIL ALIUD QUAM INTERMITTERE, DESENESCERE, INTERRUMPERE. A maxim meaning "Discontinuance is nothing else than to intermit, to abate, to interrupt."[66]

59. Thus, if a creditor appoints his debtor his executor, the debt is discharged by operation of law, because the executor cannot have an action against himself. Black L. Dict. [*citing* Chitty Contr. 714; Coke Litt. 264*b* note 1; Williams Ex. 1216].

60. Webster Dict. [*quoted* in Union Bank *v.* Powell, 3 Fla. 175, 193, 52 Am. Dec. 367].

Not equivalent to "acquitted."— Morgan *v.* Hughes, 2 T. R. 225, 231 [*cited* in Law *v.* Franks, Cheves (S. C.) 9, 10]. See also Bacon *v.* Townsend, 2 Edm. Sel. Cas. (N. Y.) 120, 122.

61. Moores *v.* Clackamas County, 40 Oreg. 536, 541, 67 Pac. 662 [*citing* 1 Beach Mod. Eq. Pr. § 281].

62. Black L. Dict. [*citing* Vivian *v.* Moat, 16 Ch. D. 730, 50 L. J. Ch. 331, 44 L. T. Rep. N. S. 210, 29 Wkly. Rep. 504].

63. Isham *v.* Miller, 44 N. J. Eq. 61, 62, 14 Atl. 20.

Resembles a release or conveyance.— In Prescott *v.* Hutchinson, 13 Mass. 439, 440 [*quoted* in Kentucky Union Co. *v.* Cornett, 112 Ky. 677, 681, 66 S. W. 728, 23 Ky. L. Rep. 1922], the court said: "A disclaimer, instead of being a plea to the action, resembled so far a release or conveyance of the land, that, in general, no person could disclaim, who was incapable of conveying the land."

64. Reg. *v.* Skeen, 8 Cox C. C. 143, 158 [*quoting* Richardson Dict.].

65. English *v.* Dickey, 128 Ind. 174, 182, 27 N. E. 495, 13 L. R. A. 40 [*citing* Thurman *v.* James, 48 Mo. 235]. See also Taft *v.* Northern Transp. Co., 56 N. H. 414, 417, opinion of Cushing, C. J.

66. Tayler L. Gloss.

DISCONTINUOUS EASEMENT. See EASEMENTS.

DISCOUNT.[67] In a general sense, as a noun, a counting off, an allowance or deduction made from a gross sum on any account whatever;[68] an allowance or deduction generally of so much per cent made for prepayment or for prompt payment of a bill or account; a sum deducted, in consideration of cash payment, from the price of a thing usually sold on credit; any deduction from the customary price or from a sum due or to be due at a future time;[69] an allowance sometimes made for prompt payment;[70] an allowance upon an account, debt, demand, price asked, and the like; something taken off or deducted;[71] a reduction;[72] the difference between the price of a debt and the amount of a debt,[73] the evidence of which is transferred;[74] as a verb, to abate in advance from the sum paid in a business transaction;[75] to count back; to pay back;[76] to purchase something or pay the amount therefor in cash less a certain per cent.[77] In a more limited and technical sense, as a noun, interest taken in advance;[78] interest either paid in advance or reserved in a note;[79] interest reserved from the amount lent at the time of making a loan;[80] a percentage taken from the face value of the security or property negotiated;[81] the difference between what is paid for a claim evidenced by negotiable paper and the face amount thereof;[82] the rate per cent deducted from the face value of a promissory note, bill of exchange, etc., when purchasing the privilege of collecting its amount at maturity;[83] as a verb, to lend or advance the amount of a security, deducting interest;[84] to loan money, with right to take the

67. "There is no technical sense attached to the term discount." U. S. Bank *v.* Hammond, 2 Brev. (S. C.) 415, 416 [*citing* Parke *v.* Eliason, 1 East 544, 550]. And it "is an equivocal word which may mean commercial discount, or may mean true discount." *In re* Land Securities Co., [1896] 2 Ch. 320, 327, 65 L. J. Ch. 587, 74 L. T. Rep. N. S. 400, 44 Wkly. Rep. 514.

"The use of the word discount in two different senses, has also contributed to introduce obscurity. It being used in some of the cases, and by some Judges to designate the reception of paper in payment of a loan, or debt, and in other cases and by other judges, in the sense in which it appears to have been used by the broker in this case, to designate the reception of it on a sale as a piece of property." Baxter *v.* Duren, 29 Me. 434, 441, 50 Am. Dec. 602.

68. Carroll *v.* Drury, 170 Ill. 571, 574, 49 N. E. 311 [*quoting* Dunkle *v.* Renick, 6 Ohio St. 527, 535].

69. Century Dict. [*quoted* in Carroll *v.* Drury, 170 Ill. 571, 575, 49 N. E. 311]. See also Building Assoc. *v.* Seemiller, 3 Phila. (Pa.) 115, 118.

70. Carroll *v.* Drury, 170 Ill. 571, 575, 49 N. E. 311.

71. Webster Dict. [*quoted* in Carroll *v.* Drury, 170 Ill. 571, 574, 49 N. E. 311].

72. Atlantic State Bank *v.* Savery, 82 N. Y. 291, 301.

73. Atlantic State Bank *v.* Savery, 82 N. Y. 291, 302 [*quoting* MacLeod Banking 43].

74. Greenville First Nat. Bank *v.* Sherburne, 14 Ill. App. 566, 570. And see Gloversville Nat. Bank *v.* Johnson, 104 U. S. 271, 277, 26 L. ed. 742 [*quoted* in Anderson *v.* Cleburne Bldg., etc., Assoc., 4 Tex. App. Civ. Cas. § 174, 16 S. W. 298].

75. Camden First Nat. Bank *v.* Carleton, 43 N. Y. App. Div. 6, 9, 59 N. Y. Suppl. 635, per Spring, J., in dissenting opinion.

76. Building Assoc. *v.* Seemiller, 3 Phila. (Pa.) 115, 118 [*citing* Johnson Dict.].

77. Century Dict. [*quoted* in Eastin *v.* Cincinnati Third Nat. Bank, 102 Ky. 64, 66, 42 S. W. 1115, 19 Ky. L. Rep. 1043].

78. Philadelphia Loan Co. *v.* Towner, 13 Conn. 249, 259; Bailey *v.* Murphy, Walk. (Mich.) 424, 425. And see New York Firemen Ins. Co. *v.* Ely, 2 Cow. (N. Y.) 678, 699; Marsh *v.* Martindale, 3 B. & P. 154, 159; Parker *v.* Norton, 6 T. R. 695, 699.

79. Peterborough First Nat. Bank *v.* Childs, 133 Mass. 248, 252, 43 Am. Rep. 509. And see State *v.* Boatmen's Sav. Inst., 48 Mo. 189, 191.

80. Youngblood *v.* Birmingham Trust, etc., Co., 95 Ala. 521, 523, 12 So. 579, 36 Am. St. Rep. 245, 20 L. R. A. 58 [*cited* in Anderson *v.* Timberlake, 114 Ala. 377, 389, 22 So. 431, 62 Am. St. Rep. 105; Planters', etc., Bank *v.* Goetter, 108 Ala. 408, 410, 19 So. 54]; State *v.* Boatmen's Sav. Inst., 48 Mo. 189, 191; Bouvier L. Dict. [*quoted* in Eastin *v.* Cincinnati Third Nat. Bank, 102 Ky. 64, 66, 42 S. W. 1115, 19 Ky. L. Rep. 1043].

81. Swift, etc., Co. *v.* U. S., 18 Ct. Cl. 42, 57 [*citing* Bouvier L. Dict.].

82. Anderson L. Dict. [*quoted* in Anderson *v.* Cleburne Bldg., etc., Assoc., 4 Tex. App. Civ. Cas. § 174, 16 S. W. 298]. See also Gloversville Nat. Bank *v.* Johnson, 104 U. S. 271, 277, 26 L. ed. 742 [*quoted* in Anderson *v.* Cleburne Bldg., etc., Assoc., 4 Tex. App. Civ. Cas. § 174, 16 S. W. 298], where it is said: "That difference represents interest charged, being at some rate, according to which the price is paid, if invested until the maturity of the debt, will produce its amount."

83. Century Dict. [*quoted* in Carroll *v.* Drury, 170 Ill. 571, 574, 49 N. E. 311].

84. Camden First Nat. Bank *v.* Carleton, 43 N. Y. App. Div. 6, 7, 59 N. Y. Suppl. 635; Webster Dict. [*quoted* in Com. *v.* Commercial Bank, 28 Pa. St. 383, 396].

interest in advance;[85] to take interest in advance.[86] By the language of the commercial world, and the settled practice of banks, a discount by a bank means, *ex vi termini*, a deduction or drawback made upon its advances or loans of money, upon negotiable paper, or other evidences of debt, payable at a future day, which are transferred to the bank;[87] a deduction made for interest in advancing money upon a bill or note not due; payments in advance of interest upon money loaned;[88] the deduction of a sum for advanced payment, particularly the deduction of the interest on a sum lent at the time of lending;[89] the interest allowed in advancing upon bills of exchange or negotiable securities.[90] In practice, a cross action, in which the defendant is the actor;[91] some cause, matter or thing, not necessarily arising out of, or connected with the cause of action.[92] (See DISCOUNTED; DISCOUNTING; and, generally, BANKS AND BANKING; BUILDING AND LOAN SOCIETIES; COMMERCIAL PAPER; USURY.)

DISCOUNT BROKER. See FACTORS AND BROKERS.

DISCOUNTED. Sold;[93] transferred.[94] Applied to commercial paper, the word is used to mean purchased or acquired, having advanced upon it, in money, the amount thereof, less such percentage as is retained for interest.[95] (See DISCOUNT;

85. Farmers', etc., Bank *v.* Baldwin, 23 Minn. 198, 206, 23 Am. Rep. 683 [*quoted* in Niagara County Bank *v.* Baker, 15 Ohio St. 68]; Penn Mut. L. Ins. Co. *v.* Carpenter, 40 Ohio St. 260, 265 [*citing* Niagara County Bank *v.* Baker, 15 Ohio St. 68].

86. Weckler *v.* Hagerstown First Nat. Bank, 42 Md. 581, 592, 20 Am. Rep. 95 [*quoted* in Black *v.* Westminster First Nat. Bank, 96 Md. 399, 428, 54 Atl. 88; Anderson *v.* Cleburne Bldg., etc., Assoc., 4 Tex. App. Civ. Cas. § 174, 16 S. W. 298].

87. Fleckner *v.* U. S. Bank, 8 Wheat. (U. S.) 338, 351, 5 L. ed. 631 [*quoted* in Younghlood *v.* Birmingham Trust, etc., Co., 95 Ala. 521, 523, 12 So. 579, 36 Am. St. Rep. 245, 20 L. R. A. 58; Philadelphia Loan Co. *v.* Towner, 13 Conn. 249, 260; Neilsville Bank *v.* Tuthill, 4 Dak. 295, 30 N. W. 154, 156; Pape *v.* Capitol Bank, 20 Kan. 440, 449, 27 Am. Rep. 183; Eastin *v.* Cincinnati Third Nat. Bank, 102 Ky. 64, 66, 42 S. W. 1115, 19 Ky. L. Rep. 1043; Farmers,' etc., Bank *v.* Baldwin, 23 Minn. 198, 205, 23 Am. Rep. 683; Salmon Falls Bank *v.* Leyser, 116 Mo. 51, 22 S. W. 504; Niagara County Bank *v.* Baker, 15 Ohio St. 68, 87; Building Assoc. *v.* Seemiller, 3 Phila. (Pa.) 115, 119; Gloversville Nat. Bank *v.* Johnson, 104 U. S. 271, 276, 26 L. ed. 742, and *followed* in Greenville First Nat. Bank *v.* Sherburne, 14 Ill. App. 566, 570; Lazear *v.* National Union Bank, 52 Md. 78, 128, 36 Am. Rep. 355; Danforth *v.* Elizabeth Nat. State Bank, 48 Fed. 271, 273, 1 C. C. A. 62, 17 L. R. A. 622]. And see Nicholson *v.* New Castle Nat. Bank, 92 Ky. 251, 255, 17 S. W. 627, 13 Ky. L. Rep. 478, 16 L. R. A. 223; Camden First Nat. Bank *v.* Carleton, 43 N. Y. App. Div. 6, 7, 59 N. Y. Suppl. 635.

88. Webster Dict. [*quoted* in Carroll *v.* Drury, 170 Ill. 571, 574, 49 N. E. 311].

89. Webster Dict. [*quoted* in Building Assoc. *v.* Seemiller, 3 Phila. (Pa.) 115, 118].

90. Saltmarsh *v.* Planters', etc., Bank, 14 Ala. 668, 677.

"Bank discount is simple interest paid in advance and received not on the sum advanced in the purchase, but on the amount of the note or bill." Eastin *v.* Cincinnati Third Nat. Bank, 102 Ky. 64, 66, 42 S. W. 1115, 19 Ky. L. Rep. 1043 [*quoting* Century Dict.]. And see Building Assoc. *v.* Seemiller, 3 Phila. (Pa.) 115, 119, where it is said: "By discount, in the Constitution, I understand to be meant bank discounts, and a bank discount is the purchase of a promissory note, bill of exchange, or other negotiable paper, at less than its face."

91. Cain *v.* Spann, 1 McMull. (S. C.) 258, 261.

92. Brown *v.* McMullen, 1 Hill (S. C.) 29, 30.

Distinguished from "set-off" in Trabue *v.* Harris, 1 Metc. (Ky.) 597, 598.

Used in connection with "counter-claim." — Where a statute declared that the plaintiff to obtain an attachment "must show" that he is entitled to recover the sum stated to be due to him "over and above all counter-claims," but the allegation of the complaint was "over and above all discounts and set-offs," the court said: "The word 'discounts' simply conveys the thought of something to be discounted or taken from the claim itself by reason of any agreement, express or implied, between the parties." Lampkin *v.* Douglass, 63 How. Pr. (N. Y.) 47, 48 [*citing* Bouvier L. Dict.]. See, generally, ATTACHMENT.

93. Ridgway *v.* New Castle Nat. Bank, 12 Ky. L. Rep. 216, 217 (where it is said: "The words 'sold' and 'discounted' used [in pleading] . . . have the same meaning, the word 'sold' being used to convey the idea of a transfer by discounting according to the usages of business and the regular rates of discount, rather than a barter and sale"); *In re* Weeks, 29 Fed. Cas. No. 17,349, 8 Ben. 265, 13 Nat. Bankr. Reg. 263, 269 [*quoting* Bouvier L. Dict.]. See also Baxter *v.* Duren, 29 Me. 434, 441, 50 Am. Dec. 602, where the terms "discounted" and "sold" are compared.

94. *In re* Weeks, 29 Fed. Cas. No. 17,349, 8 Ben. 265, 13 Nat. Bankr. Reg. 263, 269 [*quoting* Bouvier L. Dict.].

95. Camden First Nat. Bank *v.* Carleton, 26 Misc. (N. Y.) 536, 538, 57 N. Y. Suppl.

DISCOUNTING; and, generally, BANKS AND BANKING; COMMERCIAL PAPER; FACTORS AND BROKERS.)

DISCOUNTING.[96] Advancing money before due;[97] advancing money not due until some future period less the interest due thereon when payable;[98] advancing money to be repaid at a future day;[99] making a deduction from a sum due in consideration of payment of remainder before it becomes due;[1] taking interest in advance;[2] taking out of the principal sum, and the retention by the lender, at the time of the loan, of the interest charged for the use of the principal;[3] throwing off a portion of the price for present payment.[4] Applied to a bill or note in its most comprehensive sense, lending money and taking a bill or note in payment;[5] in its more ordinary sense, advancing a consideration for a bill or note, deducting or taking out the interest which will accrue for the time the note has to run;[6] advancing a consideration for a bill or note, and deducting the interest which will accrue for the time the note has to run;[7] advancing money upon it, deducting the interest, and receiving, retaining, or reserving the same in advance;[8] buying it for a less sum than that which upon its face is payable;[9] counting off, or taking from the face or amount of the paper, a sum at the time the money is advanced upon it;[10] giving money for it, deducting the interest;[11]

674 [*citing* Gloversville Nat. Bank *v.* Johnson, 104 U. S. 271, 276, 26 L. ed. 742].

"**When, . . . bankrupts say, that agreeable to their correspondent's wishes they had discounted,** it must be understood that they had accepted of the proposal made to them, and used the latter expression with reference to the calculation of the amount which upon deducting interest and commission they meant to allow to be drawn upon them." Parke *v.* Elison, 1 East 544, 553.

96. "**Carrying on business by discounting.**"— The president of a bank was in the habit of going every day to various offices in New York "looking for paper"; and at one place "they said to him they had a good piece of paper, and if he wanted it he could have it." After examining it, and the "mercantile book to see if it was all right," "he made a bargain for it, bought it, and paid for it." The court said: "The transaction above narrated, and through which the plaintiff acquired the note in question, was, I think, directly within the power thus conferred to carry on its business, 'by discounting . . . notes and other evidences of debt,' and this is so according to the general practice and understanding among men, and the decisions of our courts." Atlantic State Bank *v.* Savery, 82 N. Y. 291, 301.

97. Building Assoc. *v.* Seemiller, 3 Phila. (Pa.) 115, 119.

98. Carroll *v.* Drury, 170 Ill. 571, 576, 49 N. E. 311; Weckler *v.* Hagerstown First Nat. Bank, 42 Md. 581, 592, 20 Am. Rep. 95 [*quoted* in Anderson *v.* Cleburne Bldg., etc., Assoc., 4 Tex. App. Civ. Cas. § 174, 16 S. W. 298].

99. Bailey *v.* Murphy, Walk. (Mich.) 424, 425.

1. Carroll *v.* Drury, 170 Ill. 571, 575, 49 N. E. 311 [*citing* Schober *v.* Accommodation Sav. Fund, etc., Assoc., 35 Pa. St. 223].

2. Philadelphia Loan Co. *v.* Towner, 13 Conn. 249, 259 [*quoting* Marsh *v.* Martindale, 3 B. & P. 154, 159; Parker *v.* Norton, 6 T. R. 695, 699, and *citing* New York Firemen Ins. Co. *v.* Ely, 2 Cow. (N. Y.) 678, 699].

3. Planters', etc., Bank *v.* Goetter, 108 Ala. 408, 410, 19 So. 54.

4. Carroll *v.* Drury, 170 Ill. 571, 575, 49 N. E. 311, applied to a sale of goods by a merchant.

5. Philadelphia Loan Co. *v.* Towner, 13 Conn. 249, 259; New York Firemen Ins. Co. *v.* Ely, 2 Cow. (N. Y.) 678, 699.

6. Philadelphia Loan Co. *v.* Towner, 13 Conn. 249, 259.

7. Carroll *v.* Drury, 170 Ill. 571, 574, 49 N. E. 311 [*citing* Philadelphia Loan Co. *v.* Towner, 13 Conn. 249].

8. "That is to say, the notes are made for certain amounts, running a certain time to maturity; the interest or discount is deducted at the time the notes are made from their face, and the net proceeds only are placed to the credit of the borrower." Bobo *v.* People's Nat. Bank, 92 Tenn. 444, 447, 21 S. W. 888.

9. Saltmarsh *v.* Planters', etc., Bank, 14 Ala. 668, 677; Bouvier L. Dict. [*quoted* in Pape *v.* Capitol Bank, 20 Kan. 440, 451, 27 Am. Rep. 183; Salmon Falls Bank *v.* Leyser, 116 Mo. 51, 71, 22 S. W. 504; Anderson *v.* Cleburne Bldg., etc., Assoc., 4 Tex. App. Civ. Cas. § 174, 16 S. W. 298]. See also Camden First Nat. Bank *v.* Carleton, 26 Misc. (N. Y.) 536, 538, 57 N. Y. Suppl. 674 [*citing* Gloversville Nat. Bank *v.* Johnson, 104 U. S. 271, 276, 26 L. ed. 742].

10. Niagara County Bank *v.* Baker, 15 Ohio St. 68, 85 [*quoted* in Pape *v.* Capitol Bank, 20 Kan. 440, 451, 27 Am. Rep. 183; Salmon Falls Bank *v.* Leyser, 116 Mo. 51, 71, 22 S. W. 504; Anderson *v.* Cleburne Bldg., etc., Assoc., 4 Tex. App. Civ. Cas. § 174, 16 S. W. 298; Danforth *v.* Elizabeth Nat. State Bank, 48 Fed. 271, 273, 1 C. C. A. 62, 17 L. R. A. 622].

11. Youngblood *v.* Birmingham Trust, etc., Co., 95 Ala. 521, 523, 12 So. 579, 36 Am. St. Rep. 245, 20 L. R. A. 58 [*cited* in Anderson *v.* Timberlake, 114 Ala. 377, 389, 22 So.

lending money upon it and deducting the interest in advance.[12] In banking, the word is often used to designate or to signify a mode of loaning money,[13] with the right to take interest in advance;[14] advancing a sum of money, less than that expressed in the note, on the payee's transferring the title to the same to the bank.[15] Again the term may include purchase[16] as well as loan;[17] and figuratively, but not in its technical or primary sense, the word is often used as implying a sale,[18] as a buying at a discount,[19] or a purchase by way of discount;[20] or a

431, 62 Am. St. Rep. 105]; Newell *v.* Somerset First Nat. Bank, 13 Ky. L. Rep. 775, 777 [*citing* Nicholson *v.* New Castle Nat. Bank, 92 Ky. 251, 255, 17 S. W. 627, 13 Ky. L. Rep. 478, 16 L. R. A. 223; Triplett *v.* Holly, 4 Litt. (Ky.) 130, 131; Bouvier L. Dict.]; State *v.* Boatmen's Sav. Inst., 48 Mo. 189, 191. See also Planters', etc., Bank *v.* Goetter, 108 Ala. 408, 410, 19 So. 54.

12. Columbus City Bank *v.* Bruce, 17 N. Y. 507, 515 [*citing* Webster Dict., and *quoted* in Carroll *v.* Drury, 170 Ill. 571, 575, 49 N. E. 311].

13. Weckler *v.* Hagerstown First Nat. Bank, 42 Md. 581, 592, 20 Am. Rep. 95 [*quoted* in Black *v.* First Nat. Bank, 96 Md. 399, 428, 54 Atl. 88; Anderson *v.* Cleburne Bldg., etc., Assoc., 4 Tex. App. Civ. Cas. § 174, 16 S. W. 298]; Smith *v.* Pittsburg Exch. Bank, 26 Ohio St. 141, 151 [*citing* Niagara County Bank *v.* Baker, 15 Ohio St. 68, 69; Fleckner *v.* U. S. Bank, 8 Wheat. (U. S.) 338, 5 L. ed. 631].

14. Farmers', etc., Bank *v.* Baldwin, 23 Minn. 198, 206, 23 Am. Rep. 683 [*quoting* Niagara County Bank *v.* Baker, 15 Ohio St. 68]; Penn Mut. L. Ins. Co. *v.* Carpenter, 40 Ohio St. 260, 265 [*citing* Niagara County Bank v. Baker, 15 Ohio St. 68].

15. U. S. *v.* Fay, 9 Port. (Ala.) 465, 469 [*citing* Bouvier L. Dict.].

16. *Illinois.*— Greenville First Nat. Bank *v.* Sherburne, 14 Ill. App. 566, 570.

Kansas.— Pape *v.* Capitol Bank, 20 Kan. 440, 451, 27 Am. Rep. 183.

Kentucky.— Nicholson *v.* New Castle Nat. Bank, 92 Ky. 251, 255, 17 S. W. 627, 13 Ky. L. Rep. 478, 16 L. R. A. 223.

Missouri.— Salmon Falls Bank *v.* Leyser, 116 Mo. 51, 71, 22 S. W. 504.

Ohio.— Niagara County Bank *v.* Baker, 15 Ohio St. 68, 85.

South Carolina.— U. S. Bank *v.* Hammond, 2 Brev. 415, 416.

Texas.— Anderson *v.* Cleburne Bldg., etc., Assoc., 4 Tex. App. Civ. Cas. § 174, 16 S. W. 298.

United States.— Gloversville Nat. Bank *v.* Johnson, 104 U. S. 271, 276, 26 L. ed. 742; Fleckner *v.* U. S. Bank, 8 Wheat. 338, 351, 5 L. ed. 631; Danforth *v.* Elizabeth Nat. State Bank, 48 Fed. 271, 274, 1 C. C. A. 62, 17 L. R. A. 622.

17. Bittin *v.* Freeman, 17 N. J. L. 191, 206; Niagara County Bank *v.* Baker, 15 Ohio St. 68, 85 [*quoted* in Pape *v.* Capitol Bank, 20 Kan. 440, 451, 27 Am. Rep. 183; Salmon Falls Bank *v.* Leyser, 116 Mo. 51, 71, 22 S. W. 504; Anderson *v.* Cleburne Bldg., etc., Assoc., 4 Tex. App. Civ. Cas. § 174, 16 S. W. 298; Danforth *v.* Elizabeth Nat. State Bank, 48 Fed. 271, 273, 1 C. C. A. 62, 17 L. R. A. 622]; Com. *v.* Commercial Bank, 28 Pa. St. 383, 396. See also Greenville First Nat. Bank *v.* Sherburne, 14 Ill. App. 566, 570 [*quoted* in Danforth *v.* Elizabeth Nat. State Bank, 48 Fed. 271, 274, 1 C. C. A. 62, 17 L. R. A. 622], where it is said: "A loan may be made by way of discount."

Compared with and distinguished from "lending" see Bailey *v.* Murphy, Walk. (Mich.) 424, 425; State *v.* Boatmen's Sav. Inst., 48 Mo. 189, 191; Gloversville Nat. Bank v. Johnson, 104 U. S. 271, 277, 26 L. ed. 742.

18. *In re* Weeks, 29 Fed. Cas. No. 17,349, 8 Ben. 265, 13 Nat. Bankr. Reg. 263, 269 [*quoting* Bouvier L. Dict.].

Compared with and distinguished from "buying" see Neilsville Bank *v.* Tuthill, 4 Dak. 295, 30 N. W. 154, 155 [*citing* Bouvier L. Dict.]; Nicholson *v.* New Castle Nat. Bank, 92 Ky. 251, 255, 17 S. W. 627, 13 Ky. L. Rep. 478, 16 L. R. A. 223; Newell *v.* Somerset First Nat. Bank, 13 Ky. L. Rep. 775, 777 [*citing* Triplett *v.* Holly, 4 Litt. (Ky.) 130, 131; Bouvier L. Dict.]; Farmers', etc., Bank *v.* Baldwin, 23 Minn. 198, 206, 23 Am. Rep. 683 [*citing* Bouvier L. Dict.; Pothier de l'Usure 128].

Compared with and distinguished from "selling" see Nicholson *v.* New Castle Nat. Bank, 92 Ky. 251, 255, 17 S. W. 627, 13 Ky. L. Rep. 478, 16 L. R. A. 223; Triplett *v.* Holly, 4 Litt. (Ky.) 130, 131; Newell *v.* Somerset First Nat. Bank, 13 Ky. L. Rep. 775, 777; Ridgway *v.* New Castle Nat. Bank, 12 Ky. L. Rep. 216, 217; Baxter *v.* Duren, 29 Me. 434, 441, 50 Am. Dec. 602; Brittin *v.* Freeman, 17 N. J. L. 191, 209; *In re* Weeks, 29 Fed. Cas. No. 17,349, 8 Ben. 265, 13 Nat. Bankr. Reg. 263, 269 [*citing* Columbus City Bank *v.* Bruce, 17 N. Y. 507].

19. Tracy *v.* Talmage, 18 Barb. (N. Y.) 456, 462 [*citing* Richardson Dict., and *quoted* in Atlantic State Bank *v.* Savery, 82 N. Y. 291, 302; Danforth *v.* Elizabeth Nat. State Bank, 48 Fed. 271, 273, 1 C. C. A. 62, 17 L. R. A. 622].

"Discounting a note and buying it are not identical in meaning, the latter expression being used to denote the transaction 'when the seller does not endorse the note, and is not accountable for it.'" Farmers', etc., Bank *v.* Baldwin, 23 Minn. 198, 206, 23 Am. Rep. 683 [*citing* Bouvier L. Dict.; Pothier de l'Usure 128]. See also Neilsville Bank *v.* Tuthill, 4 Dak. 295, 30 N. W. 154, 155 [*citing* Bouvier L. Dict.].

20. Greenville First Nat. Bank *v.* Sherburne, 14 Ill. App. 566, 570 [*quoted* in Danforth *v.* Elizabeth Nat. State Bank, 48 Fed. 271, 274, 1 C. C. A. 62, 17 L. R. A. 622]; Nicholson *v.* New Castle Nat. Bank,

transfer.[21] (See Discount; Discounted; and, generally, Banks and Banking; Commercial Paper.)

DISCOVERT. Not covert; unmarried.[22] (See Covert; Coverture; and, generally, Husband and Wife; Marriage.)

92 Ky. 251, 255, 17 S. W. 627, 13 Ky. L. Rep. 478, 16 L. R. A. 223 [*citing* Bouvier L. Dict.]; U. S. Bank *v.* Hammond, 2 Brev. (S. C.) 415, 416; Fleckner *v.* U. S. Bank, 8 Wheat. (U. S.) 338, 351, 5 L. ed. 631 [*quoted* in Gloversville Nat. Bank *v.* Johnson, 104 U. S. 271, 276, 26 L. ed. 742].

21. *In re* Weeks, 29 Fed. Cas. No. 17,349, 8 Ben. 265, 13 Nat. Bankr. Reg. 263.

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DISCOVERY

By Roderick E. Rombauer*

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CROSS-REFERENCES

For Matters Relating to:
Accounting Without Discovery, see ACCOUNTS AND ACCOUNTING.
Compelling Witness to Give Deposition, see DEPOSITIONS.
Discovery:
Abatement of Proceedings, see ABATEMENT AND REVIVAL.
As Ground of Relief From Judgment, see JUDGMENTS.
Bill of, Against Corporation, see CORPORATIONS.
In Case of Champerty or Maintenance, see CHAMPERTY AND MAINTENANCE.
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In Suit For Copyright Infringement, see COPYRIGHT.
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Review of Decision Relating to, see APPEAL AND ERROR.
Discovery in Aid of:
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Discovery of Assets:
Of Assigned Estate, see ASSIGNMENTS FOR BENEFIT OF CREDITORS.
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Action For Accounting, see ACCOUNTS AND ACCOUNTING.
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Contempt Proceeding, see CONTEMPT.
Taking Testimony in Writing in General, see DEPOSITIONS.

I. DEFINITION.

Every bill in equity, except the bill of certiorari, is in a sense a bill of discovery;[1] but the bill usually distinguished by this appellation is a bill for the discovery of facts resting in the knowledge of defendant, or of deeds, writings, or other

1. McFarland *v.* Hunter, 8 Leigh (Va.) 439, 492; Bouvier L. Dict.

things in his custody or power, and seeking no relief in consequence of the discovery,[2] but seeking discovery merely in aid of some other proceeding, either in law,[3] pending or about to be brought,[4] or in equity.[5]

II. DISCOVERY IN EQUITY.

A. In General — 1. Jurisdiction — a. In Aid of What Actions and Proceedings Bill Lies. A bill will lie by either party to an action at law to have a discovery of matter material to the claim or defense at law.[6] But in order that a pure bill of discovery may lie a suit in aid of which the discovery is sought must be pending or contemplated at law.[7] The suit must also be one for the enforcement of a civil right;[8] but if so, it is immaterial whether the cause of action arises out of contract, or out of torts to property,[9] unless the tort involves criminal responsibility.[10] It has been said, however, in an early English decision that discovery could not be had in an action based on purely personal torts,[11] and it was so held in a case where plaintiff sought discovery in aid of an action of criminal conversation;[12] but it has been held in a recent decision that a bill of discovery would lie in aid of an action for negligently causing the death of an employee.[13] It is permissible in aid of a plea of abatement,[14] of a defense to a

2. Bonvier L. Dict.; Little *v.* Cooper, 10 N. J. Eq. 273; McFarland *v.* Hunter, 8 Leigh (Va.) 489, 492.

3. Bonvier L. Dict.; De Wolf *v.* De Wolf, 4 R. I. 450. And see Faulkner *v.* Harwood, 6 Rand. (Va.) 125, 129, where it is said: "A bill of discovery . . is commonly used in aid of the jurisdiction of some other Court; as to enable the Plaintiff to prosecute or defend an action at Law," and the bill must be filed as soon as the party discovers the necessity of appealing to the conscience of his adversary. Equity will not suffer him to spin out litigation, take the chance of a jury, and failing there, file his bill for discovery."

4. Kearny *v.* Jeffries, 48 Miss. 343; Allen *v.* Hopson, Freem. (Miss.) 276.

5. De Wolf *v.* De Wolf, 4 R. I. 450.

Illustrations of what are not pure bills of discovery.— Where the only discovery songht is purely incidental, such as may be elicited by the interrogating part of the bill, which consists of a series of questions intended to obtain discovery in aid of the complainant's case, and required to be directed to facts previously stated or charged, the bill is not a bill for discovery alone, and should not be tested by the rules applicable to such bills (Russell *v.* Garrett, 75 Ala. 348); so a bill is not strictly a bill for discovery if it prays a discovery of facts, when the discovery prayed and the allegations are not separate and distinct from the main object of the bill (Thrasher *v.* Doig, 18 Fla. 809); and a complaint in an action for legal and equitable relief, with which are filed interrogatories under the code of procedure, section 1661, which provides for a discovery of facts by plaintiff by means of such interrogatories is not a technical bill of discovery (Le May *v.* Baxter, 11 Wash. 649, 40 Pac. 122).

6. State Bank *v.* Steen, 13 Ark. 36; Bartlett *v.* Marshall, 2 Bibb (Ky.) 467; Wright *v.* King, Harr. (Mich.) 12; Shotwell *v.* Struble, 21 N. J. Eq. 31.

Illustrations.— A garnishee may file a bill of discovery against plaintiff in the garnishee process to compel him to answer whether or not his judgment against the debtor has been paid, and may use such answer as evidence on the motion to charge him as garnishee. Hinkle *v.* Currin, 1 Humphr. (Tenn.) 74. So where the debtor applies for the benefit of the insolvent debtor's act, the creditor may file a bill of discovery against him as ancillary to the proceedings upon such application. Brandon *v.* Gowing, 6 Rich. Eq. (S. C.) 5.

7. See *supra*, I.

8. Montague *v.* Dudman, 2 Ves. 396, 28 Eng. Reprint 253.

9. Skinner *v.* Judson, 8 Conn. 528, 21 Am. Dec. 691; Gaines *v.* New Orleans, 17 Fed. 16, 4 Woods 213; Burrell *v.* Nicholson, 3 B. & Ad. 649, 23 E. C. L. 286; Taylor *v.* Crampton, Bunb. 95; Sloane *v.* Heatfield, Bunb. 18; Heathcote *v.* Fleete, 2 Vern. Ch. 442, 23 Eng. Reprint 883; East India Co. *v.* Evans, 1 Vern. Ch. 306, 23 Eng. Reprint 486; East India Co. *v.* Sandys, 1 Vern. Ch. 127, 23 Eng. Reprint 362; Macclesfield *v.* Davis, 3 Ves. & B. 16, 35 Eng. Reprint 385.

10. See *infra*, II, A, 3, e, (v), (vi).

11. Glynn *v.* Houston, 1 Keen 329, 6 L. J. Ch. 129, 15 Eng. Ch. 329.

12. Robinson *v.* Craig, 16 Ala. 50. The court in this case erroneously based its decision on the *dictum* of the English case before mentioned, instead of basing its holding on the proper ground that the answer would have tended to incriminate defendant. While it is true that most actions for personal tort are such that a discovery would tend to incriminate defendant, circumstances may arise when such is not the case and then there is no more reason for holding that a bill of discovery in an action for a personal tort will not lie than in actions based on torts to property.

13. Reynolds *v.* Burgess Sulphite Fibre Co., 71 N. H. 332, 51 Atl. 1075, 93 Am. St. Rep. 535, 57 L. R. A. 949.

14. Palmer *v.* Hicks, 17 Ark. 505.

set-off,[15] of an action of mandamus,[16] or of an interpleader, although there are no pleadings.[17] It cannot be maintained in aid of a suit before a justice of the peace,[18] or of proceedings before arbitrators,[19] or of proceedings in the ecclesiastical courts in England.[20] It will not be entertained after a judgment at law, where the facts sought to be elicited are matter of legal defense, unless a sufficient excuse is offered for not having exhibited it,[21] and this is the rule as well in case of foreign as domestic judgments.[22] It cannot be maintained for the purpose of impeaching a witness,[23] or to guard against anticipated perjury in a suit at law,[24] or to discover the names of the other parties' witnesses,[25] or the evidence by means of which his case is to be established,[26] or to ascertain against whom suit shall be brought.[27] So the English courts hold that a discovery will not be granted in aid of proceedings before a foreign tribunal;[28] the theory of the courts being that every foreign court is an inferior court.[29] The American courts, however, hold that a bill of discovery will lie in aid of the prosecution or defense of a civil suit in a sister state,[30] and it has been said that such a bill will also lie in aid of

15. Lane *v.* Stebbins, 9 Paige (N. Y.) 622.

16. Reg. *v.* Ambergate, etc., R. Co., 17 Q. B. 957, 16 Jur. 777, 79 E. C. L. 957.

17. Philipps *v.* Philipps, 40 L. T. Rep. N. S. 815, 27 Wkly. Rep. 939.

18. Davis *v.* Gerhard, 5 Whart. (Pa.) 466; Baker *v.* Pritchard, 2 Atk. 387, 26 Eng. Reprint 634. *Contra,* Semple *v.* Murphy, 8 B. Mon. (Ky.) 271.

Amount involved less than jurisdictional amount in equity.— A bill for discovery may be maintained in aid of a suit pending in a court of law, although the amount in dispute in such suit is less in amount than the amount required to give the court in which the bill is filed jurisdiction of suits. Schroeppel *v.* Redfield, 5 Paige (N. Y.) 245; Goldey *v.* Becker, 1 Edw. (N. Y.) 271.

19. Street *v.* Rigby, 6 Ves. Jr. 815, 31 Eng. Reprint 1323. But see British Empire Shipping Co. *v.* Somes, 3 Jur. N. S. 883, 3 Kay & J. 433, 26 L. J. Ch. 759, 5 Wkly. Rep. 813.

20. Dunn *v.* Coates, 1 Atk. 288, 26 Eng. Reprint 185. It has been held, however, that the old rule that the court would not admit a bill of discovery in aid of the jurisdiction of the ecclesiastical court is not applicable in the case of a bill for discovery in aid of proceedings in the probate court, because that court has not the same power of compelling discovery as the ecclesiastical court had.

21. *Alabama.*— McCollum *v.* Prewitt, 37 Ala. 573; Powell *v.* Stewart, 17 Ala. 719; Jones *v.* Kirksey, 10 Ala. 579; Hill *v.* McNeill, 8 Port. 432; McGraw *v.* Tombeckbee Bank, 5 Port. 547; Moore *v.* Dial, 3 Stew. 155; Lucas *v.* Darien Bank, 2 Stew. 280.

California.— Norris *v.* Denton, 2 Cal. 378.

Georgia.— Pollock *v.* Gilbert, 16 Ga. 398, 60 Am. Dec. 732.

Indiana.— Bush *v.* Mahon, 2 Ind. 44.

Kentucky.— Gentry *v.* Thornberry, 3 Dana 500.

Michigan.— Wright *v.* King, Harr. 12.

New York.— McVickar *v.* Wolcott, 4 Johns. 510; Patterson *v.* Bangs, 9 Paige 627; Norton *v.* Wood, 5 Paige 249 [*affirmed* in 22 Wend. 520]; Duncan *v.* Lyon, 3 Johns. Ch. 351, 8 Am. Dec. 513; Barker *v.* Elkins, 1 Johns. Ch. 465.

Tennessee.— Thurmond *v.* Durham, 3 Yerg. 99.

Virginia.— Green *v.* Massie, 21 Gratt. 356; Faulkner *v.* Harwood, 6 Rand. 125.

West Virginia.— Zoll *v.* Campbell, 3 W. Va. 226.

United States.— Brown *v.* Swann, 10 Pet. 497, 9 L. ed. 508.

England.— Barbone *v.* Brent, 1 Vern. Ch. 176, 23 Eng. Reprint 397. But see Field *v.* Beaumont, 1 Swanst. 204, 36 Eng. Reprint 358.

See 16 Cent. Dig. tit. "Discovery," § 6.

22. Martin *v.* Nicolls, 3 Sim. 458, 6 Eng. Ch. 458.

23. Allen *v.* Kyle, 1 Phila. (Pa.) 27.

24. Leggett *v.* Postley, 2 Paige (N. Y.) 599.

25. Marriott *v.* Chamberlain, 17 Q. B. D. 154, 55 L. J. Q. B. 448, 54 L. T. Rep. N. S. 714, 34 Wkly. Rep. 783; Hennessy *v.* Wright, 24 Q. B. D. 445 note, 36 Wkly. Rep. 879; Humphries *v.* Taylor Drug Co., 39 Ch. D. 693, 59 L. T. Rep. N. S. 177, 37 Wkly. Rep. 192.

26. Sunset Telephone, etc., Co. *v.* Eureka, 122 Fed. 960.

27. Meridian First Nat. Bank *v.* Phillips, 71 Miss. 51, 15 So. 29; Twells *v.* Costen, 1 Pars. Eq. Cas. (Pa.) 373; Dineley *v.* Dineley, 2 Atk. 394, 26 Eng. Reprint 638. But where parties have been sued as partners and have denied the existence of the partnership a bill of discovery may be maintained to ascertain whether the partnership exists. Hurricane Tel. Co. *v.* Mohler, 51 W. Va. 1, 41 S. E. 421.

28. Dreyfus *v.* Peruvian Guano Co., 41 Ch. D. 151, 58 L. J. Ch. 471, 60 L. T. Rep. N. S. 216, 37 Wkly. Rep. 394; Reiner *v.* Salisbury, 2 Ch. D. 378, 24 Wkly. Rep. 843; Bent *v.* Young, 9 Sim. 180, 16 Eng. Ch. 180. *Compare* Crowe *v.* Del Rio [*cited* in Bent *v.* Young, 9 Sim. 180, 185, 16 Eng. Ch. 180].

29. Dreyfus *v.* Peruvian Guano Co., 58 L. J. Ch. 471, 60 L. T. Rep. N. S. 216, 37 Wkly. Rep. 394.

30. Post *v.* Toledo, etc., R. Co., 144 Mass. 341, 11 N. E. 540, 59 Am. Rep. 86; Mitchell

the prosecution or defense of a suit in a foreign tribunal or in a court of the United States;[31] but in any event the bill will not lie where the discovery would not be available.[32]

b. Retaining Bill For Relief For Purposes of Discovery. A bill for relief and discovery cannot be sustained solely for the sake of discovery;[33] therefore where, in a bill for discovery and relief, the discovery sought is incidental to the relief sought, a demurrer well taken to the relief holds good as to the discovery also.[34] But where a bill filed for discovery and relief, seeking to withdraw from a court of law a matter of strict legal cognizance, shows that the discovery sought is indispensable to the ends of justice and that the facts as to which a discovery is sought cannot be proved otherwise than by defendant's answer it will be entertained.[35] Nevertheless if a bill is filed to obtain discovery and relief not cogniz-

v. Smith, 1 Paige (N. Y.) 286; Dykers *v.* Wilder, 3 Edw. (N. Y.) 492; Burgess *v.* Smith, 2 Barb. Ch. (N. Y.) 276.

31. Burgess *v.* Smith, 2 Barb. Ch. (N. Y.) 276.

32. Dykers *v.* Wilder, 3 Edw. (N. Y.) 496.

33. *Maine.*— Coombs *v.* Warren, 17 Me. 404.

Massachusetts.— Emery *v.* Bidwell, 140 Mass. 271, 3 N. E. 24; Mitchell *v.* Green, 10 Metc. 101; Chapin *v.* Coleman, 11 Pick. 331.

Michigan.— Welles *v.* River Raisin, etc., R. Co., Walk. 35.

Mississippi.— Gilmer *v.* Felhour, 45 Miss. 627.

New Jersey.— United New Jersey R., etc., Co. *v.* Hoppock, 28 N. J. Eq. 261; Little *v.* Cooper, 10 N. J. Eq. 273; Miller *v.* Ford, 1 N. J. Eq. 358. And see Brown *v.* Edsall, 9 N. J. Eq. 256.

United States.— Walker *v.* Brown, 58 Fed. 23; Preston *v.* Smith, 26 Fed. 884.

England.— Lee *v.* Shoulbred, 1 Anstr. 83.

Contra.— Reddington *v.* Lanahan, 59 Md. 429; Midland R. Co. *v.* Hitchcock, 34 N. J. Eq. 278; Laight *v.* Morgan, 2 Cai. Cas. (N. Y.) 344; Thompson *v.* Newlin, 38 N. C. 338, 42 Am. Dec. 169.

See 16 Cent. Dig. tit. "Discovery," § 27.

34. *Connecticut.*— Norwich, etc., R. Co. *v.* Storey, 17 Conn. 364; Middletown Bank *v.* Russ, 3 Conn. 135, 8 Am. Dec. 164.

Illinois.— Yates *v.* Monroe, 13 Ill. 212.

Massachusetts.— Pool *v.* Lloyd, 5 Metc. 525.

Michigan.— Welles *v.* River Raisin, etc., R. Co., Walk. 35.

New Jersey.— Courter *v.* Crescent Sewing Mach. Co., 60 N. J. Eq. 413, 45 Atl. 609 [*reversing* (Ch. 1899) 43 Atl. 570].

New York.— Souza *v.* Belcher, 3 Edw. 117.

United States.— McClanahan *v.* Davis, 8 How. 170, 12 L. ed. 1033; Everson *v.* Equitable L. Assur. Co., 68 Fed. 258; Walker *v.* Brown, 58 Fed. 23; Venner *v.* Atchison, etc., R. Co., 28 Fed. 581.

England.— Albretcht *v.* Sussmann, 2 Ves. & B. 323, 13 Rev. Rep. 110, 35 Eng. Reprint 342.

See 16 Cent. Dig. tit. "Discovery." § 27.

35. *Alabama.*— Shackelford *v.* Bankhead, 72 Ala. 476; Continental L. Ins. Co. *v.* Webb, 54 Ala. 688; Guice *v.* Parker, 46 Ala. 616; Crowthers *v.* Lee, 29 Ala. 337; Perrine *v.* Carlisle, 19 Ala. 686.

Arkansas.— Hill *v.* Cawthon, 15 Ark. 29.

Connecticut.— Norwich, etc., R. Co. *v.* Storey, 17 Conn. 364.

Georgia.— Molyneux *v.* Collier, 17 Ga. 46; Merchants' Bank *v.* Davis, 3 Ga. 112.

Illinois.— Helmle *v.* Queenan, 18 Ill. App. 103.

Indiana.— Williams *v.* Wann, 8 Blackf. 477; Coquillard *v.* Suydam, 8 Blackf. 24.

Iowa.— Temple *v.* Gove, 8 Iowa 511, 74 Am. Dec. 320.

Kentucky.— Emerson *v.* Staton, 3 T. B. Mon. 116; Munday *v.* Shatzell, Litt. Sel. Cas. 373; Bullock *v.* Boyd, 2 A. K. Marsh. 322.

Maine.— Laney *v.* Randlett, 80 Me. 169, 13 Atl. 686, 6 Am. St. Rep. 169.

Maryland.— Oliver *v.* Palmer, 11 Gill & J. 426.

Massachusetts.— Law *v.* Thorndike, 20 Pick. 317.

Mississippi.— Pleasants *v.* Glasscock, Sm. & M. Ch. 17.

New Hampshire.— Tappan *v.* Evans, 11 N. H. 311.

New Jersey.— Turner *v.* Dickerson, 9 N. J. Eq. 140.

New York.— Marsh *v.* Davison, 9 Paige 580.

South Carolina.— Stacy *v.* Pearson, 3 Rich. Eq. 148.

Tennessee.—Avery *v.* Holland, 2 Overt. 71.

Vermont.— Hopkins *v.* Adams, 20 Vt. 407.

Virginia.— Skinner *v.* Dodge, 4 Hen. & M. 432.

West Virginia.— Thompson *v.* Whitaker Iron Co., 41 W. Va. 574, 23 S. E. 795; Yates *v.* Stuart, 39 W. Va. 124, 19 S. E. 423.

United States.— Denver *v.* Roane, 99 U. S. 355, 25 L. ed. 476; Cecil Nat. Bank *v.* Thurber, 59 Fed. 913, 8 C. C. A. 365; Paton *v.* Majors, 46 Fed. 210; Wallis *v.* Shelly, 30 Fed. 747. But see Erskine *v.* Forest Oil Co., 80 Fed. 583.

Contra.— People's Nat. Bank *v.* Kern, 193 Pa. St. 59, 44 Atl. 331.

Application of rule.— Where a bill in equity to recover the profits complainants would have realized but for the breach of a contract by which defendant agreed to sell them all the coal mined by it from several mines during the year alleged that to learn the amount of coal mined a discovery from

able in equity and the discovery fails the bill should be dismissed,[36] and equity has no jurisdiction to grant relief on the ground of discovery where the discovery is a mere pretext.[37] So where a bill for relief and discovery shows that plaintiff is not entitled to relief, and does not show that the evidence sought cannot be elicited by interrogatories in an action at law, discovery will not be granted.[38]

c. As Affected by Statutes. In some jurisdictions statutes authorizing the examination of parties in actions at law specially provide that the remedy by a bill of discovery shall in no way be affected thereby,[39] and in many jurisdictions where such statutes do not so provide it is held that they do not take away or in any way affect the established jurisdiction of courts of equity in matters of discovery. In other words they merely provide a cumulative remedy.[40] In other

defendants through its officers and books was absolutely necessary, and that the information could not be otherwise obtained, and prayed for such discovery and proper relief, it was held that the necessity for discovery was sufficiently shown to give a court of equity jurisdiction. Virginia, etc., Min., etc., Co. *v.* Hale, 93 Ala. 542, 9 So. 256. But where a bill was filed by stock-holders of a corporation asking an accounting for profits and a discovery as to matters which would appear from the corporation books and papers and the bill did not charge that the papers failed to fully and truly show such matters, that plaintiffs were denied access to them, or that the legal remedy by mandamus was inadequate to enforce the right of the stockholders to examine them, it was held that so far as the bill depended on the demand for discovery it was without equity. Wolf *v.* Underwood, 96 Ala. 329, 11 So. 344.

36. *Alabama.*—Steele *v.* Lowry, 6 Ala. 124.

Illinois.— Fifield *v.* Gorton, 15 Ill. App. 458; U. S. Ins. Co. *v.* Central Nat. Bank, 7 Ill. App. 426; Philadelphia F. Ins. Co. *v.* Central Nat. Bank, 1 Ill. App. 344.

Kentucky.— Nourse *v.* Gregory, 3 Litt. 378; Ferguson *v.* Waters, 3 Bibb 303; McIlvoy *v.* Bowman, Ky. Dec. 317. But see Nichols *v.* Jones, 3 A. K. Marsh. 385.

New Hampshire.— Kidder *v.* Barr, 35 N. H. 235.

New Jersey.— Grafton *v.* Brady, 7 N. J. Eq. 79; Jones *v.* Sherwood, 6 N. J. Eq. 210.

North Carolina.— Patterson *v.* Patterson, 2 N. C. 167.

South Carolina.— Rees *v.* Parish, 1 McCord Eq. 56; Parker *v.* Kennedy, 2 Desauss. 37.

Tennessee.— Overton *v.* Searcy, Cooke 36, 5 Am. Dec. 665.

Vermont.— Viele *v.* Hoag, 24 Vt. 46.

United States.— Russell *v.* Clark, 7 Cranch 69, 3 L. ed. 271.

Instance.— After a verdict for defendant in a suit on notes alleged to have been given by a partnership and defended on the ground that they were given by one partner for his own purposes after the dissolution of the partnership, plaintiff filed a bill to discover whether the notes were actually given in the course of the partnership business. On a denial by defendant in his answer the bill was dismissed. Foltz *v.* Pourie, 2 Desauss. (S. C.) 40.

37. Nesbit *v.* St. Patrick's Church, 9 N. J. Eq. 76; Harr *v.* Shaffer, 45 W. Va. 709, 31 S. E. 905.

38. Ahrend *v.* Odiorne, 118 Mass. 261, 19 Am. Dec. 449.

39. Mahone *v.* Central Nat. Bank, 17 Ga. 111.

40. *Alabama.*— Wood *v.* Hudson, 96 Ala. 469, 11 So. 530; Handley *v.* Heflin, 84 Ala. 600, 4 So. 725; Shackleford *v.* Bankhead, 72 Ala. 476; Cannon *v.* McNab, 48 Ala. 99; Horton *v.* Moseley, 17 Ala. 794; Mallory *v.* Matlock, 10 Ala. 595.

Illinois.— Kendallville Refrigerator Co. *v.* Davis, 40 Ill. App. 616; Grimes *v.* Hilliary, 38 Ill. App. 246. But see Detroit Copper, etc., Rolling Mills *v.* Ledwidge, 53 Ill. App. 351.

Kentucky.— Semple *v.* Murphy, 8 B. Mon. 271.

Maryland.— Union Pass. R. Co. *v.* Baltimore, 71 Md. 238, 17 Atl. 933.

Massachusetts.— Post *v.* Toledo, etc., R. Co., 144 Mass. 341, 13 N. E. 540, 59 Am. Rep. 86.

Mississippi.— Millsaps *v.* Pfeiffer, 44 Miss. 805.

New Hampshire.— Reynolds *v.* Burgess Sulphite Fibre Co., 71 N. H. 332, 51 Atl. 1075, 93 Am. St. Rep. 535, 57 L. R. A. 949; Wheeler *v.* Wadleigh, 37 N. H. 55.

New Jersey.— Miller *v.* U. S. Casualty Co., 61 N. J. Eq. 110, 47 Atl. 509; Shotwell *v.* Smith, 20 N. J. Eq. 79; Ames *v.* New Jersey Franklinite Co., 12 N. J. Eq. 66, 72 Am. Dec. 385; Howell *v.* Ashmore, 9 N. J. Eq. 82, 57 Am. Dec. 371.

Pennsylvania.— Block *v.* Universal Ins. Co., 16 Phila. 72.

Rhode Island.— Starkweather *v.* Williams, 21 R. I. 55, 41 Atl. 1003.

Tennessee.— Elliston *v.* Hughes, 1 Head 225.

West Virginia.— Hurricane Tel. Co. *v.* Mohler, 51 W. Va. 1, 41 S. E. 421; Russell *v.* Dickeschied, 24 W. Va. 61.

England.— Carver *v.* Pinto Leite, L. R. 7 Ch. 90, 41 L. J. Ch. 92, 25 L. T. Rep. N. S. 722, 20 Wkly. Rep. 134; Lovell *v.* Galloway, 17 Beav. 1; Birch *v.* Mather, 22 Ch. D. 629, 52 L. J. Ch. 292, 31 Wkly. Rep. 362.

See 16 Cent. Dig. tit. "Discovery," § 4.

These decisions proceed upon the theory "that where a Court of equity has original jurisdiction, and a statute confers upon the

jurisdictions, however, it is held that equitable jurisdiction is abrogated by the statutes, although they contain no express provision to that effect.[41] In another the decisions are conflicting.[42] And in others the statutes are held to have abolished pure bills of discovery in aid of actions at law,[43] but not to repeal statutes expressly providing for a judgment creditor's bill to compel the discovery of the debtor's property.[44] So in some jurisdictions the statutes expressly abolish bills of discovery.[45]

2. Parties[46] — a. In General — (I) *Nominal Parties to Action at Law.* A bill of discovery may be maintained in behalf of or against a nominal party to an action at law, although he be not a party in interest.[47]

(II) *Persons Not Parties to Action at Law.* Subject to some exceptions which will be adverted to in the following section, the general rule is well settled that a bill of discovery cannot be sustained against a person who is not a party to the record at law.[48] Accordingly it has been held that a mere witness cannot be made a party to a bill of discovery,[49] and this is true, although the witness is interested in the subject of the action.[50] So also an agent cannot be made a party to a bill for discovery.[51]

(III) *Corporations and Their Officers or Agents.* It has been said that where a corporation is the sole party defendant, it is its duty if required to do so by the bill to put in a full, true, and complete answer, and to enable it to do so, it

common law Courts a similar power, the jurisdiction of equity is not thereby ousted." Union Pass. R. Co. *v.* Baltimore, 71 Md. 238, 241, 17 Atl. 933.

41. *Minnesota.*— Turnbull *v.* Crick, 63 Minn. 91, 65 N. W. 135; Leuthold *v.* Fairchild, 35 Minn. 99, 27 N. W. 503, 28 N. W. 218.

Missouri.— Bond *v.* Worley, 26 Mo. 253.

Ohio.— See Chapman *v.* Lea, 45 Ohio 356, 13 N. E. 736.

South Carolina.— Hall *v.* Joiner, 1 S. C. 186.

Texas.— Love *v.* Keowne, 58 Tex. 191.

Wisconsin.—Cleveland *v.* Burnham, 60 Wis. 16, 17 N. W. 126, 18 N. W. 190.

See 16 Cent. Dig. tit. "Discovery," § 4.

42. That the remedy provided by statutes is cumulative see Indianapolis Gas Co. *v.* Indianapolis, 90 Fed. 196; Kelley *v.* Boettcher, 85 Fed. 55, 29 C. C. A. 14; Continental Nat. Bank *v.* Hielman, 66 Fed. 184; Bryant *v.* Leiland, 6 Fed. 125. That bills of discovery are abolished see Safford *v.* Ensign Mfg. Co., 120 Fed. 480, 56 C. C. A. 630; Rindskopf *v.* Platto, 29 Fed. 130; Heath *v.* Erie R. Co., 11 Fed. Cas. No. 6,307, 9 Blatchf. 316.

43. Warren *v.* Baker, 43 Me. 507; Riopelle *v.* Doelner, 26 Mich. 102.

44. McCreery *v.* Cobb, 93 Mich. 463, 53 N. W. 613.

45. Baylis *v.* Bullock Electric Mfg. Co., 59 N. Y. App. Div. 576, 69 N. Y. Suppl. 693; People *v.* Mutual Gas-light Co., 54 How. Pr. (N. Y.) 286.

46. Parties generally see Parties.

47. Minor *v.* Gaw, 11 Sm. & M. (Miss.) 322; Scott *v.* Hamblin, 3 Sm. & M. (Miss.) 285.

The nominal plaintiff can be made a witness at law, unless he himself objects. If he does object defendant has no mode of compelling him to testify. He must resort to a bill of discovery in chancery. Watts *v.* Smith, 24 Miss. 77.

48. Reg. *v.* Glyn, 7 Cl. & F. 466, 7 Eng. Reprint 1147. And see cases cited *infra*, note 49 *et seq.*

49. *Illinois.*—Detroit Copper, etc., Rolling Mills *v.* Ledwidge, 162 Ill. 305, 44 N. E. 751; Yates *v.* Monroe, 13 Ill. 212.

Massachusetts.— Kelly *v.* Morrison, 176 Mass. 531, 57 N. E. 1018.

New Jersey.— Howell *v.* Ashmore, 9 N. J. Eq. 82, 67 Am. Dec. 371.

New York.— Wakeman *v.* Bailey, 3 Barb. Ch. 482; Burgess *v.* Smith, 2 Barb. Ch. 276; Ellsworth *v.* Curtis, 10 Paige 105; Gelston *v.* Hoyt, 1 Johns. Ch. 543; Geer *v.* Kissam, 3 Edw. 129.

Pennsylvania.— Twells *v.* Costen, 1 Pars. Eq. Cas. 373.

England.— Burchard *v.* Macfarlane, [1891] 2 Q. B. 241, 7 Aspin. 93, 60 L. J. Q. B. 587, 65 L. T. Rep. N. S. 282, 39 Wkly. Rep. 694; Tooth *v.* Canterbury, 3 Sim. 49, 6 Eng. Ch. 49; London *v.* Levy, 8 Ves. Jr. 398, 32 Eng. Reprint 408; Fenton *v.* Hughes, 7 Ves. Jr. 287, 32 Eng. Reprint 117.

See 16 Cent. Dig. tit. "Discovery," § 18.

50. Reg. *v.* Glyn, 7 Cl. & F. 466, 7 Eng. Reprint 1147; Irving *v.* Thompson, 3 Jur. 1071, 8 L. J. Ch. 357, 9 Sim. 17, 16 Eng. Ch. 17; Kerr *v.* Rew, 5 Myl. & C. 154, 46 Eng. Ch. 140; Fenton *v.* Hughes, 7 Ves. Jr. 287, 32 Eng. Reprint 117; Anderson *v.* Dowling, 11 Ir. Eq. 590. *Contra*, Carter *v.* Jordan, 15 Ga. 76. And see Plummer *v.* May, 1 Ves. 426, 27 Eng. Reprint 1121.

51. Le Texier *v.* Anspach, 15 Ves. Jr. 159, 33 Eng. Reprint 714. It has been held, however, that where an auctioneer has the avails of a fraudulent sale in his hands, he cannot protect himself from making a discovery thereof on the ground that he is a mere witness in the trover suit brought against the

must cause diligent examination to be made of all papers in its possession before answer.[52] Nevertheless a corporation answers under its seal and not under oath and therefore to obtain discovery under oath the practice has grown up of permitting officers or agents of a corporation having particular knowledge of the matters sought to be discovered to be joined as defendants,[53] the same being an exception to the rule stated in the preceding section. Former as well as present officers of a corporation can be made parties to a suit against the corporation, and be thus compelled to make discovery of facts within their knowledge.[54] And officers of a corporation cannot evade making discovery by resigning after the suit is brought.[55] But an officer of a corporation cannot be made a defendant for discovery, where he did not derive his information in an official capacity.[56]

(IV) *Stock-Holders of Corporation.* Individual members of a corporation may be called upon to answer a bill of discovery under oath, but in that case the individuals must be named as defendants in the bill.[57]

(V) *Infants and Married Women.* Infants cannot be made parties for discovery merely, where they have no interest, as they never answer on their oaths;[58] but it has been held that a married woman may be compelled to make discovery against herself.[59]

(VI) *Non-Residents.* A bill of discovery lies against a non-resident party to an action at law pending in the state.[60]

(VII) *The State.* The crown has the right to discovery, but cannot be compelled to give it.[61]

(VIII) *Defendants in Separate Actions.* A joinder in a bill of discovery of defendants in separate actions in aid of which the bill of discovery is brought is a fatal defect in the bill.[62]

(IX) *Joint Participants in Fraud.* Where several persons are participants in a fraud on plaintiff, he may file a bill of discovery against all the participants jointly,[63] although such persons have distinct interests and participate in different degrees in the fraud, provided the fraud consisted of one connected series of acts.[64]

b. In Bills For Discovery and Relief. In bills for discovery and relief concerning land all persons interested in the land are necessary parties.[65]

purchasers. Schmidt *v.* Dietericht, 1 Edw. (N. Y.) 119.

52. Continental Nat. Bank *v.* Heilman, 66 Fed. 184 [*citing* 1 Dan. Ch. Pl. & Pr. 146]. But *compare* Roanoke St. R. Co. *v.* Hicks, 96 Va. 510, 32 S. E. 295, holding that a bill of discovery does not lie against a corporation alone as it does not answer under oath, but under the seal of the corporation.

53. *Alabama.*— Virginia, etc., Min., etc., Co. *v.* Hale, 93 Ala. 542, 9 So. 256.

New York.— Many *v.* Beekman Iron Co., 9 Paige 188; Vermilyea *v.* Fulton Bank, 1 Paige 37.

Tennessee.— Lindsley *v.* James, 3 Coldw. 477; Buckner *v.* Abrahams, 3 Tenn. Ch. 346.

United States.— Continental Nat. Bank *v.* Heilman, 66 Fed. 184; Manchester F. Assur. Co. *v.* Stockton Combined Harvester, etc., Works, 38 Fed. 378; Vaughan *v.* East Tennessee, etc., R. Co., 28 Fed. Cas. No. 16,898.

England.— Glasscott *v.* Copper-Miner's Co. of England, 5 Jur. 264, 10 L. J. Ch. 30, 11 Sim. 305, 34 Eng. Ch. 305; Anonymous, 1 Vern. Ch. 117, 23 Eng. Reprint 355; Atty.-Gen. *v.* East Dereham Corn Exch. Co., 5 Wkly. Rep. 486.

See 16 Cent. Dig. tit. "Discovery," § 18.

54. Fulton Bank *v.* Sharon Canal Co., 1 Paige (N. Y.) 219.

55. Acomb *v.* Landed Estates Co., 14 L. T. Rep. N. S. 57, 14 Wkly. Rep. 387.

56. McComb *v.* Chicago, etc., R. Co., 7 Fed. 426, 19 Blatchf. 69.

57. Brumly *v.* Westchester County Mfg. Soc., 1 Johns. Ch. (N. Y.) 366. It is not necessary where a stock-holder of a corporation is made defendant to allege that the stock-holder possesses information not possessed by other members of the corporation. Wright *v.* Dame, 1 Metc. (Mass.) 237.

58. Leggett *v.* Sellon, 3 Paige (N. Y.) 84; Curtis *v.* Mundy, [1892] 2 Q. B. 178, 40 Wkly. Rep. 317.

59. Metler *v.* Metler, 18 N. J. Eq. 270.

60. Arnold *v.* Sheppard, 6 Ala. 299; Miller *v.* Henry, 3 Manitoba 425.

61. Atty.-Gen. *v.* Newcastle-upon-Tyne Corp., [1897] 2 Q. B. 384, 66 L. J. Q. B. 593, 77 L. T. Rep. N. S. 203. But a foreign prince suing in England may be compelled to make discovery. Rothschild *v.* Reg., 3 Y. & C. Exch. 594.

62. Broadbent *v.* State, 7 Md. 416.

63. Robinson *v.* Davis, 11 N. J. Eq. 302, 69 Am. Dec. 591.

64. Brinkerhoff *v.* Brown, 6 Johns. Ch. (N. Y.) 139.

65. Key *v.* Lambert, 1 Hen. & M. (Va.) 330.

3. Pleadings[66] — **a. The Bill** — (i) *Necessity of.* Discovery cannot be sought by the answer, but must be sought by bill or cross bill.[67] It has been held, however, that if an answer asks no relief but propounds interrogatories in bar of the relief sought by the bill, a failure to answer these interrogatories is deemed an admission of the facts alleged, although the answer was not made a cross bill.[68]

(ii) *Time of Filing.* The party applying for a bill of discovery in a trial at law must use diligence, so as not to unnecessarily delay the trial of the cause.[69] As a general rule the bill must be filed before the trial at law.[70] A bill of discovery is not filed in time when filed at the time the cause of action is called for trial,[71] after the jury is sworn,[72] after verdict,[73] or after judgment.[74]

(iii) *Necessary Allegations* — (a) *Pendency or Contemplation of Suit at Law.* Where the bill is a pure bill of discovery, it must show a suit pending or contemplated at law.[75]

(b) *Legal Cause of Action or Defense.* The bill must show a legal cause of action or defense in aid of which the discovery is sought.[76] For this purpose,

66. Equity pleadings generally see Equity.

67. Andrews *v.* Gilman, 122 Mass. 471; Millsaps *v.* Pfeiffer, 44 Miss. 805; Bogert *v.* Bogert, 2 Edw. (N. Y.) 399; Spragg *v.* Corner, 2 Cox Ch. 109, 30 Eng. Reprint 50; Micklethwait *v.* Moore, 3 Meriv. 292, 36 Eng. Reprint 112; Penfold *v.* Nunn, 5 Sim. 409, 9 Eng. Ch. 409; Sligo *v.* Hildebrand, 2 Ir. Ch. 118.

68. McClain *v.* McGee, 9 Dana (Ky.) 368.

69. Dillahunty *v.* Smith, 7 How. (Miss.) 673.

70. Paterson *v.* Bangs, 9 Paige (N. Y.) 591.

A bill filed after a trial at law cannot be maintained, unless the person filing it can show that the failure to file it before was not due to negligence on his part. Alley *v.* Ledbetter, 16 N. C. 449; Thurmond *v.* Durham, 3 Yerg. (Tenn.) 99. There must be a clear case of accident, surprise, or fraud, before equity will interfere. Brown *v.* Swann, 10 Pet. (U. S.) 497, 9 L. ed. 508.

71. Rule *v.* Taylor, 4 Sm. & M. (Miss.) 577.

72. Price *v.* Cannon, 3 Mo. 453.

73. Barker *v.* Elkins, 1 Johns. Ch. (N. Y.) 465; Faulkner *v.* Harwood, 6 Rand. (Va.) 125; Brown *v.* Swann, 10 Pet. (U. S.) 497, 9 L. ed. 508.

74. Moore *v.* Dial, 3 Stew. (Ala.) 155; Harrison *v.* Harrison, 1 Litt. (Ky.) 137.

75. *Connecticut.*— Stebbins *v.* Cowles, 10 Conn. 399.

Maryland.— Parrott *v.* Chestertown Nat. Bank, 88 Md. 515, 41 Atl. 1067; Wolf *v.* Wolf, 2 Harr. & G. 382, 18 Am. Dec. 313.

Massachusetts.—Haskins *v.* Burr, 106 Mass. 48; Bates *v.* Boston, 5 Cush. 93; Mitchell *v.* Green, 10 Metc. 101; Pease *v.* Pease, 8 Metc. 395; Clapp *v.* Shepard, 2 Metc. 127; Fiske *v.* Slack, 21 Pick. 361.

Mississippi.— George *v.* Solomon, 71 Miss. 168, 14 So. 531; Buckner *v.* Ferguson, 44 Miss. 677.

Montana.— State *v.* Second Judicial Dist. Ct., 26 Mont. 396, 411, 68 Pac. 570, 69 Pac. 103.

New Jersey.— United New Jersey R., etc., Co. *v.* Hoppock, 28 N. J. Eq. 261.

New York.—Van Kleeck *v.* Reformed Dutch Church, 6 Paige 600.

Pennsylvania.— Collom *v.* Francis, 1 Pars. Eq. Cas. 527; Portuondo *v.* Faunce, 9 Wkly. Notes Cas. 539; Peebles *v.* Boggs, 1 Phila. 151.

United States.— Perkins *v.* Hendryx, 23 Fed. 418.

England.— Moodalay *v.* Morton, 1 Bro. Ch. 469, 28 Eng. Reprint 1245, Dick. 652, 21 Eng. Reprint 425; Heathcote *v.* Fleete, 2 Vern. Ch. 442, 23 Eng. Reprint 883.

See 16 Cent. Dig. tit. "Discovery," § 20.

76. *District of Columbia.*— McCartney *v.* Fletcher, 10 App. Cas. 572.

Illinois.— Harris *v.* Galbraith, 43 Ill. 309; Primmer *v.* Patten, 32 Ill. 528; Mason *v.* Leith, 60 Ill. App. 527; New Era Gas Fuel Appliance Co. *v.* Shannon, 44 Ill. App. 477.

New Jersey.— Hanneman *v.* Richler, 63 N. J. Eq. 803, 52 Atl. 1131 [*affirming* 62 N. J. Eq. 365, 50 Atl. 904].

New York.— Carroll *v.* Carroll, 11 Barb. 293; Verplank *v.* Caines, 1 Johns. Ch. 57.

Pennsylvania.— Washington Ins. Co. *v.* Grant, 2 Pa. L. J. Rep. 308, 4 Pa. L. J. 88.

Rhode Island.—Clark *v.* Rhode Island Locomotive Works, 24 R. I. 307, 53 Atl. 47.

United States.— Cassidy Fork Boom, etc., Co. *v.* Roaring Creek, etc., R. Co., 119 Fed. 425; American Ore Machinery Co. *v.* Atlas Cement Co., 110 Fed. 53; Young *v.* Colt, 30 Fed. Cas. No. 18,155, 2 Blatchf. 373.

If the discovery is in aid of a defense and is not sought in aid of a pleading, the bill must show that the defense has been set up in a court of law. Harris *v.* Galbraith, 43 Ill. 309.

Where relief has been refused to a party in a chancery court on account of the illegality of the transaction, the court will not grant him a discovery in aid of a suit at law on the same transaction. Welles *v.* River Raisin, etc., R. Co., Walk. (Mich.) 35.

Form of action not maintainable at law.— Discovery will not be granted in aid of a suit at law in which the proper form of action is not brought. Atwill *v.* Ferrett, 2 Fed. Cas. No. 640, 2 Blatchf. 39.

however, it is not necessary to set out the pleadings in the action at law. It will be sufficient merely to set out facts showing an issue to which the discovery sought is applicable.[77] The merits of the case will not, however, be inquired into on a bill of discovery.[78]

(c) *Defendant's Knowledge of the Facts and Complainant's Want of Knowledge.* It must show that defendant is capable of making discovery of the facts sought.[79] It is not sufficient to allege that there are no other witnesses than the adverse party to prove the facts. The bill should allege that the facts can be proved by defendant.[80] It must also allege that the facts are not within complainant's knowledge,[81] or, if he sues, as assignee not within the knowledge of his assignor.[82] It cannot be maintained to discover matter whereof complainant has the same means of information as has defendant.[83]

(d) *Materiality of Facts Sought to Be Discovered.* The bill must allege that the discovery sought is of material facts and show how they are material.[84] The subject-matter of the facts sought to be inquired into should be stated with sufficient precision to disclose their materiality to the determination of the issue at

77. Hinkle *v.* Currin, 1 Humphr. (Tenn.) 74.

78. Sperry *v.* Miller, 2 Barb. Ch. (N. Y.) 632; Desplaces *v.* Goris, 1 Edw. (N. Y.) 350; Mitchell *v.* Harris, 4 Bro. Ch. 311, 29 Eng. Reprint 908, 2 Ves. Jr. 129, 30 Eng. Reprint 557; Hindman *v.* Taylor, 2 Bro. Ch. 7, 29 Eng. Reprint 4; Drake *v.* Drake, 3 Hare 523, 8 Jur. 642, 13 L. J. Ch. 406, 25 Eng. Ch. 523; Thomas *v.* Tyler, 8 L. J. Exch. Eq. 4, 3 Y. & Coll. 255.

79. Shackelford *v.* Bankhead, 72 Ala. 476; Irwin *v.* Bailey, 72 Ala. 467; Guice *v.* Parker, 46 Ala. 616; Horton *v.* Moseley, 17 Ala. 794; Plumb *v.* Bateman, 2 App. Cas. (D. C.) 156; Carroll *v.* Farmers', etc., Bank, Harr. (Mich.) 197; Many *v.* Beekman Iron Co., 9 Paige (N. Y.) 188; Seymour *v.* Seymour, 4 Johns. Ch. (N. Y.) 409; Primmer *v.* Patten & Co., 32 Ill. 528.

Application of rule.— In a bill for the discovery and production of deeds, it is necessary to charge that the deeds have come to or are in the hands of defendant. It is not enough to state facts that merely show it. Hough *v.* Martin, 22 N. C. 379, 34 Am. Dec. 403.

80. Primmer *v.* Patten, 32 Ill. 528.

81. McKee *v.* Coffee, 58 Miss. 653; Collins *v.* Sutton, 94 Va. 127, 26 S. E. 415; Bass *v.* Bass, 4 Hen. & M. (Va.) 478; Baker *v.* Biddle, 2 Fed. Cas. No. 764, Baldw. 394; De Faria *v.* Lawrie, 17 L. T. Rep. N. S. 296.

What allegation sufficient.— In a suit in equity by the judgment creditors of a corporation to obtain discovery of the names of stock-holders, etc., the hill alleged that the complainants did not know the names and residences of the stock-holders and the amount of stock held by them respectively; that complainants had requested the treasurer of the defendant corporation to give them such information, but he had neglected to do so; and that they had no means of ascertaining the facts, which it was necessary that they should know in order to commence and prosecute an intended suit at law. It was held that the allegations as to complainants' want of knowledge were sufficient. Clark *v.* Rhode Island Locomotive Works, 24 R. I. 307, 53 Atl. 47.

82. Wilson *v.* Mallett, 4 Sandf. (N. Y.) 112; Dyett *v.* Seymour, 13 N. Y. Civ. Proc. 127. But see Adams *v.* Porter, 1 Cush. (Mass.) 170.

83. Bigelow *v.* Sanford, 98 Mich. 657, 57 N. W. 1037; Boyd *v.* Swing, 38 Miss. 182; Baker *v.* Biddle, 2 Fed. Cas. No. 764, Baldw. 394; Bird *v.* Malzy, 1 C. B. N. S. 308, 87 E. C. L. 308.

Limitation of rule.— A bill will not be dismissed for want of equity in that plaintiff asks for something he could himself ascertain, where the question of jurisdiction was not raised until the case had been referred and several hundred pages of testimony taken. Kane *v.* Schuylkill F. Ins. So., 199 Pa. St. 205, 48 Atl. 989.

84. *Alabama.*— Dargin *v.* Hewlitt, 115 Ala. 510, 22 So. 128; Dickinson *v.* Lewis, 34 Ala. 638; Horton *v.* Moseley, 17 Ala. 794; Spence *v.* Duren, 3 Ala. 251; Lucas *v.* Darien Bank, 2 Stew. 280.

Georgia.— Burns *v.* Hill, 19 Ga. 22; Carter *v.* Jordan, 15 Ga. 76.

Maine.— Lancy *v.* Randlett, 80 Me. 169, 13 Atl. 686, 6 Am. St. Rep. 169.

Michigan.— Carroll *v.* Farmers', etc., Bank, Harr. 197.

New York.— Bailey *v.* Dean, 5 Barb. 297; Newkirk *v.* Willett, 2 Johns. Cas. 413, 2 Cai. Cas. 296; Deas *v.* Harvie, 2 Barb. Ch. 448; Jewett *v.* Belden, 11 Paige 618; Lane *v.* Stebbins, 9 Paige 622; Leggett *v.* Postley, 2 Paige 599; McIntyre *v.* Mancius, 3 Johns. Ch. 45; Gelston *v.* Hoyt, 1 Johns. Ch. 543; Fay *v.* Jewett, 2 Edw. 323.

Ohio.— Smith *v.* Simmons, Tapp. 311.

Pennsylvania.— Benkert *v.* Benkert, 12 Phila. 295; Shaffer *v.* Kinkelin, 1 Phila. 465.

Tennessee.— Hayney *v.* Coyne, 10 Heisk. 339; Lindsley *v.* James, 3 Coldw. 477.

United States.— Alexander *v.* Scotland Mortg. Co., 47 Fed. 131; Atwill *v.* Ferrett, 2 Fed. Cas. No. 640, 2 Blatchf. 39; Bell *v.* Pomeroy, 3 Fed. Cas. No. 1,263, 4 McLean 57; Markey *v.* Mutual Ben. L. Ins. Co., 16

law.[85] But if the court can see from the bill that the discovery is material and in what manner it is material this will be sufficient.[86] It is no objection to answering an interrogatory that the information sought is immaterial to the relief sought against one of several defendants.[87]

(E) *Necessity of Obtaining Facts Sought to Be Discovered.* According to the weight of authority, where the bill is for discovery only, it will be sufficient to allege that the evidence sought to be adduced is material and will aid the complainant's action or defense. It is not necessary to allege that the matter sought to be proved can only be proved by defendant's answer.[88] Where, however, a bill is filed for relief as well as discovery, seeking to withdraw from a court of law a matter of strict legal cognizance, it must allege that the facts as to which a discovery is sought cannot be proved otherwise than by defendant's answer.[89] And it has been held that if the bill in addition to seeking discovery ask an injunction to stay the proceedings at law, it must be alleged that the facts cannot be proved otherwise than by defendant's answer.[90] It must show that the facts,

Fed. Cas. No. 9,091; Vaughan *v.* Central Pac. R. Co., 28 Fed. Cas. No. 16,897, 4 Sawy. 280.

See 16 Cent. Dig. tit. "Discovery," § 23.

Isolated fact.— Defendant in a suit at law is not entitled to a discovery in equity of a mere isolated fact, which may or may not be material to his defense; but he must show what his defense is and must state a case which will constitute a good defense. Williams *v.* Harden, 1 Barb. Ch. (N. Y.) 298.

85. Dull *v.* Amies, 2 Miles (Pa.) 134.

86. Turner *v.* Diekerson, 9 N. J. Eq. 140.

87. Marsh *v.* Keith, 1 Dr. & Sm. 342, 6 Jur. N. S. 1182, 30 L. J. Ch. 127, 3 L. T. Rep. N. S. 498, 9 Wkly. Rep. 115.

88. *Illinois.*— Robson *v.* Doyle, 191 Ill. 566, 61 N. E. 435 [*reversing* 94 Ill. App. 281].

Indiana.— Williams *v.* Wann, 8 Blackf. 477.

Massachusetts.— Peck *v.* Ashley, 12 Metc. 478; Clapp *v.* Shephard, 23 Pick. 228.

New Jersey.— Howell *v.* Ashmore, 9 N. J. Eq. 82, 57 Am. Dec. 371.

New York.— Vance *v.* Andrews, 2 Barb. Ch. 370; Marsh *v.* Davison, 9 Paige 580; Many *v.* Beekman Iron Co., 9 Paige 188; Atlantic Ins. Co. *v.* Lunar, 1 Sandf. Ch. 91.

Pennsylvania.— Block *v.* Universal Ins. Co., 16 Phila. 72; Peebles *v.* Boggs, 1 Phila. 151.

South Carolina.— Stacy *v.* Pearson, 3 Rich. Eq. 148.

Virginia.— McFarland *v.* Hunter, 8 Leigh 489.

West Virginia.— Thompson *v.* Whitaker Iron Co., 41 W. Va. 574, 23 S. E. 795; Russell *v.* Dickeschied, 24 W. Va. 61.

See 16 Cent. Dig. tit. "Discovery," § 21.

Contra.— Carroll *v.* Farmers', etc., Bank, Harr. (Mich.) 197; Leggett *v.* Postley, 2 Paige (N. Y.) 599; Whitesides *v.* Lafferty, 9 Humphr. (Tenn.) 27; Bell *v.* Pomeroy, 2 Fed. Cas. No. 1,263, 4 McLean 57; Vaughan *v.* Central Pac. R. Co., 28 Fed. Cas. No. 16,897, 3 Ban. & A. 27, 4 Sawy. 280.

89. *Alabama.*— Dargin *v.* Hewlitt, 115 Ala. 510, 22 So. 128; Sullivan *v.* Lawler, 72 Ala. 72; Guice *v.* Parker, 46 Ala. 616; Perrine *v.* Carlisle, 19 Ala. 686.

Connecticut.— Skinner *v.* Judson, 8 Conn. 528, 21 Am. Dec. 691.

District of Columbia.— Plumb *v.* Bateman, 2 App. Cas. 156.

Georgia.— Merchants' Bank *v.* Davis, 3 Ga. 112.

Indiana.— Williams *v.* Wann, 8 Blackf. 477; Coquillard *v.* Suydam, 8 Blackf. 24.

Kentucky.— Emerson *v.* Staton, 3 T. B. Mon. 116; Bullock *v.* Boyd, 2 A. K. Marsh. 322.

Maine.— Lancy *v.* Randlett, 80 Me. 169, 13 Atl. 686, 6 Am. St. Rep. 169.

Massachusetts.— Ahrend *v.* Odiorne, 118 Mass. 261, 19 Am. Dec. 449.

New York.— Seymour *v.* Seymour, 4 Johns. Ch. 409.

South Carolina.— Stacy *v.* Pearson, 3 Rich. Eq. 148.

West Virginia.— Thompson *v.* Whitaker Iron Co., 41 W. Va. 574, 23 S. E. 795.

United States.— Brown *v.* Swann, 10 Pet. 497, 9 L. ed. 508; Russell *v.* Clark, 7 Cranch 69, 3 L. ed. 271; Atwill *v.* Ferrett, 2 Fed. Cas. No. 640, 2 Blatchf. 39.

See 16 Cent. Dig. tit. "Discovery," § 21.

Allegation as to necessity held sufficient.— A bill charged that plaintiff placed money and other property in defendant's hands in trust for her benefit, that defendant accepted some money and property and made large profits therefrom by investing the same in lands and negroes, and that the particular price of the lands so purchased as well as the names and numbers of the negroes and other property purchased and the amount thereof defendant fraudulently and in bad faith withheld from complainant and concealed the same under his own name. It was held that the bill alleged facts sufficient to give equity jurisdiction of the suit against the trustee, as it appeared from the facts alleged that a discovery from defendant was necessary to enable complainant to obtain a decree, although the necessity for such discovery was not expressly alleged. Keaton *v.* Greenwood, 8 Ga. 97.

90. Vance *v.* Andrews, 2 Barb. Ch. (N. Y.) 370; Duval *v.* Ross, 2 Munf. (Va.) 290; Brown *v.* Swan, 10 Pet. (U. S.) 497, 9 L. ed. 508.

discovery of which is sought, are necessary to complainant's case and not facts by which his adversary intends to establish his case.[91] But where the facts, discovery of which is sought, are necessary to the case of plaintiff, the discovery will not be denied because the facts also pertain to defendant's case.[92]

(F) *Statement of Facts Sought to Be Discovered.* The bill must set forth the particular matters with reference to which discovery is sought, alleging them with sufficient certainty.[93] But uncertainty is not fatal to a bill whose object is to discover material facts alleged to be entirely in defendant's knowledge.[94]

(G) *Diligence in Seeking Information.* Diligence on the part of the complainant to secure the information sought must be shown.[95]

(H) *Requiring Answer Under Oath.* Answer under oath cannot properly be waived; if it is waived, the bill is demurrable;[96] but where a bill is for both

91. *District of Columbia.*— McCartney *v.* Fletcher, 10 App. Cas. 572.

Maryland.— Cullison *v.* Bossom, 1 Md. Ch. 95.

Massachusetts.— Kelly *v.* Morrison, 176 Mass. 531, 57 N. E. 1018.

New Jersey.— Thompson *v.* Engle, 4 N. J. Eq. 271.

New York.— Lansing *v.* Starr, 2 Johns. Ch. 150; Souza *v.* Belcher, 3 Edw. 117; Fitzhugh *v.* Everingham, 2 Edw. 605.

Pennsylvania.— Werne *v.* Berners, 1 Phila. 432.

United States.— Kelley *v.* Boettcher, 85 Fed. 55, 29 C. C. A. 14; Atwill *v.* Ferritt, 2 Fed. Cas. No. 640, 2 Blatchf. 39; Vaughan *v.* Central Pac. R. Co., 28 Fed. Cas. No. 16,897, 3 Ban. & A. 27, 4 Sawy. 280.

England.— London Sewer Com'rs *v.* Glasse, L. R. 15 Eq. 302, 42 L. J. Ch. 345, 28 L. T. Rep. N. S. 433, 21 Wkly. Rep. 520; Wallen *v.* Forrest, L. R. 7 Q. B. 239, 41 L. J. Q. B. 96, 26 L. T. Rep. N. S. 290; Ingilby *v.* Shagto, 33 Beav. 31, 9 Jur. N. S. 1141, 32 L. J. Ch. 807, 8 L. T. Rep. N. S. 785.

Contra.— Adams *v.* Porter, 1 Cush. (Mass.) 170.

Illustration.— Defendant may have discovery of plaintiff's claim, whether it be as heir, devisee, or grantee, although he cannot have discovery of the evidence by which plaintiff will establish his title. Meakings *v.* Cromwell, 1 Sandf. (N. Y.) 698.

Bill seeking more concise bill of particulars.— A bill of discovery will not lie in aid of a defendant at law to compel plaintiff at law to furnish a more full bill of particulars which the court of law has refused to compel. Nieury *v.* O'Hara, 1 Barb. (N. Y.) 484.

Rule limited to matters of title.— The rule that a party is not bound to discover his own case is confined to matters of title not to those of account. Corbett *v.* Hawkins, 1 Y. & J. 421.

92. *Maryland.*— Cullison *v.* Bossom, 1 Md. Ch. 95.

Massachusetts.—Haskell *v.* Haskell, 3 Cush. 540.

Pennsylvania.—Bonn *v.* Bebee, 3 Phila. 446.

Virginia.— Baker *v.* Morris, 10 Leigh 284.

United States.— Findlay *v.* Hinde, 1 Pet. 241, 7 L. ed. 128; Indianapolis Gas Co. *v.* Indianapolis, 90 Fed. 196; Gaines *v.* Mausseaux, 9 Fed. Cas. No. 5,176, 1 Woods 118.

England.— Whateley *v.* Crowter, 5 E. & B. 709, 2 Jur. N. S. 207, 25 L. J. Q. B. 163, 4 Wkly. Rep. 121, 85 E. C. L. 709; Bayley *v.* Griffiths, 1 H. & C. 429, 31 L. J. Exch. 477, 10 Wkly. Rep. 798; Combe *v.* London, 1 Y. & Coll. 631, 4 Y. & Coll. 139, 6 Jur. 571, 20 Eng. Ch. 631.

93. Horton *v.* Moseley, 17 Ala. 794; Lucas *v.* Darien Bank, 2 Stew. (Ala.) 280; Powell *v.* Chamberlain, 22 Ga. 123; Primmer *v.* Patten, 32 Ill. 528; Hough *v.* Martin, 22 N. C. 379, 34 Am. Dec. 403.

94. Bennett *v.* Woolfolk, 15 Ga. 213; Watson *v.* Murray, 23 N. J. Eq. 257.

95. *Arkansas.*— Hill *v.* Cawthon, 15 Ark. 29.

Indiana.— Bush *v.* Mahon, 2 Ind. 44.

Mississippi.— Northrop *v.* Flaig, 57 Miss. 754.

Missouri.— Price *v.* Cannon, 3 Mo. 453.

Tennessee.— Whitesides *v.* Lafferty, 9 Humphr. 27.

See 16 Cent. Dig. tit. "Discovery," § 21.

Applications of rule.— On an appeal from a justice of the peace, a party who has not interrogated his adversary before the justice cannot maintain a bill of discovery to ascertain the facts from him. Noble *v.* Tillotson, 2 Ind. 553. So where a defendant attempted to set up usury as a defense in an action at law, and failed from an insufficiency in his affidavits for an examination of plaintiff under the laws, and then brought a bill of discovery alleging among other facts that a former party had now become a competent witness, it was held that as he had at first a right to his bill for discovery and had elected to make his defense at law and had failed, there were no grounds to support his bill. Cowman *v.* Kingsland, 4 Edw. (N. Y.) 627. And a bill of discovery cannot be maintained in aid of a bill of review after decree, of the contents of a record which might with reasonable diligence have been ascertained during the pendency of the suit. Gentry *v.* Thornberry, 3 Dana (Ky.) 500.

96. *Massachusetts.*—Badger *v.* McNamara, 123 Mass. 117; Ward *v.* Peck, 114 Mass. 121.

Michigan.— Torrent *v.* Rodgers, 39 Mich. 85.

discovery and relief, discovery will be compelled, although an answer under oath is waived.[97]

(I) *Prayer For Process.* A mistake in the prayer for process will not vitiate a bill for discovery otherwise good.[98] Thus the words in a prayer of process "to stand to and abide such order and decree" will not turn the bill into one for relief.[99]

(IV) *Verification.* A bill praying for discovery merely need not be sworn to;[1] but if it seeks in addition to stay proceedings at law,[2] or seeks to transfer the jurisdiction from a court of law to a court of equity on the ground that material facts are in the knowledge of defendant only,[3] or seeks relief founded on lost instruments,[4] it must be sworn to.

(V) *Multifariousness.* A plaintiff cannot by one bill obtain specific relief and also discovery in matter distinct from that specific relief.[5] Nor can separate suits at law be embraced in the same bill for discovery of evidence.[6]

(VI) *Amendment.* A bill for discovery cannot be amended by adding new parties plaintiff,[7] even before an answer is filed to the original bill;[8] nor can it be amended by adding a prayer for relief, either before or after answer filed.[9] On the other hand a bill for discovery and relief may be amended by striking out the prayer for relief.[10] And where there is a mere clerical mistake in a bill, the court will permit it to be corrected instanter unless defendant is misled by it.[11] Where an injunction is dissolved upon the coming in of answers, the bill cannot be amended or a supplemental bill filed.[12]

New Jersey.— Somerset Bank *v.* Veghte, 42 N. J. Eq. 39, 6 Atl. 278.

Rhode Island.— Starkweather *v.* Williams, 21 R. I. 55, 41 Atl. 1003.

Tennessee.— Markham *v.* Townshend, 2 Tenn. Ch. 713.

United States.— Tillinghast *v.* Chace, 121 Fed. 435; Manchester F. Assur. Co. *v.* Stockton Combined Harvester, etc., Works, 38 Fed. 378.

See 16 Cent. Dig. tit. "Discovery," § 20.

97. Manley *v.* Mickle, 55 N. J. Eq. 563, 37 Atl. 738.

98. Schroeppel *v.* Redfield, 5 Paige (N. Y.) 245.

99. Angell *v.* Westcombe, 6 Sim. 30, 9 Eng. Ch. 30.

1. *Indiana.*— Owsley *v.* Barbour, 4 Ind. 584.

Mississippi.—Buckner *v.* Ferguson, 44 Miss. 677.

New York.— Laight *v.* Morgan, 2 Cai. Cas. 344, 1 Johns. Cas. 429.

South Carolina.—McElwee *v.* Sutton, 1 Hill Eq. 32.

Tennessee.— Parsons *v.* Wilson, 2 Overt. 260.

See 16 Cent. Dig. tit. "Discovery," § 26.

In Maine a chancery rule requiring bills of discovery to be verified does not apply to bills filed for relief to which the discovery is merely incidental. Dinsmore *v.* Crossman, 53 Me. 441; Hilton *v.* Lothrop, 46 Me. 297.

In Rhode Island a bill asking for discovery but waiving an answer under oath will not be treated as a bill for discovery but will have simply the force of a plea. Harrington *v.* Harrington, 15 R. I. 341, 5 Atl. 502.

2. Owsley *v.* Barbour, 4 Ind. 584. But see Harrington *v.* Harrington, 15 R. I. 341, 5 Atl. 502.

3. Munday *v.* Shatzell, Litt. Sel. Cas. (Ky.) 373.

4. Livingston *v.* Livingston, 4 Johns. Ch. (N. Y.) 294; Parsons *v.* Wilson, 2 Overt. (Tenn.) 260; Findlay *v.* Hinde, 1 Pet. (U. S.) 241, 7 L. ed. 128. But see Le Roy *v.* Servis, 1 Cai. Cas. 111, 2 Am. Dec. 281.

Limitation of rule.— The rule that, where resort is had to a court of equity instead of a court of law upon the ground that the writings upon which the action is founded have been lost, destroyed, or suppressed, an affidavit that such instruments are not in the custody or power of the complainant, and that he knows not where they are, unless in the hands of defendant, must be annexed to the bill, does not apply to a case where defendants are severally called upon by the bill to answer whether they executed a bond or instrument in writing or print by which they received and became the owners of shares of stock of a corporation, and whether they received certificates of such shares or not. Holmes *v.* Sherwood, 16 Fed. 725, 3 McCrary 405.

5. Wood *v.* Hitchings, 3 Beav. 504, 10 L. J. Ch. 257, 43 Eng. Ch. 504.

6. McDougald *v.* Maddox, 17 Ga. 52.

7. Cholmondeley *v.* Clinton, 2 Meriv. 71, 16 Rev. Rep. 167, 35 Eng. Reprint 867.

8. Southampton Boat, etc., Co. *v.* Rawlins, 10 Jur. N. S. 118, 9 L. T. Rep. N. S. 633, 3 New Rep. 349, 12 Wkly. Rep. 285.

9. Parker *v.* Ford, 1 Coll. 506, 28 Eng. Ch. 506; Butterworth *v.* Bailey, 15 Ves. Jr. 358, 33 Eng. Reprint 789. But see Lousada *v.* Templer, 2 Russ. 561, 3 Eng. Ch. 561.

10. Gurish *v.* Donovan, 2 Atk. 166, Barn. Ch. 428, 26 Eng. Reprint 504.

11. Howell *v.* Ashmore, 9 N. J. Eq. 82, 57 Am. Dec. 371.

12. Yates *v.* Monroe, 13 Ill. 212.

b. Demurrer — (i) *Grounds.* It is ground for demurrer if the bill fails to allege that an action at law is pending or is contemplated,[13] or does not show that plaintiff has a right of action or defense at law,[14] or that the discovery sought is material,[15] or that the case made by the bill was not one of which a court of equity would assume jurisdiction;[16] that the suit for which discovery is sought is not of a purely civil nature;[17] that the bill seeks a discovery in support of an action which is against public policy,[18] or of matters relating to defendant's title,[19] or makes one a party who is not a party to the action at law,[20] or seeks to discover matters which if established would subject defendant to penal consequences[21] or to forfeitures,[22] or seeks discovery of privileged matter,[23] or shows that the claim is barred by the statute of limitations.[24]

(ii) *Necessity, Sufficiency, and Effect.* Where a bill seeks the discovery of matter that defendant is not obliged to answer he must take advantage of it by demurrer.[25] When a bill for discovery improperly prays for relief, a general demurrer thereto will be sustained;[26] it must appear on the face of the bill that no case could be made by complainant, no matter what is the discovery or proof.[27] If the bill is for both discovery and relief a demurrer if good as to

13. United New Jersey R., etc., Co. *v.* Hoppock, 28 N. J. Eq. 261; Cardale *v.* Watkins, 5 Madd. 18; Story Eq. Pl. § 559.

14. Kensington *v.* Mansell, 13 Ves. Jr. 240, 33 Eng. Reprint 284; Debigge *v.* Howe [*cited* in Rondeau *v.* Wyatt, 3 Bro. Ch. 154, 155, 29 Eng. Reprint 462].

15. Kuypers *v.* Reformed Dutch Church, 6 Paige (N. Y.) 570; Wallis *v.* Portland, 8 Bro. P. C. 161, 3 Eng. Reprint 508, 3 Ves. Jr. 494, 30 Eng. Reprint 1123, 4 Rev. Rep. 78.

Immateriality of the discovery must clearly appear or the demurrer will be overruled. Evans *v.* Lancaster City St. R. Co., 64 Fed. 626.

16. Cooper Eq. Pl. §§ 187–190; 2 Story Eq. Jur. § 1489; Story Eq. Pl. § 551.

17. Story Eq. Pl. § 553.

18. King *v.* Burr, 3 Meriv. 693, 36 Eng. Reprint 266.

19. Lowther *v.* Troy, 1 Reg. L. & S. 192; Loker *v.* Rolle, 3 Ves. Jr. 4, 30 Eng. Reprint 863; Ivy *v.* Kekewick, 2 Ves. Jr. 679, 3 Rev. Rep. 30, 30 Eng. Reprint 839.

20. How *v.* Best, 5 Madd. 19; Irving *v.* Thompson, 3 Jur. 1071, 8 L. J. Ch. 357, 9 Sim. 17, 16 Eng. Ch. 17. But see Platt *v.* Barcroft, 4 Phila. (Pa.) 67.

21. Meres *v.* Christman, 7 B. Mon. (Ky.) 422; Selby *v.* Crew, 2 Anstr. 504; Oliver *v.* Haywood, 1 Anstr. 82; Wallis *v.* Portland, 8 Bro. P. C. 161, 3 Eng. Reprint 588, 3 Ves. Jr. 494, 30 Eng. Reprint 1123, 4 Rev. Rep. 78; Glynn *v.* Houston, 1 Keen 329, 6 L. J. Ch. 129, 15 Eng. Ch. 329.

Showing how answer will incriminate.—A demurrer to a bill of discovery against a partnership to ascertain the nature of the business on the ground that the discovery might subject defendants to penalties under the laws of the United States, but without stating why or wherefore, is bad. Sharp *v.* Sharp, 3 Johns. Ch. (N. Y.) 407.

22. Uxbridge *v.* Staveland, 1 Ves. 56, 27 Eng. Reprint 888.

23. McCartney *v.* Fletcher, 10 App. Cas. (D. C.) 572; Richards *v.* Jackson, 18 Ves. Jr. 472, 34 Eng. Reprint 396, advice given by counsel to client.

24. Brewster *v.* Brewster, 3 Phila. (Pa.) 355.

25. Selby *v.* Selby, 4 Bro. Ch. 11, 29 Eng. Reprint 752.

26. Slack *v.* Black, 109 Mass. 496; Welles *v.* River Raisin, etc., R. Co., Walk. (Mich.) 35; Gilmer *v.* Felhour, 45 Miss. 627; Collis *v.* Swayne, 4 Bro. Ch. 480, 29 Eng. Reprint 999; Price *v.* James, 2 Bro. Ch. 319, 29 Eng. Reprint 175, Dick. 697, 21 Eng. Reprint 442; Evan *v.* Avon, 6 Jur. N. S. 1361, 3 L. T. Rep. N. S. 347, 9 Wkly. Rep. 84; Hodle *v.* Healey, 6 Madd. 181, 1 Ves. & B. 536, 22 Rev. Rep. 270, 35 Eng. Reprint 209; Jones *v.* Jones, 3 Meriv. 161, 36 Eng. Reprint 62; Mellish *v.* Richardson, 12 Price 530; Atty.-Gen. *v.* Brown, 1 Swanst. 265, 36 Eng. Reprint 384; Speer *v.* Craivter, 17 Ves. Jr. 216, 34 Eng. Reprint 84; Gordon *v.* Simkinson, 11 Ves. Jr. 509, 32 Eng. Reprint 1186; Barker *v.* Dacie, 6 Ves. Jr. 681; Muckleston *v.* Brown, 6 Ves. Jr. 52, 5 Rev. Rep. 211, 31 Eng. Reprint 934; East India Company *v.* Neave, 5 Ves. Jr. 173, 31 Eng. Reprint 530; Jones *v.* Maund, 3 Y. & Coll. 347; King *v.* Rossett, 2 Y. & J. 33.

A prayer for such other relief as complainant may be entitled to in a pure bill for discovery does not change its character as such. Hodgens *v.* Scott, 2 Molloy 436.

Effect of prayer for injunction.—Where plaintiff is entitled to the discovery he seeks in support of an action a prayer for general relief or for relief that is consequential to the prayer for discovery as an injunction will not sustain a demurrer. Brandon *v.* Sands, 2 Ves. Jr. 514, 30 Eng. Reprint 751.

Where a prayer for process contained words adapted to a bill for relief a general demurrer will be sustained. Rose *v.* Gannel, 3 Atk. 439, 26 Eng. Reprint 1053; Andrews *v.* Lupton, 13 L. J. Ch. 201; James *v.* Herriott, 5 L. J. Ch. 133, 6 Sim. 428, 9 Eng. Ch. 428; Ambury *v.* Jones, Younge 199.

27. Le Roy *v.* Veeder, 1 Johns Cas. (N. Y.) 417.

the relief will be good as to the discovery also, as the latter is merely ancillary to the relief;[28] where a party is entitled to an answer of some part of his bill for discovery and relief, a general demurrer to the whole bill will be overruled;[29] so too where the bill is for discovery alone, a general demurrer to the whole bill will be overruled if plaintiff is entitled to a discovery of any part.[30] Where the demurrer is to specific interrogatories in the bill on the ground that they are impertinent, immaterial, and irrelevant, without stating the particulars in which they are alleged to be so, it will be overruled.[31] A demurrer to discovery on the ground that the answer would incriminate defendant does not operate as an admission of the fact sought to be proved.[32] A demurrer to a bill for discovery in aid of proceedings at law, where the bill charges that plaintiff cannot procure proof so as to proceed at law, admits the fact of the inability of plaintiff to procure proof.[33]

c. Plea — (i) *Grounds.* A noted commentator[34] has classified grounds of pleas to bills of discovery as follows: To the jurisdiction,[35] to the person,[36] to the bill or frame of the bill,[37] and in bar.[38] According to some decisions a plea of matter which would be a good plea to the action at law is bad.[39] This doctrine, however,

28. Williams *v.* Steward, 3 Meriv. 472, 36 Eng. Reprint 182; Baker *v.* Mellish, 10 Ves. Jr. 544, 32 Eng. Reprint 955. See also Jeffreys *v.* Baldwin, Ambl. 164, 27 Eng. Reprint 109. *Contra*, Kuypers *v.* Reformed Dutch Church, 6 Paige (N. Y.) 570. And *compare* Deare *v.* Atty.-Gen., 1 Y. & C. Exch. 197, holding that where a proper case for equitable relief is stated in the bill, which prays also for a discovery and contains a prayer for specific and general relief, a demurrer to the relief will not extend to the discovery, although the relief specifically prayed for may be improper.

Extent of rule.— The rule that if plaintiff is not entitled to the relief, although entitled to discovery, a general demurrer holds does not preclude defendant from demurring to the relief and answering as to the discovery. Todd *v.* Gee, 17 Ves. Jr. 273, 11 Rev. Rep. 76, 34 Eng. Reprint 106; Hodgkin *v.* Longden, 8 Ves. Jr. 2, 32 Eng. Reprint 249.

29. McLaren *v.* Steapp, 1 Ga. 376; Kimberly *v.* Sells, 3 Johns. Ch. (N. Y.) 467.

30. Treadwell *v.* Brown, 44 N. H. 551; Chetwynd *v.* Lindon, 2 Ves. 450, 28 Eng. Reprint 288.

31. Moyer *v.* Livingood, 2 Woodw. (Pa.) 317.

32. Lloyd *v.* Passingham, 16 Ves. Jr. 59, 33 Eng. Reprint 906.

33. Schroeppel *v.* Redfield, 5 Paige (N. Y.) 245; Long *v.* Beard, 6 N. C. 337.

34. Story Eq. Pl. § 816 [*citing* Beames Pl. Eq. 252; Cooper Eq. Pl. 292; Mitford Eq. Pl. by Jeremy 282].

35. **The first division,** he says, applies where plaintiff's case is such as does not entitle a court of equity to compel a discovery in his favor, although for the purpose of avoiding a demurrer it is differently and falsely stated in the bill. Story Eq. Pl. § 817.

36. **As respects the second division,** pleas to the person, a defendant may plead that plaintiff is outlawed, excommunicated, an alien enemy, a person attainted, an infant, a married woman, an idiot, a lunatic, or a bankrupt; that he has no title to the character which he assumes in the bill of discovery; that defendant has no interest in the subject-matter of the discovery or that he does not sustain the character which he assumes; or that there is a want of privity between defendant and plaintiff to sustain the bill. Story Eq. Pl. § 818 [*citing* Cooper Eq. Pl. 293, 294, 295, 924; Hare Discovery 41, 42, 46, 63, 83; Mitford Eq. Pl. (by Jeremy) 158, 159, 187, 188, 234, 282, 283].

37. **In regard to the third class** of pleas, it has been said that the fact that the value of the matter in controversy is beneath the dignity of the court would be a good plea; and also a plea that the parties are not the same in the suit in equity as in the suit at law, in aid of which the discovery is sought. Story Eq. Pl. § 820.

38. **As regards the fourth class** of pleas, it is a good plea in bar of discovery that the facts sought to be discovered might render defendant liable to a criminal prosecution (Heriz *v.* Riera, 5 Jur. 20, 10 L. J. Ch. 47, 11 Sim. 318, 34 Eng. Ch. 318; Brownsword *v.* Edwards, 2 Ves. 243, 28 Eng. Reprint 157; Claridge *v.* Hoare, 14 Ves. Jr. 59, 33 Eng. Reprint 443); that the discovery sought is of privileged matter (Story Eq. Pl. § 824); or that defendant is a purchaser for valuable consideration without notice of plaintiff's title (Story Eq. Pl. § 824). And so where the question arising upon the state of the pleadings in the suit at law in aid of which a discovery is sought appears to be a mere question of law it may be pleaded in bar of a discovery of any facts which might if the pleadings terminated in an issue of fact have been important at the trial. Story Eq. Pl. § 823.

39. Sperry *v.* Miller, 2 Barb. Ch. (N. Y.) 632 (where it was said that this would transfer the trial of the action at law to the court of chancery; and that too without the power of deciding the case in chancery if the plea turned out to be untrue); Hindman *v.* Taylor, 2 Bro. Ch. 7, 29 Eng. Reprint 4.

has been repudiated in other cases and the weight of authority seems to be to the contrary.[40]

(II) *Requisites and Sufficiency.* A plea in bar of the discovery must set up facts which if true would be a clear and inevitable bar to plaintiff's demand for discovery,[41] and if based on the ground that the discovery will subject defendant to a criminal prosecution or to fines or forfeitures it must distinctly show this fact, unless it is apparent on the face of the bill.[42] Such a plea, however, does not require the support of an answer.[43] Where the bill is for discovery and relief, a plea good as to the relief is good as to the discovery.[44] Where the bill prays merely for discovery, a plea to the discovery and relief is bad.[45] If the plea is overruled as false, the complainant may have an order to examine defendant orally before the master as to matter concerning which discovery is sought.[46] If the plea is falsified by proofs the complainant is permitted to examine defendant on interrogatories.[47] A plea to a bill of discovery filed after a demurrer to the plea at law may be allowed.[48]

d. Answer — (I) *Requisites* — (A) *Fulness.* If defendant submits to answer at all he must answer fully;[49] not merely to the complainant's interrogatories, but

40. Mendizabel *v.* Machado, 5 L. J. Ch. O. S. 20, 1 Sim. 68, 2 Eng. Ch. 68; Gait *v.* Osbaldeston, 1 Russ. 158, 46 Eng. Ch. 158 [*reversing* 5 Madd. 428]; MacGregor *v.* East India Co., 2 Sim. 452, 2 Eng. Ch. 452; Jermy *v.* Best, 1 Sim. 373, 2 Eng. Ch. 373; Baillie *v.* Sibbald, 15 Ves. Jr. 185, 33 Eng. Reprint 724.

The defense of the statute of limitations may be pleaded in bar to a bill of discovery. Chapin *v.* Coleman, 11 Pick. (Mass.) 331. And see Hopkins *v.* Calloway, 7 Coldw. (Tenn.) 37.

41. Green *v.* McCarroll, 24 Miss. 427; Ellsworth *v.* Curtis, 10 Paige (N. Y.) 105; New York M. E. Church *v.* Jaques, 1 Johns. Ch. (N. Y.) 65; Hindman *v.* Taylor, Dick. 651, 21 Eng. Reprint 425; Mendizabel *v.* Machado, 5 L. J. Ch. O. S. 20, 1 Sim. 68, 2 Eng. Ch. 68.

42. Story Eq. Pl. § 825.

A plea on the ground of forfeiture must be confined to protect against discovery of the act causing it and not extending to collateral matters. Weaver *v.* Meath, 2 Ves. 108, 28 Eng. Reprint 71.

43. Claridge *v.* Hoare, 14 Ves. Jr. 59, 33 Eng. Reprint 443.

44. Northleigh *v.* Luscombe, Ambl. 612, 27 Eng. Reprint 397; Gait *v.* Osbaldeston, 1 Russ. 158, 46 Eng. Ch. 158 [*reversing* 5 Madd. 428]; Sutton *v.* Scarborough, 9 Ves. Jr. 71, 32 Eng. Reprint 528. But see Jackson *v.* Ward, 22 L. T. Rep. N. S. 699, where it was held that a plea which was in terms to relief only, where defendant did not give all the discovery by his answer, should be overruled. See also King *v.* Heming, 9 Sim. 59, 16 Eng. Ch. 59, where it was held that where defendant pleads to the relief only he must make discovery.

Where the plea is to the relief and some of the discovery and the complainant is entitled to some relief the plea is too broad and will be overruled. Hewitt *v.* Hewitt, 8 L. T. Rep. N. S. 630, 11 Wkly. Rep. 84.

45. Asgill *v.* Dawson, Bunb. 70.

46. Dows *v.* McMichael, 2 Paige (N. Y.) 345.

47. Souzer *v.* De Meyer, 2 Paige (N. Y.) 574.

48. Stewart *v.* Nugent, 1 Keen 201, 6 L. J. Ch. 128, 15 Eng. Ch. 201.

49. *Arkansas.*— Hill *v.* Cravy, 7 Ark. 536.

Maryland.— Neale *v.* Hagthrop, 3 Bland 551; Salmon *v.* Clagett, 3 Bland 125.

Missouri.— Roussin *v.* St. Louis Perpetual Ins. Co., 15 Mo. 244.

New Jersey.— Mutual L. Ins. Co. *v.* Cokefair, 41 N. J. Eq. 142, 3 Atl. 686.

England.— Elmer *v.* Creasy, L. R. 9 Ch. 69, 43 L. J. Ch. 166, 29 L. T. Rep. N. S. 632, 22 Wkly. Rep. 141; Hoffmann *v.* Postill, L. R. 4 Ch. 673, 20 L. T. Rep. N. S. 893, 17 Wkly. Rep. 901; Great Luxembourg R. Co. *v.* Magnay, 23 Beav. 646; Clegg *v.* Edmonson, 22 Beav. 125, 2 Jur. N. S. 824; Swinborne *v.* Nelson, 16 Beav. 416, 22 L. J. Ch. 331, 1 Wkly. Rep. 155; Swabey *v.* Sutton, 1 Hem. & M. 514, 9 Jur. N. S. 1321, 9 L. T. Rep. N. S. 711, 12 Wkly. Rep. 124; Gray *v.* Bateman, 21 Wkly. Rep. 137.

See 16 Cent. Dig. tit. "Discovery," §§ 29, 30.

Applications of rule.— Where the bill charges a sale by defendant to a third person of goods on credit, without security, and defendant admits the sale, but not without security, he must make full discovery as to the security taken. Robinson *v.* Woodgate, 3 Edw. (N. Y.) 422. In a bill alleging non-payment of consideration and praying a discovery, an answer that a consideration was paid but not showing by whom, for whom, or to any one is not sufficient. Wilson *v.* Woodruff, 5 Mo. 40, 31 Am. Dec. 194. When the interrogatories of a bill asked what were the powers and authorities given to defendants, agents of complainant, and by what documents they made out the same, it is not sufficient to answer that the powers and authorities appeared from written correspondence, and that various letters had passed between the parties to which they referred but that they were bound to specify the documents. Inglessi *v.* Spartali, 29 Beav. 564. Where a suit is instituted by parties in a representative capacity and de-

to the whole and every substantial part of plaintiff's case.[50] A simple denial of plaintiff's case literally, as stated, is wholly insufficient.[51] Defendant is not exempted from answering fully by the fact that if he should answer the interrogatories in detail he would be merely repeating statements contained in the affidavits and depositions previously filed in the cause;[52] nor is it a sufficient answer to allege that the interrogatories in the bill are identical with the interrogatories in an action at law that have been answered by defendant and to refer to such answers;[53] nor that, although defendant has in his power the means of acquiring the information necessary to enable him to make the discovery called for he cannot acquire the same without great trouble on his part.[54] So the answer cannot set up matter of avoidance merely and have the effect of a plea[55] or demurrer.[56] It is not sufficient for him to answer that he has no knowledge of the facts, but he must also state that he has no information or is utterly ignorant of the facts,[57] and that he did not have any at the time of the filing of the bill;[58] nor is it sufficient to deny the principal fact upon which plaintiff's right to recover is based and decline to answer matters which would tend to prove that fact;[59] nor to deny generally the allegations of the bill as to liability.[60] On the other hand irrelevant inquiries need not be answered.[61] And a defendant who has no knowledge or

fendant files a bill of discovery to ascertain whether the beneficiaries have received any money, it is not sufficient for the representatives to answer that they do not believe that they did. Fletcher *v.* Faust, 22 Ga. 559. Where defendant has answered to the original bill without interrogatories, the complainant is not entitled to an answer to interrogatories covering the entire case in an amended bill. An answer to interrogatories as to matters covered by the amendment is sufficient. Denis *v.* Rochussen, 4 Jur. N. S. 298, 27 L. J. Ch. 368, 6 Wkly. Rep. 265; Hill *v.* Buenos Ayres Northern R. Co., 41 L. J. Ch. 69.

Limitations of rule.— Where the answer is technically insufficient, yet where plaintiff cannot gain anything by a more full answer, and in the absence of an allegation that anything was fraudulently or erroneously omitted, exception thereto will be overruled. White *v.* Barker, 5 De G. & Sm. 746, 17 Jur. 174. As a general rule where a defendant submits to answer, he must answer fully; but a *bona fide* purchaser may in his answer object to a discovery of matter which would destroy his title, provided the answer fully denies all the circumstances stated in the bill which go to charge him with notice of plaintiff's equity. Cuyler *v.* Bogert, 3 Paige (N. Y.) 186; New York M. E. Church *v.* Jaques, 1 Johns. Ch. (N. Y.) 65.

50. Walker *v.* Walker, 3 Ga. 302; Neale *v.* Hagthrop, 3 Bland (Md.) 551.

51. He must meet it with full and circumstantial denial, and not with a negative pregnant, which, while it controverts the case in the precise terms in which it is stated, is perfectly consistent with one not substantially differing from it. Moors *v.* Moors, 17 N. H. 481; Woods *v.* Morrell, 1 Johns. Ch. (N. Y.) 103; Story Eq. Pl. § 855.

52. Turner *v.* Jack, 23 L. T. Rep. N. S. 800, 19 Wkly. Rep. 433.

53. Hudson *v.* Grenfell, 3 Giff. 388, 8 Jur. N. S. 878, 5 L. T. Rep. N. S. 417.

54. Green *v.* Carey, 12 Ga. 601; Beall *v.* Blake, 10 Ga. 449.

Information from agents.— A party answering is bound to acquire information from his agents and servants. Bolckow *v.* Fisher, 10 Q. B. D. 161; Rasbotham *v.* Shropshire Union R., etc., Co., 24 Ch. D. 110, 53 L. J. Ch. 327, 48 L. T. Rep. N. S. 902, 32 Wkly. Rep. 117.

55. Bentley *v.* Cleaveland, 22 Ala. 814; Salmon *v.* Claggett, 3 Bland (Md.) 125; Waring *v.* Suydam, 4 Edw. (N. Y.) 426. *Contra*, Phillips *v.* Prevost, 4 Johns. Ch. (N. Y.) 205; Perry *v.* Kinley, 1 Phila. (Pa.) 505.

56. Waring *v.* Suydam, 4 Edw. (N. Y.) 426.

57. Smith *v.* Lasher, 5 Johns. Ch. (N. Y.) 247; Norton *v.* Warner, 3 Edw. (N. Y.) 106; Painter *v.* Harding, 3 Phila. (Pa.) 144. It is not sufficient for defendant to say that he does not know or believe the insolvency of a party to whom he sold goods. He must show his information if he have any and express his belief founded thereon. But if he has no information he need not express his belief. Robinson *v.* Woodgate, 3 Edw. (N. Y.) 422.

58. Trotter *v.* Bunce, 1 Edw. (N. Y.) 573.

59. Bains *v.* Goldey, 35 Pa. St. 51.

60. Hoyt *v.* Smith, 23 Conn. 177, 60 Am. Dec. 632.

61. Benkert *v.* Benkert, 12 Phila. (Pa.) 295; Kennedy *v.* Dodson, [1895] 1 Ch. 334, 64 L. J. Ch. 257, 72 L. T. Rep. N. S. 172, 12 Reports 92, 43 Wkly. Rep. 259; Codrington *v.* Codrington, 3 Sim. 519, 6 Eng. Ch. 519.

Denial of relevancy.— A defendant cannot defeat a full discovery by denying that the evidence will be of assistance to the complainant. It is only when it can be seen that the interrogatories if answered affirmatively would not assist the complainant in establishing his cause of action that answers will be dispensed with. Anderson *v.* Kissam, 28 Fed. 900.

Interrogatories not founded on specific allegations.— Interrogatories which are pertinent must be answered, although not founded on any specific allegations in the bill, where the party has no knowledge on which to

information as to the matters charged in the bill is not obliged to answer each charge separately and particularly.[62]

(B) *Positiveness.* The answer must be positive and admission or denial by implication is not enough.[63]

(C) *Responsiveness.* Answers to bills for discovery must not be evasive.[64] But all matter strictly responsive to the bill is evidence, whether the same be affirmative or negative.[65] In answering the bill the respondent has a right to state all the circumstances connected with the matter about which the discovery is sought, as well that which makes for as that which makes against him.[66] Nothing contained in the answer to a bill for discovery in aid of a defense at law can be deemed impertinent, which tends to disprove the existence of the alleged defense at law.[67]

(II) *Failure to Answer.* Upon a failure to answer the bill the same will be taken as confessed,[68] the same as if the bill had been answered and every fact charged therein to exist had been expressly admitted.[69] If the party answers, the bill will not be taken for confessed, although the answer is not full, but the answer must be excepted to.[70] A party is not in contempt for refusing to answer an interrogatory before the commissioner if he excepts thereto before the commissioner, although he made no exception thereto in court. The better practice, however, is to except before the time for answering fixed by the court.[71]

(III) *Exceptions to Answer.* If the answer is insufficient exceptions should be filed thereto,[72] and it is not proper to demur.[73] The foundation for

found such information. McGarel *v.* Moon, L. R. 10 Eq. 22, 39 L. J. Ch. 367, 22 L. T. Rep. N. S. 355, 18 Wkly. Rep. 568; Marsh *v.* Keith, 1 Dr. & Sm. 342, 6 Jur. N. S. 1182, 30 L. J. Ch. 127, 3 L. T. Rep. N. S. 498, 9 Wkly. Rep. 115.

62. Utica Ins. Co. *v.* Lynch, 3 Paige (N. Y.) 210.

63. Benkert *v.* Benkert, 12 Phila. (Pa.) 295; Rishton *v.* Grissel, 14 Wkly. Rep. 578. The answer must be in such form that an issue of perjury could be made on its falsity. Walker *v.* Daniell, 30 L. T. Rep. N. S. 357, 22 Wkly. Rep. 595.

64. Tomlinson *v.* Lindley, 2 Ind. 569. Although the answer is evasive it is not a ground for reversal where the party is dead. The executor cannot purge conscience. Sitler *v.* McComas, 66 Md. 135, 6 Atl. 527.

65. Farmers', etc., Bank *v.* Griffith, 2 Wis. 443.

66. Chambers *v.* Warren, 13 Ill. 318; Turner *v.* Knell, 24 Md. 55; Dyre *v.* Sturges, 3 Desauss. (S. C.) 553.

He may explain the entire transaction with which he is charged (Moody *v.* Metcalf, 51 Ga. 128); and need not confine himself strictly to the discovery sought, but may set up new and distinct facts in avoidance of what is admitted to be true (Saltmarsh *v.* Bower, 22 Ala. 221; Parkhurst *v.* Devine, 1 Phila. (Pa.) 486; Waldron *v.* Bayard, 1 Phila. (Pa.) 484; Lyons *v.* Miller, 6 Gratt. (Va.) 427, 52 Am. Dec. 129. *Contra,* Hamilton *v.* Wood, 3 Edw. (N. Y.) 134).

A party is not entitled to a discovery of a mere isolated fact. He cannot deprive his adversary of the right to make full answer showing that the defense does not exist. Jewett *v.* Belden, 11 Paige (N. Y.) 618.

67. Jewett *v.* Belden, 11 Paige (N. Y.) 618.

68. Semple *v.* Murphy, 8 B. Mon. (Ky.) 271; McClain *v.* McGee, 9 Dana (Ky.) 368; Sprigg *v.* Jarret, 1 A. K. Marsh. (Ky.) 335; Roussin *v.* St. Louis Perpetual Ins. Co., 15 Mo. 244. Although a party cannot be compelled to answer any matter which may subject him to a penalty, forfeiture, or infamous punishment, yet where a bill is taken as confessed for failure to answer, the allegations are all taken as true, as well those concerning the objectionable matter as the others. Atterberry *v.* Knox, 8 Dana (Ky.) 282.

The English practice is an order to show cause why the interrogatories should not be taken *pro confesso.* Lewes *v.* Morgan, 5 Price 468.

69. Nancy *v.* Trammel, 3 Mo. 306.

70. Roussin *v.* St. Louis Perpetual Ins. Co., 15 Mo. 244. Exceptions to answer see *infra,* II, A, 3, d, (III).

Where defendant fails to answer as to a date and no proof as to the date is made the date must be presumed to be the one most favorable to plaintiff. Tarpley *v.* Wilson, 33 Miss. 467.

If the exceptions are sustained and the party thereupon declines to answer further the bill will be taken as confessed. Tomlinson *v.* Lindley, 2 Ind. 569.

71. Bonnell *v.* Shepard, 2 Wis. 503. And see CONTEMPT, 9 Cyc. 17.

72. Roussin *v.* St. Louis Perpetual Ins. Co., 15 Mo. 244; Croskey *v.* European, etc., Steam Shipping Co., 14 Wkly. Rep. 514.

Partial answer.— If the answer is a partial one, the right should be reserved to the complainant to except for want of a complete answer, if it should be found on the hearing of the answer that he is entitled to it. Bentley *v.* Cleaveland, 22 Ala. 814.

73. Chicago, etc., R. Co. *v.* Macomb, 2 Fed. 18.

exceptions to an answer for insufficiency consists of sufficient allegations in the bill and proper interrogatories based thereon.[74] An exception for impertinence which covers more than should be expunged makes the whole exception nugatory.[75] General exceptions to an answer to interrogatories are improper where some of the interrogatories have been properly answered.[76] For the purpose of exceptions no part of the answer is assumed to be true.[77]

(IV) *WAIVER OF DEFECTS IN ANSWER.* Any objection to the sufficiency of the answer is waived by an offer of the answer in evidence.[78]

(V) *ANSWER AS EVIDENCE* — (A) *In General.* The answer to a bill of discovery is evidence and cannot be replied to.[79] The legality of such evidence must be determined by the court of law in which the cause is pending in aid of which the bill was filed.[80] It is optional with the party filing the bill whether he will use the answer as evidence,[81] and it cannot be used as evidence by the party making it, unless it is first offered in evidence by the opposite party.[82] It must be used as an entirety, unless part is expunged for impertinence,[83] or unless some of it is not responsive.[84] Where both discovery and relief are sought the answer so far as responsive to the bill is evidence for defendant as well as against him,[85] but any matter contained in the answer which is not responsive is not evidence for him but must be otherwise proved.[86] So if the bill is for discovery alone, an

74. U. S. *v.* McLaughlin, 24 Fed. 823.

It is no ground for exception that the answer states a totally immaterial fact or answers interrogatories improperly put and which the party was not compelled to answer. Conway *v.* Turner, 8 Ark. 356.

Protection from discovery.— Where the statute protects an officer of a corporation from making discovery unless on special order of the court a voluntary answer on his part is not subject to exception because it fails to make the disclosures sought. McCreery *v.* Cobb, 93 Mich. 463, 53 N. W. 613.

75. Waring *v.* Suydam, 4 Edw. (N. Y.) 426.

76. Higginson *v.* Blockley, 1 Jur. N. S. 1104, 25 L. J. Ch. 74.

77. Swabey *v.* Sutton, 1 Hem. & M. 514, 9 Jur. N. S. 1321, 9 L. T. Rep. N. S. 711, 12 Wkly. Rep. 124.

78. Roussin *v.* St. Louis Perpetual Ins. Co., 15 Mo. 244.

79. Dunn *v.* Dunn, 8 Ala. 784; Ragsdale *v.* Buford, 3 Hayw. (Tenn.) 192.

80. Chambers *v.* Warren, 13 Ill. 318; Price *v.* Tyson, 3 Bland (Md.) 392, 22 Am. Dec. 279.

81. *Alabama.*— Saltmarsh *v.* Bower, 22 Ala. 221; Cox *v.* Cox, 2 Port. 533.

Arkansas.— Conway *v.* Turner, 8 Ark. 356.

Kentucky.— Nourse *v.* Gregory, 3 Litt. 378.

Mississippi.—Carson *v.* Flowers, 7 Sm. & M. 99.

Tennessee.— Hays *v.* Crawford, 1 Heisk. 86.

See 16 Cent. Dig. tit. "Discovery," § 39.

82. *Alabama.*— Saltmarsh *v.* Bower, 22 Ala. 221.

Arkansas.— Conway *v.* Turner, 8 Ark. 356.

New Hampshire.— Kidder *v.* Barr, 35 N. H. 235.

New York.— Phillips *v.* Thompson, 1 Johns. Ch. 131.

Tennessee.— Jones *v.* Davidson, 2 Sneed 447; Thompson *v.* French, 10 Yerg. 452.

See 16 Cent. Dig. tit. "Discovery," § 39.

83. *Alabama.*— Saltmarsh *v.* Bower, 22 Ala. 221.

Illinois.— Chambers *v.* Warren, 13 Ill. 318.

Maryland.— Ringgold *v.* Ringgold, 1 Harr. & G. 11, 18 Am. Dec. 250; Glenn *v.* Randall, 2 Md. Ch. 220.

New York.— Jewett *v.* Belden, 11 Paige 618.

Virginia.— Fant *v.* Miller, 17 Gratt. 187.

The rule that where a part of an answer is offered the party answering may read other parts applies to a portion of an entire correspondence produced under the rule. Lawrence *v.* Ocean Ins. Co., 11 Johns. (N. Y.) 245 note.

84. Massingill *v.* Carraway, 13 Sm. & M. (Miss.) 324.

85. *Mississippi.*— Money *v.* Dorsey, 7 Sm. & M. 15; Petrie *v.* Wright, 6 Sm. & M. 647.

New Hampshire.—Moors *v.* Moors, 17 N. H. 481.

Tennessee.— Spurlock *v.* Fulks, 1 Swan 289; Jones *v.* Perry, 10 Yerg. 59, 30 Am. Dec. 430.

Virginia.— Ward *v.* Cornett, 91 Va. 676, 22 S. E. 494, 49 L. R. A. 550.

West Virginia.— Jones *v.* Cunningham, 7 W. Va. 707.

What is a responsive answer.— Where defendant is interrogated as to a certain arrangement and whether it was written or oral, and the answer sets out a paper as the arrangement, it is responsive and must be taken as true until disproved. Glenn *v.* Grover, 3 Md. 212; Reed *v.* Cumberland Mut. F. Ins. Co., 36 N. J. Eq. 146.

86. *New York.*—Atwater *v.* Fowler, 1 Edw. 416.

North Carolina.— Fleming *v.* Murph, 59 N. C. 59.

Texas.—Aubrey *v.* Cannon, 11 Tex. 110.

Virginia.— Taylor *v.* Moore, 2 Rand. 563.

West Virginia.— Jones *v.* Cunningham, 7 W. Va. 707.

Wisconsin.— Farmers', etc., Bank *v.* Griffith, 2 Wis. 443.

answer responsive thereto is evidence for as well as against defendant,[87] and in a number of cases where the bill was for discovery alone, it has been held that the answer will be evidence for defendant, although it contains matters in avoidance of the complainant's claim.[88] The bill may be read as introductory to the answer,[89] if necessary to an understanding of it.[90]

(B) *Conclusiveness of Answer.* The answer is not conclusive evidence of the facts stated therein.[91] According to some decisions the answer is entitled to no higher consideration than the answers of the party's own witnesses from the stand and may be controverted in the same way.[92] And in others it is held that an answer to a petition for discovery in aid of a suit at law must be taken as true unless contradicted by two witnesses, or by one with strong corroborating circumstances.[93] Evidence offered to impeach an answer to a bill of discovery is correctly excluded where it does not go to the issue between the parties,[94] and the party answering cannot be impeached by showing that he is unworthy of belief.[95]

e. Privileged Matter[96] — (I) *Matter Involving Legal Professional Confidence* — (A) *Communication Between Attorney and Client* — (1) General Rule. The rule is well established that the discovery of confidential communications, oral or written, between an attorney and his client with reference to professional business generally or to litigation pending or contemplated, cannot be compelled at the instance of a third party.[97] The rule is founded on a regard to

87. Turner *v.* Knell, 24 Md. 55.

88. Saltmarsh *v.* Bower, 22 Ala. 221; Chambers *v.* Warren, 13 Ill. 318; Price *v.* Tyson, 3 Bland (Md.) 392, 22 Am. Dec. 279; Dyre *v.* Sturges, 3 Desauss. (S. C.) 553. *Contra,* Atwater *v.* Bower, 1 Edw. (N. Y.) 416. See Marion *v.* Faxon, 20 Conn. 486.

89. Grimes *v.* Hilliary, 51 Ill. App. 641; Walsh *v.* Agnew, 12 Mo. 520. *Contra,* Clark *v.* Depew, 25 Pa. St. 509, 64 Am. Dec. 717.

90. Lancaster *v.* Arendell, 2 Heisk. (Tenn.) 434.

91. *Alabama.*— Cox *v.* Cox, 2 Port. 533.

Arkansas.— Turner *v.* Miller, 6 Ark. 463.

District of Columbia.— District of Columbia *v.* Robinson, 14 App. Cas. 512 [*affirmed* in 180 U. S. 92, 21 S. Ct. 283, 45 L. ed. 440].

Georgia.— Heard *v.* Nix, 96 Ga. 51, 23 S. E. 122.

Illinois.— Chambers *v.* Warren, 13 Ill. 318.

Indiana.— Williams *v.* Wann, 8 Blackf. 477.

Kentucky.— Nourse *v.* Gregory, 3 Litt. 378.

Virginia.— Fant *v.* Miller, 17 Gratt. 187; Lyons *v.* Miller, 6 Gratt. 427, 52 Am. Dec. 129.

See 16 Cent. Dig. tit. "Discovery," § 40.

Contra.— Butler *v.* Catling, 1 Root (Conn.) 310.

Limitations of rule.— Although answers to interrogatories on facts and articles may generally be contradicted, yet when evoked as a substitute for a counter letter, to prove what could otherwise be proved by nothing but such a letter, such answers cannot be contradicted by anything but a like letter. Godwin *v.* Neustadtl, 42 La. Ann. 735, 7 So. 744.

Where matters in avoidance are stated in an answer to a bill for discovery, they are not conclusive, but are subject to be supported or disproved by evidence *aliunde* on both sides. Greenleaf *v.* Highland, Walk. (Miss.) 375.

92. *Illinois.*— Williams *v.* Jayne, 55 Ill. 181; Chambers *v.* Warren, 13 Ill. 318.

Indiana.— Williams *v.* Wann, 8 Blackf. 477; McNutt *v.* Dair, 8 Blackf. 35.

Kentucky.— Nourse *v.* Gregory, 3 Litt. 378.

New York.— March *v.* Davison, 9 Paige 580.

Tennessee.— Allen *v.* McNew, 8 Humphr. 46.

See 16 Cent. Dig. tit. "Discovery," § 40.

93. *Arkansas.*— Turner *v.* Miller, 6 Ark. 463.

Georgia.— Heard *v.* Nix, 96 Ga. 51, 23 S. E. 122.

Maryland.— Turner *v.* Knell, 24 Md. 55.

Missouri.— Buckner *v.* Armour, 1 Mo. 534.

New York.— Clason *v.* Morris, 10 Johns. 524.

Tennessee.— Spurlock *v.* Fulks, 1 Swan 289; Smith *v.* Kincaid, 10 Humphr. 73.

Virginia.— Thompson *v.* Clark, 81 Va. 422.

United States.— Hinkle *v.* Wanzer, 17 How. 353, 15 L. ed. 173.

See 16 Cent. Dig. tit. "Discovery," § 40.

Application of rule.—Where a bill charges generally that certain deeds are fraudulent and void, and also propounds special interrogatories predicated upon some of the averments, defendants have a right to answer all the allegations, whether specially interrogated or not; and in such a case the positive denials of the answers must be met in the usual way — by the oaths of two witnesses or of one with pregnant circumstances. Glenn *v.* Grover, 3 Md. 212.

94. Field *v.* Pope, 5 Ark. 66.

95. Chambers *v.* Warren, 13 Ill. 318; Murray *v.* Johnson, 1 Head (Tenn.) 353. *Contra,* Miller *v.* Tollison, Harp. Eq. (S. C.) 145, 14 Am. Dec. 712.

96. Privileged communications generally see Witnesses.

97. Crosby *v.* Berger, 4 Edw. (N. Y.) 254 [*affirmed* in 11 Paige 377, 42 Am. Dec. 117];

the interest and administration of justice. If the privilege did not exist, a party

West Grove Nat. Bank *v.* Earle, 196 Pa. St. 217, 46 Atl. 268; Minet *v.* Morgan, L. R. 8 Ch. 361, 42 L. J. Ch. 627, 28 L. T. Rep. N. S. 573, 21 Wkly. Rep. 467; Hamilton *v.* Nott, L. R. 16 Eq. 112, 42 L. J. Ch. 512; Macfarlan *v.* Rolt, L. R. 14 Eq. 580, 41 L. J. Ch. 649, 27 L. T. Rep. N. S. 305, 20 Wkly. Rep. 945; Wilson *v.* Northampton, etc., R. Co., L. R. 14 Eq. 477, 27 L. T. Rep. N. S. 507, 20 Wkly. Rep. 938; Worthington *v.* Dublin, etc., R. Co., L. R. 22 Ir. 310; Lyell *v.* Kennedy, 9 App. Cas. 81, 53 L. J. Ch. 449, 50 L. T. Rep. N. S. 277, 32 Wkly. Rep. 497 [*affirming* 23 Ch. D. 387, 48 L. T. Rep. N. S. 455, 31 Wkly. Rep. 691]; Stratford *v.* Hogan, 2 Ball & B. 164; Few *v.* Guppy, 13 Beav. 457; Flight *v.* Robinson, 8 Beav. 22, 8 Jur. 888, 13 L. J. Ch. 425; Ainsworth *v.* Wilding, [1900] 2 Ch. 315, 69 L. J. Ch. 695, 48 Wkly. Rep. 539; Greenough *v.* Gaskell, Coop. t. Brough. 96, 1 Myl. & K. 98, 7 Eng. Ch. 98; McCorquodale *v.* Bell, 1 C. P. D. 471, 45 L. J. C. P. 329, 35 L. T. Rep. N. S. 261, 24 Wkly. Rep. 399; Pearse *v.* Pearse, 1 De G. & Sm. 12, 11 Jur. 52, 16 L. J. Ch. 153; Lawrence *v.* Campbell, 4 Drew. 485, 5 Jur. N. S. 1071, 28 L. J. Ch. 780, 7 Wkly. Rep. 336; Thompson *v.* Falk, 1 Drew. 21; Mauser *v.* Dix, 3 Eq. Rep. 650, 1 Jur. N. S. 466, 1 Kay & J. 451, 24 L. J. Ch. 497, 3 Wkly. Rep. 313; Bluck *v.* Galsworthy, 2 Giff. 453, 7 Jur. N. S. 91, 3 L. T. Rep. N. S. 399; Russell *v.* Jackson, 9 Hare 387, 15 Jur. 1117, 21 L. J. Ch. 146, 41 L. J. Ch. 387; Walsingham *v.* Goodricke, 3 Hare 122, 25 Eng. Ch. 122; Wentworth *v.* Lloyd, 10 H. L. Cas. 589, 10 Jur. N. S. 961, 33 L. J. Ch. 688, 10 L. T. Rep. N. S. 767; Goodall *v.* Little, 15 Jur. 309, 20 L. J. Ch. 132, 1 Sim. N. S. 155, 40 Eng. Ch. 155; Follett *v.* Jefferyes, 15 Jur. 118, 20 L. J. Ch. 65, 1 Sim. N. S. 3, 40 Eng. Ch. 3; Herring *v.* Clobery, 6 Jur. 202, 11 L. J. Ch. 149, Phil. 91, 19 Eng. Ch. 91; Bushnell *v.* Bushnell, 2 Jur. 774; Desborough *v.* Rawlins, 2 Jur. 125, 7 L. J. Ch. 171, 3 Myl. & C. 515, 14 Eng. Ch. 515; Ford *v.* De Pontes, 5 Jur. N. S. 993, 29 L. J. Ch. 883, 32 L. T. Rep. N. S. 383, 7 Wkly. Rep. 299; Cotman *v.* Orton, 9 L. J. Ch. 268; Willson *v.* Leonard, 7 L. J. Ch. 242; Harvey *v.* Kirwan, 7 L. J. Exch. Eq. 50; Moseley *v.* Victoria Rubber Co., 55 L. T. Rep. N. S. 482; Boyd *v.* Petrie, 20 L. T. Rep. N. S. 934, 17 Wkly. Rep. 903; Morgan *v.* Shaw, 4 Madd. 54; Sawyer *v.* Birchmore, 3 Myl. & K. 572, 10 Eng. Ch. 572; Bolton *v.* Liverpool Corp., 1 Myl. & K. 88, 7 Eng. Ch. 88; Vent *v.* Pacey, 4 Russ. 193, 4 Eng. Ch. 193; Hughes *v.* Biddulph, 4 Russ. 190, 28 Rev. Rep. 46, 4 Eng. Ch. 190; Garland *v.* Scott, 3 Sim. 396, 6 Eng. Ch. 396; Parkhurst *v.* Lowten, 2 Swanst. 194 and note, 19 Rev. Rep. 63, 36 Eng. Reprint 589; Richards *v.* Jackson, 18 Ves. Jr. 472, 34 Eng. Reprint 396; Knight *v.* Waterford, 2 Y. & C. Exch. 37; Kelly *v.* Jackson, 13 Ir. Eq. 129; Dederick *v.* Ashdown, 4 Manitoba 174; Lawton *v.* Chance, 9 N. Brunsw. 411; Hamelyn *v.* Whyte, 6 Ont. Pr. 143; Lynch *v.* O'Hara, 6 U. C. C. P. 259. See Hoffman *v.* Crerar, 17 Ont. Pr. 404.

The belief of a client based on knowledge or information derived from privileged communication from his solicitor or agent is privileged to the same extent as the knowledge or information would be. Lyell *v.* Kennedy, 9 App. Cas. 81, 53 L. J. Ch. 449, 50 L. T. Rep. N. S. 277, 32 Wkly. Rep. 497. A client is not bound to disclose any information given him by his solicitor as to the inferences drawn by the latter, or as to the effect on his mind of what he has seen or heard. Kennedy *v.* Lyell, 23 Ch. D. 387, 48 L. T. Rep. N. S. 455, 31 Wkly. Rep. 691 [*affirmed* in 9 App. Cas. 81, 53 L. J. Ch. 449, 50 L. T. Rep. N. S. 277, 32 Wkly. Rep. 497].

Request to procure opinion of counsel.— A letter written by the client to his solicitor directing the latter to procure the opinion of counsel as to questions in dispute is privileged. Vent *v.* Pacey, 4 Russ. 193, 4 Eng. Ch. 193.

Disclosure of client.— A solicitor who at the request of his client loans money of the latter on mortgage and takes the mortgage in his own name will not in a suit by a creditor of the client be compelled to disclose the latter's name, or the particulars of other mortgages on the same property similarly taken by other clients. Jones *v.* Pugh, 6 Jur. 613, 11 L. J. Ch. 323, 1 Phil. 96, 19 Eng. Ch. 96, 12 Sim. 470, 35 Eng. Ch. 470.

The correspondence of a married woman with her solicitor with respect to a divorce, afterward obtained by collusion between the parties, is not privileged as to the husband or his privies. Ford *v.* De Pontes, 5 Jur. N. S. 993, 29 L. J. Ch. 883, 32 L. T. Rep. N. S. 383, 7 Wkly. Rep. 299, which also holds that correspondence after the divorce but not relating thereto would be privileged.

Advice to wife by husband's attorney.— Where husband and wife have distinct interests, and the wife is induced to act under the advice of an attorney employed by the husband, the attorney is deemed to act for both, and each has the right to the production of documents coming into the attorney's possession during his employment, and relating to the transaction, and to the advice given the wife. Warde *v.* Warde, 15 Jur. 759, 21 L. J. Ch. 90, 3 MacN. & G. 365, 49 Eng. Ch. 277 [*reversing* 1 Sim. N. S. 18, 40 Eng. Ch. 18].

Clients having adverse interests.— Communications between a trustee and one of the beneficiaries for whom he acted as solicitor in a dispute with the other concerning trust matters are not privileged as against such other. Tugwell *v.* Hooper, 10 Beav. 348, 16 L. J. Ch. 171. One of two clients who was represented by the same solicitor cannot compel him to disclose professional communications received from the other. Eadie *v.* Ad-

would not venture to consult any skilful person or would only dare to tell his counselor half his case.[98] It should, however, extend no further than is absolutely necessary to enable the client to obtain professional advice with safety.[99]

(2) SUBSEQUENT ACTIONS. Communications had in one action are privileged in a subsequent action in which the same matters are involved.[1]

(3) MUST BE PROFESSIONAL AND CONFIDENTIAL. The communications must have been with an attorney,[2] acting professionally, and must have been confidential and made in the usual course of business.[3] The privilege does not extend to communications not in their nature confidential, although they relate to the litigation,[4] or to communications made after the relation has ceased.[5] And where

dison, 52 L. J. Ch. 80, 47 L. T. Rep. N. S. 543, 31 Wkly. Rep. 320; *Re* Ubsdell, 27 L. T. Rep. N. S. 460, 21 Wkly. Rep. 70.

Possession of document.— A solicitor will not be permitted to disclose who has possession of a document, when his knowledge of the fact came in the course of confidential communications with his client in his professional capacity. Cotman *v.* Orton, 9 L. J. Ch. 268. But see Kingston *v.* Gale, Rep. t. Finch 259, 23 Eng. Reprint 142.

Disposition of books of bankrupt solicitor. — The assignees of a bankrupt solicitor have no authority to dispose of such of his books as contain entries relating to confidential relations between the bankrupt and his clients. *Re* Holden, 3 New Rep. 230.

The court may inspect a writing to determine the right to its protection. Lafone *v.* Falkland Islands Co., 4 Kay & J. 34, 27 L. J. Ch. 25, 6 Wkly. Rep. 4.

98. Greenough *v.* Gaskell, Coop. t. Brough. 96, 1 Myl. & K. 98, 7 Eng. Ch. 98; Russell *v.* Jackson, 9 Hare 387, 15 Jur. 1117, 21 L. J. Ch. 146, 41 Eng. Ch. 387.

99. Glyn *v.* Caulfield, 15 Jur. 807, 3 MacN. & G. 463, 49 Eng. Ch. 358.

1. Pearce *v.* Foster, 15 Q. B. D. 114, 54 L. J. Q. B. 432, 52 L. T. Rep. N. S. 886, 50 J. P. 4, 33 Wkly. Rep. 919; Bullock *v.* Corry, 3 Q. B. D. 356, 47 L. J. Q. B. 352, 38 L. T. Rep. N. S. 102, 26 Wkly. Rep. 330; Hughes *v.* Garnous, 6 Beav. 352.

Same issues.— Documents relating to the particular suit or to another suit, which, although not actually in the matter of the same litigation, involve or embrace the same issue are privileged. Thompson *v.* Falk, 1 Drew. 21.

Exhibits.— Accounts of transactions between plaintiff and defendant prepared by the attorney for the former with a view to litigation anticipated and actual, produced on the examination of defendant, admitted by him to be correct and annexed as exhibits to his deposition are privileged from production in a subsequent action. Goldstone *v.* Williams, [1899] 1 Ch. 47, 68 L. J. Ch. 24, 79 L. T. Rep. N. S. 373, 47 Wkly. Rep. 91.

Different parties and solicitors.— Documents prepared for the defense of a former action concerning the same right, defended by a predecessor in title of one of the parties and found in the office of the successors of the solicitors of such predecessor are privileged. Calcraft *v.* Guest, [1898] 1 Q. B. 759, 67 L. J. Q. B. 505, 78 L. T. Rep. N. S. 283, 46 Wkly. Rep. 420.

Action with third parties.— The privilege extends to any subsequent litigation with third parties respecting the same subject-matter and involving the questions to which the communications relate. Holmes *v.* Baddeley, 9 Jur. 289, 14 L. J. Ch. 113, 1 Phil. 476, 19 Eng. Ch. 476 [*reversing* 6 Beav. 521].

2. Slade *v.* Tucker, 14 Ch. D. 824, 49 L. J. Ch. 644, 43 L. T. Rep. N. S. 49, 28 Wkly. Rep. 807.

Attorney retired from practice.— Communications between a person and a solicitor who had retired from practice, of which fact such person was ignorant, are privileged. Calley *v.* Richards, 19 Beav. 401, 2 Wkly. Rep. 614.

Evidence obtained by a scrivener in professional confidence is privileged. Parkhurst *v.* Lowten, 2 Swanst. 194 and note, 19 Rev. Rep. 66, 36 Eng. Reprint 589.

3. Smith *v.* Daniell, L. R. 18 Eq. 649, 44 L. J. Ch. 189, 30 L. T. Rep. N. S. 752, 22 Wkly. Rep. 856; Bramwell *v.* Lucas, 2 B. & C. 745, 4 D. & R. 367, 2 L. J. K. B. O. S. 161, 9 E. C. L. 323; Greenough *v.* Gaskell, Coop. t. Brough. 96, 1 Myl. & K. 98, 7 Eng. Ch. 98; Pritchard *v.* Foulkes, C. P. Coop. 14; Walsh *v.* Trevanion, 11 Jur. 360, 16 L. J. Ch. 330, 15 Sim. 577, 38 Eng. Ch. 577; Moseley *v.* Victoria Rubber Co., 55 L. T. Rep. N. S. 482; Walker *v.* Wildman, 6 Madd. 47, 22 Rev. Rep. 234; Wilson *v.* Rastall, 4 T. R. 753, 2 Rev. Rep. 515; Kelly *v.* Jackson, 13 Ir. Eq. 129. And see Goodall *v.* Little, 15 Jur. 309, 20 L. J. Ch. 132, 1 Sim. N. S. 155, 40 Eng. Ch. 155; Ford *v.* De Pontes, 5 Jur. N. S. 993, 29 L. J. Ch. 883, 32 L. T. Rep. N. S. 383, 7 Wkly. Rep. 299; Walker *v.* Wildman, 6 Madd. 47, 22 Rev. Rep. 234.

4. Foakes *v.* Webb, 28 Ch. D. 287, 54 L. J. Ch. 262, 51 L. T. Rep. N. S. 624, 33 Wkly. Rep. 249; Cobden *v.* Kendrick, 4 T. R. 431, 2 Rev. Rep. 424.

Acts of attorney.— The privilege does not extend to the acts of the attorney himself. Kelly *v.* Jackson, 13 Ir. Eq. 129.

5. Cobden *v.* Kendrick, 4 T. R. 431, 2 Rev. Rep. 424, after compromise of action.

Employment ended with filing bill.—As to whether memoranda sworn to have been treated as instructions for an answer are privileged where the solicitor's employment ended at the time the bill was filed see Moxhay *v.* Trederwick, 9 Jur. 343.

the advice is given by the attorney merely as a friend or agent and not professionally, it is not privileged.[6]

(4) SUBJECT-MATTER OF. Some of the early cases confine the privilege to communications as to actual litigation, or where a dispute has arisen and litigation is threatened or contemplated;[7] but the later cases and the weight of authority are to the effect that the privilege extends to all matters or communications, whether relative to litigation or to the conduct of business generally, and within the ordinary scope of professional employment.[8]

6. Bustros *v.* White, 1 Q. B. D. 423, 45 L. J. Q. B. 642, 34 L. T. Rep. N. S. 835, 24 Wkly. Rep. 721; Smith *v.* Daniell, L. R. 18 Eq. 649, 44 L. J. Ch. 189, 30 L. T. Rep. N. S. 752, 22 Wkly. Rep. 856; Bramwell *v.* Lucas, 2 B. & C. 745, 4 D. & R. 367, 2 L. J. K. B. O. S. 161, 9 E. C. L. 323; Greenlaw *v.* King, 1 Beav. 137, 8 L. J. Ch. 92, 17 Eng. Ch. 137; Greenough *v.* Gaskell, Coop. t. Brough. 96, 1 Myl. & K. 98, 7 Eng. Ch. 98; Wilson *v.* Rastall, 4 T. R. 753, 2 Rev. Rep. 515.

Patent agent.— Communications between a person and his solicitor while the latter is acting as his patent agent are not privileged. Moseley *v.* Victoria Rubber Co., 55 L. T. Rep. N. S. 482.

Direction as to person to be arrested.—A direction by a client to his attorney or clerk to send a person with the sheriff for the purpose of pointing out the person to be arrested is not privileged. Caldbeck *v.* Boon, Ir. R. 7 C. L. 32.

7. Wadsworth *v.* Hamshaw, 2 B. & B. 5 note, 6 E. C. L. 13; Flight *v.* Robinson, 8 Beav. 22, 8 Jur. 888, 13 L. J. Ch. 425; Beadon *v.* King, 13 Jur. 570, 17 Sim. 34, 42 Eng. Ch. 34; Clagett *v.* Phillips, 7 Jur. 31, 2 Y. & Coll. 82, 21 Eng. Ch. 82; Original Hartlepool Collieries Co. *v.* Moon, 30 L. T. Rep. N. S. 585; Broad *v.* Pitt, M. & M. 233, 22 E. C. L. 515; Williams *v.* Mundie, R. & M. 34, 21 E. C. L. 697.

Except under extraordinary circumstances communications and statements made before suit are not privileged. Bluck *v.* Galsworthy, 2 Giff. 453, 7 Jur. N. S. 91, 3 L. T. Rep. N. S. 399.

Communications in course of dispute.— It is not necessary that the communications should have been made in contemplation of the suit, but it is sufficient if they relate to and were made in the course of the dispute which is the subject of the suit. Clagett *v.* Phillips, 7 Jur. 31, 2 Y. & Coll. 82, 21 Eng. Ch. 82. In Gainsford *v.* Grammar, 2 Campb. 9, 11 Rev. Rep. 648, the court refused to permit an attorney to be examined touching a proposal which he had carried from his client to the plaintiff several months before the institution of suit.

8. Minet *v.* Morgan, L. R. 8 Ch. 361, 42 L. J. Ch. 627, 28 L. T. Rep. N. S. 573, 21 Wkly. Rep. 467; Turton *v.* Barber, L. R. 17 Eq. 329, 43 L. J. Ch. 468, 22 Wkly. Rep. 438; Cromack *v.* Heathcote, 2 B. & B. 4, 4 Moore C. P. 357, 22 Rev. Rep. 638, 6 E. C. L. 12; Carpmael *v.* Powis, 9 Beav. 16, 16 L. J. Ch. 275, 1 Phil. 687, 19 Eng. Ch. 687; Flight *v.* Robinson, 8 Beav. 22, 13 L. J. Ch. 425, 8 Jur. 888; Greenough *v.* Gaskell, Coop. t. Brough. 96, 1 Myl. & K. 98, 7 Eng. Ch. 98; Pearse *v.* Pearse, 1 De G. & Sm. 12, 11 Jur. 52, 16 L. J. Ch. 153; Brard *v.* Ackerman, 5 Esp. 119; Robson *v.* Kemp, 4 Esp. 233, 5 Esp. 52, 8 Rev. Rep. 831; Walsingham *v.* Goodricke, 3 Hare 122, 25 Eng. Ch. 122; Herring *v.* Clobery, 6 Jur. 202, 11 L. J. Ch. 149, 1 Phil. 91, 19 Eng. Ch. 91; Bushnell *v.* Bushnell, 2 Jur. 774; Boyd *v.* Petrie, 20 L. T. Rep. N. S. 734, 17 Wkly. Rep. 903; Walker *v.* Wildman, 6 Madd. 47, 22 Rev. Rep. 234; Clark *v.* Clark, 1 M. & Rob. 3; Hamelyn *v.* Whyte, 6 Ont. Pr. 143 [*disapproving* MacDonald *v.* Putman, 11 Grant Ch. (U. C.) 258]; Anonymous, Skin. 404; Parkhurst *v.* Lowten, 2 Swanst. 194 and note, 19 Rev. Rep. 66, 36 Eng. Reprint 589. And see Clagett *v.* Phillips, 7 Jur. 31, 2 Y. & Coll. 82, 21 Eng. Ch. 82.

Rule stated.— If touching matters that come within the ordinary scope of professional employment, solicitors receive a communication in their professional capacity, either from a client or on his account and for his benefit in the transaction of his business, or if in the course of their employment they commit to paper matters which they know only through their professional relation, they are not only justified in withholding such matters but are bound to withhold, and cannot be compelled to disclose the information in any court either as a party or witness. Greenough *v.* Gaskell Coop. t. Brough. 96, 1 Myl. & K. 98, 7 Eng. Ch. 98.

Extent of protection.—An attorney cannot be compelled to disclose papers delivered or communications made to him, nor letters written by him or by his direction or entries made by him in his confidential character or situation. Greenough *v.* Gaskell, Coop. t. Brough. 96, 1 Myl. & K. 98, 7 Eng. Ch. 98.

Form of litigation not apparent.— Communications made in apprehension of litigation are privileged, although the precise form which the litigation might take could not have been foreseen at the time. Lafone *v.* Falkland Islands Co., 4 Kay & J. 34, 27 L. J. Ch. 25, 6 Wkly. Rep. 4.

Communications as to a contract which may lead to litigation are privileged. Wilson *v.* Northampton, etc., R. Co., L. R. 14 Eq. 477, 27 L. T. Rep. N. S. 507, 20 Wkly. Rep. 938.

Real estate transaction.— At the instance of a purchaser, a vendor cannot be required to disclose confidential communications made by him to his solicitor and counsel respecting the property, although made on behalf of persons

(5) Communications Through Agents. Communications between the attorney or his client and an agent employed by the former or by the latter at his instance to collect evidence or make investigations, or reports made by the agent to either of them in pursuance of such employment, are privileged.[9]

(B) *Information Acquired by Attorney Otherwise Than From Client.* Information as to facts acquired by the attorney otherwise than from his client or the agent of the latter or from his own agent, or transactions or communications had between the attorney and third parties, are not privileged from discovery,[10] except where such transactions were at the request of the client,[11] or the communications or information were had or obtained in view of anticipated litigation or for the purposes of such litigation.[12]

consulting singly and not during a dispute, after a threat, or during a suit. Pearse *v.* Pearse, 11 Jur. 52, 16 L. J. Ch. 153, 1 De G. & Sm. 12.

9. Macfarlan *v.* Rolt, L. R. 14 Eq. 580, 41 L. J. Ch. 649, 27 L. T. Rep. N. S. 305, 20 Wkly. Rep. 945; Bunbury *v.* Bunbury, 2 Beav. 173, 9 L. J. Ch. 1, 17 Eng. Ch. 173; Kennedy *v.* Lyell, 23 Ch. D. 387, 48 L. T. Rep. N. S. 455, 31 Wkly. Rep. 691 [*affirmed* in 9 App. Cas. 81, 53 L. J. Ch. 449, 50 L. T. Rep. N. S. 277, 32 Wkly. Rep. 497]; Churton *v.* Frewen, 2 Dr. & Sm. 390, 12 L. T. Rep. N. S. 105, 13 Wkly. Rep. 490; Reid *v.* Langlois, 2 Hall & T. 59, 14 Jur. 467, 19 L. J. Ch. 337, 1 Macn. & G. 627, 47 Eng. Ch. 498; Russell *v.* Jackson, 9 Hare 387, 15 Jur. 1117, 21 L. J. Ch. 146, 41 Eng. Ch. 387; Walsham *v.* Stainton, 2 Hem. & M. 1, 9 L. T. Rep. N. S. 603, 3 New Rep. 241, 12 Wkly. Rep. 119; Hooper *v.* Gumm, 2 Johns. & H. 602, 6 L. T. Rep. N. S. 891, 10 Wkly. Rep. 644; Steele *v.* Stewart, 9 Jur. 121, 14 L. J. Ch. 34, 1 Phil. 471, 19 Eng. Ch. 471 [*affirming* 13 Sim. 533, 36 Eng. Ch. 533]; Mostyn *v.* West Mostyn Coal, etc., Co., 34 L. T. Rep. N. S. 531.

Privileged and unprivileged matter mixed. — Where extracts, or copies from, or references to, public records, are so mixed up with the protected parts of the report of an agent that exhibition of one portion would disclose the other, the production of the report will not be ordered. Churton *v.* Frewen, 2 Dr. & Sm. 390, 12 L. T. Rep. N. S. 105, 13 Wkly. Rep. 490.

10. Crosby *v.* Berger, 4 Edw. (N. Y.) 254 [*affirmed* in 11 Paige 377, 42 Am. Dec. 117]; Paddon *v.* Winch, L. R. 9 Eq. 666, 39 L. J. Ch. 627, 22 L. T. Rep. N. S. 403; Ford *v.* Tennant, 32 Beav. 162, 9 Jur. N. S. 292, 32 L. J. Ch. 465, 7 L. T. Rep. N. S. 732, 1 New Rep. 303, 11 Wkly. Rep. 324; Wheeler *v.* Le Marchant, 17 Ch. D. 675, 45 J. P. 728, 50 L. J. Ch. 793, 44 L. T. Rep. N. S. 632; Greenough *v.* Gaskell, Coop. t. Brough. 96, 1 Myl. & K. 98, 7 Eng. Ch. 98; Gore *v.* Bowser, 5 De G. & Sm. 30; Marsh *v.* Keith, 1 Dr. & Sm. 342, 6 Jur. N. S. 1182, 30 L. J. Ch. 127, 3 L. T. Rep. N. S. 498, 9 Wkly. Rep. 115; Spenceley *v.* Schulenburgh, 7 East 357, 3 Smith K. B. 325; Desborough *v.* Rawlins, 2 Jur. 125, 7 L. J. Ch. 171, 3 Myl. & C. 515, 14 Eng. Ch. 515; Page *v.* Ward, 20 L. T. Rep. N. S. 518, 17 Wkly. Rep. 435; Morgan *v.* Shaw, 4 Madd. 54; Sawyer *v.* Birchmore, 3 Myl. & K. 572, 10 Eng. Ch. 572.

Copies of letters written by a party to a third person and obtained from the latter by the solicitor for the purpose of defense are not privileged. Chadwick *v.* Bowman, 16 Q. B. D. 561, 54 L. T. Rep. N. S. 16.

Knowledge acquired before communications. — That a solicitor or client obtains by means of confidential communications information about a fact will not protect him from disclosing what he already knew about that fact. Lewis *v.* Pennington, 6 Jur. N. S. 478, 29 L. J. Ch. 670, 8 Wkly. Rep. 465.

Knowledge by the attorney of facts patent to the senses, and as to which others have like knowledge or information, is not privileged. Greenough *v.* Gaskell, Coop. t. Brough. 96, 1 Myl. & K. 98, 7 Eng. Ch. 98.

Transcripts of shorthand notes. — A transcript of the notes of a trial or proceeding, taken by a shorthand writer in open court, is not privileged. *In re* Worswick, 38 Ch. D. 370, 58 L. J. Ch. 31, 59 L. T. Rep. N. S. 399, 36 Wkly. Rep. 625; Rawstome *v.* Preston Corp., 30 Ch. D. 116, 54 L. J. Ch. 1102, 52 L. T. Rep. N. S. 922, 33 Wkly. Rep. 795; Nicholl *v.* Jones, 2 Hem. & M. 588, 5 New Rep. 361, 13 Wkly. Rep. 451; *Re* Brown, 42 L. T. Rep. N. S. 501, 28 Wkly. Rep. 575. *Contra*, Nordon *v.* Defries, 8 Q. B. D. 508, 46 J. P. 566, 51 L. J. Q. B. D. 415, 30 Wkly. Rep. 612; Rapson *v.* Cubitt, 7 Jur. 77.

11. Marriott *v.* Anchor Reversionary Co., 3 Giff. 304, 8 Jur. N. S. 51, 5 L. T. Rep. N. S. 545.

A solicitor who at the request of his client negotiated a sale cannot at the instance of the purchaser be required to state what took place on the negotiations. Lodge *v.* Prichard, 4 De G. & Sm. 587, 15 Jur. 1147.

12. Wilson *v.* Northampton, etc., R. Co., L. R. 14 Eq. 477, 27 L. T. Rep. N. S. 507, 20 Wkly. Rep. 938; McCorquodale *v.* Bell, 1 C. P. D. 471, 45 L. J. C. P. 329, 35 L. T. Rep. N. S. 261, 24 Wkly. Rep. 399 [*approving* Cossey *v.* London, etc., R. Co., L. R. 5 C. P. 146, 39 L. J. C. P. 174, 22 L. T. Rep. N. S. 19, 18 Wkly. Rep. 493; Skinner *v.* Great Northern R. Co., L. R. 9 Exch. 298, 43 L. J. Exch. 150, 32 L. T. Rep. N. S. 233, 23 Wkly. Rep. 7]; Curling *v.* Perring, 4 L. J. Ch. 80, 2 Myl. & K. 380, 7 Eng. Ch. 380. In one decision it was held immaterial whether or not the subject-matter of the correspondence led to litigation or might probably do so. Wilson *v.* Northampton, etc., R. Co., L. R. 14 Eq. 477, 27 L. T. Rep. N. S. 507, 20 Wkly. Rep. 938.

(c) *Communications Between Attorneys.* Correspondence or communications between the individual members of a firm of attorneys[13] or between legal advisers representing the same parties stand on the same footing as communications between attorney and client.[14] But this rule is inapplicable to communications between the solicitors of opposite parties.[15]

(d) *Communications by Client With Others Than Attorney.* While it has been held that communications between a client and agent respecting matters concerning litigation, had with the intention of submitting the information obtained to an attorney, are privileged,[16] especially where the communication was at the instance of the attorney,[17] and that information obtained by the client, although such communications or otherwise from persons other than his legal advisers, with a view to litigation actual or contemplated, are likewise protected,[18] it has also been held that the privilege does not extend to communications had by the client with agents or strangers, without the suggestion or direction of the attorney, whether or not litigation is threatened or pending.[19]

In another that correspondence with third parties is only privileged when prepared after dispute, and for the purpose of obtaining information, evidence, or advice with reference to existing or contemplated litigation, and that the evidence obtained by the solicitor, or at his instance, even if obtained by the client, is protected, if obtained after litigation has been commenced or threatened, or with a view to the defense or prosecution of such litigation. Wheeler *v.* Le Marchant, 17 Ch. D. 675, 45 J. P. 728, 50 L. J. Ch. 793, 44 L. T. Rep. N. S. 632 [*quoted* with approval in Kennedy *v.* Lyell, 23 Ch. D. 387, 48 L. T. Rep. N. S. 455, 31 Wkly. Rep. 691].

Anonymous letters to the solicitor and counsel in a cause are treated as if received in answer to inquiries, and are privileged. *In re* Holloway, 12 P. D. 167, 56 L. J. P. 81, 57 L. T. Rep. N. S. 515, 35 Wkly. Rep. 751.

13. Mostyn *v.* West Mostyn Coal, etc., Co., 34 L. T. Rep. N. S. 531.

In an accounting between members of a firm of solicitors papers relating to professional business transacted for their clients is not privileged. Brown *v.* Perkins, 2 Hare 540, 8 Jur. 186, 24 Eng. Ch. 540.

14. Macfarlan *v.* Rolt, L. R. 14 Eq. 580, 41 L. J. Ch. 649, 27 L. T. Rep. N. S. 305, 20 Wkly. Rep. 945; Goodall *v.* Little, 15 Jur. 309, 20 L. J. Ch. 132, 1 Sim. N. S. 155, 40 Eng. Ch. 155; Catt *v.* Tourle, 23 L. T. Rep. N. S. 485, 19 Wkly. Rep. 56; Hughes *v.* Beddulph, 4 Russ. 190, 28 Rev. Rep. 46, 4 Eng. Ch. 190.

Letters written two years before suit by a solicitor to his law agents are not privileged, although they afterward acted as solicitors in a suit involving the subject-matter of the letters. Hampson *v.* Hampson, 26 L. J. Ch. 612.

15. Gore *v.* Harris, 15 Jur. 1168, 21 L. J. Ch. 10.

16. Reid *v.* Langlois, 2 Hall & T. 59, 14 Jur. 467, 19 L. J. Ch. 337, 1 Macn. & G. 627, 47 Eng. Ch. 498; Steele *v.* Stewart, 9 Jur. 121, 14 L. J. Ch. 34, 1 Phil. 471, 19 Eng. Ch. 471. And see Ross *v.* Gibbs, L. R. 8 Eq. 522, 39 L. J. Ch. 61; India, etc., Chartered Bank *v.* Rich, 4 B. & S. 73, 32 L. J. Q. B. 300, 8 L. T. Rep. N. S. 454, 11 Wkly. Rep. 830, 116 E. C. L. 73.

17. Friend *v.* London, etc., R. Co., 2 Ex. D. 437, 46 L. J. Exch. 696, 36 L. T. Rep. N. S. 729, 25 Wkly. Rep. 735; Lafone *v.* Falkland Islands Co., 4 Kay & J. 34, 27 L. J. Ch. 25, 6 Wkly. Rep. 4.

The test is whether or not the agent was doing that which it was the duty of the solicitor to do. Lafone *v.* Falkland Islands Co., 4 Kay & J. 34, 27 L. J. Ch. 25, 6 Wkly. Rep. 4.

18. Woolley *v.* North London R. Co., L. R. 4 C. P. 602, 38 L. J. C. P. 317, 20 L. T. Rep. N. S. 813, 17 Wkly. Rep. 650, 797; Kennedy *v.* Lyell, 23 Ch. D. 387, 48 L. T. Rep. N. S. 455, 31 Wkly. Rep. 691 [*affirmed* in 9 App. Cas. 81, 53 L. J. Ch. 449, 50 L. T. Rep. N. S. 277, 32 Wkly. Rep. 497].

Where claims have been made for injuries, or litigation is reasonably apprehended, the results of investigations made with a view to prepare a defense are privileged. Cossey *v.* London, etc., R. Co., L. R. 5 C. P. 146, 39 L. J. C. P. 174, 22 L. T. Rep. N. S. 19, 18 Wkly. Rep. 493; Skinner *v.* Great Northern R. Co., L. R. 9 Exch. 298, 43 L. J. Exch. 150, 32 L. T. Rep. N. S. 233, 23 Wkly. Rep. 7; Collins *v.* London Gen. Omnibus Co., 57 J. P. 678, 63 L. J. Q. B. 428, 68 L. T. Rep. N. S. 831, 5 Reports 355; London, etc., R. Co. *v.* Kirk, 51 L. T. Rep. N. S. 599.

Minutes of a corporation and subcommittees appointed to report as to matters connected with a litigation are privileged. Bristol *v.* Cox, 26 Ch. D. 678, 53 L. J. Ch. 1144, 50 L. T. Rep. N. S. 719, 33 Wkly. Rep. 255. And see Worthington *v.* Dublin, etc., R. Co., L. R. 22 Ir. 310.

19. English *v.* Tottie, 1 Q. B. D. 141, 45 L. J. Q. B. 138, 33 L. T. Rep. N. S. 724, 24 Wkly. Rep. 393; Kerr *v.* Gillespie, 7 Beav. 572, 29 Eng. Ch. 572; Anderson *v.* British Columbia Bank, 2 Ch. D. 644, 45 L. J. Ch. 449, 35 L. T. Rep. N. S. 76, 24 Wkly. Rep. 624; Colman *v.* Truman, 3 H. & N. 871, 28 L. J. Exch. 5; Vetter *v.* Schreiber, 53 J. P. 39; Glyn *v.* Caulfield, 15 Jur. 807, 3 Macn. & G. 463, 49 Eng. Ch. 358; Goodall *v.* Little, 15 Jur. 309, 20 L. J. Ch. 132, 1 Sim. N. S. 155, 40 Eng. Ch. 155 [*distinguishing* Steele

(E) *Communications Between Co-Defendants.* Communications between co-defendants are not privileged, although had with a view of preparing or making a defense,[20] or to enable the defendant addressed to consult a solicitor.[21] The rule is otherwise where the defendant addressed was instructed to forward the communication to their attorney,[22] or was himself an attorney, and acted in the cause as the agent for the attorney of record.[23]

(F) *Documents Prepared by or in Possession of Attorney* — (1) IN GENERAL. Documents prepared by an attorney in his client's cause or business, or belonging to the client and in the possession of the attorney, are privileged from discovery.[24]

v. Stewart, 9 Jur. 121, 14 L. J. Ch. 34, 1 Phil. 471, 19 Eng. Ch. 471]; McLean *v.* Jones, 66 L. T. Rep. N. S. 653; Westinghouse *v.* Midland R. Co., 48 L. T. Rep. N. S. 462.

Reports of a railway official made to the corporation at its request which fall short of being notes of the case to be laid before counsel are not privileged. Fenner *v.* London, etc., R. Co., L. R. 7 Q. B. 767, 41 L. J. Q. B. 313, 26 L. T. Rep. N. S. 971, 20 Wkly. Rep. 830.

Reports of employees of railroad corporations or other carriers as to accidents, and the results thereof, made in the ordinary course of duty or after investigation directed, are not privileged. Baker *v.* London, etc., R. Co., L. R. 3 Q. B. 91, 8 B. & S. 645, 37 L. J. Q. B. 53, 16 Wkly. Rep. 126; Skinner *v.* Great Northern R. Co., L. R. 9 Exch. 298, 43 L. J. Exch. 150, 32 L. T. Rep. N. S. 233, 23 Wkly. Rep. 7. And see Woolley *v.* North London R. Co., L. R. 4 C. P. 602, 38 L. J. C. P. 317, 20 L. T. Rep. N. S. 813, 17 Wkly. Rep. 650, 797; Parr *v.* London, etc., R. Co., 24 L. T. Rep. N. S. 558.

The report of a survey of a vessel, made at the instance of a party suing to recover for the improper construction of the same, is not privileged. Martin *v.* Butchard, 36 L. T. Rep. N. S. 732.

Investigation as to applicant for life insurance.— The result of a medical examination and report thereof to a life-insurance company, and the reports of persons to whom the company was referred for inquiries respecting the applicant are not privileged from inspection, where on the basis of the reports a special rate was charged for insurance. Mahony *v.* National Widows' L. Assur. Fund, L. R. 6 C. P. 252, 40 L. J. C. P. 203, 24 L. T. Rep. N. S. 548, 19 Wkly. Rep. 722.

20. Goodall *v.* Little, 15 Jur. 309, 20 L. J. Ch. 132, 1 Sim. N. S. 155, 40 Eng. Ch. 155; Betts *v.* Menzies, 3 Jur. N. S. 885, 26 L. J. Ch. 528, 5 Wkly. Rep. 767; Whitbread *v.* Gurney, Younge 541; Sankey *v.* Alexander, Ir. R. 8 Eq. 241.

Solicitor co-defendant.— Letters passing before dispute between co-defendants, one of whom acted as solicitor for the others in the original transaction, except such as contain legal advice, are not privileged. Sankey *v.* Alexander, Ir. R. 8 Eq. 241.

21. Goodall *v.* Little, 15 Jur. 309, 10 L. J. Ch. 132, 1 Sim. N. S. 155, 40 Eng. Ch. 155.

22. Jenkyns *v.* Bushby, L. R. 2 Eq. 547, 12 Jur. N. S. 558, 35 L. J. Ch. 820, 15 L. T. Rep. N. S. 310.

23. Hamilton *v.* Nott, L. R. 16 Eq. 112, 42 L. J. Ch. 512.

24. Goldstone *v.* Williams, [1899] 1 Ch. 47, 68 L. J. Ch. 24, 79 L. T. Rep. N. S. 373, 47 Wkly. Rep. 91; Bargaddie Coal Co. *v.* Wark, 3 Macq. H. L. 467. And see Dover *v.* Harrell, 58 Ga. 572.

Copies of depositions taken before a government official and obtained by a solicitor for the purpose of an action are privileged. The Palermo, 9 P. D. 6, 5 Aspin. 165, 53 L. J. P. 6, 49 L. T. Rep. N. S. 551, 32 Wkly. Rep. 403.

Documents in office of successors to solicitors.— In an action as to a right in property, documents which were prepared for the purpose of the defense to a former action concerning the same right, defended by a predecessor in title of one of the parties, and found in the office of the successors of the solicitors of such predecessor, are privileged from production. Calcraft *v.* Guest, [1898] 1 Q. B. 759, 67 L. J. Q. B. 505, 78 L. T. Rep. N. S. 283, 46 Wkly. Rep. 420.

Extracts from public records, which are the result of the professional knowledge, research, and skill of a legal adviser, and have been obtained for the purpose of defending an action, are privileged. Lyell *v.* Kennedy, 27 Ch. D. 1, 51 L. J. Ch. 937, 50 L. T. Rep. N. S. 730.

Title deed.—An attorney will not be required to produce a deed of his client's title or to discover its date or contents. Kington *v.* Gale, Rep. t. Finch 259, 23 Eng. Reprint 142.

Office copies of the examination of a bankrupt before the commissioner ought not to be produced until the hearing of the cause. Gander *v.* Stansfeld, 5 Jur. N. S. 778, 28 L. J. Ch. 436, 7 Wkly. Rep. 297. Office copies of accounts of transactions between defendant and a bank, prepared under the direction of plaintiffs' solicitors, for the purposes of the action and also with a view to future litigation, produced on the examination of defendant, admitted by such defendant to be correct, and made exhibits to depositions, read in an order of compromise of the action, which copies are in plaintiff's possession, are not privileged from production in a subsequent action between the same parties. Goldstone *v.* Williams, [1899] 1 Ch. 47, 68 L. J. Ch. 24, 79 L. T. Rep. N. S. 373, 47 Wkly. Rep. 91.

(2) Cases and Opinions — (a) In General. Although there are decisions holding that a case submitted for an opinion is not privileged,[25] the undoubted weight of authority is that cases so submitted by a client to his attorney or counsel and the opinion of the latter rendered thereon are protected from discovery at the instance of third parties.[26]

(b) As Between Trustee and Cestui Que Trust. This rule extends to cases submitted by, and opinions or advice given to, trustees for the purpose of enabling them to resist claims of their *cestuis que trustent*[27] or to an opinion given to a *cestui que trust* to aid him in an action against a trustee for an infraction of the trust;[28] but opinions procured by trustees for their guidance in dealing with or managing the trust estate,[29] or taken by the trustee for the benefit of

In New York where from the petition for discovery, and the affidavit in opposition, there is reason to believe that it is in the possession or under the control of the party or his attorney, an order for its production is proper. Union Trust Co. *v.* Driggs, 49 N. Y. App. Div. 406, 63 N. Y. Suppl. 381.

25. Stanhope *v.* Roberts, 2 Atk. 214, 26 Eng. Reprint 532; Radcliffe *v.* Fursman, 2 Bro. P. C. 514, 1 Eng. Reprint 1101; Glegg *v.* Legh, 4 Madd. 193; Richards *v.* Jackson, 18 Ves. Jr. 472, 34 Eng. Reprint 396; Preston *v.* Carr, 1 Y. & J. 175; Newton *v.* Berresford, Younge 377.

Opinion alone privileged.— A bill will lie for the discovery of a case submitted to counsel for his opinion, but not as to the opinion. Radcliffe *v.* Fursman, 2 Bro. P. C. 514, 1 Eng. Reprint 1101; Richards *v.* Jackson, 18 Ves. Jr. 472, 34 Eng. Reprint 396.

Matters not relating to dispute.— In an action for specific performance, cases submitted to counsel and correspondence with solicitors prior to sale are not privileged, because not relating to the dispute out of which the litigation arose. Flight *v.* Robinson, 8 Beav. 22, 8 Jur. 888, 13 L. J. Ch. 425.

26. West Grove Nat. Bank *v.* Earle, 196 Pa. St. 217, 46 Atl. 268; Jenkyns *v.* Bushby, L. R. 2 Eq. 547, 12 Jur. N. S. 558, 35 L. J. Ch. 820, 15 L. T. Rep. N. S. 310; Penruddock *v.* Hammond, 11 Beav. 59; Reece *v.* Trye, 9 Beav. 316; Bunbury *v.* Bunbury, 2 Beav. 173, 9 L. J. Ch. 1, 17 Eng. Ch. 173; Dennis *v.* Codrington, Cary 100, 21 Eng. Reprint 53; Bristol *v.* Cox, 26 Ch. D. 678, 53 L. J. Ch. 1144, 50 L. T. Rep. N. S. 719, 33 Wkly. Rep. 255; *Ex p.* Collier, 4 Deac. & C. 364; Pearse *v.* Pearse, 1 De G. & Sm. 12, 11 Jur. 52, 16 L. J. Ch. 153; Mauser *v.* Dix, 3 Eq. Rep. 650, 1 Jur. N. S. 466, 1 Kay & J. 451, 24 L. J. Ch. 497, 3 Wkly. Rep. 313; Walsingham *v.* Goodricke, 3 Hare 122, 25 Eng. Ch. 122; McCann *v.* O'Conor, 1 Hog. 341; Glyn *v.* Caulfield, 15 Jur. 807, 3 Macn. & G. 463, 49 Eng. Ch. 358; Beadon *v.* King, 13 Jur. 570, 17 Sim. 34, 42 Eng. Ch. 34; Holmes *v.* Baddeley, 9 Jur. 289, 14 L. J. Ch. 113, 1 Phil. 476, 19 Eng. Ch. 476 [*reversing* 6 Beav. 521]; Birch *v.* Barker, 5 Jur. 430; Nias *v.* Northern, etc., R. Co., 2 Jur. 295, 7 L. J. Ch. 170, 3 Myl. & Cr. 355 [*affirming* 2 Keen 76, 15 Eng. Ch. 76]; Willson *v.* Leonard, 7 L. J. Ch. 242; Mostyn *v.* West Mostyn Coal, etc., Co., 34 L. T. Rep. N. S. 531; Parkhurst *v.* Lowten, 2 Swanst. 194 and note, 19 Rev. Rep. 66, 36 Eng. Reprint 589; Richards *v.* Jackson, 18 Ves. Jr. 472, 34 Eng. Reprint 396; Knight *v.* Waterford, 2 Y. & C. Exch. 37; Combe *v.* London, 1 Y. & Coll. 631, 4 Y. & Coll. 139, 6 Jur. 571, 20 Eng. Ch. 631; Preston *v.* Carr, 1 Y. & J. 175; Newton *v.* Berresford, Younge 377; Sankey *v.* Alexander, Ir. R. 8 Eq. 241.

A draft of an advertisement of the result of an action involving a trade-mark, submitted to counsel, and settled by him for publication is privileged in an action for libel founded on the publication of the advertisement. Lowden *v.* Blakey, 23 Q. B. D. 332, 54 J. P. 54, 58 L. J. Q. B. 617, 61 L. T. Rep. N. S. 251, 38 Wkly. Rep. 64.

Opinion to deceased executor.— A case and opinion as to claims against a deceased executor are protected in the hands of a surviving executor who did not act in a proceeding to enforce claims of a similar nature against him. Adams *v.* Barry, 2 Y. & Coll. 167, 21 Eng. Ch. 167.

Where plaintiff sues as a pauper defendant is not entitled to inspect the case submitted to counsel and his opinion thereon, upon which permission to sue was obtained. Sloane *v.* Britain Steamship Co., [1897] 1 Q. B. 185, 66 L. J. Q. B. 72, 75 L. T. Rep. N. S. 542, 45 Wkly. Rep. 203.

27. Brown *v.* Oakshott, 12 Beav. 252; Talbot *v.* Marshfield, 2 Dr. & Sm. 549, 6 New Rep. 288.

A mere claimant of an estate is not entitled to the production of cases and accompanying documents submitted and opinions taken by a trustee. Wynne *v.* Humberston, 27 Beav. 421, 5 Jur. N. S. 5, 28 L. J. Ch. 284.

The relation of trustee and cestui que trust must exist in fact before the latter can insist on the production of cases submitted to counsel by the former, the opinions thereon or the papers accompanying the cases. Wynne *v.* Humberston, 27 Beav. 421, 5 Jur. N. S. 5, 28 L. J. Ch. 281.

28. Woods *v.* Woods, 4 Hare 83, 30 Eng. Ch. 83.

29. Wynne *v.* Humberston, 27 Beav. 421, 5 Jur. N. S. 5, 28 L. J. Ch. 281; Talbot *v.* Marshfield, 2 Dr. & Sm. 549, 6 New Rep. 288; Thomas *v.* India State Secretary, 18 Wkly. Rep. 312.

Action for breach of trust.— In an action by *cestuis que trustent* to compel their trustees to respond for a breach of the trust, cor-

the *cestui que trust*, are not privileged in a suit by the *cestui que trust* against the trustee.[30]

(c) As Between Shareholder and Corporation. A shareholder suing a corporation is entitled to the discovery of communications between it and its legal advisers, which were paid for out of corporate funds.[31]

(3) Briefs. The privilege has been held to extend to briefs prepared by counsel for or on behalf of a suitor,[32] although this proposition has been denied.[33]

(4) Drafts of Pleadings — Memoranda of Counsel. Drafts of pleadings or affidavits,[34] or notes or memoranda made by an attorney or counsel to aid him in the conduct of his client's litigation or business are protected from discovery.[35]

(G) *Documents Prepared by Client.* While it has been held that the privilege does not extend to documents prepared by the client unconnected with professional legal consultation or advice,[36] it has also been held that documents prepared in relation to an intended action, whether at the request of a solicitor or not, or whether or not ultimately submitted to him, if prepared for the purpose of taking his advice thereon, are protected.[37]

(H) *Disclosure of Residence and Occupation of Client.* In this country the weight of authority is to the effect that the attorney for plaintiff may be compelled to disclose the residence and occupation of his client;[38] but in England the contrary rule prevails, where the address of the client has been communicated confidentially.[39]

respondence between the trustees and their solicitors relative to matters involved in the action are not privileged. *In re* Mason, 22 Ch. D. 609, 52 L. J. Ch. 478, 48 L. T. Rep. N. S. 631.

No expense to estate.— Letters by trustees to their solicitors with reference to the trust and instructions and memoranda prepared by the latter for counsel are privileged, where no expense was incurred by the estate. Bacon *v.* Bacon, 34 L. T. Rep. N. S. 349.

30. Devaynes *v.* Robinson, 20 Beav. 42.

31. Gouraud *v.* Edison Gower Bell Telephone Co., 57 L. J. Ch. 498, 59 L. T. Rep. N. S. 813. But see Bristol *v.* Cox, 26 Ch. D. 678, 53 L. J. Ch. 1144, 50 L. T. Rep. N. S. 719, 33 Wkly. Rep. 255, where it was held that cases submitted to counsel by a municipal corporation and opinions thereon were privileged, although the party seeking their production was a rate-payer, and the opinions were paid for out of the rates.

32. Nicholl *v.* Jones, 2 Hem. & M. 588, 5 New Rep. 361, 13 Wkly. Rep. 451; Willson *v.* Leonard, 7 L. J. Ch. 242.

33. Walsham *v.* Stainton, 2 Hem. & M. 1, 9 L. T. Rep. N. S. 603, 3 New Rep. 241, 12 Wkly. Rep. 119.

Lunacy proceedings.— In an action by a remainder-man who had been committee of the life-tenant to enforce an agreement made in lunacy in respect of the estate, defendant, who it is claimed entered upon the estate in his private as well as his representative capacity, may be required to produce a brief of counsel in the lunacy proceedings. *Re* Brown, 42 L. T. Rep. N. S. 501, 28 Wkly. Rep. 575.

34. Lamb *v.* Orton, 1 Drew. 414, 10 Hare (appendix) xxxi, 22 L. J. Ch. 713, 44 Eng. Ch. 745, 1 Wkly. Rep. 207; Walsham *v.* Stainton, 2 Hem. & M. 1, 9 L. T. Rep. N. S. 603, 3 New Rep. 241, 12 Wkly. Rep. 119.

As against representative of client.— The draft of an answer prepared for a deceased defendant is privileged as to his personal representative. Belsham *v.* Perceval, 10 Jur. 772, 15 L. J. Ch. 438.

35. Nicholl *v.* Jones, 2 Hem. & M. 588, 5 New Rep. 361, 13 Wkly. Rep. 451; Walsham v. Stainton, 2 Hem. & M. 1, 9 L. T. Rep. N. S. 603, 3 New Rep. 241, 12 Wkly. Rep. 119.

A bill of the costs or charges of an attorney are privileged (Turton *v.* Barber, L. R. 17 Eq. 329, 43 L. J. Ch. 468, 22 Wkly. Rep. 432) as against the client or those claiming under him (Chant *v.* Brown, 9 Hare 790, 16 Jur. 606, 41 Eng. Ch. 790).

Notes of proceedings had in presence of adverse party.— Copies of or extracts from memoranda or notes made by a solicitor of what took place in proceedings at chambers in the presence of the opposite party are not privileged. Ainsworth *v.* Wilding, [1900] 2 Ch. 315, 69 L. J. Ch. 695, 48 Wkly. Rep. 539.

36. Maden *v.* Veevers, 7 Beav. 489, 29 Eng. Ch. 489, 5 Beav. 503, 12 L. J. Ch. 38.

Anticipated litigation.—A document is not protected on the ground that it was made to lay before a solicitor for his use in the defense in the event that an action was brought. Cook *v.* North Metropolitan Tramway Co., 54 J. P. 263.

37. Southwark, etc., Water Co. *v.* Quick, 3 Q. B. D. 315, 47 L. J. Q. B. 258, 26 Wkly. Rep. 341 [*affirming* 38 L. T. Rep. N. S. 28].

A model of premises destroyed by a casualty cannot be inspected by the adverse party. Morley *v.* Great Cent. Gas Co., 2 F. & F. 373.

38. Alden *v.* Goddard, 73 Me. 345; Corbett *v.* Gibson, 18 Hun (N. Y.) 49; Ninety-nine Plaintiffs *v.* Vanderbilt, 4 Duer (N. Y.) 632; Walton *v.* Fairchild, 4 N. Y. Suppl. 522. But see Corbett *v.* Gibson, 6 Fed. Cas. No. 3,222, 16 Blatchf. 336.

39. *Ex p.* Campbell, L. R. 5 Ch. 703, 23

(I) *Illegal and Fraudulent Transactions.* Communications in furtherance of an illegal or improper purpose, or relative to a fraud contrived between the attorney and his client, are not privileged.[40]

(J) *Who May Assert Privilege*—(1) In General. The privilege is not that of the attorney but of the client or his representatives,[41] and no presumption arises against a client who declines to permit his solicitor to disclose confidential communication.[42]

(2) Lien on Documents. An attorney cannot insist on a lien on documents as against a party seeking its production but as against whom he has no claim;[43] nor can one who has created such a lien compel production of the document on which the lien is claimed.[44]

(K) *Waiver or Loss of Privilege.* The privilege may be waived by the client,[45]

L. T. Rep. N. S. 289, 18 Wkly. Rep. 1056; Heath *v.* Crealock, L. R. 15 Eq. 257, 42 L. J. Ch. 455, 28 L. T. Rep. N. S. 101, 21 Wkly. Rep. 380; Harris *v.* Holler, 7 D. & L. 319, 19 L. J. Q. B. 62; *Re* Arnott, 60 L. T. Rep. N. S. 109, 5 Morr. Bankr. Cas. 286, 37 Wkly. Rep. 223; Clark *v.* Compton, 4 New Rep. 15. But see *contra* Cox *v.* Bochett, 18 C. B. N. S. 239, 11 Jur. N. S. 88, 34 L. J. C. P. 125, 11 L. T. Rep. N. S. 629, 13 Wkly. Rep. 292, 114 E. C. L. 239.

In a proper case, however, a solicitor may be required to disclose the address of a ward of the court. A solicitor is bound to disclose to the court information as to the whereabouts of a ward of the court, although he derived such information confidentially from his client in the course of his employment. Ramsbotham *v.* Senior, L. R. 8 Eq. 575, 21 L. T. Rep. N. S. 293, 17 Wkly. Rep. 1057, where the solicitor was ordered to produce the envelopes of letters from his client, the mother of the ward who had absconded with her, for inspection of the postmarks.

40. Reynell *v.* Sprye, 10 Beav. 51, 11 Beav. 618, 16 L. J. Ch. 117; Williams *v.* Quebrada R., etc., Co., [1895] 2 Ch. 751, 65 L. J. Ch. 68, 73 L. T. Rep. N. S. 397, 44 Wkly. Rep. 76; *In re* Postlethwaite, 35 Ch. D. 722, 56 L. J. Ch. 1077, 56 L. T. Rep. N. S. 733, 36 Wkly. Rep. 563; Cutts *v.* Pickering, 3 Ch. Rep. 66, 21 Eng. Reprint 730; Gore *v.* Bowser, 5 De G. & Sm. 30, 15 Jur. 1168, 21 L. J. Ch. 10; Russell *v.* Jackson, 9 Hare 387, 15 Jur. 1117, 21 L. J. Ch. 146, 41 Eng. Ch. 387; Hawkins *v.* Gathercole, 15 Jur. 186, 20 L. J. Ch. 303, 1 Sim. N. S. 150, 40 Eng. Ch. 150; Feaver *v.* Williams, 11 Jur. N. S. 902, 13 L. T. Rep. N. S. 270; Davis *v.* Parry, 4 Jur. N. S. 431, 27 L. J. Ch. 294, 6 Wkly. Rep. 171; Gartside *v.* Outram, 3 Jur. N. S. 39, 26 L. J. Ch. 113, 5 Wkly. Rep. 35; Gresley *v.* Mousley, 2 Jur. N. S. 156, 2 Kay & J. 288; Kelly *v.* Jackson, 13 Ir. Eq. 129.

Parties charged with fraud cannot claim privilege. Phillips *v.* Holmer, 15 Wkly. Rep. 578.

Illegal purpose.— The communication will not be protected because it may lead to the disclosure of an illegal purpose. Russell *v.* Jackson, 9 Hare 387, 15 Jur. 1117, 21 L. J. Ch. 146, 41 Eng. Ch. 387.

Immoral transaction.— It is immaterial that the transaction is immoral, if nothing transpired between the attorney and client which was unlawful, or it was proper to give the advice sought. Mornington *v.* Mornington, 2 Johns. & H. 697; Follett *v.* Jefferyes, 15 Jur. 118, 20 L. J. Ch. 65, 1 Sim. N. S. 3, 40 Eng. Ch. 3.

Attorney not party to action.— In Charlton *v.* Coombes, 4 Giff. 372, 9 Jur. N. S. 534, 32 L. J. Ch. 284, 8 L. T. Rep. N. S. 81, 1 New Rep. 547, 11 Wkly. Rep. 504, a demurrer by a solicitor to the production of letters written to him by his client about the time and with relation to an alleged fraudulent matter was allowed, the solicitor not having been made a party nor charged with fraud.

41. Russell *v.* Jackson, 9 Hare 387, 15 Jur. 1117, 21 L. J. Ch. 146, 41 Eng. Ch. 387; Gresley *v.* Mousley, 2 Jur. N. S. 156, 2 Kay & J. 288; Herring *v.* Clobery, 6 Jur. 202, 11 L. J. Ch. 149, 1 Phil. 91, 19 Eng. Ch. 91; Procter *v.* Smiles, 55 L. J. Q. B. 527; Parkhurst *v.* Lowten, 2 Swanst. 194, 19 Rev. Rep. 63, 36 Eng. Reprint 589; Wilson *v.* Rastall, 4 T. R. 753, 2 Rev. Rep. 515.

Parties claiming adversely under deceased client.— The reasons for the protection do not apply in cases of testamentary disposition by the client as between different parties claiming in different rights under and adversely to the will. Thus the privilege does not belong to executors against the next of kin, but following the legal interest is subject to the trusts and incidents to which the legal interest is subject. Russell *v.* Jackson, 9 Hare 387, 15 Jur. 1117, 21 L. J. Ch. 146, 41 Eng. Ch. 387.

42. Wentworth *v.* Lloyd, 10 H. L. Cas. 589, 10 Jur. N. S. 961, 33 L. J. Ch. 688, 10 L. T. Rep. N. S. 767.

43. *In re* Cameron's Coalbrook, etc., R. Co., 25 Beav. 1.

Lien for costs.— An attorney sued by a person claiming under his client cannot refuse to produce documents belonging to the latter on the ground that he has a lien thereon for costs. Lockett *v.* Cary, 3 New Rep. 405.

44. Hope *v.* Liddell, 20 Beav. 438, 7 De G. M. & G. 331, 3 Eq. Rep. 790, 1 Jur. N. S. 665, 24 L. J. Ch. 691, 3 Wkly. Rep. 581, 56 Eng. Ch. 255.

45. *In re* Cameron's Coalbrook, etc., Co., 25 Beav. 1, failure of client to object.

but not by the attorney, unless the client consent,[46] and a waiver of privilege as to a part of the documents does not affect the question of privilege as to the rest.[47] The privilege may be lost by publication of the documents,[48] by the attorney subsequently becoming the personal representative of his client,[49] or by setting out the privileged matter in a pleading;[50] but not by furnishing the adverse attorney with extracts of an opinion,[51] or loaning copies of a case and opinion to attorneys in another like case,[52] or by having made use of the documents in a former proceeding.[53]

(II) *Communications Between Husband and Wife.* A bill of discovery cannot be obtained against a husband or a wife to obtain evidence to use against the other,[54] and the death of one of them will not prevent the claim of privilege by the survivor as to communications made in his or her lifetime;[55] but it may be maintained for the purpose of obtaining evidence from a married person to be used against other parties, although the husband or wife has a collateral interest in opposition to the party filing the bill.[56]

(III) *Communications Between Physician and Patient.* Communications made by patients to their physicians are privileged.[57]

(IV) *State Secrets.* Political communications, the disclosure of which may be detrimental to the public interest, are privileged from discovery.[58] The question is to be determined not by the court but by the head of the department having the information.[59]

(V) *Matter Subjecting Party to Criminal Prosecution.* A person cannot be compelled to make a discovery, the effect of which might be to subject him to an indictment and punishment for an offense against the law of the state,[60]

Where a solicitor joined with his client as defendant claims privilege, but the client makes no objection, documents called for must be produced. Gaskell *v.* Chambers, 26 Beav. 303, 28 L. J. Ch. 388.

46. *In re* Cameron's Coalbrook, etc., R. Co., 25 Beav. 1.

Where the solicitor has acquired an interest in the subject-matter of the communications subsequent thereto, if he refuses to disclose them the consent of the client may be disregarded. Chant *v.* Brown, 7 Hare 79, 27 Eng. Ch. 79.

47. Lyell *v.* Kennedy, 27 Ch. D. 1, 51 L. J. Ch. 937, 50 L. T. Rep. N. S. 730.

48. Underwood *v.* India State Secretary, 12 Jur. N. S. 321, 35 L. J. Ch. 545, 14 L. T. Rep. N. S. 385, 14 Wkly. Rep. 551.

49. Crosby *v.* Beiger, 4 Edw. (N. Y.) 254 [*affirmed* in 11 Paige 377, 42 Am. Dec. 117].

50. Belsham *v.* Perceval, 10 Jur. 772, 15 L. J. Ch. 438. *Compare* Roberts *v.* Oppenheim, 26 Ch. D. 724, 53 L. J. Ch. 1148, 50 L. T. Rep. N. S. 729, 32 Wkly. Rep. 654.

51. Carey *v.* Cuthbert, Ir. R. 6 Eq. 599.

52. Enthoven *v.* Cobb, 2 De G. M. & G. 632, 17 Jur. 81, 51 Eng. Ch. 494.

53. Goldstone *v.* Williams, [1899] 1 Ch. 47, 68 L. J. Ch. 24, 79 L. T. Rep. N. S. 373, 47 Wkly. Rep. 91.

54. McCartney *v.* Fletcher, 10 App. Cas. (D. C.) 572; City Bank *v.* Bangs, 3 Paige (N. Y.) 36; Barron *v.* Grillard, 3 Ves. & B. 165, 35 Eng. Reprint 441; Le Texier *v.* Anspach, 5 Ves. Jr. 322, 31 Eng. Reprint 610; Alban *v.* Pritchett, 6 T. R. 680.

55. McCartney *v.* Fletcher, 10 App. Cas. (D. C.) 572.

56. Fitch *v.* Hill, 11 Mass. 286; Nelius *v.* Brickell, 2 N. C. 19; *Ex p.* James, 1 P. Wms. 610, 24 Eng. Reprint 538; Cole *v.* Gray, 2 Vern. Ch. 79, 23 Eng. Reprint 660; Vowles *v.* Young, 13 Ves. Jr. 140, 9 Rev. Rep. 154, 33 Eng. Reprint 247.

57. Lowenthal *v.* Leonard, 20 N. Y. App. Div. 330, 46 N. Y. Suppl. 818.

58. Hennessy *v.* Wright, 21 Q. B. D. 509, 53 J. P. 52, 56 L. J. Q. B. 530, 59 L. T. Rep. N. S. 323; Wadeer *v.* East India Co., 8 De G. M. & G. 182, 2 Jur. N. S. 407, 25 L. J. Ch. 345, 4 Wkly. Rep. 421, 57 Eng. Ch. 142; The H. M. S. Bellerophon, 44 L. J. Adm. 5, 31 L. T. Rep. N. S. 756, 23 Wkly. Rep. 248; Smith *v.* East India Co., 11 L. J. Ch. 71, 1 Phil. 50, 19 Eng. Ch. 50; Wright *v.* Mills, 62 L. T. Rep. N. S. 558.

Information to the government that a party intends to defraud the revenue laws is privileged. Worthington *v.* Scribner, 109 Mass. 487, 12 Am. Rep. 736.

How shown that discovery is inexpedient. — It is not sufficient to state in a formal affidavit that the discovery is objected to on the ground of public policy, but it should appear that the mind of a responsible person has been brought to bear on the question of the expediency to the public interest of giving or refusing the information asked for. Kain *v.* Farrer, 37 L. T. Rep. N. S. 469.

59. Beatson *v.* Skene, 5 H. & N. 838, 6 Jur. N. S. 780, 29 L. J. Exch. 430, 2 L. T. Rep. N. S. 378, 8 Wkly. Rep. 544.

60. *Georgia.*—Higdon *v.* Heard, 14 Ga. 255.

Illinois.— Robson *v.* Doyle, 191 Ill. 566, 61 N. E. 435; Hayes *v.* Caldwell, 10 Ill. 33.

Maryland.— Broadbent *v.* State, 7 Md. 416.

Massachusetts.— Adams *v.* Porter, 1 Cush. 170.

and he cannot waive this right even by agreement.[61] But the protection against answering does not extend to matters of moral turpitude not criminally punishable,[62] or to matters of crime, prosecution for which is barred by the statute of limitations.[63] And where a statute provides that no disclosure made in a civil suit shall be used in a criminal prosecution, it is no excuse for not making discovery that the civil injury for which complainant is seeking redress is also an offense under the criminal law.[64] So where a part only of the discovery sought tends to incriminate defendant, he should answer as to the part which would not

New Jersey.— Fairchild *v.* Fairchild, 43 N. J. Eq. 473, 11 Atl. 426; Black *v.* Black, 26 N. J. Eq. 431; Marsh *v.* Marsh, 16 N. J. Eq. 391, 84 Am. Dec. 164.

New York.— Deas *v.* Harvie, 2 Barb. Ch. 448; Taylor *v.* Bruen, 2 Barb. Ch. 301; Marsh *v.* Davison, 9 Paige 580; New York M. E. Church *v.* Jaques, 1 Johns. Ch. 65.

Ohio.— Kibby *v.* Kibby, Wright 607.

Tennessee.—Douglass *v.* Wood, 1 Swan 393.

Virginia.— Northwestern Bank *v.* Nelson, 1 Gratt. 108.

United States.—U. S. *v.* National Lead Co., 75 Fed. 94; Ocean Ins. Co. *v.* Fields, 18 Fed. Cas. No. 10,406, 2 Story 59; Stewart *v.* Drasha, 23 Fed. Cas. No. 13,424, 4 McLean 563.

England.— Selby *v.* Crew, 2 Anstr. 504; Oliver *v.* Haywood, 1 Anstr. 82; Harrison *v.* Southcote, 1 Atk. 528, 26 Eng. Reprint 333; Wallis *v.* Portland, 8 Bro. P. C. 161, 3 Eng. Reprint 588, 3 Ves. Jr. 494, 30 Eng. Reprint 1123, 4 Rev. Rep. 78; Cartwright *v.* Green, 2 Leach 952, 8 Ves. Jr. 405, 7 Rev. Rep. 99, 32 Eng. Reprint 412; Alabaster *v.* Harness, 70 L. T. Rep. N. S. 375; Thorpe *v.* Macauley, 5 Madd. 218; Redfern *v.* Redfern, [1891] P. 139, 60 L. J. P. 9; Harvey *v.* Lovekin, 10 P. D. 122, 54 L. J. P. 1, 33 Wkly. Rep. 188; Euston *v.* Smith, 9 P. D. 57, 32 Wkly. Rep. 596; Sarp *v.* Carter, 3 P. Wms. 375, 24 Eng. Reprint 1108; Firebrass' Case, 2 Salk. 550; Fleming *v.* St. John, 2 Sim. 181, 2 Eng. Ch. 181; Whitaker *v.* Izod, 2 Taunt. 115; Bird *v.* Hardwicke, 1 Vern. Ch. 109, 23 Eng. Reprint 349; *Ex p.* Symes, 11 Ves. Jr. 521, 32 Eng. Reprint 1191.

See 16 Cent. Dig. tit. "Discovery," § 12.

Where the bill is not demurrable because it does not charge defendant with anything which on its face imputes criminal misconduct to him an answer that the circumstances of the acts charged are such as to amount to a crime is sufficient to protect defendant from further answering. Northwestern Bank *v.* Nelson, 1 Gratt. (Va.) 108.

61. Lee *v.* Read, 5 Beav. 381, 6 Jur. 1026, 12 L. J. Ch. 26.

62. *Connecticut.*— Skinner *v.* Judson, 8 Conn. 528, 21 Am. Dec. 691.

Maine.— Foss *v.* Haynes, 31 Me. 81.

Mississippi.— Watts *v.* Smith, 24 Miss. 77.

New York.— Attwood *v.* Coe, 4 Sandf. Ch. 412.

Canada.—MacDonald *v.* Sheppard Pub. Co., 19 Ont. Pr. 282.

England.— French *v.* Connelly, 2 Anstr. 454; Goodman *v.* Holroyd, 15 C. B. N. S. 839, 109 E. C. L. 839; Manningham *v.* Bolingbroke, Dick. 533, 21 Eng. Reprint 377; Stickland *v.* Aldridge, 9 Ves. Jr. 516, 7 Rev. Rep. 292, 32 Eng. Reprint 703.

See 16 Cent. Dig. tit. "Discovery," § 12.

Illustration.— After the commencement of a suit upon a promissory note indorsed in blank by two persons as holders thereof, defendant filed a bill against one of the plaintiffs stating that he had a good defense to the action and that such plaintiff, defendant in the bill, was a material witness for defendant and that he had no interest in the note and had been made a party fraudulently for the purpose of depriving defendant of his testimony, and a discovery of these facts was prayed; but the bill did not disclose the nature of the defense and no discovery of evidence to be used in the trial at law was asked. It was held that the bill was sufficient and a demurrer on the ground that the purpose of the discovery might be useless or frivolous, or might subject defendant in the bill to a forfeiture or to punishment for crime was overruled. McIntyre *v.* Mancius, 16 Johns. (N. Y.) 592. Although the effect of usury is to subject the usurious lender to a loss of the money lent, yet a bill for discovery and relief in such case is not a criminal case, within the meaning of the provision of the constitution exempting persons from bearing testimony against themselves. Perrine *v.* Striker, 7 Paige (N. Y.) 598.

63. Skinner *v.* Judson, 8 Conn. 528, 21 Am. Dec. 691; Dwinal *v.* Smith, 25 Me. 379; Trinity House Corp. *v.* Burge, 7 L. J. Ch. O. S. 44, 2 Sim. 411, 29 Rev. Rep. 126, 2 Eng. Ch. 413. But the fact that the crime is barred by the statute of limitations must appear on the face of the bill, otherwise it cannot be insisted on at the hearing. Northwestern Bank *v.* Nelson, 1 Gratt. (Va.) 108.

64. *Kentucky.*— Meres *v.* Chrisman, 7 B. Mon. 422.

Maryland.— Day *v.* State, 7 Gill 321.

New York.— Siffkin *v.* Manning, 4 Edw. 37.

Pennsylvania.— Rose *v.* Savings Fund, 6 Phila. 10.

Tennessee.— Douglass *v.* Wood, 1 Swan 393.

See 16 Cent. Dig. tit. "Discovery," § 12.

Cases to which statute not applicable.— The act of 1833 providing that a defendant shall be obliged to answer as to any fraud, but that his answer shall not be used against him on an indictment, only intends to provide for compelling answer in cases in which he cannot be punished by common law but can be by statute, and hence an answer to a

incriminate him,[65] but only to that part,[66] and if the matter tending to incriminate and that which does not are so mixed up or connected that either by inference or exclusion they may lead to a disclosure which might subject defendant to prosecution, he is not bound to answer any portion of it. It is the duty of plaintiff to separate the two.[67] The privilege does not extend to a discovery of facts that would tend to incriminate others.[68]

(VI) *MATTER SUBJECTING PARTY TO FORFEITURE OR PENALTY.* Where the effect of making discovery would be to subject a party to a forfeiture or penalty, he is privileged from making the discovery,[69] unless the bill releases all claim to

charge that defendant has conspired to defraud complainant by means of forgeries cannot be compelled. Union Bank *v.* Barker, 3 Barb. Ch. (N. Y.) 358.

Cases to which statute applicable.— The act of March 3, 1860, makes it an offense for an officer of a body corporate to misappropriate moneys of such corporation, and by section 123 of the same act no such officer shall be entitled to refuse to make discovery by answer to a bill in equity, but such answer shall not be admissible in evidence against him if charged with any such misdemeanor. It was held that defendant, an officer of a municipal corporation, was within the provisions of said section and should make discovery by answer to a bill in equity. Philadelphia *v.* Keyser, 10 Phila. (Pa.) 50.

65. Fisher *v.* Price, 11 Beav. 194, 18 L. J. Ch. 235.

66. U. S. Bank *v.* Biddle, 2 Pars. Eq. Cas. (Pa.) 31.

67. Lichfield *v.* Bond, 6 Beav. 88, 7 Jur. 209, 12 L. J. Ch. 327; Glynn *v.* Houston, 1 Keen 329, 6 L. J. Ch. 129, 15 Eng. Ch. 329.

68. Tetley *v.* Easton, 18 C. B. 643, 25 L. J. C. P. 293, 86 E. C. L. 643; Parkhurst *v.* Lowten, 2 Swanst. 194, 19 Rev. Rep. 63, 36 Eng. Reprint 589. Thus an agent of a corporation cannot decline to answer for the reason that his answer would expose the corporation to a prosecution for a misdemeanor. Conant *v.* Delafield, 3 Edw. (N. Y.) 201.

69. *Illinois.*— Robson *v.* Doyle, 191 Ill. 566, 61 N. E. 435.

New Jersey.— Vanderveer *v.* Holcomb, 17 N. J. Eq. 87.

New York.— Bailey *v.* Dean, 5 Barb. 297; Tayler *v.* Bruen, 2 Barb. Ch. 301; Lansing *v.* Pine, 4 Paige 639; Brockway *v.* Copp, 3 Paige 539; Livingston *v.* Harris, 3 Paige 528; Livingston *v.* Tompkins, 4 Johns. Ch. 415, 8 Am. Dec. 598.

North Carolina.— McDowell *v.* Maultsby, 62 N. C. 16.

Tennessee.— Lindsley *v.* James, 3 Coldw. 477.

Virginia.— Northwestern Bank *v.* Nelson, 1 Gratt. 108.

West Virginia.— Thompson *v.* Whitaker Iron Co., 41 W. Va. 574, 23 S. E. 795.

United States.— U. S. *v.* Saline Bank, 1 Pet. 100, 7 L. ed. 69; U. S. *v.* National Lead Co., 75 Fed. 94; Atwill *v.* Ferrett, 2 Fed. Cas. No. 640, 2 Blatchf. 39; U. S. *v.* Twenty-eight Packages of Pins, 28 Fed. Cas. No. 16,561, Gilp. 306.

England.— Mexborough *v.* Whitwood Urban Dist. Council, [1897] 2 Q. B. 111, 66 L. J. Q. B. 637, 76 L. T. Rep. N. S. 765, 45 Wkly. Rep. 564; The Mary or Alexandra, L. R. 2 A. & E. 319, 38 L. J. Adm. 29, 18 L. T. Rep. N. S. 891, 17 Wkly. Rep. 551; Honeywood *v.* Selwin, 3 Atk. 276, 26 Eng. Reprint 961; Duncalf *v.* Blake, 1 Atk. 52, 26 Eng. Reprint 35; Mitchell *v.* Koecker, 11 Beav. 380, 12 Beav. 44, 13 Jur. 797, 18 L. J. Ch. 394; Nobkissen *v.* Hastings, 4 Bro. Ch. 253, 29 Eng. Reprint 879, 2 Ves. Jr. 84, 30 Eng. Reprint 535; Atty.-Gen. *v.* Vincent, Bunb. 192; Fane *v.* Atlee, 1 Eq. Cas. Abr. 77, 21 Eng. Reprint 890; Robinson *v.* Lamond, 15 Jur. 240; Parkhurst *v.* Lowten, 1 Meriv. 391, 15 Rev. Rep. 359, 35 Eng. Reprint 718; Hincks *v.* Nelthorpe, 1 Vern. Ch. 204, 23 Eng. Reprint 414; Brownsword *v.* Edwards, 2 Ves. 243, 28 Eng. Reprint 157; East India Co. *v.* Campbell, 1 Ves. 246, 27 Eng. Reprint 1010; Uxbridge *v.* Staveland, 1 Ves. 56, 27 Eng. Reprint 888.

See 16 Cent. Dig. tit. "Discovery," § 12.

Action by informer.— Discovery will not be granted in aid of an action brought by a common informer. Saunders *v.* Wiel, [1892] 2 Q. B. 321, 62 L. J. Q. B. 37, 67 L. T. Rep. N. S. 207, 4 Reports 1, 40 Wkly. Rep. 594; Hobbs *v.* Hudson, 25 Q. B. D. 232, 54 J. P. 520, 59 L. J. Q. B. 562, 63 L. T. Rep. N. S. 215, 38 Wkly. Rep. 682; Jones *v.* Jones, 22 Q. B. D. 425, 58 L. J. Q. B. 178, 60 L. T. Rep. N. S. 421, 37 Wkly. Rep. 479; Martin *v.* Treacher, 16 Q. B. D. 507, 50 J. P. 356, 55 L. J. Q. B. 209, 54 L. T. Rep. N. S. 7, 34 Wkly. Rep. 315; Hunnings *v.* Williamson, 10 Q. B. D. 459, 47 J. P. 390, 52 L. J. Q. B. 273, 48 L. T. Rep. N. S. 581, 31 Wkly. Rep. 336.

Usury.— Discovery will not be granted in aid of the defense of usury. Pearce *v.* Hedrick, 3 Litt. (Ky.) 109; Masters *v.* Prentiss, 55 N. C. 62; Smith *v.* Fisher, 2 Desauss. (S. C.) 275; Hogshead *v.* Baylor, 16 Gratt. (Va.) 99. *Contra,* Zeigler *v.* Scott, 10 Ga. 389, 54 Am. Dec. 395; Ball *v.* Leonard, 24 Ill. 146.

The refunding of money received on a stock-jobbing transaction is not such a forfeiture as will excuse a defendant liable to refund from answering under oath in relation to such transaction. Gram *v.* Stebbins, 6 Paige (N. Y.) 124.

Forfeiture of securities for moneys lent at play is not a penalty of such a nature as to protect a party from discovering whether the security on which he brings his action was not for moneys lent at play. Sloman *v.* Kelly, 4 Y. & C. Exch. 169.

the penalty,[70] or unless the right to protect himself against answering has been waived by agreement by defendant as is competent for him to do,[71] or unless the right to enforce the penalty or forfeiture is barred by the statute of limitations.[72]

(VII) *How Privilege Claimed.* Where facts sufficient to justify defendant's claim of privilege appear on the face of the bill the claim may be made by demurrer,[73] otherwise it must be made in the answer.[74]

f. Practice. A bill of discovery cannot be set down for final hearing.[75] The proper course is either to strike it out of the paper,[76] or to pray an order on plaintiff to pay the costs of the suit to be taxed.[77] An order to stay proceedings because a bill of discovery is pending must be made in the equity suit and not in the action at law.[78]

Forfeiture of charter.— The objection that a discovery may subject a corporation of which defendants are officers to forfeiture of its charter is not sufficient to support a general demurrer to the whole bill, both as to the discovery and relief, even if it would have authorized a demurrer to the discovery as to particular facts. Defendants may be compelled to make discovery in certain cases, although it may subject the corporation to forfeiture of its franchises. Robinson *v.* Smith, 3 Paige (N. Y.) 222, 24 Am. Dec. 212.

Conversion by widow of property belonging to estate.— To a bill of discovery filed by an executor against the widow of his testator charging her with withholding from him a certain sum of money and choses in action belonging to the estate of his testator and that no person was present when she possessed herself of them so that there was no legal proof without a discovery, defendant demurred on the ground that the discovery might and did by the laws of the state subject her to certain pains and penalties, but the court overruled the demurrer and held that the allegations in the bill were not such as would if answered subject her to such consequences. Wolf *v.* Wolf, 2 Harr. & G. (Md.) 382, 18 Am. Dec. 313.

70. Shed *v.* Garfield, 5 Vt. 39; Finch *v.* Rikeman, 9 Fed. Cas. No. 4,788, 2 Blatchf. 301; Boteler *v.* Allington, 3 Atk. 453, 26 Eng. Reprint 1061; Atty.-Gen. *v.* Conroy, 2 Jones Exch. 791.

71. French *v.* Macale, 1 C. & L. 459, 2 Dr. & War. 269, 4 Ir. Eq. 568; East India Co. *v.* Atkins, 1 Str. 168; African Co. *v.* Parish, 2 Vern. Ch. 244, 23 Eng. Reprint 758. A man may contract so as to incur the obligation to make the discovery of all the facts relative to that contract, although the effect of that discovery may incidentally subject him to pecuniary penalties. Green *v.* Weaver, 6 L. J. Ch. O. S. 1, 1 Sim. 404, 27 Rev. Rep. 214, 2 Eng. Ch. 404.

72. Williams *v.* Farrington, 3 Bro. Ch. 38, 29 Eng. Reprint 395; Talbot *v.* Smith, 1 Ridg. L. & S. 360.

Limits of rule.— The rule, however, has never been so far extended as to relieve a party from answering on the ground that it would subject him to a mere pecuniary loss which he could not in justice claim, or that the answer would affect his right of action for the recovery of a sum of money in violation of law (Taylor *v.* Matchell, 1 How. (Miss.) 596; Williams *v.* Trye, 18 Beav. 366, 18 Jur. 442, 23 L. J. Ch. 860, 2 Wkly. Rep. 314; Benyon *v.* Nettlefold, 15 Jur. 209, 20 L. J. Ch. 186, 3 Macn. & G. 94, 49 Eng. Ch. 71); and defendant is not protected from discovery where an answer might merely subject him to liquidated damages and not a penalty (Adams *v.* Batly, 18 Q. B. D. 625, 56 L. J. Q. B. 393, 56 L. T. Rep. N. S. 770, 35 Wkly. Rep. 437; Jones *v.* Green, 3 Y. & J. 298); or where the discovery may occasion loss of a future or present benefit as in the case of a conditional limitation over (Chauncey *v.* Tahourden, 2 Atk. 392, 26 Eng. Reprint 637). So if it is a debatable question whether there is a penalty attached to the act, discovery of which is sought, the party must answer (Wilkinson *v.* L'Engier, 2 Y. & C. Exch. 366), and where a defendant does not object to answering on the ground that his answer may subject him to a penalty or forfeiture, and does not allege in his answer that the discovery sought would subject him to any such danger, he cannot avail himself of that defense on the argument. Thomas *v.* Watson, 23 Fed. Cas. No. 13,913, Taney 297.

73. McCartney *v.* Fletcher, 10 App. Cas. (D. C.) 572; West Point Nat. Bank *v.* Earle, 196 Pa. St. 217, 46 Atl. 268; Wistar *v.* McManus, 54 Pa. St. 318, 93 Am. Dec. 700; Daisley *v.* Dun, 98 Fed. 497.

74. McCartney *v.* Fletcher, 10 App. Cas. (D. C.) 572; Hayes *v.* Caldwell, 10 Ill. 33.

Defendant must fully state in his answer the facts which entitle him to protection, and a mere statement in argument of counsel of a reason for declining to answer an interrogatory is not sufficient. Slater *v.* Banwell, 50 Fed. 150.

75. Townsend *v.* Odam, Walk. (Miss.) 356.

It is improper to dismiss a bill in equity for discovery for want of prosecution. Woodcock *v.* King, 1 Atk. 286, 26 Eng. Reprint 183; Anonymous, Moseley 185; Bennett *v.* Harrap, 22 L. T. Rep. N. S. 647; Parr *v.* Howlin, San. & Sc. 124. But see Gurish *v.* Donovan, 2 Atk. 166, Barn. Ch. 428, 26 Eng. Reprint 504.

76. Anonymous, Moseley 185.

77. Woodcock *v.* King, 1 Atk. 286, 26 Eng. Reprint 183.

78. Noble *v.* Tillotson, 2 Ind. 553.

g. Costs. As a general rule the complainant in a bill of discovery must pay the costs.[79] But where prior to the filing of the bill an application has been made to the opposite party for the information sought and he has refused to furnish the information and the same is within his knowledge he is not entitled to costs.[80] So where a bill for discovery contains also a prayer for general relief and a replication is filed to the answer defendant is not entitled to an order for costs on motion as in a mere bill for discovery,[81] and where an injunction is prayed in aid of a bill of discovery solely and unsuccessfully opposed, the costs therein must be paid by defendant.[82] Where exceptions to the answer are taken and sustained, defendant must pay the costs upon the exceptions.[83] Under the English practice, when defendant to a bill of discovery and a commission examines in chief, instead of confining himself to cross-examination, he should not have costs,[84] and in any event neither party is entitled to costs as to the commission.[85] For the purpose of taxing costs the officers of corporations are deemed part of the corporation.[86] But when the discovery obtained is used to charge the officers in supplemental proceedings they are entitled to their costs.[87] Where the complainant is compelled to pay the costs of an officer of a corporation necessarily made a party to a bill he is entitled to recover the same from the other parties to the suit.[88]

B. Production and Inspection of Books and Papers — 1. Jurisdiction. The power to direct either party to give to the other an inspection and permission to take copies of any books or papers in his possession is inherent in a court of equity, and can be exercised in the absence of any statute conferring such right.[89] The jurisdiction is confined to cases where the same are evidential in a cause pending in the court, and cases arising under a bill filed for relief, as well as for discovery, or under a bill filed for discovery only in aid of a prosecution or defense in litigation pending or contemplated.[90] The power of a court of equity to order production or inspection of books or papers should be exercised with

79. *Alabama.*— Drake *v.* Foster, 28 Ala. 649.

Maryland.— Price *v.* Tyson, 3 Bland 392, 22 Am. Dec. 279.

Massachusetts.— Wright *v.* Dame, 1 Metc. 237.

New Hampshire.— Dennis *v.* Riley, 21 N. H. 50.

New York.— Deas *v.* Harvie, 2 Barb. Ch. 448; Broughton *v.* Phillips, 6 Paige 334; King *v.* Clark, 3 Paige 76; Burnett *v.* Sanders, 4 Johns. Ch. 503.

Ohio.— Porter *v.* Dailey, Wright 759.

South Carolina.— McCelvy *v.* Noble, 13 Rich. 330.

England.— London Assur. Co. *v.* Hankey, 1 Anstr. 9; Hickey *v.* Duffey, Hayes 353; Skrine *v.* Powell, 9 Jur. 1054, 15 Sim. 81, 38 Eng. Ch. 81; Meyrick *v.* Whishaw, 4 Madd. 272; Noble *v.* Garland, 1 Madd. 344; Coventry *v.* Bentley, 3 Meriv. 677, 36 Eng. Reprint 259; Hibberson *v.* Fielding, 2 Sim. & St. 371, 1 Eng. Ch. 371; Simmonds *v.* Kinnaird, 4 Ves. Jr. 735, 31 Eng. Reprint 380.

See 16 Cent. Dig. tit. "Discovery," § 38.

80. Dennis *v.* Riley, 21 N. H. 50; King *v.* Clark, 3 Paige (N. Y.) 76; Burnett *v.* Sanders, 4 Johns. Ch. (N. Y.) 503; McElwee *v.* Sutton, 1 Hill Eq. (S. C.) 32; Lovell *v.* Yates, 6 Jur. 479, 11 L. J. Ch. 158; Perry *v.* Newenham, 1 Molloy 72; Weymouth *v.* Boyer, 1 Ves. Jr. 416, 30 Eng. Reprint 416.

81. McDougall *v.* Miln, 2 Paige (N. Y.) 325.

Where the bill prays relief against all of the defendants but one, against whom it only prays discovery, such defendant cannot after answer obtain an order for the costs. Atty.-Gen. *v.* Burch, 4 Madd. 178.

82. Lovell *v.* Galloway, 3 Wkly. Rep. 156.

83. Price *v.* Tyson, 3 Bland (Md.) 392, 22 Am. Dec. 279.

84. Noble *v.* Garland, Coop. 222, 35 Eng. Reprint 538, 19 Ves. Jr. 372, 34 Eng. Reprint 556; Anonymous, 8 Ves. Jr. 69, 32 Eng. Reprint 277.

85. London Assur. Co. *v.* Hankey, 1 Anstr. 9.

86. Masters *v.* Rossie Read Min. Co., 2 Sandf. Ch. (N. Y.) 301.

87. Masters *v.* Rossie Read Min. Co., 2 Sandf. Ch. (N. Y.) 301.

88. Fulton Bank *v.* New York, etc., Canal Co., 4 Paige (N. Y.) 127.

89. Bryant *v.* Peters, 3 Ala. 160; Williams *v.* Williams, 1 Md. Ch. 199; Lawless *v.* Fleming, 56 N. J. Eq. 615, 40 Atl. 638; Little *v.* Cooper, 10 N. J. Eq. 273; Elliston *v.* Hughes, 1 Head (Tenn.) 225. Where a reference is made to a master to superintend the production of books and papers all parties in interest may examine the party producing the same as to the fact whether the order has been complied with, and the master should allow a reasonable time to inspect the books and papers and to prepare interrogatories for the examination of the party if necessary. Hallett *v.* Hallett, 2 Paige (N. Y.) 432.

90. Fuller *v.* Hollander, 61 N. J. Eq. 648, 47 Atl. 646, 88 Am. St. Rep. 456.

caution.[91] A production for inspection in advance of the trial will not be ordered.[92] A party has no right to an inspection of papers proved as exhibits by his adversary.[93]

2. PROCEDURE TO OBTAIN — a. Demand For Production or Inspection. A demand for production or inspection is not a necessary prerequisite for a bill of discovery of such books or papers.[94]

b. Form and Requisites of Plaintiff's Pleadings. The proper and only method for obtaining the inspection or production of books or papers is by bill or cross bill alone,[95] which bill or cross bill must describe the books or papers of which an inspection or production is sought with reasonable certainty[96] and must state the facts which are expected to be proved thereby.[97] The bill must show possession or control of the books or papers sought by the party who is asked to produce them,[98] the pertinency of the facts to be proved by them to the issue,[99] and that the facts pertain to the case of the complainant,[1] and must require answer under oath,[2] admitting or denying the allegations.[3]

3. CHARACTER OF ANSWER ENTITLING PLAINTIFF TO PRODUCTION. Plaintiff is in no case entitled to a production and inspection of the documents, unless defendant in his answer admits that they are in his possession or power.[4] If, however, the answer to a bill asking production and inspection admits possession of the books

91. Williams *v.* Savage Mfg. Co., 3 Md. Ch. 418; Williams *v.* Williams, 1 Md. Ch. 199.

92. Adams *v.* Rolston, 6 N. J. L. 183; Ryder *v.* Bateman, 93 Fed. 31. Before issue joined a defendant in a patent case will not be ordered to set up and operate his machine for the inspection of plaintiff's expert. Com. *v.* Perkins, 124 Pa. St. 36, 16 Atl. 525, 2 L. R. A. 223.

93. Clark *v.* Field, 10 Vt. 321.

94. Burroughs *v.* McNeill, 22 N. C. 297.

95. Evans *v.* Staples, 42 N. J. Eq. 584, 8 Atl. 528; Lupton *v.* Johnson, 2 Johns. Ch. (N. Y.) 429; Bischoffsheim *v.* Brown, 29 Fed. 341; Burton *v.* Neville, 2 Cox Ch. 242, 30 Eng. Reprint 112; Spragg *v.* Corner, 2 Cox Ch. 109, 30 Eng. Reprint 50; —— *v.* ——, 2 Dick. 778; Micklethwaite *v.* Moore, 3 Meriv. 292, 36 Eng. Reprint 112; Milligan *v.* Mitchell, 6 Sim. 186, 9 Eng. Ch. 186; Penfold *v.* Nunn, 5 Sim. 409, 9 Eng. Ch. 409; Pickering *v.* Rigby, 18 Ves. Jr. 484, 34 Eng. Reprint 400.

Limitations of rule.— It has been held that the rule is different as to partnership books and papers, to the inspection of which both parties have an equal right, but which are in the hands of one of the copartners or his assignees or representatives. In such a case, upon the application of either party in any such suit, the adverse party will be compelled to deposit the partnership books and papers which are in his possession or under his control, in the hands of the officers of the court for the inspection of the party making such application. Kelly *v.* Eckford, 5 Paige (N. Y.) 548. This doctrine has been denied even in a partnership case in Pickering *v.* Rigby, 18 Ves. Jr. 484, 34 Eng. Reprint 400, by Lord Eldon. In Maund *v.* Allies, 3 Jur. 309, 4 Myl. & C. 503, 18 Eng. Ch. 503, he again refused an order for the inspection of plaintiff's documents where there was a partnership and one of the partners was receiver, except so far as his receiver's books were concerned.

96. Eschbach *v.* Lightner, 31 Md. 528; Duvall *v.* Farmers' Bank, 2 Bland (Md.) 686; Williams *v.* Savage Mfg. Co., 3 Md. Ch. 418; Williams *v.* Williams, 1 Md. Ch. 199. Thus an application for the production of books which state "that if they had been kept with any regard to good faith and accuracy, they must contain evidence pertinent to the issues in the cause," but which designates no particular books and no facts expected to be proved by them, is insufficient. Williams *v.* Savage Mfg. Co., 3 Md. Ch. 418.

97. Williams *v.* Savage Mfg. Co., 3 Md. Ch. 418; Williams *v.* Williams, 1 Md. Ch. 199.

98. Williams *v.* Savage Mfg. Co., 3 Md. Ch. 418; Williams *v.* Williams, 1 Md. Ch. 199.

99. Eschbach *v.* Lightner, 31 Md. 528. A bill will not lie to compel defendant to bring into court all papers and parchments in his possession, anterior to a certain date, in which plaintiff may have an apparent interest, for plaintiff's inspection, that he may thereby obtain the necessary evidence to enable him to prosecute his claim to certain lands, if he has any. Collom *v.* Francis, 1 Pars. Eq. Cas. (Pa.) 527.

1. Eschbach *v.* Lightner, 31 Md. 528.

2. Carpenter *v.* Benson, 4 Sandf. Ch. (N. Y.) 496.

3. Bischoffsheim *v.* Brown, 29 Fed. 341.

4. Watson *v.* Renwick, 4 Johns. Ch. (N. Y.) 381; Erskine *v.* Bize, 2 Cox Ch. 226, 30 Eng. Reprint 105; Murray *v.* Walter, Cr. & Ph. 114, 3 Jur. 719, 18 Eng. Ch. 114; Heeman *v.* Midland, 4 Madd. 391; Wales *v.* Liverpool, 1 Swanst. 114, 36 Eng. Reprint 320; Evans *v.* Richardson, 1 Swanst. 7, 36 Eng. Reprint 275.

If defendant makes no allusion to the documents mentioned in the bill, plaintiff must except to the answer. He is not entitled on motion to the production of papers to which no allusion is made in the answer. Robbins *v.* Davis, 20 Fed. Cas. No. 16,880, 1 Blatchf. 238.

or documents mentioned in the bill a motion for the production based on such answer is then made,[5] which will be granted as a matter of course.[6]

4. Excuses For Failure to Obey Order For Production. An affidavit that the books are not in the possession of defendant will not prevent the order for their production from being made, but will exonerate defendant from producing the books in response to the order.[7]

III. Under Statutory Provisions.

A. Examination of Parties and Other Persons — 1. In General. The statutes of many of the states provide a method of obtaining discovery in an action at law, either by an examination of the adverse party before trial,[8] or on interrogatories filed in the cause.[9] In New York the statutes also provide a

5. Eager *v.* Wiswall, 2 Paige (N. Y.) 369; Bischoffsheim *v.* Brown, 29 Fed. 341.

6. Eager *v.* Wiswall, 2 Paige (N. Y.) 369; Watson *v.* Renwick, 4 Johns. Ch. (N. Y.) 381. *Compare*, however, Bischoffscheim *v.* Brown, 29 Fed. 34, in which it is said that upon the application defendants may controvert the materiality of the evidence.

7. Russell *v.* McLellan, 21 Fed. Cas. No. 12.158, 3 Woodb. & M. 157.

8. *Connecticut.*— Buckingham *v.* Barnum, 30 Conn. 358.

Indiana.— Working *v.* Garn, 148 Ind. 546, 47 N. E. 951.

Louisiana.— Darbes *v.* Decuir, 5 Rob. 491; Allain *v.* Truxillo, 14 La. 297; Carlin *v.* Stewart, 2 La. 73.

Missouri.— Coburn *v.* Tucker, 21 Mo. 219.

Nebraska.— Farrington *v.* Stone, 35 Nebr. 456, 53 N. W. 389.

New Hampshire.— State *v.* Farmer, 46 N. H. 200.

New Jersey.— Apperson *v.* Mutual Ben. L. Ins. Co., 38 N. J. L. 272.

New York.— Herbage *v.* Utica, 109 N. Y. 81, 16 N. E. 62.

North Carolina.— Pender *v.* Mallett, 122 N. C. 163, 30 S. E. 324, 123 N. C. 57, 31 S. E. 351.

Ohio.— Thomas *v.* Beebe, 8 Ohio S. & C. Pl. Dec. 231, 5 Ohio N. P. 32.

South Carolina.— Wallace *v.* Norvell, 1 Bailey 125.

Texas.— West Michigan Furniture Co. *v.* Lacey, (Civ. App. 1896) 34 S. W. 167.

Vermont.— *In re* Foster, 44 Vt. 570.

Virginia.— Plainville *v.* Brown, 4 Hen. & M. 482.

Wisconsin.— Kelly *v.* Chicago, etc., R. Co., 60 Wis. 480, 19 N. W. 521.

The Wisconsin statutes provide that the examination of a party otherwise than as a witness on the trial may be taken by deposition at the instance of the adverse party, in any action or proceeding, at any time after its commencement, and before judgment, and that in any examination the judge or commissioner shall have power to compel the party to answer. It was held that the filing of a verified claim for allowance in the county court against an administrator is a proceeding and the claimant can be compelled to appear before a commissioner of the circuit court to testify as to the transaction between him and the intestate. Frawley *v.* Cosgrove, 83 Wis. 441, 53 N. W. 689.

The Revised Statutes of the United States providing that wherever necessary to prevent a failure of justice, United States courts may issue a dedimus to take depositions, does not authorize the granting of a dedimus to take the deposition of a defendant, where the only object appears to be to ascertain what he will swear to before placing him on the witness stand in court, especially where no answer has been filed and the answer is not yet due. Turner *v.* Shackman, 27 Fed. 183.

The New York code of civil procedure, section 872, does not prevent the examination of parties to actions, but merely exempts the applicant from the restrictions imposed thereby on other examinations. Farmers' L. & T. Co. *v.* Siefke, 144 N. Y. 354, 39 N. E. 358.

In Louisiana a party residing in the parish must answer in open court, before the judge at chambers, the clerk, or some judicial officer of the parish authorized to administer oaths, and then no commission is requisite. Baine *v.* Wilson, 18 La. 59.

9. *Alabama.*— Cain Lumber Co. *v.* Standard Dry Kiln Co., 108 Ala. 346; Goodwin *v.* Wood, 5 Ala. 152.

Arkansas.— Conway *v.* Turner, 8 Ark. 356.

Connecticut.— Downie *v.* Nettleton, 61 Conn. 593, 24 Atl. 977.

Florida.— Volusia County Bank *v.* Bigelow, (1903) 33 So. 704.

Georgia.— Brown *v.* Mercier, 82 Ga. 550, 9 S. E. 471.

Iowa.— Jones *v.* Berryhill, 25 Iowa 289.

Kentucky.— Burnett *v.* Garnett, 18 B. Mon. 68.

Louisiana.— Demarest *v.* Ledoux, 10 Rob. 189.

Massachusetts.— Robbins *v.* Brockton St. R. Co., 180 Mass. 51, 61 N. E. 265.

Michigan.— Mulhern *v.* Grove, 111 Mich. 528, 70 N. W. 15.

Mississippi.— Illinois Central R. Co. *v.* Sanford, 75 Miss. 862, 23 So. 355, 942.

New Hampshire.— Wood *v.* Weld, Smith 367.

North Carolina.— Shober *v.* Wheeler, 113 N. C. 370, 18 S. E. 328.

Ohio.— Springfield, etc., R. Co. *v.* Western R. Constr. Co., 49 Ohio St. 681, 32 N. E. 961.

Pennsylvania.—Hazlett's Estate, 8 Pa. Dist. 201.

method for taking the deposition of an unwilling witness for use on the hearing of motions.[10]

2. Who May Be Examined — a. Parties and Persons Interested in Suit. Unless the statute expressly so provides no person except parties to the record can be examined before trial.[11] That a person is a party in interest is not sufficient to authorize his examination.[12] But persons who are parties to the record may be so examined, notwithstanding the fact that they are suing or being sued in a representative capacity.[13] A party not a resident of the county in which the suit is pending may be examined before trial;[14] so also may a party non-resident of the state if he can be found in the jurisdiction.[15]

b. Officers or Agents of Corporation. A statute authorizing the examination of parties before trial at the instance of the adversary party does not authorize the examination of officers, servants, agents, or employees of a party, although a corporation.[16] However, authority to examine officers of a corporation, which is a party to the suit, may be conferred by express statutory provision.[17] Under such

South Carolina.— Holly *v.* Thurston, Rice 282.

Texas.— Knight *v.* Booth, 35 Tex. 10.

Virginia.— Poindexter *v.* Davis, 6 Gratt. 481.

Washington.— Lowry *v.* Moore, 16 Wash. 476, 48 Pac. 238, 58 Am. St. Rep. 49.

Wisconsin.— Blossom *v.* Ludington, 32 Wis. 212.

United States.— Dawson Town, etc., Co. *v.* Woodhull, 67 Fed. 451, 14 C. C. A. 464.

10. Moses *v.* Banker, 7 Rob. (N. Y.) 131, 34 How. Pr. (N. Y.) 212; People *v.* Squire, 3 N. Y. St. 194.

11. Seeley *v.* Clark, 78 N. Y. 220; Sharp *v.* Hutchinson, 48 N. Y. Super. Ct. 101; Atty.-Gen. *v.* Continental L. Ins. Co., 4 N. Y. Civ. Proc. 214, 66 How. Pr. (N. Y.) 51; Knowlton *v.* Bannigan, 11 Abb. N. Cas. (N. Y.) 419; Matter of Bryan, 3 Abb. N. Cas. (N. Y.) 289; Woods *v.* De Figaniere, 16 Abb. Pr. (N. Y.) 1; Sweetzer *v.* Chaflin, 74 Tex. 667, 12 S. W. 395.

In North Carolina persons for whose immediate benefit the action is prosecuted or defended can be examined but no others. Strudwick *v.* Brodnax, 83 N. C. 401.

Applications of rule.— Thus one who has by default ceased to be a party to an action cannot be examined before trial (Sharp *v.* Hutchinson, 48 N. Y. Super. Ct. 101) and a next friend who brings a petition in the name of the ward for the removal of a guardian is not a party to the petition, and is not required to answer interrogatories filed by the respondent. Gray *v.* Parke, 155 Mass. 433, 29 N. E. 641. So in a suit instituted by the attorney-general to dissolve a life-insurance company a policy-holder who has not intervened is not entitled to an order for the examination of a person as a witness. Atty.-Gen. *v.* Continental L. Ins. Co., 4 N. Y. Civ. Proc. 214, 66 How. Pr. (N. Y.) 51.

12. Seeley *v.* Clark, 78 N. Y. 220; Woods *v.* De Figaniere, 16 Abb. Pr. (N. Y.) 1.

13. Blanchin *v.* Pickett, 21 La. Ann. 680; Delacroix *v.* Prevost, 6 Mart. (La.) 727; Harding *v.* Morrill, 136 Mass. 291; Harding *v.* Noyes, 125 Mass. 572; McGuffin *v.* Dinsmore, 4 Abb. N. Cas. (N. Y.) 241.

Executors.— The rule applies to executors (Delacroix *v.* Prevost, 6 Mart. (La.) 727) unless discharged after suit brought (Hawkins *v.* Brown, 3 Rob. (La.) 310).

14. Brown *v.* Mercier, 82 Ga. 550, 9 S. E. 471. If the party to answer resides out of the state, his answers must be taken, although the code makes no provision for such case, with no less formality than if he resided in another parish of the state than that where the suit is pending. Baine *v.* Wilson, 18 La. 59.

15. Campbell *v.* Joseph H. Bauland Co., 41 N. Y. App. Div. 474, 58 N. Y. Suppl. 984; Wallace *v.* Reinhart, 11 Misc. (N. Y.) 519, 32 N. Y. Suppl. 740 [*distinguishing* Witcher *v.* Tribune Assoc., 59 N. Y. Super. Ct. 224, 14 N. Y. Suppl. 290, 20 N. Y. Civ. Proc. 283].

But if he is not in the jurisdiction and is not likely to come into it the order for his examination should not be made. Witcher *v.* Jones, 15 Daly (N. Y.) 243, 5 N. Y. Suppl. 917.

16. Apperson *v.* Mutual Ben. L. Ins. Co., 38 N. J. L. 272; Boorman *v.* Atlantic, etc., R. Co., 78 N. Y. 599; People *v.* Mutual Gas Light Co., 74 N. Y. 434 [*reversing* 14 Hun 157]; Duncan *v.* Jones, 32 Hun (N. Y.) 12; Goodyear *v.* Phœnix Rubber Co., 48 Barb. (N. Y.) 522; Woods *v.* De Figaniere, 1 Rob. (N. Y.) 617; Gulf, etc., R. Co. *v.* White, (Tex. Civ. App. 1895) 32 S. W. 322. *Contra*, McCoy *v.* Mutual Reserve L. Ins. Co., 84 N. Y. App. Div. 315, 82 N. Y. Suppl. 638; Carr *v.* Great Western Ins. Co., 3 Daly (N. Y.) 160.

17. Under such a statute an order for such an examination will be made in an action against a corporation on a contract so that it may be ascertained if the person who made the contract on behalf of the corporation had authority to do so. Bloom *v.* Pond's Extract Co., 18 N. Y. Suppl. 179.

Intention to be present at trial.— The fact that the officers who are to be examined make affidavit that they intend to be present upon the trial of the action does not affect the right of the other party to an examination of them before trial. Press Pub. Co. *v.* Star Co., 33 N. Y. App. Div. 242, 53 N. Y. Suppl. 371. *Compare* Hancock *v.* Franklin Ins. Co.,

a statute a non-resident officer of a foreign corporation may be so examined.[18] In no event are officers of corporations parties for the purpose of moving the stay of proceedings or to question the materiality of the issues as to which they are required to answer or to appeal from an order denying a motion for a stay.[19]

c. Co-Defendants. A co-defendant is not, as to defendant, an adversary party within the meaning of the statute permitting an examination of the adverse party before trial.[20]

d. Insane Party. An order for an examination of defendant before trial will not be granted when he is an insane person.[21]

3. Oral Examination of Party — a. The Statutes — (i) *In General.* Under the statutes of some of the states the examination of the adversary party before trial is a matter of course,[22] under the same restrictions under which the examination of witnesses may be had.[23] The Kentucky statutes do not authorize the examination of the adversary party before trial by deposition.[24] Under the Georgia statutes and the statutes now in force in New York an examination of the adversary party before trial can only be had on an order directing such examination.[25] Statutes for the examination of the adverse party should be liberally construed.[26]

(ii) *Effect on Practice in Federal Courts.* State statutes providing for the examination of the adversary party before trial will not authorize the examination of a party before trial in suits in the federal courts.[27] The examination of a party to a suit as a witness for the adversary party, pending in a state court under

107 Mass. 113, holding that interrogatories which do not call for official information, but as to his personal knowledge and admissions concerning the matters in suit, need not be answered, as such matters are properly provable by him as a witness at the trial or by deposition.

Such a statute does not apply to municipal corporations. Lineham *v.* Cambridge, 109 Mass. 212.

The fact that answers called for are outside of the personal knowledge of the officer examined does not excuse him from answering if he can acquire the information sought from agents and servants of the corporation. Robbins *v.* Brockton St. R. Co., 180 Mass. 51, 61 N. E. 265; Gunn *v.* New York, etc., R. Co., 171 Mass. 417, 50 N. E. 1031.

Where, in an action against a corporation for the death of an employee, there is a doubt as to who are the owners or operators of its mine, plaintiff is entitled to an examination before trial of the superintendent of the mine to ascertain such fact. Matter of Nolan, 70 Hun (N. Y.) 536, 24 N. Y. Suppl. 238.

18. Sterne *v.* Metropolitan Telephone, etc., Co., 19 N. Y. App. Div. 316, 46 N. Y. Suppl. 110; Farmers' Nat. Bank *v.* Underwood, 6 N. Y. App. Div. 373, 39 N. Y. Suppl. 596; Real Estate Loan Co. *v.* Molsworth, 2 Manitoba 93.

19. Sterne *v.* Metropolitan Telephone, etc., Co., 33 N. Y. App. Div. 164, 53 N. Y. Suppl. 470.

20. Roberts *v.* Thompson, 3 How. Pr. (N. Y.) 321, 1 Code Rep. (N. Y.) 113.

21. Mason *v.* Libbey, 2 Abb. N. Cas. (N. Y.) 137.

22. Vann *v.* Lawrence, 111 N. C. 32, 15 S. E. 1031; Plainville *v.* Brown, 4 Hen. & M. (Va.) 482.

23. Buckingham *v.* Barnum, 30 Conn. 358; Gabaroche *v.* Hebert, 7 Mart. N. S. (La.) 526; *In re* Foster, 44 Vt. 570.

24. Musick *v.* Ray, 3 Metc. (Ky.) 427. See Davis *v.* Young, 3 T. B. Mon. (Ky.) 381.

25. Tillinghast *v.* Nourse, 14 Ga. 641; Partin *v.* Elliott, 2 Sandf. (N. Y.) 667.

Discretion of judge.— Under the New York statutes the right to an examination before trial is not absolute but is within the sound discretion of the judge. Jenkins *v.* Putnam, 106 N. Y. 272, 12 N. E. 613; Merchants' Nat. Bank *v.* Sheehan, 101 N. Y. 176, 4 N. E. 333; Williams *v.* Folsom, 52 Hun (N. Y.) 68, 5 N. Y. Suppl. 211, 16 N. Y. Civ. Proc. 429; Winston *v.* English, 35 N. Y. Super. Ct. 512, 14 Abb. Pr. N. S. (N. Y.) 119 [*affirming* 44 How. Pr. 398]; Fullerton *v.* Gaylord, 7 Rob. (N. Y.) 551; McVickar *v.* Greenleaf, 4 Rob. (N. Y.) 657; Dorf *v.* Walter, 18 N. Y. Suppl. 434; Hamilton *v.* Hudson, 2 N. Y. Suppl. 146; Schepmoes *v.* Bousson, 1 Abb. N. Cas. (N. Y.) 481, 52 How. Pr. (N. Y.) 401; Duffy *v.* Lynch, 36 How. Pr. (N. Y.) 509. *Contra*, Levy *v.* Loeb, 5 Abb. N. Cas. (N. Y.) 157; Corbett *v.* De Comeau, 4 Abb. N. Cas. (N. Y.) 252, 54 How. Pr. (N. Y.) 506; Ludewig *v.* Pariser, 4 Abb. N. Cas. (N. Y.) 246, 54 How. Pr. (N. Y.) 498; Webster *v.* Stockwell, 3 Abb. N. Cas. (N. Y.) 115; Green *v.* Wood, 6 Abb. Pr. (N. Y.) 277. And the same is the rule under the Ohio statutes. *In re* Humphrey, 14 Ohio Cir. Ct. 517, 7 Ohio Cir. Dec. 603; Thomas *v.* Beebe, 5 Ohio N. P. 32.

26. People *v.* Nussbaum, 55 N. Y. App. Div. 245, 67 N. Y. Suppl. 492 [*reversing* 32 Misc. 1, 66 N. Y. Suppl. 129].

27. Corbett *v.* Gibson, 18 Hun (N. Y.) 49; Despeaux *v.* Pennsylvania R. Co., 81 Fed. 897; National Cash-Register Co. *v.* Leland, 77 Fed. 342; Shellabarger *v.* Oliver, 64 Fed. 306;

a provision of the code of procedure of that state, may be continued after the removal of such suit to the federal court, although such examination would not be allowed under the practice in the federal court, had the action been originally brought there.[28]

b. Grounds and Purposes of Examination — (i) *In General.* An order for examination of a party before trial, it has been held, lies in any case where a bill of discovery would have been upheld in equity and such examination operates as a substitute therefor.[29] An order will be granted to ascertain the proper party to sue,[30] to ascertain the names of persons whom the applicant desires to join by amendment as parties,[31] or to enable plaintiff to ascertain the amount for which he should ask judgment.[32] The examination will not be permitted for the purpose of ascertaining whether the applicant has a cause of action or defense,[33] or whether he has a cause of action against persons not parties,[34] or to ascertain against which of certain parties he has a cause of action,[35] or to ascertain which of two causes of action he has,[36] or to ascertain the evidence on which the opposite party bases his cause of action or defense,[37] or to ascertain the names of his witnesses,[38] or for the purpose of aiding the party in the preparation of his case for

Corbett *v.* Gibson, 6 Fed. Cas. No. 3,222, 16 Blatchf. 336; Easton *v.* Hodges, 8 Fed. Cas. No. 4,258, 7 Biss. 324. But see Bryant *v.* Leyland, 6 Fed. 125.

28. Fogg *v.* Fisk, 19 Fed. 235.

29. King *v.* Leighton, 58 N. Y. 383; Wiggin *v.* Gans, 4 Sandf. (N. Y.) 646; Phœnix *v.* Dupuy, 7 Daly (N. Y.) 238, 2 Abb. N. Cas. (N. Y.) 146, 53 How. Pr. (N. Y.) 158; Carr *v.* Great Western Ins. Co., 3 Daly (N. Y.) 160; Schepmoes *v.* Bousson, 1 Abb. N. Cas. (N. Y.) 481, 52 How. Pr. (N. Y.) 401; Glenney *v.* Stedwell, 1 Abb. N. Cas. (N. Y.) 327; Draper *v.* Hensingsen, 16 How. Pr. (N. Y.) 281. But see Goldberg *v.* Roberts, 12 Daly (N. Y.) 337; Hynes *v.* McDermott, 55 How. Pr. (N. Y.) 259; Kelly *v.* Chicago, etc., R. Co., 60 Wis. 480, 19 N. W. 521.

30. Clark *v.* Wilcklow, 75 Hun (N. Y.) 290, 27 N. Y. Suppl. 43; Baas *v.* Pain, 71 Hun (N. Y.) 612, 24 N. Y. Suppl. 583. Thus an examination will be allowed to enable a party to ascertain who is the owner of a newspaper, the proprietor of which is to be defendant. Matter of Weil, 25 N. Y. App. Div. 173, 49 N. Y. Suppl. 133. *Contra*, Matter of Singer, 40 Misc. (N. Y.) 561, 82 N. Y. Suppl. 870.

31. Glenney *v.* Stedwell, 64 N. Y. 120.

32. Hofman *v.* Seixas, 12 Misc. (N. Y.) 3, 33 N. Y. Suppl. 23. But not if the amount can otherwise be stated with approximate accuracy. Boeck *v.* Smith, 85 N. Y. App. Div. 575, 83 N. Y. Suppl. 428. It is no valid objection to an application for an order to examine a party before trial that the moving papers allege the existence of facts which if established will entitle plaintiff to more than one cause of action or more than one ground upon which relief may be demanded. Judah *v.* Lane, 14 Daly (N. Y.) 308, 12 N. Y. St. 130.

33. Tenoza *v.* Pelham Hod-Elevating Co., 50 N. Y. App. Div. 581, 64 N. Y. Suppl. 99; Nathan *v.* Whitehill, 67 Hun (N. Y.) 398, 22 N. Y. Suppl. 63; Dobyns *v.* Commercial Trust Co., 31 Misc. (N. Y.) 829, 64 N. Y. Suppl. 554; New York State Banking Co. *v.* Van Antwerp, 23 Misc. (N. Y.) 38, 51 N. Y. Suppl. 653; Byrnes *v.* Ladew, 15 Misc. (N. Y.) 413, 36 N. Y. Suppl. 1048; Britton *v.* MacDonald, 3 Misc. (N. Y.) 514, 23 N. Y. Suppl. 350; Govin *v.* De Miranda, 17 N. Y. Suppl. 816; Lathrop *v.* Brown, 5 N. Y. Civ. Proc. 101.

Limitations of rule.— But where a cause of action exists against owners of a particular enterprise and the party is ignorant of the fact as to who such owners are and cannot ascertain the same otherwise, he may have an examination of the person in charge of the enterprise to ascertain who are the owners. Matter of Nolan, 70 Hun (N. Y.) 536, 24 N. Y. Suppl. 238.

34. Bloodgood *v.* Slayback, 54 N. Y. App. Div. 634, 66 N. Y. Suppl. 610; Ziegler *v.* Lamb, 5 N. Y. App. Div. 47, 40 N. Y. Suppl. 65.

35. Matter of Schoeller, 74 N. Y. App. Div. 347, 77 N. Y. Suppl. 614.

36. Green *v.* Carey, 81 Hun (N. Y.) 496, 31 N. Y. Suppl. 8, 1 N. Y. Annot. Cas. 179.

37. Robbins *v.* Brockton St. R. Co., 180 Mass. 51, 61 N. E. 265; Plant *v.* Harrison, 52 N. Y. App. Div. 628, 65 N. Y. Suppl. 236; Dobyns *v.* Commercial Trust Co., 31 Misc. (N. Y.) 829, 64 N. Y. Suppl. 554; Douglass *v.* Meyer, 21 N. Y. Suppl. 1091, 22 N. Y. Civ. Proc. 345; Jersey City First Nat. Bank *v.* Lindenmeyr, 8 N. Y. Suppl. 447; Glen Cove Mfg. Co. *v.* Sutro, 6 N. Y. Suppl. 384; Schepmoes *v.* Bousson, 1 Abb. N. Cas. (N. Y.) 481, 52 How. Pr. (N. Y.) 401. Taking the deposition of a party in a pending cause merely to ascertain in advance what his testimony will be, and not for the purpose of using the same as evidence, is an abuse of judicial authority and process; and a party committed for refusing to give his deposition in such a case will be released on habeas corpus. *In re* Cubberly, 39 Kan. 291, 18 Pac. 173; *In re* Davis, 38 Kan. 408, 16 Pac. 790.

38. Chapin *v.* Thompson, 16 Hun (N. Y.) 53; Opdyke *v.* Marble, 44 Barb. (N. Y.) 64;

trial,[39] or to prove matters within the applicant's own knowledge.[40] So it will not be granted for the mere convenience of the party,[41] nor to establish facts pertinent to the decision of a motion[42] nor for the purpose of gratifying public curiosity.[43]

(II) *To Enable Party to Frame Pleadings.* An examination may be had before trial for the purpose of obtaining facts necessary to enable a party to frame his complaint,[44] or answer,[45] or bill of particulars.[46] But the inquiries should be limited to facts necessary to be included in the pleading[47] and cannot be had from

Douglass *v.* Meyer, 61 N. Y. Super. Ct. 369, 20 N. Y. Suppl. 435; Beach *v.* New York, 2 Abb. N. Cas. (N. Y.) 236.

39. Dudley *v.* New York Filter Mfg. Co., 80 N. Y. App. Div. 164, 80 N. Y. Suppl. 529; Leary *v.* Rice, 15 N. Y. App. Div. 397, 44 N. Y. Suppl. 82; Weston *v.* Reich, 48 Hun (N. Y.) 320, 1 N. Y. Suppl. 412; Broad-Street Nat. Bank *v.* Sinclair, 16 N. Y. Suppl. 88; Dyett *v.* Seymour, 3 N. Y. Suppl. 643; Cutter *v.* Pool, 3 Abb. N. Cas. (N. Y.) 130, 54 How. Pr. (N. Y.) 311.

If the object of the examination is in good faith to procure evidence for use in the trial it is no objection that it will enable the party to prepare for trial, or that it will anticipate the evidence of the adversary party. Plant *v.* Harrison, 52 N. Y. App. Div. 628, 65 N. Y. Suppl. 236.

Limitations of rule.— But where a fiduciary relation exists between the parties an examination may be had to enable the party to prepare for trial. Kastner *v.* Kastner, 53 N. Y. App. Div. 293, 65 N. Y. Suppl. 756; McCready *v.* Haight, 22 N. Y. App. Div. 632, 49 N. Y. Suppl. 39; Green *v.* Carey, 81 Hun (N. Y.) 496, 31 N. Y. Suppl. 8; Carter *v.* Good, 57 Hun (N. Y.) 116, 10 N. Y. Suppl. 647; Talbot *v.* Doran, etc., Co., 16 Daly (N. Y.) 174, 9 N. Y. Suppl. 478; Rosenbaum *v.* Rice, 36 Misc. (N. Y.) 410, 73 N. Y. Suppl. 714; Drake *v.* Weinman, 33 N. Y. Suppl. 177; Fatman *v.* Fatman, 18 N. Y. Suppl. 847; Valentine *v.* Harbeck, 6 N. Y. Suppl. 572, 22 Abb. N. Cas. (N. Y.) 448; Miller *v.* Kent, 59 How. Pr. (N. Y.) 322. And see Caldwell *v.* Labaree, 40 Misc. (N. Y.) 564, 82 N. Y. Suppl. 865. The strictness of the rule which governs the granting of an order for the examination of a party before trial will be relaxed when a relation of trust and confidence has existed between the parties to the action, especially if the party asking for the examination was an infant at the time that the transaction to be investigated occurred. Carter *v.* Good, 57 Hun (N. Y.) 116, 10 N. Y. Suppl. 647. A director of a corporation does not hold such a fiduciary relation to a stock-holder thereof as to require him to disclose to her what he has done with the property of the corporation in an examination before issue joined, in a suit against the directors by the stock-holder, where the moving affidavit shows that plaintiff has sufficient information to draw her complaint without such examination. Elmes *v.* Duke, 39 Misc. (N. Y.) 244, 79 N. Y. Suppl. 425.

40. Dyett *v.* Seymour, 13 N. Y. Civ. Proc. 127.

41. McVickar *v.* Ketchum, 1 Abb. Pr. N. S. (N. Y.) 452.

42. Stake *v.* Andre, 9 Abb. Pr. (N. Y.) 420, 18 How. Pr. (N. Y.) 159; Huelin *v.* Ridner, 6 Abb. Pr. (N. Y.) 10. *Contra,* McGehee *v.* Brown, 3 La. Ann. 272.

43. People *v.* Nussbaum, 55 N. Y. App. Div. 245, 67 N. Y. Suppl. 492 [*reversing* 32 Misc. 1, 66 N. Y. Suppl. 129].

44. Glenney *v.* Stedwell, 64 N. Y. 120; McCoy *v.* Mutual Reserve L. Ins. Co., 84 N. Y. App. Div. 315, 82 N. Y. Suppl. 638; Matter of Porter Screen Mfg. Co., 70 N. Y. App. Div. 329, 75 N. Y. Suppl. 286; Bloodgood *v.* Slayback, 54 N. Y. App. Div. 634, 66 N. Y. Suppl. 610; Kastner *v.* Kastner, 53 N. Y. App. Div. 293, 55 N. Y. Suppl. 756; Butler *v.* Richardson, 31 N. Y. App. Div. 281, 52 N. Y. Suppl. 756; Blatchford *v.* Paine, 24 N. Y. App. Div. 140, 48 N. Y. Suppl. 783; Thayer *v.* Humphrey, 69 Hun (N. Y.) 343, 23 N. Y. Suppl. 531; O'Reilley *v.* Western Union Tel. Co., 12 Hun (N. Y.) 124; Matter of Darling, 31 Misc. (N. Y.) 543, 64 N. Y. Suppl. 793; Frothingham *v.* Broadway, etc., R. Co., 9 N. Y. Civ. Proc. 304; Havemeyer *v.* Ingersoll, 12 Abb. Pr. N. S. (N. Y.) 301; Raymond *v.* Brooks, 59 How. Pr. (N. Y.) 383; Anderson *v.* Mackey, 46 Fed. 105.

45. Lewisohn Bros. *v.* Muller, 6 N. Y. App. Div. 459, 39 N. Y. Suppl. 570; Farmers' Nat. Bank *v.* Underwood, 6 N. Y. App. Div. 373, 79 N. Y. Suppl. 596; Farmers *v.* National L. Assoc., 73 Hun (N. Y.) 522, 26 N. Y. Suppl. 126; Haynes *v.* Creighton, 58 Hun (N. Y.) 140, 11 N. Y. Suppl. 490, 19 N. Y. Civ. Proc. 299; Mora *v.* McCredy, 2 Bosw. (N. Y.) 669; New York, etc., R. Co. *v.* McHenry, 9 N. Y. St. 148.

Limitations of rule.— In an action for libel defendant cannot procure an examination of plaintiff before trial for the purpose of preparing a plea in justification, as such plea can only employ facts known and believed at the time of the alleged libel. Gray *v.* Baker, 69 Hun (N. Y.) 84, 23 N. Y. Suppl. 387 [*affirmed* in 140 N. Y. 636, 35 N. E. 892]; Strakosh *v.* Press Pub. Co., 53 Hun (N. Y.) 503, 6 N. Y. Suppl. 246; Miller *v.* Brooks, 20 N. Y. Suppl. 359.

46. Cornish *v.* Wormser, 53 Hun (N. Y.) 40, 5 N. Y. Suppl. 889, 17 N. Y. Civ. Proc. 282; Ball *v.* Evening Post Pub. Co., 48 Hun (N. Y.) 149 [*reversing* 12 N. Y. Civ. Proc. 4]; Schmidt *v.* Menasha Wooden Ware Co., 92 Wis. 529, 66 N. W. 695.

47. Williams *v.* Western Union Tel. Co., 47 N. Y. Super. Ct. 380, 1 N. Y. Civ. Proc. 294; Raymond *v.* Brooks, 59 How. Pr. (N. Y.) 383.

one not a party to the action.[48] So if it appears that an examination is unnecessary to enable the applicant to frame his pleading the application will of course be denied.[49]

c. Pendency and Condition of Cause. The order for an examination of the adverse party may be made at any time after suit brought, before as well as after issue joined,[50] or where an action is not pending, but is expected to be brought.[51] The statutes do not authorize the examination while the trial is in progress before a referee,[52] or after the case is called for trial,[53] or on the day the case is set for trial, or after it has once been continued on account of the absence of a material witness for the applicant,[54] unless the cause of delay is satisfactorily explained in the application.[55] An order for the examination will not be made, when a pre-

48. Knowlton *v.* Bannigan, 11 Abb. N. Cas. (N. Y.) 419.

49. Dalzell *v.* Fahys Watch Case Co., 58 N. Y. Super. Ct. 136, 9 N. Y. Suppl. 713; Martin *v.* Clews, 55 N. Y. Super. Ct. 552; Williams *v.* West. Union Tel. Co., 47 N. Y. Super. Ct. 380, 1 N. Y. Civ. Proc. 294; Govin *v.* De Miranda, 17 N. Y. Suppl. 816; Rycroft *v.* Green, 17 N. Y. Suppl. 9; Immig *v.* Haesloop, 14 N. Y. Suppl. 638. And see Tanenbaum *v.* Lindheim, 54 N. Y. App. Div. 188, 66 N. Y. Suppl. 375.

Applications of rule.— Thus a discovery will be denied where the application shows that the facts in the possession of the party are sufficient to enable him to plead (Kessler *v.* Levy, etc., Co., 7 N. Y. App. Div. 142, 40 N. Y. Suppl. 271; Dalzell *v.* Fahys Watch Case Co., 58 N. Y. Super. Ct. 136, 9 N. Y. Suppl. 713; Elms *v.* Duke, 39 Misc. (N. Y.) 244, 79 N. Y. Suppl. 425; Snow, etc., Co. *v.* Snow-Church Surety Co., 80 N. Y. Suppl. 512; Butler *v.* Duke, 39 Misc. (N. Y.) 235, 79 N. Y. Suppl. 419); or where it can fairly be inferred from the allegations of the application that plaintiff by following up the information in his possession could have procured the desired information (Tanenbaum *v.* Lindheim, 54 N. Y. App. Div. 188, 66 N. Y. Suppl. 375; McNamara *v.* Keene, 37 Misc. (N. Y.) 864, 76 N. Y. Suppl. 992); or that the facts sought are such that in order to be a defense they must have been known to the party seeking a discovery prior to the time when he makes his application (Gray *v.* Baker, 69 Hun (N. Y.) 84, 23 N. Y. Suppl. 387 [*affirmed* in 140 N. Y. 636, 35 N. E. 892]; Strakhosch *v.* Press Pub. Co., 53 Hun (N. Y.) 503, 6 N. Y. Suppl. 246, 17 N. Y. Civ. Proc. 209; Miller *v.* Brooks, 20 N. Y. Suppl. 359); or that the answer will be a general denial (Immig *v.* Haesloop, 14 N. Y. Suppl. 638. And see Golin *v.* Moers, 5 Silv. Supreme (N. Y.) 189, 8 N. Y. Suppl. 12). So an application for the examination of plaintiff in order to enable defendant to frame his answer is properly denied where made before the complaint is filed, as until then defendant cannot show that the examination is material or necessary. Winston *v.* English, 14 Abb. Pr. N. S. (N. Y.) 119 [*affirming* 44 How. Pr. 398].

Limitations of rule.— But where a fiduciary relation exists between the parties and an accounting is asked for the order will not be denied on the ground that plaintiff was in possession of sufficient material to prepare his complaint. Drake *v.* Weinmann, 12 Misc. (N. Y.) 65, 33 N. Y. Suppl. 177, 24 N. Y. Civ. Proc. 323.

50. New York, etc., R. Co. *v.* Carhart, 36 Hun (N. Y.) 288; Brisbane *v.* Brisbane, 20 Hun (N. Y.) 48; Fullerton *v.* Gaylord, 7 Rob. (N. Y.) 551; McVickar *v.* Greenleaf, 4 Rob. (N. Y.) 657, 30 How. Pr. (N. Y.) 61; Dorf *v.* Walter, 18 N. Y. Suppl. 434; Winston *v.* English, 14 Abb. Pr. N. S. (N. Y.) 119; Hadley *v.* Fowler, 12 Abb. Pr. N. S. (N. Y.) 244; Havemeyer *v.* Ingersoli, 12 Abb. Pr. N. S. (N. Y.) 301; McVickar *v.* Ketchum, 1 Abb. Pr. N. S. (N. Y.) 452, 19 Abb. Pr. (N. Y.) 241; Duffy *v.* Lynch, 36 How. Pr. (N. Y.) 509; Miller *v.* Mather, 5 How. Pr. (N. Y.) 160, 2 Code Rep. (N. Y.) 101. *Contra*, Bell *v.* Richmond, 50 Barb. (N. Y.) 571, 4 Abb. Pr. N. S. (N. Y.) 44; Chichester *v.* Livingston, 3 Sandf. (N. Y.) 718, Code Rep. N. S. (N. Y.) 108; Morgan *v.* Whittaker, 14 Abb. Pr. N. S. (N. Y.) 127; Cook *v.* Bidwell, 29 How. Pr. (N. Y.) 483; Suydam *v.* Suydam, 11 How. Pr. (N. Y.) 518; Balbani *v.* Grasheim, 2 Code Rep. (N. Y.) 75.

51. Drake *v.* Wineman, 12 Misc. (N. Y.) 65, 33 N. Y. Suppl. 177, decided under N. Y. Code Civ. Proc. § 872, expressly so providing.

52. Richardson *v.* McCreery, 1 Abb. N. Cas. (N. Y.) 355.

53. Brooks *v.* Walker, 3 La. Ann. 150.

54. Glasgow *v.* Switzer, 12 Mo. 395. The statute entitles a party to a discovery from the adverse party of all matters material to the issue in all cases where a bill for a discovery might have been filed in a court of equity. It was held that where defendant had obtained a continuance for an absent witness and had afterward taken his deposition in vacation expecting to show certain matters and on being disappointed therein on the first day of the succeeding term had filed a petition for a discovery of plaintiff of such matters alleging that the information could be obtained from no one else, the petition was in due time and should have been granted. Dempsey *v.* Harrison, 4 Mo. 267.

55. Where a party has waited until his case has been placed on the day calendar for trial, the court must have satisfactory reasons explaining the cause for delay, which must be stated in the affidavit, or the order

vious order has been reversed and a reargument is pending.[56] Under some statutes discovery may be invoked on appeal in aid of suits originating before a justice of the peace.[57] If for the purpose of procuring evidence for use on the trial, the application is prematnre if made before answer filed.[58] The application is made in time, if made within a reasonable time before trial.[59]

d. Application For Order — (i) *Notice.* No notice of the application for the order is required.[60]

(ii) *Form and Requisites* — (a) *In General.* The court cannot make an order for an examination of the adverse party upon notice and hearing,[61] but the application for the order must be by affidavit.[62]

(b) *Necessary Allegations* — (1) Action Pending or in Contemplation. The application must show that the action is pending or in contemplation.[63]

(2) Nature of Cause of Action or Defense. Where an application is made by plaintiff, it must state the nature of the action and the substance of the judgment demanded.[64] Some decisions go so far as to hold that the application, when the application is made by plaintiff, must state a cause of action,[65] but there is nothing in the statutes providing what the application shall contain that sustains this holding; and the weight of authority is that it is not necessary that the affidavit should state a complete cause of action; that it is sufficient that the nature of the action is stated and the substance of the judgment demanded.[66]

will be vacated for laches. Turner *v.* Kinghorn, 5 Abb. N. Cas. (N. Y.) 157 note. But see Skinner *v.* Steele, 88 Hun (N. Y.) 307, 34 N. Y. Suppl. 748, holding that delay in making application for a discovery is no reason for refusing it if the necessity for it exists when the application is made.

56. Smith *v.* Seattle, etc., R. Co., 20 N. Y. Suppl. 784.

57. Maxwell *v.* Guthrie, 23 Ark. 702; Atwood *v.* Reyburn, 5 Mo. 555.

58. St. John *v.* Buckley, 56 N. Y. Suppl. 635; Pender *v.* Mallett, 123 N. C. 57, 31 S. E. 351.

59. Haehler *v.* Hubbard, 36 Misc. (N. Y.) 840, 74 N. Y. Suppl. 932. See also Skinner *v.* Steele, 88 Hun (N. Y.) 307, 34 N. Y. Suppl. 748.

60. Jerrells *v.* Perkins, 25 N. Y. App. Div. 348, 49 N. Y. Suppl. 597; Dixon *v.* Dixon, 8 N. Y. St. 816. *Contra*, Farrington *v.* Stone, 35 Nebr. 456, 53 N. W. 389.

61. Wiechers *v.* New Home Sewing-Mach. Co., 38 N. Y. App. Div. 1, 50 N. Y. Suppl. 235.

62. Norton *v.* Abbott, 28 How. Pr. (N. Y.) 388.

63. *In re* Dounce, 7 N. Y. Civ. Proc. 426.

64. People *v.* Lyman, 67 N. Y. App. Div. 446, 73 N. Y. Suppl. 987; Churchman *v.* Merritt, 51 Hun (N. Y.) 375, 4 N. Y. Suppl. 245; Swain *v.* Pettengill, 12 N. Y. Suppl. 57; Frothingham *v.* Broadway, etc., R. Co., 9 N. Y. Civ. Proc. 304; Boorman *v.* Pierce, 56 How. Pr. (N. Y.) 251; Greene *v.* Herder, 30 How. Pr. (N. Y.) 210.

Affidavits held insufficient.— An affidavit to obtain an order for the examination before trial of defendant in an action stated that defendant was president of a corporation of which plaintiff was a stock-holder, and that defendant had wrongfully issued stock thereof which he had converted to his own use, and that a summons in the action had been served on him but no complaint had been served. It was held that this did not state the "nature of the action and the substance of the judgment demanded" as required by the code and the application should not be granted. Swain *v.* Pettengill, 12 N. Y. Suppl. 57. So an affidavit for an order to compel defendant to be examined before trial, simply averring the action to be brought to recover damages for certain breaches on the part of defendant of a contract in writing stated, is insufficient. Hale *v.* Rogers, 22 Hun (N. Y.) 19. And it has been held that an affidavit merely stating that the purpose of the action is to reform a deed or mortgage or other paper is insufficient; that the grounds upon which the relief is sought should be indicated with reasonable certainty. Churchman *v.* Merritt, 51 Hun (N. Y.) 375, 4 N. Y. Suppl. 245.

Statute of limitations.— Where a cause of action is shown, the fact that the statute of limitations would probably be a bar is no reason why the order should not be granted, as the statute may never be pleaded. Fatman *v.* Fatman, 18 N. Y. Suppl. 847, 22 N. Y. Civ. Proc. 149.

65. New York State Banking Co. *v.* Van Antwerp, 23 Misc. (N. Y.) 38, 51 N. Y. Suppl. 653; De Leon *v.* De Lima, 66 How. Pr. (N. Y.) 287; McCoon *v.* White, 60 How. Pr. (N. Y.) 149; Draper *v.* Hensingen, 16 How. Pr. (N. Y.) 281. And see Gage *v.* Culver, 19 N. Y. Suppl. 936.

66. Hart *v.* Chase, 67 N. Y. App. Div. 445, 73 N. Y. Suppl. 957; Videtto *v.* Dudley, 56 N. Y. Super. Ct. 600, 4 N. Y. Suppl. 437; Butler *v.* Duke, 39 Misc. (N. Y.) 235, 79 N. Y. Suppl. 419; Fatman *v.* Fatman, 18 N. Y. Suppl. 847, 22 N. Y. Civ. Proc. 149; Frothingham *v.* Broadway, etc., R. Co., 9 N. Y. Civ. Proc. 304.

On the other hand, if the application is made by defendant, it should state the nature of the defense.[67]

(3) Materiality and Necessity of Discovery. The application must show that the information sought is material[68] and necessary.[69] This averment is jurisdictional and its omission, it has been held, renders an order granting an application void even though it appears from the papers that such testimony is material and necessary.[70] The application must also specify the facts and circumstances showing the testimony to be material and necessary.[71] A mere statement

67. Robertson *v.* Russell, 20 Hun (N. Y.) 243; Roberts *v.* Press Pub. Co., 57 N. Y. Super. Ct. 526, 8 N. Y. Suppl. 870.

Affidavit held insufficient.— Under the code declaring that the affidavit for an order for the examination of a plaintiff before answer must set forth the nature of the defense, an order for such an examination of plaintiff in an action for libel is properly vacated when the affidavit therefor shows that defendant intends to set up a defense of justification by pleading and proving that plaintiff attempted to obtain money by fraudulent representations, but has no means of ascertaining the particulars wherein said representations were false, the substance of the affidavit being that defendant is ignorant of the existence of a defense. Johns *v.* Press Pub. Co., 58 N. Y. Super. Ct. 580, 8 N. Y. Suppl. 958; Roberts *v.* Press Pub. Co., 57 N. Y. Super. Ct. 526, 8 N. Y. Suppl. 870, 18 N. Y. Civ. Proc. 251.

68. Ryan *v.* Reagan, 46 N. Y. App. Div. 590, 62 N. Y. Suppl. 39; Bigler *v.* Duryee, 73 Hun (N. Y.) 556, 26 N. Y. Suppl. 112; Wayne County Sav. Bank *v.* Brackett, 31 Hun (N. Y.) 434; Greer *v.* Allen, 15 Hun (N. Y.) 432; Dart *v.* Laimbeer, 47 N. Y. Super. Ct. 490; Kaupe *v.* Isdell, 3 Rob. (N. Y.) 699; Bagley *v.* Winslow, 34 Misc. (N. Y.) 223, 69 N. Y. Suppl. 611; Young *v.* Eames, 24 Misc. (N. Y.) 432, 53 N. Y. Suppl. 678; Britton *v.* MacDonald, 3 Misc. (N. Y.) 514, 23 N. Y. Suppl. 350; Neurath *v.* Schmitz, 2 N. Y. Civ. Proc. 400; Schepmoes *v.* Bousson, 1 Abb. N. Cas. (N. Y.) 481, 52 How. Pr. (N. Y.) 401; Richards *v.* Judd, 15 Abb. Pr. N. S. (N. Y.) 184; Norton *v.* Abbott, 28 How. Pr. (N. Y.) 388.

Evidence of secondary character.—An order for the examination of the adverse party should be vacated where it appears that the testimony sought is of a secondary character and that the testimony desired may be obtained from primary sources without such examination. Chaskel *v.* Metropolitan El. R. Co., 2 Silv. Supreme (N. Y.) 36, 6 N. Y. Suppl. 369.

69. Hutchinson *v.* Simpson, 73 N. Y. App. Div. 520, 55 N. Y. Suppl. 197; Kramer *v.* Kramer, 70 N. Y. App. Div. 615, 74 N. Y. Suppl. 1049; Insurance Press *v.* Montauk F. Detecting Wire Co., 70 N. Y. App. Div. 50, 74 N. Y. Suppl. 1093; Clark *v.* Ennis, 65 N. Y. App. Div. 164, 72 N. Y. Suppl. 581; York *v.* Dick, 61 N. Y. App. Div. 620, 70 N. Y. Suppl. 614; Bernheimer *v.* Schmid, 59 N. Y. App. Div. 564, 69 N. Y. Suppl. 659; Hay *v.* Zliger, 50 N. Y. App. Div. 462, 64 N. Y. Suppl. 202; Schmerber *v.* Reinach, 38 N. Y. App. Div. 622, 58 N. Y. Suppl. 84; Leary *v.* Rise, 15 N. Y. App. Div. 397, 44 N. Y. Suppl. 82; Savage *v.* Neely, 8 N. Y. App. Div. 316, 40 N. Y. Suppl. 946; Wayne County Sav. Bank *v.* Brackett, 31 Hun (N. Y.) 434; Greer *v.* Allen, 15 Hun (N. Y.) 432; Jersey City First Nat. Bank *v.* Lindenmeyer, 5 Silv. Supreme (N. Y.) 452, 8 N. Y. Suppl. 447; Martin *v.* Clews, 55 N. Y. Super. Ct. 552; Dart *v.* Laimbeer, 47 N. Y. Super. Ct. 490; Corbett *v.* De Comeau, 44 N. Y. Super. Ct. 306, 5 Abb. N. Cas. (N. Y.) 169; Butler *v.* Duke, 39 Misc. (N. Y.) 235, 79 N. Y. Suppl. 419; Bagley *v.* Winslow, 34 Misc. (N. Y.) 223, 69 N. Y. Suppl. 611; Lowenthal *v.* Leonard, 20 Misc. (N. Y.) 420, 45 N. Y. Suppl. 1031; Matter of Gains, 15 Misc. (N. Y.) 75, 36 N. Y. Suppl. 1113; Britton *v.* McDonald, 3 Misc. (N. Y.) 514, 23 N. Y. Suppl. 350; Grout *v.* Streng, 1 Misc. (N. Y.) 214, 20 N. Y. Suppl. 881; Hunt *v.* Sullivan, 79 N. Y. Suppl. 708; Byrne *v.* Van Dolsen, 75 N. Y. Suppl. 413; Rycroft *v.* Green, 17 N. Y. Suppl. 9; Woodhull *v.* Washburn, 16 N. Y. Suppl. 78; Sheehan *v.* Albany, etc., Turnpike Co., 8 N. Y. Suppl. 14; Balcon *v.* Adams, 2 N. Y. Suppl. 255, 15 N. Y. Civ. Proc. 198; Dixon *v.* Dixon, 8 N. Y. St. 816; Neurath *v.* Schmitz, 2 N. Y. Civ. Proc. 400; Carr *v.* Risher, 20 Abb. N. Cas. (N. Y.) 176; Cornell *v.* Fryer, 9 Abb. N. Cas. (N. Y.) 52; Gelston *v.* Marshall, 6 How. Pr. (N. Y.) 398. *Contra*, Fiske *v.* Bynum, 7 Mart. N. S. (La.) 269; Naab *v.* Stewart, 32 N. Y. App. Div. 478, 52 N. Y. Suppl. 1094.

70. Matter of Gains, 15 Misc. (N. Y.) 75, 36 N. Y. Suppl. 1113, 25 N. Y. Civ. Proc. 243.

71. State *v.* Continental Tobacco Co., 177 Mo. 1, 75 S. W. 737; Abbott-Downing Co. *v.* Faber, 87 Hun (N. Y.) 299, 34 N. Y. Suppl. 433; Crooke *v.* Corbin, 23 Hun (N. Y.) 176; Robertson *v.* Russell, 20 Hun (N. Y.) 243; Holtz *v.* Schmidt, 34 N. Y. Super. Ct. 28; Greismann *v.* Dreyfus, 4 N. Y. Civ. Proc. 32; Strong *v.* Strong, 1 Abb. Pr. N. S. (N. Y.) 233; Husson *v.* Fox, 15 Abb. Pr. (N. Y.) 464; Hynes *v.* McDermott, 55 How. Pr. (N. Y.) 259; Duffy *v.* Lynch, 36 How. Pr. (N. Y.) 509; Pegram *v.* Carson, 18 How. Pr. (N. Y.) 519; Wilkie *v.* Moore, 17 How. Pr. (N. Y.) 480. But see Burnett *v.* Mitchell, 26 Misc. (N. Y.) 547, 57 N. Y. Suppl. 474, 29 N. Y. Civ. Proc. 201.

Affidavit held sufficient.— An affidavit of plaintiff in an action upon a check, the defense to which was that the check was given for alleged gaming and other illegal considerations, stated that the check was given

that an examination is material and necessary is not sufficient. This is nothing more than a statement of the applicant's opinion.[72] The facts showing materiality and necessity must be stated positively and not argumentatively or inferentially.[73] But an argumentative statement of unnecessary facts will not vitiate an affidavit otherwise sufficient.[74] Where the application shows that it is not made *bona fide* for the purpose of obtaining necessary testimony, the party is not entitled to examination of his adversary, although the attorney of the latter voluntarily offers to allow his client to be examined.[75]

(4) KNOWLEDGE OF ADVERSE PARTY AND WANT OF KNOWLEDGE OF APPLICANT. The application must show want of knowledge and lack of sources of information on the part of the applicant,[76] and that the facts are known to the adverse party,[77] and are peculiarly within his knowledge.[78] It must also

by defendant in satisfaction of a balance found due plaintiff on a settlement of accounts between them and that defendant then took away with him plaintiff's memoranda by which such balance was ascertained, that there were no other means of ascertaining such balance, that there was a valid consideration for such check, and that defendant had special knowledge regarding certain facts of the case not possessed by any one else. It was held that these averments sufficiently showed that the examination of defendant before trial was necessary to obtain evidence for plaintiff. Huntoon *v.* Jerkowski, 13 N. Y. Suppl. 40.

Affidavit held insufficient.— An affidavit for an order for the examination of defendant to enable plaintiff to frame his complaint gave the facts showing the nature of the action and averred that after the discovery sought the complaint will state appropriate allegations based upon said facts and that plaintiffs and their attorneys had endeavored to obtain information and evidence "of the details and particulars of the matter hereinbefore set forth" and have not been able to procure or obtain either from defendant, and that the books and records of the other defendants were kept in another state. It was held that the affidavit did not show the materiality and necessity for the examination, because the allegations were to be based upon said facts alleged by affiant and because there was no specification of the kind of details and particulars required and it did not appear that plaintiffs had no other sufficient sources of knowledge. De Lacey *v.* Walcott, 59 N. Y. Super. Ct. 137, 13 N. Y. Suppl. 800. An affidavit for the examination of the chairman of defendant, a foreign corporation, to enable plaintiff to obtain facts to frame his complaint, is fatally defective, where it fails to aver that an application was made to the company for the desired information, followed by a refusal to give it, or that there was an imperfect response to it. Sherman *v.* Beacon Constr. Co., 58 Hun (N. Y.) 143, 11 N. Y. Suppl. 369.

72. Robertson *v.* Russell, 20 Hun (N. Y.) 243; Matter of Gains, 15 Misc. (N. Y.) 75, 36 N. Y. Suppl. 113, 25 N. Y. Civ. Proc. 243.

73. Fleuchtwanger *v.* Dessar, 1 Silv. Supreme (N. Y.) 1, 5 N. Y. Suppl. 129, 17 N. Y. Civ. Proc. 119; Kirkland *v.* Moss, 11 Abb. N. Cas. (N. Y.) 421. But see Van Ray *v.* Harriot, 66 How. Pr. (N. Y.) 269.

74. Miller *v.* Kent, 59 How. Pr. (N. Y.) 321.

75. Drake *v.* New York Iron Mine, 75 Hun (N. Y.) 539, 27 N. Y. Suppl. 489.

76. Williams *v.* Folson, 52 Hun (N. Y.) 68, 5 N. Y. Suppl. 211, 16 N. Y. Civ. Proc. 429; Hutchinson *v.* Lawrence, 29 Hun (N. Y.) 450, 3 N. Y. Civ. Proc. 98; Bandman *v.* Jones, 4 Silv. Supreme (N. Y.) 363, 7 N. Y. Suppl. 577, 17 N. Y. Civ. Proc. 417; Cross *v.* National F. Ins. Co., 2 Silv. Supreme (N. Y.) 443, 6 N. Y. Suppl. 84, 17 N. Y. Civ. Proc. 199; Elmes *v.* Duke, 39 Misc. (N. Y.) 244, 79 N. Y. Suppl. 425; Leary *v.* O'Brien, 33 Misc. (N. Y.) 499, 68 N. Y. Suppl. 908; Cahill *v.* Kurscheedt, 61 N. Y. Suppl. 1100; Calligan *v.* Augusta City, 18 N. Y. Suppl. 162; Spero *v.* West Side Bank, 10 N. Y. Suppl. 897; Waters *v.* Shayne, 10 N. Y. Suppl. 772; Tenney *v.* Maultner, 1 N. Y. Civ. Proc. 64; Wallace *v.* Norvell, 1 Bailey (S. C.) 125.

77. Ryan *v.* Reagan, 46 N. Y. App. Div. 590, 62 N. Y. Suppl. 39; Hutchinson *v.* Lawrence, 29 Hun (N. Y.) 450, 3 N. Y. Civ. Proc. 98; Elmes *v.* Duke, 39 Misc. (N. Y.) 244, 79 N. Y. Suppl. 425; Bagley *v.* Winslow, 34 Misc. (N. Y.) 223, 69 N. Y. Suppl. 611.

The sworn denial of the party sought to be examined that he can give the information sought is not sufficient to defeat an order for the examination of the party. Matter of Nolan, 70 Hun (N. Y.) 536, 24 N. Y. Suppl. 238; Wallace *v.* Reinhart, 11 Misc. (N. Y.) 519, 32 N. Y. Suppl. 740. An application for an order for an examination of a party to ascertain what goods he manufactured during a given time will not be granted, if the party sought to be examined denies positively that he has manufactured any goods during the time referred to. Maitland *v.* Central Gas, etc., Co., 13 Misc. (N. Y.) 324, 34 N. Y. Suppl. 464.

78. Burke *v.* Flood, 5 Mart. (La.) 403; Davis *v.* Mills, 163 Mass. 481, 40 N. E. 852; Wetherbee *v.* Winchester, 128 Mass. 293; Sheren *v.* Lowell, 104 Mass. 24; Wilson *v.* Webber, 2 Gray (Mass.) 558; State *v.* Farmer, 46 N. H. 200; Vial *v.* Jackson, 73 N. Y. App. Div. 355, 76 N. Y. Suppl. 668; Dreyfus *v.* Bernhard, 31 N. Y. App. Div. 628, 55 N. Y. Suppl. 6; Fiske *v.* Smith, 9 N. Y. App. Div. 208, 41 N. Y. Suppl. 176; Adams

charge specifically knowledge of particular facts and circumstances to which he can testify.[79]

(5) Intent to Use Evidence on Trial. Except where the purpose of the application is to obtain facts necessary to enable the applicant to frame his pleadings,[80] the application must show that the applicant intends to use the testimony on the trial,[81] and when it is deficient in this respect, the court is justified in setting aside the order for the examination.[82] The intention, however, need not be expressly stated;[83] and the fact that the party in his affidavit on which the order for such an examination was made incidentally refers to obtaining admissions to enable him to prepare for trial or to prepare a bill of particulars does not necessarily qualify the substantial and legitimate purpose to use the deposition on the trial, if the application seems by the affidavit to have been founded thereupon.[84]

(6) Grounds For Asking Examination Before Trial. A party asking an examination of his adversary before trial must show special circumstances making it important to take the testimony of such adversary before instead of after the trial,[85] or it should be shown that there is reason to apprehend that the adverse

v. Cavanaugh, 37 Hun (N. Y.) 232; New York City Fourth Nat. Bank *v.* Boynton, 29 Hun (N. Y.) 441; Chapin *v.* Thompson, 16 Hun (N. Y.) 53; Beach *v.* New York, 14 Hun (N. Y.) 79, 4 Abb. N. Cas. (N. Y.) 236; Elmes *v.* Duke, 39 Misc. (N. Y.) 244, 79 N. Y. Suppl. 425; Bird *v.* Kreiser, 7 Misc. (N. Y.) 737, 27 N. Y. Suppl. 425; Manhattan Electric Light Co. *v.* Consolidated Tel., etc., Co., 13 N. Y. Suppl. 352; Hirschsprung *v.* Boe, 8 N. Y. St. 349; Jenkins *v.* Putnam, 6 N. Y. St. 425; Schepmoes *v.* Bousson, 1 Abb. N. Cas. (N. Y.) 481, 52 How. Pr. (N. Y.) 401. But see Thebaud *v.* Hume, 15 N. Y. Suppl. 664; Sanger *v.* Seymour, 4 N. Y. St. 449; Mudge *v.* Gilbert, 43 How. Pr. (N. Y.) 319.

Limitations of rule.— Where in a suit to recover margins from an incorporated company of brokers the party avers that his orders to buy and sell were never executed and alleges that it is impossible otherwise to show the fact but by an inspection of its books and an examination of its president, vice-president, and secretary, which he demands, these officers will be presumed to have knowledge of the transactions and plaintiff need not allege such knowledge in his affidavit. Talbot *v.* Doran, 16 Daly (N. Y.) 174, 9 N. Y. Suppl. 478, 18 N. Y. Civ. Proc. 304.

79. Beach *v.* New York, 14 Hun (N. Y.) 79, 4 Abb. N. Cas. (N. Y.) 236; Phœnix *v.* Dupuy, 2 Abb. N. Cas. (N. Y.) 146; Elmore *v.* Hyde, 2 Abb. N. Cas. (N. Y.) 129.

Where there is more than one defendant to be examined it must state the facts that the applicant expects to prove by each of the parties to be examined. Simmons *v.* Hazard, 65 Hun (N. Y.) 612, 20 N. Y. Suppl. 508, 23 N. Y. Civ. Proc. 15.

80. Brisbane *v.* Brisbane, 20 Hun (N. Y.) 48.

81. Jenkins *v.* Putnam, 106 N. Y. 272, 12 N. E. 613; Williams *v.* Folsom, 52 Hun (N. Y.) 68, 5 N. Y. Suppl. 211, 16 N. Y. Civ. Proc. 429; Spero *v.* West Side Bank, 3 Silv. Supreme (N. Y.) 558, 7 N. Y. Suppl. 546; Dart *v.* Laimbeer, 47 N. Y. Super. Ct. 490; Woodhull *v.* Washburn, 16 N. Y. Suppl. 78; Russ *v.* Campbell, 1 N. Y. Civ. Proc. 41; Knowlton *v.* Bannigan, 11 Abb. N. Cas. (N. Y.) 419. Where it affirmatively appears that the object of the desired examination is for another purpose than to obtain evidence to be used on the trial, an order for such examination should not be granted. Gilbert *v.* Third Ave. R. Co., 49 N. Y. Super. Ct. 129.

82. Jenkins *v.* Putnam, 106 N. Y. 272, 12 N. E. 613.

83. St. Clair Paper Mfg. Co. *v.* Brown, 16 N. Y. App. Div. 317, 44 N. Y. Suppl. 625; Fogg *v.* Fisk, 30 Hun (N. Y.) 61; Rosenbaum *v.* Rice, 36 Misc. (N. Y.) 410, 73 N. Y. Suppl. 714; Green *v.* Middlesex R. Co., 10 Misc. (N. Y.) 473, 32 N. Y. Suppl. 177, 24 N. Y. Civ. Proc. 272, 1 N. Y. Annot. Cas. 167; Ridert *v.* Blumenkrohn, 1 Misc. (N. Y.) 7, 20 N. Y. Suppl. 614; Green *v.* Middlesex Valley R. Co., 36 N. Y. Suppl. 1107; Van Ray *v.* Harriot, 66 How. Pr. (N. Y.) 269.

84. Ball *v.* Evening Post Pub. Co., 12 N. Y. Civ. Proc. 4.

85. Jenkins *v.* Putnam, 106 N. Y. 272, 12 N. E. 613; McGuire *v.* McGuire, 65 N. Y. App. Div. 74, 72 N. Y. Suppl. 490; Williams *v.* Folsom, 52 Hun (N. Y.) 68, 5 N. Y. Suppl. 211, 16 N. Y. Civ. Proc. 429; Spero *v.* West-Side Bank, 3 Silv. Supreme (N. Y.) 558, 7 N. Y. Suppl. 546; Chaskel *v.* Metropolitan El. R. Co., 2 Silv. Supreme (N. Y.) 36, 6 N. Y. Suppl. 369; Blocker *v.* Guild, 15 Daly (N. Y.) 348, 7 N. Y. Suppl. 651; Blennerhasset *v.* Stephens, 12 N. Y. Suppl. 602.

A mere allegation that it is necessary to examine defendant before trial without stating the facts on which such allegation is based is insufficient. Woodhull *v.* Washburn, 16 N. Y. Suppl. 78.

The application will be denied if it shows no reason for supposing that the facts may not be as well proved by the examination of defendants upon trial as by taking their testimony previous to that time. Williams *v.* Folsom, 54 Hun (N. Y.) 308, 7 N. Y. Suppl. 568; Spero *v.* West-Side Bank, 3 Silv. Supreme (N. Y.) 558, 7 N. Y. Suppl. 546;

party will not be present at the trial.[86] It is not necessary, however, that both of the grounds mentioned should be stated. An application showing that the knowledge of facts which could only be obtained by the examination of the opposite party is essential to enable plaintiff to proceed with the prosecution of the action is sufficient.[87] It is not necessary to show further that the party will not be present at the trial.[88]

(7) Names and Residences of Parties to Action. The application must state the names and residences of all the parties to the action.[89] An allegation that the residences of defendants are unknown to the applicant is insufficient, where there is no evidence that an effort was made to ascertain their places of residence.[90]

(8) Name of Officer of Corporation Whose Examination Is Asked. If the opposite party is a corporation, the affidavit must state the name of the officer thereof whose examination is desired.[91]

(9) Stating Facts on Information and Belief. An affidavit for examination of a party before trial, stating facts on information and belief, is sufficient, where the sources of information and grounds of belief are stated;[92] but the source of the information or grounds of belief must be given or it will be fatally defective,[93] and when the affidavit is made solely on information and belief, it must in addition to giving the source of information state reasons why an affidavit is not made by the informant.[94] Mere allegations on information and belief contained in the petition are not proved by the verification of the petition so as

Blocker *v.* Guild, 15 Daly (N. Y.) 348, 7 N. Y. Suppl. 651.

86. Williams *v.* Folsom, 52 Hun (N. Y.) 68, 5 N. Y. Suppl. 211, 16 N. Y. Civ. Proc. 429; Chaskel *v.* Metropolitan El. R. Co., 2 Silv. Supreme (N. Y.) 36, 6 N. Y. Suppl. 369.

87. Dyett *v.* Seymour, 50 Hun (N. Y.) 278, 2 N. Y. Suppl. 841; Judah *v.* Lane, 14 Daly (N. Y.) 308, 12 N. Y. St. 131; Frothingham *v.* Broadway, etc., R. Co., 9 N. Y. Civ. Proc. 304; Miller *v.* Kent, 59 How. Pr. (N. Y.) 321.

Illustrations.—An examination should be granted on an application showing that a broker withholds the fullest information from his customer in relation to property alleged to have been bought or sold. Miller *v.* Kent, 59 How. Pr. (N. Y.) 321. So where the affidavit on which an order for the examination of defendants in an action to enable plaintiffs to frame their complaint alleged that plaintiffs were ignorant of all the details in reference to the transactions complained of, and of the particular share and interest therein taken by each of the defendants, and these facts were necessary to a proper statement of the cause of action foreshadowed in the affidavit, it was held that the affidavit sufficiently showed that an examination of defendants and their books was necessary. Frothingham *v.* Broadway, etc., R. Co., 9 N. Y. Civ. Proc. 304.

88. Press Pub. Co. *v.* Star Co., 33 N. Y. App. Div. 242, 53 N. Y. Suppl. 371; Hay *v.* Zeiger, 30 Misc. (N. Y.) 35, 61 N. Y. Suppl. 647. And see Green *v.* Wood, 6 Abb. Pr. (N. Y.) 277.

89. Simmons *v.* Hazard, 65 Hun (N. Y.) 612, 20 N. Y. Suppl. 508, 23 N. Y. Civ. Proc. 15; Dunham *v.* Mercantile Mut. Ins. Co., 44 N. Y. Super. Ct. 387, 56 How. Pr. (N. Y.) 240; Ball *v.* Evening Post Pub. Co., 12 N. Y. Civ. Proc. 4.

Residence of plaintiff's attorney.—An order for the examination of a party before trial will be denied where the moving affidavit does not state the residence and office address of plaintiff's attorney as required by the code. Depierris *v.* Slaven, 74 Hun (N. Y.) 628, 26 N. Y. Suppl. 970.

90. Simmons *v.* Hazard, 65 Hun (N. Y.) 612, 20 N. Y. Suppl. 508, 23 N. Y. Civ. Proc. 15.

91. Williams *v.* Western Union Tel. Co., 47 N. Y. Super. Ct. 380, 1 N. Y. Civ. Proc. 294.

92. Leach *v.* Haight, 34 N. Y. App. Div. 522, 54 N. Y. Suppl. 550.

93. Jiminez *v.* Ward, 21 N. Y. App. Div. 387, 47 N. Y. Suppl. 557; Cook *v.* New Amsterdam Real Estate Assoc., 85 Hun (N. Y.) 417, 32 N. Y. Suppl. 888; Matter of Van Nostrand, 78 Hun (N. Y.) 351, 29 N. Y. Suppl. 112; Hale *v.* Rogers, 22 Hun (N. Y.) 19; Koehler *v.* Sewards, 5 Silv. Supreme (N. Y.) 425, 8 N. Y. Suppl. 504; Simmons *v.* Hudson, 4 Abb. N. Cas. (N. Y.) 247 note; Tilton *v.* U. S. Life Ins. Co., 1 Abb. N. Cas. (N. Y.) 348, 52 How. Pr. (N. Y.) 179. But see Frothingham *v.* Broadway, etc., R. Co., 9 N. Y. Civ. Proc. 304. An affidavit on information and belief is not sufficient that shows no knowledge derived from any person having knowledge. Taneubaum *v.* Lindheim, 54 N. Y. App. Div. 188, 66 N. Y. Suppl. 375.

94. Goodyear's India Rubber Glove Mfg. Co. *v.* Gorham, 83 Hun (N. Y.) 342, 31 N. Y. Suppl. 965; Matter of Bronson, 78 Hun (N. Y.) 351, 29 N. Y. Suppl. 112; New York Press Club *v.* Loyd, 12 Misc. (N. Y.) 210, 34 N. Y. Suppl. 24; Husson *v.* Fox, 15 Abb. Pr. (N. Y.) 464.

to authorize an order for discovery.[95] Where, however, the applicant states the ground of his belief and the sources of his knowledge so far as he can, and the knowledge as to which he fails is peculiarly with the parties he seeks to examine, this will be sufficient.[96] And where the necessary allegations of the affidavit are on knowledge or information derived from the adverse party it is not ground for a refusal to grant that there are surplus allegations on information and belief.[97]

(c) *By Whom Application Made.* The affidavit need not be made by the party in whose behalf the application is made, but may be made by his attorney, his agent, or by a third person;[98] but it must show that the facts were within the personal knowledge of such person,[99] or if on information and belief it must show the sources of the information and grounds of belief,[1] and must state sufficient reasons why the affidavit is not made by the party himself.[2]

e. The Order — (i) *In General.* A party may in the discretion of the judge to whom the application is made have an order for a general examination of his adversary. The examination is not as of course limited to an affirmative cause of action or an affirmative defense set forth in favor of the party desiring the examination.[3] The scope of an examination before trial should not be limited, especially where the testimony is taken before a judge and not before a referee.[4] The propriety of the order is confessed by the appearance of the party from time to time before the referee in pursuance thereof.[5] Where the order provides that witness fees should be tendered five days before the day fixed for examination, and the fees are not tendered until four days before the time, defendant is not bound to attend for examination, although the order was served in time.[6]

(ii) *Notice of Order.* Notice of the order for examination must be given to all the adversary parties.[7] If the adverse party has appeared, service on the

95. Goodyear's India Rubber Glove Mfg. Co. *v.* Gorham, 83 Hun (N. Y.) 342, 31 N. Y. Suppl. 965.

96. Rosenbaum *v.* Rice, 36 Misc. (N. Y.) 410, 73 N. Y. Suppl. 714.

97. Blatchford *v.* Paine, 24 N. Y. App. Div. 140, 48 N. Y. Suppl. 783.

98. Young *v.* McLemore, 3 Ala. 295; Hanson *v.* Marcus, 8 N. Y. App. Div. 318, 40 N. Y. Suppl. 951; Cross *v.* National F. Ins. Co., 2 Silv. Supreme (N. Y.) 443, 6 N. Y. Suppl. 84, 17 N. Y. Civ. Proc. 199; Railway Age, etc., Railroader *v.* Pryibil, 18 Misc. (N. Y.) 561, 42 N. Y. Suppl. 697; Corbett *v.* De Comeau, 4 Abb. N. Cas. (N. Y.) 252, 54 How. Pr. (N. Y.) 506; Lane *v.* Williams, 20 N. Y. Wkly. Dig. 16.

99. Orne *v.* Greene, 74 N. Y. App. Div. 404, 77 N. Y. Suppl. 475; Goodyear's India Rubber Glove Mfg. Co. *v.* Gorham, 83 Hun (N. Y.) 342, 31 N. Y. Suppl. 965; Simmons *v.* Hazard, 58 Hun (N. Y.) 119, 11 N. Y. Suppl. 511; Pittsburgh Bank *v.* Murphy, 18 N. Y. Suppl. 575.

1. Simmons *v.* Hazard, 65 Hun (N. Y.) 612, 20 N. Y. Suppl. 508, 23 N. Y. Civ. Proc. 15. And see *supra*, III, A, 3, d, (II), (B), (9).

2. Wolff *v.* Kaufman, 65 N. Y. App. Div. 29, 72 N. Y. Suppl. 500; Simmons *v.* Hazard, 58 Hun (N. Y.) 119, 11 N. Y. Suppl. 511; Doyle *v.* Kimball, 23 Misc. (N. Y.) 431, 52 N. Y. Suppl. 195; Pittsburgh Bank *v.* Murphy, 18 N. Y. Suppl. 575; Woodhull *v.* Washburn, 16 N. Y. Suppl. 78.

A mere allegation that the party is absent from the state is not sufficient. Wolff *v.* Kaufman, 65 N. Y. App. Div. 29, 72 N. Y. Suppl. 500.

3. Herbage *v.* Utica, 109 N. Y. 81, 16 N. E. 62; Kastner *v.* Kastner, 53 N. Y. App. Div. 293, 65 N. Y. Suppl. 756; Rosenbaum *v.* Rice, 36 Misc. (N. Y.) 410, 73 N. Y. Suppl. 714. And see Harrold *v.* New York El. R. Co., 21 Hun (N. Y.) 268, holding that the court has no greater or different power to limit the extent of such examination than it has to limit the examination of any witness upon the trial. But *compare* Kinsella *v.* Second Ave. R. Co., 61 N. Y. Super. Ct. 454, 19 N. Y. Suppl. 188.

4. Fatman *v.* Fatman, 18 N. Y. Suppl. 847, 22 N. Y. Civ. Proc. 149.

5. Langerman *v.* McAdam, 6 Misc. (N. Y.) 374, 26 N. Y. Suppl. 755.

6. Elkhorn First Nat. Bank *v.* Wood, 26 Wis. 500.

7. Working *v.* Garn, 148 Ind. 546, 47 N. E. 951; Allain *v.* Truxillo, 14 La. 297; Clarke *v.* Jones, 1 Rob. (La.) 78; Loop *v.* Gould, 17 Hun (N. Y.) 585; Riddle *v.* Cram, 3 Abb. N. Cas. (N. Y.) 117 note; Leeds *v.* Brown, 5 Abb. Pr. (N. Y.) 418; Mayer *v.* Noll, 56 How. Pr. (N. Y.) 214; Pake *v.* Proal, 54 How. Pr. (N. Y.) 93.

Lack of diligence in serving an order cannot be imputed to defendant upon a general statement in the papers moving a vacation thereof, that at certain intervals of time plaintiff has been publicly and frequently within the city of New York, it not appearing that defendant or his attorney could have known of his presence, and caused service to be made upon him. Dudley *v.* Press Pub.

attorney will be sufficient;[8] but an order for examination of a party before trial cannot be enforced by contempt proceedings without service on the party, service on the attorney not being sufficient.[9] Although the statute requires a particular day to be named, the presence of defendant is a waiver of notice to appear on the particular day and he will be bound to answer.[10] Where the order is for the examination of a witness, it must be served upon the attorney of the opposite party.[11]

f. Place of Examination. The examination of a party resident of the state can be had only in the county in which the person resides or has his place of business.[12] If the party is a non-resident the examination may be had out of the state on commission issued for that purpose.[13] Formerly it must have been had before a judge and not before a referee.[14]

g. Conduct of Examination — (I) *In General.* The conduct of the examination should be the same as in case of any other witness.[15] The questions must be legal and pertinent, otherwise the party is not bound to answer them.[16] The party who is examined by his adversary before trial may be cross-examined on the direct examination.[17]

(II) *Production of Books and Papers in Aid of Examination.* The statutory provisions for the examination of the adverse party do not authorize the court to order the production of books and papers of the party examined on such examination.[18] Books or documents may, however, be asked for the purpose of refreshing the recollection of the witnesses and in aiding their memory on the oral examination.[19] And it has been held that if a party on his examination voluntarily refers to the contents of books or papers he may be compelled to produce them or state the contents thereof.[20] If it becomes necessary to prove entries in

Co., 58 Hun (N. Y.) 181, 11 N. Y. Suppl. 337.

In South Carolina notice must be served on the party himself; service on the attorney is insufficient. Claiborne *v.* Frazier, 2 Brev. (S. C.) 47.

Under the early statutes of New York, an examination of the adverse party could be had at any time by giving five days' notice (Partin *v.* Elliott, 2 Sandf. (N. Y.) 667; Thaule *v.* Ritter, 13 Abb. Pr. N. S. (N. Y.) 439; Leeds *v.* Brown, 5 Abb. Pr. (N. Y.) 418), unless the judge on good cause shown ordered otherwise (Green *v.* Wood, 6 Abb. Pr. (N. Y.) 277; Leeds *v.* Brown, 5 Abb. Pr. (N. Y.) 418).

8. Greene *v.* Herder, 7 Rob. (N. Y.) 455, 4 Rob. (N. Y.) 655, 30 How. Pr. (N. Y.) 210; Thompson *v.* Sickels, 3 Abb. N. Cas. (N. Y.) 121 note; Webster *v.* Stockwell, 3 Abb. N. Cas. (N. Y.) 115. And see Brokaw *v.* Culver, 23 Abb. N. Cas. (N. Y.) 224, 7 N. Y. Suppl. 167.

9. Loop *v.* Gould, 17 Hun (N. Y.) 585; Tebo *v.* Baker, 16 Hun (N. Y.) 182; Freiberg *v.* Branigan, 3 Abb. N. Cas. (N. Y.) 121; Riddle *v.* Cram, 3 Abb. N. Cas. (N. Y.) 117 note; Mayer *v.* Noll, 56 How. Pr. (N. Y.) 214.

10. Leckie *v.* Scott, 10 La. 412.

11. Cowen *v.* Ferguson, 7 N. Y. St. 403.

12. Gustaf *v.* American Steamship Co., 31 Hun (N. Y.) 95, 4 N. Y. Civ. Proc. 243; Marsh *v.* Woolsey, 14 Hun (N. Y.) 1; Hesse *v.* Briggs, 45 N. Y. Super. Ct. 417. But see Todd *v.* Lambden, 10 Abb. Pr. N. S. (N. Y.) 383, 41 How. Pr. (N. Y.) 230.

13. Brockway *v.* Stanton, 2 Sandf. (N. Y.) 640, 1 Code Rep. (N. Y.) 128.

14. Berdell *v.* Berdell, 86 N. Y. 519; Draper *v.* Henningsen, 1 Bosw. (N. Y.) 611.

15. Dambman *v.* Butterfield, 4 Thomps. & C. (N. Y.) 542; People *v.* Dyckman, 24 How. Pr. (N. Y.) 222; *In re* Foster, 44 Vt. 570.

16. Boorman *v.* Pierce, 56 How. Pr. (N. Y.) 251.

17. *In re* Foster, 44 Vt. 570.

18. Jerrells *v.* Perkins, 25 N. Y. App. Div. 348, 49 N. Y. Suppl. 597; Savage *v.* Neely, 8 N. Y. App. Div. 316, 40 N. Y. Suppl. 946; Hauseman *v.* Sterling, 61 Barb. (N. Y.) 374; Woods *v.* De Figaniere, 1 Rob. (N. Y.) 607; El Tazi *v.* Stein, 13 N. Y. Suppl. 96, 20 N. Y. Civ. Proc. 125; Martin *v.* Spofford, 3 Abb. N. Cas. (N. Y.) 125; Fisk *v.* Chicago, etc., R. Co., 3 Abb. Pr. N. S. (N. Y.) 430; De Bary *v.* Stanley, 48 How. Pr. (N. Y.) 349.

Other proceedings to compel such production are specially prescribed by statute and rules of practice. El Tazi *v.* Stein, 13 N. Y. Suppl. 96.

19. Duffy *v.* Consolidated Gas Co., 59 N. Y. App. Div. 580, 69 N. Y. Suppl. 635; Ryan *v.* Reagan, 46 N. Y. App. Div. 590, 62 N. Y. Suppl. 39; Ahlmeyer *v.* Healy, 14 Daly (N. Y.) 288, 12 N. Y. St. 677; Rosenbaum *v.* Rice, 36 Misc. (N. Y.) 410, 73 N. Y. Suppl. 714; Clark *v.* Ennis, 35 Misc. (N. Y.) 339, 71 N. Y. Suppl. 943. And see Mauthey *v.* Wyoming County Co-operative F. Ins. Co., 76 N. Y. App. Div. 579, 78 N. Y. Suppl. 596.

20. Morrison *v.* McDonald, 9 Abb. N. Cas. (N. Y.) 57 note.

books, their production may be compelled on the examination by subpœna duces tecum,[21] and this is the proper course to pursue.[22] The production does not entitle the adverse party to a discovery of their contents, nor to an inspection or examination of them, nor to a conducting of the examination with respect to them otherwise than at the trial.[23] They are to be used solely as an adjunct of the oral examination.[24]

h. Failure to Appear or Answer. A party who refuses to appear for examination when ordered to do so is in contempt of court,[25] although it does not appear that the misconduct was calculated to or did defeat, impair, impede, or prejudice the rights or remedies of the applicant;[26] for such refusal, the complaint, answer, or reply may be stricken out[27] on motion but not *ex parte*,[28] or the attendance of the party may be procured by warrant.[29] Where the refusal takes place before answer filed, defendant's time to answer will be extended until plaintiff appears or secures a vacation of the order.[30] The default of defendant to appear for examination is waived by plaintiff's subsequently assigning days for such examination and postponing the same from time to time.[31]

i. Second Examination. A second examination of the adverse party may be had, although the statute makes no express provision for such reëxamination,[32] but will be granted only upon a showing of special facts justifying it.[33] The order for the second examination may be made on the affidavit for the original examination.[34]

4. Interrogatories — a. In General. As heretofore seen the statutes of some of the states provide for discovery at law by written interrogatories addressed to

21. People *v.* Armour, 18 N. Y. App. Div. 584, 46 N. Y. Suppl. 317; Savage *v.* Neely, 8 N. Y. App. Div. 316, 40 N. Y. Suppl. 946; Central Nat. Bank *v.* Arthur, 2 Sweeny (N. Y.) 194.

22. Gaughe *v.* Laroche, 6 Duer (N. Y.) 685, 14 How. Pr. (N. Y.) 451; Smith *v.* Macdonald, 1 Abb. N. Cas. (N. Y.) 350, 50 How. Pr. (N. Y.) 619, 52 How. Pr. (N. Y.) 117; Garighe *v.* Losche, 6 Abb. Pr. (N. Y.) 284 note.

23. Duffy *v.* Consolidated Gas Co., 59 N. Y. App. Div. 580, 69 N. Y. Suppl. 635; Drake *v.* Weinman, 12 Misc. (N. Y.) 65, 33 N. Y. Suppl. 177, 24 N. Y. Civ. Proc. 323; Bloom *v.* Ponds Extract Co., 18 N. Y. Suppl. 179, 27 Abb. N. Cas. (N. Y.) 366; Black *v.* Curry, 1 N. Y. Civ. Proc. 193; McGuffin *v.* Dinsmore, 4 Abb. N. Cas. (N. Y.) 241.

24. Mauthey *v.* Wyoming County Co-operative F. Ins. Co., 76 N. Y. App. Div. 579, 78 N. Y. Suppl. 596; Brett *v.* Buckam, 32 Barb. (N. Y.) 655.

25. State *v.* Cost, 10 Ohio Dec. (Reprint) 619, 22 Cinc. L. Bul. 250.

26. Wood *v.* De Figaniere, 1 Rob. (N. Y.) 607. But the judge or commissioner has no power to punish for contempt for refusal to be examined before the action is at issue. Stuart *v.* Allen, 45 Wis. 158.

27. Greene *v.* Herder, 7 Rob. (N. Y.) 455, 4 Rob. (N. Y.) 655, 30 How. Pr. (N. Y.) 210; Gaughe *v.* Laroche, 6 Duer (N. Y.) 685, 14 How. Pr. (N. Y.) 451; Garighe *v.* Losche, 6 Abb. Pr. (N. Y.) 284 note.

Defective service of process.—The fact that service of an order to strike out an answer unless defendants comply with an order for discovery is made on defendants' attorney and not on them personally does not deprive the court of power to strike out the answer for their failure, where they appear on the motion and contest the matter on the merits. Brown *v.* Georgi, 26 Misc. (N. Y.) 128, 56 N. Y. Suppl. 923.

In Missouri it has been held that the complaint should not be dismissed for failure of the party to appear or answer, unless the refusal is wilful; nor should it be dismissed, where the party refused believing he had the right to refuse and expressed his willingness to testify when he found he did not have such right. Coburn *v.* Tucker, 21 Mo. 219.

28. Thaule *v.* Ritter, 13 Abb. Pr. N. S. (N. Y.) 439.

29. Greene *v.* Herder, 7 Rob. (N. Y.) 455, 4 Rob. (N. Y.) 655, 30 How. Pr. (N. Y.) 210; Gaughe *v.* Laroche, 6 Duer (N. Y.) 685, 14 How. Pr. (N. Y.) 451; Garighe *v.* Losche, 6 Abb. Pr. (N. Y.) 284 note.

30. Farmers' Nat. Bank *v.* Underwood, 90 Hun (N. Y.) 342, 35 N. Y. Suppl. 693, 25 N. Y. Civ. Proc. 94.

31. Satterlee *v.* De Comeau, 7 Rob. (N. Y.) 661.

32. *In re* Spreen, 1 N. Y. Civ. Proc. 375. The fact that defendants in an action pending had been previously examined in proceedings supplementary to execution presents no objection to their examination before trial on motion of plaintiff. Watts *v.* Wilcox, 17 N. Y. Suppl. 647, 23 N. Y. Civ. Proc. 69. That one application has been made prematurely does not preclude the granting of a subsequent application properly made. Pender *v.* Mallett, 123 N. C. 57, 31 S. E. 351.

33. Dambmann *v.* Butterfield, 15 Hun (N. Y.) 495.

34. Haebler *v.* Hubbard, 36 Misc. (N. Y.) 642, 74 N. Y. Suppl. 461.

the adverse party.[35] Under such a statute interrogatories may be filed in an action pending at the date when the law takes effect.[36] The statutes should be liberally construed,[37] and are not repealed by statutes making parties competent witnesses.[38]

b. Application For Order Requiring Answer to. The application for an order requiring an answer to interrogatories must be based on the affidavit of the party, or some showing equivalent thereto, which must be recited in the order of court or appear of record.[39] The affidavit must show a cause of action on the merits in the applicant.[40]

c. Form and Requisites. The interrogatories must be specific.[41] If they are numerous and drawn with great carelessness so as to devolve upon the judge the trouble of settling them, he may send them back to be reformed and put into fit condition to be accepted.[42] They must be such as could be properly propounded in a bill of discovery.[43] They must disclose the party's case so far as to enable the court to form an opinion on the propriety of the proposed interrogatories.[44] They must be concerning matters material to the issue,[45] and to the case of the

35. See *supra*, II, A, 1.

A formal order is not necessary but defendant need merely be served with the interrogatories. Livesay *v.* O'Brien, 6 Wash. 553, 34 Pac. 134.

A party can be required to answer in open court only when sued in the parish of his domicile. Crocker *v.* Turnstall, 6 Rob. (La.) 354.

Necessity of order.— One party cannot as of right, and without a specific order of court, require the other to produce all his books and papers in answer to interrogatories. Amherst, etc., R. Co. *v.* Watson, 8 Gray (Mass.) 529.

36. Robbins *v.* Holman, 11 Cush. (Mass.) 26; Ramsden *v.* Brearley, 33 L. T. Rep. N. S. 322.

37. Volusia County Bank *v.* Bigelow, (Fla. 1903) 33 So. 704.

38. Jacksonville, etc., R. Co. *v.* Peninsular Land, etc., Co., 27 Fla. 1, 157, 9 So. 661, 17 L. R. A. 33, 65; Hubbard *v.* Hubbard, 6 Gray (Mass.) 362.

39. Marshall *v.* Riley, 7 Ga. 367. And see Bivens *v.* Brown, 37 Ala. 422.

Presumptions on appeal.— Where the trial court declines to compel an answer, in the absence of record showing to the contrary the appellate court will presume that the affidavit was not made. Bivens *v.* Brown, 37 Ala. 422.

40. Bivens *v.* Brown, 37 Ala. 422; May *v.* Hawkins, 3 C. L. R. 895, 11 Exch. 210, 1 Jur. N. S. 600, 24 L. J. Exch. 309, 3 Wkly. Rep. 550.

41. A party cannot make affidavit detailing the circumstances of a transaction and then ask his opponent whether the affidavit be not true or to state wherein it is incorrect. He must dissect the affidavit and state its details in distinct interrogatories. Demarest *v.* Ledoux, 10 Rob. (La.) 189.

42. Phillips *v.* Emens, 11 L. T. Rep. N. S. 512. See also Cawley *v.* Burton, 32 Wkly. Rep. 33, holding that if interrogatories as a whole are vexatious and unreasonable the court may strike out the whole of them without sifting the mass for the purpose of saving those questions which may be reasonable and proper.

43. *Alabama.*— Cain Lumber Co. *v.* Standard Dry Kiln Co., 108 Ala. 346, 18 So. 882; Montgomery Branch Bank *v.* Parker, 5 Ala. 731; Goodwin *v.* Wood, 5 Ala. 152.

Connecticut.— Downie *v.* Nettleton, 61 Conn. 593, 24 Atl. 977.

Florida.— Jacksonville, etc., R. Co. *v.* Peninsular Land, etc., Co., 27 Fla. 1, 157, 9 So. 661, 17 L. R. A. 33, 65.

Georgia.— Roberts *v.* Keaton, 21 Ga. 180; Thornton *v.* Adkins, 19 Ga. 464; Marshall *v.* Riley, 7 Ga. 367.

Michigan.— Mulhern *v.* Grove, 111 Mich. 528, 70 N. W. 15.

South Carolina.— Holly *v.* Thurston, Rice 282.

England.—Dalrymple *v.* Leslie, 8 Q. B. D. 7, 51 L. J. Q. B. 61, 45 L. T. Rep. N. S. 478, 30 Wkly. Rep. 105; Atherley *v.* Harvey, 2 Q. B. D. 524, 46 L. J. Q. B. 518, 36 L. T. Rep. N. S. 551, 25 Wkly. Rep. 727; Pye *v.* Butterfield, 5 B. & S. 829, 11 Jur. N. S. 220, 34 L. J. Q. B. 17, 11 L. T. Rep. N. S. 448, 13 Wkly. Rep. 178, 117 E. C. L. 829.

See 16 Cent. Dig. tit. "Discovery," § 76 *et seq.*

In Ohio the right to compel answers to interrogatories is not confined to cases where under the practice in chancery a discovery might be compelled, but extends to all cases where one party has the right to use the depositions of the opposite party. Templeton *v.* Morgan, 2 Ohio Dec. (Reprint) 602, 4 West. L. Month. 146.

44. Gourley *v.* Plimsoll, L. R. 8 C. P. 362, 42 L. J. C. P. 121, 28 L. T. Rep. N. S. 598, 21 Wkly. Rep. 683; Croomes *v.* Morrison, 5 E. & B. 984, 2 Jur. N. S. 163, 4 Wkly. Rep. 282, 85 E. C. L. 984.

45. McFarland *v.* Muscatine, 98 Iowa 199, 67 N. W. 233. An interrogatory in a bill for discovery as to the amount of income received by an execution-proof debtor as a public official and the disposition thereof is not impertinent or improper if designed to disclose profitable investments. Moore *v.* Alabama Nat. Bank, 120 Ala. 89, 23 So. 831.

party filing them.[46] Irrelevant interrogatories will not be allowed,[47] and need not be answered;[48] but the court and not the adversary party determines the question of relevancy.[49] The interrogatories must inquire as to matters of fact and not of law.[50] No cross-examination is permitted by interrogatories.[51] Interrogatories which have been served on defendants need not bear the signature of the clerk or the seal of the court.[52] Successive interrogatories on the same subject-matter are discretionary with the court.[53]

d. Time For Propounding. Interrogatories may be annexed to an amended petition,[54] but cannot be annexed to a petition refiled when not annexed to the original petition.[55] It is too late to propound interrogatories at the trial, or after it has commenced,[56] without some showing by affidavit excusing the delay.[57] But a party present at the trial may be ordered to answer instanter interrogatories, although propounded for the first time, where the questions require no recourse to books or papers and cannot delay the trial.[58] The right to file interrogatories on appeal is not waived by the fact that they were filed before a justice of the peace and withdrawn.[59] Where a party fails to file interrogatories in time and his adversary files cross interrogatories, he waives his right to have his interrogatories answered before answering the cross interrogatories.[60]

e. Who May Propound. The right to propound interrogatories depends on the capacity of plaintiff to sue.[61]

f. Who May Be Required to Answer. An infant plaintiff or defendant is not compelled to answer interrogatories,[62] nor is a guardian *ad litem*.[63] A corpora-

46. *Georgia.*— Marshall *v.* Riley, 7 Ga. 367.
Louisiana.— Saunders *v.* Carroll, 14 La. Ann. 27; Phillips *v.* Carr, 13 La. 71; Bullett *v.* Serpentine, 12 Mart. 393.
New Jersey.—Wolters *v.* Fidelity Trust Co., 65 N. J. L. 130, 46 Atl. 627.
New York.— Videtto *v.* Dudley, 56 N. Y. Super. Ct. 600, 4 N. Y. Suppl. 437.
Washington.— Du Clos *v.* Batcheller, 17 Wash. 389, 49 Pac. 483.
England.— Wiley *v.* Pistor, 7 Ves. Jr. 411, 32 Eng. Reprint 166; The Mary or Alexandra, 2 A. & E. 319, 38 L. J. Adm. 29, 18 L. T. Rep. N. S. 891, 17 Wkly. Rep. 551.
The statement of the applicant in his affidavit that they are material is not conclusive of the question. Foss *v.* Nutting, 14 Gray (Mass.) 484.

47. Whittaker *v.* Scarborough Post Newspaper Co., [1896] 2 Q. B. 148, 65 L. J. Q. B. 564, 74 L. T. Rep. N. S. 753, 44 Wkly. Rep. 657.

48. Levistones *v.* Marigny, 13 La. Ann. 353; Devore *v.* Dinsmore, 2 Ohio Dec. (Reprint) 600, 4 West. L. Month. 144; Red Polled Cattle Club of America *v.* Red Polled Cattle Club of America, 108 Iowa 105, 78 N. W. 803; Robinson *v.* Philadelphia, etc., R. Co., 28 Fed. 340; Smith *v.* Berg, 36 L. T. Rep. N. S. 471, 25 Wkly. Rep. 606.
What is not irrelevant.— An interrogatory whether the facts stated in the petition be not true cannot be irrelevant. Perron *v.* Grassier, 2 La. 152.
Failure to object on ground of irrelevancy. — If answered the admission of the answer in evidence cannot be objected to on the ground of irrelevancy, when no motion to reject the interrogatory has been made. Cincinnati, etc., R. Co. *v.* Howard, 124 Ind. 280, 24 N. E. 892, 19 Am. St. Rep. 96, 8 L. R. A. 593.

49. Hoyt *v.* Smith, 23 Conn. 177, 60 Am. Dec. 632.

50. Whateley *v.* Crowter, 5 E. & B. 709, 2 Jur. N. S. 207, 25 L. J. Q. B. 163, 4 Wkly. Rep. 121, 85 E. C. L. 709.

51. Kennedy *v.* Dodson, [1895] 1 Ch. 334, 64 L. J. Ch. 257, 72 L. T. Rep. N. S. 172, 12 Reports 92, 43 Wkly. Rep. 259.

52. Toomer *v.* Righton, Riley (S. C.) 263.

53. Hancock *v.* Franklin Ins. Co., 107 Mass. 113.

54. Blair *v.* Sioux City, etc., R. Co., (Iowa 1898) 73 N. W. 1053.

55. Theis *v.* Chicago, etc., R. Co., 107 Iowa 522, 78 N. W. 199.

56. Jones *v.* Berryhill, 25 Iowa 289.
In New Jersey interrogatories to a complaint must be filed within fifteen days after the filing of the answer, or the complainant will not be compelled to answer them, unless there be some sufficient excuse for not filing them until after that time. Phelps *v.* Curtis, 2 N. J. Eq. 387.
In England leave will be granted to plaintiff to file interrogatories after defense made as of course. Janies *v.* Barns, 17 C. B. 596, 25 L. J. C. P. 182, 84 E. C. L. 596.

57. Dabbs *v.* Hemken, 3 Rob. (La.) 123; Gravier *v.* Cullion, 11 La. 269; Coco *v.* Lacour, 4 La. 507. And see McMillan *v.* Croft, 2 Tex. 397.

58. Hayden *v.* Davis, 9 Rob. (La.) 323; Coco *v.* Lacour, 4 La. 507.

59. Kennedy *v.* Gooding, 7 Gray (Mass.) 417.

60. Garwood *v.* Curteis, 10 Jur. N. S. 199, 10 L. T. Rep. N. S. 26, 12 Wkly. Rep. 509.

61. Union Bank *v.* McDonough, 5 La. 63.

62. Mayor *v.* Collins, 24 Q. B. D. 361, 59 L. J. Q. B. 199, 62 L. T. Rep. N. S. 326, 38 Wkly. Rep. 349.

63. Ingram *v.* Little, 11 Q. B. D. 251, 31 Wkly. Rep. 858.

tion can be required to answer interrogatories,[64] even though it be a foreign corporation;[65] but the party propounding the interrogatories must prove to the satisfaction of the court that the other party is a corporation.[66]

g. Service. The interrogatories may be served on plaintiff or on his attorney,[67] and when a party has no attorney of record, service of interrogatories by leaving a copy at his domicile with his wife is sufficient, and where notice besides is given by the commissioner the evidence will be received.[68] A defect in the service of interrogatories cannot avail after they have been in court several years.[69] Plaintiff is not bound to answer interrogatories ordered to be served on him until service is made,[70] and unless the statutory notice of the propounding of the interrogatories is given the answers will not be allowed to be taken for confessed.[71]

h. Objections — (1) *Grounds.* Interrogatories cannot be based upon a pleading held bad on demurrer,[72] or upon a pleading constituting no defense to an action,[73] or require answers concerning matters not stated in the pleading,[74] or not pertinent to the issue,[75] or require the statement of conclusions of law, or answers to hypothetical questions, or to give opinions, or set out copies of instruments.[76] But although an interrogatory be too broad it is not to be treated with unnecessary strictness, and the party will be required to answer so much as is relevant to the cause at issue.[77] A party is not entitled to interrogatories as to what facts possible witnesses would testify to.[78] They cannot be filed for the purpose of ascertaining the contents of a written instrument,[79] or to contradict the same.[80] So interrogatories seeking exclusively for information relating to the case of the other side are fishing interrogatories and are not permitted.[81]

64. Blair *v.* Sioux City, etc., R. Co., 109 Iowa 369, 80 N. W. 673.

65. Illinois Cent. R. Co. *v.* Sanford, 75 Miss. 862, 23 So. 355, 942.

66. Gott *v.* Adams Express Co., 100 Mass. 320.

67. Jackson *v.* Hughes, 6 Ala. 257 (service on the solicitor of a party is a proper foundation for an attachment for failure to answer); *In re* Mulcaster, 47 L. J. Ch. 609, 26 Wkly. Rep. 434.

68. Flower *v.* Downs, 6 La. Ann. 538.

69. Wood *v.* Maguire, 21 Ga. 576.

70. Desfarge *v.* Desfarge, 1 La. 365.

71. Cain Lumber Co. *v.* Standard Dry Kiln Co., 108 Ala. 346, 18 So. 882; Morrison *v.* Bean, 25 Tex. Suppl. 442.

72. Lung *v.* Sims, 14 Ind. 467.

73. Lamson *v.* Falls, 6 Ind. 309.

74. Chaffin *v.* Brownfield, 88 Ind. 305; Devore *v.* Dinsmore, 2 Ohio Dec. (Reprint) 600, 4 West. L. Month. 144. Where a plaintiff in answer to or avoidance of a defense sets up new or distinct matter, it is competent for him to seek from defendant a disclosure in support of such new issue. Todd *v.* Bishop, 136 Mass. 386; Wilson *v.* Webber, 2 Gray (Mass.) 558.

75. *Georgia.*— Roberts *v.* Keaton, 21 Ga. 180.

Indiana.— Stevens *v.* Flannagan, 131 Ind. 122, 30 N. E. 898.

Kentucky.— Burnett *v.* Garnett, 18 B. Mon. 68.

Louisiana.— Butler *v.* Stewart, 18 La. Ann. 554; Picket *v.* Vance, 14 La. Ann. 668; Kenner *v.* Peck, 2 La. Ann. 938.

Massachusetts.— Elliott *v.* Lyman, 3 Allen 110.

See 16 Cent. Dig. tit. "Discovery," § 78.

Interrogatories propounded for delay.—Interrogatories to plaintiff, although sworn to be material to the defense, will be struck out when evidently propounded for delay. Parker *v.* Hewitt, 1 Rob. (La.) 11.

Where fraud is charged great latitude is allowed in the interrogatories, and although they are seemingly immaterial they will not be stricken out unless clearly improper. Cecile *v.* St. Denis, 14 La. 184.

76. Meyer *v.* Manhattan L. Ins. Co., 144 Ind. 439, 43 N. E. 448.

77. Hancock *v.* Franklin Ins. Co., 107 Mass. 113. And see Tuscaloosa First Nat. Bank *v.* Leland, 122 Ala. 289, 25 So. 195.

Where some of the interrogatories to an answer are frivolous, the party is not entitled to an order that they may be generally answered. Hogaboom *v.* Price, 53 Iowa 703, 6 N. W. 43.

78. Robbins *v.* Brockton St. R. Co., 180 Mass. 51, 61 N. E. 265. Only such interrogatories need be answered as to matters in personal knowledge of the interrogated party, and not as to matters in knowledge of others which he expects to prove. Parker *v.* Wilson, 2 N. J. L. J. 365.

79. Herschfeld *v.* Clarke, 11 Exch. 712, 2 Jur. N. S. 239, 25 L. J. Exch. 113.

Limitations of rule.— While inspection or copy cannot be demanded by interrogatories, patent and unmistakable facts to be gathered from such writings, as for example the date and amount of a draft, may be legally demanded. Wolters *v.* Fidelity Trust Co., 65 N. J. L. 130, 46 Atl. 627.

80. Moor *v.* Roberts, 2 C. B. N. S. 671, 3 Jur. N. S. 1221, 26 L. J. C. P. 246, 5 Wkly. Rep. 693, 89 E. C. L. 671.

81. Volusia County Bank *v.* Bigelow, (Fla.

(II) *Requisites and Sufficiency.* An objection that is made to the interrogatories for the first time when they are offered in evidence at the trial with the answers thereto is made too late.[82] If some of the interrogatories are objectionable, the objection to each with the reason therefor must be stated.[83] It is error for the court to strike out all the interrogatories if any of them are competent.[84] Objections to the form of the interrogatories must be made in writing.[85]

i. Answers to Interrogatories — (I) *In General.* The answers to interrogatories are part of the record and cannot be withdrawn, although excepted to, and although the party is ordered to answer again.[86] It is the duty of the interrogated party, althongh a non-resident, to take out the commission to take his signature, and oath, and answers to be filed by him in reply to the interrogatories filed by the adverse party.[87]

(II) *Time For Making Answer.* It is within the discretion of the court to permit a party to answer interrogatories after the time limited by the statute for answering the same has expired.[88] They need not accompany the answer to the petition, but may be filed before the trial.[89]

(III) *By Whom Answer Made.* The answers cannot be made by an agent[90]

1903) 33 So. 704; *In re* Pfirman, 1 Ohio S. & C. Pl. Dec. 177, 1 Ohio N. P. 127; Edwards *v.* Wakefield, 6 E. & B. 462, 2 Jur. N. S. 762, 4 Wkly. Rep. 710, 88 E. C. L. 462; Zarifi *v.* Thornton, 3 Jur. N. S. 92, 26 L. J. Exch. 214.

What are and what are not fishing interrogatories.—It was proper to refuse to compel an answer to an interrogatory as to what caused the collision, as a party cannot be required to state his views or disclose his defense. Robbins *v.* Brockton St. R. Co., 180 Mass. 51, 61 N. E. 265. Interrogatories propounded to plaintiff under the statute are not in the nature of a fishing bill, where, in connection with the affidavit made previous to their being filed, they state the existence of a pertinent fact which defendant believes to be within plaintiff's knowledge, and calls on him to answer in respect thereto. Chandler *v.* Hudson, 8 Ala. 366.

82. Combs *v.* Union Trust Co., 146 Ind. 688, 46 N. E. 16. But see Poindexter *v.* Davis, 6 Gratt. (Va.) 481.

83. Swinney *v.* Dorman, 25 Ala. 433; Dalgleish *v.* Lowther, [1899] 2 Q. B. 590, 68 L. J. Q. B. 956, 81 L. T. Rep. N. S. 161, 48 Wkly. Rep. 37; Church *v.* Perry, 36 L. T. Rep. N. S. 513.

Objections to a part of the interrogatories on the ground of irrelevancy, or that they seek to discover the evidence of the other party, must be taken by affidavit and do not afford ground for setting aside interrogatories. Gay *v.* Labouchere, 4 Q. B. D. 206, 48 L. J. Q. B. 279, 27 Wkly. Rep. 413.

84. Volusia County Bank *v.* Bigelow, (Fla. 1903) 33 So. 704.

85. Allerkamp *v.* Gallagher, (Tex. Civ. App. 1893) 24 S. W. 372.

86. McKerall *v.* McMillan, 9 Rob. (La.) 19; Hunter *v.* Smith, 5 Mart. N. S. (La.) 177; Poston *v.* Adams, 5 Mart. (La.) 272.

87. Clarke *v.* Jones, 1 Rob. (La.) 78; Townsend *v.* Gibbs, 11 Cush. (Mass.) 158; Sheldon *v.* Kendall, 11 Cush. (Mass.) 74. Where defendant moved for the continuance of the cause on the ground that the commission to take the answers of plaintiff, residing out of the state, on interrogatories propounded to him had not been returned and the counsel of plaintiff then offered as a substitute the answers of plaintiff taken without a commission in another state responsive to the interrogatories which were received in evidence, it was held that the admission of the answers so taken was irregular. Kirtland *v.* Harris, 20 La. Ann. 153.

Under the Georgia statutes it is the duty of the party examined to execute and return the commission, on notice of the filing of the interrogatories, but in the absence of such notice the burden is on the party seeking the discovery. Hatcher *v.* Mechanicsburg First Nat. Bank, 79 Ga. 538, 5 S. E. 127.

88. Pool *v.* Harrison, 18 Ala. 514.

Filing before trial of canse sufficient.—Where interrogatories on facts and articles are not required to be answered in open court, nor to be sworn to before the clerk, the answers sworn to before a justice of the peace and filed in court before the trial of the cause cannot be objected to on the ground of their not being filed until after the day fixed in the order of the court for their being answered. Huff *v.* Freeman, 15 La. Ann. 240.

89. Seal *v.* Erwin, 2 Mart. N. S. (La.) 245.

Where there are annexed to the answer, requiring no reply, interrogatories to be answered by plaintiff, the court should be asked to fix a definite time within which they should be answered before moving for a dismissal for failure to answer. Garviu *v.* Cannon, 53 Iowa 716, 6 N. W. 122; Hogaboom *v.* Price, 53 Iowa 703, 6 N. W. 43.

90. Henderson *v.* Bowles, 3 Mart. N. S. (La.) 152; Buford *v.* Valentine, 3 Mart. N. S. (La.) 57; Wentzel *v.* Zinn, 10 Ohio S. & C. Pl. Dec. 97, 7 Ohio N. P. 512. When a party is ordered to answer in open court, the interrogatories should be severally read to him, and he should then dictate his an-

or attorney,[91] but must be made by the party, and if not so made are nullities and need not be excepted to.[92] If the interrogatories are addressed to a corporation the answer should be made by the president;[93] if to partners, each partner must answer if he is expressly required to do so by the interrogatories,[94] but not otherwise.[95] They are sufficiently authenticated, if made by a non-resident, if the person authenticating the same *prima facie* has authority to administer an oath.[96]

(IV) *Requisites and Sufficiency of Answer.* The party to whom the interrogatories are propounded must make just such answers as he would be required to do to a bill of discovery.[97] If not responsive to the interrogatories[98] or evasive[99] they will be stricken out. Although the answer must be categorical, it is immaterial what language is used.[1] And if substantially all the interrogatories are answered it is not necessary that the answers should correspond numerically with the interrogatories, unless it is apparent that defendant's rights were prejudiced thereby.[2] A party is not bound to answer positively, if he swears that his memory does not enable him to do so.[3] If the interrogatories are not specifically directed to the information and belief of the party as well as knowledge, it is sufficient if he answers from knowledge.[4] If an officer of a corporation is examined, he may be required to make inquiries of other officers and servants of the corporation and give the information so received,[5] except such as

swers to the clerk, to be put on record in the presence of the judge and the opposite party, on the day fixed by order of the court, or if there is no order after notice to the party interrogating. So when defendant's answers written by his counsel out of court are brought in and sworn to by him in open court, with whose leave they are filed, without, however, being read to the court and without the knowledge of plaintiff's counsel, they will on motion be stricken out. Nicholson *v.* Sherard, 10 La. Ann. 533.

91. Harding *v.* Noyes, 125 Mass. 572.

Answer on information derived from attorney.— Where one in answer to interrogatories filed an answer thereto by an attorney under whose advice the acts complained of were done, accompanying his own affidavit stating that his information was derived from the attorney, but did not state that he believed the answer of the attorney to be true, such answer should have been stricken from the files. Gollobitsch *v.* Rainbow, 84 Iowa 567, 51 N. W. 48.

92. Henderson *v.* Bowles, 3 Mart. N. S. (La.) 152; Buford *v.* Valentine, 3 Mart. N. S. (La.) 57.

93. Commercial Bank *v.* Guice, 12 Rob. (La.) 181.

94. Allain *v.* Truxillo, 14 La. 297. But see Ferguson *v.* Murphy, 10 La. Ann. 53.

95. Tiernan *v.* Noe, 15 La. 119; Martineau *v.* Carr, 3 Mart. (La.) 497.

96. Reid *v.* Reid, 11 Tex. 585.

97. Saltmarsh *v.* Bower, 22 Ala. 221; Thompson *v.* Mapp, 6 Ga. 260.

98. Tuscaloosa First Nat. Bank *v.* Leland, 122 Ala. 289, 25 So. 195. *Compare* Conway *v.* Turner, 8 Ark. 356.

Where the facts of an answer are not closely connected with those of the question, the opposite party should move to strike out the irrelevant matter. Smith *v.* Richardson, 11 Rob. (La.) 516; Wells *v.* Hickman, 6 Rob. (La.) 1.

99. Farrow *v.* Nashville, etc., R. Co., 109 Ala. 448, 20 So. 303; Blair *v.* Sioux City, etc., R. Co., 109 Iowa 369, 80 N. W. 673; Baker *v.* Garlick, 9 Rob. (La.) 125; Robbins *v.* Leverich, 6 La. 340; Lowry *v.* Moore, 16 Wash. 476, 48 Pac. 238, 58 Am. St. Rep. 49.

What answers not evasive.— Plaintiff in a suit for personal injuries against a railroad company cannot complain if defendant in answer to interrogatories asking if a written report of the killing has been made to it, and if so that the report be attached to the answer, stated that the engineer and section foreman had made unsworn reports of the accident and refused to attach the same, such *ex parte* statements of persons being hearsay and not competent evidence. Culver *v.* Alabama Midland R. Co., 108 Ala. 330, 18 So. 827.

Limitation of rules.— Where answers to interrogatories on facts and articles all taken together present a complete answer to all the interrogatories taken together, the court will not order one of the interrogatories to be taken for confessed on an objection that the answer to that particular interrogatory was evasive. Wright-Blodgett Co. *v.* Elms, 106 La. 150, 30 So. 311.

1. Gabaroche *v.* Hebert, 7 Mart. N. S. (La.) 526.

2. Maduel *v.* Mousseau, 28 La. Ann. 691. A party to an action may make one answer to several interrogatories of the adverse party, to each of which it is responsive, notwithstanding that the statute provides that "each interrogatory shall be answered separately and fully." Amherst, etc., R. Co. *v.* Watson, 8 Gray (Mass.) 529.

3. Lewis *v.* Decoux, 5 Mart. N. S. (La.) 649.

4. Fry *v.* Shehee, 55 Ga. 208.

5. Toland *v.* Paine Furniture Co., 179 Mass. 501, 61 N. E. 52; Bolckow *v.* Fisher, 52 L. J. Q. B. 12; Pavitt *v.* North Metropolitan Tramways Co., 48 L. T. Rep. N. S. 730. The corporation cannot shield itself behind an avowal of personal ignorance on the part

may have been accidentally acquired by them and not in the course of their employment.[6] A party is not bound to confine himself in his answer to a simple and unexplained negative or affirmative response to the questions, but he may give such explanations and state such circumstances as are necessary to a full and fair understanding of the matters concerning which he is interrogated.[7] The explanation must, however, be reasonably limited.[8] The whole answer must be taken together.[9] The answer may deal much in generalities without being obnoxious to the objection that it is not closely connected with the main facts as to which the party was interrogated,[10] and may introduce any matter relevant to the issue in the cause between the parties.[11] But a party interrogated as to a particular fact cannot annex to his answer letters to a third person and thus introduce statements not under oath to influence the jury on other points,[12] nor state his conclusions of law on the facts.[13]

(v) *Verification.* The answer should be verified by the oath of the party[14] and not by his attorney,[15] and although the answer is made by a corporation, it must nevertheless be verified.[16] The verification may be on a separate paper.[17] After going to trial defendant cannot ask that the suit be dismissed, because there is no legal evidence that plaintiff's answers are sworn to.[18]

(vi) *Exceptions to Answer.* The exceptions to the answer must be in writing[19] and must be made before trial.[20] Objections to portions of the answer on the ground that they are irrelevant may be made on the trial in the same manner as an objection would be made on the examination of a witness;[21] so may the objection that the officer before whom the answers were sworn to was not authorized to receive an oath.[22]

(vii) *Answer as Evidence* — (a) *In General.* Answers to interrogatories are not considered oral evidence.[23] The answers to interrogatories may be read in evidence with the same effect as answers to bills of discovery.[24] The party filing

of the officer when he can reasonably ascertain the facts sought. Robbins *v.* Brockton St. R. Co., 180 Mass. 51, 61 N. E. 265.

6. Welsbach Incandescent Gas Lighting Co. *v.* New Sunlight Incandescent Co., [1900] 2 Ch. 1, 69 L. J. Ch. 546, 83 L. T. Rep. N. S. 58, 48 Wkly. Rep. 595.

7. Manning *v.* Maroney, 87 Ala. 563, 6 So. 343, 13 Am. St. Rep. 67; Crymes *v.* White, 37 Ala. 549; Pritchett *v.* Munroe, 22 Ala. 501; Railsback *v.* Koons, 18 Ind. 274; Gusman *v.* Hearsey, 26 La. Ann. 251; Quick *v.* Haskins, 15 La. Ann. 656; Broxton *v.* Bloom, 15 La. Ann. 618; Tegarden *v.* Powell, 15 La. Ann. 184; Bowers *v.* Hale, 14 La. Ann. 419; Ross *v.* Ross, 9 Rob. (La.) 173; Lauve *v.* Bell, 1 La. 191; Nichols *v.* Pierce, 6 Mart. N. S. (La.) 705; Glasgow *v.* Stevenson, 6 Mart. N. S. (La.) 567; Maxwell *v.* Gunn, 2 Mart. N. S. (La.) 140; Rogers *v.* Parmetti, 1 Mart. N. S. (La.) 382; Richardson *v.* Terrel, 9 Mart. (La.) 1; Taylor *v.* Morgan, 1 Mart. (La.) 203; Foster *v.* Spear, 22 Tex. 226. *Contra*, Berthole *v.* Mace, 5 Mart. (La.) 576; Yocum *v.* Roy, 3 Mart. (La.) 409.

Application of rule.— Where defendant and plaintiff resorted to interrogatories on facts and articles the witness had the right to state in her answers any facts tending to her defense closely linked to the facts on which she was being questioned. Carroll *v.* Carroll, 48 La. Ann. 956, 20 So. 210. But see Woodruff *v.* Dodd, 15 La. Ann. 644.

8. Lyell *v.* Kennedy, 33 Wkly. Rep. 44.

9. Ross *v.* Ross, 9 Rob. (La.) 173; Bradford *v.* Brown, 11 Mart. (La.) 217.

10. Herbert *v.* Butterworth, 23 Tex. 250.

11. Pritchett *v.* Munroe, 22 Ala. 501; Saltmarsh *v.* Bower, 22 Ala. 221; Baxter *v.* Massasoit Ins. Co., 13 Allen (Mass.) 320. *Contra*, Lake *v.* Gilchrist, 7 Ala. 955; Zeigler *v.* Scott, 10 Ga. 389, 54 Am. Dec. 395.

12. Reynolds *v.* Rowley, 3 Rob. (La.) 201, 38 Am. Dec. 233.

13. Owen *v.* Brown, 13 La. Ann. 201; Knox *v.* Thompson, 12 La. Ann. 114.

14. Henderson *v.* Bowles, 3 Mart. N. S. (La.) 152; Wentzel *v.* Zinn, 10 Ohio S. & C. Pl. Dec. 9, 7 Ohio N. P. 512.

Interrogatories cannot be taken for confessed against a plaintiff who has actually answered merely because his oath was not taken under a commission from the court before which the case was pending. McCloskey *v.* Wingfield, 32 La. Ann. 38.

15. Wentzel *v.* Zinn, 10 Ohio S. & C. Pl. Dec. 9, 7 Ohio N. P. 512.

16. Blair *v.* Sioux City, etc., R. Co., (Iowa 1898) 73 N. W. 1053.

17. Roy *v.* Wiley, 2 La. 315.

18. Dean *v.* Smith, 12 Mart. (La.) 316.

19. Allen *v.* Atchison, 26 Tex. 616.

20. McCargo *v.* Crutcher, 27 Ala. 171; Allen *v.* Atchison, 26 Tex. 616; Dikes *v.* De Cordova, 17 Tex. 618.

21. Pritchett *v.* Munroe, 22 Ala. 501.

22. Center *v.* Stockton, 8 Mart. (La.) 208.

23. Semere *v.* Semere, 10 La. Ann. 704.

24. Wilson *v.* Maria, 21 Ala. 359; Maxwell *v.* Guthrie, 23 Ark. 702; Strawn *v.* Norris, 23 Ark. 542; Stillwell *v.* Badgett, 22 Ark. 164; Field *v.* Pope, 5 Ark. 66; Clayton *v.*

the petition for discovery is not bound to read the answer,[25] but may prove his demand by any other testimony.[26] It is entirely in the discretion of the party calling for it, whether he will use it or not.[27] If, however, he offers a portion of it, he makes the whole of it evidence,[28] at least so far as it is pertinent to the interrogatories. This would not only include the answer given, but also all matter in explanation thereof;[29] yet if the answer is to an entirely distinct matter from that inquired of it is not evidence for the party making it.[30] In a number of jurisdictions the party answering the interrogatories is not entitled to the benefit thereof as evidence unless introduced as evidence by his adversary, the practice being the same in this regard as was the case with pure bills of discovery.[31] In other jurisdictions, however, the party answering is entitled to the benefit of his answer as evidence whether introduced by his adversary or not.[32] It is evidence as against parties to the suit other than the party answering.[33] It is evidence in another suit, although the issues are different,[34] and in the same suit in support of amended pleadings.[35] The party cannot amend his petition by striking out interrogatories the answers to which are unfavorable to him.[36] If he introduces the answer he admits the respondent is worthy of credit in so far that he cannot impeach him.[37] It may be read, although the adversary party is present at the trial,[38] and prepared to testify,[39] in which event the opposite party may

Brown, 30 Ga. 490. See also Lovett *v.* Casey, 17 Tex. 944.

Both the interrogatories and answers may be read. Clinton Nat. Bank *v.* Torry, 30 Iowa 85.

25. *Alabama.*— Saltmarsh *v.* Bower, 22 Ala. 221.

Arkansas.— Conway *v.* Turner, 8 Ark. 356.

New Hampshire.— Wood *v.* Weld, Smith 367.

North Carolina.— Shober *v.* Wheeler, 113 N. C. 370, 16 S. E. 328.

South Carolina.— Chapman *v.* Clarke, 2 Rich. 366.

Virginia.— McFarland *v.* Hunter, 8 Leigh 489.

See 16 Cent. Dig. tit. "Discovery," § 99.

A party's answer cannot make evidence of his conversations with third persons in his opponent's absence, nor can he make evidence of a copy without accounting for the original. Lafarge *v.* Ripley, 4 Mart. N. S. (La.) 303. But see *contra*, Van Horn *v.* Smith, 59 Iowa 142, 12 N. W. 789.

26. Conway *v.* Turner, 8 Ark. 356.

27. Montgomery Branch Bank *v.* Parker, 5 Ala. 731.

28. Pritchett *v.* Munroe, 22 Ala. 501; Saltmarsh *v.* Bower, 22 Ala. 221; Strawn *v.* Norris, 23 Ark. 542; Stillwell *v.* Badgett, 22 Ark. 164; Scott *v.* Indianapolis Wagon Works, 48 Ind. 75; Dawson Town, etc., Co. *v.* Woodhull, 67 Fed. 451, 14 C. C. A. 464. And see Hart *v.* Freeman, 42 Ala. 567.

Where a party has offered in evidence responsive answers of his adversary to interrogatories propounded under these statutes he is not entitled to have such answers included, although the testimony considered them inadmissible. Farrow *v.* Nashville, etc., R. Co., 109 Ala. 448, 20 So. 303.

29. Allend *v.* Spokane Falls, etc., R. Co., 21 Wash. 324, 58 Pac. 244.

30. Lake *v.* Gilcrist., 7 Ala. 955.

31. *Alabama.*— Welles *v.* Bransford, 28 Ala. 200; Montgomery Branch Bank *v.* Parker, 5 Ala. 731.

Arkansas.— Conway *v.* Turner, 8 Ark. 356.

Missouri.— Fugate *v.* Carter, 6 Mo. 267.

Virginia.— Vaughn *v.* Garland, 11 Leigh 251; McFarland *v.* Hunter, 8 Leigh 489.

Washington.— Moore *v.* Palmer, 14 Wash. 134, 44 Pac. 142.

See 16 Cent. Dig. tit. "Discovery," § 100.

32. Bachemin *v.* Scheixnaydre, 16 La. Ann. 32; McKerall *v.* McMillan, 9 Rob. (La.) 19; Hunter *v.* Smith, 5 Mart. N. S. (La.) 177; Berthole *v.* Mace, 5 Mart. (La.) 576; Standard L., etc., Ins. Co. *v.* Tinney, 73 Miss. 726, 19 So. 662; Fuqua *v.* Tindall, 11 Sm. & M. (Miss.) 465; Page *v.* Krekey, 17 N. Y. Suppl. 764; Barry *v.* Galvin, 37 How. Pr. (N. Y.) 310; Handley *v.* Leigh, 8 Tex. 129.

33. Stetson *v.* Wolcott, 15 Gray (Mass.) 545; Montgomery *v.* Dillingham, 3 Sm. & M. (Miss.) 647; Hadley *v.* Upshaw, 27 Tex. 547, 86 Am. Dec. 654; McGown *v.* Randolph, 26 Tex. 492. *Contra*, Huff *v.* Freeman, 13 La. Ann. 262; Johnson *v.* Marsh, 2 La. Ann. 772.

A defendant who is brought into court after the other defendants have obtained plaintiff's testimony is not bound by such previous testimony, but may require him to testify again. Larimore *v.* Bobb, 114 Mo. 446, 21 S. W. 922.

34. Williams *v.* Cheney, 3 Gray (Mass.) 215.

35. Weatherby *v.* Brown, 106 Mass. 338.

36. Scull *v.* Mowry, 2 Mart. (La.) 275.

37. Southern R. Co. *v.* Hubbard, 116 Ala. 387, 22 So. 541; Wilson *v.* Maria, 21 Ala. 359.

38. Scott *v.* Indianapolis Wagon Works, 48 Ind. 75; Island County *v.* Babcock, 20 Wash. 238, 55 Pac. 114.

39. Presbrey *v.* Public Opinion Co., 6 N. Y. App. Div. 600, 39 N. Y. Suppl. 957; Meier *v.* Paulus, 70 Wis. 165, 35 N. W. 301; Cannon *v.* Sweet, (Tex. Civ. App. 1894) 28 S. W. 718.

explain his answer.[40] It cannot be read against an absent co-defendant unless plaintiff has notified defendant not absent to produce his co-defendant or his deposition.[41]

(B) *Conclusiveness of Answer.* The answer, however, is not conclusive evidence, and other testimony is to be heard and considered if contradictory.[42] The force of the answer cannot be destroyed by the testimony of one witness without corroborating circumstances,[43] or by circumstantial evidence, however strong, unless in corroboration of the testimony of a witness.[44]

(VIII) *FAILURE TO ANSWER*—(A) *Consequence of.* On failure to answer interrogatories, the opposite party is entitled to the benefit of some one or more of the following remedies: Continuance of the cause until full answers to the interrogatories are made;[45] compelling an answer by attachment;[46] the direction of a nonsuit,[47] or default,[48] or dismissal;[49] the striking out of the party's pleading;[50] or the taking of the interrogatories as confessed,[51] without any formal motion

The error in excluding the same is not waived by thereupon calling the adverse party. Meier *v.* Paulus, 70 Wis. 165, 35 N. W. 301.

40. Smith *v.* Olson, 92 Tex. 181, 46 S. W. 631 [*reversing* (Tex. Civ. App. 1898) 44 S. W. 874].

41. Saxby *v.* Neal, 2 Pinn. (Wis.) 399, 2 Chandl. (Wis.) 53.

42. Wilson *v.* Maria, 21 Ala. 359; Le Bleu *v.* Savoie, 109 La. 680, 33 So. 729; Godfrey *v.* Hall, 4 La. 158; Hunter *v.* Smith, 3 Mart. N. S. (La.) 109; Read *v.* Bailey, 2 Mart. (La.) 59; Sawdey *v.* Spokane Falls, etc., R. Co., 30 Wash. 349, 70 Pac. 972, 94 Am. St. Rep. 880. *Contra,* Robinson *v.* Francis, 7 How. (Miss.) 458; Fugate *v.* Carter, 6 Mo. 267.

43. Shiers *v.* Poole, 6 La. Ann. 401; Fletcher *v.* Fletcher, 5 La. Ann. 406; Conrey *v.* Harrison, 4 La. Ann. 349; Graneri *v.* Talbot, 12 Rob. (La.) 526; Bourgeois *v.* Bourg, 2 La. 537; Stafford *v.* Stafford, 1 Mart. N. S. (La.) 648; Oliver *v.* Chapman, 15 Tex. 400.

44. Oliver *v.* Chapman, 15 Tex. 400.

45. *Ex p.* McLendon, 33 Ala. 276; Jackson *v.* Hughes, 6 Ala. 257.

Rights of defaulting party.—Where interrogatories to plaintiffs are filed, and an order obtained directing them to answer, and they fail, they cannot complain that no further steps were taken to enforce an answer until the calling of the cause for trial. Hubler *v.* Pullen, 9 Ind. 273, 68 Am. Dec. 620.

46. *Ex p.* McLendon, 33 Ala. 276; Goodwin *v.* Harrison, 6 Ala. 438; *Re* Mulcaster, 47 L. J. Ch. 609, 26 Wkly. Rep. 434.

47. *Ex p.* McLendon, 33 Ala. 276; Huggins *v.* Carter, 7 Ala. 630; Young *v.* McLemore, 3 Ala. 295; Patterson *v.* Lafarge, 1 Mart. N. S. (La.) 194; Harding *v.* Morrill, 136 Mass. 291; Robbins *v.* Holman, 11 Cush. (Mass.) 26; Illinois Cent. R. Co. *v.* Sanford, 75 Miss. 862, 23 So. 355. *Contra,* Knight *v.* Booth, 35 Tex. 10.

It is within the discretion of the court either to order a nonsuit to be entered at the time fixed for answering interrogatories, or to allow further time (Harding *v.* Noyes, 125 Mass. 572); and from the exercise of such discretion an appeal does not lie (Harding *v.* Noyes, 125 Mass. 572. But see Baker *v.* Carpenter, 127 Mass. 226).

48. Goodwin *v.* Harrison, 6 Ala. 438; Young *v.* McLemore, 3 Ala. 295.

This default the court may set aside at its discretion, but the discretion should not be exercised unless a satisfactory reason is shown for failure to answer, and showing in all cases where practicable should be accompanied by full and explicit answers. Goodwin *v.* Harrison, 6 Ala. 438.

49. Jackson *v.* Hughes, 6 Ala. 257; Kennedy *v.* Guise, 62 Ga. 304; Stern *v.* Filene, 14 Allen (Mass.) 19.

50. Royer *v.* German, 48 Mo. App. 510; Teas *v.* McDonald, 13 Tex. 394, 65 Am. Dec. 65.

Where defendant refuses to answer certain questions considered by him impertinent, under the advice of his counsel, the court may exercise its discretion in the matter of striking out his pleading. Dustin *v.* Farrelly, 81 Mo. App. 380.

51. Walker *v.* Wingfield, 16 La. Ann. 300; Owen *v.* Brown, 13 La. Ann. 201; Seaman *v.* Babington, 11 La. Ann. 173; Knight *v.* Murchison, 1 Rob. (La.) 31; Baine *v.* Wilson, 18 La. 59; Polo *v.* Natili, 14 La. 260; Cox *v.* Mitchell, 7 La. 520; Barrow *v.* Sterling, 2 Mart. N. S. (La.) 55; Patterson *v.* Lafarge, 1 Mart. N. S. (La.) 194; Harrell *v.* Kemper, 44 Tex. 421; Toomer *v.* Righton, Riley (S. C.) 263; Gulf, etc., R. Co. *v.* Nelson, 5 Tex. Civ. App. 387, 24 S. W. 588. But see Alston *v.* Graves, 6 Ala. 174, where it was held that when a party fails or refuses to answer interrogatories propounded to him under the act authorizing discoveries in suits at law, the court is not authorized to consider the interrogatories as confessed, or to submit an account exhibited with them to the jury, without further proof than arises from the judgment by default entered under the statute.

Interrogatories propounded to plaintiff by a defendant corporation can be taken as confessed, although there is no provision by which a corporation could be required to answer interrogatories. Gulf, etc., R. Co. *v.* Nelson, 5 Tex. Civ. App. 387, 24 S. W.

therefor,[52] and although other evidence of the facts is accessible to the party.[53] Interrogatories will not be taken for confessed, however, unless the refusal to answer the same is wilful,[54] and unless the interrogatories are pertinent and relevant at the time when the answer is required;[55] and in order that advantage may be taken of the statutory provision that interrogatories evasively answered shall be taken as confessed, interrogatories must distinctly embody the facts desired to be proved.[56] So if the petition is neither answered nor taken for confessed, the party filing it has the right to abandon it and prove the facts by witnesses,[57] and it has been held that if a party fail to answer a petition for discovery the petition may be read in evidence.[58] Nevertheless the failure of plaintiff to answer interrogatories does not entitle defendant to the affirmative relief prayed for in his answer.[59] The neglect or refusal of nominal parties to answer should not be permitted to prejudice the rights of real parties in interest.[60] Although interrogatories are not fully answered the answers are not to be disregarded as far as responsive.[61] The burden is on the party refusing to answer to show cause for such refusal.[62]

(B) *Waiver of Right to Take Advantage of.* The right to have a nonsuit for failure to answer defendant's interrogatories is waived by not making motion for the same until after the jury is sworn,[63] and cannot be taken advantage of on appeal.[64] But the mere fact that plaintiff's attorney caused the action to be

588. But see *contra*, Houston, etc., R. Co. *v.* Stuart, (Tex. Civ. App. 1898) 48 S. W. 799.

Effect of cross-examination at trial.— The fact that plaintiff is cross-examined at the trial by defendant does not render harmless the court's refusal to take interrogatories which he refuses to answer as confessed. Gulf, etc., R. Co. *v.* Nelson, 5 Tex. Civ. App. 387, 24 S. W. 588.

Order not self-executing.—An order of the court that interrogatories attached to a pleading be answered on or before a certain time, and in default thereof that the action stand dismissed, does not execute itself, and the action continues on the docket until dismissed by the court. Springfield, etc., R. Co. *v.* Western R. Constr. Co., 49 Ohio St. 681, 32 N. E. 961.

Testimony cannot be introduced to disprove answers taken as confessed for failure to answer. Gulf, etc., R. Co. *v.* Hamilton, 17 Tex. Civ. App. 76, 42 S. W. 358.

Privileged matter.— The refusal of a party to answer an interrogatory on the ground that he is privileged from answering the same is not a confession of the truth of the matters concerning which he is interrogated. Wentworth *v.* Lloyd, 10 H. L. Cas. 589, 10 Jur. N. S. 961, 33 L. J. Ch. 688, 10 L. T. Rep. N. S. 767; Lloyd *v.* Passingham, 16 Ves. Jr. 59, 33 Eng. Reprint 906; *Ex p.* Symes, 11 Ves. Jr. 521, 32 Eng. Reprint 1191.

52. McCloskey *v.* Wingfield, 32 La. Ann. 38. But see Leblanc *v.* Massieu, 26 La. Ann. 332.

53. Roche *v.* Chaplin, 1 Bailey (S. C.) 419.

54. *Georgia.*— Dawson *v.* Callaway, 31 Ga. 47.

Indiana.— Bish *v.* Beatty, 111 Ind. 403, 12 N. E. 523; Chaffin *v.* Brownfield, 88 Ind. 305.

Louisiana.— Graves *v.* Hemken, 12 Rob. 103.

Missouri.— Tyson *v.* Farm, etc., Assoc., 156 Mo. 588, 57 S. W. 740.

Texas.— Robertson *v.* Melasky, 84 Tex. 559, 19 S. W. 776; Bounds *v.* Little, 75 Tex. 316, 12 S. W. 1109; Rushing *v.* Willis, (Civ. App. 1894) 28 S. W. 921. And see Wells *v.* Groesbeck, 22 Tex. 429.

England.— Von Hoff *v.* Hoerster, 27 L. J. Exch. 299.

See 16 Cent. Dig. tit. "Discovery," § 84 *et seq.*

Illustration.— A plaintiff cannot be nonsuited for insufficiency of answers which substantially meet all the interrogatories of the adverse party, unless he has refused to comply with an order of the court pointing out the insufficiencies and directing further answers. Amherst, etc., R. Co. *v.* Watson, 8 Gray (Mass.) 529.

A party is entitled to advice of counsel and is not in default for refusing to answer without notice and without opportunity for consultation. Wofford *v.* Farmer, 90 Tex. 651, 40 S. W. 788.

55. Barnard *v.* Blum, 69 Tex. 608, 17 S. W. 98.

56. Church *v.* Waggoner, 78 Tex. 200, 14 S. W. 581.

57. Foster *v.* Pinckard, 5 Sm. & M. (Miss.) 792.

58. Field *v.* Pope, 5 Ark. 66.

59. Waite *v.* Wingate, 4 Wash. 324, 30 Pac. 81.

60. Bridges *v.* Nicholson, 20 Ga. 90.

61. Meyer *v.* Claus, 15 Tex. 516.

62. Gulf, etc., R. Co. *v.* Hamilton, 17 Tex. Civ. App. 76, 42 S. W. 358.

63. Gitzandener *v.* Macarty, 10 Mart. (La.) 70; Dean *v.* Hubbard, 1 Mart. N. S. (La.) 566; Woolsey *v.* Paulding, 9 Mart. (La.) 280; Voorhees *v.* Jones, 29 N. J. L. 270.

64. Garvin *v.* Cannon, 53 Iowa 716, 6 N. W. 122. But see Bird *v.* Bowie, 3 Mart. N. S. (La.) 112.

placed upon the trial list was held not to constitute a waiver of the right to claim a default for failure to answer interrogatories.[65]

5. Privileged Matter — a. Confidential Communications. An attorney may properly refuse to answer on the ground that his answer would disclose facts and information given in confidence by his client.[66] It is also the policy of the law to exclude the testimony of one spouse against the other.[67] So workmen pledged to secrecy, and employed in a factory in which the business is conducted in private, to secure the secrecy of the machinery and methods of manufacture, will not be compelled in a suit against their employer to answer interrogatories and describe the peculiarities of his machinery, where no evidence has been introduced to show that the secrets of defendant were used to conceal an invasion of complainant's rights.[68] Where a physician makes affidavit to facts derived in a professional capacity for use against his patient in violation of his duty to his client he may be compelled at the instance of the patient to make an affidavit upon the same subject.[69]

b. Matters Subjecting to Criminal Prosecutions, Penalties, or Forfeitures. A party cannot be compelled in an oral examination before trial or in answer to interrogatories propounded in accordance with statute to disclose matters which would subject him to a criminal prosecution or to a penalty or forfeiture.[70] But

65. Kennedy *v.* Gooding, 7 Gray (Mass.) 417.

66. Procter *v.* Smiles, 55 L. J. Q. B. 527.

The existence or non-existence of a suit is immaterial. Penruddock *v.* Hammond, 11 Beav. 59; Pearse *r.* Pearse, 1 De G. & Sm. 12, 11 Jur. 52, 16 L. J. Ch. 153; Walsingham *v.* Goodricke, 3 Hare 122, 25 Eng. Ch. 122; Boyd *r.* Petrie, 20 L. T. Rep. N. S. 934, 17 Wkly. Rep. 903. But see Stanhope *v.* Roberts, 2 Atk. 214, 26 Eng. Reprint 532.

In New York the court may in a proper case make an order requiring the attorney for plaintiff to furnish defendant with a sworn statement of plaintiff's residence and address, but in the United States courts, where there are no provisions for the oral examination of parties before trial corresponding to the provisions of the New York code of procedure, such an order will not be made. Corbett *v.* Gibson, 18 Hun 49; Corbett *v.* Gibson, 6 Fed. Cas. No. 3,222, 16 Blatchf. 336. So defendant is not entitled to an order requiring a disclosure of plaintiff's occupation and residence where a written offer by plaintiff's attorney to furnish the address and occupation of plaintiff, if it was desired for any purpose connected with the action, was refused, as such refusal shows an ulterior design in procuring the order. Drake *v.* New York Iron Mine, 75 Hun (N. Y.) 539, 27 N. Y. Suppl. 489.

67. Carter *v.* Taylor, 20 La. Ann. 421; Cartwright *r.* Green, 2 Leach 952, 8 Ves. Jr. 405, 7 Rev. Rep. 99, 32 Eng. Reprint 412.

68. Dobson *v.* Graham, 49 Fed. 17.

69. Mason *v.* Libbey, 2 Abb. N. Cas. (N. Y.) 137.

70. *Alabama.*— Southern R. Co. *v.* Bush, 122 Ala. 470, 26 So. 168.

Georgia.— Marshall *r.* Riley, 7 Ga. 367.

Indiana.— French *r.* Venneman, 14 Ind. 282.

Louisiana.— Shepherd *v.* Payson, 16 La. Ann. 360.

New York.—Andrews *v.* Prince, 31 Hun 233, 66 How. Pr. 280; Yamato Trading Co. *v.* Brown, 27 Hun 248, 63 How. Pr. 283; Kinney *v.* Roberts, 26 Hun 166; Sprague *v.* Butterworth, 22 Hun 502; Brandon Mfg. Co. *v.* Bridgman, 14 Hun 122; Roberts *v.* Press Pub. Co., 57 N. Y. Super. Ct. 526, 8 N. Y. Suppl. 870; Phœnix *v.* Dupuy, 7 Daly 238, 2 Abb. N. Cas. 146; Franks *v.* Reimer, 9 N. Y. Suppl. 273; Jones *v.* Press Pub. Co., 8 N. Y. Suppl. 958; Funk *v.* Tribune Assoc., 4 N. Y. Civ. Proc. 408; Andrews *v.* Keene, 4 N. Y. Civ. Proc. 330; Walker *v.* Dunlevey, 4 N. Y. Civ. Proc. 38; Burbank *v.* Reed, 1 N. Y. Civ. Proc. 42 note; Bennett *v.* Hughes, 1 Code Rep. 4.

Pennsylvania.— Horstman *v.* Kaufman, 97 Pa. St. 147, 39 Am. Rep. 802; *In re* Hazlett, 8 Pa. Dist. 201, 29 Pittsb. Leg. J. N. S. 376.

Texas.— Parr *v.* Johnston, 15 Tex. 294.

United States.— Snow *v.* Mast, 63 Fed. 623.

England.— Pritchett *v.* Smart, 7 C. B. 625, 6 D. & L. 702, 18 L. J. C. P. 211, 62 E. C. L. 625; Webb *v.* East, 5 Ex. D. 108, 44 J. P. 200, 49 L. J. Exch. 250, 41 L. T. Rep. N. S. 715, 28 Wkly. Rep. 336; Short *v.* Mercier, 15 Jur. 93, 20 L. J. Ch. 289, 3 Macn. & G. 205, 49 Eng. Ch. 155; Lamb *v.* Munster, 52 L. J. Q. B. 46, 47 L. T. Rep. N. S. 442, 31 Wkly. Rep. 117; Maccallum *v.* Turton, 2 Y. & J. 183.

See 16 Cent. Dig. tit. "Discovery," §§ 56, 58.

Penalties under foreign laws.— The privilege extends to penalties and forfeitures under foreign as well as under domestic laws. U. S. *v.* McRae, L. R. 3 Ch. 79, 37 L. J. Ch. 129, 17 L. T. Rep. N. S. 428, 16 Wkly. Rep. 377; Heriz *v.* Riera, 5 Jur. 20, 10 L. J. Ch. 47, 11 Sim. 318, 34 Eng. Ch. 318.

Slander.— An examination of the adverse party will not be permitted to ascertain whether a slander has been committed. De Leon *v.* De Lima, 66 How. Pr. (N. Y.) 287.

Usury.— An order was granted for the ex-

it is no ground for refusal to be examined that such examination will result in a pecuniary loss to the party,[71] or show him to have been guilty of a fraud.[72] The fact that acts for which penalties are sought to be recovered are misdemeanors is no reason for denying plaintiff the right to examine third persons.[73]

c. When and How Objections Claimed. It is ordinarily no objection to the application for an order for the examination of a party either orally or on interrogatories or for the production of documents that the answers to the questions that may be propounded to the party on such examination, or the documents when produced, may criminate the party who is examined or who is asked to produce the document, but the objection should be made on the examination, or on the refusal to produce the documents in compliance with the order.[74] This is the rule where the examination will not necessarily involve the giving of information which might incriminate the party or subject him to a penalty or forfeiture,[75] or where it is not apparent that the testimony which the party seeks to obtain relates exclusively to the facts which if proven would show that the witness was guilty of a crime or subject him to a penalty or forfeiture.[76] If, however, it is apparent that all the evidence sought for must tend to criminate the party, or to subject him to a penalty or forfeiture, the order for his examination should not be made,[77] and if made should be vacated.[78] The claim for privilege must be made

amination to disclose usury, as usury is not necessarily a crime, it being such only when there is a corrupt agreement to receive more than the statutory amount of interest. Fox *v.* Miller, 20 N. Y. App. Div. 333, 46 N. Y. Suppl. 837.

Limitations of rule.— If a defendant makes statements in his answer sufficient to show that he has incurred penalties he cannot refuse to produce documents referred to. Ewing *v.* Osbaldiston, 6 Sim. 608, 9 Eng. Ch. 608.

71. Holt *v.* Southern Finishing, etc., Co., 116 N. C. 480, 21 S. E. 919.

72. Frothingham *v.* Broadway, etc., R. Co., 9 N. Y. Civ. Proc. 304.

73. People *v.* Armour, 18 N. Y. App. Div. 584, 46 N. Y. Suppl. 317.

74. Ryan *v.* Reagan, 46 N. Y. App. Div. 590, 62 N. Y. Suppl. 39; Campbell *v.* Brock's Commercial Agency, 38 N. Y. App. Div. 137, 56 N. Y. Suppl. 540; Skinner *v.* Steele, 88 Hun (N. Y.) 307, 34 N. Y. Suppl. 748; Farmer *v.* National L. Assoc., 73 Hun (N. Y.) 522, 26 N. Y. Suppl. 126; Davenport Glucose Mfg. Co. *v.* Taussig, 33 Hun (N. Y.) 32; Sprague *v.* Butterworth, 22 Hun (N. Y.) 502; Edison Mfg. Co. *v.* Hazard, 58 N. Y. Super. Ct. 566, 9 N. Y. Suppl. 433; Batterson *v.* Sanford, 45 N. Y. Super. Ct. 127; Judah *v.* Lane, 14 Daly (N. Y.) 308, 12 N. Y. St. 130; Rosenbaum *v.* Rice, 36 Misc. (N. Y.) 410, 73 N. Y. Suppl. 714; Haynes *v.* Hatch, 15 N. Y. Suppl. 615; Ball *v.* Evening Post Pub. Co., 12 N. Y. Civ. Proc. 4; Greismann *v.* Dreyfus, 4 N. Y. Civ. Proc. 32; Corbett *v.* De Comeau, 4 Abb. N. Cas. (N. Y.) 252, 54 How. Pr. (N. Y.) 506; McGuffin *v.* Dinsmore, 4 Abb. N. Cas. (N. Y.) 241; Greensward *v.* Union Dime Sav. Inst., 59 How. Pr. (N. Y.) 399; Globe Rolling Mill *v.* King, 2 Cinc. Super. Ct. 21; Allhusen *v.* Labouchere, 3 Q. B. D. 654. 48 L. J. Q. B. 34; Harvey *v.* Lovekin, 10 P. D. 122, 54 L. J. P. 1, 33 Wkly. Rep. 188 [*followed* in Spokes *v.* Grosvenor, etc., R. Terminus Hotel Co., [1897] 2 Q. B. 124, 66 L. J. Q. B. 598, 76 L. T. Rep. N. S. 677, 45 Wkly. Rep. 545].

75. Campbell *v.* Brock's Commercial Agency, 38 N. Y. App. Div. 137, 56 N. Y. Suppl. 540; Farmer *v.* National L. Assoc., 73 Hun (N. Y.) 522, 26 N. Y. Suppl. 126.

76. Matter of Sayre, 70 N. Y. App. Div. 329, 75 N. Y. Suppl. 286; Skinner *v.* Steele, 88 Hun (N. Y.) 307, 34 N. Y. Suppl. 748; Abbott-Downing Co. *v.* Faber, 87 Hun (N. Y.) 299, 34 N. Y. Suppl. 433; Ryan *v.* Reegan, 46 N. Y. App. Div. 590, 62 N. Y. Suppl. 39; Haynes *v.* Hatch, 15 N. Y. Suppl. 615; Canada Steamship Co. *v.* Sinclair, 65 How. Pr. (N. Y.) 474.

77. Yamato Trading Co. *v.* Brown, 27 Hun (N. Y.) 248, 63 How. Pr. (N. Y.) 283; Kinney *v.* Roberts, 26 Hun (N. Y.) 166; Brandon Mfg. Co. *v.* Bridgmann, 14 Hun (N. Y.) 122; Kugelman *v.* Barry, 17 Misc. (N. Y.) 30, 40 N. Y. Suppl. 767; Ball *v.* Evening Post Pub. Co., 12 N. Y. Civ. Proc. 4; Burbank *v.* Reed, 1 N. Y. Civ. Proc. 42 note; Russ *v.* Campbell, 1 N. Y. Civ. Proc. 41; Saunders *v.* Wiel, [1892] 2 Q. B. 321, 62 L. J. Q. B. 37, 67 L. T. Rep. N. S. 207, 4 Reports 1, 40 Wkly. Rep. 594; Hobbs *v.* Hudson, 25 Q. B. D. 232, 54 J. P. 520, 59 L. J. Q. B. 562, 63 L. T. Rep. N. S. 215, 38 Wkly. Rep. 682; Jones *v.* Jones, 22 Q. B. D. 425, 58 L. J. Q. B. 178, 60 L. T. Rep. N. S. 421, 37 Wkly. Rep. 479; Martin *v.* Treacher, 16 Q. B. D. 507, 50 J. P. 356, 55 L. J. Q. B. 209, 54 L. T. Rep. N. S. 7, 34 Wkly. Rep. 315; Hunnings *v.* Williamson, 10 Q. B. D. 459, 47 J. P. 390, 52 L. J. Q. B. 273, 48 L. T. Rep. N. S. 581, 31 Wkly. Rep. 336; Glynn *v.* Houston, 1 Keen 329, 6 L. J. Ch. 129, 15 Eng. Ch. 329; Whiteley *v.* Barley, 56 L. J. Q. B. 312.

78. Skinner *v.* Steele, 88 Hun (N. Y.) 307, 34 N. Y. Suppl. 748; Andrews *v.* Prince, 31 Hun (N. Y.) 233, 66 How. Pr. (N. Y.) 280; Yamato Trading Co. *v.* Brown, 27 Hun (N. Y.) 248, 63 How. Pr. (N. Y.) 283; Johns *v.* Press Pub. Co., 58 N. Y. Super. Ct.

by the party and cannot be made by his attorney,[79] and it must be made under oath.[80]

6. Physical Examination[81]— a. Power of Court to Order Examination — (i) *In General.* The authorities are conflicting as to the power of the court to order a physical examination of a party before trial. In a number of jurisdictions, in actions to recover damages for personal injuries, it has been held that the court may order a reasonable physical examination of plaintiff to be made before trial by competent physicians and surgeons, whenever such an examination is necessary to ascertain the nature, extent, or permanency of the injuries complained of;[82] and especially in the case of latent injuries the extent of which can only be correctly ascertained through an examination by experts.[83] In other jurisdictions it is held that in the absence of statute the court has no such power.[84]

(ii) *Statutory Provisions.* In New Jersey and New York there are now statutes expressly authorizing the court to order a physical examination of plaintiff in actions to recover damages for personal injuries,[85] and these statutes have been declared constitutional.[86]

580, 8 N. Y. Suppl. 958; Roberts *v.* Press Pub. Co., 57 N. Y. Super. Ct. 526, 8 N. Y. Suppl. 870, 18 N. Y. Civ. Proc. 251; Franks *v.* Reimer, 9 N. Y. Suppl. 273; Andrews *v.* Keene, 4 N. Y. Civ. Proc. 330.

79. Hobbs *v.* Stone, 5 Allen (Mass.) 109; Osborn *v.* London Dock Co., 3 C. L. R. 313, 10 Exch. 698, 1 Jur. N. S. 93, 24 L. J. Exch. 140, 3 Wkly. Rep. 238.

80. Hobbs *v.* Stone, 5 Allen (Mass.) 109.

81. In divorce cases see Divorce.

On assessment of damages for personal injury see Damages.

On writ de ventre inspiciendo see Criminal Law.

82. *Alabama.*— Alabama, etc., R. Co. *v.* Hill, 90 Ala. 71, 8 So. 90, 24 Am. St. Rep. 764, 9 L. R. A. 442.

Arkansas.— Sibley *v.* Smith, 46 Ark. 275, 55 Am. Rep. 584.

Georgia.— Richmond, etc., R. Co. *v.* Childress, 82 Ga. 719, 9 S. E. 602, 14 Am. St. Rep. 189, 3 L. R. A. 808.

Iowa.— Schroeder *v.* Chicago, etc., R. Co., 47 Iowa 375.

Minnesota.— Wanek *v.* Winona, 78 Minn. 98, 80 N. W. 581, 79 Am. St. Rep. 354, 46 L. R. A. 448.

Missouri.— Owens *v.* Kansas City, etc., R. Co., 95 Mo. 169, 8 S. W. 350, 6 Am. St. Rep. 39; Shepard *v.* Missouri Pac. R. Co., 85 Mo. 629, 55 Am. Rep. 390 [*disapproving* Loyd *v.* Hannibal, etc., R. Co., 53 Mo. 509].

Ohio.— Miami, etc., Turnpike Co. *v.* Baily, 37 Ohio St. 104.

Pennsylvania.— Demenstein *v.* Richardson, 2 Pa. Dist. 825, 34 Wkly. Notes Cas. 295; Clark *v.* Northumberland Borough, 23 Pa. Co. Ct. 555; Lawrenee *v.* Keim, 19 Phila. 351.

Washington.— Lane *v.* Spokane Falls, etc., R. Co., 21 Wash. 119, 57 Pac. 367, 75 Am. St. Rep. 821, 46 L. R. A. 153.

Wisconsin.— White *v.* Milwaukee City R. Co., 61 Wis. 536, 21 N. W. 524, 50 Am. Rep. 154.

See 16 Cent. Dig. tit. "Discovery," § 92.

83. Hess *v.* Lake Shore, etc., R. Co., 7 Pa. Co. Ct. 565.

84. *Illinois.*—Joliet St. R. Co. *v.* Call, 143 Ill. 177, 32 N. E. 389.

Indiana.— Pennsylvania Co. *v.* Newmeyer, 129 Ind. 401, 28 N. E. 860 [*overruling* Terre Haute, etc., R. Co. *v.* Brunker, 128 Ind. 542, 26 N. E. 178; Hess *v.* Lowrey, 122 Ind. 225, 23 N. E. 156, 17 Am. St. Rep. 355, 7 L. R. A. 90].

Massachusetts.— Stack *v.* New York, etc., R. Co., 177 Mass. 155, 58 N. E. 686, 83 Am. St. Rep. 269, 52 L. R. A. 328.

New York.— McQuigan *v.* Delaware, etc., R. Co., 129 N. Y. 50, 29 N. E. 235, 26 Am. St. Rep. 507, 14 L. R. A. 466 [*affirming* 60 Hun 576, 15 N. Y. Suppl. 973, and *overruling* Walsh *v.* Sayre, 52 How. Pr. 334]; Roberts *v.* Ogdensburgh, etc., R. Co., 29 Hun 154; Neuman *v.* Third Ave. R. Co., 50 N. Y. Super. Ct. 412.

South Carolina.—Easler *v.* Southern R. Co., 60 S. C. 117, 38 S. E. 258.

Texas.—Austin, etc., R. Co. *v.* Cluck, (Civ. App. 1903) 73 S. W. 569; Galveston, etc., R. Co. *v.* Sherwood, (Civ. App. 1902) 67 S. W. 776 [*overruling* in effect Missouri Pac. R. Co. *v.* Johnson, 72 Tex. 95, 10 S. W. 325].

United States.— Union Pac. R. Co. *v.* Botsford, 141 U. S. 250, 11 S. Ct. 1000, 35 L. ed. 734; Illinois Cent. R. Co. *v.* Griffin, 80 Fed. 278, 25 C. C. A. 413.

See 16 Cent Dig. tit. "Discovery," § 92.

A statute providing for the production of books or writings does not authorize the physical examination of a party before trial. Union Pac. R. Co. *v.* Botsford, 141 U. S. 250, 11 S. Ct. 1000, 35 L. ed. 734.

85. McGovern *v.* Hope, 63 N. J. L. 76, 42 Atl. 830; Lyon *v.* Manhattan R. Co., 142 N. Y. 298, 37 N. E. 113, 25 L. R. A. 402; Green *v.* Middlesex R. Co., 10 Misc. (N. Y.) 473, 32 N. Y. Suppl. 177, 24 N. Y. Civ. Proc. 252, 1 N. Y. Annot. Cas. 167.

The statute does not apply to any other actions than those for the recovery of damages for personal injuries. People *v.* Roosa, 43 N. Y. App. Div. 611, 60 N. Y. Suppl. 244.

86. McGovern *v.* Hope, 63 N. J. L. 76, 42 Atl. 830; Lyon *v.* Manhattan R. Co., 142 N. Y. 298, 37 N. E. 113, 25 L. R. A. 402.

b. Right of Defendant to Demand Examination. The right of defendant to an order for a physical examination of plaintiff is not absolute, but rests in the discretion of the court,[87] the exercise of which will not be interfered with unless clearly abused.[88]

c. Purpose and Grounds. The purpose of the examination is to obtain evidence to be used upon the trial,[89] and should be allowed only where the ends of justice seem to demand it.[90] The application for an examination should be refused whenever it is not shown to be necessary for the purposes of the trial,[91] or where it would be calculated to impair plaintiff's health[92] or to injure his person.[93]

d. The Application. The application for a physical examination should be made before the trial begins,[94] and so as not to delay the trial[95] or prejudice plaintiff in proving his case.[96] And it must show that the examination is material and necessary for the purposes of the trial.[97]

87. Alabama Great Southern R. Co. *v.* Hill, 90 Ala. 71, 8 So. 90, 24 Am. St. Rep. 764, 9 L. R. A. 442; Richmond, etc., R. Co. *v.* Childress, 82 Ga. 719, 9 S. E. 602, 14 Am. St. Rep. 189, 3 L. R. A. 808; Owens *v.* Kansas City, etc., R. Co., 95 Mo. 169, 8 S. W. 350, 6 Am. St. Rep. 39; O'Brien *v.* La Crosse, 99 Wis. 421, 75 N. W. 81, 40 L. R. A. 831.

Where the injuries are alleged to be permanent it has been held that defendant is entitled as a matter of right to have the opinion of a surgeon based upon a personal examination. Sibley *v.* Smith, 46 Ark. 275, 55 Am. Rep. 584.

88. Owens *v.* Kansas City, etc., R. Co., 95 Mo. 169, 8 S. W. 350, 6 Am. St. Rep. 39; Sidekum *v.* Wabash, etc., R. Co., 93 Mo. 400, 4 S. W. 701, 3 Am. St. Rep. 549; Norton *v.* St. Louis, etc., R. Co., 40 Mo. App. 642; Kinney *v.* Springfield, 35 Mo. App. 97.

In a clear case of abuse of discretion the action of the trial court will be reviewed and corrected on appeal. Alabama Great Southern R. Co. *v.* Hill, 90 Ala. 71, 8 So. 90, 24 Am. St. Rep. 764, 9 L. R. A. 442; Sibley *v.* Smith, 46 Ark. 275, 55 Am. Rep. 584.

89. St. Louis Bridge Co. *v.* Miller, 138 Ill. 465, 28 N. E. 1091; McGovern *v.* Hope, 63 N. J. L. 76, 42 Atl. 830.

90. Gulf, etc., R. Co. *v.* Norfleet, 78 Tex. 321, 14 S. W. 703; International, etc., R. Co. *v.* Underwood, 64 Tex. 463. See also Galesburg *v.* Benedict, 22 Ill. App. 111.

Where the complaint does not state plaintiff's injuries with sufficient definiteness, and the defect is not supplied by a bill of particulars, a physical examination before trial may be required. Harvey *v.* Philadelphia Traction Co., 26 Wkly. Note Cas. (Pa.) 231.

The fact that a physical examination has been already made by the regular physician of the party is no ground for refusing to order another examination by a disinterested physician appointed by the court. Alabama Great Southern R. Co. *v.* Hill, 90 Ala. 71, 8 So. 90, 24 Am. St. Rep. 764, 9 L. R. A. 442.

Refusal to grant an order for a physical examination in a proper case is not ground for reversal where an opportunity for such examination is given during the trial (Gulf, etc., R. Co. *v.* Norfleet, 78 Tex. 321, 14 S. W. 703), or where subsequent to such refusal plaintiff submits to an examination by physicians of defendant's selection (Chicago, etc., R. Co. *v.* Holland, 122 Ill. 461, 13 N. E. 145), or by other reputable physicians who are examined by defendant at the trial (International, etc., R. Co. *v.* Underwood, 64 Tex. 463).

91. St. Louis Bridge Co. *v.* Miller, 138 Ill. 465, 28 N. E. 1091.

92. O'Brien *v.* La Crosse, 99 Wis. 421, 75 N. W. 81, 40 L. R. A. 831.

The delicacy of feeling or nervous temperament of the party is not ground for refusing a motion, if it appears that the examination can be made without injury to health. Alabama Great Southern R. Co. *v.* Hill, 90 Ala. 71, 8 So. 90, 24 Am. St. Rep. 764, 9 L. R. A. 442.

93. Boelter *v.* Ross Lumber Co., 103 Wis. 324, 79 N. W. 243.

94. Chadron *v.* Glover, 43 Nebr. 732, 62 N. W. 62; Stuart *v.* Havens, 17 Nebr. 211, 22 N. W. 419.

An application made after plaintiff has introduced all his evidence (Galesburg *v.* Benedict, 22 Ill. App. 111; Terre Haute, etc., R. Co. *v.* Brunker, 128 Ind. 542, 26 N. E. 178) and where no reason is shown for the delay (Hess *v.* Lowrey, 122 Ind. 225, 23 N. E. 156, 17 Am. St. Rep. 355, 7 L. R. A. 90; Miami, etc., Turnpike Co. *v.* Baily, 37 Ohio St. 104) is properly refused.

The application should generally be preceded by a request made of the party to submit to the examination voluntarily. Richmond, etc., R. Co. *v.* Childress, 82 Ga. 719, 9 S. E. 602, 14 Am. St. Rep. 189, 3 L. R. A. 808.

95. Kinney *v.* Springfield, 35 Mo. App. 97, holding that an application made on the day previous to the trial and two days after the date for which the case was docketed is properly refused.

96. Miami, etc., Turnpike Co. *v.* Baily, 37 Ohio St. 104.

97. St. Louis Bridge Co. *v.* Miller, 138 Ill. 465, 28 N. E. 1091; International, etc., R. Co. *v.* Underwood, 64 Tex. 463.

The application should be accompanied by an affidavit showing the necessity for the examination. Terre Haute, etc., R. Co. *v.* Brunker, 128 Ind. 542, 26 N. E. 178.

A mere allegation that the examination is material and necessary, without stating any

e. The Order. The order for a physical examination must be directed to the party himself,[98] and should contain such directions as to the conduct of the examination as will insure a protection of his rights.[99] The order cannot be made by a judge at chambers.[1]

f. The Examination. Neither of the parties has any right to designate the physicians by whom the examination shall be made, the matter being entirely within the discretion of the trial judge.[2] The examination should be regulated by the order of the court and should strictly conform thereto.[3] It should be conducted in such a manner as not to subject the party to danger of his life, pain of his body, or indignity to his person,[4] and the use of anæsthetics, opiates, or drugs of any kind or tests of a painful character should not be allowed.[5] The physician conducting the examination may ask the person examined any questions necessary to enable him to ascertain the nature and extent of the injuries complained of.[6] But the person examined should not be required to submit to any further examination than the necessities of the case require,[7] or than is consistent with his state of health.[8]

g. Failure to Submit to Examination and Enforcement of Order. The court has no right in the enforcement of its order to compel plaintiff to actually submit to an examination of his person against his will;[9] but on his refusal to do so may

facts upon which it is based, is insufficient. Naab *v.* Stewart, 32 N. Y. App. Div. 478, 52 N. Y. Suppl. 1094. But see Campbell *v.* Joseph H. Bauland Co., 41 N. Y. App. Div. 474, 58 N. Y. Suppl. 984.

Under the New York statute it is sufficient for the application to state merely that defendant is ignorant of the nature and extent of plaintiff's injuries. Green *v.* Middlesex R. Co., 10 Misc. (N. Y.) 473, 32 N. Y. Suppl. 177, 24 N. Y. Civ. Proc. 252, 1 N. Y. Annot. Cas. 167. It need not allege that defendant will use the testimony adduced (Moses *v.* Newburg Electric R. Co., 91 Hun (N. Y.) 278, 36 N. Y. Suppl. 149), it being sufficient that it should appear that the examination is asked solely for the purposes of the trial (Campbell *v.* Joseph H. Bauland Co., 41 N. Y. App. Div. 474, 58 N. Y. Suppl. 984; Green *v.* Middlesex R. Co., 10 Misc. (N. Y.) 473, 32 N. Y. Suppl. 177, 24 N. Y. Civ. Proc. 252, 1 N. Y. Annot. Cas. 167).

98. Bowe *v.* Brunnbauer, 13 Misc. (N. Y.) 631, 34 N. Y. Suppl. 919, 25 N. Y. Civ. Proc. 56.

Under the New York statute the order can be made only in connection with or as a part of an order for the oral examination of plaintiff before trial (Lyon *v.* Manhattan R. Co., 142 N. Y. 298, 37 N. E. 113, 25 L. R. A. 402 [*affirming* 7 Misc. (N. Y.) 401, 27 N. Y. Suppl. 966], and it should be returnable before a judge or referee and not before the court, and cannot be made returnable in less than five days except where this is necessary under special circumstances which must be recited in the order; and it must also direct the time of service of a copy thereof (Bowe *v.* Brunnbauer, 13 Misc. (N. Y.) 631, 34 N. Y. Suppl. 919, 25 N. Y. Civ. Proc. 56).

99. Sibley *v.* Smith, 46 Ark. 275, 55 Am. Rep. 584; Schroeder *v.* Chicago, etc., R. Co., 47 Iowa 375; McGovern *v.* Hope, 63 N. J. L. 76, 42 Atl. 830.

1. Ellsworth *v.* Fairbury, 41 Nebr. 881, 60 N. W. 336, holding, however, that the making of such an order is not ground for reversal where plaintiff acquiesces therein by selecting a physician to act as a member of the board, and by submitting to the examination without objection.

2. Alabama Great Southern R. Co. *v.* Hill, 93 Ala. 514, 9 So. 722, 30 Am. St. Rep. 65.

In Nebraska the examining physician must be mutually agreed upon by the parties or appointed by the court. Stuart *v.* Havens, 17 Nebr. 211, 22 N. W. 419.

A female is entitled under the New York statute to have the examination made by a physician of her own sex, but an order appointing a male physician is not erroneous where no attempt is made to have it modified. Lawrence *v.* Samuels, 16 Misc. (N. Y.) 501, 38 N. Y. Suppl. 976.

3. Hess *v.* Lake Shore, etc., R. Co., 7 Pa. Co. Ct. 565.

4. Sibley *v.* Smith, 46 Ark. 275, 55 Am. Rep. 584; Schroeder *v.* Chicago, etc., R. Co., 47 Iowa 375; McGovern *v.* Hope, 63 N. J. L. 76, 42 Atl. 830; Hess *v.* Lake Shore, etc., R. Co., 7 Pa. Co. Ct. 565.

5. Sibley *v.* Smith, 46 Ark. 275, 55 Am. Rep. 584; Schroeder *v.* Chicago, etc., R. Co., 47 Iowa 375.

6. Wunsch *v.* Webber, 29 N. Y. Suppl. 1100, 31 Abb. N. Cas. (N. Y.) 365.

7. Lawrence *v.* Keim, 19 Phila. (Pa.) 351.

8. O'Brien *v.* La Crosse, 99 Wis. 421, 75 N. W. 81, 40 L. R. A. 831.

9. Wanek *v.* Winona, 78 Minn. 98, 80 N. W. 581, 79 Am. St. Rep. 354, 46 L. R. A. 448; Demenstein *v.* Richardson, 2 Pa. Dist. 825, 34 Wkly. Notes Cas. (Pa.) 295.

A refusal to be examined by a certain physician to whom plaintiff has a particular aversion, and the failure of the court to require it, is not ground for reversal where plaintiff is willing to be examined by any other reputable physician. Missouri Pac. R. Co. *v.* Johnson, 72 Tex. 95, 10 S. W. 325.

dismiss the case,[10] or decline to allow it to proceed,[11] or decline to permit any evidence to establish the injury to be given [12] until the order is complied with.

7. Depositions of Third Persons For Use on Motion. Under the New York code the court may in its discretion appoint a referee to take the deposition of a person not a party to the record for use on a motion in civil but not in criminal cases,[13] and not to be used on special motion made by one not a party to the action.[14] This provision of the code does not authorize the appointment of a referee to take the deposition of a party to the suit on the ground that he has refused to make an affidavit.[15] The application must show that the party intends to make or oppose a motion,[16] and that it is necessary for him in making or opposing such motion to have the affidavit of some person,[17] and that such person has refused to make the affidavit.[18] The application must disclose a necessity for the affidavit, by a statement of facts and circumstances which in the discretion of the court will authorize the appointment of a referee to take the deposition.[19] The proper practice is to draft an affidavit and submit it to the witness to be verified before applying for an order for the examination of the witness so as to show

10. Wanek *v.* Winona, 78 Minn. 98, 80 N. W. 581, 79 Am. St. Rep. 354, 46 L. R. A. 448; Miami, etc., Turnpike Co. *v.* Baily, 37 Ohio St. 104.

11. Demenstein *v.* Richardson, 2 Pa. Dist. 825, 34 Wkly. Notes Cas. (Pa.) 295.

A stay of proceedings is usually a sufficient remedy, although the order may be enforced by attachment. Lawrence *v.* Keim, 19 Phila. (Pa.) 351.

12. Miami, etc., Turnpike Co. *v.* Baily, 37 Ohio St. 104.

13. People *v.* Squire, 3 N. Y. St. 194.

14. Crane *v.* Evans, 18 Abb. N. Cas. (N. Y.) 444, 12 N. Y. Civ. Proc. 445.

15. Spratt *v.* Huntington, 4 Thomps. & C. (N. Y.) 551; Hodgskin *v.* Atlantic, etc., R. Co., 3 Daly (N. Y.) 70, 5 Abb. Pr. N. S. (N. Y.) 73; Stubbs *v.* Stubbs, 7 N. Y. St. 282; Cockey *v.* Hurd, 12 Abb. Pr. N. S. (N. Y.) 307; Stake *v.* Andre, 9 Abb. Pr. (N. Y.) 420, 18 How. Pr. (N. Y.) 159; Knoeppel *v.* Kings County F. Ins. Co., 47 How. Pr. (N. Y.) 412; Palmer *v.* Adams, 22 How. Pr. (N. Y.) 375. *Contra*, King *v.* Leighton, 58 N. Y. 383; Cockey *v.* Hurd, 36 N. Y. Super. Ct. 42, 14 Abb. Pr. N. S. (N. Y.) 183, 45 How. Pr. (N. Y.) 70; Fisk *v.* Chicago, etc., R. Co., 3 Abb. Pr. N. S. (N. Y.) 430.

The relator in an application for mandamus is a party whose deposition cannot be taken under the provisions of the code providing that where a party intends to make or oppose a motion and it is necessary for him to have the affidavit or deposition of a person not a party upon the motion the court may direct such deposition to be taken. People *v.* Paton, 20 Abb. N. Cas. (N. Y.) 172.

Receiver of corporation.— Under the code providing that a party intending to make or oppose a motion may on a showing by affidavit have an order requiring any person not a party, who is alleged to have knowledge of material facts, and who refuses to make an affidavit to appear and give a deposition, a party intending to apply for an attachment may have such an order against the receiver of a corporation defendant; but the witness cannot be compelled by such order to produce books or papers nor to examine such for the purpose of qualifying himself to give the testimony desired. Wallace *v.* Baring, 2 N. Y. App. Div. 501, 37 N. Y. Suppl. 1078, 3 N. Y. Annot. Cas. 16.

16. Moses *v.* Banker, 7 Rob. (N. Y.) 131, 34 How. Pr. (N. Y.) 212; Erie R. Co. *v.* Gould, 14 Abb. Pr. N. S. (N. Y.) 279.

17. Moses *v.* Banker, 7 Rob. (N. Y.) 131, 34 How. Pr. (N. Y.) 212; Erie R. Co. *v.* Gould, 14 Abb. Pr. N. S. (N. Y.) 279.

Where one makes a full affidavit to the merits in opposing a motion the court will not grant an order for his examination, pursuant to 2 N. Y. Rev. St. cc. 24, 25, p. 457, although he has before refused to testify for the moving party. Ryers *v.* Hedges, 1 Hill (N. Y.) 646.

18. Williams *v.* Western Union Tel. Co., 3 N. Y. Civ. Proc. 448.

What amounts to refusal.— Where a witness was applied to several times on successive days to make an affidavit for a party to use on a motion, but each time declined to make the affidavit until he could consult his counsel, there is a sufficient refusal to authorize an order for a compulsory examination under the code. Rogers *v.* Durant, 2 Thomps. & C. (N. Y.) 676. The refusal to make an affidavit necessary to authorize the appointment of a referee for the purpose of taking it, under N. Y. Code Proc. § 401, is not shown where the party merely refused to answer oral questions on oath in the presence of a stenographer, and no affidavit has been drawn and presented to him for his signature and oath. Erie R. Co. *v.* Gould, 14 Abb. Pr. N. S. (N. Y.) 279.

19. Cockey *v.* Hurd, 36 N. Y. Super. Ct. 42, 14 Abb. Pr. N. S. (N. Y.) 183, 45 How. Pr. (N. Y.) 70 [*affirming* 12 Abb. Pr. 307].

The affidavit should specify the subject on which the witness was requested to depose and the facts claimed to be within the knowledge of the witness, and the bearing of such facts upon the merits of the motion to be made. Dauchy *v.* Miller, 16 Abb. Pr. N. S. (N. Y.) 100.

the materiality of his evidence;[20] but an objection that no affidavit has been prepared and submitted to the person whose examination is sought is waived where the witness when asked to make the affidavit does not require a draft to be submitted but makes a general refusal to testify.[21] The adversary party has no standing for the purpose of interfering to prevent the party from obtaining the affidavit,[22] and he is not entitled to notice of the application for the order of reference,[23] nor to cross-examine the witness.[24] Nor can he move to set aside the order for the examination, this being the privilege of the party to be examined.[25] The order will be vacated, when it is apparent that the process of the court is not to be used for a legitimate purpose.[26] The proceedings will not be arrested, although an affidavit be subsequently tendered, unless the affidavit is full and frank.[27] It is too late to make objection that the party has not refused the affidavit after he has been partly examined,[28] nor can the party at that late day make the objection that the affidavit on which the examination was ordered is not sufficient.[29] Objections to the contents of the affidavit or to the mode of obtaining it must be made when the affidavit is sought to be used.[30]

8. COSTS.[31] Costs are not of course to be taxed for the successful party, but the matter rests in the discretion of the court.[32]

B. Production and Inspection of Writings and Other Matters — 1. THE STATUTORY PROVISIONS. In most jurisdictions statutory methods are provided for obtaining the production or inspection of books or papers of the adverse party.[33]

20. Fisk *v.* Chicago, etc., R. Co., 3 Abb. Pr. N. S. (N. Y.) 430.
21. Fisk *v.* Chicago, etc., R. Co., 3 Abb. Pr. N. S. (N. Y.) 430.
22. McCue *v.* Tribune Assoc., 1 Hun (N. Y.) 469, 3 Thomps. & C. (N. Y.) 451.
23. Erie R. Co. *v.* Champlain, 35 How. Pr. (N. Y.) 73.
24. Keenan *v.* O'Brien, 2 N. Y. Suppl. 242; Erie R. Co. *v.* Champlain, 35 How. Pr. (N. Y.) 73.
25. Erie R. Co. *v.* Champlain, 35 How. Pr. (N. Y.) 73.
26. Moses *v.* Banker, 7 Rob. (N. Y.) 131, 34 How. Pr. (N. Y.) 212.
27. Fisk *v.* Chicago, etc., R. Co., 3 Abb. Pr. N. S. (N. Y.) 430.
28. Erie R. Co. *v.* Champlain, 35 How. Pr. (N. Y.) 73.
29. McCue *v.* Tribune Assoc., 1 Hun (N. Y.) 469, 3 Thomps. & C. (N. Y.) 451.
30. McCue *v.* Tribune Assoc., 1 Hun (N. Y.) 469, 3 Thomps. & C. (N. Y.) 451.
31. Costs generally see COSTS.
32. Smith *v.* Great Western R. Co., 6 E. & B. 405, 2 Jur. N. S. 668, 25 L. J. Q. B. 279, 88 E. C. L. 405.
33. *Alabama.*— *Ex p.* Baker, 118 Ala. 185, 23 So. 996.
Colorado.— People *v.* De France, 29 Colo. 309, 68 Pac. 267.
Connecticut.— Sage *v.* Middleton Ins. Co., 5 Day 409.
Delaware.— Kelly *v.* Mutual L. Ben. Assoc., 1 Marv. 183, 40 Atl. 954.
District of Columbia.— District of Columbia *v.* Bakersmith, 18 App. Cas. 574.
Florida.— Neafie *v.* Miller, 37 Fla. 173, 20 So. 252.
Georgia.— Davis *v.* Davis, 47 Ga. 81.
Illinois.— Leslie *v.* People, 150 Ill. 408, 23 N. E. 387, 37 N. E. 1004, 41 Am. St. Rep. 375.
Indiana.— Silvers *v.* Junction R. Co., 17 Ind. 142.
Iowa.— Lay *v.* Wissman, 36 Iowa 305.
Kansas.— Stevens *v.* Blake, 5 Kan. App. 124, 48 Pac. 488.
Kentucky.— Marion Nat. Bank *v.* Abell, 88 Ky. 428, 11 S. W. 300, 10 Ky. L. Rep. 980.
Louisiana.—Atwater *v.* Colton, 18 La. Ann. 226.
Maryland.— Eschbach *v.* Lightner, 31 Md. 528.
Michigan.— Mulhern *v.* Grove, 111 Mich. 528, 70 N. W. 15.
Missouri.— Hill *v.* Meyer, 47 Mo. 585.
Montana.— State *v.* Second Judicial Dist. Ct., 27 Mont. 441, 71 Pac. 602, 94 Am. St. Rep. 831.
Nebraska.— Spielman *v.* Flynn, 19 Nebr. 342, 27 N. W. 224.
New Jersey.— Tillou *v.* Hutchinson, 15 N. J. L. 178.
New York.— Romer *v.* Kensico Cemetery, 79 N. Y. App. Div. 100, 80 N. Y. Suppl. 38.
North Carolina.— McGibboney *v.* Mills, 35 N. C. 163.
Ohio.—Arbuckle *v.* Woolson Spice Co., 21 Ohio Cir. Ct. 356, 11 Ohio Cir. Dec. 726.
Pennsylvania.— Raub *v.* Van Horn, 133 Pa. St. 573, 19 Atl. 704.
Rhode Island.— Congdon *v.* Aylsworth, 16 R. I. 281, 18 Atl. 247.
South Carolina.— Jenkins *v.* Bennett, 40 S. C. 393, 18 S. E. 929.
Vermont.—Vermont Farm Mach. Co. *v.* Batchelder, 68 Vt. 430, 35 Atl. 378.
Virginia.—Avis *v.* Lee, 77 Va. 553.
Wisconsin.— Kraus *v.* Sentinel Co., 62 Wis. 660, 23 N. W. 12.
United States.— Gray *v.* Schneider, 119 Fed. 474.
See 16 Cent. Dig. tit. "Discovery," § 103 *et seq.*

The statutes relating to the production of books and papers on trial are constitutional;[34] they are of a remedial nature and should be liberally construed.[35]

2. WHO MAY BE REQUIRED TO PRODUCE. The court will not order the production or inspection of the books or papers of a plaintiff or defendant at the instance of his co-plaintiff or co-defendant,[36] unless the applicant, being nominally plaintiff or defendant, is really a defendant or plaintiff.[37] A next friend is not a party within the meaning of the statutes,[38] but one who appears to defend an action *in rem* is.[39]

3. PRODUCTION OF BOOKS AND PAPERS IN WHICH PARTIES HAVE A COMMON INTEREST. A production or inspection of papers will be granted where the applicant has an interest or right in them which justifies an unlimited inspection and the right is the attendant of the relief to which he is entitled.[40] This is the case with books kept by an executor[41] or trustee, where the inspection is sought by one interested in the estate of the decedent or by a beneficiary of the trust,[42] of partnership books where inspection is sought by one of the partners,[43] or books of an agent, where the inspection is sought by his principal,[44] or books of an employer at the instance of his employee, where the employee is to be paid by a percentage of

A book containing a record of the proceedings of an association before and after its incorporation is a document within the meaning of the statute. Arnold *v.* Pawtuxet Valley Water Co., 18 R. I. 189, 26 Atl. 55, 19 L. R. A. 602.

Under the New York statutes an inspection of lands is permitted where it is necessary or expedient to prepare a pleading, or for trial where an action relating to real estate is pending. Howe's Cave Lime, etc., Co. *v.* Howe's Cave Assoc., 88 Hun 554, 34 N. Y. Suppl. 848, 2 N. Y. Annot. Cas. 199.

Rules of court cannot authorize a discovery of property other than that specifically mentioned in the statutes. Auerbach *v.* Delaware, etc., R. Co., 66 N. Y. App. Div. 201, 73 N. Y. Suppl. 118; Kennedy *v.* Nichols, 33 Misc. (N. Y.) 726, 68 N. Y. Suppl 1053. *Compare* Henszey *v.* Langdon-Henszey Coal Min. Co., 80 Fed. 178.

34. Mulhern *v.* Grove, 111 Mich. 528, 70 N. W. 15; State *v.* Second Judicial Dist. Ct., 27 Mont. 441, 71 Pac. 602, 94 Am. St. Rep. 831.

35. Wills *v.* Kane, 2 Grant (Pa.) 47. But if production is likely to be vexatious to defendant the court will look into it narrowly. Carver *v.* Pinto Leite, L. R. 7 Ch. 90, 41 L. J. Ch. 92, 25 L. T. Rep. N. S. 722, 20 Wkly. Rep. 134.

36. Dassaux *v.* Sheppard, 2 Fowl. Exch. Pr. 60. *Contra,* Brown *v.* Watkins, 16 Q. B. D. 125, 55 L. J. Q. B. 126, 53 L. T. Rep. N. S. 726, 34 Wkly. Rep. 293.

37. Applebee *v.* Duke, 21 N. Y. Suppl. 890; Shaw *v.* Smith, 18 Q. B. D. 193, 56 L. J. Q. B. 174, 56 L. T. Rep. N. S. 40, 35 Wkly. Rep. 188.

38. Dyke *v.* Stephens, 30 Ch. D. 189, 55 L. J. Ch. 41, 53 L. T. Rep. N. S. 561, 33 Wkly. Rep. 932; *In re* Corsellis, 52 L. J. Ch. 399, 48 L. T. Rep. N. S. 425, 31 Wkly. Rep. 414. *Contra,* Crowe *v.* Bank of Ireland, Ir. R. 5 Eq. 578, 19 Wkly. Rep. 910.

39. The Emma, 3 Aspin. 218, 34 L. T. Rep. N. S. 742, 24 Wkly. Rep. 587.

40. Stalker *v.* Gaunt, 12 N. Y. Leg. Obs. 132; Inman *v.* Hodgson, 1 Y. & J. 28.

41. Stalker *v.* Gaunt, 12 N. Y. Leg. Obs. 132; Freeman *v.* Fairlie, 3 Meriv. 29, 17 Rev. Rep. 7, 36 Eng. Reprint 12.

42. Stalker *v.* Gaunt, 12 N. Y. Leg. Obs. 132.

43. Copeland *v.* Brown, 73 N. Y. App. Div. 423, 77 N. Y. Suppl. 129; Howlett *v.* Hall, 55 N. Y. App. Div. 614, 67 N. Y. Suppl. 267; Fleischmann *v.* Fleischmann, 54 N. Y. App. Div. 202, 66 N. Y. Suppl. 631; Martine *v.* Albro, 26 Hun (N. Y.) 559, 2 N. Y. Civ. Proc. 70, 63 How. Pr. (N. Y.) 215; Livingston *v.* Curtis, 12 Hun (N. Y.) 121, 54 How. Pr. (N. Y.) 370; Zimmermann *v.* Dieckerhoff, 12 N. Y. St. 613; Stalker *v.* Gaunt, 12 N. Y. Leg. Obs. 132.

Application of rule.— Where the agreement of dissolution of a partnership provides that the retiring partner shall receive one half of the commissions for the sale of goods under contracts then subsisting between the partnership and third persons, the retiring partner in an action against his former copartner for his share of the commissions is entitled to discovery from the copartner as to the sales made and commissions realized, and his right to such discovery is not affected by the fact that the copartner has conducted the business mainly through an agent, or that the retiring partner can obtain the desired information from the persons with whom the contracts were made. Montrose *v.* Wannamaker, 21 Abb. N. Cas. (N. Y.) 478.

Representatives of partner.— Where a partner has sold his interest in the partnership in his lifetime, his representatives have no right of inspection after his decease. Platt *v.* Platt, 61 Barb. (N. Y.) 52, 11 Abb. Pr. N. S. (N. Y.) 110.

44. Eschbach *v.* Lightner, 31 Md. 528; Ruberry *v.* Binns, 5 Bosw. (N. Y.) 685; Talbot *v.* Doran, etc., Co., 16 Daly (N. Y.) 174, 9 N. Y. Suppl. 478, 18 N. Y. Civ. Proc. 304; Haebler *v.* Hubbard, 36 Misc. (N. Y.) 840, 74 N. Y. Suppl. 932; Harding *v.* Field, 18 N. Y. Suppl. 918; Manley *v.* Bonnel, 11 Abb. N. Cas. (N. Y.) 123; Stalker *v.* Gaunt, 12 N. Y. Leg. Obs. 132; Duff *v.* Hutchinson, 19 N. Y. Wkly. Dig. 20; Winchester *v.* Bowker, 29 Beav. 479,

the business done by the employer,[45] or of books showing the profits of a joint venture, at the instance of one of the parties engaged therein.[46] In all such cases the production of all books and documents can be compelled on the ground of common interest.[47]

4. Production of Private Books of Persons Not Parties. Private books of persons not parties to the action are not subject to production for inspection before trial, although they contain accounts the examination of which is important to the preparation of the case for trial.[48]

5. Grounds and Purposes of Production and Inspection — a. In General. The statutes generally are designed to provide a method for the production or inspection of books or papers by proceedings at law in those cases where their production and inspection might formerly have been compelled by the ordinary rules of proceedings in chancery.[49] A party cannot obtain a roving commission for the inspection or production of books or papers in order that he may ransack them for evidence to make out his case.[50] He is entitled to production or inspection only when the same is material and necessary to establish his cause of action.[51] The application will not be granted where the facts to be proved by the books

9 Wkly. Rep. 404; Beresford *v.* Driver, 16 Beav. 134, 22 L. J. Ch. 407.

45. Brigham *v.* Zaiss, 48 N. Y. App. Div. 144, 62 N. Y. Suppl. 706; Veiller *v.* Oppenheim, 75 Hun (N. Y.) 21, 26 N. Y. Suppl. 1051, 31 Abb. N. Cas. (N. Y.) 181; Churchill *v.* Loeser, 35 N. Y. Suppl. 310.

46. Petrie *v.* Muskegon County, 90 Mich. 265, 51 N. W. 278.

47. Petrie *v.* Muskegon County, 90 Mich. 265, 51 N. W. 278; Perrow *v.* Lindsay, 52 Hun (N. Y.) 115, 4 N. Y. Suppl. 795, 16 N. Y. Civ. Proc. 359; Stebbins *v.* Harmon, 17 Hun (N. Y.) 445; Stalker *v.* Gaunt, 12 N. Y. Leg. Obs. 132; Arrot *v.* Pratt, 2 Whart. (Pa.) 566.

48. Marion Nat. Bank *v.* Abell, 88 Ky. 428, 11 S. W. 300, 10 Ky. L. Rep. 980; Brock *v.* Surpless, 66 N. Y. App. Div. 609, 72 N. Y. Suppl. 831; People *v.* Armour, 18 N. Y. App. Div. 584, 46 N. Y. Suppl. 317; Davenbagh *v.* McKinnie, 5 Cow. (N. Y.) 27; Southern R. Co. *v.* North Carolina Corp. Commission, 104 Fed. 700. See also McCall *v.* Moschowitz, 14 Daly (N. Y.) 16, 1 N. Y. St. 99. But see Lefferts *v.* Brampton, 24 How. Pr. (N. Y.) 257, where plaintiffs brought an action to recover the possession of goods obtained from them by defendant's assignors upon representations alleged to have been fraudulent, and in the sworn petition stated that they were informed and believed that an examination of the books of the assignors by a competent bookkeeper would enable plaintiffs to show that the assignors were, when they made their representations of solvency, hopelessly insolvent and that they knew the representations made by them were false. The defendants made no answer to the application, but moved to dismiss it on the ground that the discovery could not be allowed by the practice of the court. It was held that an inspection of the books and papers of defendant's assignors in the possession of defendant should be ordered.

Illustration.— A grantor in whose name ejectment is prosecuted by his grantee is not a party to the action who may be compelled to produce books and papers. Adriance *v.* Sanders, 11 Abb. N. Cas. (N. Y.) 422.

49. *District of Columbia.*— Smithson *v.* Stanton, 7 D. C. 6.

New York.— McAllister *v.* Pond, 6 Duer (N. Y.) 702, 15 How. Pr. (N. Y.) 299; Wallis *v.* Murray, 4 Cow. (N. Y.) 399.

Vermont.—Vermont Farm Mach. Co. *v.* Batchelder, 68 Vt. 430, 35 Atl. 378.

United States.— Newgold *v.* American Electrical Novelty, etc., Co., 108 Fed. 341; Finch *v.* Rikeman, 9 Fed. Cas. No. 4,788, 2 Blatchf. 301.

England.— Gomm *v.* Parrott, 3 C. B. N. S. 47, 3 Jur. N. S. 1150, 26 L. J. C. P. 279, 5 Wkly. Rep. 882, 91 E. C. L. 47. *Contra,* Kraus *v.* Sentinel Co., 62 Wis. 660, 23 N. W. 12, where an inspection was ordered in aid of a suit for libel.

50. Seligsberg *v.* Schepp, 79 N. Y. App. Div. 626, 80 N. Y. Suppl. 154; Brownell *v.* Gloversville Nat. Bank, 20 Hun (N. Y.) 517; Cassard *v.* Hinman, 6 Duer (N. Y.) 695; Commercial Bank *v.* Dunham, 13 How. Pr. (N. Y.) 541; Herbert *v.* Spring, 1 Month. L. Bul. (N. Y.) 21; Davenport *v.* Pennsylvania R. Co., 2 Pa. Dist. 784; Triplett *v.* Washington Bank, 24 Fed. Cas. No. 14,178, 3 Cranch C. C. 646.

51. New York Fidelity, etc., Co. *v.* Seagrist, 79 N. Y. App. Div. 614, 80 N. Y. Suppl. 277; Genet *v.* Hirschberg, 32 Misc. (N. Y.) 761, 65 N. Y. Suppl. 786; Matter of Woodward, 28 Misc. (N. Y.) 602, 59 N. Y. Suppl. 1080; Bailey *v.* Williams Mfg. Co., 9 N. Y. St. 518; Board of Education *v.* King, 7 N. Y. Civ. Proc. 64.

It will not be granted where the books must be produced on trial by the opposite party to establish his case. Rice *v.* West, 7 Pa. Dist. 764, 22 Pa. Co. Ct. 122.

Where the materiality of the discovery depends upon a preliminary disputed question, and the discovery sought is calculated to cause considerable trouble, or prove vexatious or oppressive to the party from whom it is sought, the court will postpone the discovery until the preliminary question is settled.

can be otherwise established,[52] as where documents are copies of public records open to the inspection of all and copies of which may be obtained on the payment of necessary fees,[53] or where defendant has offered to produce and allow plaintiff to inspect books and plaintiff has declined to avail himself of the offer.[54] It will therefore be denied where the party has in his possession or under his control the means of acquiring all the information he seeks to obtain,[55] or where the books do not in themselves contain evidence, but merely information by which evidence can be obtained.[56] It is not permitted to enable a party to ascertain whether he has a cause of action,[57] or defense,[58] or to ascertain the evidence on which his opponent's action or defense rests,[59] unless the claim is made that they are forgeries and the inspection is sought to enable the party to prove that fact.[60] But where the books or documents are material to the case of the applicant, it is no objection to their production or inspection that they relate also to the case of his adversary.[61] Neither is it permitted to enable the attorney for the applicant to cross-examine him on his examination before trial,[62] to qualify a witness as an expert,[63]

Wood *v.* Anglo Italian Bank, 34 L. T. Rep. N. S. 255.

Where a bill prays alternative relief, and plaintiff would only be entitled to the discovery asked for under one of the alternatives, which is not the one principally relied on by the bill, and the information could not be material for the purpose of determining to which of such alternatives plaintiff is entitled, such discovery will not be compelled before the hearing. Lett *v.* Parry, 1 Hem. & M. 517.

In an action for the infringement of a patent complainant will not be granted an inspection of machinery of defendant kept in secret and claimed to embody important secrets, when complainant introduces no evidence tending to show that it infringes his patents. Dobson *v.* Graham, 49 Fed. 17.

52. Hauseman *v.* Sterling, 61 Barb. (N. Y.) 347; Woods *v.* De Figaniere, 1 Rob. (N. Y.) 681, 24 How. Pr. (N. Y.) 522; Justice *v.* Newbern Nat. Bank, 83 N. C. 8. *Contra*, Whitworth *v.* Erie R. Co., 37 N. Y. Super. Ct. 437. It will not be granted where witnesses could testify to the whole truth and the paper unexplained is misleading. Van Zandt *v.* Cobb, 12 How. Pr. (N. Y.) 544.

53. Spielman *v.* Flynn, 19 Nebr. 342, 27 N. W. 224.

54. Bearns *v.* Burras, 86 Hun (N. Y.) 258, 33 N. Y. Suppl. 262; Gaughe *v.* Laroche, 6 Duer (N. Y.) 685; Walmsley *v.* Nelson, 3 Abb. N. Cas. (N. Y.) 127. But see Lord *v.* Spielman, 13 Misc. (N. Y.) 48, 34 N. Y. Suppl. 52. Where in an action in this state against a foreign corporation, defendant offered to allow its books to be examined in its home office, an order directing the production of the books in New York and for the examination of a resident officer will be vacated. Phillips *v.* Germania Mills, 20 Abb. N. Cas. (N. Y.) 381.

55. Woods *v.* De Figaniere, 1 Rob. (N. Y.) 681, 25 How. Pr. (N. Y.) 522; McAllister *v.* Pond, 6 Duer (N. Y.) 702, 15 How. Pr. (N. Y.) 299; Cassard *v.* Hinman, 6 Duer (N. Y.) 695; Meakings *v.* Cromwell, 1 Sandf. (N. Y.) 698; Stalker *v.* Gaunt, 12 N. Y. Leg. Obs. 132. But see Commercial Bank *v.* Dunham, 13 How. Pr. (N. Y.) 541.

Where a party has a right as a stock-holder to examine corporate books, which right has never been denied him, the application will not be granted. Charlick *v.* Flushing R. Co., 10 Abb. Pr. (N. Y.) 130.

56. Woods *v.* De Figaniere, 1 Rob. (N. Y.) 681, 25 How. Pr. (N. Y.) 522.

57. Walsh *v.* Press Co., 48 N. Y. App. Div. 333, 62 N. Y. Suppl. 833; Goodyear's India Rubber Glove Mfg. Co. *v.* Gorham, 83 Hun (N. Y.) 342, 31 N. Y. Suppl. 965; Nathan *v.* Whitehill, 67 Hun (N. Y.) 398, 22 N. Y. Suppl. 63; Brownell *v.* Gloversville Nat. Bank, 20 Hun (N. Y.) 517; Hoyt *v.* American Exch. Bank, 1 Duer (N. Y.) 652; Frowein *v.* Lindheim, 12 N. Y. Suppl. 526; Thompson *v.* Erie R. Co., 9 Abb. Pr. N. S. (N. Y.) 212.

58. McInnes *v.* Gardiner, 27 Misc. (N. Y.) 124, 57 N. Y. Suppl. 356.

If the information sought is relevant and material, it is not to be denied because it may lead to a discovery of new causes of action by plaintiff. Palmer *v.* United Press, 67 N. Y. App. Div. 64, 73 N. Y. Suppl. 456.

59. Davis *v.* Davis, 47 Ga. 81; Shoe, etc., Reporter Assoc. *v.* Bailey, 49 N. Y. Super. Ct. 385; Andrews *v.* Townsend, 2 N. Y. Civ. Proc. 76; Sutherland *v.* Sutherland, 17 Beav. 209; Houghton *v.* London, etc., Assur. Co., 17 C. B. N. S. 80, 112 E. C. L. 80; Lyell *v.* Kennedy, 20 Ch. D. 484, 51 L. J. Ch. 409, 46 L. T. Rep. N. S. 752, 30 Wkly. Rep. 493.

60. Davis *v.* Davis, 47 Ga. 81; Chews *v.* Driver, 1 N. J. L. 109; Bamberger *v.* U. S. Fidelity, etc., Co., 37 Misc. (N. Y.) 512, 75 N. Y. Suppl. 1005; Mierisch *v.* Mt. Morris Bank, 32 Misc. (N. Y.) 743, 65 N. Y. Suppl. 565; Andrews *v.* Townsend, 2 N. Y. Civ. Proc. 76; Jackson *v.* Jones, 3 Cow. (N. Y.) 17; Cornell *v.* Woolsey, 7 N. Y. Wkly. Dig. 555; McGibbhoney *v.* Mills, 35 N. C. 163. But see Frank *v.* Frank, 1 Houst. (Del.) 245.

61. Shoe, etc., Reporter Assoc. *v.* Bailey, 49 N. Y. Super. Ct. 385; Powers *v.* Elmendorf, 4 How. Pr. (N. Y.) 63.

62. Cooke *v.* Lalance Grosjean Mfg. Co., 3 N. Y. Civ. Proc. 332.

63. Martin *v.* Elliott, 106 Mich. 130, 63 N. W. 998, 31 L. R. A. 169; Ansen *v.* Tuska, 1 Rob. (N. Y.) 663, 19 Abb. Pr. (N. Y.) 391;

to ascertain whether the documents will furnish grounds to move for a new trial,[64] or to secure evidence when better evidence could be obtained.[65] The application will be denied if equivalent relief can be obtained by subpœna duces tecum.[66] A production cannot be compelled in aid of an action of libel.[67] But may be ordered to enable a party to prepare for trial.[68]

b. To Enable Party to Frame Pleading. Under some of the statutes relating to production and inspection an order cannot be obtained therefor to enable the party to frame his pleadings.[69] Other statutes, however, authorize such an order.[70] If a party cannot plead intelligently without inspecting a paper which is in the possession of his adversary, he should obtain an extension of time to plead and prosecute a petition for an inspection and copy of the paper[71] or for a production of the same.[72] An order for an inspection or production will be granted to enable a party to furnish a bill of particulars, where the necessary information is contained only in the books of his adversary.[73] If, however, it appears that all the facts necessary for pleading are in the possession of the applicant the application should be denied,[74] and it has been said that an application will not be granted to enable the party to state his damages with certainty.[75]

6. Pendency and Condition of Cause. In order that the court may have power to order the production of books or papers there must be a suit pending in the court.[76] Under some statutes the cause must be at issue to authorize the granting of an order.[77] Under others an order may be made both before and after issue joined. In the first instance to enable the party to plead and in the second to prepare for

Lundberg *v.* Albany, etc., Iron, etc., Co., 32 Fed. 501.

64. Pratt *v.* Goswell, 9 C. B. N. S. 706, 3 L. T. Rep. N. S. 669, 99 E. C. L. 706.

65. Holtz *v.* Schmidt, 34 N. Y. Super. Ct. 28.

66. People *v.* Judge Kent County Cir. Ct., 38 Mich. 351; Central Cross-town R. Co. *v.* Twenty-third St. R. Co., 53 How. Pr. (N. Y.) 45; Clarke *v.* Eastern Bldg., etc., Assoc., 89 Fed. 779. *Contra,* Rigdon *v.* Conley, 31 Ill. App. 630; Arbuckle *v.* Woolson Spice Co., 21 Ohio Cir. Ct. 347, 11 Ohio Cir. Dec. 743.

67. Opdyke *v.* Marble, 44 Barb. (N. Y.) 64.

68. Cutting *v.* Baltimore, etc., R. Co., 51 N. Y. App. Div. 628, 64 N. Y. Suppl. 258; Palen *v.* Johnson, 18 Abb. Pr. (N. Y.) 304.

69. Kelly *v.* Mutual L. Ben. Assoc., 1 Marv. (Del.) 183, 40 Atl. 954; Raub *v.* Van Horn, 133 Pa. St. 573, 19 Atl. 704; Paine *v.* Warren, 33 Fed. 357; Guyot *v.* Hilton, 32 Fed. 743.

70. Earle *v.* Beman, 1 N. Y. App. Div. 136, 36 N. Y. Suppl. 833; Ward *v.* New York L. Ins. Co., 78 Hun (N. Y.) 363, 29 N. Y. Suppl. 186; Fox *v.* Brega, 1 Silv. Supreme (N. Y.) 445, 5 N. Y. Suppl. 908; Inyo Consol. Min. Co. *v.* Pheby, 49 N. Y. Super. Ct. 392; Travers *v.* Satterlee, 22 N. Y. Suppl. 118; Thompson *v.* Erie R. Co., 9 Abb. Pr. N. S. (N. Y.) 212; Justice *v.* National Bank, 83 N. C. 8.

A prospective defendant cannot be compelled to produce his books to enable plaintiff to frame his complaint. Green *v.* Carey, 81 Hun (N. Y.) 496, 31 N. Y. Suppl. 8.

71. Lay *v.* Wissman, 36 Iowa 305; Hill *v.* Meyer, 47 Mo. 585.

72. Birdsall *v.* Pixly, 3 Wend. (N. Y.) 425. But see Denslow *v.* Fowler, 2 Cow. (N. Y.) 592, where it is said that in trover for a bond a motion to compel a delivery of a copy to enable plaintiff to declare accurately will be denied.

73. Campbell *v.* Brock's Commercial Agency, 38 N. Y. App. Div. 137, 56 N. Y. Suppl. 540; Prince *v.* Currie, 2 How. Pr. (N. Y.) 119. *Contra,* McIlhanney *v.* Magie, 12 N. Y. Civ. Proc. 27.

74. Snow *v.* Snow-Church Surety Co., 80 N. Y. App. Div. 40, 80 N. Y. Suppl. 512; Cutting *v.* Baltimore, etc., R. Co., 51 N. Y. App. Div. 628, 64 N. Y. Suppl. 258; Leach *v.* Haight, 4 N. Y. App. Div. 613, 38 N. Y. Suppl. 886; Ward *v.* New York L. Ins. Co., 78 Hun (N. Y.) 363, 29 N. Y. Suppl. 186; Watts *v.* Knevals, 56 N. Y. Super. Ct. 592, 3 N. Y. Suppl. 548; Mehesy *v.* Kahn, 50 N. Y. Super. Ct. 209, 6 N. Y. Civ. Proc. 33.

75. Stanton *v.* Friedman, 47 N. Y. App. Div. 621, 62 N. Y. Suppl. 291; Brummer *v.* Cohen, 47 N. Y. App. Div. 470, 62 N. Y. Suppl. 241; Taylor *v.* American Ribbon Co., 38 N. Y. App. Div. 144, 56 N. Y. Suppl. 667.

76. People *v.* De France, 29 Colo. 309, 68 Pac. 267; State *v.* Second Judicial Dist. Ct., 27 Mont. 441, 71 Pac. 602, 94 Am. St. Rep. 831; Stalker *v.* Gaunt, 12 N. Y. Leg. Obs. 132; Branson *v.* Fentress, 35 N. C. 165.

77. Kelly *v.* Mutual L. Ben. Assoc., 1 Marv. (Del.) 183, 40 Atl. 954; Smithson *v.* Stanton, 7 D. C. 6; Jacques *v.* Collins, 13 Fed. Cas. No. 7,167, 2 Blatchf. 23.

Under N. C. Code, § 1373, providing for the production of evidence "pertinent to the issue the defendant is not entitled to an order to inspect the papers in plaintiff's possession before answer. But under § 578, providing that the court before which an action "is pending" may order either party to give the other an inspection, etc., an inspection may be or-

trial.[78] But if made for the purpose of preparing for trial it can be made only after issue joined.[79] Production may then be ordered before as well as on the trial, according to some decisions.[80] Others, however, hold the contrary.[81]

7. Demand For Inspection. A previous demand for an inspection is unnecessary where an order to show cause has been served and opposed on the return-day.[82]

8. The Application — a. Time of Making Application. It is made in time when made before trial,[83] but ordinarily the application comes too late when made when the case is reached for trial.[84] It has been held, however, that the application will be entertained even after the case has proceeded to hearing before referees and evidence has been given on both sides, under special circumstances, and where the delay in making it has been fully explained.[85] If it appear that the delay in making the application was caused by some action or statement of the opposite party on which the applicant had the right to rely this will excuse the delay.[86] It will be denied in case of gross delay in making it.[87]

b. Requisites of Application — (I) *In General.* A party cannot be compelled to produce books and papers for examination by the adverse party except in the manner prescribed by statute.[88] The application must be by petition,[89] but need not have all the formalities of a bill of discovery.[90]

(II) *Necessary Allegations* — (A) *Showing Cause of Action or Defense.* The application must show a probable cause of action or defense in the applicant in support of which the production or inspection is sought.[91] And in addition

dered in a proper case as soon as defendant has been summoned to appear. Sheek *v.* Sain, 127 N. C. 266, 37 S. E. 334.

78. Babbitt *v.* Crampton, 1 N. Y. Civ. Proc. 169; Morrison *v.* Sturges, 26 How. Pr. (N. Y.) 177. And see Bensinger *v.* Erhardt, 60 N. Y. App. Div. 303, 70 N. Y. Suppl. 24.

79. Allen *v.* Fowler, 45 N. Y. App. Div. 506, 61 N. Y. Suppl. 325.

80. Gray *v.* Schneider, 119 Fed. 474; Victor G. Bloede Co. *v.* Joseph Bancroft, etc., Co., 98 Fed. 175; Lucker *v.* Phœnix Assur. Co., 67 Fed. 18.

81. Sage *v.* Middleton Ins. Co., 5 Day (Conn.) 409; Kelly *v.* Ingersoll, 6 Ohio Dec. (Reprint) 630, 7 Am. L. Rec. 189; U. S. *v.* National Lead Co., 75 Fed. 94.

82. Hallett *v.* American L. Book Co., 40 Misc. (N. Y.) 652, 83 N. Y. Suppl. 110; Albany Brass, etc., Co. *v.* Hoffman, 12 Misc. (N. Y.) 167, 33 N. Y. Suppl. 600.

83. Bensinger *v.* Erhardt, 60 N. Y. App. Div. 303, 70 N. Y. Suppl. 24.

84. Moran *v.* Vreeland, 29 N. Y. App. Div. 243, 51 N. Y. Suppl. 434; Mutual Reserve Fund L. Assoc. *v.* Patterson, 33 Misc. (N. Y.) 572, 68 N. Y. Suppl. 885.

85. Jackson *v.* Ives, 22 Wend. (N. Y.) 637, Mechanic's Bank *v.* James, 2 Code Rep. (N. Y.) 46.

86. Fleischmann *v.* Fleischmann, 54 N. Y. App. Div. 632, 66 N. Y. Suppl. 1131; New York Fidelity, etc., Co. *v.* F. W. Seagrist Jr. Co., 79 N. Y. App. Div. 614, 80 N. Y. Suppl. 277.

87. Hooker *v.* Matthews, 3 How. Pr. (N. Y.) 329, 1 Code Rep. (N. Y.) 108. Thus where plaintiff allowed his claim to sleep for five years and defendant has been examined after issue as a party before trial, it is too late for plaintiff to ask an order for the discovery of books, etc., before the trial. Walmsley *v.* Nelson, 3 Abb. N. Cas. (N. Y.) 127.

88. Romer *v.* Kensico Cemetery, 79 N. Y. App. Div. 100, 80 N. Y. Suppl. 38.

89. Boeck *v.* Smith, 85 N. Y. App. Div. 575, 83 N. Y. Suppl. 428; Bloodgood *v.* Slayback, 62 N. Y. App. Div. 315, 71 N. Y. Suppl. 809; Dick *v.* Phillips, 41 Hun (N. Y.) 603; Levey *v.* New York Cent., etc., R. Co., 53 N. Y. Super. Ct. 263; Cutter *v.* Pool, 3 Abb. N. Cas. (N. Y.) 130, 54 How. Pr. (N. Y.) 311; Johnson *v.* Consolidated Silver Min. Co., 2 Abb. Pr. (N. Y.) 413; Dole *v.* Fellows, 5 How. Pr. (N. Y.) 451. *Contra*, Justice *v.* Newbern Nat. Bank, 83 N. C. 8; Christopherson *v.* Lotinga, 15 C. B. N. S. 809, 10 Jur. N. S. 180, 33 L. J. C. P. 121, 9 L. T. Rep. 688, 12 Wkly. Rep. 410, 109 E. C. L. 809.

Joining application with motion. — An application for the inspection of books and papers cannot be joined with a motion for an order for the examination of a party before trial. Boeck *v.* Smith, 85 N. Y. App. Div. 575, 83 N. Y. Suppl. 428.

90. Jacques *v.* Collins, 13 Fed. Cas. No. 7,167, 2 Blatchf. 23.

91. *In re* Lewis, 29 N. J. Eq. 279; Fromme *v.* Lisner, 63 Hun (N. Y.) 290, 17 N. Y. Suppl. 850, 22 N. Y. Civ. Proc. 37; Marrone *v.* New York Jockey Club, 60 Hun (N. Y.) 577, 14 N. Y. Suppl. 199; Bridgman *v.* Scott, 13 N. Y. Suppl. 338; Walmsley *v.* Nelson, 3 Abb. N. Cas. (N. Y.) 127. But the merits of the action will not be litigated on the application. *Ex p.* Baker, 118 Ala. 185, 23 So. 996; Gould Roofing Co. *v.* Gilldea, 4 N. Y. App. Div. 107, 38 N. Y. Suppl. 915; Churchill *v.* Loeser, 35 N. Y. Suppl. 310; Frowein *v.* Lindheim, 12 N. Y. Suppl. 526; Riccard *v.* Blanuri, 3 C. L. R. 119, 4 E. & B. 329, 1 Jur.

the application must also show, either expressly or by necessary implication, that the court has or would have jurisdiction of the action itself.[92]

(B) *Materiality and Necessity of Production and Inspection.* The application must show that the books or papers, discovery of which is sought, are material to some issue involved in the action,[93] and contain the information wanted,[94] and it must state the same definitely.[95] It must also show the necessity for the inspection or production,[96] and must allege the facts from which the court can determine the necessity,[97] and if the application shows that there were other sources of information open to the party it must show an exhaustion of such sources.[98]

(C) *Existence of Books and Documents and Possession and Control by Adverse Party.* It must show the existence of the books or documents,[99]

N. S. 495, 24 L. J. Q. B. 49, 3 Wkly. Rep. 113, 82 E. C. L. 329.

92. Snow, etc., Co. *v.* Snow-Church Surety Co., 80 N. Y. Suppl. 512.

93. *Georgia.*— Bull *v.* Edward Thompson Co., 99 Ga. 134, 25 S. E. 31; Carlton *v.* Western, etc., R. Co., 81 Ga. 531, 7 S. E. 623.

Indiana.— Beaver *v.* Hartsville University, 34 Ind. 245.

New York.— New York Fidelity, etc., Co. *v.* F. W. Seagrist Jr. Co., 79 N. Y. App. Div. 614, 80 N. Y. Suppl. 277; Phillips *v.* Curtis, 70 N. Y. App. Div. 551, 75 N. Y. Suppl. 581; Palmer *v.* United Press, 67 N. Y. App. Div. 64, 73 N. Y. Suppl. 456; Rhoades *v.* Schwartz, 52 N. Y. App. Div. 379, 65 N. Y. Suppl. 111; Keilty *v.* Traynor, 31 N. Y. App. Div. 115, 52 N. Y. Suppl. 550; Rutter *v.* Germicide Co., 70 Hun 403, 24 N. Y. Suppl. 215; Hart *v.* Ogdensburg, etc., R. Co., 67 Hun 556, 22 N. Y. Suppl. 401; Russell *v.* McSwegan, 39 Misc. (N. Y.) 306, 79 N. Y. Suppl. 440; Davis *v.* Dunham, 13 How. Pr. 425.

Pennsylvania.— Mange *v.* Guenat, 6 Whart. 141.

United States.—San Fernando Copper Min., etc., Co. *v.* Humphrey, 111 Fed. 772; Owyhee Land, etc., Co. *v.* Tautphaus, 109 Fed. 547, 40 C. C. A. 535; Iasigi *v.* Brown, 12 Fed. Cas. No. 6,993, 1 Curt. 401.

England.— Alsworthy *v.* Norman, 15 Jur. 1061 note, 21 L. J. Q. B. 70.

See 16 Cent. Dig. tit. "Discovery," § 126.

94. Marx *v.* Pennsylvania F. Ins. Co., 28 Misc. (N. Y.) 490, 59 N. Y. Suppl. 693. It is not enough to show that they probably will furnish the desired information. Dickie *v.* Austin, 4 N. Y. Civ. Proc. 123.

95. Williams *v.* Savage Mfg. Co., 3 Md. Ch. 418; Hayden *v.* Van Cortlandt, 84 Hun (N. Y.) 150, 32 N. Y. Suppl. 507; Stichter *v.* Tillinghast, 43 Hun (N. Y.) 95, 11 N. Y. Civ. Proc. 413; Dickie *v.* Austin, 4 N. Y. Civ. Proc. 123, 65 How. Pr. (N. Y.) 420; Dale *v.* Stokes, 5 Redf. Surr. (N. Y.) 586.

Statement on belief.— It is not sufficient for the applicant to swear that he believes the books will tend to prove the issue without stating any ground for the belief. Equitable L. Assur. Soc. *v.* Clark, 80 Miss. 471, 31 So. 964; Caspary *v.* Carter, 84 Fed. 416.

96. Park *v.* Gates, 54 N. Y. App. Div. 512, 66 N. Y. Suppl. 1034; Sanger *v.* Seymour, 42 Hun (N. Y.) 641; Bloom *v.* Patten, 58 N. Y. Super. Ct. 225, 10 N. Y. Suppl. 228; Rafferty *v.* Williams, 50 N. Y. Super. Ct. 66; Cassard *v.* Hinman, 6 Duer (N. Y.) 695; Gaughe *v.* Laroche, 6 Duer (N. Y.) 685, 6 Abb. Pr. (N. Y.) 284, 14 How. Pr. (N. Y.) 451; Marx *v.* Pennsylvania F. Ins. Co., 28 Misc. (N. Y.) 490, 50 N. Y. Suppl. 693; Bien *v.* Hellman, 2 Misc. (N. Y.) 168, 21 N. Y. Suppl. 618; Smith *v.* Seattle, etc., R. Co., 16 N. Y. Suppl. 417; Keenan *v.* O'Brien, 5 N. Y. Suppl. 490, 491, 23 Abb. N. Cas. (N. Y.) 63, 16 N. Y. Civ. Proc. 439 [*reversing* 4 N. Y. Suppl. 66, 16 N. Y. Civ. Proc. 75]; Dyett *v.* Seymour, 3 N. Y. Suppl. 643; New England Iron Co. *v.* New York Loan, etc., Co., 55 How. Pr. (N. Y.) 351; Commercial Bank *v.* Dunham, 13 How. Pr. (N. Y.) 541; Moore *v.* McIntosh, 18 Wend. (N. Y.) 529; Nichols *v.* McGeoch, 78 Wis. 360, 47 N. W. 372.

97. *Florida.*— Neafie *v.* Miller, 37 Fla. 173, 20 So. 252.

Indiana.— Spencer *v.* Woollen, 42 Ind. 364.

New Jersey.— Condict *v.* Wood, 25 N. J. L. 319.

New York.— Brooklyn L. Ins. Co. *v.* Pierce, 7 Hun 236; Strong *v.* Strong, 3 Rob. 675, 1 Abb. Pr. N. S. 233; McAllister *v.* Pond, 6 Duer 702, 15 How. Pr. 299; Stanton *v.* Delaware Mut. Ins. Co., 2 Sandf. 662; Bissell *v.* Mutual Reserve Fund Assoc., 38 Misc. 249, 77 N. Y. Suppl. 536; Frothingham *v.* Broadway, etc., R. Co., 9 N. Y. Civ. Proc. 304; Husson *v.* Fox, 15 Abb. Pr. 464; Pegram *v.* Carson, 10 Abb. Pr. 340, 18 How. Pr. 519; Morrison *v.* Sturges, 26 How. Pr. 177; Davis *v.* Dunham, 13 How. Pr. 425.

South Carolina.— Jenkins *v.* Bennett, 40 S. C. 393, 18 S. E. 929.

Wisconsin.— Noonan *v.* Orton, 28 Wis. 600.

See 16 Cent. Dig. tit. "Discovery," § 125 *et seq.*

Showing held insufficient.— The necessity therefor does not sufficiently appear where the application alleges that the books were mislaid and that the party would be put to much trouble to find them. Campbell *v.* Hoge, 4 Thomps. & C. (N. Y.) 540.

98. Perls *v.* Metropolitan L. Ins. Co., 16 Daly (N. Y.) 255, 10 N. Y. Suppl. 110; Russell *v.* McSwegan, 39 Misc. (N. Y.) 306, 79 N. Y. Suppl. 440.

99. Frowein *v.* Lindheim, 11 N. Y. Suppl. 495, 25 Abb. N. Cas. (N. Y.) 87. It is not sufficient that it refers to classes of docu-

and that the same are in the possession of the adverse party or under his control.[1]

(D) *Description of Books or Documents.* The books or documents must be described with such particularity as to advise the adverse party of what is required and to enable the court to determine the propriety of allowing the inspection sought,[2] and show that they are competent evidence,[3] in support of the applicant's case.[4]

(E) *Other Allegations.* The application need not show a property interest in the books or documents.[5] It must appear from the application that there was a prior request for the inspection and notice given to the party.[6] If the application is to obtain inspection of books of a foreign corporation it must show that the books are within the state.[7]

ments, or that the applicant states that he has grounds for belief, based on *a priori* reasoning, that a correspondence must have passed, or that books and documents must exist relating to the subject-matter. White *v.* Spafford, [1901] 2 K. B. 241, 70 L. J. K. B. 658, 84 L. T. Rep. N. S. 574.

1. *District of Columbia.*—Smithson *v.* Stanton, 7 D. C. 6.

Georgia.— Carlton *v.* Western, etc., R. Co., 81 Ga. 531, 7 S. E. 623.

Indiana.— Whitman *v.* Weller, 39 Ind. 515.

New York.— Opdyke *v.* Marble, 44 Barb. 64.

Pennsylvania.— Megargee *v.* Insurance Co., 15 Phila. 226.

Wisconsin.— See Schuetze *v.* Continental L. Ins. Co., 69 Wis. 252, 34 N. W. 90.

United States.— Lundberg *v.* Albany, etc., Co., 32 Fed. 501.

England.— Fiott *v.* Mullins, 22 L. J. Ch. 72.

See 16 Cent. Dig. tit. "Discovery." § 118.

The affidavit of plaintiff is prima facie sufficient for this purpose. Amsinck *v.* North, 62 How. Pr. (N. Y.) 114; Com. *v.* Gross, 1 Ashm. (Pa.) 281; Megargee *v.* Insurance Co., 15 Phila. (Pa.) 226; Congdon *v.* Aylsworth, 16 R. I. 281, 18 Atl. 247.

2. Neafie *v.* Miller, 37 Fla. 173, 20 So. 252; Cornish *v.* Wormser, 53 Hun (N. Y.) 40, 5 N. Y. Suppl. 889, 17 N. Y. Civ. Proc. 282; Phelps *v.* Platt, 54 Barb. (N. Y.) 557; Merquelle *v.* Continental Bank Note Co., 7 Rob. (N. Y.) 77; Jackling *v.* Edmonds, 3 E. D. Smith (N. Y.) 539; Halstead *v.* Halstead, 3 Misc. (N. Y.) 618, 23 N. Y. Suppl. 191; Dyett *v.* Seymour, 3 N. Y. Suppl. 643; Dickie *v.* Austin, 4 N. Y. Civ. Proc. 123, 65 How. Pr. (N. Y.) 420; Frowein *v.* Lindheim, 25 Abb. N. Cas. (N. Y.) 87, 11 N. Y. Suppl. 495; Low *v.* Graydon, 14 Abb. Pr. (N. Y.) 443; Lynch *v.* Henderson, 10 Abb. Pr. (N. Y.) 345 note; People *v.* Trinity Church, 6 Abb. Pr. (N. Y.) 177; New England Iron Co. *v.* New York Loan, etc., Co., 55 How. Pr. (N. Y.) 351; Dale *v.* Stokes, 5 Redf. Surr. (N. Y.) 586; Davenport *v.* Pennsylvania R. Co., 2 Pa. Dist. 784; San Fernando Copper Min., etc., Co. *v.* Humphrey, 111 Fed. 772.

Where the demand is too general in its nature, it is in the discretion of the court to make the order in such manner and form as will be compatible with the purpose for which the evidence is to be produced and the demand should be granted according to the exigencies of the case. Arbuckle *v.* Woolson Spice Co., 21 Ohio Cir. Ct. 347, 11 Ohio Cir. Dec. 743.

Too great generality is cured by particularizing the books in the order. Hofman *v.* Scixas, 12 Misc. (N. Y.) 3, 33 N. Y. Suppl. 23.

Where no answer is filed to a petition for an order upon the assignees of a bank to produce books and papers and there was no allegation that the documents were not within their control the petition should not be refused on the ground of vagueness and indefiniteness of the description of the evidence sought. Keim's Estate, 1 Woodw. (Pa.) 108.

If letters, the contents need not be stated positively. Otherwise the application would show that there was no need for the discovery sought. Mason *v.* Smith, 49 Hun (N. Y.) 612, 24 N. Y. Suppl. 355.

3. Woods *v.* De Figaniere, 1 Rob. (N. Y.) 681, 25 How. Pr. (N. Y.) 522; Morrison *v.* Sturges, 26 How. Pr. (N. Y.) 177; Davenport *v.* Pennsylvania R. Co., 2 Pa. Dist. 784; San Fernando Copper Min., etc., Co. *v.* Humphrey, 111 Fed. 772.

4. Meakings *v.* Cromwell, 1 Sandf. (N. Y.) 698; Ahlmeyer *v.* Healy, 14 Daly (N. Y.) 288, 12 N. Y. St. 677; Union Paper Collar Co. *v.* Metropolitan Collar Co., 3 Daly (N. Y.) 171; Cutter *v.* Pool, 54 How. Pr. (N. Y.) 311; Boyd *v.* Petrie, 20 L. T. Rep. N. S. 934, 17 Wkly. Rep. 903.

5. Arnold *v.* Pawtuxet Valley Water Co., 18 R. I. 189, 26 Atl. 55, 19 L. R. A. 602.

6. Beaver *v.* Hartsville University, 34 Ind. 245; Gross *v.* Bock, 48 Hun (N. Y.) 620, 1 N. Y. Suppl. 263, 14 N. Y. Civ. Proc. 314; Wenzel *v.* Palmetto Brewing Co., 48 S. C. 80, 26 S. E. 1; Jenkins *v.* Bennett, 40 S. C. 393, 18 S. E. 929. *Contra*, Blumberg *v.* Lindeman, 19 N. Y. App. Div. 370, 46 N. Y. Suppl. 302; Matter of Bryce, 56 How. Pr. (N. Y.) 359.

What equivalent to demand.— An order of a county judge for the inspection of books or to show cause, with a refusal of the party to allow the inspection, takes the place of a demand and refusal. Albany Brass, etc., Co. *v.* Hoffman, 12 Misc. (N. Y.) 167, 33 N. Y. Suppl. 600.

7. Snow *v.* Snow-Church Surety Co., 80 N. Y. App. Div. 40, 80 N. Y. Suppl. 512. *Compare* Morrice *v.* Swaby, 2 Beav. 500, 17

(III) *Signature and Verification.* The fact that the petition for a discovery and inspection of papers in defendant's possession is not subscribed by plaintiff but by his attorney is not material when it is verified by plaintiff.[8] The application must be verified by affidavit,[9] which should be the affidavit of the petitioner[10] or of his attorney;[11] but if made by the attorney some reason should be shown for his making it,[12] and in that event it must be positive and cannot be on information and belief.[13]

(IV) *Notice of Application.* It is necessary to give notice of a motion for the production or inspection of books or papers for the purpose of using the information as evidence on the trial,[14] but not where the purpose is to enable a party to plead.[15] The notice must be in writing.[16]

9. The Order — a. In General. A judge in chambers has no power to order a party to furnish copies of papers which are evidence in the cause of his adversary[17] except in vacation.[18] The propriety of granting the order is largely a matter for the discretion of the trial court, and a strong case is required to secure a reversal.[19] This discretion, however, must not be arbitrarily exercised;[20] but in exercising it the court should consider whether the discovery would facilitate the trial of the action.[21] A peremptory order should not be made at once, but there should first be a rule to show cause.[22] It should designate with reasonable certainty the particular book or papers desired.[23] It is improper to insert in the

Eng. Ch. 500; Mertens *v.* Haigh, 8 L. T. Rep. N. S. 561, 2 New Rep. 254.

8. Hallett *v.* American L. Book Co., 40 Misc. (N. Y.) 652, 83 N. Y. Suppl. 110.

9. Dick *v.* Phillips, 41 Hun (N. Y.) 603; Jackling *v.* Edmonds, 3 E. D. Smith (N. Y.) 539.

Statement of facts on information and belief.— Where material facts are positively verified it is no objection that additional facts are stated on information and belief. Kings County Bank *v.* Dougherty, 20 N. Y. Suppl. 817. An affidavit on advice and belief that papers are in the possession of the adversary party is sufficient if not denied by the adversary. National Oleo Meter Co. *v.* Jackson, 54 N. Y. Super. Ct. 444.

10. Strong *v.* Strong, 3 Rob. (N. Y.) 675, 1 Abb. Pr. N. S. (N. Y.) 233. *Compare dictum* in Exchange Bank *v.* Monteath, 4 How. Pr. (N. Y.) 280, 2 Code Rep. (N. Y.) 148, where it is held that the facts may be shown by the oath of any person.

11. Walker *v.* Granite Bank, 19 Abb. Pr. (N. Y.) 111. *Contra,* Herschfeld *v.* Clarke, 11 Exch. 712, 2 Jur. N. S. 239, 25 L. J. Exch. 113.

In case of a corporation aggregate the affidavit may be made by attorneys. Kingsford *v.* Great Western R. Co., 16 C. B. N. S. 761, 10 Jur. N. S. 804, 33 L. J. C. P. 307, 10 L. T. Rep. N. S. 722, 12 Wkly. Rep. 1059, 111 E. C. L. 761.

12. Phelps *v.* Platt, 54 Barb. (N. Y.) 557.

The fact that defendant does not reside in the city is not a sufficient reason for allowing his attorney to verify the petition for the inspection before answer of a document in the possession of plaintiff, and where this is the only reason given the affidavit is insufficient. Fromme *v.* Lisner, 63 Hun (N. Y.) 290, 17 N. Y. Suppl. 850, 22 N. Y. Civ. Proc. 37.

13. Opdyke *v.* Marble, 44 Barb. (N. Y.) 64; Walker *v.* Granite Bank, 19 Abb. Pr. (N. Y.) 111; Central Cross-town R. Co. *v.* Twenty-third St. R. Co., 53 How. Pr. (N. Y.) 45.

14. Philadelphia *v.* McManes, 17 Phila. (Pa.) 4; Bronson *v.* Kensey, 4 Fed. Cas. No. 1,927, 3 McLean 180.

15. Bronson *v.* Kensey, 4 Fed. Cas. No. 1,927, 3 McLean 180.

16. Tillou *v.* Hutchinson, 15 N. J. L. 178.

17. Clarke *v.* Spencer, 6 Cow. (N. Y.) 59; Willis *v.* Bailey, 19 Johns. (N. Y.) 268.

18. Moore *v.* McIntosh, 18 Wend. (N. Y.) 529.

19. *Iowa.*— Allison *v.* Vaughan, 40 Iowa 421.

Nebraska.— Chamberlain *v.* Chamberlain Banking House, (1903) 93 N. W. 1021.

New York.— Clyde *v.* Rogers, 87 N. Y. 625; Stilwell *v.* Priest, 85 N. Y. 649; O'Gorman *v.* O'Gorman, 92 Hun 605, 36 N. Y. Suppl. 401; Hart *v.* Ogdensburg, etc., R. Co., 69 Hun 497, 23 N. Y. Suppl. 713; White *v.* Munroe, 33 Barb. 650; Ashley *v.* Whitney, 54 N. Y. Super. Ct. 540; Cooke *v.* Lalance Grosjean Mfg. Co., 3 N. Y. Civ. Proc. 332; Bowne *v.* Cribb, 20 Wend. 682.

Pennsylvania.— Cowles *v.* Cowles, 2 Penr. & W. 139.

England.— Lane *v.* Gray, L. R. 16 Eq. 552, 43 L. J. Ch. 187.

20. McAllister *v.* Pond, 6 Duer (N. Y.) 702, 15 How. Pr. (N. Y.) 299.

21. Babbitt *v.* Crampton, 1 N. Y. Civ. Proc. 169.

22. District of Columbia *v.* Bakersmith, 18 App. Cas. (D. C.) 574.

23. Whitman *v.* Weller, 39 Ind. 515. But see Forsyth County *v.* Lemly, 85 N. C. 341.

Generality in description is not objectionable if the subject-matter is specifically mentioned in the motion and notice. Victor G. Bloede Co. *v.* Joseph Bancroft, etc., Co., 98 Fed. 175.

order for the discovery the consequence of not obeying it,[24] but such insertion will not render the order void.[25] And it has been held that an order for the examination of defendant before trial and an order for the examination and inspection of books are distinct proceedings and cannot be united in one order.[26]

b. Time, Place, and Manner of Inspection. The order should limit the time within which the inspection should be made.[27] It may fix a day for the production and inspection different from the day of trial.[28] It should name a place for their inspection.[29] It should generally provide that the books or papers remain in defendant's custody and that at a stated time and place he should give liberty of inspection to plaintiff and his counsel and such persons as should accompany them;[30] or that the books should be produced in open court, or before an officer of the court.[31] The court may in its discretion otherwise fix the place of examination,[32] or change the place fixed by the order.[33] It should not provide that they be taken from the party and delivered to his adversary.[34] It need not limit the number of assistants the party may employ in the inspection, as the court will

Order held improper.— An order directing the deposit of certain books and papers and "all other books of the defendants which contain any accounts or entries showing or tending to show" certain matters is improper and unwarranted as being an attempt to use the power of the court to hunt for evidence. Opdyke *v.* Marble, 44 Barb. (N. Y.) 64; Walker *v.* Granite Bank, 44 Barb. (N. Y.) 39, 19 Abb. Pr. (N. Y.) 111.

Order held sufficient.— In an action for libel against a corporation engaged in furnishing news to various newspapers throughout the United States, an order requiring defendant to make discovery of its books and papers showing its transactions in the matter of the transmission of news despatches between Sept. 30 and Nov. 5, 1892, about the date of the issuance of the alleged libelous item, is sufficiently specific, where it does not appear that defendant's interests will be prejudiced by the fact that a more specific description is not given. Palmer *v.* United Press, 67 N. Y. App. Div. 64, 73 N. Y. Suppl. 456.

24. Rice *v.* Ehle, 65 Barb. (N. Y.) 185. *Contra*, Whitworth *v.* Erie R. Co., 37 N. Y. Super. Ct. 437.

25. Rice *v.* Ehle, 65 Barb. (N. Y.) 185.

An order made by a judge out of court for discovery, declaring a penalty for failure to comply therewith, is an entirety, and the specification of the penalty vitiates the whole order. Broderick *v.* Shelton, 18 Abb. Pr. (N. Y.) 213.

26. Boeck *v.* Smith, 85 N. Y. App. Div. 575, 83 N. Y. Suppl. 428; Bloodgood *v.* Slayback, 62 N. Y. App. Div. 315, 71 N. Y. Suppl. 809.

27. Smith *v.* Mackay, 4 Tenn. Leg. Rep. 202.

Where it fails to do so the court exceeds its jurisdiction and certiorari will lie. State *v.* Second Judicial Dist. Ct., 27 Mont. 441, 71 Pac. 602, 94 Am. St. Rep. 831.

Order held proper.— An order permitting an inspection of the papers in defendant's possession at a particular date and such other time as the referee may appoint is proper. Hallett *v.* American L. Book Co., 40 Misc. (N. Y.) 652, 83 N. Y. Suppl. 110.

28. Murison *v.* Butler, 18 La. Ann. 296 [*reversing* 18 La. Ann. 197]. The designation of the day of trial as that for answering or producing a book is insufficient, unless the day is ascertained with certainty in the order; nor is the usual weekly notice posted in the court-room of the days for which cases are fixed sufficient. Spears *v.* Nugent, 2 La. Ann. 11.

29. Rogers *v.* Turner, 21 L. J. Exch. 8.

Defendant need not produce the books at the office of plaintiff's attorney, but may either permit them to be inspected at the office of his own attorney, or furnish duly verified copies of the entries in question. Fox *v.* Brega, 1 Silv. Supreme (N. Y.) 445, 5 N. Y. Suppl. 908.

30. Pindar *v.* Seaman, 33 Barb. (N. Y.) 140; Skey *v.* Bennett, 6 Jur. 981; Grane *v.* Cooper, 4 Myl. & C. 263, 18 Eng. Ch. 263.

31. Hilyard *v.* Harrison Tp., 37 N. J. L. 170; Bundschu *v.* Simon, 23 N. Y. Suppl. 714, 23 N. Y. Civ. Proc. 80; Elsworth *v.* Hinton, 10 N. Y. Suppl. 40, 23 Abb. N. Cas. (N. Y.) 374; Ferry *v.* Rubel, 12 N. Y. Leg. Obs. 138.

Refusal to accept terms of order.— Where the order provided for an inspection by defendant of plaintiff's books under the supervision of a referee, and defendant refused to accept these terms, it was within the discretion of the court to deny the inspection entirely. Clyde *v.* Rogers, 94 N. Y. 541.

The examination may be made in a foreign state under supervision of a proper officer (Avis *v.* Lee, 77 Va. 553; Bustros *v.* Bustros, 30 Wkly. Rep. 374); but will not be permitted of the original books abroad where duplicates are in the country (Steward *v.* East-India Co., 9 Mod. 387).

32. Talbot *v.* Marshfield, 11 Jur. N. S. 901, 13 L. T. Rep. N. S. 424, 13 Wkly. Rep. 885; Republic *v.* Weguelin, 41 L. J. Ch. 165.

33. Prestney *v.* Colchester, 52 L. J. Ch. 877.

34. Hilyard *v.* Harrison Tp., 37 N. J. L. 170. A request that a paper purporting to be a receipt, held by the adverse party, be put into the custody of some disinterested person for the respondent to photograph in the complainant's absence, was held to be properly refused. Ely *v.* Mowry, 12 R. I. 570.

see to it that the privilege is not abused;[35] but it is not error to limit them.[36] The books should be returned to the party producing them after they have been inspected, although they may be required on the hearing.[37]

c. Limits of Inspection. The inspection should not be granted of property other than that mentioned in the petition;[38] and should be limited to such documents or to such entries in the books as show the transactions relating to the claim in controversy.[39]

d. Service of Order. The order for discovery or inspection, where such discovery or inspection is desired from the opposite party, must be served on the party; notice to his attorney is not sufficient,[40] unless the party required to produce books or documents is a corporation.[41]

10. Sealing up Portions of Books or Documents. Where the books contain accounts and transactions which in no way relate to the subject of the examination, the party producing them has the right to seal up such parts of the books so that they shall not be exposed to the observation of those who have no right to examine them,[42] or the court may order such parts sealed.[43] Where books are produced by a party with portions thereof sealed up, his affidavit stating that

35. Veiller *v.* Oppenheim, 75 Hun (N. Y.) 21, 26 N. Y. Suppl. 1051, 31 Abb. N. Cas. (N. Y.) 181; Crease *v.* Penprase, 1 Jur. 840, 7 L. J. Exch. Eq. 8, 2 Y. & C. Exch. 527.

The order may provide for an inspection by an accountant in a proper case. Lindsay *v.* Gladstone, L. R. 9 Eq. 132; Bonnardet *v.* Taylor, 1 Johns. & H. 383, 7 Jur. N. S. 328, 30 L. J. Ch. 523, 3 L. T. Rep. N. S. 384, 9 Wkly. Rep. 452. But see Coleman *v.* West Hartlepool Harbour, etc., Co., 5 L. T. Rep. N. S. 266.

Under the North Carolina code the inspection should be limited to the adverse party and it is error to order a party to give inspection to others. Sheek *v.* Sain, 127 N. C. 226, 37 S. E. 334.

36. Stevens *v.* Blake, 5 Kan. App. 124, 48 Pac. 888.

37. Jones *v.* Thomas, 6 L. J. Exch. Eq. 81, 2 Y. & C. Exch. 312; Small *v.* Attwood, 1 Y. & C. Exch. 37.

Withdrawal after reasonable time.— A party who under a rule of court deposits books for inspection may withdraw the same after a reasonable time for inspection and taking copies has expired. Stow *v.* Betts, 7 Wend. (N. Y.) 536.

38. State *v.* Second Judicial Dist. Ct., 26 Mont. 396, 411, 68 Pac. 570, 69 Pac. 103.

An order for the inspection of a mine may make available to the persons making the inspection all the appliances in use for ingress and egress. State *v.* Second Judicial Dist. Ct., 26 Mont. 396, 411, 68 Pac. 570, 69 Pac. 103.

39. *Illinois.*— Rigdon *v.* Conley, 141 Ill. 565, 30 N. E. 1060 [*affirming* 31 Ill. App. 630]; Pynchon *v.* Day, 18 Ill. App. 147.

Indiana.— Whitman *v.* Weller, 39 Ind. 515.

Montana.— State *v.* Second Judicial Dist. Ct., 27 Mont. 441, 71 Pac. 602, 94 Am. St. Rep. 831.

New York.— De Brunoff *v.* McClure-Tissot Co., 83 N. Y. App. Div. 640, 82 N. Y. Suppl. 38; Continental Nat. Bank *v.* Myerle, 29 N. Y. App. Div. 282, 51 N. Y. Suppl. 497; Cram *v.* Moore, 1 Sandf. 662; Allen *v.* Allen, 11 N. Y. Suppl. 535.

United States.— Victor G. Bloede Co. *v.* Joseph Bancroft, etc., Co., 98 Fed. 175.

Modification of order.— Where plaintiff was entitled to a discovery of the amount of wages paid defendant's employees, and the number of persons employed during the continuance of certain indemnity policies, an order requiring defendant to produce its ledgers, cash-books, time-books, time-sheets, and all other books showing the amount of wages paid to its employees during the period covered by the policies was too broad, and should be modified so as to require only a production of cash-books, time-books, and time-sheets, during such period. New York Fidelity, etc., Co. *v.* F. W. Seagrist Jr. Co., 79 N. Y. App. Div. 614, 80 N. Y. Suppl. 277.

Where books contain entries with which the applicant has no concern, the order will be conditioned to require the deposit of the books in the clerk's office, and to provide for the attendance of a representative of the opposite party, the relevancy of the contested entries to be determined in the first instance by the clerk, with summary application for the review thereof by the judge in chambers. Gray *v.* Schneider, 119 Fed. 474.

40. Brokaw *v.* Culver, 7 N. Y. Suppl. 167, 23 Abb. N. Cas. (N. Y.) 224; Claiborne *v.* Frazier, 2 Brev. (S. C.) 47. But see People *v.* Brower, 4 Paige (N. Y.) 405.

If the party is present at the trial or when the order is made no notice is required. Weathersby *v.* Huddleston, 2 La. Ann. 845; Spears *v.* Nugent, 2 La. Ann. 11.

41. Rossner *v.* New York Museum Assoc., 20 Hun (N. Y.) 182.

42. Titus *v.* Cortelyou, 1 Barb. (N. Y.) 444; Robbins *v.* Davis, 20 Fed. Cas. No. 11,880, 1 Blatchf. 238, 5 N. Y. Leg. Obs. 245; Talbot *v.* Marshfield, 11 Jur. N. S. 901, 13 L. T. Rep. N. S. 424, 13 Wkly. Rep. 885; Fazakerly *v.* Gillibrand, 8 L. J. Ch. 248.

The court may inspect disputed passages in order to determine the right to protection. Lafone *v.* Falkland Islands Co., 4 Kay & J. 34, 27 L. J. Ch. 25, 6 Wkly. Rep. 4.

43. Pynchon *v.* Day, 118 Ill. 9, 7 N. E. 65; Elder *v.* Bogardus, 1 Edm. Sel. Cas. (N. Y.) 110.

those portions do not relate to the matters in issue is to be taken in the first instance as sufficient to protect them from examination, but if the adversary can show any fair grounds for supposing the sealed portions to be material the court can order them to be opened.[44] Before coming into court for an order that sealed portions of books be opened the party should first apply to the referee to whom the case has been referred.[45] The inspection of sealed portions of books or papers renders the party liable for contempt.[46]

11. Privileged Matter — a. Communications Between Attorney and Client. Documents of a client in the hands of an attorney are privileged from production or inspection at the instance of third parties.[47] So are cases submitted to counsel and their opinions thereon,[48] whether such opinions are written before or after litigation begun.[49] And a waiver of the privilege as to some documents does not waive the privilege as to the balance.[50] But legal opinions taken by a trustee for his mere guidance are not privileged as against his *cestui que trust*,[51] nor are opinions taken by a corporation privileged as against a stock-holder when the opinions were paid for out of corporate funds.[52] The privilege extends only to documents that are placed in the hands of an attorney in reference to an existing or anticipated controversy and not when made or delivered to him in general course of professional business.[53] The claim for privilege will not be denied because the documents are alleged to have been prepared to evade the law.[54]

b. Communications Between Physician and Patient. The books of a physician which contain information concerning his patient are privileged in an action between the physician and a third person.[55]

c. Public Documents. Documents of a public official character whose production would be prejudicial to the public interest are privileged from production.[56]

d. Matters Subjecting Party to Criminal Prosecution, Penalties, or Forfeiture. That the production or inspection asked for will prove the party guilty of the commission of a crime is a proper ground for refusing it,[57] but not where the crime is barred by the statute of limitations,[58] nor unless the party swears that the discovery sought would tend to criminate him.[59] The right to such protec-

44. Titus *v.* Cortelyou, 1 Barb. (N. Y.) 444. But see Jones *v.* Andrews, 58 L. T. Rep. N. S. 601, where it is said that the affidavit of a party that the matter sealed up is irrelevant cannot be denied by evidence and is conclusive unless the court is satisfied from the documents produced, from something in the affidavit of documents or sealing, from the admission of the party making the discovery, or necessarily from the circumstances of the case that the affidavit does not truly state the facts.

45. Titus *v.* Cortelyou, 1 Barb. (N. Y.) 444.

46. Dias *v.* Merle, 2 Paige (N. Y.) 494.

47. Peck *v.* Williams, 13 Abb. Pr. (N. Y.) 68; Wheeler *v.* Le Marchant, 17 Ch. D. 675, 45 J. P. 728, 50 L. J. Ch. 793, 44 L. T. Rep. N. S. 632.

48. Underwood *v.* India State Secretary, 12 Jur. N. S. 321, 35 L. J. Ch. 545, 14 L. T. Rep. N. S. 385, 14 Wkly. Rep. 551; Jenkyns *v.* Bushby, L. R. 2 Eq. 547, 12 Jur. N. S. 558, 35 L. J. Ch. 820, 15 L. T. Rep. N. S. 310.

49. Bristol *v.* Cox, 26 Ch. D. 678, 53 L. J. Ch. 1144, 50 L. T. Rep. N. S. 719, 33 Wkly. Rep. 255; Mostyn *v.* West Mostyn Coal, etc., Co., 34 L. T. Rep. N. S. 531.

50. Lyell *v.* Kennedy, 27 Ch. D. 1, 51 L. J. Ch. 937, 50 L. T. Rep. N. S. 730.

51. Talbot *v.* Marshfield, 2 Dr. & Sm. 549, 6 New Rep. 288.

52. Gourand *v.* Edison Gower Bell Telephone Co., 57 L. J. Ch. 498, 59 L. T. Rep. N. S. 813.

53. Peck *v.* Williams, 13 Abb. Pr. (N. Y.) 68.

54. Bullivant *v.* Atty.-Gen., [1901] A. C. 196, 70 L. J. K. B. 645, 84 L. T. Rep. N. S. 737, 50 Wkly. Rep. 1. But see Russell *v.* Jackson, 9 Hare 387, 15 Jur. 1117, 21 L. J. Ch. 146, 41 Eng. Ch. 387. See also Charlton *v.* Coombes, 4 Giff. 372, 9 Jur. N. S. 534, 32 L. J. Ch. 284, 8 L. T. Rep. N. S. 81, 1 New Rep. 547, 11 Wkly. Rep. 504.

55. Lowenthal *v.* Leonard, 20 N. Y. App. Div. 330, 46 N. Y. Suppl. 818; Mott *v.* Consumers' Ice Co., 2 Abb. N. Cas. (N. Y.) 143, 52 How. Pr. (N. Y.) 148 [*affirmed* in 52 How. Pr. 244].

56. Hennessy *v.* Wright, 24 Q. B. D. 445 note, 36 Wkly. Rep. 879; Wadeer *v.* East India Co., 8 De G. M. & G. 182, 2 Jur. N. S. 407, 25 L. J. Ch. 345, 4 Wkly. Rep. 421, 57 Eng. Ch. 142; The H. M. S. Bellerophon, 44 L. J. Adm. 5, 31 L. T. Rep. N. S. 756, 23 Wkly. Rep. 248.

57. Kern *v.* Bridwell, 119 Ind. 226, 21 N. E. 664, 12 Am. St. Rep. 409.

58. McCreery *v.* Ghormley, 6 N. Y. App. Div. 170, 39 N. Y. Suppl. 1036.

59. O'Connor *v.* Tack, 2 Brewst. (Pa.) 407; Kraus *v.* Sentinel Co., 62 Wis. 660, 23 N. W. 12.

tion cannot be waived by agreement[60] nor by reference to the documents in the pleadings.[61] The court and not the party is the ultimate judge as to whether the production might tend to criminate the party,[62] and it should have very clear evidence that danger to the deponent cannot reasonably be apprehended before it declines to allow the privilege claimed.[63] The claim of privilege on the ground that the disclosure might tend to incriminate the party making it must be made on the oath of the party.[64] It is also a proper ground for refusing the order that the books contain evidence of matter which will subject the party to a penalty.[65] Protection will be afforded at every stage of the proceedings against being compelled to answer any question having a direct tendency to criminate the party, or subjecting him to penalty, or forming one step toward it.[66]

12. Use of Documents Produced. A plaintiff should not use for any collateral purpose documents produced for the purpose of the suit.[67] If necessary an injunction will be granted to restrain him from doing so.[68] The court may as a condition for making an order for production require the applicant to undertake not to make public the contents of the documents.[69]

13. Failure to Produce or Permit Inspection. A party ordered to produce books or papers must comply with the order instanter.[70] Giving leave to a party to examine the books at a place other that provided by the order is not a compliance therewith.[71] For failure to comply with the order the court may direct that the facts stated in the application for the order be taken as confessed,[72] may impose a fine upon the party failing to comply therewith,[73] or may render a judgment of nonsuit or default against the party,[74] as far as relates to that part of

60. Southall *v.* ——, Younge 308; Paxton *v.* Douglas, 16 Ves. Jr. 239, 33 Eng. Reprint 975, 19 Ves. Jr. 225, 34 Eng. Reprint 502, 12 Rev. Rep. 175; Claridge *v.* Hoare, 14 Ves. Jr. 59, 33 Eng. Reprint 443; Maccallum *v.* Turton, 2 Y. & J. 183.

61. Roberts *v.* Oppenheim, 26 Ch. D. 724, 53 L. J. Ch. 1148, 50 L. T. Rep. N. S. 729, 32 Wkly. Rep. 654.

62. Reg. *v.* Boyes, 1 B. & S. 311, 101 E. C. L. 311; *Ex p.* Reynolds, 20 Ch. D. 294, 46 J. P. 533, 51 L. J. Ch. 756, 46 L. T. Rep. N. S. 508, 30 Wkly. Rep. 651. But see Blenkinsopp *v.* Blenkinsopp, 10 Beav. 143, 11 Jur. 721, 16 L. J. Ch. 88.

63. Bradley *v.* Clayton, L. R. 26 Ir. 405.

Where necessary the court will examine the documents to see whether the claim for privilege is justified. Williams *v.* Quebrada R., etc., Co., [1895] 2 Ch. 751, 65 L. J. Ch. 68, 73 L. T. Rep. N. S. 397, 44 Wkly. Rep. 76.

64. Webb *v.* East, 5 Ex. D. 108, 44 J. P. 200, 49 L. J. Exch. 250, 41 L. T. Rep. N. S. 715, 28 Wkly. Rep. 336; The Mary or Alexandra, L. R. 2 A. & E. 319, 38 L. J. Adm. 29, 18 L. T. Rep. N. S. 891, 17 Wkly. Rep. 551.

65. People *v.* Western Manufacturers' Mut. Ins. Co., 40 Ill. App. 428; Boyle *v.* Smithman, 146 Pa. St. 255, 23 Atl. 397; Finch *v.* Rikeman, 9 Fed. Cas. No. 4,788, 2 Blatchf. 301.

Waiver of privilege.— This privilege is not waived by the fact that the party has produced the same books in an equity suit. Newgold *v.* American Electrical Novelty, etc., Co., 108 Fed. 341.

What does not amount to a penalty.— A foreign corporation may be required to furnish evidence against itself in an action brought to exclude it from the state as the revocation of a privilege to do business in the state does not amount to a penalty. State *v.* Standard Oil Co., 61 Nebr. 28, 84 N. W. 413, 87 Am. St. Rep. 449.

66. Lee *v.* Read, 5 Beav. 381, 6 Jur. 1026, 12 L. J. Ch. 26. But see South-Sea Co. *v.* Bumsted, 1 Eq. Cas. Abr. 77, 21 Eng. Reprint 890; Davis *v.* Reid, 5 Sim. 443, 9 Eng. Ch. 443; East India Co. *v.* Atkins, 1 Str. 168.

67. Richardson *v.* Hastings, 7 Beav. 354, 13 L. J. Ch. 416, 29 Eng. Ch. 354.

68. Williams *v.* Prince of Wales Life, etc., Co., 23 Beav. 338, 3 Jur. N. S. 55.

69. O'Connor *v.* Tack, 2 Brewst. (Pa.) 407; Williams *v.* Prince of Wales Life, etc., Co., 23 Beav. 338, 3 Jur. N. S. 55. But see Tagg *v.* South Devon R. Co., 12 Beav. 151.

70. People *v.* Brower, 4 Paige (N. Y.) 405.

Effect of inconvenience.— It is no excuse for failure to produce books in the possession of a party that he will be put to inconvenience to find them. Holly Mfg. Co. *v.* Venner, 86 Hun (N. Y.) 42, 33 N. Y. Suppl. 287, 2 N. Y. Annot. Cas. 8.

71. Snyder *v.* Olmstead, 1 How. Pr. (N. Y.) 194.

72. Mills *v.* Fellows, 30 La. Ann. 824; Atwater *v.* Colton, 18 La. Ann. 226; Dorchester First Nat. Bank *v.* Smith, 36 Nebr. 199, 54 N. W. 154.

73. But the fine must be such only as will indemnify the aggrieved party for the costs and expenses, and such costs and expenses must be ascertained by competent proof before the amount of the fine can be fixed. Ludlow *v.* Knox, 1 Alb. L. J. 161.

74. Silvers *v.* Junction R. Co., 17 Ind. 142; Gould *v.* McCarty, 11 N. Y. 575; Brown *v.* Georgi, 56 N. Y. Suppl. 851; La Farge *v.* La Farge F. Ins. Co., 14 How. Pr. (N. Y.)

the action or defense to which the books or papers are alleged to apply,[75] or may enforce the order by attachment[76] or exclude the document from being given in evidence.[77] The imposition of the penalty is discretionary with the court and not imperative.[78] It should not be imposed until it is ascertained judicially that such refusal was without good reason,[79] and that the evidence sought is pertinent to the issues and should be produced,[80] and should not be imposed where the application for the production is ambiguous on its face,[81] or does not conform to the statutes.[82] Sworn copies may be produced in lieu of the originals, where defendant and his books are in another state, or at such a great distance that the production in court would be attended with great inconvenience, expense, or detriment.[83] And it is a sufficient excuse for the failure to produce books ordered to be produced that the party states on oath that he kept no such books,[84] or positively denies possession of them,[85] and denies all control of the books or papers sought,[86] provided he shows that he parted with possession if he ever had it before the order of court was made and that the books are not his property.[87] But he must swear positively that they are not in his possession or control, or state facts which with his denial of knowledge are the equivalent of a positive assertion.[88] It is not sufficient to state on oath that the books contain no entries

26; Victor G. Bloede Co. *v.* Joseph Bancroft, etc., Co., 110 Fed. 76; Liberia Republic *v.* Roye, 1 App. Cas. 139, 45 L. J. Ch. 297, 34 L. T. Rep. N. S. 145, 24 Wkly. Rep. 967.

75. Wills *v.* Kane, 2 Grant (Pa.) 47. It does not authorize the court to compel defendant to make any admission of plaintiff's claim other than would be implied by his neglect to plead. Follett *v.* Weed, 3 How. Pr. (N. Y.) 360.

76. *District of Columbia.*— District of Columbia *v.* Bakersmith, 18 App. Cas. 574.

Ohio.— Arbuckle *v.* Woolson Spice Co., 21 Ohio Cir. Ct. 356, 11 Ohio Cir. Dec. 726.

Pennsylvania.— Keim's Estate, 1 Woodw. 108.

United States.— Victor G. Bloede Co. *v.* Joseph Bancroft, etc., Co., 110 Fed. 76.

England.— Thomas *v.* Palin, 21 Ch. D. 360, 47 L. T. Rep. N. S. 207, 30 Wkly. Rep. 716.

A party should not be imprisoned for contempt where he complies with the order after attachment issued and before enforcement. Gay *v.* Hancock, 56 L. T. Rep. N. S. 726.

77. Dorchester First Nat. Bank *v.* Smith, 36 Nebr. 199, 54 N. W. 154; Gould *v.* McCarty, 11 N. Y. 575; Roberts *v.* Oppenheim, 26 Ch. D. 724, 53 L. J. Ch. 1148, 50 L. T. Rep. N. S. 729, 32 Wkly. Rep. 654.

78. Chamberlain *v.* Chamberlain Banking House, (Nebr. 1903) 93 N. W. 1021; Hartley *v.* Owen, 34 L. T. Rep. N. S. 752.

79. Jenkins *v.* Bennett, 40 S. C. 393, 18 S. E. 929.

Incapacity of party after order.— The penalty should not be enforced where the party becomes incapacitated after the order is made. Cardwell *v.* Tomlinson, 54 L. J. Ch. 957, 52 L. T. Rep. N. S. 746, 33 Wkly. Rep. 814.

80. State *v.* Second Judicial Dist. Ct., 27 Mont. 441, 71 Pac. 602; Owyhee Land, etc., Co. *v.* Tautphaus, 109 Fed. 547, 48 C. C. A. 535.

81. Victor G. Bloede Co. *v.* Joseph Bancroft, etc., Co., 110 Fed. 76.

82. Victor G. Bloede Co. *v.* Joseph Bancroft, etc., Co., 110 Fed. 76.

83. Neafie *v.* Miller, 37 Fla. 173, 20 So. 252. But see Reed *v.* Stevenson, 12 Phila. (Pa.) 536, where it is said that a party cannot by furnishing copies preclude his adversary from inspecting the originals and compelling their production for that purpose.

84. Cottrell *v.* Warren, 18 Pa. St. 487.

85. McIlhanney *v.* Magie, 13 N. Y. Civ. Proc. 16; Russell *v.* McLellan, 21 Fed. Cas. No. 12,158, 3 Woodb. & M. 157. But see Hepburn *v.* Archer, 20 Hun (N. Y.) 535.

It is not sufficient to deny possession if control is not denied. Sibley *v.* New York Times Pub. Co., 80 Hun (N. Y.) 561, 30 N. Y. Suppl. 604; Brown *v.* Georgi, 26 Misc. (N. Y.) 128, 56 N. Y. Suppl. 923. Want of possession or control must be accounted for. McCreery *v.* Ghormley, 6 N. Y. App. Div. 170, 39 N. Y. Suppl. 1036.

Evasive answer.— An affidavit is not sufficient if it is evasive in not showing how the party parted with possession. Union Trust Co. *v.* Driggs, 49 N. Y. App. Div. 406, 63 N. Y. Suppl. 381; Hicks *v.* Charlick, 10 Abb. Pr. (N. Y.) 129.

86. Watts *v.* Knevals, 56 N. Y. Super. Ct. 592, 3 N. Y. Suppl. 548; Woods *v.* De Figaniere, 1 Rob. (N. Y.) 607, 25 How. Pr. (N. Y.) 522; Hoyt *v.* American Exch. Bank, 1 Duer (N. Y.) 652, 8 How. Pr. (N. Y.) 89; Bradstreet *v.* Bailey, 4 Abb. Pr. (N. Y.) 233.

Want of possession by corporate officer.— To entitle a corporate officer failing to produce books of a corporation to claim as an excuse lack of possession or control over the books, he must establish that fact as well as his good faith by affirmative proof. Press Pub. Co. *v.* Associated Press, 27 Misc. (N. Y.) 90, 58 N. Y. Suppl. 186, 29 N. Y. Civ. Proc. 203.

87. State *v.* Lucksinger, 79 Mo. App. 289; Perrow *v.* Lindsay, 52 Hun (N. Y.) 115, 4 N. Y. Suppl. 795, 16 N. Y. Civ. Proc. 359.

88. Southart *v.* Dwight, 2 Sandf. (N. Y.) 672.

An affidavit by defendant's attorney that the books are not in defendant's custody is

relative to the matters in controversy,[89] that the entries are false ones,[90] or that the agent of the opposite party had free access to the books shortly before suit brought, when further examination was denied.[91] The objection of inability to produce cannot be raised on the hearing if not made in opposition to the order or on the hearing of the appeal from the order.[92] That the instrument of which inspection is sought is comprised in and forms part of a very large document in other portions of which the party has no interest is no objection to an inspection of the instrument.[93] Whether the books called for have been brought into court is a question for the court to investigate and not for the party who issued it to determine.[94]

DISCREDIT. To refuse credence to; not to accept as true; to disbelieve;[1] to distrust.[2] (Discredit: Of Witness, see WITNESSES.)

DISCRETIO EST DISCERNERE PER LEGEM QUID SIT JUSTUM. A maxim meaning "Discretion is to discern through law what is just."[3] (See DISCRETION.)

DISCRETIO EST SCIRE PER LEGEM QUID SIT JUSTUM. A maxim meaning "Discretion consists in knowing what is just in law."[4]

DISCRETIO JUDICIS EST PER LEGES DISCERNERE. The discretion of a judge is a legal discretion.[5]

DISCRETION.[6] In general, the discernment of what is right and proper;[7] knowledge and prudence, that discernment which enables a person to judge critically of what is correct and proper, united with caution; nice discernment, and judgment directed by circumspection;[8] judgment;[9] deliberate judgment;[10]

no defense to the motion, when the affidavit is based on information and belief and does not assign any good reason why defendant does not swear to the facts himself. Fox *v.* Brega, 1 Silv. Supreme (N. Y.) 445, 5 N. Y. Suppl. 908.

Denial by agent.— It is not sufficient that the denial of the existence of a paper is made by an agent, where it does not appear that he could have known of its existence or non-existence. People *v.* Newaygo Cir. Judge, 41 Mich. 258, 49 N. W. 921.

89. Elder *v.* Bogardus, 1 Edm. Sel. Cas. (N. Y.) 110.

90. Central Nat. Bank *v.* White, 37 N. Y. Super. Ct. 297.

91. Williams Mower, etc., Co. *v.* Raynor, 38 Wis. 132.

92. Press Pub. Co. *v.* Associated Press, 27 Misc. (N. Y.) 90, 58 N. Y. Suppl. 186, 29 N. Y. Civ. Proc. 203.

93. Umfreville *v.* Manhattan R. Co., 46 N. Y. App. Div. 594, 62 N. Y. Suppl. 20.

94. Philadelphia *v.* McManes, 16 Phila. (Pa.) 1.

1. Howard *v.* State, 25 Tex. App. 686, 693, 8 S. W. 929 [*quoting* Webster Dict.].

2. People *v.* Clark, 84 Cal. 573, 582, 24 Pac. 313 [*citing* Abbott L. Dict.; Anderson L. Dict.; Webster Dict.].

3. Bouvier L. Dict. [*citing* Broom Leg. Max. 84 note].

Applied or quoted in the following cases:

Georgia.— Miller *v.* Wallace, 76 Ga. 479, 484, 2 Am. St. Rep. 48 [*citing* 4 Coke Inst. 41].

Massachusetts.— Com. *v.* Anthes, 5 Gray 185, 204 [*citing* Coke Litt. 227*b*].

Missouri.— Dooley *v.* Barker, 2 Mo. App. 325, 328; Cator *v.* Collins, 2 Mo. App. 225, 232.

New York.— Matter of Watson, 2 Dem. Surr. 642, 645.

Pennsylvania.— *In re* Kilgore, 14 Wkly. Notes Cas. 466, 470.

Virginia.— Harris *v.* Harris, 31 Gratt. 13, 16 [*citing* 4 Coke Inst. 41].

England.— Gough *v.* Howarde, 3 Bulstr. 121, 128; Rex *v.* Peters, 1 Burr. 568, 570.

Canada.— *In re* Pattullo, 31 Ont. 192, 194; Reg. *v.* Cameron, 15 Ont. 115, 118. See also Reg. *v.* Darlington Free Grammar School, 6 Q. B. 682, 700, 9 Jur. 21, 14 L. J. Q. B. 67, 51 E. C. L. 682.

4. Bouvier L. Dict.

Applied in Le Roy *v.* New York, 4 Johns. Ch. (N. Y.) 352, 356; Keighley's Case, 10 Coke 139*a*, 140*a*.

5. *In re* Leonard, 15 Fed. Cas. No. 8,255.

6. "The word 'discretion' is used in various meanings." Lent *v.* Tillson, 72 Cal. 404, 422, 14 Pac. 71. And see Murray *v.* Buell, 74 Wis. 14, 18, 41 N. W. 1010.

7. Citizens' St. R. Co. *v.* Heath, 29 Ind. App. 395, 62 N. E. 107, 111 [*citing* Anderson L. Dict.].

There is discretion "in the decision of what is just and proper under the circumstances." Bouvier L. Dict. [*quoted* in Murray *v.* Buell, 74 Wis. 14, 18, 41 N. W. 1010; The Styria *v.* Morgan, 186 U. S. 1, 9, 22 S. Ct. 731, 46 L. ed. 1027]. See also Oneida C. Pl. *v.* People, 18 Wend. (N. Y.) 79, 99.

8. Towle *v.* State, 3 Fla. 202, 214, where it is said: "To decide, of course requires reflection — the exercise of judgment and discretion."

9. McManus *v.* Finan, 4 Iowa 283, 287. See also 2 Cyc. 413 note 32.

10. Citizens' St. R. Co. *v.* Heath, 29 Ind. App. 395, 62 N. E. 107, 111 [*citing* Anderson L. Dict.]; Stewart *v.* Stewart, 28 Ind. App.

soundness of judgment;[11] a science or understanding to discern between falsity and truth, between wrong and right, between shadow and substance, between equity and colorable glosses and pretences, and not to do according to the wills and private affections of persons.[12] In its ordinary meaning, unrestrained exercise of choice or will;[13] freedom to act according to one's own judgment; unrestrained exercise of will;[14] the liberty or power of acting without other control than one's own judgment.[15] When applied to public functionaries, a power or right, conferred upon them by law, of acting officially in certain circumstances according to the dictates of their own judgment and conscience, uncontrolled by the judgment or conscience of others.[16] In criminal law, the ability to know and distinguish between good and evil,— between what is lawful and what is unlawful.[17] (See DISCRETION OF COURT.)

DISCRETIONARY POWER.[18] A term which involves an alternative power, i. e., a power to do or refrain from doing a certain thing.[19] (See DISCRETION.)

DISCRETIONARY TRUST. See TRUSTS.

DISCRETION OF COURT.[20] Ability to discern by the right line of law and not

378, 62 N. E. 1023, 1025 [*citing* Anderson L. Dict.].

11. McManus *v.* Finan, 4 Iowa 283, 287.

12. Rooke's Case, 5 Coke 99*b*, 100*a* [*quoted* in Miller *v.* Wallace, 76 Ga. 479, 484, 2 Am. St. Rep. 48; *In re* Pattullo, 31 Ont. 192, 194].

13. People *v.* McAllister, 10 Utah 357, 370, 37 Pac. 578. And see McManus *v.* Finan, 4 Iowa 283, 287.

14. Webster Dict. [*quoted* in 11 Centr. L. J. 505].

15. People *v.* New York City Super. Ct., 10 Wend. (N. Y.) 285, 291 [*citing* Webster Dict.]; The Styria *v.* Morgan, 186 U. S. 1, 9, 22 S. Ct. 731, 46 L. ed. 1027 [*quoting* Webster Dict.].

The term implies the absence of a hard-and-fast rule. Norris *v.* Clinkscales, 47 S. C. 488, 498, 25 S. E. 797; The Styria *v.* Morgan, 186 U. S. 1, 9, 22 S. Ct. 731, 46 L. ed. 1027, where it is said: "The establishment of a clearly defined rule of action would be the end of discretion, and yet discretion should not be a word for arbitrary will or inconsiderate action." See also Goodwin *v.* Prime, 92 Me. 355, 362, 42 Atl. 785 [*quoting* State *v.* Wood, 23 N. J. L. 560, 564], where it is said: "Discretion implies that in the absence of positive law or fixed rule the judge is to decide by his view of expediency or of the demands of equity and justice."

16. Oneida C. Pl. *v.* People, 18 Wend. (N. Y.) 79, 99 [*quoted* in Farrelly *v.* Cole, 60 Kan. 356, 372, 56 Pac. 492, 44 L. R. A. 464; Platt *v.* Munroe, 34 Barb. (N. Y.) 291, 293]; Rio Grande County *v.* Lewis, 28 Colo. 378, 379, 65 Pac. 51 [*citing* Murray *v.* Buell, 74 Wis. 14, 18, 41 N. W. 1010; Bouvier L. Dict.]; State *v.* Hultz, 106 Mo. 41, 51, 16 S. W. 940.

Applied to allowances of county commissioners.— Where a statute authorized county boards to make allowances for public purposes "at their discretion," the court said: "The words to 'make allowances at their discretion,' . . . mean to make allowances according to law, at their discretion. They do not mean an arbitrary, uncontrolled, unlimited discretion, contrary to law, or without authority of law; for where there is no law there is no act to do, and, therefore, no discretion to be exercised. They mean a legal discretion, not a personal discretion; for to allow the board a personal discretion would give them the power to make law." Rothrock *v.* Carr, 55 Ind. 334, 335 [*cited* in Scott *v.* La Porte, (Ind. 1903) 68 N. E. 278, 281].

17. Bouvier L. Dict.

18. "The terms, 'discretionary power,' and, 'judicial power,' are often used interchangeably; but there are many acts requiring the exercise of judgment which may fairly be considered of a judicial nature, and yet do not in any proper sense come within the 'judicial power,' as applicable to courts." State *v.* Le Clair, 86 Me. 522, 532, 30 Atl. 7 [*citing Ex p.* Gist, 26 Ala. 156; Dickinson *v.* Kingsbury, 2 Day (Conn.) 1; *Ex p.* Farnham, 8 Mich. 89; Tillotson *v.* Cheetham, 2 Johns. (N. Y.) 63; Cox *v.* Coleridge, 1 B. & C. 37, 2 D. & R. 86, 25 Rev. Rep. 298, 8 E. C. L. 17].

19. Bennett *v.* Norton, 171 Pa. St. 221, 231, 32 Atl. 1112.

Illustration of use of the term.— In *In re* Taylor, 4 Ch. D. 157, 159 [*quoted* in *In re* Pattullo, 31 Ont. 192, 194], Jessel, M. R., said: "Therefore the law was altered by Talfourd's Act to this extent, that that which was formerly the absolute right of the father became, and is now, subject to the discretionary power of the Judge. When I say 'the discretionary power of the Judge,' I mean that, though the Act of Parliament gave the power in the most ample terms in which language could express it, 'if he should see fit'— or, as the recent Act expresses it, 'as the Court shall deem proper, or shall direct'— yet, of course, like every other power given to a Judge, the discretion of the Judge is to be exercised on judicial grounds — not capriciously, but for substantial reasons." See also Doherty *v.* Allman, 3 App. Cas. 709, 728, 39 L. T. Rep. N. S. 129, 26 Wkly. Rep. 513.

20. "The discretion of a judge is the law of tyrants; it is always unknown; it is different in different men; it is casual and depends upon constitution and passion. In the best it is often, at times, capricious; in the worst it is every vice, folly and madness, to which human nature is liable." *Ex p.* Chase,

by the crooked cord of private opinion, which the vulgar call discretion;[21] freedom to act according to the judgment of the court,[22] or according to the rules of equity and the nature of circumstances;[23] judicial discretion regulated according to known rules of law;[24] legal discretion,[25] and not a personal discretion;[26] sound discretion guided by fixed legal principles;[27] sound discretion guided by law;[28] sound judgment, to be exercised according to the rules of law;[29] sound judicial discretion.[30] In practice, the exercise of final judgment by the court in the decision of such questions of fact as, from their nature and the circumstances of the case, come peculiarly within the province of the presiding judge to determine without the intervention and to the exclusion of the functions of a jury.[31] (Discretion of Court: In Particular Actions or Proceedings — Abatement, see ABATEMENT AND REVIVAL; Administration, see EXECUTORS AND ADMINISTRATORS; Admiralty, see ADMIRALTY; Appeal, see APPEAL AND ERROR; Arrest, see ARREST; Attachment, see ATTACHMENT; Bail, see BAIL; Bankruptcy, see BANKRUPTCY; Bastardy, see BASTARDS; By or Against Attorney, see ATTORNEY AND

43 Ala. 303, 310 [*quoting* Bouvier L. Dict.]; State *v.* Cummings, 36 Mo. 263, 278.

Distinguished from "law" in State *v.* Wood, 23 N. J. L. 560, 564.

Distinguished from the "power of a Roman prætor" in Miller *v.* Wallace, 76 Ga. 479, 484, 2 Am. St. Rep. 48.

21. Coke Litt. 227*b* [*quoted* in Beach *v.* Stanstead Tp., 8 Quebec Super. Ct. 178, 188].

22. Murray *v.* Buell, 74 Wis. 14, 18, 41 N. W. 1010 [*citing* Webster Dict.].

23. Platt *v.* Munroe, 34 Barb. (N. Y.) 291, 293 [*citing* Bouvier L. Dict.]; La. Civ. Code (1900), art. 3556, subs. 10.

"Discretion does mean, (and can mean nothing else but) exercising the best of their judgment [by courts] upon the occasion that calls for it." Rex *v.* Young, 1 Burr. 556, 560 [*quoted* in Tompkins *v.* Sands, 8 Wend. (N. Y.) 462, 467, 24 Am. Dec. 46; Norris *v.* Clinkscales, 47 S. C. 488, 498, 25 S. E. 797].

Applied to granting an injunction in Hennessy *v.* Carmony, 50 N. J. Eq. 616, 625, 25 Atl. 374.

24. Lee *v.* Bude, etc., R. Co., L. R. 6 C. P. 576, 580, 40 L. J. C. P. 285, 24 L. T. Rep. N. S. 827, 19 Wkly. Rep. 954 [*quoted* in Beach *v.* Stanstead Tp., 8 Quebec Super. Ct. 178, 188].

25. *Indiana.*— Rothrock *v.* Carr, 55 Ind. 334, 335 [*cited* in Scott *v.* La Porte, (1903) 68 N. E. 278, 281].

Massachusetts.— Com. *v.* Anthes, 5 Gray 185, 200 [*citing* Coke Litt. 227*b*].

New York.— People *v.* New York City Super. Ct., 5 Wend. 114, 126.

Wisconsin.— Norton *v.* Kearney, 10 Wis. 443, 450. And see State *v.* Cunningham, 83 Wis. 90, 137, 53 N. W. 35, 35 Am. St. Rep. 27, 17 L. R. A. 145.

United States.— Osborn *v.* U. S. Bank, 9 Wheat. 738, 866, 6 L. ed. 204 [*quoted* in State *v.* Cunningham, 83 Wis. 90, 137, 53 N. W. 35, 35 Am. St. Rep. 27, 17 L. R. A. 145], where it is said to be "a discretion to be exercised in discerning the course prescribed by law."

"A legal discretion is one that is regulated and governed by well-known and established principles of law." Detroit Tug, etc., Co. *v.* Wayne Cir. Judge, 75 Mich. 360, 382, 42 N. W. 968. See also State *v.* Lafayette County Ct., 41 Mo. 221, 226; Lovinier *v.* Pearce, 70 N. C. 167, 171, where the court, in speaking of the discretion of a judge to set aside a sale, etc., said: "True, it is a matter of discretion; but then the discretion is not willful or arbitrary, but legal. And although its exercise be not purely a matter of law, yet it 'involves a matter of law or legal inference.'"

26. Rothrock *v.* Carr, 55 Ind. 334, 335 [*cited* in Scott *v.* La Porte, (Ind. 1903) 68 N. E. 278, 281].

27. Norris *v.* Clinkscales, 47 S. C. 488, 498, 25 S. E. 797.

28. Haupt *v.* Independent Tel. Messenger Co., 25 Mont. 122, 129, 63 Pac. 1033; Rex *v.* Wilkes, 4 Burr. 2527, 2539 [*quoted* in Miller *v.* Wallace, 76 Ga. 479, 484, 2 Am. St. Rep. 48; Tingley *v.* Dolby, 13 Nebr. 371, 374, 14 N. W. 146; Sea Isle City Imp. Co. *v.* Sea Isle City, 61 N. J. L. 476, 477, 39 Atl. 1063; Platt *v.* Munroe, 34 Barb. (N. Y.) 291, 293; *Ex p.* Mackey, 15 S. C. 322. 328; Harris *v.* Harris, 31 Gratt. (Va.) 13, 16; Sharp *v.* Greene, 22 Wash. 677, 688, 62 Pac. 147; *In re* Pattullo, 31 Ont. 192, 194, and *cited* in Matter of Watson, 2 Dem. Surr. (N. Y.) 642, 645] (where it is also said: "It must be governed by rule, not by humour; it must not be arbitrary, vague, and fanciful, but legal and regular"); Jacob L. Dict. [*quoted* in People *v.* New York City Super. Ct., 10 Wend. (N. Y.) 285, 291; Schlaudecker *v.* Marshall, 72 Pa. St. 200, 206]. And see Jensen *v.* Barbour, 12 Mont. 566, 576, 31 Pac. 592; Wilson *v.* Rastall, 4 T. R. 753, 757, 2 Rev. Rep. 515.

29. Lent *v.* Tillson, 72 Cal. 404, 422, 14 Pac. 71.

30. Shilling *v.* Reagan, 19 Mont. 508, 512, 48 Pac. 1109.

31. Bundy *v.* Hyde, 50 N. H. 116, 120.

"Judicial discretion, in its technical legal sense, is the name of the decision of certain questions of fact by the court." Darling *v.* Westmoreland, 52 N. H. 401, 408, 13 Am. Rep. 55 [*citing* Bundy *v.* Hyde, 50 N. H. 116, 120, and *quoted* in Colburn *v.* Groton, 66 N. H. 151, 153, 28 N. W. 95, 22 L. R. A. 763]. See also Faber *v.* Bruner, 13 Mo. 541, 543; Norris *v.* Clinkscales, 47 S. C. 488, 498, 25 S. E. 797.

CLIENT; Certiorari, see CERTIORARI; Change of Venue, see CRIMINAL LAW; VENUE; Consolidation of Actions, see CONSOLIDATION AND SEVERANCE OF ACTIONS; Contempt, see CONTEMPT; Continuance, see CONTINUANCES IN CIVIL CASES; CONTINUANCES IN CRIMINAL CASES; Criminal Prosecution, see CRIMINAL LAW; Discontinuance, see DISMISSAL AND NONSUIT; Discovery, see DISCOVERY; Dismissal, see APPEAL AND ERROR; DISMISSAL AND NONSUIT; Divorce, see DIVORCE; Execution, see EXECUTIONS; Equity, see EQUITY; Error, see APPEAL AND ERROR; Garnishment, see GARNISHMENT; Injunction, see INJUNCTIONS; Insolvency, see INSOLVENCY; Joinder of Actions, see JOINDER AND SPLITTING OF ACTIONS; Mandamus, see MANDAMUS; New Trial, see APPEAL AND ERROR; CRIMINAL LAW; NEW TRIAL; Nonsuit, see DISMISSAL AND NONSUIT; Reference, see REFERENCES; Removal of Cause, see REMOVAL OF CAUSES; Review, see APPEAL AND ERROR; CERTIORARI; CRIMINAL LAW; REVIEW; Revival, see ABATEMENT AND REVIVAL; Splitting Actions, see JOINDER AND SPLITTING OF ACTIONS; Witness, see CRIMINAL LAW; TRIAL; WITNESSES. Review of, see APPEAL AND ERROR; CRIMINAL LAW. To Admit Attorney, see ATTORNEY AND CLIENT. With Respect to — Costs, see COSTS; Deposition, see DEPOSITIONS; Evidence, see CRIMINAL LAW; EVIDENCE; Indictment or Information, see INDICTMENTS AND INFORMATIONS; Judgment, see JUDGMENTS; Jury, see GRAND JURIES; JURIES; License, see INTOXICATING LIQUORS; LICENSES; Matters of Trial, see CRIMINAL LAW; TRIAL; Parties, see APPEAL AND ERROR; PARTIES; Pleading, see EQUITY; PLEADING; Process, see PROCESS; Punishment, see CRIMINAL LAW; Receiver, see RECEIVERS. See also DISCRETION; and, generally, COURTS; JUSTICES OF THE PEACE.)

DISCRIMINATION. The act of treating differently.[32] (Discrimination: Against Citizen, see CIVIL RIGHTS; COMMERCE. By Carrier, see CARRIERS. By State Against Product of Other State, see COMMERCE. In Matter of Bridge Tolls, see BRIDGES. In Taxation, see CUSTOMS DUTIES; LICENSES; TAXATION. On Account of Color or Race, see CIVIL RIGHTS; CONSTITUTIONAL LAW.)

DISCUSSION. In the civil law, a proceeding, at the instance of a surety, by which the creditor is obliged to exhaust the property of the principal debtor, towards the satisfaction of the debt, before having recourse to the surety.[33] In Scotch law, the ranking of the proper order in which heirs are liable to satisfy the debts of the deceased.[34] (See, generally, PRINCIPAL AND SURETY.)

DISEASE.[35] Any derangement of the functions or alteration of the structure of the animal organs; a morbid condition, resulting from some functional disturbance or failure of physical function which tends to undermine the constitution.[36] (Disease: In General, see ASYLUMS; HEALTH; HOSPITALS; NUISANCES. In Accident Insurance Policy, see ACCIDENT INSURANCE. In Life Insurance Policy, see LIFE INSURANCE. Liability For Communicating, see TORTS. Of Animal, see ANIMALS.)

DISFIGUREMENT. The act of disfiguring, or the state of being disfigured; blemish; defacement; change of external form for the worse.[37] (Disfigurement: As Element of Damages, see DAMAGES. Of Animal, see ANIMALS. Of Person, see MAYHEM. See also COVENTRY ACT.)

DISFRANCHISEMENT.[38] An act which destroys or takes away the franchise or

32. English L. Dict.

33. And this right of the surety is termed the "benefit of discussion." Black L. Dict. [*citing* La. Civ. Code, art. 3045].

34. Black L. Dict. [*citing* Bell Dict.].

35. **"Disease" and "infirmity"** as used in an insurance policy mean practically the same thing. Meyer *v.* New York Fidelity, etc., Co., 96 Iowa 378, 385, 65 N. W. 328, 59 Am. St. Rep. 374. See also 1 Cyc. 261.

36. Meyer *v.* New York Fidelity, etc., Co., 96 Iowa 378, 383, 385, 65 N. W. 328, 59 Am. St. Rep. 374.

37. Century Dict.

38. **Distinguished from "amotion."** — In White *v.* Brownell, 4 Abb. Pr. N. S. (N. Y.) 162, 192, the court said: "In a corporation there is a distinction between what is called amotion, or the right to remove an officer, which is a power inherent in every corporation, and disfranchisement. The former may be exercised without interfering with the franchise, as the officer, when removed, still continues a member; but disfranchisement is an actual expulsion of the member from the body and the taking away of his franchise."

right of being a member of the corporation;[39] taking a franchise from a man for some reasonable cause.[40] (Disfranchisement: Of Elector, see Elections. Of Member — Of Association in General, see Associations; Of Beneficial Association, see Mutual Benefit Insurance; Of Board of Trade, see Exchanges; Of Board of Underwriters, see Insurance; Of Club, see Clubs; Of Corporation in General, see Corporations; Of Religious Society, see Religious Societies.)

DISGRACE. A cause of shame or reproach; that which dishonors; a state of ignominy, dishonor, or shame.[41]

DISGUISE. As a noun, a dress or exterior put on to conceal or deceive; artificial language or manner, assumed for deception; change of manner by drink; slight intoxication. As a verb, to change the guise or appearance of, especially to conceal by an unusual dress; to hide by a counterfeit appearance; to affect or change by liquor; to intoxicate.[42] (See Conceal; Concealment.)

DISHONOR. See Commercial Paper.

DISINTER. To unbury; to take out of the grave; to disentomb; to exhume;[43] to uncover; to expose the dead body of a human being that had been interred to light and air.[44]

DISINTERESTED. Not having any interest in the matter referred to or in controversy.[45]

DISINTERESTED WITNESS. A witness devoid of pecuniary interest, having no prospect of gain or loss.[46] (See, generally, Witnesses.)

DISJUNCTIVE. Serving or tending to disjoin; separating; dividing; distinguishing.[47] (Disjunctive: Allegations, see Indictments and Informations; Pleading. Covenants,[48] see Covenants.)

DISMISS. See Dismissal and Nonsuit.

DISMISSAL. In practice, discontinuance.[49] (See, generally, Dismissal and Nonsuit.)

And see Richards *v.* Clarksburg, 30 W. Va. 491, 497, 4 S. E. 774.

39. Richards *v* Clarksburg, 30 W. Va. 491, 497, 4 S. E. 774 [*citing* 1 Dillon Mun. Corp. § 238, p. 177; 2 Kent Comm. 298; Willcox Mun. Corp. § 708, p. 150].

40. Symmers *v.* Regem, 2 Cowp. 489, 502.

41. Slawson *v.* State, 39 Tex. Cr. 176, 178, 45 S. W. 575, 73 Am. St. Rep. 914 [*citing* Century Dict.; Webster Dict.].

42. Dale County *v.* Gunter, 46 Ala. 118, 142 [*citing* Webster Dict.].

43. People *v.* Baumgartner, 135 Cal. 72, 74, 66 Pac. 974 [*quoting* Worcester Dict., and *citing* Encyclopedic Dict.; Webster Dict.], where it is said: "'Disinter' is not a technical word, nor has it acquired a peculiar meaning in law."

44. People *v.* Baumgartner, 135 Cal. 72, 73, 66 Pac. 974 [*citing* Cal. Pen. Code], where it is said: "To constitute a disinterment it is not necessary that the body should be removed from the place of sepulture." See, generally, Cemeteries; Dead Bodies.

45. English L. Dict.

"The term 'disinterested' does not mean simply lack of pecuniary interest, but requires the appraiser [of property] to be one not biased or prejudiced." Bradshaw *v.* Agricultural Ins. Co., 137 N. Y. 137, 145, 32 N. E. 1055 [*cited* in Hall *v.* Western Assur. Co., 133 Ala. 637, 640, 32 So. 257; Insurance Co. of North America *v.* Hegewald, 161 Ind. 631, 640, 66 N. E. 902; Brock *v.* Dwelling House Ins. Co., 102 Mich. 583, 592, 61 N. W. 67, 47 Am. St. Rep. 562, 26 L. R. A. 623]. See also Hickerson *v.* German-American Ins. Co., 96 Tenn. 193, 203, 33 S. W. 1041, 32 L. R. A. 172; Blodget *v.* Brinsmaid, 9 Vt. 27, 30.

46. State *v.* Easterlin, 61 S. C. 71, 74, 39 S. E. 250.

47. Century Dict.

48. Disjunctive covenants defined see 11 Cyc. 1053 note 68.

49. English *v.* Dickey, 128 Ind. 174, 27 N. E. 495, 13 L. R. A. 40; Thurman *v.* James, 48 Mo. 235, 236.

DISMISSAL AND NONSUIT

EDITED BY WILLIAM ALEXANDER MARTIN

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I. DEFINITION AND NATURE OF PROCEEDINGS.

A. Dismissal. Dismissal signifies the final ending of a suit, not a final judgment on the controversy but an end of that proceeding.[1]

1. Anderson L. Dict.; Bouvier L. Dict. And see Taft *v.* Northern Transp. Co., 56 N. H. 414, 417.
"A dismissal of an action is a final decision of the action, and it is a final determination of the action as against all claim made by it, although it may not be a final determination of the rights of the parties as they may be presented in some other action." Leese *v.* Sherwood, 21 Cal. 151, 164.

B. Discontinuance. A discontinuance in practice is the chasm or interruption in proceedings occasioned by the failure of plaintiff to continue the suit from time to time as he ought, or failure to follow up his case.[2] The entry upon record of a discontinuance has the same effect. In pleading it is the interruption occurring when no answer is given to some material matter in the preceding pleading and the opposite party neglects to take advantage of such omission.[3] Discontinuances are either voluntary, as where plaintiff withdraws his suit, or involuntary, as where in consequence of some technical omission, mispleading, or the like, the

The dismissal of a complaint under the code in an action in the nature of what were formerly termed "common-law actions" is identical with a nonsuit under the common law. Coit *v.* Beard, 33 Barb. (N. Y.) 357, 12 Abb. Pr. (N. Y.) 462, 22 How. Pr. (N. Y.) 2.

The term was not originally applied to common-law proceedings, but seems to have been borrowed from proceedings in the court of chancery. Bosley *v.* Bruner, 24 Miss. 457, 462 [*citing* Bouvier L. Dict.]. See also Pescud *v.* Hawkins, 71 N. C. 299; Morgan *v.* Allen, 27 N. C. 156, 157.

In practice the words "discontinuance" and "dismissal" import the same thing — namely, that the cause is sent out of court. English *v.* Dickey, 128 Ind. 174, 27 N. E. 475, 13 L. R. A. 40; Thurman *v.* James, 48 Mo. 235. See also *infra*, I, B.

2. Gillespie *v.* Bailey, 12 W. Va. 70, 86, 29 Am. Rep. 445 [*citing* 3 Blackstone Comm. 296; Bouvier L. Dict.]; Bouvier L. Dict. [*quoted* in *Ex p.* Humes, 130 Ala. 201, 203, 30 So. 732, where it is said: "It is in substance and effect an abandonment of the moving party of his pending cause"]. And see Penniman *v.* Daniel, 91 N. C. 431, 434.

Other definitions are: "A break or chasm in a suit arising from the failure of the plaintiff to carry the proceedings forward in due course of law." Kennedy *v.* McNickle, 7 Phila. (Pa.) 217.

"The result of some act done or omitted by the plaintiff, which legally withdraws his cause from the power and jurisdiction of the court." McGuire *v.* Hay, 6 Humphr. (Tenn.) 419, 421.

"At common law [it] was a failure to continue the cause regularly from day to day, or term to term, between the commencement of the suit and final judgment" (Germania F. Ins. Co. *v.* Francis, 52 Miss. 457, 467, 24 Am. Rep. 674); "a chasm or gap left by neglecting to enter a continuance" (Taft *v.* Northern Transp. Co., 56 N. H. 414, 416); "a gap or chasm in the proceedings, occurring while the suit is pending" (Hayes *v.* Dunn, 136 Ala. 528, 531, 34 So. 944; *Ex p.* State, 71 Ala. 363, 367; *Ex p.* Hall, 47 Ala. 675, 680 [*citing* Drinkard *v.* State, 20 Ala. 9; Chitty Cr. L. 346; 2 Hawkins P. C. 416]. And see Kennedy *v.* McNickle, 7 Phila. (Pa.) 217).

Compared with "dismissal" see Bullock *v.* Perry, 2 Stew. & P. (Ala.) 319, 322. In Thurman *v.* James, 48 Mo. 235, 236, the court said: "In practice, a dismissal and a discontinuance amount to the same thing, and are but different words employed to convey the same idea, namely, that the cause is sent out of court." See also *supra*, I, A.

Compared with "retraxit" see Bullock *v.* Perry, 2 Stew. & P. (Ala.) 319, 322; Kennedy *v.* McNickle, 7 Phila. (Pa.) 217. See also *infra*, I, D.

"'A discontinuance,' is somewhat similar to a non-suit; for when a plaintiff leaves a chasm in the proceedings of his cause, as by not continuing the process regularly from day to day and time to time, as he ought to do, the suit is discontinued, and the defendant is no longer bound to attend." Rountree *v.* Key, 71 Ga. 214, 215 [*citing* 3 Blackstone Comm. 296; Bouvier L. Dict.]; Hunt *v.* Griffin, 49 Miss. 742, 748 [*citing* 3 Blackstone Comm. 296; Bouvier L. Dict.]. Under the Louisiana practice discontinuance and voluntary nonsuit are the same. Dennistown *v.* Rist, 9 La. Ann. 464.

Election to proceed in equity does not constitute a discontinuance. Simpson *v.* Sadd, 16 C. B. 26, 3 C. L. R. 917, 1 Jur. N. S. 736, 81 E. C. L. 26.

Submission to arbitration of the matters in controversy, involved in an action pending in court, does not operate as a discontinuance of the suit. Nettleton *v.* Gridley, 21 Conn. 531, 56 Am. Dec. 378.

Plea to action after judgment set aside.— If after a judgment against him defendant comes into court at a subsequent term and procures the judgment to be set aside and pleads to the action, and a verdict is subsequently rendered against him, it is no discontinuance of the action of which he can take advantage. Horah *v.* Long, 20 N. C. 416, 34 Am. Dec. 278.

Discontinuance a proceeding in the cause.— "It is difficult to say that taking out a rule to discontinue, is not taking a step in the cause. In order to perfect it, the plaintiff must go on and procure the costs to be taxed; which clearly would be taking a proceeding in the cause." Per Tindal, C. J., in Murray *v.* Silver, 1 C. B. 638, 639, 87 E. C. L. 638. See also as holding that a discontinuance is a proceeding in the cause Hodgson *v.* Graham, 26 U. C. Q. B. 127.

3. Anderson L. Dict.; 3 Blackstone Comm. 296; Bouvier L. Dict. [*citing* Bacon Abr. tit. "Pleas;" Comyns. Dig. tit. "Pleader"] (where it is said: "It is distinguished from insufficient pleading by the fact that the pleading does not profess to answer all the preceding pleading in a case of discontinuance"); Gould Pl. 336.

suit is regarded as out of court.[4] A discontinuance means no more than a declaration of plaintiff's willingness to stop the pending action; it is neither an adjudication of his cause by the proper tribunal nor an acknowledgment by him that his claim is not well founded.[5]

C. Nonsuit. A voluntary nonsuit is an abandonment of his cause by a plaintiff who allows a judgment for costs to be entered against him by absenting himself or failing to answer when called upon to hear the verdict.[6] An involuntary or compulsory nonsuit takes place where plaintiff, on being called, when his case is before the court for trial, neglects to appear, or when he has given no evidence on which a jury could find a verdict.[7] A nonsuit is not a final disposition of the cause and does not bar another suit upon the same cause of action.[8]

D. Retraxit and Nolle Prosequi. A *retraxit* is the act of a plaintiff in voluntarily withdrawing from his suit. It differs from a nonsuit in that it cannot be entered by attorney.[9] A *retraxit*, being a perpetual bar, can be entered

4. Hunt *v.* Griffin, 49 Miss. 742; Hill *v.* Bloomer, 1 Pinn. (Wis.) 463, 467 [*citing* Graham Pr. 603; Petersdorf Abr. 387, 393].

"A voluntary discontinuance is like a nol. pros., or what we call, a withdrawal, or a no appearance, perhaps. An involuntary discontinuance is effected, in various ways. Sometimes, by the neglect of the proper officer of the court, in not bringing forward or continuing causes from term to term; sometimes, by some peculiarity in the pleadings of the plaintiffs; as if the defendant pleads in abatement, and the plaintiff replies as to a plea in bar; or if there be a wrong conclusion of a prayer for judgment in a replication, etc. Alice *v.* Gale, 10 Mod. 112; Bisse *v.* Harcourt, 1 Salk. 177; 2 Petersdorf Abr. tit. "Discontinuance." But this, and many other peculiarities of English judicial practice, we have never adopted." Nettleton *v.* Gridley 21 Conn. 531, 536, 56 Am. Dec. 378.

No application where one of several counts fully answered.— The doctrine of discontinuance does not apply to a case where one or more of several counts is fully answered; but to those cases where a count is only answered in part. McAllister *v.* Ball, 28 Ill. 210.

5. Eugle *v.* Susquehanna Mut. F. Ins. Co., 20 Pa. Co. Ct. 90.

6. 2 Bouvier L. Dict.; Laird *v.* Morris, 23 Nev. 34, 37, 42 Pac. 11; Deeley *v.* Heintz, 169 N. Y. 129, 62 N. E. 158. And see Crumley *v.* Lutz, 180 Pa. St. 476, 36 Atl. 929.

Other definitions are: "A voluntary letting fall the action." Alexander *v.* Davidson, 2 McMull. (S. C.) 49, 51.

"A renunciation of a suit by the plaintiff or demandant, most commonly upon the discovery of some error or defect, when the matter is so far proceeded in, that the Jury is ready to deliver their verdict." Jacob L. Dict. [*quoted* in Dana *v.* Gill, 5 J. J. Marsh. (Ky.) 242, 243, 20 Am. Dec. 255].

"A nonsuit is, where the plaintiff is adjudged not to follow, or pursue his remedy, as he ought to do; or is ordered, in consequence of a total or essential failure of necessary evidence, to go to a jury in proof of his claim or demand." State *v.* Stark, 3 Brev. (S. C.) 101, 102.

Distinguished from continuance.—A nonsuit implies that a plaintiff is constrained to abandon his suit, which is not the fact where he has good cause for a continuance. A voluntary nonsuit waives all known reasons for a continuance. Williams *v.* King, 1 Overt. (Tenn.) 185.

Under the rules of court of Georgia the term "nonsuit" is to be taken "in the sense of the *non.-pros.* of the English practice or the dismissal of our practice." Kelly *v.* Strouse, 116 Ga. 872, 883, 43 S. E. 280.

7. 2 Bouvier L. Dict. And see Alexander *v.* Davidson, 2 McMull. (S. C.) 49.

"Where a plaintiff is demanded and doth not appear, he is said to be nonsuit." Bacon Abr. tit. "Nonsuit" [*quoted* in Dana *v.* Gill, 5 J. J. Marsh. (Ky.) 242, 243, 20 Am. Dec. 255].

A nonsuit is not involuntary unless the action of the court is such as to preclude plaintiff from recovering. Graham *v.* Parsons, 88 Mo. App. 385.

8. *Alabama.*— Bullock *v.* Perry, 2 Stew. & P. 319.

Illinois.— Herring *v.* Poritz, 6 Ill. App. 208.

Kentucky.— Dana *v.* Gill, 5 J. J. Marsh. 242, 20 Am. Dec. 255.

Maine.— Washburn *v.* Allen, 77 Me. 344.

Nevada.— Laird *v.* Morris, 23 Nev. 34, 42 Pac. 11.

South Carolina.— Baker *v.* Deliesseline, 4 McCord 372.

West Virginia.— Southern Branch R. Co. *v.* Long, 26 W. Va. 692.

See 17 Cent. Dig. tit. "Dismissal and Nonsuit," § 75 *et seq.*

A nonsuit is in many instances of importance, because it gives the party the right to commence the same suit again, and alter its status by additional testimony, whereas if he answers and hears the verdict he must stand on the case as then presented and rely upon his exceptions and upon obtaining a reversal of the judgment on appeal. Hall *v.* Schuchardt, 34 Md. 15.

9. Lambert *v.* Sandford, 2 Blackf. (Ind.) 137, 18 Am. Dec. 149; Bacon Abr. tit. "Non-Suit"; Bouvier L. Dict. See also ATTORNEY AND CLIENT, 4 Cyc. 936.

only by plaintiff in person,[10] and in open court,[11] since it operates to discharge, release, and bar the cause of action, and the retractor cannot afterward contest the matter in any form of action.[12] It cannot be made before declaration filed, as it would then operate only as a nonsuit.[13] A *nolle prosequi* does not amount to a *retraxit*, but has the effect of a discontinuance;[14] and the mere dismissal of a suit is not a *retraxit*.[15] The doctrine in regard to *retraxit* has been expressly held to be obsolete and unknown to modern practice in a number of jurisdictions.[16]

II. VOLUNTARY TERMINATION OF SUIT.

A. Right to Dismissal, Discontinuance, or Nonsuit — 1. IN GENERAL. Plaintiff has no absolute right at all times and under all circumstances to discontinue, to dismiss, or to take a nonsuit.[17] But where plaintiff is entitled to dismiss his action, his motive in so doing furnishes no ground for denying him such right and is not a proper subject of inquiry by the court.[18] Plaintiff may discontinue

"A retraxit is 'When the trial is called on, by a plaintiff's coming in person into court and saying that he will not proceed in it.'" Eagin *v.* Musgrove, 61 N. C. 13 [*quoting* 2 Sellon Pr. 46].

10. Cox *v.* Griffin, 17 Ga. 249; Schmidt *v.* Halle, 15 Mo. App. 36; Lowry *v.* McMillan, 8 Pa. St. 157, 49 Am. Dec. 501.

11. Justices Morgan County Inferior Ct. *v.* Selman, 6 Ga. 432; Bond *v.* McNider, 25 N. C. 440; Muse *v.* Farmers' Bank, 27 Gratt. (Va.) 252. And see Canada Exch. Bank *v.* Gilman, 17 Can. Supreme Ct. 108.

12. *Alabama.*— Hardy *v.* Montgomery Branch Bank, 15 Ala. 722; Evans *v.* McMahan, 1 Ala. 45; Bullock *v.* Perry, 2 Stew. & P. 319.

Arkansas.— Harris *v.* Preston, 10 Ark. 201.

Florida.— Broward *v.* Roche, 21 Fla. 465.

Georgia.—Justices Morgan County Inferior Ct. *v.* Selman, 6 Ga. 432.

Indiana.—Barnard *v.* Daggett, 68 Ind. 305; Lambert *v.* Sandford, 2 Blackf. 137, 18 Am. Dec. 149.

Kentucky.— Thompson *v.* Thompson, 65 S. W. 457, 23 Ky. L. Rep. 1535.

Minnesota.— Rolfe *v.* Burlington, etc., R. Co., 39 Minn. 398, 40 N. W. 267.

New York.— Kellogg *v.* Gilbert, 10 Johns. 220, 6 Am. Dec. 335.

North Carolina.— Wilkinson *v.* Gilchrist, 27 N. C. 228; Bond *v.* McNider, 25 N. C. 440; Worke *v.* Byers, 10 N. C. 228.

Pennsylvania.— Lowry *v.* McMillan, 8 Pa. St. 157; Schuylkill Bank *v.* Macalester, 6 Watts & S. 147.

South Carolina.—Napier *v.* Gidiere, Cheves 101.

Virginia.— Wohlford *v.* Compton, 79 Va. 333; Pinner *v.* Edwards, 6 Rand. 675.

West Virginia.— South Branch R. Co. *v.* Long, 26 W. Va. 692.

United States.— Deloach *v.* Dixon, 7 Fed. Cas. No. 3,775, Hempst. 428.

Canada.— Reg. *v.* Atkinson, 15 Quebec 171. See also Canada Exch. Bank *v.* Gilman, 17 Can. Supreme Ct. 108.

See 17 Cent. Dig. tit. "Dismissal and Nonsuit," § 2.

13. Eagin *v.* Musgrove, 61 N. C. 13; Lowry *v.* McMillan, 8 Pa. St. 157, 49 Am. Dec. 501.

14. Lambert *v.* Sandford, 2 Blackf. (Ind.) 137, 8 Am. Dec. 149; Quigley *v.* Merritt, 4 Iowa 475.

It is simply an agreement not to proceed further in the suit as to a particular person or cause of action. Minor *v.* Alexandria Mechanics Bank, 1 Pet. (U. S.) 46, 7 L. ed. 47; Deloach *v.* Dixon, 7 Fed. Cas. No. 3,775, Hempst. 428.

15. Bullock *v.* Perry, 2 Stew. & P. (Ala.) 319; Lord *v.* Dunster, 79 Cal. 477, 21 Pac. 865; Justices Morgan County Inferior Ct. *v.* Selman, 6 Ga. 432; Hoffman *v.* Porter, 12 Fed. Cas. No. 6,577, 2 Brock. 156.

To operate as a retraxit an order of dismissal must be made on motion of one party on the written consent of the other. Stoutenborough *v.* Board of Education, 104 Cal. 664, 38 Pac. 449.

16. Walker *v.* St. Paul City R. Co., 52 Minn. 127, 53 N. W. 1068; Schmidt *v.* Halle, 15 Mo. App. 36; Lowry *v.* McMillan, 8 Pa. St. 157, 49 Am. Dec. 501.

17. Winans *v.* Winans, 6 N. Y. St. 813.

Such right is often dependent upon the effect it has on the rights of defendant (see *infra*, II, D, 1), or upon the application being made at the proper time (see *infra*, II, C), and the granting of leave to do so is often held to rest within the discretion of the court (see *infra*, II, A, 3).

Forms of voluntary dismissal or discontinuance see the following cases:

Indiana.— St. John *v.* Hardwick, 17 Ind. 180, 181.

Kansas.—Norton *v.* Lawrence, 39 Kan. 458, 459, 18 Pac. 526.

Michigan.— Slocomb *v.* Thatcher, 20 Mich. 52, 53.

Missouri.— Heald *v.* Donnell, 121 Mo. 416, 423, 26 S. W. 568.

Montana.— *In re* Mouillerat, 14 Mont. 245, 246, 36 Pac. 185.

New Hampshire.— Bryant's Case, 24 N. H. 149, 151.

Vermont.— Pelton *v.* Mott, 11 Vt. 148, 149, 34 Am. Dec. 678.

Forms of voluntary nonsuit see Sauls *v.* Carmichael, 37 Ala. 87, 88; Wilcox *v.* McKenzie, 75 Ga. 73, 74; Brown *v.* Wentworth, 46 N. H. 490, 88 Am. Dec. 223.

18. See *infra*, II, B, 1.

when he misconceives his action,[19] or when the suit is commenced by defective process.[20]

2. On Adverse Ruling of Court. Provided the motion be not made at a stage at which the court will not consider it,[21] plaintiff may upon a ruling of the court adverse to him elect to take a nonsuit,[22] or dismiss the action,[23] or in some jurisdictions withdraw a juror and discontinue.[24] Within this doctrine a nonsuit will be considered voluntary, where plaintiff is not precluded by the rulings of the court from recovering judgment and substantial damages,[25] or suffers a nonsuit after the court gives an opinion that he should do so,[26] or on an intimation that the court would sustain a demurrer to the evidence.[27] On the other hand a nonsuit taken after instructions which preclude plaintiff's recovery is not a voluntary nonsuit.[28]

3. Necessity For Leave and Order of Court. While some cases hold that plaintiff may dismiss without formal application or leave of court at any time before trial,[29] and others that such dismissal may be had in term-time, but not

19. Roth *v.* Steffe, 9 Lanc. Bar (Pa.) 77.

20. Hill *v.* Dunlap, 15 Vt. 645.

21. See *infra*, II, C.

22. *Alabama.*—Baldwin *v.* Roman, 132 Ala. 323, 31 So. 596 (where plaintiff's right to contest a garnishee's answer is determined against him); Blackburn *v.* Minter, 22 Ala. 613 (when court overrules plaintiff's objections to defendant's testimony).

Colorado.—Long *v.* McGowan, (App. 1901) 66 Pac. 1076, after demurrer to complaint sustained.

Michigan.— Ludeman *v.* Hirth, 96 Mich. 17, 55 N. W. 449, 35 Am. St. Rep. 588, upon refusal of court to permit plaintiff in ejectment to amend his declaration so as to set forth his estate in the land.

Missouri.— State *v.* Gaddy, 83 Mo. 138; Layton *v.* Riney, 33 Mo. 87; Hageman *v.* Moreland, 33 Mo. 86; Overall *v.* Ellis, 32 Mo. 322.

North Carolina.— Graham *v.* Tate, 77 N. C. 120; Pescud *v.* Hawkins, 71 N. C. 299 [*followed* in North Carolina Mut. L. Ins. Co. *v.* Bishop, 71 N. C. 303].

Pennsylvania.— Miller *v.* Knauff, 2 Pa. L. J. Rep. 11, 3 Pa. L. J. 225, on failure to prove joint liability of other defendants, after judgment by default against one.

Texas.— Hume *v.* Schintz, 91 Tex. 204, 42 S. W. 543 (where verdict vacated as a whole); Austin *v.* Townes, 10 Tex. 24.

Washington.— Lowman *v.* West, 7 Wash. 407, 35 Pac. 130, after demurrer to complaint sustained.

United States.— Wilson *v.* Breyfogle, 63 Fed. 379, 11 C. C. A. 248, where plaintiff's evidence was excluded from jury.

England.— Wellock *v.* Constantine, 2 H. & C. 146, 9 Jur. N. S. 232, 32 L. J. Exch. 285, 7 L. T. Rep. N. S. 751, where the judge stated his intention to direct verdict for defendant.

See 17 Cent. Dig. tit. "Dismissal and Nonsuit," § 29.

"Whenever in the progress of a cause the plaintiff perceives that the judge or the jury is decidedly against him, or that he will, on a future occasion, be able to establish a better cause, he may elect to be nonsuited." Wharton *v.* Currituck County Com'rs, 82 N. C. 11, 15.

23. Montgomery *v.* Hays, 44 Ind. 433 (new trial erroneously granted on application of defendant); Vertrees *v.* Newport News, etc., R. Co., 95 Ky. 314, 25 S. W. 1, 15 Ky. L. Rep. 680 (after defendant's motion for peremptory instruction to find for him sustained). In Schafer *v.* Weaver, 20 Kan. 294, it was held that the court, after sustaining a demurrer to evidence interposed by defendant, and before rendering judgment thereon, may in its discretion allow plaintiff to dismiss his action without prejudice.

24. Wolcott *v.* Studebaker, 34 Fed. 8.

25. Chiles *v.* Wallace, 83 Mo. 84; Loring *v.* Cooke, 60 Mo. 564. And see Williams *v.* Finks, 156 Mo. 597, 57 S. W. 732.

26. Runyon *v.* Central R. Co., 25 N. J. L. 556.

27. Graham *v.* Parsons, 88 Mo. App. 385. And see McClure *v.* Campbell, 148 Mo. 96, 49 S. W. 881, holding that where the court announces that it will grant an instruction sustaining defendant's demurrer to the evidence, and plaintiff thereupon asks leave to take a nonsuit, which the court grants, and no instruction is in fact "given" as required by Mo. Rev. St. (1889) § 2188, there has been no ruling or action of the court with respect to the instruction, and the nonsuit is voluntary.

28. Martin *v.* Fewell, 79 Mo. 401.

29. Allen *v.* Van, 1 Iowa 568; Burlington, etc., R. Co. *v.* Sater, 1 Iowa 421.

"According to the practice of some of the courts in the Union, it is understood to be the right of the plaintiff to enter a discontinuance of the cause at any time, either in term or in vacation, upon the payment of costs, before a verdict is given, without any formal assent of or application to, the court; and that thereupon the cause is deemed, in contemplation of law, to be discontinued. In Massachusetts and Maine a different practice is understood to prevail, and the discontinuance can only be in term, and is generally upon application to the court. In many cases, however, in these States, it is a matter of right. In Haskell *v.* Whitney (12 Mass. 47, 50), this doctrine was expressly recognized. The court, on that occasion, said: 'The plaintiff or demandant may, in various modes, become nonsuit, or discontinue his cause at his pleasure. At the beginning of every term at which he is demandable, he may

in vacation,[30] the general rule is that a discontinuance must be by leave of court express or implied,[31] and upon its order,[32] and that a dismissal cannot be accomplished by the mere act of plaintiff alone.[33] It is considered that the granting or the refusal of leave to dismiss, to discontinue, or to take a nonsuit is a matter of practice resting in the discretion of the court, which discretion is to be exercised with reference to the rights of both the parties.[34] Even where leave is considered necessary, however, a discontinuance is in actual practice in some jurisdictions entered without leave,[35] which is presumed unless defendant interferes and asks

neglect or refuse to appear. If the pleadings are not closed, he may refuse to reply, or to join an issue tendered; or after issue joined, he may decline to open his cause to the jury. The court also may, upon sufficient cause shown, allow him to discontinue, even when it cannot be claimed as a right, or after the cause is opened and submitted to the jury.' Before trial, then, the plaintiff may in many cases as a matter of right, discontinue his cause according to the practice of the State courts, at any time when he is demandable in court. After a trial or verdict, he can do so only by leave of the court, which it may grant or refuse, at its discretion. But under ordinary circumstances, before verdict, it is almost a matter of course to grant it upon a payment of costs, when it is not strictly demandable of right." Veazie *v.* Wadleigh, 11 Pet. (U. S.) 55, 61, 9 L. ed. 630.

30. Mollere *v.* Bayon, 2 Mart. O. S. (La) 144.

31. Newcomb *v.* White, 5 N. M. 435, 23 Pac. 671; Davis *v.* Sharpe, 5 Wkly. Notes Cas. (Pa.) 404; Murphy *v.* Murphy, 8 Phila. (Pa.) 357; Veazie *v.* Wadleigh, 11 Pet. (U. S.) 55, 9 L. ed. 630.

Leave to enter nolle prosequi.— In Backus *v.* Richardson, 5 Johns. (N. Y.) 476, the court inclines to the view that by analogy to the case of a nonsuit after a judgment on demurrer plaintiff cannot enter a *nolle prosequi* as to one of the counts in the declaration and take judgment on the others, without leave of the court.

32. Smith-Frazer Boot, etc., Co. *v.* Derse, 41 Kan. 150, 21 Pac. 167; Allen *v.* Dodson, 39 Kan. 220, 17 Pac. 667; Oberlander *v.* Confrey, 38 Kan. 462, 17 Pac. 88; Brown *v.* Galena Min., etc., Co., 32 Kan. 528; Ringle *v.* Wallis Iron Works, 85 Hun (N. Y.) 279, 32 N. Y. Suppl. 1011; Wilder *v.* Boynton, 63 Barb. (N. Y.) 547; Bishop *v.* Bishop, 7 Rob. (N. Y.) 194; Schenck *v.* Fancher, 14 How. Pr. (N. Y.) 95; Fifield *v.* Brown, 2 Cow. (N. Y.) 503; McAden *v.* Jenkins, 64 N. C. 796; Wyman *v.* Herard, 9 Okla. 35, 59 Pac. 1009.

Action of the court is necessary in order that a discontinuance may terminate the suit. Cherry *v.* Mississippi Valley Ins. Co., 16 Lea (Tenn.) 292.

The filing of the written statement of abandonment and the clerk's entry in the register of actions does not, under Cal. Code Civ. Proc. § 581, operate as a dismissal of the action if no judgment of dismissal was ever made or entered nor any order of the court made in relation to the matter of abandonment. Barnes *v.* Barnes, 95 Cal. 171, 30 Pac. 298, 16 L. R. A. 660; Rochat *v.* Gee, 91 Cal. 355, 27 Pac. 670.

33. Smith-Frazer Boot, etc., Co. *v.* Derse, 41 Kan. 150, 21 Pac. 167; Averill *v.* Patterson, 10 N. Y. 500 [*reversing* 10 How. Pr. 85]; Grunert *v.* Sheich, 114 Wis. 355, 89 N. W. 496; State *v.* Ludwig, 106 Wis. 226, 82 N. W. 158 [*overruling* Noble *v.* Strachan, 32 Wis. 314]; Warwick *v.* Cox, 9 Hare (appendix) xiv, 41 Eng. Ch. xiv; Rowe *v.* Wood, 1 Jac. & W. 345, 21 Rev. Rep. 179. And see Adger *v.* Pringle, 11 S. C. 527.

34. *Missouri.*— Adderton *v.* Collier, 32 Mo. 507.

New York.— Carleton *v.* Darcy, 75 N. Y. 375; *In re* Waverly Water Works Co., 16 Hun 57; Winans *v.* Winans, 6 N. Y. St. 813.

Ohio.— Conner *v.* Drake, 1 Ohio St. 166.

Rhode Island.— Payton *v.* Sherburne, 15 R. I. 213, 2 Atl. 300.

South Carolina.— Gilreath *v.* Furman, 57 S. C. 289, 35 S. E. 516.

See 17 Cent. Dig. tit. "Dismissal and Nonsuit," § 31.

But see Evans *v.* Clover, 1 Grant (Pa.) 164; Knabb *v.* Conner, 30 Pittsb. Leg. J. N. S. 285, holding that while the allowance of a discontinuance is a matter of discretion with the court a nonsuit is a matter of the discretion of plaintiff which it would be error to refuse.

Application of rule.— Where, at the close of the evidence in an action for injuries resulting in the death of plaintiff's intestate, plaintiff asked leave to dismiss the action, and in reply to a question by the court stated that he would not be able to furnish further evidence of the accident on a new trial, but expected to be able to furnish testimony which would indicate that the engine causing the injury could have been stopped before deceased was struck, a refusal to grant such leave and a direction of a verdict for defendant were not an abuse of discretion. Lando *v.* Chicago, etc., R. Co., 81 Minn. 279, 83 N. W. 1089.

The decision will not be disturbed or reviewed, unless there was evident misapprehension of the facts or of the rights of the parties or an abuse of such discretion on the part of the court. Carleton *v.* Darcy, 75 N. Y. 375; Winans *v.* Winans, 6 N. Y. St. 813; Crosby *v.* Fitzpatrick, 23 N. Y. Wkly. Dig. 35; Payton *v.* Sherburne, 15 R. I. 213, 2 Atl. 300.

35. Murphy *v.* Murphy, 8 Phila. (Pa.) 357; Yeatman *v.* Henderson, 30 Fed. Cas. No. 18,132.

the court to withhold it.[36] But the court may on cause shown refuse leave after the discontinuance has been entered.[37] After the proper time has passed for discontinuing a cause it is necessary in all cases for plaintiff to obtain leave of the court.[38]

4. Loss of Right by Estoppel or Waiver. A motion for a new trial on the ground that a nonsuit was improperly refused is not a waiver of plaintiff's right to have such nonsuit.[39] Nor is his right to a discontinuance waived by cross-examining defendant's witness called after the denial of a motion for discontinuance, and by submitting the case at the close of the testimony without renewing his motion;[40] nor by asking leave to introduce further testimony after the court's refusal to allow a discontinuance, where on leave being granted the request was withdrawn and no further action taken.[41] Submitting to a nonsuit, in deference to the opinion of the judge at the trial, which opinion is incorrect, does not estop plaintiff from moving to set aside such nonsuit.[42] A general appearance after a discontinuance waives it,[43] and where in an equity suit a written dismissal has been filed, but no leave to dismiss has been obtained, and complainant continues to prosecute his suit, the dismissal will be presumed to have been withdrawn.[44]

B. Parties Entitled to Discontinuance, Dismissal, or Nonsuit — 1. In General. Ordinarily a suitor has a right to discontinue any action or proceeding commenced by him, and his reasons for so doing are of no concern to the court.[45] So one who has assumed the situation of plaintiff,[46] or has become his successor in interest,[47] may discontinue an action, but a stranger to an action cannot move to dismiss it.[48] While plaintiff has a right to dismiss without prejudice, defendant, brought into court by summons, has no right to demand that the action be dismissed as to any proper party plaintiff.[49]

2. Nominal Plaintiffs and Persons Beneficially Interested. Although a nominal or legal plaintiff may dismiss or discontinue a suit brought for the use of another, where the latter is shown to have no beneficial interest in the subject-matter in controversy,[50] and although there are a few early decisions which, fol-

36. Yeatman *v.* Henderson, 30 Fed. Cas. No. 18,132.

37. Schuylkill Bank *v.* Macalester, 6 Watts & S. (Pa.) 147; County *v.* Geisinger, 1 Lehigh Val. L. Rep. (Pa.) 113; Jenney *v.* Glynn, 12 Vt. 480.

38. See *infra*, II, C.

39. Denton *v.* Central School Supply House, 61 Ill. App. 267.

40. Rothenberg *v.* Filarsky, 30 Misc. (N. Y.) 610, 62 N. Y. Suppl. 721.

41. Goldberg *v.* Victor, 26 Misc. (N. Y.) 728, 56 N. Y. Suppl. 1044.

42. Alexander *v.* Barker, 2 Cromp. & J. 133, 1 L. J. Exch. 40, 2 Tyrw. 140. See also Sweet *v.* Lee, 5 Jur. 1134, 3 M. & G. 452, 4 Scott N. R. 77, 42 E. C. L. 240.

43. McDougle *v.* Gates, 21 Ind. 65; Mahon *v.* Mahon, 19 Ind. 324; Clark *v.* State, 4 Ind. 268; Wilson *v.* Coles, 2 Blackf. (Ind.) 402; Bosley *v.* Farquar, 2 Blackf. (Ind.) 61.

44. Newcomb *v.* White, 5 N. M. 435, 23 Pac. 671.

45. *In re* Butler, 101 N. Y. 307, 4 N. E. 518; Carleton *v.* Darcy, 75 N. Y. 375; *In re* Anthony St., 20 Wend. (N. Y.) 618, 32 Am. Dec. 608. And see Banks *v.* Uhl, 6 Nebr. 145, where it was held that a plaintiff in a probate court is entitled to dismiss an action voluntarily without prejudice to another action, although his object in procuring the dismissal is to enable him to proceed with another action concerning the same subject-matter, fraudulently instituted in another county.

A party should no more be compelled to continue a litigation than to commence one, except where substantial rights of other parties have accrued and injustice will be done to them by permitting the discontinuance. *In re* Butler, 101 N. Y. 307, 4 N. E. 518.

46. Broussard *v.* Duhamel, 4 La. 366.

An attaching creditor who has obtained leave to defend an action at a term after it has been defaulted and continued on account of the trustee, while he will not be allowed to file a plea in abatement may, however, have leave to move to dismiss the action if there be no such person as the nominal plaintiff. Kimball *v.* Wellington, 20 N. H. 439.

47. Hallett *v.* Hallett, 10 Misc. (N. Y.) 304, 30 N. Y. Suppl. 946, assignee of cause of action.

48. Soule *v.* Billings, 42 Cal. 285.

49. Roberts *v.* Tomlinson, 9 Kan. App. 85, 57 Pac. 1060.

50. Moore *v.* Bres, 19 La. Ann. 532; Wilson *v.* Hammitt, 1 Harr. & J. (Md.) 141; Sherwood *v.* Ellenstein, 27 Misc. (N. Y.) 30, 57 N. Y. Suppl. 99; Welch *v.* Mandeville, 7 Cranch (U. S.) 152, 3 L. ed. 299. And see Norton *v.* Tuttle, 60 Ill. 130.

Right as dependent upon conditional attorney's fees.— Three plaintiffs joined with others in an action to set aside an order admitting a will to probate and for leave to

lowing the rule that courts of law consider only legal rights, hold that plaintiff of record may dismiss, even though it is alleged and offered to be proved that the beneficial interest is really in another,[51] yet the weight of authority is that where persons other than plaintiff of record are interested in the prosecution of a suit, the courts will protect the rights of such persons and will not permit plaintiff to dismiss to the prejudice of the persons beneficially interested,[52] where the latter will indemnify him against the costs to which he may be subjected.[53]

3. PLAINTIFFS ACTING IN OFFICIAL CAPACITY. Plaintiffs who act in an official capacity for the public in bringing a suit, as for instance selectmen, overseers of the poor, etc., being the only parties plaintiff before the court, may discontinue such suit,[54] during the continuance of their term of office,[55] where they all concur in such discontinuance.[56]

4. PERSONS ACTING IN REPRESENTATIVE CAPACITY. Where one of several parties plaintiff in a cause dies, a dismissal as to him is illegal unless made at the instance of someone representing his interest.[57] Where the reorganization committee of an insolvent corporation are empowered to institute, compromise, and dismiss suits

probate a later will. After appeal from a judgment adverse to plaintiffs, they moved to dismiss on payment of their proportion of the costs. It was held that the motion would not be denied, although their attorneys, who had a contingent fee, had spent considerable money and earned attorney's fees of considerable value. Williams *v.* Miles, 63 Nebr. 851, 89 N. W. 455.

51. Jones *v.* Blackledge, 4 N. C. 342 [*following* Bouerman *v.* Radenius, 2 Esp. 653, 7 T. R. 633]; McElwee *v.* House, 1 Bailey (S. C.) 108. In Casey *v.* Casey, 2 Root (Conn.) 269, it was held that a plaintiff might discharge an action in his name brought upon a note, notwithstanding the note is assigned and plaintiff insolvent.

52. *Alabama.*— Jennings *v.* Pearce, 99 Ala. 303, 13 So. 605; White *v.* Nance, 16 Ala. 345; Cunningham *v.* Carpenter, 10 Ala. 109.

Illinois.— Hanchett *v.* Ives, 133 Ill. 332, 24 N. E. 396 [*affirming* 33 Ill. App. 471]; Lyon *v.* Worcester, 49 Ill. App. 638; Major *v.* Collins, 11 Ill. App. 658.

Indiana.— Steeple *v.* Downing, 60 Ind. 478.

Maine.— Penobscot R. Co. *v.* Mayo, 60 Me. 306.

Pennsylvania.— McCullum *v.* Coxe, 1 Dall. 139, 1 L. ed. 72; Bentley *v.* Reading, 22 Wkly. Note Cas. 60.

South Carolina.— Morris *v.* Peay, 1 Hill 35.

West Virginia.— Lewis *v.* Laidley, 39 W. Va. 422, 19 S. E. 378.

Wisconsin.— Selleck *v.* Phelps, 11 Wis. 380.

See 17 Cent. Dig. tit. "Dismissal and Nonsuit," § 39.

The claimant of property levied on is not entitled to take a nonsuit against the objection of the execution plaintiff. McDuffie *v.* Greenway, 24 Tex. 625.

Rule in ejectment.— Plaintiff in ejectment or trespass to try title may dismiss the suit whenever he thinks proper, and the fact that the beneficial interest in such suit is in another cannot affect his right to do so. White *v.* Nance, 16 Ala. 345. And see EJECTMENT.

In New York a plaintiff who brings an action in behalf of himself and others similarly situated has the right to control the action and may discontinue it at pleasure until a person similarly situated has procured an order to be made a party to the action. Manning *v.* Mercantile Trust Co., 37 Misc. 215, 75 N. Y. Suppl. 168.

53. Jennings *v.* Pearce, 99 Ala. 303, 13 So. 605; Farmers', etc., Bank *v.* Gaither, 8 Fed. Cas. No. 4,654, 3 Cranch C. C. 345.

54. Mears *v.* Boston, etc., R. Co., 5 Gray (Mass.) 371, in which it was held that selectmen of a town may discontinue a suit in equity to restrain a railroad corporation from unlawfully and dangerously running cars on their road, although a temporary injunction has been issued, and although some of the inhabitants of the town move to come in and prosecute the suit.

The attorney-general of the province of Quebec is the sole *dominus* of a suit instituted by him in his official capacity, whether there be a relator or not. Accordingly a mandamus will not lie at the instance of a relator to compel him to continue proceedings under article 997 of the Canadian code, nor need he obtain the leave of the court before discontinuing such proceedings. A succeeding attorney-general cannot retract a discontinuance by his predecessor. Casgrain *v.* Atlantic, etc., R. Co., [1895] A. C. 282, 64 L. J. P. C. 88, 72 L. T. Rep. N. S. 369, 11 Reports 449.

55. Wright *v.* Smith, 13 Barb. (N. Y.) 414, holding that after the expiration of their term of office overseers of the poor have no power to discontinue a suit commenced in their name.

After office abolished.— Where the further prosecution of an action by officials to recover a statutory penalty is rendered impossible by the abolition of their office they are entitled to a discontinuance without costs. Cole *v.* Rose, 65 How. Pr. (N. Y.) 520.

56. Perry *v.* Tynen, 22 Barb. (N. Y.) 137.

57. McLaran *v.* Wilhelm, 50 Mo. App. 658.

The personal representative of a deceased plaintiff may agree to the dismissal of the suit. Banta *v.* Marcellus, 2 Barb. (N. Y.) 373; Wohlford *v.* Compton, 79 Va. 333.

brought in its behalf, the fact that one member of the committee refuses to join with the rest in taking a nonsuit does not deprive the committee of their power to take it.[58]

5 As Between Co-Plaintiffs — a. In General. Although one of two or more co-plaintiffs may withdraw from, abandon, or dismiss a suit so far as his interest is concerned,[59] where such interest is ascertained,[60] yet such action will not be allowed to affect the further progress of the suit as to the other plaintiffs;[61] and one of two or more plaintiffs has no right to dismiss a suit against the objections of the others, unless he can satisfy the court that the latter have no interest in the claim or that he himself is liable to be injured by its further prosecution,[62] and even then he has been held to have no such right if his co-plaintiff shall indemnify him against loss.[63] This doctrine has been applied to the extent of refusing to allow one partner to dismiss a suit which another insists on prosecuting;[64] but it has been held that where plaintiffs are partners and the obligation sought to be enforced runs to the partnership, one may discontinue or dismiss even against the will of the other unless the co-plaintiff will suffer injury, or fraud or collusion is shown.[65]

b. On Showing Want of Interest. Where there is a misjoinder of plaintiffs it is competent for one of them, having no interest in the suit, to withdraw and dismiss the action as to himself;[66] but in a joint action by two or more plaintiffs, since the right of any one or more to recover may depend on facts to be passed on by a jury, plaintiffs cannot be compelled to determine those facts in advance by a voluntary nonsuit as to such of the plaintiffs as may ultimately fail to recover.[67]

c. In Suit Brought Without Authority. In a personal action where one of several co-plaintiffs, each having equally an interest in the cause of action and maintaining the suit, if at all, in his own right and for his own benefit, and having an equal right to control the suit, shows the court that the suit is brought

58. Bangs *v.* Sullivan, (Tex. Civ. App. 1903) 73 S. W. 74.

59. Cunningham *v.* Carpenter, 10 Ala. 109; Aylesworth *v.* Brown, 31 Ind. 270; Noonan *v.* Orton, 31 Wis. 265; Langdale *v.* Langdale, 13 Ves. Jr. 167, 33 Eng. Reprint 258.

Where property sued for belongs partly to one and partly to the other, defendant cannot complain of the dismissal of the action as to one of the plaintiffs, and the rendition of judgment for the other in relation to the property of the latter. Kehoe *v.* Phillipi, 42 Mo. App. 292.

60. Cunningham *v.* Carpenter, 10 Ala. 109, in which it was held that a permission to one of several plaintiffs, copartners, to dismiss a suit so far as he is concerned in interest, amounts to nothing without ascertaining what that interest is.

An action brought upon a bond in the name of the two joint obligees therein may be discharged by one of them. Shaw *v.* Keep, 34 Me. 199.

61. Wall *v.* Galvin, 80 Ind. 447; Stepanek *v.* Kula, 36 Iowa 563; Cooper *v.* Cooper, 1 Phila. (Pa.) 129; Biencourt *v.* Parker, 27 Tex. 558.

62. Winslow *v.* Newlan, 45 Ill. 145. And see Noonan *v.* Orton, 31 Wis. 265. In Holkirk *v.* Holkirk, 4 Madd. 50, the right of some of the plaintiffs to withdraw and have the suit dismissed as to themselves was denied, if by so doing the remaining plaintiffs in the suit would be injured and the order was so framed as to protect them from injury.

Showing as to imprudence of further prosecution.— If several plaintiffs join in instituting a suit, one of them will not be allowed to withdraw from the prosecution of it unless he makes out to the satisfaction of the court that it is not consistent with prudence to prosecute the suit further. Jeffcoat *v.* Jeffcoat, 3 L. J. Ch. O. S. 45.

63. Winslow *v.* Newlan, 45 Ill. 145.

64. Cunningham *v.* Carpenter, 10 Ala. 109.

Agreement made to defraud co-plaintiff.— In Loring *v.* Brackett, 3 Pick. (Mass.) 403, one of two joint plaintiffs, who had formerly been partners, having agreed that the action should be discontinued, the other made affidavit that the cause of action was a debt due to the partnership, and that the agreement was made to defraud him by collusion between his co-plaintiff and defendant, and thereupon the court refused to order a nonsuit.

65. Noonan *v.* Orton, 31 Wis. 265.

66. Ocheltree *v.* Hill, 77 Iowa 721, 42 N. W. 523; Hanks *v.* North, 58 Iowa 396, 10 N. W. 785; Walsh *v.* Brooklyn Union El. R. Co., 69 N. Y. App. Div. 389, 74 N. Y. Suppl. 1019; Hawkins *v.* Lewis, 2 Nott & M. (S. C.) 141. See also Jackson *v.* Bates, 13 Rich. (S. C.) 62.

67. Miller *v.* Bledsoe, 61 Mo. 96 [*followed* in Miller *v.* English, 61 Mo. 444; Miller *v.* McCune, 61 Mo. 248], decided under the Missouri statute of 1849.

without his knowledge, consent, or authority, and by petition duly presented requests to be nonsuited, and no fraud appears, ordinarily a nonsuit will be entered as to all the plaintiffs.[68]

6. Person Having Power of Attorney. Where authority is given by power of attorney to one to discontinue a suit, it must be strictly pursued and the discontinuance should be by him personally and not by another.[69]

C. At What Stage of Cause Allowable — 1. After Judgment. After a final judgment it is too late to dismiss the cause or take a nonsuit, whether as to the whole case,[70] or as to part only of defendants,[71] and whether or not there has been an entry of the judgment.[72] This rule applies, although defendant has obtained a rule to open the judgment,[73] but after a recall of the judgment it has been held that plaintiff may dismiss.[74] It is also held in some jurisdictions that an interlocutory judgment does not deprive plaintiff of the right to dismiss.[75]

2. After Verdict. Under the earlier English decisions plaintiff might become nonsuit even after verdict if dissatisfied with the damages awarded by the jury.[76] But the rule was changed by 2 Hen. IV, c. 7, providing that "after verdict a plaintiff shall not be nonsuit."[77] The English rule before the enactment of the statute mentioned was followed in one early decision in this country,[78] but so far as the books show no other American courts have permitted a nonsuit after verdict.[79]

68. Brown *v.* Wentworth, 46 N. H. 490, 88 Am. Dec. 223; Caverly *v.* Jones, 23 N. H. 573.

69. Mechanics' Bank *v.* Fisher, 1 Rawle (Pa.) 341, where it was held that a power of attorney given to a prothonotary cannot be executed by his clerk.

70. Long *v.* Thwing, 9 Ind. 179; Stanton *v.* King, 76 N. Y. 585; Picabia *v.* Everard, 4 How. Pr. (N. Y.) 113; Mauney *v.* Long, 91 N. C. 170; Todd *v.* Todd, 7 S. D. 174, 63 N. W. 777.

Reason for rule.— "When a party has once had the opportunity of litigating his rights in a competent tribunal, . . . they cannot be again drawn into question with the same parties. He has had his day in court." Ball *v.* Trenholm, 45 Fed. 588, 590.

The quashal of a writ is a final judgment and plaintiff will not be allowed to dismiss thereafter. Cole *v.* Peniwell, 5 Blackf. (Ind.) 175.

71. Turpin *v.* Turpin, 3 J. J. Marsh. (Ky.) 327; State *v.* Powers, 52 Miss. 198.

72. Carleton *v.* Darcy, 43 N. Y. Super. Ct. 373.

73. Kennedy *v.* McNickle, 2 Brewst. (Pa.) 536.

74. Randalls *v.* Wilson, 24 Mo. 76.

75. Piedmont Mfg. Co. *v.* Buxton, 105 N. C. 74, 11 S. E. 264; Lecroix *v.* Macquart, 1 Miles (Pa.) 156. And see Gordon *v.* Goodell, 34 Ill. 429, holding that where a judgment had been confessed but defendant permitted to plead, the judgment being held for plaintiff's benefit, the latter might take a nonsuit, notwithstanding the judgment upon a motion to that effect previously submitting the cause.

76. Keat *v.* Barker, 5 Mod. 208; Bacon Abr. tit. "Nonsuit."

77. Outhwaite *v.* Hudson, 7 Exch. 380, 16 Jur. 430, 21 L. J. Exch. 151; Keat *v.* Barker, 5 Mod. 208; Bacon Abr. tit. "Nonsuit"; Coke Litt. 139b.

78. Wooster *v.* Burr, 2 Wend. (N. Y.) 295.

79. *Connecticut.*— McCurdy *v.* Mather, Kirby 273.

Georgia.— Merchants' Bank *v.* Rawls, 7 Ga. 191, 50 Am. Dec. 394.

Louisiana.— Chedoteau *v.* Dominguez, 7 Mart. 490.

Maine.— Washburn *v.* Allen, 77 Me. 344.

Massachusetts.—Truro *v.* Atkins, 122 Mass. 418.

Missouri.— Savoni *v.* Brashear, 46 Mo. 345.

New Hampshire.— Wright *v.* Bartlet, 45 N. H. 289; Probate Judge *v.* Abbott, 13 N. H. 22.

Ohio.— Taylor *v.* Alexander, 6 Ohio 144.

Pennsylvania.— Lawrence *v.* Burns, 2 Browne 59.

South Carolina.— Magwood *v.* Milne, 12 Rich. 474.

Tennessee.—Hendrick *v.* Stewart, 1 Overt. 476.

See 17 Cent. Dig. tit. "Dismissal and Nonsuit," § 20.

"The reason of the rule is apparent, and needs no discussion. It is founded upon principle. If there were no place at which a party defendant could have any rights, save as to costs, till after verdict, great injustice might oftentimes result, with no power in the court to correct or restrain it. As a nonsuit is no bar to a future action for the same cause, a plaintiff, if so disposed, might harass the opposing party, whose residence or situation might be such as to necessitate great expense in the preparation or defense of a cause, with continued litigation, and the costs recoverable would be absolutely inadequate to compensate him for either." Washburn *v.* Allen, 77 Me. 344, 352.

A verdict in favor of the only defendant who tendered an issue for trial, which issue related exclusively to his own several liability, having been returned into court and published, and thereupon, the jury having been

3. After Findings by Court. In an action tried by the court it is too late to move to dismiss after the court has announced its findings, under a statute providing that the motion "may" be made at any time before the court has announced its findings,[80] or under a statute permitting[81] or requiring plaintiff to make his motion before such submission to the court.[82] In another jurisdiction where there does not appear to be any statutory regulation of the character just mentioned, it is held that plaintiff may dismiss after the court has announced its finding but before a note has been made thereof.[83]

4. At Any Time Before Verdict. In England plaintiff originally had a right to abandon an action at law and become nonsuit at any time before verdict.[84] But the rule has been abolished there by a rule of the supreme court adopted under the Judicature Act,[85] and has been changed by statute in a large number of the United States.[86] So without any special statutory regulations on the subject the courts of many other states have declined to follow the rule.[87] In other states where there has been no statutory change of the rule, plaintiff may still dismiss his action at any time before verdict;[88] at least he can do so unless a set-off or

remanded to their room to perfect the verdict by finding *pro forma* as to the other two defendants, it was too late for plaintiff to dismiss his whole action. After so much had transpired, the litigating defendant was entitled to have a verdict recorded for his protection. Meador *v.* Dollar Sav. Bank, 56 Ga. 605.

Where the jury found for defendant but neglected to calculate interest and retired to make the calculation, it is too late on their return to take a nonsuit. Lawrence *v.* Burns, 2 Browne (Pa.) 59.

80. Randles *v.* Randles, 63 Ind. 93; Walker *v.* Heller, 56 Ind. 298; Livergood *v.* Rhoades, 20 Ind. 411; Doughty *v.* Elliott, 8 Blackf. (Ind.) 405. See also Plant *v.* Edwards, 85 Ind. 588.

What amounts to announcement of finding. — Language used by the court after argument in stating that there was a lack of evidence necessary to sustain one branch of plaintiff's case is not the announcement of its finding (Burns *v.* Reigelsberger, 70 Ind. 522), nor is a mere intimation by the court of its judgment (Somerville *v.* Johnson, 3 Wash. 140, 28 Pac. 373); and it has been held that where the court states what the special finding in a case will be when written, such announcement is not the decision of the court, and notwithstanding such announcement the case may be dismissed at any time before the written finding is announced (Crafton *v.* Mitchell, 134 Ind. 320, 33 N. E. 1032; Mitchell *v.* Friedly, 126 Ind. 545, 26 N. E. 391). So plaintiff may dismiss after the hearing of the evidence and intimation by the court that there is no evidence to sustain some of plaintiff's material allegations, and a consent by the court to make special findings and before announcement thereof. Beard *v.* Becker, 69 Ind. 498.

81. Masterson *v.* McKelvey, (Tex. Civ. App. 1893) 21 S. W. 1005.

82. Reed *v.* Reed, 39 Mo. App. 473.

83. Adams *v.* Shepard, 24 Ill. 464; Howe *v.* Harroun, 17 Ill. 494; Deaton *v.* Central School Supply House, 61 Ill. App. 267; Turnock *v.* Walker, 54 Ill. App. 374; Shabad *v.* Hanchett, 40 Ill. App. 545; Prindiville *v.* Leon, 11 Ill. App. 657; Wilson Sewing Mach., etc., Co. *v.* White, 10 Ill. App. 191.

84. Outhwaite *v.* Hudson, 7 Exch. 380, 16 Jur. 430, 21 L. J. Exch. 151.

85. Wilson Pr. Supreme Ct. Jud. (7th ed.) 234.

86. See *infra*, II, C, 5, 6, 7, 9.

87. See *infra*, II, C, 9.

88. *District of Columbia.*—Jackson *v.* Merritt, 21 D. C. 276.

Georgia.— Peeples *v.* Root, 48 Ga. 592.

Pennsylvania.— Matter of Carter, 1 Phila. 507.

South Carolina.— Usher *v.* Sibley, 2 Brev. 32.

United States.— Stewart *v.* Gray, 23 Fed. Cas. No. 13,428*a*, 4 Hempst. 94.

Canada.— Grant *v.* Protection Ins. Co., 1 N. S. 12.

See 17 Cent. Dig. tit. "Dismissal and Nonsuit," §§ 20, 21.

Reason for rule.— The rule permitting plaintiff to suffer nonsuit at the last moment before verdict is rendered is intended to guard against accidents and surprises. Matter of Carter, 1 Phila. (Pa.) 507.

A statute prohibiting nonsuit after the jury are ready to give their verdict does not prohibit a nonsuit, where from manifest mistake he is prevented from giving any evidence. Franklin *v.* Mackey, 16 Serg. & R. (Pa.) 117.

Within the rule it has been held that plaintiff may dismiss at any time before the jury signify their willingness to give their verdict (McLugham *v.* Bovard, 4 Watts (Pa.) 308), at any time before the verdict is delivered to the clerk (Bulkley *v.* Treadway, 1 Root (Conn.) 552), after the jury return, enter the jury box, and after nine are called (Easton Bank *v.* Coryell, 9 Watts & S. (Pa.) 153), at any time before the verdict is read by the clerk (Johnson *v.* Basquere, 1 Speers (S. C.) 329; Lawrin *v.* Hanks, 3 McCord (S. C.) 558). It has been held, however, in one case that after the jury has sealed the

counter-claim is pleaded by defendant,[89] or unless defendant has acquired a right to some affirmative relief.[90]

5. Before Submission to Court or Jury or Retirement of Jury. In many jurisdictions there are statutes which provide in substance either that plaintiff, if he desires to suffer a nonsuit or dismiss his cause, "must" do so before the cause is finally submitted to the court or jury or before the jury retire, or that he "may" suffer a nonsuit at any time before the final submission of the cause to the court or jury or before the jury retire. Under either class of statutes it is of course competent for plaintiff to dismiss or suffer a nonsuit before a final submission of the cause,[91] or what amounts to the same thing before the jury retire.[92] This right being one given by statute is it is believed absolute, and one which the court has no right to deny.[93]

6. After Submission to Court or Jury or Retirement of Jury. Both classes of statutes mentioned in the preceding section are very generally construed to mean that plaintiff is not entitled as of right to dismiss or take a nonsuit after the cause has been submitted to the jury or the court trying the case as a jury,[94] or

verdict but before formal announcement it is too late. Newton *v.* Singlob, 5 Pa. Co. Ct. 151.

Under the practice act of New Jersey plaintiff has no right to dismiss after the coming in of the jury. Dunkle *v.* Rotholz, (N. J. Sup. 1890) 19 Atl. 260.

89. Merchants' Bank *v.* Schulenberg, 54 Mich. 49, 19 N. W. 741.

90. Tate *v.* Phillips, 77 N. C. 126; Graham *v.* Tate, 77 N. C. 120.

91. *Iowa.*— Jones *v.* Currier, 65 Iowa 533; Perry *v.* Heighton, 26 Iowa 451; Harris *v.* Laird, 25 Iowa 143; Burlington, etc., R. Co. *v.* Sater, 1 Iowa 421.

Kansas.—Amos *v.* Humboldt Loan Assoc., 21 Kan. 474; Schafer *v.* Weaver, 20 Kan. 294; St. Joseph, etc., R. Co. *v.* Dryden, 17 Kan. 278; McVey *v.* Burns, 14 Kan. 291.

Missouri.— Greene County Bank *v.* Gray, 146 Mo. 568, 48 S. W. 447; Wood *v.* Nortman, 85 Mo. 298; Lawrence *v.* Shreve, 26 Mo. 492; Templeton *v.* Wolf, 19 Mo. 101; Mayer *v.* Old, 51 Mo. App. 214; Wilson *v.* Stark, 42 Mo. App. 376.

Nebraska.— Sharpless *v.* Giffen, 47 Nebr. 146, 66 N. W. 285; Sheedy *v.* McMurtry, 44 Nebr. 499, 63 N. W. 21; Grimes *v.* Chamberlain, 27 Nebr. 605, 43 N. W. 395; Banks *v.* Uhl, 6 Nebr. 145.

New York.— Rothenberg *v.* Filarsky, 30 Misc. 610, 62 N. Y. Suppl. 721; Goldberg *v.* Victor, 26 Misc. 728, 56 N. Y. Suppl. 1044.

Ohio.— Dayton, etc., R. Co. *v.* Marshall, 11 Ohio St. 497; Scott *v.* Reedy, 5 Ohio Dec. (Reprint) 388, 5 Am. L. Rec. 367.

United States.— Chicago, etc., R. Co. *v.* Metalstaff, 101 Fed. 769, 41 C. C. A. 669; Ætna L. Ins. Co. *v.* Lakin, 59 Fed. 989, 8 C. C. A. 437.

See 17 Cent. Dig. tit. "Dismissal and Nonsuit," §§ 15, 16, 17.

92. *Alabama.*— Blackburn *v.* Minter, 22 Ala. 613.

Arkansas.— Fowler *v.* Lawson, 15 Ark. 148.

Florida.— National Broadway Bank *v.* Lesley, 31 Fla. 56, 12 So. 525.

Illinois.— Gordon *v.* Goodell, 34 Ill. 429; Amons *v.* Sennott, 5 Ill. 440; Berry *v.* Savage, 3 Ill. 261.

Indiana.— Dunning *v.* Galloway, 47 Ind. 182.

New Jersey.— Bauman *v.* Whiteley, 57 N. J. L. 487, 31 Atl. 982.

Tennessee.— Parltow *v.* Elliott, Meigs 547.

Texas.— Frois *v.* Mayfield, 31 Tex. 366.

United States.— Gassman *v.* Jarvis, 94 Fed. 603; Wolcott *v.* Studebaker, 34 Fed. 8.

See 17 Cent. Dig. tit. "Dismissal and Nonsuit," § 17.

93. New Hampshire Banking Co. *v.* Ball, 57 Kan. 812, 48 Pac. 137; Beals *v.* Western Union Tel. Co., 53 Nebr. 601, 74 N. W. 54; Sharpless *v.* Giffen, 47 Nebr. 146, 66 N. W. 285; Grimes *v.* Chamberlain, 27 Nebr. 605, 43 N. W. 395. But see Worthington *v.* White, 42 Mo. 462, where it was said in one case that a strict construction of the statute should perhaps not be allowed where it is manifest that the rights and interests of defendant would be prejudiced thereby.

94. *Arkansas.*— St. Louis Southwestern R. Co. *v.* White Sewing-Mach. Co., 69 Ark. 431, 64 S. W. 96.

California.— Westbay *v.* Gray, 116 Cal. 660, 48 Pac. 800; Casey *v.* Jordan, 68 Cal. 246, 9 Pac. 92, 305; Heinlein *v.* Castro, 22 Cal. 100; Brown *v.* Harter, 18 Cal. 76.

Iowa.— Dunn *v.* Wolf, 81 Iowa 688, 47 N. W. 887; McArthur *v.* Schultz, 78 Iowa 364, 43 N. W. 223; Belzor *v.* Logan, 32 Iowa 322; Mansfield *v.* Wilkerson, 26 Iowa 482; Hays *v.* Turner, 23 Iowa 214.

Kansas.— Mason *v.* Ryus, 26 Kan. 464; Ashmead *v.* Ashmead, 23 Kan. 262; Schafer *v.* Weaver, 20 Kan. 294; St. Joseph, etc., R. Co. *v.* Dryden, 17 Kan. 278; Dickerman *v.* Crane, 8 Kan. App. 795, 57 Pac. 305.

Kentucky.— Glenny Glass Co. *v.* Taylor, 99 Ky. 24, 34 S. W. 711, 17 Ky. L. Rep. 1331; Linn *v.* Valz, 11 Ky. L. Rep. 846; Hill *v.* Small, 7 Ky. L. Rep. 376.

Missouri.— Hesse *v.* Missouri State Mut. F., etc., Ins. Co., 21 Mo. 93; McLean *v.* Stuve, 15 Mo. App. 317.

Nebraska.— State *v.* Scott, 41 Nebr. 263, 59 N. W. 893; State *v.* Hazelet, 41 Nebr. 257, 59 N. W. 890; State *v.* Scott, 22 Nebr. 628, 36 N. W. 121.

what amounts to the same thing (in case of trial by jury) after retirement of the jury.[95] It is held, however, that while all legal right on the part of plaintiff has ended, the court may in its discretion permit plaintiff to recall such submission and dismiss without prejudice; and in such case the action of the court, unless it has abused its discretion, is no ground of error.[96] Furthermore, when the court so exercises its power, its ruling is conclusive in any collateral inquiry.[97] So also plaintiff may dismiss after submission to the jury, if plaintiff consent.[98]

7. What Amounts to a Submission or Retirement of Jury. Within the rule that plaintiff cannot dismiss or take a nonsuit after final submission, it has been said that "a submission is final only when nothing remains to be done to render it complete."[99] It has accordingly been held that plaintiff may dismiss or take a nonsuit after intimation by the court as to what the instructions will be but before they are given;[1] after the instructions are given but before the jury retire;[2] after motion for verdict and intimation by the court that it will sustain the motion, but before any entry to that effect or any direction to the jury to return a verdict;[3] before introduction of all the evidence upon the issues made by the pleadings;[4] where after the cause has once been submitted the court permits an amendment raising a new issue;[5] where after the jury have retired plaintiff suggests the death of defendant;[6] or after declarations of law are passed on by the court, but before they are settled.[7] A plaintiff is not entitled to a dismissal or nonsuit where a case, although finally submitted, is laid over on conditions which are not complied with;[8] after a final submission with an attempted reservation of a right to dismiss without prejudice;[9] after the jury had been considering their verdict and plaintiff learned that the court was about to instruct that in case nine

See 17 Cent. Dig. tit. "Dismissal and Nonsuit," §§ 15, 16, 17.

In Maryland submission to the court, where the court acts as jury, does not deprive plaintiff of his right to a nonsuit. Hall *v.* Schuchardt, 34 Md. 15.

95. National Broadway Bank *v.* Lesley, 31 Fla. 56, 12 So. 525; Ross *v.* Chicago, 12 Ill. 366; McClelland *v.* Louisville, etc., R. Co., 94 Ind. 276; Sanders *v.* Sanders, 24 Ind. 133. And see Torrey *v.* Forbes, 94 Ala. 135, 10 So. 320.

96. St. Louis Southwestern R. Co. *v.* White Sewing Mach. Co., 69 Ark. 431, 64 S. W. 96; Ashmead *v.* Ashmead, 23 Kan. 262; Schafer *v.* Weaver, 20 Kan. 294; Dickerman *v.* Crane, 8 Kan. App. 795, 57 Pac. 305.

97. Mason *v.* Ryus, 26 Kan. 464.

98. See Heinlin *v.* Castro, 22 Cal. 100.

99. Morrisey *v.* Chicago, etc., R. Co., 80 Iowa 314, 45 N. W. 545.

1. Mullen *v.* Peck, 57 Iowa 430, 10 N. W. 829.

2. Hensley *v.* Peak, 13 Mo. 587.

Nonsuit after adverse charge.— Where the court overrules plaintiff's objections to testimony offered by defendant and charges adversely to his right to recover he may except to the rulings of the court and take a nonsuit. Blackburn *v.* Minter, 22 Ala. 613.

3. Oppenheimer *v.* Elmore, 109 Iowa 196, 198, 80 N. W. 307; Morrisey *v.* Chicago, etc., R. Co., 80 Iowa 314, 45 N. W. 545; Vertress *v.* Newport News, etc., R. Co., 95 Ky. 314, 25 S. W. 1, 15 Ky. L. Rep. 680; Chicago, etc., R. Co. *v.* Metalstaff, 101 Fed. 769, 41 C. C. A. 669. In Oppenheimer *v.* Elmore, *supra*, the court said: "There was no final submission of this case to the jury. They had not received the charge of the court, and as yet had no authority to consider of or return a verdict. Appellant contends that, as the sustaining of the motion for verdict was, in effect, a final disposal of the case, there was a final submission of the case to the court before the plaintiff asked leave to dismiss. Surely, the submission of the motion was not a submission of the case to the court; for, whether the motion was overruled or sustained, it remained to submit the case to a jury for a verdict. There was no final submission of the case to the court or jury."

After defendant's motion for nonsuit and after the court has started to state his conclusions, the court may grant plaintiff's motion for nonsuit. Colorado Fuel, etc., Co. *v.* Menapace, (Colo. App. 1901) 64 Pac. 584.

Announcement by the court of its intention to give binding instructions for defendant does not bar plaintiff's right to a dismissal. Gassman *v.* Jarvis, 94 Fed. 603.

4. Osborne *v.* Davies, 60 Kan. 695, 57 Pac. 941.

5. Westbay *v.* Gray, 116 Cal. 660, 48 Pac. 800 (where it was said that the then case stands as though no submission had ever been had); Jones *v.* Currier, 65 Iowa 533, 22 N. W. 663.

6. Huthsing *v.* Maus, 36 Mo. 101.

7. Lawrence *v.* Shreve, 26 Mo. 492; Wilson *v.* Stark, 42 Mo. App. 376.

8. Crowley *v.* Chamberlain, 6 Ohio Dec. (Reprint) 982, 9 Am. L. Rec. 377.

9. McArthur *v.* Schultz, 78 Iowa 364, 43 N. W. 223, holding that such reservation is not permissible. See also Oppenheimer *v.* Elmore, 109 Iowa 196, 80 N. W. 307.

of the jurors agreed they could return a verdict;[10] after a cause is submitted on demurrer to the petition and the demurrer sustained, although no opinion be filed;[11] after a demurrer to the evidence has been sustained;[12] or after the evidence was closed and the jury had returned their findings.[13] And if, in a cause tried before the court, at the close of the evidence of plaintiff defendant filed a demurrer to the evidence, and at the close of the evidence of defendant the court took the cause under advisement and the parties were required to furnish briefs, there is a final submission of both the law and facts to the court.[14] So it has been held that if the court has given the cause in charge to the jury for their consideration, even though they remain in the box, this constitutes a retirement within the meaning of the statutes.[15]

8. After Submission to Referees, Arbitrators, Etc. The decisions are not harmonious in regard to the effect of a submission of a cause to referees or arbitrators on the right to dismiss or take a nonsuit. In some jurisdictions it is held that plaintiff may submit to a nonsuit during a hearing before a referee.[16] In other jurisdictions it is held that after a voluntary submission under rule of court, plaintiff has no right to discontinue, dismiss, or suffer a nonsuit,[17] even before the hearing before the referees or arbitrators has begun.[18] Some decisions hold that after the report has been filed it is too late for plaintiff to dismiss or take a nonsuit; in one of them no statute is mentioned as a basis of the holding;[19] while in others the court relied on a statute making the report conclusive unless impeached by evidence, the view being taken that if a nonsuit were permitted this would in effect destroy the report by a nonsuit instead of by evidence;[20] and in another the court considered the report equivalent to the verdict of a jury.[21] But under statutes providing that plaintiff "may" or "must" if he so desires take a nonsuit before submission to the court or jury, it has been held that plaintiff may take a nonsuit after the referee has prepared but before he has filed his report,[22] or even after he has filed his report, but before judgment has been entered thereon,[23] the view being taken that there has been no final submission within the meaning of the statutes. So in another decision made without reference to any statute it was held that as a hearing on the trial before an auditor cannot terminate in a judgment for either party such hearing does not constitute a trial so as to preclude plaintiff from taking a nonsuit after the hearing but before the filing of the auditor's report.[24] After a company has obtained possession of land sought to be con-

10. McCauley *v.* Brown, 99 Mo. App. 625, 74 S. W. 464.

11. State *v.* Scott, 22 Nebr. 628, 36 N. W. 121.

12. St. Joseph, etc., R. Co. *v.* Dryden, 17 Kan. 278.

13. Dickerman *v.* Crane, 8 Kan. App. 795, 57 Pac. 306.

14. Lawyers' Co-operative Pub. Co. *v.* Gordon, 173 Mo. 139, 73 S. W. 155.

15. Gassman *v.* Jarvis, 94 Fed. 603, holding that the actual withdrawal from their seats to consider of their verdict is not necessary to constitute a retirement.

16. Plant *v.* Fleming, 20 Cal. 92; Coffin *v.* Reynolds, 37 N. Y. 640.

Where a motion by plaintiff to set aside a reference is denied, the court may refuse a motion to discontinue. It has the right to discontinue an action on terms or without terms or refuse to discontinue at all. Winans *v.* Winans, 54 N. Y. Super. Ct. 541.

17. Haskell *v.* Whitney, 12 Mass. 47; Wyatt *v.* Sweet, 48 Mich. 539, 12 N. W. 692, 53 N. W. 525; Allen *v.* Hickam, 156 Mo. 49, 56 S. W. 309; Pollock *v.* Hall, 4 Dall. (Pa.) 222, 1 L. ed. 809, 3 Yeates (Pa.) 42. And see Ives *v.* Ashelby, 26 Ill. App. 244; Horn *v.* Roberts, 1 Ashm. (Pa.) 45, holding that from the time jurisdiction of arbitrators attaches on a rule entered by defendant the case is out of court and plaintiff has no power to discontinue.

18. Haskell *v.* Whitney, 12 Mass. 47.

19. McCurdy *v.* Mather, Kirby (Conn.) 273.

20. Parker *v.* Burns, 57 N. H. 602; Fulford *v.* Converse, 54 N. H. 543.

Where report cannot be used as evidence.— In an action committed by order of court, under the referee law of 1874, to a referee, upon whose report plaintiff has elected a jury trial, plaintiff, if the report cannot be used as evidence to the jury, may at any time before the commencement of the trial become nonsuit. Benton *v.* Bellows, 61 N. H. 107.

21. Pollard *v.* Moore, 51 N. H. 188.

22. Belzor *v.* Logan, 32 Iowa 322.

23. Worthington *v.* White, 42 Mo. 462; Everett *v.* Taylor, 32 Mo. 390.

24. Carpenter *v.* New York, etc., R. Co., 184 Mass. 98, 63 N. E. 28. See also Jackson *v.* Roane, 96 Ga. 40, 23 S. E. 118, holding that the mere fact that matters of account

demned and is occupying it by virtue of the condemnation proceedings, it will not be permitted to take a nonsuit against plaintiff's consent.[25]

9. At Any Time Before Trial. In a number of jurisdictions where there are no statutes regulating the practice, plaintiff as of right may discontinue or become nonsuit at any time before the trial has commenced,[26] whether the trial be by jury or by the court without the intervention of a jury;[27] and under the statutory provisions of some jurisdictions that plaintiff may dismiss at any time before trial if no counter-claim be filed, the right to dismiss at any time before trial if no counter-claim be filed is an absolute one which the court has no discretion to disregard.[28] It is also competent for plaintiff to dismiss his action at any time before trial where a statute permits a nonsuit at any time before the jury retire.[29]

10. After Commencement of Trial. In a number of jurisdictions, where there are no statutes regulating the practice, the rule is well settled that after the trial has commenced plaintiff is not entitled as a matter of right to dismiss or to take a nonsuit, but the matter rests in the discretion of the court, which may after the trial has commenced and before verdict grant or deny permission to dismiss or take a nonsuit,[30] and plaintiff may with defendant's consent dismiss after commencement of the trial.[31] So under statutes authorizing dismissal "at any time before trial" plaintiff cannot dismiss as matter of right, after commencement of trial.[32]

have been referred to an auditor and are in process of determination does not prevent plaintiff from dismissing his petition.

25. Nevada, etc., R. Co. *v.* De Lissa, 103 Mo. 125, 15 S. W. 366.

26. Washburn *v.* Allen, 77 Me. 344; Worcester *v.* Lakeside Mfg. Co., 174 Mass. 299, 54 N. E. 833; Kempton *v.* Burgess, 136 Mass. 192; Burbank *v.* Woodward, 124 Mass. 357; Locke *v.* Wood, 16 Mass. 317; Haskell *v.* Whitney, 12 Mass. 47; Wright *v.* Bartlett, 45 N. H. 289; Probate Judge *v.* Abbot, 13 N. H. 21.

In an action against several defendants, the court may permit defendant to discontinue before trial. Exstein *v.* Robertson, 1 Silv. Supreme (N. Y.) 169, 6 N. Y. Suppl. 429, 17 N. Y. Civ. Proc. 23.

27. Washburn *v.* Allen, 77 Me. 344.

28. Kaufman *v.* San Francisco Super. Ct., 115 Cal. 152, 46 Pac. 904; Hancock Ditch Co. *v.* Bradford, 13 Cal. 637; Denver, etc., R. Co. *v.* Cobley, 9 Colo. 152, 10 Pac. 669. And see McCabe *v.* Southern R. Co., 107 Fed. 213.

"At any time before trial" as used in the statutes has in one jurisdiction been construed to mean before "commencement" of trial. St. Anthony Falls Water Power Co. *v.* King Wrought Iron Bridge Co., 23 Minn. 186, 23 Am. Rep. 682. In another it has been held to mean, "at any time before the jury retire" (Hancock Ditch Co. *v.* Bradford, 13 Cal. 637), and that plaintiff might dismiss after evidence closed on both sides (Toulouse *v.* Pare, 103 Cal. 251, 37 Pac. 146. And see Geary *v.* Simmons, 39 Cal. 224). In another a similar view was taken as to the meaning of the statute and plaintiff was permitted to take a nonsuit after his evidence had been stricken out on motion. Burns *v.* Rodefer, 15 Nev. 59. It has been held, however, that where a complaint contains three alleged causes of action, and defendant demurs thereto, and the demurrer is sustained as to two of the cases and overruled as to the third cause of action, and plaintiff dismisses as to it and does not amend his complaint, there is a trial, and he cannot afterward dismiss the entire action, but judgment may be rendered for defendants as to the issues raised by demurrer. Goldtree *v.* Spreckels, 135 Cal. 666, 67 Pac. 1091.

29. Douglass *v.* Montgomery, etc., R. Co., 37 Ala. 638, 79 Am. Dec. 76. And see Anderson *v.* Broward, (Fla. 1903) 34 So. 897.

30. Washburn *v.* Allen, 77 Me. 344; Derick *v.* Taylor, 171 Mass. 444, 50 N. E. 1038; Leavitt *v.* Leavitt, 135 Mass. 191; Burbank *v.* Woodward, 124 Mass. 357; Truro *v.* Atkins, 122 Mass. 418; Shaw *v.* Boland, 15 Gray (Mass.) 571; Means *v.* Welles, 12 Metc. (Mass.) 356; Locke *v.* Wood, 16 Mass. 317; Wright *v.* Bartlett, 45 N. H. 289; Probate Judge *v.* Abbot, 13 N. H. 21.

Reason for rule.— "The reason for denying in this Commonwealth the rule of the English common law was the injustice done to the defendant, who was subjected to being harassed a second time on one and the same cause of action on receiving costs, which in this Commonwealth are nominal. In that respect the burden of being subject to a second action is much greater here than in England, where costs are substantial." Carpenter, etc., Co. *v.* New York, etc., R. Co., 184 Mass. 98, 100, 68 N. E. 28.

After plaintiff has given in all his evidence and is not surprised by defendant's evidence, the court may properly refuse his application to dismiss. Johnson *v.* Bailey, 59 Fed. 670.

31. Emerson *v.* Joy, 34 Me. 347.

32. Day *v.* Mountin, 89 Minn. 297, 94 N. W. 887; Bettis *v.* Schreiber, 31 Minn. 329, 17 N. W. 863; St. Anthony Falls Water Power Co. *v.* King Wrought Iron Bridge Co., 23 Minn. 186, 23 Am. Rep. 682.

11. After Jury Impaneled or Sworn. In the absence of any statutory provision on the subject, the action may be discontinued as to some of the defendants after the jury has been impaneled,[33] or a *nolle prosequi* entered as to one of several counts in a declaration after the jury is sworn;[34] and under a statute permitting a dismissal at any time before the jury retire plaintiff may dismiss after the jury have been impaneled.[35] It has been held, however, that a dismissal as to one of several joint defendants should not be permitted after the jury is sworn, where plaintiff's purpose is to use him as a witness.[36]

12. After Removal of Cause. Where proper application is made by defendant for removal of the cause to a federal court, the former can proceed no further with the cause and a nonsuit cannot be taken therein by plaintiff.[37]

13. After Rescript Sent Down. After a rescript has been sent down affirming a judgment against several defendants, the trial court may allow plaintiff to discontinue as to one and enter final judgment against the others.[38]

14. After Reversal and Remand For New Trial. A nonsuit may be taken after reversal and remand for a new trial under a statute allowing a nonsuit at any time before trial as the cause then stands for trial *de novo*.[39]

D. Grounds of Objection — 1. Prejudice to Defendant's Rights. While a plaintiff may dismiss any claim where such dismissal will not prejudicially affect the interests of defendant,[40] he will not be permitted to dismiss, to discontinue, or to take a nonsuit, when by so doing he will obtain an advantage and defendant will be prejudiced or oppressed,[41] or deprived of any just defense.[42] Neverthe-

33. Catlin *v.* Jones, 1 Pinn. (Wis.) 130.

34. Breckenridge *v.* Lee, 3 A. K. Marsh. (Ky.) 446.

35. Gardner *v.* Black, 98 Ala. 638, 12 So. 813.

36. Gearhart *v.* Smallwood, 5 Mo. 452.

37. Beery *v.* Chicago, etc., R. Co., 64 Mo. 533.

38. Gray *v.* Cook, 135 Mass. 189, holding that the rescript does not operate as a judgment, and that the judgment must be entered by the trial court.

39. Currie *v.* Southern Pac. Co., 23 Oreg. 400, 31 Pac. 963. And see Latimer *v.* Sullivan, 37 S. C. 120, 15 S. E. 798, where plaintiff was allowed, after a case had gone into the supreme court and had been sent back for a new trial, in term-time, to discontinue without notice one of his two causes of action.

40. *Georgia.*— Fountain *v.* Mills, 111 Ga. 122, 36 S. E. 428.

Louisiana.— Broussard *v.* Duhamel, 4 La. 366.

New York.— New York *v.* Lynch, 1 N. Y. App. Div. 544, 37 N. Y. Suppl. 467; Beadleston *v.* Alley, 4 Silv. Supreme 595, 7 N. Y. Suppl. 747.

North Carolina.— Gatewood *v.* Leak, 99 N. C. 363, 6 S. E. 706.

Texas.— McKee *v.* Simpkins, 1 Tex. App. Civ. Cas. § 278.

Washington.— See Dane *v.* Daniel, 28 Wash. 155, 68 Pac. 446.

See 17 Cent. Dig. tit. "Dismissal and Nonsuit," § 32.

Application of rule.— A claimant cannot be denied the right to discontinue his suit, in which no plea of fraud or set-off has been filed, on statement of counsel for the government that dependent on future disclosures it may be necessary to protect the government to set up an alleged fraud in the matter of the claims, or a counter-claim showing an indebtedness to the government, since on motion to discontinue the rights of the parties must be determined on the record as it exists when the motion is filed. Atlantic Contracting Co. *v.* U. S., 35 Ct. Cl. 30.

41. *Kentucky.*— Sawyers *v.* Langford, 5 Bush 539.

Louisiana.— Leftwitch *v.* Leftwitch, 6 La. Ann. 346.

Missouri.—Nevada, etc., R. Co. *v.* De Lissa, 103 Mo. 125, 15 S. W. 366; Gray *v.* St. Louis, etc., R. Co., 81 Mo. 126; Browning *v.* Chrisman, 30 Mo. 353.

New Hampshire.— Wright *v.* Bartlett, 45 N. H. 289.

New Jersey.—Franklin *v.* Estell, 29 N. J. L. 264.

New York.— Kruger *v.* Persons, 52 N. Y. App. Div. 50, 64 N. Y. Suppl. 841, 7 N. Y. Cr. 425; Bowe *v.* Knickerbocker L. Ins. Co., 27 Hun 312; Parker *v.* Commercial Telegram Co., 3 N. Y. St. 174; Cunningham *v.* White, 45 How. Pr. 486; *In re* Bainbridge, 5 Alb. L. J. 104.

North Carolina.— Lane *v.* Morton, 81 N. C. 38; McKesson *v.* Mendenhall, 64 N. C. 502.

Pennsylvania.— Mechanics' Bank *v.* Fisher, 1 Rawle 341; Norman *v.* Hope, 2 Miles 142; Brooks *v.* Prentzel, 10 Wkly. Notes Cas. 319; Payne *v.* Grant, 7 Wkly. Notes Cas. 406.

South Carolina.—Adger *v.* Pringle, 11 S. C. 527.

Texas.— Schmick *v.* Noel, 64 Tex. 406; McKee *v.* Simpkins, 1 Tex. App. Civ. Cas. § 278.

United States.— Stevens *v.* Railroads, 4 Fed. 97.

See 17 Cent. Dig. tit. "Dismissal and Nonsuit," § 32.

42. Adderton *v.* Collier, 32 Mo. 507; Keithley *v.* May, 29 Mo. 220.

less the injury which would be thus occasioned to defendant must be of a character that deprives him of some substantive rights concerning his defenses not available in a second suit or that may be endangered by the dismissal,[43] and not the mere ordinary inconveniences of double litigation which in the eye of the law would be compensated by costs.[44]

2. Demand of Defendant For Affirmative Relief — a. In General. Plaintiff in an action will be precluded from dismissing his action on his own motion where an answer has been filed showing defendant to be entitled to and praying for affirmative relief.[45] The consent of the adverse party is necessary in such case.[46] A mere resistance, however, to the claim of plaintiff does not deprive him of the right to take a nonsuit.[47] And the right of plaintiff to discontinue the action is not affected by the fact that a defendant has served an answer asking affirmative relief against a co-defendant, having no relation to the cause of action set out in the complaint.[48]

b. Set-Off or Counter-Claim. There is considerable conflict of authority as to the effect of the filing of a set-off or counter-claim on plaintiff's right to dismiss, discontinue, or take a nonsuit. In a large number of jurisdictions a plaintiff cannot on his own motion and without defendant's consent, or leave of court, dismiss, discontinue, or take a nonsuit after defendant has filed a plea of set-off or counter-claim;[49] but in these jurisdictions the court may, at any time before trial,

43. Stevens *v.* Railroads, 4 Fed. 97.

44. Stevens *v.* Railroads, 4 Fed. 97.

Enforcement of stipulation precluding dismissal.— Where plaintiff moves to dismiss an action, it is the duty of the counsel for defendant, if he relies on a stipulation of plaintiff as precluding a motion to dismiss, to bring forward the stipulation, or ask for delay to produce it. He cannot remain silent and afterward attack the judgment of dismissal. Higgins *v.* Mahoney, 50 Cal. 444.

45. *California.*— Rodgers *v.* Parker, 136 Cal. 313, 68 Pac. 975; Islais, etc., Water Co. *v.* Allen, 132 Cal. 432, 64 Pac. 713; Acock *v.* Halsey, 90 Cal. 215, 27 Pac. 193; Thompson *v.* Spray, (1884) 4 Pac. 418; Robinson *v.* Placerville, etc., R. Co., 65 Cal. 263, 3 Pac. 878; Brannan *v.* Paty, 58 Cal. 330.

Georgia.— Frierson *v.* Alexander, 74 Ga. 666.

Minnesota.— Koerper *v.* St. Paul, etc., R. Co., 40 Minn. 132, 41 N. W. 656; Griffin *v.* Jorgenson, 22 Minn. 92.

Montana.— State *v.* Lindsay, 24 Mont. 352, 61 Pac. 883.

Nebraska.—Adams *v.* Osgood, 55 Nebr. 766, 76 N. W. 446.

New York.— Price *v.* Price, 21 N. Y. App. Div. 597, 47 N. Y. Suppl. 772; Geenia *v.* Keah, 66 Barb. 245; Exstein *v.* Robertson, 1 Silv. Supreme 169, 6 N. Y. Suppl. 429, 17 N. Y. Civ. Proc. 23.

North Carolina.— Tate *v.* Phillips, 77 N. C. 126.

Oregon.— Bailey *v.* Wilson, 34 Oreg. 186, 55 Pac. 973.

South Dakota.— Axiom Min. Co. *v.* Little, 6 S. D. 438, 61 N. W. 441.

Texas.— White *v.* Williams, 13 Tex. 258; Peters *v.* Chandler, (Civ. App. 1899) 51 S. W. 281; Akard *v.* Western Mortg., etc., Co., (Civ. App. 1896) 34 S. W. 139; Midkiff *v.* Stephens, 9 Tex. Civ. App. 411, 29 S. W. 54; Giraud *v.* Ellis, (Civ. App. 1894) 24 S. W. 967.

Washington.— Washington Nat. Bldg., etc., Assoc. *v.* Saunders, 24 Wash. 321, 64 Pac. 546.

United States.—McCabe *v.* Southern R. Co., 107 Fed. 213; Callahan *v.* Hicks, 90 Fed. 539.

See 17 Cent. Dig. tit. "Dismissal and Nonsuit," § 33.

Answer asking affirmative relief illustrated. — Where foreclosure proceedings are begun and defendants answer that the mortgage covers their homestead and ask to have it canceled as a cloud on their title, they ask affirmative relief, and the cause cannot be dismissed without their consent. Akard *v.* Western Mortg., etc., Co., (Tex. Civ. App. 1896) 34 S. W. 139.

Demand insufficient to preclude right to nonsuit.— The maker of a note paid it to an indorsee, but did not take it up nor take a receipt. Subsequently such indorsee sued the maker and certain indorsers to which the maker pleaded payment and demanded that the note be delivered for cancellation. It was held that notwithstanding such demand plaintiff could take judgment of nonsuit as to the maker and proceed against the indorsers. Mercantile Bank *v.* Pettigrew, 74 N. C. 326.

46. Rodgers *v.* Parker, 136 Cal. 313, 68 Pac. 975; Islais, etc., Water Co. *v.* Allen, 132 Cal. 432, 64 Pac. 713; Akard *v.* Western Mortg., etc., Co., (Tex. Civ. App. 1896) 34 S. W. 139.

47. Wilborn *v.* Elmendorf, (Tex. Civ. App. 1897) 40 S. W. 1059.

48. New York *v.* Lynch, 1 N. Y. App. Div. 544, 37 N. Y. Suppl. 467.

49. *California.*— Wood *v.* Jordan, 125 Cal. 263, 57 Pac. 998; Hinkel *v.* Donohue, 90 Cal. 389, 27 Pac. 301; Clark *v.* Hundley, 65 Cal. 96, 3 Pac. 131; Moyle *v.* Porter, 51 Cal. 639; People *v.* Pratt, 28 Cal. 166, 87 Am. Dec. 110; Hancock Ditch Co. *v.* Bradford, 13 Cal. 637.

Colorado.— Denver, etc., R. Co. *v.* Cobley,

upon plaintiff's application and upon sufficient cause shown, dismiss an action, although defendant has made a counter-claim or demanded affirmative relief in his answer.[50] In other jurisdictions the right to dismiss is in no way affected by the filing of a plea of set-off or counter-claim,[51] even though it exceeds the amount

9 Colo. 152, 10 Pac. 669; Long *v.* McGowan, 16 Colo. App. 540, 66 Pac. 1076.

Georgia.— Jackson *v.* Roane, 96 Ga. 40, 23 S. E. 118; Scruggs *v.* Gibson, 45 Ga. 509.

Illinois.— Barker *v.* Barth, 192 Ill. 460, 61 N. E. 388; East St. Louis *v.* Thomas, 102 Ill. 453; U. S. Sav. Inst. *v.* Brockschmidt, 72 Ill. 370; Bingham *v.* Spruill, 84 Ill. App. 218; Butler *v.* Randall, 25 Ill. App. 586; Western Union Tel. Co. *v.* Horack, 9 Ill. App. 309.

Maine.— Dyer *v.* Morris, 68 Me. 472.

Massachusetts.— Means *v.* Welles, 12 Metc. 356; Cummings *v.* Pruden, 11 Mass. 206.

Michigan.— Merchants' Bank *v.* Schulenberg, 54 Mich. 49, 19 N. W. 741.

Minnesota.— Griffin *v.* Jorgenson, 22 Minn. 92.

New York.— Iselin *v.* Smith, 62 Hun 221, 16 N. Y. Suppl. 683; Gwathney *v.* Cheatham, 21 Hun 576; Van Allen *v.* Schermerhorn, 14 How. Pr. 287.

North Carolina.— Rumbough *v.* Young, 119 N. C. 567, 26 S. E. 143; Union Bank *v.* Oxford, 116 N. C. 339, 21 S. E. 410; Wilkins *v.* Suttle, 114 N. C. 550, 19 S. E. 606; Pass *v.* Pass, 109 N. C. 484, 13 S. E. 908; Piedmont Mfg. Co. *v.* Buxton, 105 N. C. 74, 10 S. E. 264; Gatewood *v.* Leak, 99 N. C. 363, 6 S. E. 706; McNeill *v.* Lawton, 97 N. C. 16, 1 S. E. 493; People's Bank *v.* Stewart, 93 N. C. 402; Lee *v.* Eure, 93 N. C. 5; Purnell *v.* Vaughan, 80 N. C. 46; Francis *v.* Edwards, 77 N. C. 271; McKesson *v.* Mendenhall, 64 N. C. 502. *Compare* Sydnor Pump, etc., Co. *v.* Rocky Mount Ice Co., 125 N. C. 80, 34 S. E. 198, which seems to limit the rule to cases where the counter-claim grows out of the same cause of action stated in the complaint.

Oregon.— Ferguson *v.* Ingle, 38 Oreg. 43, 62 Pac. 760; Dove *v.* Hayden, 5 Oreg. 500.

Tennessee.— Boone *v.* Bush, 91 Tenn. 29, 17 S. W. 792; Galbraith *v.* East Tennessee, etc., R. Co., 11 Heisk. 169; Riley *v.* Carter, 3 Humphr. 230.

Texas.— Hoodless *v.* Winter, 80 Tex. 638, 16 S. W. 427; Block *v.* Weiller, 61 Tex. 692; Wetsell *v.* Hopkins, (Civ. App. 1902) 67 S. W. 1075; Williams *v.* Williams, (Civ. App. 1896) 38 S. W. 261.

Utah.— Flygare *v.* Maloney, 12 Utah 497, 23 Pac. 879.

Wisconsin.— Grifnon *v.* Black, 76 Wis. 674, 45 N. W. 122, 938; Damp *v.* Dane, 33 Wis. 430; McLeod *v.* Bertschy, 32 Wis. 205, 33 Wis. 176, 34 Wis. 244, 14 Am. Rep. 755.

See 17 Cent. Dig. tit. "Dismissal and Nonsuit." § 34.

Effect upon defendant's motion to dismiss. — If when plaintiff rests he has failed to prove his cause of action, defendant may move to dismiss notwithstanding that he may have set up a counter-claim in his answer. Slocum *v.* Minneapolis Millers Assoc., 33 Minn. 438, 23 N. W. 862.

50. Bingham *v.* Spruill, 84 Ill. App. 218; Mathews *v.* Taaffe, 44 Minn. 400, 46 N. W. 850.

In New York it is held that a discontinuance may be allowed in the discretion of the court upon payment of costs, if to do so will not jeopardize the counter-claim. Matter of Lasak, 131 N. Y. 624, 30 N. E. 112 [*affirming* 57 Hun 417, 10 N. Y. Suppl. 844]; Janssen *v.* Whitlock, 58 N. Y. App. Div. 367, 68 N. Y. Suppl. 1086; Yellow Pine Co. *v.* Lehigh Valley Creosoting Co., 52 N. Y. App. Div. 51, 52 N. Y. Suppl. 281; Walsh *v.* Walsh, 33 N. Y. App. Div. 579, 53 N. Y. Suppl. 881; Albany Brass, etc., Co. *v.* Hoffman, 30 N. Y. App. Div. 76, 51 N. Y. Suppl. 779; Iselin *v.* Smith, 62 Hun 221, 16 N. Y. Suppl. 683; Gwathney *v.* Cheatham, 21 Hun 576; Geenia *v.* Keah, 66 Barb. 245; Wilder *v.* Boynton, 63 Barb. 547; Livermore *v.* Bainbridge, 61 Barb. 358, 43 How. Pr. 272 [*affirming* 42 How. Pr. 53, and *affirmed* in 49 N. Y. 125]; Seaboard, etc., R. Co. *v.* Ward, 18 Barb. 595, 1 Abb. Pr. 46; Cockle *v.* Underwood, 3 Duer 676, 1 Abb. Pr. 1, 12 N. Y. Leg. Obs. 283; Oaksmith *v.* Southerland, 1 Hilt. 265, 4 Abb. Pr. 15; Wanamaker *v.* Megraw, 27 Misc. 591. 59 N. Y. Suppl. 81, 6 N. Y. Annot. Cas. 298; Washington Glass Co. *v.* Benjamin, 17 N. Y. Suppl. 135; Felix *v.* Vanslooten, 17 N. Y. Suppl. 844; Cohn *v.* Anathan, 4 N. Y. Suppl. 97, 16 N. Y. Civ. Proc. 178; Parker *v.* Commercial Telegram Co., 3 N. Y. St. 174; Tubbs *v.* Hall, 12 Abb. Pr. N. S. 237; Pacific Mail Steamship Co. *v.* Lueling, 7 Abb. Pr. N. S. 37; Livermore *v.* Berdell, 60 How. Pr. 308; Van Alen *v.* Schermerhorn, 14 How. Pr. 287; Rees *v.* Van Patten, 13 How. Pr. 258 [*following* Seaboard, etc., R. Co. *v.* Ward, 18 Barb. 595. and *dissenting* from Cockle *v.* Underwood, 3 Duer 676]; *In re* Bainbridge, 5 Alb. L. J. 104.

51. *Connecticut.*— Anderson *v.* Gregory, 43 Conn. 61.

Florida.— Clarke *v.* Wall, 5 Fla. 476; Buffington *v.* Quackenboss, 5 Fla. 196.

Kansas.— Amos *v.* Humboldt Loan Assoc., 21 Kan. 474.

Kentucky.— Northwestern Mut. L. Ins. Co. *v.* Barbour, 95 Ky. 7, 23 S. W. 584, 15 Ky. L. Rep. 394; McCann *v.* Boyers, 8 B. Mon. 285.

Pennsylvania.— McCreedy *v.* Fey, 7 Watts 496.

South Carolina.— Branham *v.* Brown, 1 Bailey 262; Usher *v.* Sibley, 2 Brev. 32. And see cases in the two following notes.

See 17 Cent. Dig. tit. "Dismissal and Nonsuit." § 34.

"From time immemorial such actions have been regarded as under the control of plain-

sued for.[52] But the dismissal is only operative as to plaintiff's action, and defendant is still in court upon his counter-claim or set-off,[53] and may proceed to a trial thereof just as if he had brought an independent suit thereon.[54]

c. Cross Complaint or Reconventional Demand. Where defendant files a cross complaint or pleads in reconvention, plaintiff cannot dismiss, discontinue, or take a nonsuit over the opposition of defendant, so as to defeat the claim of the latter.[55] Defendant is entitled to have the case retained for the trial of his

tiff, without reference to any pleas that may have been filed, and he has been allowed to withdraw them or suffer a nonsuit in them precisely as in other cases. 1 Swift Digest, 594; Homer *v.* Brown, 16 How. (U. S.) 354, 14 L. ed. 970." Anderson *v.* Gregory, 43 Conn. 61, 64.

52. Fowler *v.* Lawson, 15 Ark. 148; Fink *v.* Bruihl, 47 Mo. 173; Shannon *v.* Truefit, 1 Wkly. Notes Cas. (Pa.) 248.

53. *Indiana.*— Egolf *v.* Bryant, 63 Ind. 365.

Iowa.— Burlington, etc., R. Co. *v.* Sater, 1 Iowa 421.

Kansas.— Amos *v.* Humboldt Loan Assoc., 21 Kan. 474.

Missouri.— Heman *v.* McNamara, 77 Mo. App. 1.

Ohio.— Smith *v.* Minchell, 6 Ohio Dec. (Reprint) 1106, 10 Am. L. Rec. 484.

See 17 Cent. Dig. tit. "Dismissal and Nonsuit," § 34.

54. *Indiana.*— Tabor *v.* Mackkee, 58 Ind. 290.

Kentucky.— Brashears *v.* Letcher County Ct., 41 S. W. 22, 19 Ky. L. Rep. 478.

Ohio.—Quebec Bank *v.* Weyand, 30 Ohio St. 126; Smith *v.* Minchell, 6 Ohio Dec. (Reprint) 1106, 10 Am. L. Rec. 484, 6 Cinc. L. Bul. 834.

Oklahoma.— Wyman *v.* Herard, 9 Okla. 35, 59 Pac. 1009.

United States.— Meyer *v.* Gateus, 4 Fed. 35, 2 Flipp. 559.

See 17 Cent. Dig. tit. "Dismissal and Nonsuit," § 34.

55. *Arizona.*—Hawke *v.* Wentworth, (1895) 39 Pac. 809.

Arkansas.— Pickett *v.* Ferguson, 45 Ark. 177, 55 Am. Rep. 545; Allen *v.* Allen, 14 Ark. 666.

Indiana.— Watts *v.* Sweeney, 127 Ind. 116, 26 N. E. 680, 22 Am. St. Rep. 618.

Iowa.— Russell *v.* Lamb, 82 Iowa 558, 48 N. W. 939; Worrell *v.* Wade, 17 Iowa 96.

Kentucky.— Terry *v.* Swinford, 41 S. W. 553, 19 Ky. L. Rep. 712.

Louisiana.— Davis *v.* Young, 35 La. Ann. 739; Smith *v.* Amacker, 15 La. Ann. 299; Barrow *v.* Robichaux, 15 La. Ann. 70; Hale *v.* Saunders, 14 La. Ann. 643; Donnell *v.* Parrott, 10 La. Ann. 703; Donovan *v.* Owen, 10 La. Ann. 463; Robertson *v.* Travis, 5 La. Ann. 401; Ludwig *v.* Kohlman, 5 La. Ann. 298; Smalley *v.* Lawrence, 9 Rob. 210; Coxe *v.* Downs, 9 Rob. 133; Gouron's Succession, 7 Rob. 422; McDonough *v.* Copeland, 9 La. 308; McDonough *v.* Hart, 3 La. 457; Adams *v.* Lewis, 7 Mart. N. S. 400; Lanusse *v.* Pimpienella, 4 Mart. N. S. 439.

Ohio.— Brinkerhoff *v.* Smith, 57 Ohio St. 610, 49 N. E. 1025.

Tennessee.— Partee *v.* Goldberg, 101 Tenn. 664, 49 S. W. 758.

Texas.— Brown *v.* Pfouts, 53 Tex. 221; Slaughter *v.* Hailey, 21 Tex. 537; McCoy *v.* Jones, 9 Tex. 363; Bradford *v.* Hamilton, 7 Tex. 55; Egery *v.* Power, 5 Tex. 501; Thomas *v.* Hill, 3 Tex. 270; Smith *v.* Wilson, 18 Tex. Civ. App. 24, 44 S. W. 556.

See 17 Cent. Dig. tit. "Dismissal and Nonsuit," § 36.

Reason for rule.— "The principle of the rule that the plaintiff cannot discontinue after the defendant has pleaded in reconvention, is, that as to the matter pleaded in reconvention, the defendant is the actor or plaintiff. This principle equally applies to every case in which the defendant sets forth matter in his answer which, if true, entitles him to have, and upon which he seeks, judgment against the plaintiff, and of course embraces the present case. Where the answer contains matter which constitutes a cause of action against the plaintiff, its effect upon his right to dismiss his suit must be the same, whether it be called a plea in reconvention or a petition in the nature of a cross action, or by whatever other designation; for the defendant, as to the cause of action set forth in his answer, is to be regarded as plaintiff." Short *v.* Hepburn, 89 Tex. 622, 623, 35 S. W. 1056 [*quoting* Bradford *v.* Hamilton, 7 Tex. 55], opinion of Brown, A. J.

In California a judgment of dismissal may be entered by the clerk of a court, notwithstanding a cross complaint has been filed, if the cross complaint does not set up a counter-claim. James *v.* Center, 53 Cal. 31. And when a cross complaint has been stricken from an answer, leaving therein matters of defense only, plaintiff may dismiss the case at any time before the trial on the payment of costs. Thompson *v.* Spraig, 66 Cal. 350, 5 Pac. 506.

Waiver of objection.—A motion to set aside a voluntary nonsuit filed by a defendant's attorney, who had filed before nonsuit a plea in reconvention, should not prevail when no sufficient reason is shown in the motion why they were not present and did not object when the nonsuit was applied for, and where the motion fails to show that there was merit in the plea in reconvention. Brown *v.* Pfouts, 53 Tex. 221.

Cross complaint against co-defendant.— A dismissal of a petition will not operate as a dismissal of a cross complaint by a defendant against a co-defendant. Spearing *v.* Chambers, 25 Iowa 99; King *v.* Thorp, 21 Iowa 67; Worrell *v.* Wade, 17 Iowa 96. *Contra*, Holzner *v.* Holzner, 48 Ind. 151.

demand,[56] and it has been held that this is so even though the matter in reconvention be not well pleaded.[57] Where the motion to dismiss is made before the cross complaint is filed it should be granted.[58]

3. Rights of Interveners and Third Persons. In accordance with the general rule that none but parties to suits will be permitted to interfere with or control the conduct of the same a stranger will not be allowed to interfere to prevent a dismissal of the case.[59] The right of a plaintiff to discontinue or dismiss may, however, be lost when his rights have been seized on execution by an intervener.[60] Even though plaintiffs are nonsuited, interveners in an action are entitled to proceed therewith and plaintiffs will be bound by the result of the suit as privies thereto.[61] Where mortgaged premises in the hands of a subsequent grantee are subject to the whole of the mortgage debt, and part of it is due to the mortgagor because the mortgage has been partly paid by him, and in foreclosure the equities of the parties have been so adjusted, the mortgagee, complainant, is not authorized, upon receiving the amount payable to him, to consent to the discontinuance of the suit, while the sum payable to the mortgagor remains unpaid.[62]

E. Dismissal as to Part of Cause of Action. In actions at law plaintiff may withdraw, dismiss, or enter a *nolle prosequi* as to a part of his demand or cause of action, where such action does not prejudice the rights of other parties and is taken at the proper time;[63] and when certain paragraphs of his complaint are dismissed the complaint stands as though they had never constituted a part thereof.[64] In chancery it has been held, however, that a complainant cannot dis-

56. Russell *v.* Lamb, 82 Iowa 558, 48 N. W. 939; Barrow *v.* Robichaux, 15 La. Ann. 70; Short *v.* Hepburn, 89 Tex. 622, 35 S. W. 1056; Schmidt *v.* Talbert, 74 Tex. 451, 12 S. W. 284; Brown *v.* Pfouts, 53 Tex. 221; Stacy *v.* Campbell, (Tex. Civ. App. 1898) 45 S. W. 759; Burford *v.* Burford, (Tex. Civ. App. 1897) 40 S. W. 602.

57. Cunningham *v.* Wheatly, 21 Tex. 184.

58. McClellan *v.* Tootle, 3 Indian Terr. 325, 58 S. W. 555.

59. Gay *v.* Orcutt, 169 Mo. 400, 69 S. W. 295.

60. State *v.* Rost, 48 La. Ann. 455, 19 So. 256; Baum's Succession, 11 Rob. (La.) 314.

Where defendant in attachment gave a bond for release of the property, the fact that the third persons intervened claiming privileges in the property does not deprive plaintiff of the right to dismiss at any time before submission to the jury. State *v.* Rost, 48 La. Ann. 455, 19 So. 256.

Where in an attachment interveners claim the property and seek to bond it, the intervention may stand, although the motion to bond is dismissed, for the interveners may on the trial be able to establish their rights. Letchford *v.* Jacobs, 17 La. Ann. 79.

61. McKesson *v.* Mendenhall, 64 N. C. 502.

62. Ferris *v.* Crawford, 2 Den. (N. Y.) 595.

63. *Indiana.*—Truitt *v.* Truitt, 37 Ind. 514.

Iowa.— Cooper *v.* Wilson, 71 Iowa 204, 32 N. W. 261; Ballinger *v.* Davis, 29 Iowa 512; Campbell *v.* Ayres, 9 Iowa 108.

Kentucky.— Thomas *v.* Tanner, 6 T. B. Mon. 52; Hatcher *v.* Fowler, 1 Bibb 337.

Massachusetts.— Hall *v.* Briggs, 18 Pick. 503; Somes *v.* Skinner, 16 Mass. 348.

Minnesota.— Estes *v.* Farnham, 11 Minn. 423.

Mississippi.— Shannon *v.* Rester, 69 Miss. 238, 13 So. 587.

Missouri.— Holliway *v.* Holliway, 77 Mo. 392.

North Carolina.— Grant *v.* Burgwyn, 84 N. C. 560.

Pennsylvania.— Steelman *v.* Sites, 35 Pa. St. 216.

Texas.— Throckmorton *v.* Davenport, 55 Tex. 236; Industrial Lumber Co. *v.* Texas Pine Land Assoc., 31 Tex. Civ. App. 375, 72 S. W. 875.

United States.—Hughes *v.* Moore, 7 Cranch 176, 3 L. ed. 307.

Canada.— Salvas *v.* Guevremont, 4 Rev. Leg. 233.

See 17 Cent. Dig. tit. "Dismissal and Nonsuit," § 4.

After a judgment on demurrer to the whole declaration and assessment of damages plaintiff cannot enter a *nolle prosequi* as to one of the counts in the declaration and take judgment on the others, but should obtain leave of the court for that purpose before awarding the writ of inquiry, one of the counts being held bad. Backus *v.* Richardson, 5 Johns. (N. Y.) 476.

After two actions are merged by order of interpleader it is too late to discontinue one of the original actions. Kelly *v.* Collins, 4 N. Y. Suppl. 436.

Where general money counts are joined with one on a promissory note in the same declaration, plaintiff cannot have his damages assessed by the clerk without first entering a *nolle prosequi* as to the former, but defendant cannot compel plaintiff to enter a *nolle prosequi*, this being at his option. Beard *v.* Van Wickle, 3 Cow. (N. Y.) 335 [*citing* Burr *v.* Waterman, 2 Cow. (N. Y.) 36 note *f.*].

64. Reynolds *v.* Linard, 95 Ind. 48; Truitt *v.* Truitt, 37 Ind. 514.

miss his own bill as to part of the relief prayed and proceed with the residue, but must apply to amend.[65]

F. Dismissal or Discontinuance as to One or More Co-Defendants — **1. In Actions Ex Delicto.** Actions of tort being in their nature joint and several, plaintiff in such an action may at any stage of the cause enter a *nolle prosequi*, dismiss, or discontinue as to a part of the defendants without discharging the rest.[66]

2. In Actions Ex Contractu — a. In General. The general rule is well settled that in actions on joint contracts or obligations, a dismissal, discontinuance, or nonsuit as to one or more defendants served with process operates as a dismissal, discontinuance, or nonsuit as to all.[67]

A count as to which a nolle prosequi is entered is considered as stricken out of the declaration, except so far as referred to in other counts. Brown *v.* Feeter, 7 Wend. (N. Y.) 301.

Nolle prosequi as admission of truth of plea.— Where a plaintiff declares in one count upon a promissory note, and in another for money paid, and after a plea of *actio non accrevit infra*, etc., to the count upon the note, enters a *nolle prosequi* as to such count, such discontinuance is no admission of the truth of the plea; its only effect is to strike the count and the pleadings applicable to it from the record. Keeler *v.* Bartine, 12 Wend. (N. Y.) 110.

Withdrawal of evidence as to paragraph dismissed.— When a complaint is in two paragraphs plaintiff may upon the trial dismiss as to one of the paragraphs and withdraw all evidence which concerns only that paragraph, but he cannot without consent withdraw any evidence which concerns the paragraph not dismissed. Reynolds *v.* Linard, 95 Ind. 48.

The entry of a nolle prosequi upon a second count will not so operate as to strike out the breach of the contract at the close of a declaration, even if that is to be considered as attached to that count instead of applying equally to both. Moore *v.* Bradford, 3 Ala. 550.

65. Camden, etc., R. Co. *v.* Stewart, 19 N. J. Eq. 69.

66. *Alabama.*— Montgomery Gas Light Co. *v.* Montgomery, etc., R. Co., 86 Ala. 372, 5 So. 735.

Arkansas.— Criner *v.* Brewer, 13 Ark. 225.

Illinois.— Lasher *v.* Littell, 202 Ill. 551, 67 N. E. 372 [*affirming* 104 Ill. App. 211].

Kentucky.— Prince *v.* Flynn, 2 Litt. 240; Riley *v.* McGee, 1 A. K. Marsh. 432; Shields *v.* Perkins, 2 Bibb 227.

Maryland.— Gusdorff *v.* Duncan, 94 Md. 160, 50 Atl. 574.

Massachusetts.— Munroe *v.* Carlisle, 176 Mass. 199, 57 N. E. 332.

Michigan.— Thomas *v.* Hoffman, 22 Mich. 45.

Mississippi.— Hardy *v.* Thomas, 23 Miss. 544, 57 Am. Dec. 152.

New Jersey.— Allen *v.* Craig, 13 N. J. L. 294.

New York.— Dyett *v.* Hyman, 129 N. Y. 351, 29 N. E. 261, 26 Am. St. Rep. 533 [*affirming* 13 N. Y. Suppl. 895]; Popham *v.* Twenty-third St. R. Co., 48 N. Y. Super. Ct. 229; Hall *v.* Rochester, 3 Cow. 374.

Pennsylvania.— Wiest *v.* Electric Traction Co., 200 Pa. St. 148, 49 Atl. 391, 58 L. R. A. 666; Arundel *v.* Springer, 71 Pa. St. 398; Breidenthal *v.* McKenna, 14 Pa. St. 160; Weakly *v.* Royer, 3 Watts 460.

South Carolina.— Pearson *v.* Stroman, 1 Nott & M. 354.

Texas.— Lucas *v.* Johnson, (Civ. App. 1901) 64 S. W. 823.

Vermont.— Davenport *v.* Newton, 71 Vt. 11, 42 Atl. 1087.

West Virginia.— Porter *v.* Mack, 50 W. Va. 581, 40 S. E. 459; Bloss *v.* Plymale, 3 W. Va. 393, 100 Am. Dec. 752.

United States.— U. S. *v.* Linn, 1 How. 104, 11 L. ed. 64; Minor *v.* Alexandria Mechanics Bank, 1 Pet. 46, 7 L. ed. 47; Deloach *v.* Dixon, 7 Fed. Cas. No. 3,775, Hempst. 428.

See 17 Cent. Dig. tit. "Dismissal and Nonsuit," § 46.

The reason is said to be that the action is in its nature joint and several; and as plaintiff might originally have commenced his suit against one only, and proceeded to judgment and execution, so he might even after verdict against several elect to take his damages against either of them. Deloach *v.* Dixon, 7 Fed. Cas. No. 3,775, Hempst. 428.

67. *Alabama.*—Jones *v.* Engelhardt, 78 Ala. 505; Kendall *v.* Lassiter, 68 Ala. 181; Masterson *v.* Gibson, 56 Ala. 56; Fennell *v.* Masterson, 43 Ala. 268; Whitaker *v.* Van Horn, 43 Ala. 255; Duncan *v.* Hargrobe, 22 Ala. 150; Norwood *v.* Rossiter, 3 Ala. 134; Sadler *v.* Houston, 5 Stew. & P. 205; Adkins *v.* Allen, 1 Stew. 130.

Arkansas.—Pleasants *v.* State Bank, 8 Ark. 456; Ashley *v.* Hyde, 6 Ark. 92, 42 Am. Dec. 685; Sillivant *v.* Reardon, 5 Ark. 140; Ashley *v.* Hyde, 6 Ark. 92, 42 Am. Dec. 685; Hanly *v.* Real Estate Bank, 4 Ark. 598; Beebe *v.* Real Estate Bank, 4 Ark. 546; Frazier *v.* State Bank, 4 Ark. 509.

District of Columbia.— Linn *v.* Hoover, 6 Mackey 298.

Florida.— Hale *v.* Crowell, 2 Fla. 534, 50 Am. Dec. 301.

Illinois.— Tolman *v.* Spaulding, 4 Ill. 13.

Indiana.— Cox *v.* Davis, 16 Ind. 378; Britton *v.* Wheeler, 8 Blackf. 31; Klinger *v.* Brownell, 5 Blackf. 332.

Kentucky.— Hickman *v.* Anderson, 2 Dana 223; Coleman *v.* Edwards, 2 Bibb 595.

Michigan.— Fay *v.* Jenks, 78 Mich. 312, 44 N. W. 380; Munn *v.* Haynes, 46 Mich. 140, 9 N. W. 136; Anderson *v.* Robinson, 38 Mich. 407; Ballou *v.* Hill, 23 Mich. 60.

b. Where Defendant Pleads Matter in Personal Discharge. The rule just stated does not prevent the entry of a *nolle prosequi* as to a defendant who makes a defense personal to himself.[68] Plaintiff may enter a *nolle prosequi* as to a defendant who pleads infancy or coverture,[69] or matter in discharge aris-

New York.— Niles *v.* Battershall, 26 How. Pr. 93; Hall *v.* Rochester, 3 Cow. 374. And see Bauer *v.* Parker, 82 N. Y. App. Div. 289, 81 N. Y. Suppl. 995.

South Carolina.— Karck *v.* Avinger, 3 Hill 215.

Tennessee.— Holland *v.* Harris, 2 Sneed 68; State Bank *v.* Cowan, 11 Humphr. 126.

United States.— U. S. *v.* Linn, 1 How. 104, 11 L. ed. 64; Walker *v.* Windsor Nat. Bank, 56 Fed. 76, 5 C. C. A. 421.

Canada.—Canada Commercial Bank *v.* Cameron, 17 U. C. Q. B. 237.

See 17 Cent. Dig. tit. "Dismissal and Nonsuit," § 47.

Actions on promissory notes — Statutory changes.— Under the statutes of Kansas any one or more or all of the several makers of a promissory note may be sued thereon in one action, although the note may be joint, or joint and several; and if all are sued in one action, plaintiff may dismiss his action as to any one or more of the defendants, and proceed with his action as against the other defendants. Whittenhall *v.* Korber, 12 Kan. 618. In an action under the Arkansas statutes against several parties to a bill, a discontinuance as to one defendant served with process is a discontinuance as to all. Hanly *v.* Real Estate Bank, 4 Ark. 598; Beebe *v.* Real Estate Bank, 4 Ark. 526. The Mississippi statute authorizing a joint action against the makers and indorsers of negotiable paper does not enable a plaintiff to discontinue as to a maker after process served, and proceed to judgment against the indorsers. Smith *v.* Crutcher, 27 Miss. 455; Boush *v.* Smith, 2 Sm. & M. (Miss.) 512; Brunson *v.* Lea, 5 Sm. & M. (Miss.) 149; Wilkinson *v.* Tiffany, 5 How. (Miss.) 411. But he may "discontinue against any one or more of the indorsers or sureties that he may sue in any joint action before verdict, on payment of the costs that may have accrued, by joining said defendant in such suit." Wilkinson *v.* Tiffany, 5 How. (Miss.) 411; Vickery *v.* Rester, 4 How. (Miss.) 293. And see Kirk *v.* Seawell, 2 Sm. & M. (Miss.) 571. In Missouri in a suit against two or more on a joint note plaintiff may enter a *nolle prosequi* as to one without discharging the others. Brown *v.* Pearson, 8 Mo. 159. In Tennessee where an action is instituted against the maker and indorser jointly, a dismissal as to the maker dismisses the suit as to both. Holland *v.* Harris, 2 Sneed 68; State Bank *v.* Cowan, 11 Humphr. 126. And in Texas one bringing an action against the maker and indorser of a note cannot dismiss as to the former and proceed against the latter, unless the former is insolvent or resides outside the state or in an unorganized county. Rutherford *v.* Harris, 22 Tex. 166; Moore *v.* Janes, 6 Tex. 227. See also Groesbeck *v.* Campbell, 38 Tex. 36; Unger *v.* Anderson, 37 Tex. 550.

Sufficient dismissal as to one defendant.— An announcement by complainants in a suit for damages on a contract for sale of personalty that no personal judgment is sought against one of the defendants is a dismissal of the bill as to her, no other ground of relief being shown against her. Dorris *v.* King, (Tenn. Ch. App. 1899) 54 S. W. 683.

68. *Alabama.*—Jones *v.* Engelhardt, 78 Ala. 505.

Illinois.— Tolman *v.* Spaulding, 4 Ill. 13.

Indiana.— Britton *v.* Wheeler, 8 Blackf. 31.

Iowa.— Quigley *v.* Merritt, 4 Iowa 475.

Kentucky.— Shields *v.* Perkins, 2 Bibb 227.

New York.— Judson *v.* Gibbons, 5 Wend. 224.

Virginia.— Muse *v.* Farmers' Bank, 27 Gratt. 252.

West Virginia.— Carlon *v.* Ruffner, 12 W. Va. 297.

United States.— U. S. *v.* Linn, 1 How. 104, 11 L. ed. 64; Amis *v.* Smith, 16 Pet. 303, 10 L. ed. 973.

See 17 Cent. Dig. tit. "Dismissal and Nonsuit," § 47.

Effect of dismissal as to one in reference to amendments.— The dismissal as to one, of a suit brought against two defendants, upon a joint demand against both, does not alter the complaint or change the character of the action; and hence even after such dismissal it will be improper to allow plaintiff to amend his complaint by inserting a new count upon a separate demand against one of the defendants. Miller *v.* Northern Bank, 34 Miss. 412.

69. *Alabama.*— Mock *v.* Walker, 42 Ala. 668; Keebles *v.* Ford, 5 Ala. 183; Ivey *v.* Gamble, 7 Port. 545.

Indiana.— Kirby *v.* Cannon, 9 Ind. 371.

Massachusetts.— Woodward *v.* Newhall, 1 Pick. 500.

Michigan.— Munn *v.* Haynes, 46 Mich. 140, 9 N. W. 136.

New Jersey.—Dacosta *v.* Davis, 24 N. J. L. 319.

New York.— Fowler *v.* Elliget, 1 Sheld. 427; Butler *v.* Morris, 1 Bosw. 329; Waterbury Leather Mfg. Co. *v.* Krause, 9 Abb. Pr. 175 note; Wellington *v.* Classon, 18 How. Pr. 10; Cuyler *v.* Coats, 10 How. Pr. 141; Pell *v.* Pell, 20 Johns. 126; Hartness *v.* Thompson, 5 Johns. 160.

Pennsylvania.— Weist *v.* Jacoby, 62 Pa. St. 110; Beidman *v.* Vanderslice, 2 Rawle 334; Grace *v.* Kurts, 1 Phila. 105.

South Carolina.— Alexander *v.* Meroney, 30 S. C. 335, 9 S. E. 266.

Texas.— Mitchell *v.* Mitchell, 84 Tex. 303, 19 S. W. 477; Shipman *v.* Allee, 29 Tex. 17.

Vermont.— Allen *v.* Butler, 9 Vt. 122.

See 17 Cent. Dig. tit. "Dismissal and Nonsuit," § 55.

Misjoinder of feme covert is not cured by

ing subsequent to the contract,[70] such as discharge in bankruptcy,[71] or against one who pleads the statute of limitations,[72] or a release on payment of his proportion of the debt,[73] and may then proceed against the others.[74]

c. Joint and Several Contracts. Although the contrary rule prevails in some jurisdictions,[75] the weight of authority holds that in an action against several defendants on a joint and several contract plaintiff may dismiss, discontinue, or enter a *nolle prosequi* against one or more of the defendants and proceed to judgment against the others.[76]

3. Parties Made Defendants by Mistake. Although it has been held that a plaintiff cannot avoid the effect of a misjoinder of defendants by entering a *nolle prosequi* as to defendant improperly joined, but must discontinue and commence a new action,[77] yet the weight of authority is to the effect that if in the course of an action *ex contractu* it appears that any defendant is not liable, such defendant may be discharged on proper terms and the action as to the others proceed;[78] at least where plaintiff can show sufficient excuse for the mistake.[79]

4. Non-Resident Defendants. Where some of the defendants are non-residents

nolle prosequi as to her. McLean *v.* Griswold, 22 Ill. 218.

70. Ivey *v.* Gamble, 7 Port. (Ala.) 545; Farr *v.* Cate, 58 N. H. 367; Ashworth *v.* Wrigley, 1 Hall (N. Y.) 145; Hellman *v.* Licher, 9 Abb. Pr. N. S. (N. Y.) 288; Camp *v.* Gifford, 7 Hill (N. Y.) 169; Park *v.* Moore, 4 Hill (N. Y.) 592; Arden *v.* Merritt, 1 Wend. (N. Y.) 91.

Right of plaintiff to retain bankrupt defendant.— In White *v.* Francis, 5 Ohio Dec. (Reprint) 323, 4 Am. L. Rec. 501, three makers of a joint promissory note were all sued thereon by an indorsee in a state court, and all were served with summons. Two of them became bankrupt and received their certificate of discharge in bankruptcy. They moved the court under the provisions of the bankrupt law to stay further proceedings thereon. It was held that the motion should be denied, since no judgment could be rendered against the solvent defendants without the others remaining parties; the remedy being a stay of proceedings after judgment.

71. *Illinois.*— Smith *v.* Lozano, 1 Ill. App. 171.

Maine.— West *v.* Furbish, 67 Me. 17.

Michigan.— Munn *v.* Haynes, 46 Mich. 140, 9 N. W. 136.

New York.— Smith *v.* Skinner, 1 How. Pr. 122; Sandford *v.* Sinclair, 6 Hill 248.

Pennsylvania.— Com. *v.* Nesbitt, 2 Pa. St. 16.

See 17 Cent. Dig. tit. "Dismissal and Nonsuit." § 55.

72. Mock *v.* Walker, 42 Ala. 668; Munn *v.* Haynes, 46 Mich. 140, 9 N. W. 136.

73. Burke *v.* Noble, 48 Pa. St. 168.

74. Connerly *v.* Planters', etc., Ins. Co., 66 Ala. 432; Gayle *v.* Bishop, 14 Ala. 552; Hallett *v.* Allaire, Minor (Ala.) 360. And see cases cited in preceding notes.

75. Keebles *v.* Ford, 5 Ala. 183; Gayle *v.* Agee, 4 Port. (Ala.) 507; Sadler *v.* Houston, 5 Stew. & P. (Ala.) 205; Purefoy *v.* Hill, 18 Ark. 361. And see Dean *v.* Whiton, 16 Hun (N. Y.) 203, holding that where a servant of a corporation seeks to enforce the joint and several liability imposed upon its stockholders by section 18 of chapter 40 of the laws of 1848, he must sue each stock-holder separately or join them all in one action, and that after bringing an action, to which all the stock-holders are made parties defendants, he cannot thereafter discontinue as to one defendant without the consent of the others.

76. *Illinois.*— Massey *v.* Farmers' Nat. Bank, 104 Ill. 327; Smith *v.* Lozano, 1 Ill. App. 171.

Indiana.— Maiden *v.* Webster, 30 Ind. 317.

Iowa.— Young *v.* Brown, 10 Iowa 537.

Mississippi.— Montgomery *v.* Sinking Fund Com'rs, 7 How. 13; Nevitt *v.* Natchez Steam Packet Co., 5 How. 196; Lynch *v.* Sinking Fund Com'rs, 4 How. 377; Peyton *v.* Scott, 2 How. 870; Lyons *v.* Jackson, 1 How. 474.

South Carolina.— Bomar *v.* Williams, 2 Rich. 12; Fitch *v.* Heise, Cheves 185; Karck *v.* Avinger, 3 Hill 215.

Tennessee.—Garrison *v.* Hollins, 2 Lea 684; Link *v.* Allen, 1 Heisk. 318; Lowry *v.* Hardwick, 4 Humphr. 188.

Texas.— Anderson *v.* Carter, 29 Tex. Civ. App. 240, 69 S. W. 78. *Compare* Horton *v.* Wheeler, 17 Tex. 52.

Virginia.— Brown *v.* Belches, 1 Wash. 9.

United States.— Amis *v.* Smith, 16 Pet. 303, 10 L. ed. 973; Smith *v.* Clapp, 15 Pet. 125, 10 L. ed. 684; Minor *v.* Mechanics Bank, 1 Pet. 46, 7 L. ed. 47.

See 17 Cent. Dig. tit. "Dismissal and Nonsuit," § 48.

77. Page *v.* De Leuw, 58 Ill. 85.

78. *Massachusetts.*— Turner *v.* Bissell, 14 Pick. 192.

New Hampshire.— Essex Bank *v.* Rix, 10 N. H. 201.

New York.— Marks *v.* Bard, 1 Abb. Pr. 63.

Pennsylvania.— Norman *v.* Hope, 2 Miles 142.

West Virginia.— Carlon *v.* Ruffner, 12 W. Va. 297.

And *compare* Hagebush *v.* Ragland, 78 Ill. 40.

See 17 Cent. Dig. tit. "Dismissal and Nonsuit," § 50.

79. Layman *v.* New York Bank Note Co., 20 N. Y. Suppl. 431, where it was held that

of the county in which the action is brought a dismissal as to them does not divest the court of jurisdiction as to the others.[80] And where one of several joint defendants is a non-resident of the state so that he cannot be served, plaintiff may discontinue or dismiss as to him and have judgment against those who are within the jurisdiction.[81]

5. ABSCONDING DEFENDANTS. Even though defendant absconds and the object of the suit is thereby defeated, complainant cannot dismiss his bill without costs.[82]

6. ON DISCLAIMER. Where a party equally entitled with complainant to a legacy claimed by the bill is made a defendant and by his answer disclaims any claim for such legacy the bill as to him should be dismissed.[83]

7. DEFENDANTS NOT SERVED. A plaintiff may dismiss as to parties named as defendants but who have not been served with process.[84]

8. JOINT EXECUTORS, ADMINISTRATORS, AND TRUSTEES. Where there are several joint administrators residing in the state all must be joined as defendants and served with process, and a discontinuance as to one upon whom process is not

in an action commenced against a wrong defendant plaintiff's motion for leave to discontinue without costs will be denied, where he shows no sufficient excuse for the mistake, and where defendant has been put to the expense of a trial.

80. Robertson *v.* Thompson, 3 Ind. 190.

Discontinuance as to resident maker of note. — Where the payee of a joint note, the makers of which reside in different counties, sues them all in a joint action in the county where one of them lived, and by writs to the different counties brings them all before the court of the county where the suit is instituted, and the maker residing in that county pleads in the action while the others make default, the holder of the note may discontinue his suit as to that maker and may take judgment by default final against the others. Read *v.* Renaud, 6 Sm. & M. (Miss.) 79.

Under a statute providing that when some of the defendants are non-residents of the county in which the action is brought, and the action is dismissed as to the residents, the non-residents may on motion obtain dismissal, they are not entitled to a dismissal where the action is still pending, although not urged against the resident defendants. McAlister *v.* Safley, 65 Iowa 719, 23 N. W. 139. And it has further been held that this statute applies only to actions purely personal. Porter *v.* Dalhoff, 59 Iowa 459, 13 N. W. 420.

81. Rand *v.* Nutter, 56 Me. 339; Berry *v.* Hoeffner, 56 Me. 170.

Dismissal as to non-resident maker of note in an action against maker and indorser. Pool *v.* Hill, 44 Miss. 306; Duncan *v.* McNeill, 31 Miss. 704.

82. Palmer *v.* Van Doren, 2 Edw. (N. Y.) 384.

83. Hanson *v.* Worthington, 12 Md. 418.

84. *Alabama.*— Wade *v.* Robinson, 1 Stew. 423.

California.— Harney *v.* Corcoran, 60 Cal. 314.

Illinois.— Flinn *v.* Barlow, 16 Ill. 39.

Kentucky.— Caldwell *v.* Price, Hard. 69. *Contra*, Allen *v.* Andrews, 4 Bibb 454; Butler *v.* Stump, 4 Bibb 387.

Ohio.— Harbeson *v.* Gano, 1 Ohio Dec. (Reprint) 57, 1 West. L. J. 396.

Texas.— Decatur First Nat. Bank *v.* Houts, 85 Tex. 69, 19 S. W. 1080; Hopkins *v.* Keith, 27 Tex. 91; Robinson *v.* Mattison, 25 Tex. Suppl. 451; Underhill *v.* Thomas, 24 Tex. 283; Cook *v.* Phillips, 18 Tex. 31; Hawkins *v.* Tinnen, 10 Tex. 188; Ellis *v.* Park, 8 Tex. 205; Williams *v.* McNeil, 5 Tex. 381; Scalfi *v.* Graves, 31 Tex. Civ. App. 667, 74 S. W. 795; Pleasants *v.* State, 29 Tex. App. 214, 15 S. W. 43; Sanger *v.* Ker, 1 Tex. App. Civ. Cas. § 1081; Hooks *v.* Bramlette, 1 Tex. App. Civ. Cas. § 863.

See 17 Cent. Dig. tit. "Dismissal and Nonsuit," § 53.

In Alabama by statute every joint bond, covenant, bill, promissory note, or judgment of a court of record is made joint and several, and when a writ issues against two or more of such joint parties the action may be discontinued against any of the parties not served and plaintiff may proceed to judgment against the others, but the right to do so is limited to the cases enumerated in the statute. Smith *v.* Robinson, 11 Ala. 270; Gillaspie *v.* Wesson, 7 Port. (Ala.) 454, 31 Am. Dec. 715; Tindall *v.* Collins, 2 Port. (Ala.) 17; Sartain *v.* Weir, 3 Stew. & P. (Ala.) 421; Thompson *v.* Saffold, 2 Stew. (Ala.) 494; Martin *v.* Townsend, 2 Stew. (Ala.) 329. The right extends to actions against joint indorsers. Martin *v.* Townsend, 2 Stew. (Ala.) 329.

Where husband and wife are jointly sued, plaintiff cannot dismiss as to the husband, not served, and take judgment against the wife. Parker *v.* Hobgood, 16 Tex. 249.

Improper where proceedings by publication possible.— In a suit against stock-holders of an association, jointly liable, it was error to dismiss as to defendants not served with process, when if they were non-residents they could have been proceeded against by publication, under the act of congress of May 3, 1802, and brought before the court before a final decree. Mandeville *v.* Riggs, 2 Pet. (U. S.) 482, 7 L. ed. 493.

Necessity for return of process as to party not taken.— A plaintiff who has declared jointly against two defendants as being in custody, when in fact only one of the defendants was taken on the capias, cannot abate

served will be a discontinuance of the action.[85] Where, however, service is not effected on one of several administrators by reason of his non-residence, a discontinuance as to him will not operate as a discontinuance as to all.[86] Where several trustees are necessary parties defendant to a suit, a dismissal as to one is a bar to further prosecution against the others.[87]

9. Defendants Sued as Copartners. Although the dismissal of an action against a partnership as to a partner served with process amounts to a dismissal as against the firm,[88] plaintiff may at any time discontinue an action as to those partners not served with process,[89] or as to those who, although sued as partners and served with process, are not partners.[90]

10. Parties Sued in Different Capacities. Where one is sued in the same action as executor of one person and also as administrator of another, it is irregular to enter a nonsuit so far as he is sued in the one capacity and a judgment against him in his other capacity. A *nolle prosequi* is the proper course.[91] Where an action is brought against an executor individually, and as executor on a joint note executed by him and his decedent, a judgment by default against him individually is a discontinuance of the suit against the estate which he represents as executor.[92]

11. Where Principal and Sureties Are Joined. It is held that a suit against principal and surety jointly may be dismissed as to the principal and continued as to the surety, if they be joint makers and not indorsers,[93] if the dismissal will not prejudice the surety,[94] or where the principal is not served with process.[95]

his own action against the party not taken, unless authorized so to do by the return of the process against that party. Barton *v.* Petit, 7 Cranch (U. S.) 194, 3 L. ed. 313.

Presumption of discontinuance.— Plaintiff having merely mentioned a person in its petition as a defendant, without citing him and without his voluntary appearance, and not taking any judgment against him or joining him in its appeal, must be presumed to have discontinued its cause against him. Decatur First Nat. Bank *v.* Houts, 85 Tex. 69, 19 S. W. 1080.

85. Huff *v.* Davison, 44 Ala. 273; Caruthers *v.* Mardis, 3 Ala. 599; Owen *v.* Brown, 2 Ala. 126; Williams *v.* Sims, 8 Port. (Ala.) 579; Willard *v.* Wood, 1 App. Cas. (D. C.) 44. And see Masson *v.* Hill, 5 U. C. Q. B. 60.

One executor may be discharged on a plea of *plene administravit* and a verdict had against the other. Ivey *v.* Gamble, 7 Port. (Ala.) 545.

86. Shorter *v.* Urquhart, 28 Ala. 360; Moore *v.* Davidson, 18 Ala. 209; English *v.* Brown, 9 Ala. 504.

87. Zorn *v.* Lamar, 71 Ga. 80.

88. Storm *v.* Roberts, 54 Iowa 677, 7 N. W. 124; Phillips *v.* Hollister, 2 Coldw. (Tenn.) 269. But see White *v.* Leavitt, 20 Tex. 703, holding that the dismissal as to one of two partners who had been duly served does not *ipso facto* prevent plaintiff from rightfully proceeding to trial and judgment against the other, who is present in court, if the latter would object or claim the benefit from such dismissal he must do so by motion, exception, or plea.

89. *Alabama.*— Nall *v.* Adams, 7 Ala. 475; Clark *v.* Stoddard, 3 Ala. 366; Earbee *v.* Evans, 9 Port. 295; Gazzam *v.* Bebee, 8 Port. 49.

Mississippi.— Lyons *v.* Jackson, 1 How. 474.

Tennessee.— Link *v.* Allen, 1 Heisk. 318.

Texas.— Hawkins *v.* Tinnen, 10 Tex. 188.

Virginia.— Brown *v.* Belches, 1 Wash. 9.

See 17 Cent. Dig. tit. "Dismissal and Nonsuit," § 57.

90. Gazzam *v.* Bebee, 8 Port. (Ala.) 49; Wheeler *v.* Bullard, 6 Port. (Ala.) 352 (holding also that it is the duty of the court before whom a suit against the partnership is pending to discontinue the suit as to all persons ascertained not to be partners); Johnson *v.* Green, 4 Port. (Ala.) 127; Stoddart *v.* Van Dyke, 12 Cal. 437; Moore *v.* Otis, 18 Mo. 118; Carlon *v.* Ruffner, 12 W. Va. 297.

If a bill against two as partners is taken as confessed as to one and the other answers and disproves plaintiff's case it will be dismissed as to both defendants; but this doctrine has never been applied to the case of an answer by a defendant who had distinct rights, and no joint or common interest with the party who fails to answer. Phillips *v.* Hollister, 2 Coldw. (Tenn.) 269; Petty *v.* Hannum, 2 Humphr. (Tenn.) 102, 36 Am. Dec. 303.

91. Buie *v.* Buie, 24 N. C. 87.

92. Daves *v.* Mahorner, 41 Miss. 552.

93. Moore *v.* Knox, 46 Miss. 602; Pool *v.* Hill, 44 Miss. 306; Wilkinson *v.* Flowers, 37 Miss. 579, 75 Am. Dec. 78.

94. Dorriss *v.* Carter, 67 Mo. 544.

Dismissal after trial.— Where a person by indorsing a note payable to himself has made himself liable and sued the principal and other sureties for money paid on the note as indorser, the court will refuse to allow him after trial to discontinue against the principal in order to proceed against the surety alone for contribution. Chaffee *v.* Jones, 19 Pick. (Mass.) 260.

95. Hooks *v.* Bramlette, 1 Tex. App. Civ. Cas. § 863, although as to the other defendant he is surety. See also *supra*, II, F, 8.

By statute in some jurisdictions a discontinuance of the suit as to the principal bars a judgment against the surety, unless it is shown that such principal resided out of the state or in such part of the state that he cannot be reached by ordinary process of law.[96] A suit also may be dismissed as to the surety and proceeded with as to the principal, if the surety is not a necessary or proper party to the suit,[97] or if there cannot be a joint recovery against both,[98] or where the surety is not served with process.[99]

G. Procedure to Effect Dismissal, Discontinuance, or Nonsuit — 1. In General. Plaintiff may discontinue or dismiss where entitled to do so, as of course, by filing a written order or notice in the form prescribed by statute,[1] and by giving due notice to the adverse party if the statute requires notice.[2] So the action will be considered dismissed by entry of dismissal written on the back of the petition, when this is done with intent to dismiss and both parties act accordingly.[3] And accepting money in satisfaction of the cause of action amounts to discontinuance.[4] Plaintiff's quashal of his own writ for error therein will also work a discontinuance,[5] and he may show his election to take a nonsuit by absenting himself from court when his presence is required there for purposes of the impending trial.[6] Destruction of the complaint after the action has been begun does not amount to a discontinuance but leaves the action still pending.[7]

2. Time of Moving.[8] A plaintiff may take a nonsuit before a clerk in vacation,[9] and may dismiss his suit in vacation by filing a dismissal with the clerk as effectually as if dismissed in open court,[10] and where plaintiff dismisses during

96. Keesey *v.* Old, 82 Tex. 22, 17 S. W. 928. See also Pool *v.* Hill, 44 Miss. 306.

97. Cole *v.* Robertson, 6 Tex. 356, 55 Am. Dec. 784, holding that a surety on a forfeited forthcoming bond is not a necessary or proper party to the suit to revive the original judgment and a discontinuance as to him is not a discontinuance of the suit.

98. Under the Vermont laws of 1852, a surety who has brought a joint action of assumpsit for money paid both against his principal and his cosurety may permit either of the defendants to be discharged by the court and take a judgment against the other, where he cannot have a recovery against both. Powers *v.* Thayer, 30 Vt. 361.

99. Pleasants *v.* State, 29 Tex. App. 214, 15 S. W. 43. See also *supra*, II, F, 8.

1. *Illinois.*— Wright *v.* Wright, 21 Ill. App. 200.

Indiana.— Whitcomb *v.* Stringer, (App. 1902) 63 N. E. 582 [*rehearing denied* in (App. 1902) 64 N. E. 636].

Maryland.— Price *v.* Taylor, 21 Md. 356.

Minnesota.— Thornton *v.* Webb, 13 Minn. 498.

Rhode Island.—De Wolf *v.* A. & W. Sprague Mfg. Co., 12 R. I. 133.

See 17 Cent. Dig. tit. "Dismissal and Nonsuit," § 61.

Specification of grounds of motion.— Where a plaintiff may on his own motion procure a judgment of nonsuit unless a counter-claim has been pleaded as a defense plaintiff's motion therefor need not state any ground. Ferguson *v.* Ingle, 38 Oreg. 43, 62 Pac. 760.

A statutory provision that dismissal shall be made on written request to the clerk and by entry in the clerk's register is not mandatory and plaintiff may move in open court for dismissal. Richards *v.* Bradley, 129 Cal. 670, 62 Pac. 316.

2. Thornton *v.* Webb, 13 Minn. 498.

3. Ft. Dodge First Nat. Bank *v.* Haire, 36 Iowa 443.

In an action commenced against the receivers of a railroad company an amended petition alleging the discharge of the receivers and asking judgment against the company alone is equivalent to a dismissal as to the receivers. San Antonio, etc., R. Co. *v.* Mohl, (Tex. Civ. App. 1896) 37 S. W. 22.

4. Mellwraith *v.* Green, 14 Q. B. D. 766, 54 L. J. Q. B. 41, 52 L. T. Rep. N. S. 81.

5. Womsley *v.* Cummins, 1 Ark. 125.

6. Felts *v.* Delaware, etc., R. Co., 170 Pa. St. 432, 33 Atl. 97.

7. Ralli *v.* Pearsall, 69 N. Y. App. Div. 254, 74 N. Y. Suppl. 620.

8. See *supra*, II, C, where this question has been considered to some extent.

9. State Bank *v.* Gray, 12 Ark. 760; Whitcomb *v.* Stringer, (Ind. App. 1902) 63 N. E. 582.

Discontinuance at chambers.— An order for discontinuance may be made by a judge at chambers and out of the district, and if the order be recorded in the minutes after the orders of the previous term and before those of the next it will be sufficient. Gamble *v.* Jenkins, 12 Rich. (S. C.) 692.

10. *Arkansas.*— Lyons *v.* Green, 68 Ark. 205, 56 S. W. 1075.

Georgia.— Mountain *v.* Rowland, 30 Ga. 929.

Indiana.— St. John *v.* Hardwick, 17 Ind. 180.

Maryland.— Price *v.* Taylor, 21 Md. 356.

Rhode Island.— De Wolf *v.* A. & W. Sprague Mfg. Co., 12 R. I. 133.

vacation and the clerk neglects to make entry of the fact the omission may be cured at the next term of the court by a *nunc pro tunc* entry.[11]

3. Notice of Application and Discontinuance. Where the right to dismiss is absolute no notice of the motion need be given,[12] but in other cases due notice should be served on the adverse party,[13] where the latter has appeared.[14] A notice of the discontinuance of a civil action may be given in behalf of plaintiff by the officer who served the writ.[15] Notice need not be in writing except for the purpose of saving costs.[16] An error in a notice of the discontinuance of a suit "discontinuing the same with costs to the plaintiff" instead of to defendant is immaterial where the statute gives costs to defendant in all cases of discontinuance, since such error could not mislead.[17]

4. The Order — a. Form and Requisites. The order will be sufficient, it seems, if the record shows the nature of plaintiff's action,[18] and the reason why it was taken,[19] provided the order is not repugnant or contradictory.[20] Where an order of discontinuance is entered in term-time, it is presumed to have been made by the court, and the signature of the judge or commissioner thereto is not essential.[21]

b. Entry. An order of *retraxit*, dismissal, or discontinuance should be entered of record in order to be operative, except as between the parties.[22] And some statutes also require entry of judgment of dismissal in addition thereto,[23] but the omission to enter the dismissal may be supplied by a *nunc pro tunc* order at a

11. Mountain *v.* Rowland, 30 Ga. 929.

12. Pearson *v.* Chicago, 162 Ill. 383, 44 N. E. 739; Stanton *v.* Kinsey, 151 Ill. 301, 37 N. E. 871 [*affirming* 44 Ill. App. 229]; Northwestern Mut. L. Ins. Co. *v.* Barbour, 95 Ky. 7, 23 S. W. 584, 15 Ky. L. Rep. 394; Angier *v.* Hager, 45 N. Y. App. Div. 32, 60 N. Y. Suppl. 811; Dane *v.* Daniel, 28 Wash. 155, 68 Pac. 446.

13. Thornton *v.* Webb, 13 Minn. 498; Bedell *v.* Powell, 13 Barb. (N. Y.) 183.

14. Gamble *v.* Jenkins, 12 Rich. (S. C.) 692, where it was held that if defendant has not appeared he has no right to a notice of a motion for discontinuance.

15. Jewett *v.* Locke, 6 Gray (Mass.) 233.

16. Ballou *v.* Ballou, 26 Vt. 673; Hill *v.* Dunlap, 15 Vt. 645. But see Wright *v.* Doolittle, 5 Vt. 390.

A written notice by plaintiff's solicitors, "We are instructed to proceed no further with the action," is a sufficient notice of discontinuance within Ord. XXIII, r. 1. The Pommerania, 4 P. D. 195, 48 L. J. P. 55, 39 L. T. Rep. N. S. 642.

Insufficient notice.— In an action for an injunction and damages the defense denied liability, but a sum was paid into court in respect of the claim for damages. Plaintiff accepted the sum in satisfaction of his claim for damages and informed defendants in writing that he should discontinue the action, take the money out of court, and tax his costs. It was held that plaintiff's letter was not a notice of discontinuance so as to entitle defendants to their costs under Ord. XXXI, r. 1. Moon *v.* Dickinson, 63 L. T. Rep. N. S. 371, 38 Wkly. Rep. 278.

17. Slocomb *v.* Thatcher, 20 Mich. 52.

18. See Alderman *v.* Roesel, 52 S. C. 162, 29 S. E. 385; Dunham *v.* Carson, 37 S. C. 269, 15 S. E. 960; Haldeman *v.* U. S., 91 U. S. 584, 23 L. ed. 433.

19. Where the judgment entry recites that "plaintiff excepted to the ruling of the court, and takes a nonsuit" it sufficiently appears that the nonsuit was taken because of the adverse ruling of the court. Downs *v.* Minchew, 30 Ala. 86.

20. In Thompson *v.* Griffis, 19 Tex. 115, it was held that the recital in a judgment, and "now come the parties by their attorneys, and plaintiff dismisses his suit as to" one of the defendants, "and the other defendants being called came not, but made default" is repugnant and contradictory, and the judgment is erroneous, and if the service is defective it will be reversed.

21. Hackett *v.* Bonnell, 16 Wis. 471.

22. Wormer *v.* Canovan, 7 Lans. (N. Y.) 36; Swart *v.* Borst, 17 How. Pr. (N. Y.) 69. And see Wolters *v.* Rossi, 126 Cal. 644, 59 Pac. 143.

Sufficient showing of entry of retraxit by plaintiff in person.— A judgment of *retraxit*, which is as complete a bar as a judgment on verdict, can only be entered by plaintiff in person; but a recital in the judgment entry that "the parties came by attorney, and the plaintiff enters a *retraxit*" sufficiently shows that the *retraxit* was entered by plaintiff in person. Thomason *v.* Odum, 31 Ala. 108, 68 Am. Dec. 159.

23. Page *v.* Page, 77 Cal. 83, 19 Pac. 183; Page *v.* Alameda County Super. Ct., 76 Cal. 372, 18 Pac. 385. But see McLeran *v.* McNamara, 55 Cal. 508.

The date of the dismissal of an action is when the judgment of dismissal is entered, and not when the entry is made in the register of actions by the clerk that the action is dismissed by order of plaintiff. Acock *v.* Halsey, 90 Cal. 215, 27 Pac. 193.

Effect of filing direction without entry.— In Truett *v.* Onderdonk, (Cal. 1897) 50 Pac. 394, 120 Cal. 581, 53 Pac. 26, it was held that

subsequent term.[24] The clerk cannot defeat a dismissal by neglecting or refusing to enter a formal judgment of dismissal.[25]

5. Payment or Tender of Costs. Where plaintiff is liable for costs upon discontinuance, an attempt to discontinue without such payment is a nullity,[26] and defendant may treat it as such and proceed with the cause.[27]

H. Imposition of Terms — 1. In General. In cases where the right of a plaintiff to dismiss or discontinue is not absolute,[28] but is to be exercised under the control of the court, it may impose such equitable terms as circumstances may require, as a condition precedent to its exercise.[29] This discretion depends on the existence of rights which would be jeopardized by dismissal, not on the manner in which the court may become cognizant of them, and is not conditioned on some formal claim or assertion of them in the record.[30]

2. Payment of Costs. One of the most usual conditions imposed in such cases is the payment of costs,[31] and in proper cases the court may also impose in addi-

a direction by plaintiff to the clerk, although sufficient to authorize him to enter a judgment of dismissal in a pending action, did not effect a dismissal, where such judgment was never entered; and the court therefore retained jurisdiction over the cause and the parties. See also Brady *v.* Times-Mirror Co., 106 Cal. 56, 39 Pac. 209; Barnes *v.* Barnes, 95 Cal. 171, 30 Pac. 298, 16 L. R. A. 660; Rochat *v.* Gee, 91 Cal. 355, 27 Pac. 670; Acock *v.* Halsey, 90 Cal. 215, 27 Pac. 193.

In Minnesota entry of judgment is unnecessary. Blandy *v.* Ragnet, 14 Minn. 491.

24. Stoutenborough *v.* Board of Education, 104 Cal. 664, 38 Pac. 449; Marshall *v.* Livingston, 77 Ga. 21; Mountain *v.* Rowland, 30 Ga. 929; Aydelotte *v.* Brittain, 29 Kan. 98.

Time of entry on judge's calendar immaterial.— Where plaintiff dismisses as soon as the case is called for trial, the fact that the dismissal is not entered on the judge's calendar until after evidence is heard in defendant's behalf does not give the court jurisdiction to render a decree against plaintiff on an answer that does not state a counterclaim. Bardes *v.* Hutchinson, 113 Iowa 610, 85 N. W. 797.

25. Boyd *v.* Steele, 6 Ida. 629, 59 Pac. 21.

26. *Delaware.*— Wilcox *v.* Wilmington City R. Co., 1 Pennew. 245, 40 Atl. 191.

Florida.— Buffington *v.* Quackenboss, 5 Fla. 196.

New York.— Cole *v.* McGarvey, 6 N. Y. Civ. Proc. 305; Morrison *v.* Ide, 4 How. Pr. 304; James *v.* Delevan, 7 Wend. 511; Van Zandt *v.* McKenster, 1 Wend. 13.

Pennsylvania.— Keener *v.* Cross, 65 Pa. St. 303; La Touche *v.* Rowland, 12 Wkly. Notes Cas. 384.

Canada.— Molleur *v.* Dougall, 33 L. C. Jur. 105; Greenshields *v.* Leblanc, 12 L. C. Jur. 343; Ellis *v.* James, 1 Ont. Pr. 153; Bellay *v.* Guay, 4 Quebec 91; Lusignan *v.* Sauvageau, 3 Quebec Super. Ct. 448; Perrin *v.* Eaglesum, 4 U. C. Q. B. 254.

See 17 Cent. Dig. tit. "Dismissal and Nonsuit," § 68.

Tender not condition precedent to nonsuit. — In California plaintiff is not, under Pr. Act, § 148, bound to tender costs before the nonsuit. The provision as to costs is simply that by the nonsuit he becomes subject to costs. Hancock Ditch Co. *v.* Bradford, 13 Cal. 637. See also to the same effect Hopkins *v.* San Francisco Super. Ct., 136 Cal. 552, 69 Pac. 299.

Bill filed under mutual mistake was dismissed without costs, upon motion. Broughton *v.* Lashmar, 5 Myl. & C. 136, 46 Eng. Ch. 124.

27. Huntington *v.* Forkson, 7 Hill (N. Y.) 195.

28. **If the right is absolute** the court has no power to impose terms on plaintiff. Goward *v.* Dunbar, 4 Cush. (Mass.) 500.

29. *Mississippi.*— Mississippi Cent. R. Co. *v.* Beatty, 35 Miss. 668.

Nebraska.— Williams *v.* Miles, 63 Nebr. 851, 89 N. W. 455; Horton *v.* State, 63 Nebr. 34, 88 N. W. 146; Sheedy *v.* McMurtry, 44 Nebr. 499, 63 N. W. 21.

New York.—Bryon *v.* Durrie, 6 Abb. N. Cas. 135; Young *v.* Bush, 36 How. Pr. 240; Matter of Wells Ave. Sewer, 12 N. Y. St. 567; Winans *v.* Winans, 6 N. Y. St. 813.

Texas.— Cordova *v.* Priestly, 4 Tex. 250.

Wisconsin.— Spaulding *v.* Milwaukee, etc., R. Co., 12 Wis. 607.

See 17 Cent. Dig. tit. "Dismissal and Nonsuit," § 70.

Stipulation not to sue again.— Where plaintiff in a libel suit asks to be allowed to discontinue, the trial court cannot require him to stipulate not to sue again as the terms on which the request will be granted. Kilmer *v.* Evening Herald Co., 70 N. Y. App. Div. 291, 75 N. Y. Suppl. 243.

Perpetuation of testimony.— Where a defendant has expended time and effort in gathering together testimony, he has thereby acquired a substantial right to the use of such testimony, and may properly insist that as a condition to the dismissal of the suit by complainant he shall be required to consent to an arrangement by which the testimony taken may be perpetuated and used in any future suit between the parties or their privies involving the same subject-matter. American Steel, etc., Co. *v.* Mayer, etc., Co., 123 Fed. 204.

30. Horton *v.* State, 63 Nebr. 34, 88 N. W. 146.

31. *Illinois.*— Schofield *v.* Settley, 31 Ill. 575.

tion to costs the payment of an extra allowance.[32] Nevertheless even in cases where it is within the discretion of the court to require payment of costs, it may permit a discontinuance without payment of costs, if the allowance thereof would be inequitable,[33] and although costs are imposed costs improvidently made will not be allowed.[34]

3. Election to Proceed With Suit. Where a plaintiff has the right to discontinue at his pleasure by paying defendant's costs, an order of discontinuance is conclusive on plaintiff and does not fail by reason of his non-payment of costs,[35] but where the right to discontinue is not absolute, a plaintiff who has applied for and obtained an order for leave to discontinue upon terms may refuse to accept the terms of the order and continue the action.[36] So an agreement by a plaintiff with defendant to discharge a suit, made without consideration, may be revoked

Mississippi.— Mississippi Cent. R. Co. *v.* Beatty, 35 Miss. 668.

Montana.— State *v.* Lindsay, (1900) 61 Pac. 883.

Nebraska.— Sheedy *v.* McMurtry, 44 Nebr. 499, 63 N. W. 21.

New York.— National Exhibition Co. *v.* Crane, 167 N. Y. 505, 60 N. E. 768 [*affirming* 54 N. Y. App. Div. 175, 66 N. Y. Suppl. 361]; Jaffray *v.* Goldstone, 62 Hun 52, 16 N. Y. Suppl. 430; Petty *v.* Metropolitan St. R. Co., 33 Misc. 738, 68 N. Y. Suppl. 730 [*dismissed* in 34 Misc. 517, 69 N. Y. Suppl. 1049]; Filer *v.* Korn, 3 Misc. 624, 23 N. Y. Suppl. 115; Corbett *v.* Claflin, 17 Abb. Pr. 418; Young *v.* Bush, 36 How. Pr. 240; Huntington *v.* Forkson, 7 Hill 195; Harden *v.* Hardick, 2 Hill 384; Van Zandt *v.* McKenster, 1 Wend. 13; Saxton *v.* Stowell, 11 Paige 526.

Oregon.— Mitchell, etc., Co. *v.* Downing, 23 Oreg. 448, 32 Pac. 394.

Vermont.— Woods *v.* Darling, 71 Vt. 348, 45 Atl. 750.

Washington.— Dane *v.* Daniel, 28 Wash. 155, 68 Pac. 446.

England.— Pearson *v.* Belsher, 3 Bro. Ch. 87, 29 Eng. Reprint 423; Benge *v.* Swaine, 15 C. B. 784, 2 C. L. R. 1382, 23 L. J. C. P. 182, 80 E. C. L. 784; Curtis *v.* Platt, 16 C. B. N. S. 465, 10 Jur. N. S. 823, 33 L. J. C. P. 255, 10 L. T. Rep. N. S. 383, 111 E. C. L. 465; Harrison *v.* Leutner, 16 Ch. D. 559, 50 L. J. Ch. 264, 44 L. T. Rep. N. S. 331, 29 Wkly. Rep. 393; Bolton *v.* Bolton, 3 Ch. D. 276, 35 L. T. Rep. N. S. 358, 24 Wkly. Rep. 663; Previte *v.* Adelaide F. & M. Ins. Co., 2 Aspin. 577, 32 L. T. Rep. N. S. 768; The St. Olaf, 2 P. D. 113, 46 L. J. P. 74, 36 L. T. Rep. N. S. 30; Boensgen *v.* Chanter, 6 Scott 300; Lambton *v.* Parkinson, 35 Wkly. Rep. 545.

See 17 Cent. Dig. tit. "Dismissal and Nonsuit," § 72; and 11 Cyc. 65 *et seq.*

An agreement in writing, or the consent of defendant in open court, is necessary before a complainant can have his bill dismissed without costs. Fisher *v.* Quick, 9 N. J. Eq. 312.

After issue joined.— Plaintiff will not be permitted by the trial judge to discontinue his action, after issue joined, except upon payment of costs. Mason *v.* Winsmith, 17 S. C. 585.

Costs of former action.— It was not an abuse of discretion to deny a motion to dismiss a second action unless the costs of a former one, which plaintiff voluntarily dismissed, were paid, where the motion showed that the former action was dismissed because the court announced that the evidence was insufficient, although it offered to allow further evidence to be introduced. Eigenman *v.* Eastin, 17 Ind. App. 580, 45 N. E. 795. *Compare* Kitts *v.* Willson, 89 Ind. 95.

Charges of officers of court.— Under Hill Code Oreg. § 246, a court may in its discretion grant a nonsuit without requiring payment of the costs, but the rule is that the proper charges of the officers of the court must be paid as a condition precedent to voluntary dismissal; and if such charges are not paid it is the duty of the court to render judgment against plaintiff for their amount. Mitchell, etc., Co. *v.* Downing, 23 Oreg. 448, 32 Pac. 394.

32. Kilmer *v.* Evening Herald Co., 70 N. Y. App. Div. 291, 75 N. Y. Suppl. 243; Stallman *v.* Kimberly, 58 Hun (N. Y.) 603, 11 N. Y. Suppl. 518; Knapp *v.* Hammersley, 13 N. Y. Civ. Proc. 258; Robins *v.* Gould, 1 Abb. N. Cas. (N. Y.) 133; Bright *v.* Milwaukee, etc., R. Co., 1 Abb. N. Cas. (N. Y.) 14; Tubbs *v.* Hall, 12 Abb. Pr. N. S. (N. Y.) 237; New York, etc., R. Co. *v.* Thorne, 1 How. Pr. N. S. (N. Y.) 190; Windham *v.* Bainton, 21 Q. B. D. 199, 57 L. J. Q. B. 519, 36 Wkly. Rep. 832.

33. Johnston *v.* Garside, 70 Hun (N. Y.) 599, 24 N. Y. Suppl. 243. As for example where defendant has obtained a bankrupt's discharge after the commencement of the action (Hart *v.* Storey, 1 Johns. (N. Y.) 143), or had fraudulently concealed the fact of his infancy from plaintiff (Van Buren *v.* Fort, 4 Wend. (N. Y.) 209), or where in an action for a penalty the law imposing the penalty was repealed after the action was brought (Cole *v.* Rose, 65 How. Pr. (N. Y.) 520), or where one named as defendant by mistake and not served with process has intruded himself into a litigation, the result of which could in no manner affect his interest. Waterbury Leather Mfg. Co. *v.* Krause, 9 Abb. Pr. (N. Y.) 175 note.

34. Hequembourg *v.* Bookstaver, 54 Hun (N. Y.) 88, 7 N. Y. Suppl. 217.

35. Folsom *v.* Van Wagner, 14 Abb. Pr. N. S. (N. Y.) 44.

36. New York Hospital Soc. *v.* Coe, 15 Hun (N. Y.) 440.

by plaintiff before the entry of an order of discontinuance and he may proceed with the suit.[37] On the making of an order discontinuing an action on the payment of costs, defendant may elect to regard the discontinuance as the determination of the action, and enter judgment for costs after their adjustment.[38]

I. Operation and Effect — 1. In General. When a suit has been discontinued or dismissed as to one or more of several defendants the latter thereupon cease to be parties to the record and are not concluded by any judgment rendered in the cause;[39] and it has been held that rendition of judgment against a defendant as to whom suit has been discontinued and who has not appeared makes the judgment bad as to all defendants.[40] Nevertheless appearance of a defendant on whom no notice was served and as to whom a discontinuance was entered, cures the discontinuance and judgment may then be rendered against all the defendants.[41] Improper discontinuance as to one defendant will not avail another who waives the objection by afterward appearing and defending the suit.[42] A defendant against whom the action was dismissed cannot move to transfer the cause.[43] Where one of several plaintiffs dismisses as to his co-plaintiffs who acquiesce therein the latter are out of the cause for all purposes and cannot in future recover upon the cause of action on which they originally sued without bringing a new suit and serving process upon defendants.[44] After the entry of a discontinuance against one defendant plaintiff may immediately sue out new process against defendant so discontinued against.[45]

2. As Discharge of Cause of Action. A voluntary discontinuance, dismissal, or nonsuit by a party plaintiff does not of itself satisfy and discharge the debt or cause of action,[46] except where the basis of the dismissal is an agreement between the parties respecting the matters in controversy.[47] It settles no right of property between plaintiff and defendant, nor is it an admission of any right whatever in defendant.[48]

3. On Collateral Proceedings. Where a plaintiff in trover while the case is

37. Morrell *v.* Cole, Clarke (N. Y.) 221.

38. Sutphen *v.* Lash, 10 Hun (N. Y.) 120. But see Buffington *v.* Quackenboss, 5 Fla. 196, holding that if the costs are not paid or if the order allowing discontinuance has been conditioned on the payment of costs the only remedy of defendant is by motion in the court below to set aside the discontinuance on the refusal of plaintiff to comply with the terms of the order or the rule of court.

39. Berber *v.* Kerzinger, 23 Ill. 346; Watts *v.* Overstreet, 78 Tex. 571, 14 S. W. 704; Hathaway *v.* Fullerton, 11 Wis. 287.

40. Inglish *v.* Watkins, 4 Ark. 199.

41. Walker *v.* Chapman, 22 Ala. 116. See also Inglish *v.* Watkins, 4 Ark. 199.

42. Walker *v.* Cuthbert, 10 Ala. 213.

43. Reed *v.* Calderwood, 22 Cal. 463.

44. Sowell *v.* Jones, (Tex. Sup. 1887) 4 S. W. 620.

45. Smith *v.* Blakeney, 8 Port. (Ala.) 128.

Notwithstanding agreement for valuable consideration.— In Drake *v.* Rogers, 32 Me. 524, it was held that although a suit has been discontinued as to a co-defendant on an agreement for a valuable consideration he may be cited anew and proceeded against and another defendant cannot object to such a proceeding.

46. *Illinois.*— Holmes *v.* Chicago, etc., R. Co., 94 Ill. 439.

Iowa.— Dalhoff *v.* Coffman, 37 Iowa 283.

Maine.— Drake *v.* Rogers, 32 Me. 524.

Pennsylvania.— Berger *v.* Long, 1 Walk. 143.

United States.— Bingham *v.* Wilkins, 3 Fed. Cas. No. 1,416, Crabbe 50.

Canada.— Waddle *v.* McGinty, 15 Grant Ch. (U. C.) 261; Scholfield *v.* Dickenson, 10 Grant Ch. (U. C.) 226; Salvas *v.* Guevremont, 4 Rev. Lég. 233.

See 17 Cent. Dig. tit. "Dismissal and Nonsuit," § 76.

Rule 28 of the Alabama chancery practice, whereby the voluntary dismissal of a bill by complainant is made the equivalent of a final adjudication of the merits, is limited to the dismissal of cases which have been set down for hearing or trial, and a mere dismissal of a bill, whether or not compulsory, before it is pleaded to or set for trial or hearing, cannot be *res judicata* of the merits of the bill. Burgess *v.* American Mortg. Co., 119 Ala. 669, 24 So. 727.

Matter disposed of until reinstated on notice.— A dismissal by the court of a petition for reorganization of a bank under Gen. Laws (1897), c. 89, without prejudice, disposes of the matter until it is reinstated upon notice to parties interested therein; and a subsequent judgment rendered on such petition is without merit unless based upon the express consent of the parties interested. Abel *v.* Allemannia Bank, 79 Minn. 419, 82 N. W. 680.

47. Wohlford *v.* Compton, 79 Va. 333. See also Hoover *v.* Mitchell, 25 Gratt. (Va.) 387.

48. Van Vliet *v.* Olin, 1 Nev. 495.

still pending files a bill in equity touching the same subject-matter and prays that his trover action may be made part and parcel of the bill and for an account and settlement, the subsequent dismissal of the bill on plaintiff's motion does not dismiss the action in trover.[49] Where a defendant is in custody on mesne process and plaintiff is nonsuited the sheriff may discharge defendant.[50]

4. Right to Defend Against Counter-Claim. A dismissal does not prevent plaintiff from making any legal defense to a counter-claim filed in the action.[51] Defendant in such case occupies the same position as though he were prosecuting an independent action,[52] and plaintiff should be permitted to plead and prove any fact tending to show that he is not liable on defendant's demand.[53]

5. Upon Jurisdiction. Although not ordinarily a final determination of the rights of the parties as they may be presented in some other action, yet a dismissal of an action is a final decision of that action as against all claims made by it,[54] and ousts the court of jurisdiction of the persons dismissed which cannot be resumed until the order of dismissal is vacated,[55] and no further proceedings can be had or judgment rendered by the court.[56] After a dismissal there remains no cause pending in which a third person may be permitted to intervene.[57]

6. As Waiver of Objections to Court's Rulings. A plaintiff by voluntarily dismissing his suit waives any errors the court may have committed.[58]

7. Collateral Attack. The validity of an entry of discontinuance cannot be inquired into in a collateral proceeding.[59]

8. Effect of Two Nonsuits. In Alabama by statute it is provided that two nonsuits shall be equivalent to a verdict against the party suffering the same.[60] But a dismissal and a nonsuit are not equivalent to two nonsuits under this

49. Taylor *v.* Pittman, 37 Ga. 566.

50. Baker *v.* Deliesseline, 4 McCord (S. C.) 372, the object of his confinement, being merely that his body might answer plaintiff's suit, ended with such suit.

51. Hoyt *v.* McLagan, 87 Iowa 746, 55 N. W. 18; Crist *v.* Francis, 50 Iowa 257; Sale *v.* Bugher, 24 Kan. 432; Winters *v.* Means, 33 Nebr. 635, 50 N. W. 955.

52. Sale *v.* Bugher, 24 Kan. 432.

53. Winters *v.* Means, 33 Nebr. 635, 50 N. W. 955.

54. Leese *v.* Sherwood, 21 Cal. 151; Dowling *v.* Polack, 18 Cal. 625.

55. *California.*— Seré *v.* McGovern, 65 Cal. 244, 3 Pac. 859. Ryan *v.* Tomlinson, 31 Cal. 11.

Georgia.— Van Pelt *v.* Hurt, 92 Ga. 656, 18 S. E. 1016.

Iowa.— Tufts *v.* Bauserman, 46 Iowa 241.

Kansas.— New Hampshire Banking Co. *v.* Ball, 59 Kan. 55, 51 Pac. 899.

Maine.— Hutchings *v.* Buck, 32 Me. 277.

Massachusetts.— Marsh *v.* Hammond, 11 Allen 483; Earle *v.* Hall, 22 Pick. 102.

Michigan.— Johnson *v.* Shepard, 35 Mich. 115.

See 17 Cent. Dig. tit. "Dismissal and Nonsuit," § 80.

Before entry of a judgment of dismissal jurisdiction of the court is not taken away. Barnes *v.* Barnes, 95 Cal. 171, 30 Pac. 298, 16 L. R. A. 660.

56. *Indiana.*— Miller *v.* Mans, 28 Ind. 194; Breese *v.* Allen, 12 Ind. 426.

Iowa.— Brooks *v.* Cutler, 18 Iowa 433.

Kentucky.— Foster *v.* Atkison, 1 Litt. 214.

Mississippi.— Lewenthall *v.* Mississippi Mills, 55 Miss. 101.

Texas.— Kelly *v.* Kelly, 23 Tex. 437.

See 17 Cent. Dig. tit. "Dismissal and Nonsuit," § 80.

Entry of second judgment of dismissal.— After a judgment of dismissal of an action, the court has not jurisdiction, without a motion to vacate or modify the same, to enter a second judgment of dismissal, imposing conditions on the right to commence a new action. Connor *v.* Knott, 10 S. D. 384, 73 N. W. 264.

Jurisdiction to dispose of funds where receiver appointed.— Where plaintiff dismisses a case in which a receiver has been appointed for the assets of defendant the holder of a lien or other creditor of defendant, before the receiver has been ordered to surrender the assets in his hands, makes a claim thereto, the judge may, notwithstanding the dismissal of the original suit, retain jurisdiction over the fund, under a proper petition of the creditor for such distribution as may be legal and equitable, but it is not good practice to order a reinstatement of the original case. Fountain *v.* Mills, 111 Ga. 122, 36 S. E. 428.

57. Harris *v.* Cronk, 17 Nebr. 475, 23 N. W. 341.

58. He cannot assign for error any such errors or the judgment of the court dismissing the cause. No appeal lies in favor of a party taking a voluntary nonsuit. Newman *v.* Dick, 23 Ill. 338; Rankin *v.* Curtenius, 12 Ill. 334; Lombard *v.* Cheever, 8 Ill. 469; People *v.* Browne, 8 Ill. 87; Whiting *v.* Walker, 2 B. Mon. (Ky.) 262.

59. County *v.* Geisinger, 1 Lehigh Val. L. Rep. (Pa.) 113.

60. Russell *v.* Rolfe, 50 Ala. 56; Blackburn *v.* Minter, 22 Ala. 613; King *v.* McLoskey, 4 Ala. 91; Kennedy *v.* Geddes, 8 Port. (Ala.)

statute.[61] Nor does the statute apply to nonsuits set aside before the end of the term.[62]

J. Setting Aside and Reinstating Cause — 1. Power to Set Aside and Reinstate. The court has no power to strike out a voluntary nonsuit, against plaintiff's consent,[63] or to reinstate an action dismissed by agreement of all the parties, without notice to and consent of all parties interested.[64] So motions to set aside a nonsuit or to reinstate an action after dismissal are addressed to the discretion of the court,[65] and the decision thereon cannot be assigned for error.[66] A nonsuit cannot be set aside by agreement at the bar without the knowledge and agency of the court.[67]

2. Time. After a nonsuit or dismissal it is the usual rule that the same should be set aside and the case reinstated, if at all, at the same term at which it was granted.[68] The right, if any exist, may be lost by laches and lapse of time.[69] The general rule is that there can be no reinstatement at a subsequent term.[70]

263, 33 Am. Dec. 289; Bullock *v.* Perry, 2 Stew. & P. (Ala.) 319.

61. Bullock *v.* Perry, 2 Stew. & P. (Ala.) 319.

62. Kennedy *v.* Geddes, 8 Port. (Ala.) 263, 33 Am. Dec. 289.

63. Jackson *v.* Merritt, 21 D. C. 276; Collins *v.* Nichols, 2 Mart. (La.) 127.

Waiver of error in reinstatement.— Although under a statute declaring that a plaintiff may discontinue any suit wherein defendant has not answered, it is error to reinstate on defendant's motion an action which has been so discontinued. The error of a reinstatement in such a case is waived where plaintiff afterward files an amended petition. Werner *v.* Kasten, (Tex. Civ. App. 1894) 26 S. W. 322.

64. Howe *v.* Anderson, (Ky. 1890) 14 S. W. 216.

65. *Illinois.*— Rankin *v.* Curtenius, 12 Ill. 334.

Iowa.— Rhutasel *v.* Rule, 97 Iowa 20, 65 N. W. 1013.

Maryland.—Andrews *v.* Central Nat. Bank, 77 Md. 21, 25 Atl. 915.

New York.— Ramsay *v.* Erie R. Co., 9 Abb. Pr. N. S. 242. But see Forbes *v.* Luyster, 2 Hall 403, holding that if one insist, on account of the ruling of the judge, on being nonsuited after giving all his evidence, he will not be allowed to make a case on which to found a motion for setting aside the nonsuit.

Pennsylvania.— King *v.* Clendamel, 2 Miles 168; Lacroix *v.* Macquart, 1 Miles 156; Brockway *v.* Ætna L. Ins. Co., 4 Kulp 207; County *v.* Geisinger, 1 Lehigh Val. L. Rep. 118.

But *compare* Simpson *v.* Brock, 114 Ga. 294, 40 S. E. 266, holding that when a plaintiff by his counsel voluntarily dismisses his petition, whether for a good or a bad reason, the court has no authority over objection by defendant to reinstate the action.

See 17 Cent. Dig. tit. "Dismissal and Nonsuit," § 86.

66. Rankin *v.* Curtenius, 12 Ill. 334. And see Kirby *v.* Bruns, 45 Mo. 234, 100 Am. Dec. 376; Gentry County *v.* Black, 32 Mo. 542.

67. McPherson *v.* Hynds, 1 Overt. (Tenn.) 197.

68. *Alabama.*— Griffin *v.* Osbourne, 20 Ala. 594.

California.— Whipley *v.* Dewey, 17 Cal. 314.

Iowa.— Taylor *v.* Lusk, 9 Iowa 444.

Kentucky.— Parker *v.* Anderson, 5 T. B. Mon. 445; Coleman *v.* Harrison Cir. Ct., Hard. 171.

Mississippi.— Hunt *v.* Griffin, 49 Miss. 742.

Tennessee.— Rogers *v.* Yates, 4 Heisk. 257.

United States.— Nicholls *v.* Hazel, 18 Fed. Cas. No. 10,230, 2 Cranch C. C. 95; Riggs *v.* Chester, 20 Fed. Cas. No. 11,823, 2 Cranch C. C. 637.

See 17 Cent. Dig. tit. "Dismissal and Nonsuit," § 87.

69. Where a judgment of nonsuit is entered, with a proviso that for good cause it may be set aside, the party, to set it aside, must show good cause in a reasonable time, and not defer it for several terms of the court. Chambers *v.* Astor, 1 Mo. 327.

Discontinued after lapse of two years.— When a cause is withdrawn from the docket, and leave given at the same time to reinstate it, but the cause is not reinstated, and no steps are taken in regard to it until after the lapse of two years, the cause is discontinued, and cannot then be reinstated. Griffin *v.* Osbourne, 20 Ala. 594.

Application eighteen years after entry of discontinuance is too late. Indiana *v.* Worman, 15 Abb. Pr. (N. Y.) 264.

Compliance with statute as to new trials.— Upon the calling of a case for trial, plaintiff moved for a continuance which was refused, whereupon he took a voluntary nonsuit with leave to move to set aside the same upon affidavits. Two days after he gave notice of his intention so to move as soon as the affidavits could be prepared, but the term expired twenty-six days later without any further steps having been taken. It was held that plaintiff's right of motion in legal effect amounted only to permission to move for a new trial, and that by his failure to comply with the provisions of the statute concerning new trials the court lost jurisdiction. Whipley *v.* Dewey, 17 Cal. 314.

70. Parker *v.* Anderson, 5 T. B. Mon. (Ky.) 445; Hunt *v.* Griffin, 49 Miss. 742; Rogers *v.* Yates, 4 Heisk. (Tenn.) 257; Nicholls *v.*

3. GROUNDS. A nonsuit or dismissal may properly be set aside and a reinstatement allowed where the necessity for plaintiff's act was superinduced by the error of the court,[71] or by a clerical error for which plaintiff was not responsible;[72] or was caused by fraud[73] or undue influence of the adverse party,[74] by surprise at the rejection of his evidence,[75] by withdrawal of an important witness immediately before trial,[76] by the necessary absence of plaintiff's attorney at the time of suffering nonsuit,[77] by an agreement not kept by defendant,[78] or by mistake of fact,[79] even though the mistake was not mutual,[80] or in ignorance of his obligations to other parties interested, whose rights are prejudiced.[81] So it is ground to set aside that the action was dismissed by plaintiff's attorney without his consent;[82] that the action was dismissed by a trustee without the knowledge or consent of the person beneficially interested or his solicitor;[83] that the action was dismissed because of the absence of plaintiff and his attorney, where because of sickness plaintiff was unable to attend or to notify his attorney;[84] or that the agreement pursuant to which dismissal was made was entered into by plaintiff's attorney improvidently or without due consideration.[85] So the court may always set aside a voluntary nonsuit or discontinuance made without formal leave of

Hazel, 18 Fed. Cas. No. 10,230, 2 Cranch C. C. 95; Riggs *v.* Chester, 20 Fed. Cas. No. 11,823, 2 Cranch C. C. 637.

In at least one state, however, it is expressly provided by statute that reinstatement may be within three terms after the order of dismissal is made, but if not moved for within that time it is too late. Glascock *v.* Brandon, 35 W. Va. 84, 12 S. E. 1102.

71. Warner *v.* Graves, 25 Ga. 369; Peck *v.* Moody, 33 Tex. 84; Austin *v.* Townes, 10 Tex. 24; Wright *v.* Morning Herald Co., 14 Nova Scotia 398, 2 Can. L. T. 106; Domville *v.* Davies, 13 Nova Scotia 159; Windsor Mar. Ins. Co. *v.* Ladd, 2 Nova Scotia Dec. 493. And see Green *v.* Hare, 3 Nova Scotia Dec. 33.

Necessity that fact appear in judgment entry.— Where a party is compelled by the judgment of the court to submit to a nonsuit, to enable him to revive the judgment it is not necessary that it appear in the judgment entry that the nonsuit was taken because of the judgment, on a matter of law arising in the cause, since it is sufficient if the matter appears in the bill of exceptions. Shields *v.* Byrd, 15 Ala. 818.

72. Peck *v.* McKellar, 33 Tex. 234.

73. Abbott *v.* Abbott, 18 Nebr. 503, 26 N. W. 361 (reliance on fraudulent promises of defendant); Smith *v.* Green, 14 Hun (N. Y.) 529; Doss *v.* Tyack, 64 How. (U. S.) 297, 14 L. ed. 428.

74. Smith *v.* Snowden, 96 Ky. 32, 27 S. W. 855, 16 Ky. L. Rep. 353.

75. Easterling *v.* Blythe, 7 Tex. 210, 56 Am. Dec. 45; Huston *v.* Berry, 3 Tex. 235. And see Lyons *v.* Texas, etc., R. Co., (Tex. Civ. App. 1896) 36 S. W. 1007. A motion to set aside a voluntary nonsuit because of error in refusing to permit plaintiff to offer evidence in support of his petition was sufficient to authorize the court to review its ruling in rejecting evidence on account of the insufficiency of the petition. Way *v.* Miller, 80 Mo. App. 382.

76. Sheppard *v.* Salter, 1 N. C. 31.

77. Williams *v.* King, 1 Overt. (Tenn.) 185.

78. Cotton *v.* Lyter, 81 Tex. 10, 16 S. W. 553.

79. A cause will be reinstated where the dismissal was under supposition of the court and parties that a final decision might be had on a submission to arbitration. Johnson *v.* Cheney, 17 Tex. 336.

A misapprehension as to the legal effect of an instruction is ground to set aside a nonsuit. Walker *v.* Boaz, 2 Rob. (Va.) 485.

Mistake due to negligence.— An action voluntarily discontinued should not be reinstated merely on the ground that plaintiff's attorney was ignorant either of the law or of a fact which he ought to have known and might readily have known before the discontinuance. Juneau County *v.* Hooker, 67 Wis. 322, 30 N. W. 357.

80. Palace Hardware Co. *v.* Smith, 134 Cal. 381, 66 Pac. 474.

81. Sheehan *v.* Osborne, (Cal. 1902) 69 Pac. 842.

82. Steinkamp *v.* Gaebel, 1 Nebr. Unoff. 480, 95 N. W. 684.

83. Edwards *v.* Perryman, 18 Ga. 374.

Collusion of parties.— It has also been held that where the reorganization committee of an insolvent corporation which has brought a suit to enforce a contract of the corporation takes a nonsuit, through collusion with defendant, the court may in its discretion at the instance of an intervening stock-holder set aside the nonsuit on this ground. Bangs *v.* Sullivan, (Tex. Civ. App. 1903) 73 S. W. 74.

84. Walker *v.* Stewart, 19 Nova Scotia 182, 7 Can. L. T. 247.

85. Benwood Iron-Works Co. *v.* Tappan, 56 Miss. 659. But where a discontinuance is entered by an attorney pursuant, although sometimes subsequent, to an agreement settling the case, the court ought not to disturb it without the most convincing proof of a revocation of the attorney's power, or some evidence at least impeaching the fairness or

court where the same will give plaintiff an advantage or tend to oppress a defendant.[86] A motion to take off a nonsuit for the purpose of qualifying a witness who at the trial was incompetent is not based upon sufficient grounds and may properly be refused.[87] Nor will a cause be reinstated where it was dismissed on account of plaintiff's inexcusable negligence.[88]

4. Application and Notice. Ordinarily application to set aside an order of nonsuit or dismissal and to reinstate the cause is by motion[89] or petition,[90] supported by affidavit.[91] In some jurisdictions, however, it would seem that a rule to show cause is proper.[92] In whatever manner the application be made it should be upon due notice to the opposite party.[93]

5. Proceedings on Application. Where an order of a party dismissing his suit is presented by the opposite party, and is objected to as having been fraudulently obtained, or on other sufficient ground, the court may properly direct an issue to be made and tried with or without a party.[94] The court may in a proper case make the allowance of an application to set aside a nonsuit or discontinuance conditional upon the payment of costs.[95] And so too, it has been held, a court

validity of the settlement. Matthias *v.* Zearfoss, 3 Kulp (Pa.) 228.

86. Lacroix *v.* Macquart, 1 Miles (Pa.) 156; Murphy *v.* Murphy, 8 Phila. (Pa.) 357. And see Martinis *v.* Johnson, 21 N. J. L. 239. And see, generally, *supra*, II, D, 1.

Where ends of justice will be promoted by canceling the order of nonsuit. Collier *v.* Swinney, 13 Mo. 477.

Where facts were not disclosed to court.— Where plaintiff's attorney secured the dismissal of a cause without disclosing to the court that the case had formerly been tried and submitted to another judge, it is not only proper but the duty of the court to set aside the dismissal and reinstate the cause. Costello *v.* Costello, 112 Iowa 578, 84 N. W. 687.

87. Talbot *v.* Clark, 8 Pick. (Mass.) 51.

88. Schintz *v.* Hume, (Tex. Civ. App. 1898) 44 S. W. 680.

89. *Illinois.*— Shannahan *v.* Stevens, 139 Ill. 428, 28 N. E. 804.

Missouri.— Robinson *v.* Bobb, 139 Mo. 346, 40 S. W. 938.

Texas.— Kelly *v.* Kelly, 23 Tex. 437.

Wisconsin.— Jones *v.* Gilman, 14 Wis. 450.

United States.— Craig *v.* Brown, 6 Fed. Cas. No. 3,326, Pet. C. C. 139. And see Wolters *v.* Rossi, 126 Cal. 644, 59 Pac. 143.

See 17 Cent. Dig. tit. "Dismissal and Nonsuit," § 83.

An application by defendants to be reinstated as parties is equivalent to a motion to set aside an order of discontinuance. Morse *v.* Stockman, 65 Wis. 36, 26 N. W. 176.

Oral applications.— An application to set aside an order dismissing a suit may be made orally and affidavits in support of it may be presented when the motion is considered by the court, although at a subsequent term, since by Ill. Rev. St. (1891) c. 37, § 56, all cases undisposed of at the end of a term are continued by operation of law. Shannahan *v.* Stevens, 139 Ill. 428, 28 N. E. 804 [*reversing* 38 Ill. App. 571].

90. In Johnson *v.* Cheney, 17 Tex. 336, it was held that on motion to reinstate an action which had been dismissed it was immaterial whether the application was by petition or motion, provided the opposite party had sufficient notice.

91. Shannahan *v.* Stevens, 139 Ill. 428, 28 N. E. 804; Dearing *v.* Taylor, 1 Overt. (Tenn.) 49; Kelly *v.* Kelly, 23 Tex. 437.

When unnecessary.— Under Cal. Code Civ. Proc. § 473, providing that the court may on terms relieve a party from a judgment or order taken against him through his mistake, inadvertence, or excusable neglect, in order to obtain relief against a dismissal entered by plaintiff's attorney under a mistaken belief, no affidavit in support of the motion for relief is necessary. Palace Hardware Co. *v.* Smith, 134 Cal. 381, 66 Pac. 474.

92. Dearing *v.* Taylor, 1 Overt. (Tenn.) 49.

In Louisiana, however, an action discontinued cannot be revived by a rule to show cause, and if such revival be allowed any subsequent judgment will be null. Gilbert *v.* Meriam, 2 La. Ann. 160; Gilbert *v.* Nephler, 15 La. 59.

93. Michel *v.* Blackman, 6 Rob. (La.) 465; Chehalis County *v.* Ellingson, 21 Wash. 638, 59 Pac. 485; Jones *v.* Gilman, 14 Wis. 450.

Twenty days' notice.— 2 Ballinger Annot. Codes & St. § 5157, provides that in proceedings for the modification or vacation of judgments parties shall be brought into court on the same notice as to time, etc., as in ordinary actions (twenty days); and section 4953 authorizes a court to grant relief from a judgment taken through mistake or excusable neglect, without specifying the length of notice to be served on the adverse party. In Chehalis County *v.* Ellingson, 21 Wash. 638, 59 Pac. 485, it was held that where a plaintiff voluntarily dismissed his cause and thereafter moved to reinstate the same such motion was a proceeding under section 5157 and not under section 4953, and hence twenty days' notice thereof was required to be given to the adverse party.

94. Stanton *v.* Houston, 12 Heisk. (Tenn.) 265.

95. Craig *v.* Brown, 6 Fed. Cas. No. 3,326, Pet. C. C. 139; Doe *v.* Hunt, 1 Ont. Pr. 128; Chagnon *v.* Jackson, 18 Rev. Lég. 373.

may amend a conditional order of reinstatement and make the same absolute at a subsequent term.[96]

6. Effect of Reinstatement. Where a nonsuit is set aside plaintiff is restored to all his rights and the cause is reinstated for trial.[97] And an order vacating an order of dismissal, unappealed from, operates to annul the entry in the clerk's register showing dismissal as well as the judgment of dismissal.[98] Where a suit is not barred by limitation when brought, it is not affected by a nonsuit and reinstatement.[99] A nonsuit taken by plaintiff in a cause, although set aside and the cause reinstated on the docket at the same term, discharges the witnesses who may have been summoned so that they are not bound to attend unless summoned anew.[1]

III. Involuntary Termination of Suit.

A. Power to Order Nonsuit or Dismiss. There is considerable conflict of authority as to the power of the court to order a compulsory nonsuit. In many jurisdictions under no circumstances has the court any power to compel plaintiff to submit to a nonsuit against his consent;[2] and where the judge advises a nonsuit plaintiff may still go to the jury if he insists on doing so.[3] In other jurisdictions, however, the power to order a compulsory nonsuit is held to exist.[4] In all

When vacated without payment of costs.— Where on a stipulation between plaintiff and defendant who is insolvent, after notice from defendant's attorney forbidding discontinuance without payment of his costs, an order vacating a discontinuance without costs unless plaintiff pay the costs of defendant's attorney is proper. Wormer *v.* Canovan, 7 Lans. (N. Y.) 36.

96. Wilcoxon *v.* Howard, 26 Tex. Civ. App. 281, 62 S. W. 802, 63 S. W. 938.

97. West *v.* McMullen, 112 Mo. 405, 20 S. W. 628; Cotton *v.* Lyter, 81 Tex. 10, 16 S. W. 553; Southern Pac. Co. *v.* Winton, 27 Tex. Civ. App. 503, 66 S. W. 477.

98. Wolters *v.* Rossi, 126 Cal. 644, 59 Pac. 143 [*reversing* (1899) 57 Pac. 73].

99. Cotton *v.* Lyter, 81 Tex. 10, 16 S. W. 553.

1. Cochran *v.* Brown, 1 Humphr. (Tenn.) 329.

2. *Alabama.*— Saunders *v.* Coffin, 16 Ala. 421; Hunt *v.* Stewart, 7 Ala. 525.

Arizona.— Bryan *v.* Pinney, (1889) 21 Pac. 332.

Arkansas.— Hill *v.* Rucker, 14 Ark. 706; Carr *v.* Crain, 7 Ark. 241; Ringo *v.* Field, 6 Ark. 43; Martin *v.* Webb, 5 Ark. 72, 39 Am. Dec. 363.

Illinois.— Rankin *v.* Curtenius, 12 Ill. 334.

Indiana.— Williams *v.* Port, 9 Ind. 551; Booe *v.* Davis, 5 Blackf. 115, 33 Am. Dec. 457.

Maryland.— Hall *v.* Schuchardt, 34 Md. 15; Kettlewell *v.* Peters, 23 Md. 312.

Michigan.— Cahill *v.* Kalamazoo Mut. Ins. Co., 2 Dougl. 124, 4 Am. Dec. 457.

Massachusetts.— Mitchell *v.* New England Mar. Ins. Co., 6 Pick. 117. And see Marshall *v.* Merritt, 97 Mass. 516.

Mississippi.— Hudson *v.* Strickland, 49 Miss. 591; Winston *v.* Miller, 12 Sm. & M. 550.

Missouri.— Harrison *v.* Illinois Bank, 9 Mo. 161; Welles *v.* Biddle, 9 Mo. 159; Perrin *v.* Wilson, 9 Mo. 148; Clark *v.* The Mound City, 9 Mo. 146.

North Carolina.— Dickey *v.* Johnson, 35 N. C. 450.

Tennessee.— McGuire *v.* Hay, 6 Humphr. 419; Scruggs *v.* Brackin, 4 Yerg. 528.

Texas.— Garrett *v.* Gaines, 6 Tex. 435; Huston *v.* Berry, 3 Tex. 235; Guest *v.* Guest, Dall. 394.

Virginia.— Thweat *v.* Finch, 1 Wash. 217.

United States.— Central Transp. Co. *v.* Pullman's Palace-Car Co., 139 U. S. 24, 11 S. Ct. 478, 35 L. ed. 55; Oscanyan *v.* Winchester Repeating Arms Co., 103 U. S. 261, 26 L. ed. 539; Mercantile Mut. Ins. Co. *v.* Folsom, 18 Wall. 237, 21 L. ed. 827; Castle *v.* Bullard, 23 How. 172, 16 L. ed. 424; Crane *v.* Morris, 6 Pet. 598, 8 L. ed. 514; De Wolf *v.* Rabaud, 1 Pet. 476, 7 L. ed. 227; Elmore *v.* Grymes, 1 Pet. 469, 7 L. ed. 224; Foote *v.* Silsby, 9 Fed. Cas. No. 4,916, 1 Blatchf. 445 [*affirmed* in 14 How. 218, 14 L. ed. 394].

See 17 Cent. Dig. tit. "Dismissal and Nonsuit," § 103.

Where an issue is ordered, the judge presiding on the trial of the issue cannot grant a nonsuit. He must permit a trial and report back the result. Wookfolk *v.* Graniteville Mfg. Co., 22 S. C. 332.

3. Huston *v.* Berry, 3 Tex. 235. And see Hudson *v.* Strickland, 49 Miss. 591.

4. *California.*— Ensminger *v.* McIntire, 23 Cal. 593.

Connecticut.— Naugatuck R. Co. *v.* Waterbury Button Co., 24 Conn. 468; Ustick *v.* Jones, 1 Root 439.

Georgia.— Tison *v.* Yawn, 15 Ga. 491, 60 Am. Dec. 708.

New Hampshire.— Bailey *v.* Kimball, 26 N. H. 351.

New Jersey.— New Jersey Cent. R. Co. *v.* Moore, 24 N. J. L. 824; Aldridge *v.* New York Cent. R. Co., 20 N. J. L. 460.

New York.— Deyo *v.* New York Cent. R. Co., 34 N. Y. 9, 88 Am. Dec. 418; McMartin *v.* Taylor, 2 Barb. 356; Healy *v.* Utly, 1 Cow. 345.

jurisdictions the court has power to order a dismissal of an action where a proper case for the exercise of this power is shown.[5] The motion for involuntary nonsuit or dismissal is addressed to the discretion of the court and its refusal to grant the same will not be reviewed,[6] except in case of palpable error.[7]

B. Right to Dismissal or Nonsuit — 1. As Affected by Defendant's Demand For Affirmative Relief. A defendant who pleads a set-off cannot on failure of plaintiff to appear have judgment thereon, but the proper judgment is a nonsuit of plaintiff or a dismissal of the suit.[8] He is not required, however, to ask for a dismissal of the complaint until he has proved his cause of action.[9] If a defendant who has set up a counter-claim obtains a dismissal of the complaint, plaintiff, having excepted thereto, may insist that such counter-claim shall be passed upon by the jury and that defendant after having made the issue shall not be allowed to withdraw it, so as to reserve the right of having a new action for the same cause.[10]

2. As Affected by Admission of Part of Plaintiff's Claim. Where the answer of defendant admits some indebtedness a nonsuit should not be granted.[11]

3. Estoppel or Waiver of Right. The right to dismissal is one which may be waived or which under some circumstances defendant may be estopped from claiming by reason of conduct inconsistent with an intention to exercise such right.[12] He may be held to be thus estopped from insisting on a dismissal or discontinuance or to have waived his right thereto in various ways, as by continuance of the cause at his instance by which he admits its pendency,[13] by failure to seek a remedy in the proper time,[14] by failure of one defendant, after discontinuance as to the other, to object to the introduction of evidence on final argument

Ohio.— Ellis *v.* Ohio L. Ins., etc., Co., 4 Ohio St. 628, 64 Am. Dec. 610; Powell *v.* Jones, 12 Ohio 35; Slipher *v.* Fisher, 11 Ohio 299.

South Carolina.— Turnbull *v.* Rivers, 3 McCord 131, 15 Am. Dec. 622.

Wisconsin.— Spensley *v.* Lancashire Ins. Co., 54 Wis. 433, 11 N. W. 894.

See 17 Cent. Dig. tit. "Dismissal and Nonsuit," § 103.

In Louisiana the court can nonsuit plaintiff without his consent, only where the case has been regularly set for trial, and he fails to appear on the day fixed personally or by attorney. Code Pr. arts. 463, 536; Walton *v.* Vicksburg Commercial, etc., Bank, 12 Rob. 99.

In an equitable action plaintiff cannot be nonsuited for failure to produce evidence to support his motion. This motion can be allowed only in strictly legal actions. Dietz *v.* Neenah, 91 Wis. 422, 64 N. W. 299, 65 N. W. 500.

5. See *infra*, III, I.

6. Smith *v.* Smith, 30 N. C. 29; Medary *v.* Cathers, 161 Pa. St. 87, 28 Atl. 1012; Wray *v.* Spence, 145 Pa. St. 399, 22 Atl. 693; Learned *v.* Bellows, 8 Vt. 79; Morrison *v.* Moore, 4 Vt. 264; Ladd *v.* Hill, 4 Vt. 164. But see Tooker *v.* Arnoux, 20 Alb. L. J. 97, where it was held that the question of dismissal is not one of discretion but of strict right.

7. Sacia *v.* De Graaf, 1 Cow. (N. Y.) 356; Healy *v.* Utly, 1 Cow. (N. Y.) 345.

8. Nordmanser *v.* Hitchcock, 40 Mo. 178. But see Jackson *v.* Brooks, 1 Tex. App. Civ. Cas. § 679, holding that where defendant has pleaded in reconvention and plaintiff fails to appear the case may be tried on defendant's plea in reconvention after dismissing plaintiff's case.

Where a plaintiff unreasonably omitted to notice a cause for trial at the next circuit after issue joined and after the time to amend the last pleading put in expired, defendant on his motion to dismiss the complaint may, unless he asks additional relief, take a dismissal of the complaint and enter judgment for his costs. Cusson *v.* Whalon, Code Rep. N. S. (N. Y.) 27.

9. Moissen *v.* Kloster, 114 N. Y. 638, 21 N. E. 1050.

10. Miller *v.* Freeborn, 4 Rob. (N. Y.) 608.

11. Adams *v.* Tucker, 6 Colo. App. 393, 40 Pac. 783.

12. *Colorado.*— Hoy *v.* Leonard, 13 Colo. App. 449, 59 Pac. 229.

Illinois.— Pratt *v.* Grimes, 35 Ill. 164; Fish *v.* Regez, 46 Ill. App. 428.

Maine.— Bray *v.* Libby, 71 Me. 276.

New York.— Place *v.* Hayward, 117 N. Y. 487, 23 N. E. 25; Ransom *v.* Wetmore, 39 Barb. 104; Moskowitz *v.* Homberger, 20 Misc. 558, 46 N. Y. Suppl. 462; Cielfield *v.* Browning, 9 Misc. 98, 29 N. Y. Suppl. 710; Fuller *v.* Sweet, 9 How. Pr. 74; Colvin *v.* Burnet, 2 Hill 620.

North Carolina.— Aiken *v.* Stevenson, 61 N. C. 288.

Texas.— Keesey *v.* Old, 82 Tex. 22, 17 S. W. 928.

Wisconsin.— Ramash *v.* Scheuer, 85 Wis. 269, 55 N. W. 700.

See 17 Cent. Dig. tit. "Dismissal and Nonsuit," § 100.

13. Gary *v.* State Bank, 11 Ala. 771.

14. *Ex p.* Barclay, 49 Ala. 42.

by both parties,[15] by electing to stand on a demurrer to the complaint for want of material allegations after demurrer overruled,[16] by long acquiescence in the right of complainant to proceed by bill of interpleader,[17] by filing interrogatories for discovery on refusal of plaintiff to answer interrogatories,[18] by a waiver of service of process entered on the back of a declaration, with an agreement to appear,[19] by receiving without objection evidence on a necessary allegation omitted from the complaint,[20] by failure to object to an order allowing plaintiff leave to amend and plead over, on sustaining of a plea in abatement,[21] or by pleading or proceeding with the trial,[22] unless the right to move for dismissal is reserved by the answer,[23] or unless the motion raises a question of jurisdiction[24] or of the sufficiency of the complaint or bill to state a cause of action.[25] Where a complaint is subject to be dismissed on defendant's motion because plaintiff has not brought it to trial before the trial of other causes, which issues were subsequently joined, defendant by service of notice of trial does not waive his right to the dismissal.[26]

C. Who May Move For Dismissal or Nonsuit. A motion to dismiss should ordinarily be made by one who is a party to the suit,[27] and who has entered his appearance or filed a plea.[28] One of several defendants cannot move for judg-

After a defendant has submitted his cause to a jury by giving evidence and suffering them to retire he cannot retract his submission and demand a compulsory nonsuit. McEwen *v.* Mazyck, 3 Rich. (S. C.) 210.

15. Torrey *v.* Forbes, 94 Ala. 135, 10 So. 320.

16. Howe *v.* People, 7 Colo. App. 535, 44 Pac. 512.

17. Cooper *v.* Jones, 24 Ga. 473.

18. Bird *v.* Harville, 33 Ga. 459.

19. Humphreys *v.* Humphreys, Morr. (Iowa) 359.

20. McLain *v.* British, etc., Mar. Ins. Co., 16 Misc. (N. Y.) 336, 38 N. Y. Suppl. 77.

21. Burdett *v.* Chandler, 22 Tex. 14.

22. *Alabama.*— The Farmer *v.* McCraw, 31 Ala. 659; Freeman *v.* McBroom, 11 Ala. 943.

Arkansas.— Jester *v.* Hopper, 13 Ark. 43; Hanly *v.* Real Estate Bank, 4 Ark. 598; Gay *v.* Hanger, 3 Ark. 436.

Colorado.— Wilson *v.* Welch, 8 Colo. App. 210, 46 Pac. 106.

Illinois.— Phillips *v.* Hood, 85 Ill. 450; Matthias *v.* Cook, 31 Ill. 83; Munster *v.* Doyle, 50 Ill. App. 672.

Indiana.— Rittenour *v.* McCausland, 5 Blackf. 540.

Iowa.— Rea *v.* Flathers, 31 Iowa 545; Beard *v.* Smith, 9 Iowa 50.

Maine.— Wilson *v.* Nichols, 29 Me. 566.

Massachusetts.—Clark *v.* Montague, 1 Gray 446.

Mississippi.—McKey *v.* Torry, 28 Miss. 78; Prewett *v.* Caruthers, 7 How. 304.

Missouri.— Franciscus *v.* Bridges, 18 Mo. 208.

New York.— Buel *v.* Dewey, 22 How. Pr. 342.

Ohio.— Hill *v.* Stonecreek Tp. Road Dist. No. 6, 10 Ohio St. 621; Miller *v.* Truman, 7 Ohio Dec. (Reprint) 374, 2 Cinc. L. Bul. 241.

South Carolina.— Long *v.* Kinard, Harp. 47.

Tennessee.— Bennett *v.* Wilkins, 5 Coldw. 240; Harris *v.* Snider, 9 Humphr. 743.

Vermont.— Stevens *v.* Hewitt, 30 Vt. 262.

United States.— Bogk *v.* Gassert, 149 U. S. 17, 13 S. Ct. 738, 37 L. ed. 631.

See 17 Cent. Dig. tit. "Dismissal and Nonsuit," § 102.

Demurring to a declaration, while a motion to dismiss is undisposed of, waives the motion. Cobb *v.* Ingalls, 1 Ill. 233.

Appearance to move to strike out part of complaint waives the right to move for dismissal. Hoy *v.* Leonard, 13 Colo. App. 449, 59 Pac. 229.

Where an action is dismissed for want of prosecution and never formally reinstated, but the parties proceed in the litigation taking no notice of the dismissal, the dismissal is waived. Munster *v.* Doyle, 50 Ill. App. 672.

After plea in abatement.— A motion to dismiss the suit because the declaration was not filed in time may be filed after a plea in abatement has been made, since such plea was not to the declaration and could not operate to admit the right to file the declaration. Stoddard *v.* Miller, 29 Ill. 291.

23. Brow *v.* Norton, 167 Mass. 472, 45 N. E. 933.

24. Twine *v.* Carey, 2 Okla. 249, 37 Pac. 1096; Stevens *v.* Hewitt, 30 Vt. 262. And see Ward *v.* George, 1 Bush (Ky.) 357.

25. Webster *v.* Thompson, 55 Ga. 431; Kennerty *v.* Etiwan Phosphate Co., 17 S. C. 411, 43 Am. Rep. 607.

26. Israel *v.* Voight, 12 Misc. (N. Y.) 206, 34 N. Y. Suppl. 28, 1 N. Y. Annot. Cas. 324. And see Chilcott *v.* Waddingham, 1 Month. L. Bul. (N. Y.) 50.

27. Piggott *v.* Kirkpatrick, 31 Ind. 261, holding an *amicus curiæ* cannot move to dismiss for defective complaint.

A stock-holder in defendant corporation has no right to make a motion to dismiss. Hobbs *v.* Dane Mfg. Co., 5 Allen (Mass.) 581.

28. Rodericks *v.* Payne, 1 McCord (S. C.) 408.

ment as in case of nonsuit or without the concurrence of the others,[29] unless their liability is separate,[30] or unless in good faith they appear by separate attorneys.[31] And where several defendants jointly move to dismiss, all should be entitled to such judgment or it will be error to dismiss.[32] Where judgment is obtained against one of several defendants, the others cannot nonsuit plaintiff.[33] The fact that certain persons have been improperly joined as parties defendant will not warrant the entry of a judgment in their favor, but the action should be dismissed as to them.[34] A defendant is entitled to an order to dismiss plaintiff's bill, notwithstanding the death of a co-defendant.[35] Where a regular default exists against a party he must first have such default set aside before a motion by him to dismiss the suit can be entertained.[36] Where certain persons are proper parties defendant and are liable for costs, a disclaimer of interest in the subject-matter of the suit is not ground for dismissal as to them.[37]

D. Who May Oppose Motion. An improper dismissal as to some defendants cannot be objected to by others whose rights are in no way prejudiced thereby.[38]

E. Dismissal or Nonsuit as to Part of Cause of Action. Where a pleading contains different counts or causes of action plaintiff may be nonsuited on motion of defendant or *nolle prosequied* as to a part of the causes of action on some of the counts and allowed to proceed on the others.[39]

A defendant on whom process has not been served may have a discontinuance ordered for a hiatus in the process as to him. Dougherty *v.* Shown, 1 Heisk. (Tenn.) 302. And see Sheriff *v.* Smith, 47 How. Pr. (N. Y.) 470.

29. Bancroft *v.* Wilson, 2 Cow. (N. Y.) 495; Jackson *v.* Wakeman, 1 Cow. (N. Y.) 177; Yates *v.* Lansing, 8 Johns. (N. Y.) 289.

Nonsuit on appeal.— Where in an action on a joint contract plaintiff takes no appeal from a judgment dismissing the suit as to one defendant because a non-resident, but proceeds to judgment against the other, the latter may on appeal obtain a nonsuit. Thompson *v.* Chretien, 3 Rob. (La.) 26.

Confession of judgment by one joint defendant.— Where the evidence establishes a different contract from that sued on, the fact that one of two defendants jointly sued has confessed judgment does not affect the right of the other to have the action dismissed as to him. Loudon *v.* Robertson, (Tex. Civ. App. 1899) 54 S. W. 783.

30. Livingston County Bank *v.* Ellis, 18 Wend. (N. Y.) 562.

31. Platt *v.* Littell, 1 How. Pr. (N. Y.) 71.

32. State *v.* Cunningham, 101 Ind. 461; Bancroft *v.* Wilson, 2 Cow. (N. Y.) 495.

33. Williams *v.* Rearrs, 3 McCord (S. C.) 234.

34. Gillum *v.* St. Louis, etc., R. Co., 4 Tex. Civ. App. 622, 23 S. W. 716.

35. Kelley *v.* Macklem, 2 Ch. Chamb. (U. C.) 132; Watson *v.* Watson, 6 Ont. Pr. 229; Hall *v.* Green, 2 U. C. Q. B. O. S. 42.

Necessity for suggestion of death.— In an action against four persons, where issue was joined against two, and the third died after having pleaded, but before issue joined as against him, and the fourth died not having pleaded at all, it was held that the surviving defendants were not in the situation to move to enter up judgment as in case of a nonsuit. It would seem that the course in such a case would be to get a suggestion on the record of the death of the other defendants and then to move for such judgment. Pinkus *v.* Sturch, 5 C. B. 474, 5 D. & L. 515, 12 Jur. 121, 17 L. J. C. P. 120, 57 E. C. L. 474.

36. Fergerson *v.* Rawlings, 23 Ill. 69. And see Bancroft *v.* Wilson, 2 Cow. (N. Y.) 495.

37. Dupuy *v.* Leavenworth, 17 Cal. 262, a suit to recover plaintiff's property which several had conspired to obtain.

38. Jefferson *v.* Jefferson, 96 Ill. 551.

Action against employer and employee — Nonsuit as to former.— In an action against an independent contractor and his employer to recover damages for personal injuries caused by the negligence of the contractor, the granting of a nonsuit as to the employer, although erroneous, does not concern the contractor, and cannot be urged by him as error. Ahern *v.* McGeary, 79 Cal. 44, 21 Pac. 540.

39. Brander *v.* Lum, 11 La. Ann. 217; Packard *v.* Hill, 7 Cow. (N. Y.) 434; Symonds *v.* Craw, 5 Cow. (N. Y.) 279. *Compare* Meyer *v.* Goedel, 31 How. Pr. (N. Y.) 456.

Plaintiff in an action to recover two parcels of land on intimation of the court that he will fail as to one parcel may take a nonsuit as to such ruling and have the case reviewed and at the same time take a judgment for the other parcel. Weeks *v.* McPhail, 128 N. C. 134, 38 S. E. 292.

Dismissal as to application for extraordinary relief.— Although the allegations of a petition which sets forth a cause of action and prays for extraordinary relief in aid thereof are not sufficient to authorize the granting of such relief, the entire petition should not for this reason be dismissed, but only the allegations relating exclusively to the extraordinary relief should be stricken. Gillis *v.* Hilton, etc., Lumber Co., 113 Ga. 622, 38 S. E. 940.

Where causes involve the same questions of law.— In a number of causes between the

F. Dismissal or Nonsuit as to Some of Joint Defendants. A court may dismiss or render judgment of discontinuance as to one or more of several defendants and leave the action to proceed against the others whenever a several judgment would be proper,[40] without dismissing as to all the defendants unless the cause goes to the discharge of all.[41] Where, however, the liability, if any exists, must be joint, as for instance, in an action against two on a joint judgment, one cannot be arbitrarily dismissed and the action allowed to proceed against the other.[42] Where some of the defendants are in default, the court has no power in dismissing the complaint as to some of the parties to dismiss as to those in default, since as to them the case was confessed by their default.[43]

G. Condition of Cause — 1. In General. A cause will be arrested on motion at any stage of the proceedings, when it is ascertained that the court has not jurisdiction.[44] A cause will be dismissed even after verdict[45] or judgment if at the same term,[46] or after entry of a continuance.[47] The cause will be dismissed at any time where the complaint fails to state facts sufficient to constitute a cause of action.[48] Application for judgment as in case of nonsuit or of dismissal on other grounds has been held, however, to come too late when made after verdict,[49] unless upon the trial leave has been reserved to renew such motion notwithstanding the verdict.[50] So the application comes too late after final judgment,[51] after a judgment by default against one of the defendants,[52] on the day set for trial,[53] after the jury have been sworn,[54] after a cause has been called for trial[55] or taken

same plaintiffs and different defendants, all involving the same questions of law, some were noticed for trial and others not, and a verdict was rendered for defendants in one of them, and exceptions taken by plaintiffs. It was held that defendants were not entitled to judgment as in case of nonsuit in those not noticed for trial until the questions excepted to in the one tried were decided. Ogden *v.* Beebe, 1 How. Pr. (N. Y.) 69.

40. Thompson *v.* Reinhard, 11 Wis. 293.

41. Dean *v.* Duffield, 8 Tex. 235, 58 Am. Dec. 108.

Discontinuance as to defendant misjoined.— In an action upon a joint undertaking, if a defendant be improperly joined, and such misjoinder appears from his own plea and the admissions of his co-defendants, a discontinuance as to him affords no ground for the dismissal of the suit. Tulane *v.* McKee, 10 Tex. 335.

Dismissal as to resident defendant.— Under a statute providing that where there are several defendants residing in different counties suit may be brought in any such county, where a party residing out of the county in which suit is brought is joined as a defendant with others who are residents, the court does not lose jurisdiction over the non-resident by a dismissal as to the resident defendants. January *v.* Rice, 33 Mo. 409.

42. Howell *v.* Shands, 35 Ga. 66.

43. Nichols *v.* Bennett, 15 N. Y. St. 306.

44. *Connecticut.*—Banks *v.* Porter, 39 Conn. 307.

North Carolina.— Parker *v.* Southern Express Co., 132 N. C. 128, 43 S. E. 603; Jackson *v.* Jackson, 105 N. C. 433, 11 S. E. 173; Mastin *v.* Marlow, 65 N. C. 695; Garrett *v.* Trotter, 65 N. C. 430.

Texas.— Able *v.* Bloomfield, 6 Tex. 263. But see Watson *v.* Baker, 67 Tex. 48, 2 S. W. 375, holding that it is error to dismiss an action for want of jurisdiction after the evidence is in.

Vermont.— Shepherd *v.* Beede, 24 Vt. 40; Stoughton *v.* Mott, 13 Vt. 175.

United States.— McCloskey *v.* Cobb, 15 Fed. Cas. No. 8,702, 2 Bond 16.

See 17 Cent. Dig. tit. "Dismissal and Nonsuit," § 96.

45. King *v.* Dewey, 11 Cush. (Mass.) 218.

46. Camp *v.* Stevens, 45 Conn. 92.

47. If a summary proceeding under Ga. Code, §§ 4077, 4078, to remove a tenant at sufferance, holding over after demand, has been returned to court improperly, there being no such counter-affidavit as the law contemplates to warrant the return, it may be dismissed on petition or motion, although a continuance of the case for the term has been entered. Mothershead *v.* De Give, 82 Ga. 193, 8 S. E. 62.

48. Maddox *v.* Randolph County, 65 Ga. 216; Jackson *v.* Jackson, 105 N. C. 433, 11 S. E. 173; Brown *v.* Buttz, 15 S. C. 488.

49. Matthias *v.* Cook, 31 Ill. 83; Wilson *v.* Owens, 1 How. (Miss.) 126.

50. Downing *v.* Mann, 3 E. D. Smith (N. Y.) 36, 9 How. Pr. (N. Y.) 204.

51. Morgan *v.* Hays, 1 Ill. 126, 12 Am. Dec. 147.

52. Fergerson *v.* Rawlings, 23 Ill. 69; State *v.* Pool, 27 N. C. 105; Hempstead *v.* Drummond, 1 Pinn. (Wis.) 534.

53. Burbank *v.* Bigelow, 154 U. S. 558, 14 S. Ct. 1163, 19 L. ed. 51 [*following* Breedlove *v.* Nicolet, 7 Pet. (U. S.) 413, 8 L. ed. 731].

If defendant might have moved for judgment dismissing the complaint he may also demand such a judgment at the trial. Bridge *v.* Payson, 5 Sandf. (N. Y.) 210.

54. Grahame *v.* Harris, 5 Gill & J. (Md.) 489.

55. Troeder *v.* Hyams, 153 Mass. 536, 27 N. E. 775.

under advisement,[56] or submitted to the jury,[57] after evidence on both sides has been introduced,[58] during the direct examination of witnesses,[59] or after plaintiff has proved facts which entitle him to recover.[60]

2. When Application Premature. A defendant has no right to move for judgment as in case of nonsuit until all the pleadings in the case have been carried to an issue.[61] So a motion at the second term to dismiss a bill for want of prosecution before all the defendants are served and while a demurrer to the bill is still pending at the instance of those who are served is premature.[62] Defendant may *non prosequitur* plaintiff in replevin, although the complaint has not been returned to the sheriff but has been withdrawn from his hands by plaintiff.[63]

H. Stipulations as to Dismissal. An agreement between plaintiff and defendant that the cause shall be dismissed upon certain conditions obligates plaintiff to dismiss upon performance thereof.[64] But a stipulation for a discontinuance entered into by plaintiff and one defendant will not be enforced if prejudicial to the rights of the other defendant.[65] An entry of discontinuance pursuant to agreement does not relate back to the time of the agreement so as to enable plaintiff to prosecute another suit for the same cause of action commenced after the agreement, but before the making of the entry.[66] Where an agreement or stipulation is made between parties to dismiss a suit, and there is no dispute as to the fact of such agreement, the courts will carry it into effect on motion.[67] But if the agreement is relied upon as a defense it should be pleaded.[68] A written stipulation before trial that an action be dismissed without costs does not authorize the entry of a judgment as on the merits, so as to bar a subsequent action for the same cause.[69] An order setting aside a stipulation for dismissal of an action cannot be made at chambers.[70] And it has been held that such a stipulation can-

56. Miller *v.* Hemphill, 9 Ark. 488.

57. McEwen *v.* Mazyck, 3 Rich. (S. C.) 210.

58. Webber *v.* Shapleigh School Dist. No. 9, 45 Me. 299; Lee *v.* Hardgrave, 3 Mich. 77. See, however, Coit *v.* Beard, 33 Barb. (N. Y.) 357, 12 Abb. Pr. (N. Y.) 462, 22 How. Pr. (N. Y.) 2, both to the effect that when a judge before whom a common-law cause is tried without a jury instead of rendering a judgment in express terms for defendant orders that the complaint be dismissed, it is to be presumed that he then acts as the court, exercising the prerogative which it has always possessed of nonsuiting plaintiff either before or after the evidence is given on both sides.

59. Winfield *v.* Potter, 24 How. Pr. (N. Y.) 446.

60. Kruger *v.* Galewski, 13 Misc. (N. Y.) 56, 34 N. Y. Suppl. 66.

61. Mumford *v.* Stocker, 1 Cow. (N. Y.) 601; Klein *v.* McGeough, 10 Wkly. Notes Cas. (Pa.) 482.

Where no declaration or plea has been filed, a rule to try or *non prosequitur* cannot be enforced. Sulivan *v.* Browne, 23 Fed. Cas. No. 13,593, 2 Wash. 204.

Want of replication.— If a plaintiff files a copy of notes, without a narration or statement of his claim, and defendant voluntarily files a plea and orders the case on the trial list, and when the case is called a nonsuit is entered because of the non-appearance of plaintiff, the court will on motion take off the nonsuit, as without replication to defendant's plea the cause was irregularly on the trial list. Taylor *v.* Pearl, 2 Miles (Pa.) 291.

62. Semmes *v.* Mott, 27 Ga. 92.

63. Fort *v.* Smalley, 6 Cow. (N. Y.) 439; *Ex p.* Fort, 6 Cow. (N. Y.) 43.

64. Peoria, etc., R. Co. *v.* Barton, 38 Ill. App. 469; Otman *v.* Fish, 1 How. Pr. (N. Y.) 185.

Form of stipulation for dismissal and discontinuance see Fitzgerald *v.* Topping, 48 N. Y. 438, 443; Hammond *v.* Christie, 5 Rob. (N. Y.) 160, 163.

65. Yawkey *v.* Richardson, 9 Mich. 529, 81 Am. Dec. 769.

66. Parker *v.* Colcord, 2 N. H. 36.

67. Toupin *v.* Gargnier, 12 Ill. 79; Rybolt *v.* Milliken, 5 Ill. App. 490; Noonan *v.* Orton, 31 Wis. 265.

Reading of stipulation before receiving plaintiff's evidence.— Where a plaintiff enters into a stipulation with defendant, which is sufficient to prevent his recovering in the action, it is not error for the court to allow the stipulation to be read before plaintiff's evidence is received, and thereupon to render a judgment of nonsuit. Loop *v.* Chamberlain, 17 Wis. 504.

68. State *v.* Wilson, 16 Ind. 134; Hopkins *v.* Virgin, 11 Bush (Ky.) 677.

The proper method is by plea in abatement or upon motion to dismiss supported by affidavit, not by plea in bar. Christopher *v.* Ballinger, 47 Ill. 107.

69. Rolfe *v.* Burlington, etc., R. Co., 39 Minn. 398, 400, 40 N. W. 267, 268.

70. Rogers *v.* Greenwood, 14 Minn. 333.

not be set aside on the ground of mistake if the mistake be one which ordinary care would have avoided.[71]

I. Grounds — 1. In General. A motion to dismiss a suit is ordinarily founded upon matter of record, apparent upon the face of the proceedings,[72] because of some imperfection, gap, or chasm, caused by the act or neglect of plaintiff, or because of his disobedience to orders of the court; unless perhaps it be founded upon a release given or an agreement to dismiss pending suit.[73] As a general rule it cannot be founded on matters extrinsic to the record,[74] nor can it be made to serve the purpose of a plea in bar, nor devolve upon the court the summary determination of the merits of the case.[75]

2. Error as to Nature or Form of Remedy, and Misjoinder.[76] Error as to the nature or form of remedy is not a ground for dismissal or nonsuit,[77] especially after defendant has been defaulted.[78] So a misjoinder of causes of action is no ground for dismissal.[79]

3. Pendency of Another Action and Res Judicata.[80] An objection that another action is pending in the same court for the same cause should be raised by plea and is not ground for dismissal,[81] unless it appears on the face of the declaration

71. Rogers *v.* Greenwood, 14 Minn. 333.

72. Moore *v.* Helms, 74 Ala. 368; Hobbs *v.* Dane Mfg. Co., 5 Allen (Mass.) 581; Kittridge v. Bancroft, 1 Metc. (Mass.) 508; Crockett *v.* Beaty, 7 Humphr. (Tenn.) 66; Bent *v.* Bent, 43 Vt. 42; Bliss *v.* Smith, 42 Vt. 198; Connecticut, etc., R. Co. *v.* Bailey, 24 Vt. 465, 58 Am. Dec. 181.

73. Allen *v.* Lewis, 74 Ala. 379; Moore *v.* Helms, 74 Ala. 368.

Non-production of books.— In McNair *v.* Wilkins, 3 Whart. (Pa.) 551, a rule was obtained in 1829 against plaintiff to show cause why his books should not be produced in evidence in an action of assumpsit for work and labor. At the trial in 1838 an affidavit was read stating that the books were destroyed in 1833, and that plaintiff had admitted that the entry was originally against another than defendant. It was held that defendant was entitled to nonsuit.

74. Moore *v.* Helms, 74 Ala. 368. And see Bliss *v.* Smith, 42 Vt. 198.

Declaration of plaintiff as to ignorance of institution of suit.— In Coleman *v.* Simpson, 2 Dana (Ky.) 166, it was held that the fact that a female plaintiff visited by defendant seeking to compromise the suit, denied in a state of alarm that she authorized the suit or had a demand on him, was not ground for a nonsuit but should be left to the jury.

Where written agreement supplemented by parol agreement.— In Sloan *v.* Courtenay, 54 S. C. 314, 32 S. E. 431, it was held that a ground of nonsuit that the "written instrument sued on" imposes no obligation on defendant to make good plaintiff's claim is not tenable, where the action was also based on an additional parol agreement supplementing the written agreement, and there was some testimony tending to show the obligation.

75. Moore *v.* Helms, 74 Ala. 368; Covert *v.* Vonhardtmutt, 103 Tenn. 463, 53 S. W. 730.

76. Nature and form of remedy generally see Actions.

Misjoinder of causes of action generally see Joinder and Splitting of Actions.

77. Scallan *v.* Wait, 64 Iowa 705, 21 N. W. 152; Lansdale *v.* Mitchell, 14 B. Mon. (Ky.) 348; Downes *v.* Phœnix Bank, 6 Hill (N. Y.) 297; Scruggs *v.* Brackin, 4 Yerg. (Tenn.) 528.

Bringing an action at law as a suit in equity is not ground for dismissal. Turner *v.* Newman, 39 S. W. 504, 19 Ky. L. Rep. 231.

Suit on void agreement fully performed.— Where one sues on an oral agreement, void because not to be performed within a year, but which has been fully performed so as to possibly entitle him to a recovery on a *quantum meruit* or *valebat*, the judgment should not be for defendant on the merits, but should be entered as of nonsuit. Bartlett *v.* Wheeler, 44 Barb. (N. Y.) 162.

Refusal to elect.— Under Ky. Civ. Code, § 85, providing that in case of misjoinder of actions where plaintiff refuses to elect between them the court may strike out the cause improperly joined, the court cannot dismiss an action for refusal to elect. Sheppard *v.* Stephens, (1887) 2 S. W. 548.

78. Pyne *v.* Van Bergen, 1 Pinn. (Wis.) 533.

79. *Florida.*— Liddon *v.* Hodnett, 22 Fla. 271.

Iowa.— Wilson *v.* Baker, 52 Iowa 423, 3 N. W. 481.

Massachusetts.— Mullaly *v.* Austin, 97 Mass. 30; Barlow *v.* Leavitt, 12 Cush. 483.

New York.— Veeder *v.* Cooley, 4 Thomps. & C. 245; Tuomey *v.* O'Reilly, etc., Co., 3 Misc. 302, 22 N. Y. Suppl. 930. But see Cogswell *v.* Meech, 12 Wend. 147.

Texas.— Benson *v.* Screwmen's Ben. Assoc., 2 Tex. Civ. App. 66, 21 S. W. 562.

See 17 Cent. Dig. tit. "Dismissal and Nonsuit," § 112.

80. Another action pending generally see Abatement and Revival.

Res judicata generally see Judgments.

81. Central R., etc., Co. *v.* Coleman, 88 Ga. 294, 14 S. E. 382; Kennon *v.* Petty, 59 Ga. 175; Killen *v.* Compton, 57 Ga. 63; Champ *v.* Kendrick, 130 Ind. 549, 30 N. E. 787; Morton *v.* Sweetser, 12 Allen (Mass.) 134. See, however, Curd *v.* Lewis, 1 Dana (Ky.) 351.

or bill.[82] Nor is the fact of a former adjudication as to the same cause of action a ground for dismissal,[83] unless such former adjudication appears on the face of the declaration.[84]

4. Premature Bringing of Action.[85] The premature bringing of an action is a ground for dismissal.[86]

5. Vexatious or Fictitious Suits. An action will not be dismissed merely because it is vexatious, unless it is clear that there is no meritorious cause of action,[87] or unless it is in fraud of justice.[88] If a suit is fictitious it may be dismissed after the assignment of a judgment by default, since there are no rights under such judgment to assign.[89]

6. Statute of Limitations.[90] Where it is apparent from the face of the declaration that the suit is barred by the statute of limitations,[91] or that all of the claim except an amount below the jurisdiction of the court is barred,[92] a motion to dismiss will be sustained. But the fact that a claim was stale will not sustain a judgment of nonsuit in an action of trespass if otherwise meritorious, if such action was brought within the time allowed by statute.[93]

7. Disobedience of Order of Court.[94] Disobedience of an order of court is usually a sufficient ground for nonsuit, dismissal, or *non prosequitur*,[95] as for instance the

82. Turnipseed *v.* Crook, 8 Ala. 897; Central R., etc., Co. *v.* Coleman, 88 Ga. 294, 14 S. E. 382.

83. Coffee *v.* Groover, 20 Fla. 64.

84. Killen *v.* Compton, 57 Ga. 63.

85. Premature commencement of action generally see Actions.

86. Groning *v.* Krumbhaar, 13 La. 402; Millett *v.* Hayford, 1 Wis. 401.

87. Ramsey *v.* Erie R. Co., 57 Barb. (N. Y.) 398, 8 Abb. Pr. N. S. (N. Y.) 174, 39 How. Pr. (N. Y.) 62.

Bad faith is not ground for a perpetual stay unless suit is brought in violation of some agreement between the parties. Ramsey *v.* Erie R. Co., 57 Barb. (N. Y.) 398, 8 Abb. Pr. N. S. (N. Y.) 174, 39 How. Pr. (N. Y.) 62.

88. Merritt *v.* Merritt, 16 Wend. (N. Y.) 405. And see Stewart *v.* Butler, 27 Misc. (N. Y.) 708, 59 N. Y. Suppl. 573.

89. Haley *v.* Eureka County Bank, 21 Nev. 127, 26 Pac. 64, 12 L. R. A. 815.

90. Statute of limitations generally see Limitations of Actions.

91. Alford *v.* Hays, 87 Ga. 155, 13 S. E. 315; Colding *v.* Williamson, 71 Ga. 89; Doubleday *v.* Makepeace, 4 Blackf. (Ind.) 9, 28 Am. Dec. 33.

92. Lowe *v.* Dowbarn, 26 Tex. 507.

93. Loop *v.* Chamberlain, 17 Wis. 504.

94. Disobedience of order of court generally see Contempt.

95. *Connecticut.*—Craft Refrigerating Mach. Co. *v.* Quinnipiac Brewing Co., 63 Conn. 551, 29 Atl. 76, 25 L. R. A. 856.

Delaware.— Pleasanton *v.* Raughley, 4 Del. Ch. 43.

Indiana.— Bayless *v.* Tousey, 20 Ind. 151.

Louisiana.—Jennings *v.* Hardy, 51 La. Ann. 867, 25 So. 554.

Minnesota.— Johnson *v.* Robinson, 20 Minn. 170.

New York.— Fleurot *v.* Durand, 14 Johns. 329.

Washington.— Plummer *v.* Weil, 15 Wash. 427, 46 Pac. 648.

England.— Hollender *v.* Ffoulkes, 16 Ont. Pr. 315.

Canada.— Devlin *v.* Devlin, 3 Ch. Chamb. (U. C.) 491; McCarrol *v.* McCarrol, 2 Ch. Chamb. (U. C.) 380; Lewis *v.* Jones, 1 Ch. Chamb. (U. C.) 120; Jackson *v.* Jackson, 7 Grant Ch. (U. C.) 114; Minnesota Bank *v.* Page, 14 Ont. App. 347.

See 17 Cent. Dig. tit. "Dismissal and Nonsuit," § 117.

Failure to show the court that security for costs is unnecessary is not a ground for dismissal, but only subjects the party to an absolute order to file security. Requard *v.* Theiss, 18 Misc. (N. Y.) 563, 42 N. Y. Suppl. 460. The fact that plaintiff has lodged an appeal against an order for security for costs is "sufficient cause," within the meaning of rule 1246, to exempt him from having his action dismissed for failure to comply with the order pending the appeal. Bennett *v.* Empire Printing, etc., Co., 15 Ont. Pr. 430.

Subsequent order imposing conditions.— Plaintiff's failure to amend his declaration, for which in good faith he has obtained leave, with a continuance of the case by withdrawing a juror, and his failure to pay the term costs imposed on him as a condition of the amendment by an order subsequently made, when he could no longer have any choice as to the acceptance of the leave on those occasions, will not justify the dismissal of his action. Jackson *v.* Emmons, 176 U. S. 532, 20 S. Ct. 465, 44 L. ed. 576 [*reversing* 13 App. Cas. (D. C.) 269].

Refusal by one not bound to obey.— An action by a father for the loss of the services of his minor daughter, occasioned by personal injuries, should not be dismissed because she refuses to obey an order of the court in which the action was pending, requiring her to submit to a physical examination of her person by a physician. Bagwell *v.* Atlanta Consol. St. R. Co., 109 Ga. 611, 34 S. E. 1018, 47 L. R. A. 486.

failure to produce documents, books, or papers, when ordered to do so,[96] provided the order is peremptory in its nature.[97] A nonsuit will not be granted, however, because of the non-production of books and papers on trial, under a rule obtained by defendant, where the non-production is satisfactorily explained, nor where plaintiff is entitled to recover upon other counts in his narration.[98]

8. Irregularities in Proceedings. As a general rule no ground for dismissal is furnished by mere irregularities in proceedings, such as a defective oath for leave to prosecute *in forma pauperis*,[99] failure to tender an indemnifying bond in an action on a lost note,[1] failure to file an itemized account until two days after the writ was issued,[2] that bail was improperly required in an action commenced by capias,[3] failure of the clerk and master in chancery or the complainant for several terms to issue an alias process against certain defendants who have never been served,[4] or failure to file a statement of claim in action against a town.[5] The following omissions or irregularities have, however, been held to be properly taken advantage of by a motion to dismiss or a nonsuit: Failure to transmit the original papers, with the record of the proceedings in a cause wherein the venue has been changed;[6] failure of plaintiff to give a notice or make a demand conditional to his right to sue.[7]

9. Want of Authority to Bring Suit. That a suit is instituted without the authority of the person in whose name it is brought is ground for dismissal,[8] and

96. Trapnall *v.* Craig, 19 Ark. 243; Whitman *v.* Weller, 39 Ind. 515; Silvers *v.* Junction R. Co., 17 Ind. 142.

Previous order necessary.— A motion to nonsuit a plaintiff for not producing books or papers cannot be made, unless a previous order of the court has been obtained for the production of such books or papers. Graham *v.* Hamilton, 25 N. C. 381. See also Parish *v.* Weed Sewing-Mach. Co., 79 Ga. 682, 7 S. E. 138; U. S. Bank *v.* Kurtz, 2 Fed. Cas. No. 920, 2 Cranch C. C. 342; Dunham *v.* Riley, 8 Fed. Cas. No. 4,155, 4 Wash. 126.

Necessity for motion for order.—Under acts authorizing the circuit court on motion and notice to require a party to produce his books and on failure to do so the court on motion may give judgment for the other party as in case of nonsuit, it is not enough for a defendant to give notice to a plaintiff to produce his books and then move for a judgment, for there must first be a motion for an order to produce the books. Thompson *v.* Shelden, 20 How. (U. S.) 194, 15 L. ed. 1001. See also U. S. Bank *v.* Kurtz, 2 Fed. Cas. No. 920, 2 Cranch C. C. 342.

Effect of failure to offer proof of want of time.— A motion for judgment as in case of nonsuit must be denied, where plaintiff claims that nine days before the trial defendant served a notice to produce papers, but offers no proof of want of time to procure them. Jackson *v.* Marsh, Col. & C. Cas. (N. Y.) 210.

97. Ray *v.* Home, etc., Invest., etc., Co., 106 Ga. 492, 32 S. E. 603.

98. Foster *v.* Sandeman, 5 Phila. (Pa.) 133.

99. Fuller *v.* Montague, 53 Fed. 206.

1. Moore *v.* Fall, 42 Me. 450, 66 Am. Dec. 297.

2. Bryant *v.* J. C. Harris Lumber Co., 70 Miss. 683, 12 So. 585.

3. Lyon *v.* Harlow, 7 Mo. 345.

4. Ford *v.* Bartlett, 3 Baxt. (Tenn.) 20.

5. Schriber *v.* Richmond, 73 Wis. 5, 40 N. W. 644.

6. Wight *v.* Kirkpatrick, 5 Ill. 339. See, however, Gillespie *v.* Redmond, 13 Tex. 9, in which it was held that a failure of a plaintiff to transfer a record in time, pursuant to an order for a change of venue, may not make a discontinuance necessary, as the court to which the change is ordered may for good cause shown permit a docketing at a subsequent time.

7. Powell *v.* Coward, 2 Overt. (Tenn.) 326.

In Wisconsin by statute the court may on motion of the adverse party dismiss the action provided the state tax on the action is not paid and summons not filed within ten days after service of an answer or demurrer. Clark *v.* Fox, etc., Imp. Co., 20 Wis. 421. Defendants' right, under Wis. Rev. St. § 2632, to move for dismissal if the summons is not filed or a state tax of one dollar paid within ten days after the service of an answer is not affected by a rule of court which provides that the clerk shall not receive nor file any note of issue in any case, nor place any cause on the calendar, unless the state tax and two dollars fees for clerk's salary shall have been paid. Matthes *v.* Thompson, 83 Wis. 565, 53 N. W. 843.

8. *Mississippi.*— Dove *v.* Martin, 23 Miss. 588.

Missouri.— Keith *v.* Wilson, 6 Mo. 435, 35 Am. Dec. 443.

New Hampshire.— Brown *v.* Wentworth, 46 N. H. 490, 88 Am. Dec. 223.

Rhode Island.—Clarke *v.* Rice, 15 R. I. 132, 23 Atl. 301.

England.— Reynolds *v.* Howell, L. R. 8 Q. B. 398, 42 L. J. Q. B. 181, 29 L. T. Rep. N. S. 208, 22 Wkly. Rep. 18; Murse *v.* Dumford, 13 Ch. D. 764.

Canada.— Mackay *v.* Macfarlane, 12 Ont. Pr. 149.

a motion to dismiss is the proper method of raising the question whether the attorney appearing in the suit has been authorized by plaintiff to prosecute.[9]

10. Want of Jurisdiction — a. Of the Person. Although all questions of jurisdiction are as a general rule raised by demurrer or pleas in abatement,[10] if want of jurisdiction of the person is apparent upon the face of the record the question of jurisdiction may properly be presented by motion to dismiss.[11] Where, however, the want of jurisdiction is not apparent upon the face of the record the presumption is that jurisdiction of the person has been acquired,[12] and objection thereto can be raised only by plea in abatement,[13] plea in bar,[14] or by

See 17 Cent. Dig. tit. "Dismissal and Nonsuit," § 123.

Whether a married woman is under improper control or restraint of her husband in reference to a suit affecting her separate property may be inquired into, and if it should appear that a suit was instituted against her wishes a discontinuance may be compelled. Rusher *v.* Morris, 9 How. Pr. (N. Y.) 266.

Where a suit is brought without plaintiff's knowledge, but is prosecuted with his consent, a nonsuit will not be ordered. Cleverly *v.* Whitney, 7 Pick. (Mass.) 36.

Suit by next friend without knowledge of infant.— The fact that a suit in the name of an infant was brought by a next friend without the knowledge of the infant and even against his will does not afford ground for dismissal on the motion of defendant. Barwick *v.* Rackley, 45 Ala. 215.

9. *California.*— Ventura County *v.* Clay, 119 Cal. 213, 51 Pac. 189; Magnolia, etc., Fruit Cannery *v.* Guerne, (1892) 31 Pac. 363; Boston Tunnel Co. *v.* McKenzie, 67 Cal. 485, 8 Pac. 22; Turner *v.* Caruthers, 17 Cal. 431.

Illinois.— Frye *v.* Calhoun County, 14 Ill. 132.

Iowa.— Savery *v.* Savery, 3 Iowa 271.

Missouri.— Keith *v.* Wilson, 6 Mo. 435, 35 Am. Dec. 443.

New York.— Lindheim *v.* Manhattan R. Co., 68 Hun 122, 22 N. Y. Suppl. 685.

See 17 Cent. Dig. tit. "Dismissal and Nonsuit," § 123.

Where a prima facie showing is made that attorneys had no authority to institute an action, it should be dismissed, unless they prove their authority. Bell *v.* Farwell, 189 Ill. 414, 59 N. E. 955 [*affirming* 89 Ill. App. 638].

Suit by unlicensed attorney.— Under Ill. Rev. Laws, § 99, providing that no person shall practice as an attorney in any suit in which he is not a party in any court of record, either by using his own name or the name of any other person, without having obtained license, a suit commenced by a person who signs himself as agent for another and who has not been regularly licensed as an attorney will be dismissed on motion. Robb *v.* Smith, 4 Ill. 46.

10. See, generally, Pleading.

11. *Alabama.*— Porter *v.* Worthington, 14 Ala. 584.

Indiana.— Byers *v.* Union Cent. L. Ins. Co., 17 Ind. App. 101, 46 N. E. 475. But see Keiser *v.* Yandes, 45 Ind. 174; Newell *v.* Gatling, 7 Ind. 147.

Maine.— Badger *v.* Towle, 48 Me. 20.

Mississippi.— Vicksburg Bank *v.* Jennings, 5 How. 425.

Tennessee.— Parker *v.* Porter, 4 Yerg. 81.

West Virginia.— Price *v.* Pinnell, 4 W. Va. 296.

United States.— Herndon *v.* Ridgway, 17 How. 424, 15 L. ed. 100.

But see Rude *v.* Ohio Mut. Relief Assoc., 4 Ohio Dec. (Reprint) 244, 1 Clev. L. Rep. 157, holding that objection to the jurisdiction of the person apparent on the record must be taken by demurrer.

See 17 Cent. Dig. tit. "Dismissal and Nonsuit," §§ 115, 116.

Although personal service had before hearing on motion.— If at entry of the action the court had no jurisdiction of the person or property of defendant the case will be dismissed on motion, if seasonably filed, although personal service may have been made before a hearing upon the motion. Cassity *v.* Cota, 54 Me. 380.

Residence of defendant.— The fact that defendant is sued in a wrong county is no ground for dismissal, where by his own acts he has made it doubtful in what county he resided. Kuteman *v.* Page, 3 Tex. App. Civ. Cas. § 164.

12. Farmers', etc., Ins. Co. *v.* Buckles, 49 Ill. 482; Delaware, etc., R. Co. *v.* New York, etc., R. Co., 12 Misc. (N. Y.) 230, 33 N. Y. Suppl. 1081.

13. *Colorado.*— Western Union Tel. Co. *v.* Claymore, 2 Colo. 32; Cody *v.* Raynaud, 1 Colo. 272.

Illinois.—Farmers', etc., Ins. Co. *v.* Buckles, 49 Ill. 482.

Maine.— Badger *v.* Towle, 48 Me. 20.

Massachusetts.— Crosby *v.* Harrison, 116 Mass. 114.

Virginia.— North America Guarantee Co. *v.* Lynchburg First Nat. Bank, 95 Vt. 480, 28 S. E. 909.

See also, generally, Pleading.

Where the question of jurisdiction arises from the mode of serving the summons it is error to consider such question on a motion to dismiss. Farmers', etc., Ins. Co. *v.* Buckles, 49 Ill. 482.

14. Files *v.* Reynolds, 66 Ark. 314, 50 S. W. 509, holding that a motion to dismiss an action by an agent because his principal was a foreign corporation and had not filed with the secretary of state a certificate designating

answer.[15] A motion for dismissal for want of jurisdiction of the person will lie where plaintiff in order to give jurisdiction to the court in an action against a non-resident defendant united in the action a fictitious defendant.[16]

b. Of the Subject-Matter. A motion to dismiss is proper where it appears from the record at any stage of the proceedings that the court has not jurisdiction of the subject-matter,[17] as where it appears that the amount claimed by or found to be due plaintiff is below or in excess of the jurisdictional amount prescribed by statute.[18] So in some jurisdictions it seems a motion to dismiss will lie if the want of jurisdiction appears in any way at any stage of the proceedings,[19] but in other

an agent in the state on whom process should be served was properly denied, as that matter should have been brought in bar as a defense. See also, generally, PLEADING.

15. Keiser *v.* Yandes, 45 Ind. 174; Newell *v.* Gatling, 7 Ind. 147; Rude *v.* Ohio Mut L. Assoc., 4 Ohio Dec. (Reprint) 244, 1 Clev. L. Rep. 157.

16. Bush *v.* Cameron, 26 Gratt. (Va.) 403; Henderson *v.* Kissam, 8 Tex. 46, holding that where a defendant is sued outside of his county by means of a fictitious co-defendant, although the joinder was made by mistake defendant is entitled to a dismissal if he does not voluntarily submit to the jurisdiction of the court.

17. *Alabama.*— Burns *v.* Henry, 67 Ala. 209.

Illinois.— Frantz *v.* Fleitz, 85 Ill. 362; Windsor *v.* Cleveland, etc., R. Co., 105 Ill. App. 46.

Louisiana.— State *v.* Monroe, 35 La. Ann. 217.

Maine.— Upham *v.* Bradley, 17 Me. 423.

New Jersey.— Buttoro *v.* Whalen, 64 N. J. L. 461, 45 Atl. 981.

New York.— Gormly *v.* McIntosh, 22 Barb. 271; Perry *v.* Erie Transfer Co., 19 N. Y. Suppl. 239, 22 N. Y. Civ. Proc. 178, 28 Abb. N. Cas. 430; Bradt *v.* Kirkpatrick, 7 Paige 62.

North Carolina.— Parker *v.* Southern Express Co., 132 N. C. 128, 43 S. E. 603, after verdict.

Rhode Island.— Edwards *v.* Hopkins, 5 R. I. 138.

Texas.—Able *v.* Bloomfield, 6 Tex. 263.

Vermont.— Sanders *v.* Pierce, 68 Vt. 468, 35 Atl. 377; Stoughton *v.* Mott, 13 Vt. 175.

West Virginia.— Suber *v.* McClintic, 10 W. Va. 236.

United States.— Susquehanna, etc., R., etc., Co. *v.* Blatchford, 11 Wall. 172, 20 L. ed. 179; Municipal Invest. Co. *v.* Gardiner, 62 Fed. 954; Connor *v.* Vicksburg, etc., R. Co., 36 Fed. 273, 1 L. R. A. 331; Walker *v.* Flint, 7 Fed. 435, 2 McCrary 341.

See 17 Cent. Dig. tit. "Dismissal and Nonsuit," §§ 115, 116.

Exclusive jurisdiction of another court must appear before a case should be dismissed from a court of general jurisdiction for want of jurisdiction. Cocking *v.* Greenslit, 71 Conn. 650, 42 Atl. 1000.

A transitory action brought in the wrong place should be dismissed on motion. Otis *v.* Wakeman, 1 Hill (N. Y.) 604.

18. *Alabama.*— Burns *v.* Henry, 67 Ala. 209. Under the statutes in this state where in actions *ex contractu* upon moneyed demands the amount of recovery not reduced by set-off is less than the sum of which the court has jurisdiction the suit must be dismissed unless there is filed the prescribed affidavit stating that the amount sued for is actually due. Gadsden First Nat. Bank *v.* Pinson, 105 Ala. 588, 17 So. 182; Camp *v.* Marion County, 91 Ala. 240, 8 So. 786; Mills *v.* Long, 58 Ala. 458; Wood *v.* Fowler, 37 Ala. 55; King *v.* Parmer, 34 Ala. 416; McClure *v.* Lay, 30 Ala. 208; McAllister *v.* McDow, 26 Ala. 453; Cummings *v.* Edmunson, 5 Port. 145. But these statutes do not apply to actions of trespass *quare clausum fregit* (Morris *v.* Robinson, 80 Ala. 291) nor to actions for the conversion or detention of personal property (Haws *v.* Morgan, 59 Ala. 508; King *v.* Parmer, 34 Ala. 416).

Colorado.— Denver, etc., R. Co. *v.* Church, 7 Colo. 143, 2 Pac. 218, where amount involved exceeds the court's jurisdiction, as appears by the verdict, there must be a dismissal, although the petition stated it to be within the jurisdiction.

Illinois.— Taylor *v.* Smith, 64 Ill. 445; Phillips *v.* Quick, 63 Ill. 445.

Louisiana.— State *v.* Monroe, 35 La. Ann. 217.

Michigan.—Backus *v.* Jeffrey, 47 Mich. 127, 10 N. W. 138.

Rhode Island.— Edwards *v.* Hopkins, 5 R. I. 138.

South Carolina.— Hammarskold *v.* Bull, 9 Rich. 474.

Texas.— Carter *v.* Hubbard, 79 Tex. 356, 15 S. W. 392; Haddock *v.* Taylor, 74 Tex. 216, 11 S. W. 1093; Roller *v.* Zundelowitz, (Civ. App. 1903) 73 S. W. 1070; Hill *v.* Strauss, (Civ. App. 1900) 56 S. W. 540; Jones *v.* Texas, etc., R. Co., 23 Tex. Civ. App. 65, 55 S. W. 371; McFadin *v.* San Antonio, 22 Tex. Civ. App. 140, 54 S. W. 48; Hammond *v.* Lamar County, 18 Tex. Civ. App. 188, 44 S. W. 179. *Compare* Doherty *v.* Galveston, 19 Tex. Civ. App. 708, 48 S. W. 804.

Vermont.— Sanders *v.* Pierce, 68 Vt. 468, 35 Atl. 377. But where plaintiff brings his action in good faith believing that he has a just claim to more than the jurisdictional amount, his case will not be dismissed for want of jurisdiction because he fails to establish that amount on trial. Powers *v.* Thayer, 30 Vt. 361.

See 17 Cent. Dig. tit. "Dismissal and Nonsuit," §§ 115, 116.

19. Wildman *v.* Rider, 23 Conn. 172. And see Thompson *v.* The Julius D. Morton, 2 Ohio St. 26, 59 Am. Dec. 658.

jurisdictions it is held that a motion to dismiss is the proper procedure only where the want of jurisdiction is apparent on the record, and that in any other case of want of jurisdiction of the subject-matter the objection must be taken by plea.[20] In some cases it is held that the action may be dismissed without any objection being made,[21] as where the verdict rendered finds for plaintiff an amount less than the jurisdictional amount prescribed by statute.[22]

11. Objections Relating to Process[23] — a. Want of Service. Want of service of process unless waived is a ground for dismissal;[24] and if only one of two defendants sued jointly is served, his motion to dismiss should be granted, where it does not appear that the other defendant was dead or beyond the jurisdiction.[25] Where, however, a complete determination of the controversy can be had without the presence of defendant not served the cause will not be dismissed on that ground.[26]

b. Delay in Issue, Service, and Return of Process. Defendant is entitled to a dismissal unless a summons is issued[27] or process is served[28] within the time prescribed by statute. A statute which provides that an action shall be dismissed unless summons shall be issued within one year and service and return thereon made within three years after the commencement of the action[29] does not limit

20. *Alabama.*— Burns *v.* Henry, 67 Ala. 209.

Georgia.— Crawford *v.* Ryals, 86 Ga. 349, 12 S. E. 814.

Indiana.— Ludwick *v.* Beckamire, 15 Ind. 198.

New York.— Gormly *v.* McIntosh, 22 Barb. 271; Bradt *v.* Kirkpatrick, 7 Paige 62.

North Carolina.— Cole *v.* Carolina Cent. R. Co., 74 N. C. 587.

Texas.— Hoffman *v.* Clehurne Bldg., etc., Assoc., 85 Tex. 409, 22 S. W. 154; Carter *v.* Hubbard, 79 Tex. 356, 15 S. W. 392. *Compare* Gouhenant *v.* Anderson, 20 Tex. 459; Austin *v.* Jordan, 5 Tex. 130; Fitzpatrick *v.* Small, 1 Tex. App. Civ. Cas. § 1140; Sander *v.* Ker, 1 Tex. App. Civ. Cas. § 1081, all holding that although the jurisdiction may appear regular on the record, yet if it appears that statements therein were made falsely for the purpose of conferring jurisdiction it is good ground for dismissal.

United States.— Susquehanna, etc., R., etc., Co. *v.* Blatchford, 11 Wall. 172, 20 L. ed. 179; Walker *v.* Flint, 7 Fed. 435, 2 McCrary 341.

See 17 Cent. Dig. tit. "Dismissal and Nonsuit," §§ 115, 116.

That the court had no jurisdiction of the subject-matter of the action must be raised by demurrer or answer and not by motion to dismiss the complaint. Delaware, etc., R. Co. *v.* New York, etc., R. Co., 12 Misc. (N. Y.) 230, 33 N. Y. Suppl. 1081.

21. Burgess *v.* Burgess, 71 N. H. 293, 51 Atl. 1074; Edwards *v.* Hopkins, 5 R. I. 138; Hammarskold *v.* Bull, 9 Rich. (S. C.) 474, holding that where the matter is clearly not within its jurisdiction the court may at any time of its own motion or upon suggestion of party or friend stay further proceedings. See also *infra*, III, M.

In federal courts.— Where by means of any fictitious transaction an action is brought in a federal court by one for the benefit of the real party in interest who could not have sued in that court, for the purpose of giving the court jurisdiction of the cause, upon discovery of such fact, the court would dismiss the action of its own motion for want of jurisdiction. Maxwell *v.* Levy, 2 Dall. (Pa.) 381, 1 L. ed. 424, 16 Fed. Cas. No. 9,321; Lake County *v.* Dudley, 173 U. S. 243, 19 S. Ct. 398, 43 L. ed. 684; Lehigh Min., etc., Co. *v.* Kelly, 160 U. S. 327, 16 S. Ct. 307, 40 L. ed. 444; Jones *v.* League, 18 How. (U. S.) 76, 15 L. ed. 263; Hurst *v.* McNeil, 12 Fed. Cas. No. 6,936, 1 Wash. 70. See also Barney *v.* Baltimore, 6 Wall. (U. S.) 280, 18 L. ed. 825; Smith *v.* Kernochen, 7 How. (U. S.) 198, 12 L. ed. 666; McDonald *v.* Smalley, 1 Pet. (U. S.) 620, 7 L. ed. 287.

An appellate court will dismiss a bill, although there was no demurrer thereto, where the lower court had no jurisdiction of the subject-matter. Cresap *v.* Kemble, 26 W. Va. 603.

22. Denver, etc., R. Co. *v.* Church, 7 Colo. 143, 2 Pac. 218; Owens *v.* Curry, 3 Strobh. (S. C.) 261 [*overruling* Nance *v.* Palmer, 2 Bailey (S. C.) 88].

23. For matters relating to process generally see Process.

24. McGhee *v.* Gainesville, 78 Ga. 790, 3 S. E. 670; Searls *v.* Hardy, 75 Me. 461; Briggs *v.* Davis, 34 Me. 158.

25. Graham *v.* Marks, 95 Ga. 38, 21 S. E. 986. See also Morris *v.* Crawford, 16 Abb. Pr. (N. Y.) 124.

26. Kaliske *v.* Weil, 33 N. Y. Suppl. 413, 24 N. Y. Civ. Proc. 248. And see Peck *v.* Agnew, 126 Cal. 607, 59 Pac. 125.

27. Under a statute providing that at any time within one month after filing of complaint plaintiff may have a summons issued, the action must he dismissed unless the summons is issued within that time. Coombs *v.* Parish, 6 Colo. 296; Steves *v.* Carson, 2 Colo. App. 202, 30 Pac. 1102.

28. Solomon *v.* Newell, 67 Ga. 572. And see Smith *v.* Bohn, 22 Fed. Cas. No. 13,015, 4 Wash. 127.

29. Such a statute is not unconstitutional so far as it is made applicable to pending

the time for service of the summons to one year after the commencement of the action, but fixes the extreme limit of time, both for the service of summons and return of summons, at three years;[30] but the court may in its discretion[31] dismiss, even though summons was issued and service was had within the time prescribed by statute.[32]

c. Defects in Steps Leading to Issuance of Process. The action will be dismissed for omission to indorse upon the writ in an action of trover the true nature of the action,[33] and an arrest of a debtor on mesne process under a creditor's sworn certificate, which is not made in compliance with the statutory requirements, is a ground for dismissal.[34]

d. Defective or Irregular Service or Return. Ordinarily defective service[35] or return of process[36] is not a ground for dismissal. A motion to dismiss for insufficiency of service, based on facts not apparent of record, cannot be entertained.[37] So it is not a ground for dismissal that service of process was procured by a fraudulent device or trick;[38] that a copy of the writ alone and no process was served on defendant;[39] or that a cause was improperly commenced by a capias ad respondendum instead of summons;[40] and an action will not be dismissed because the service was insufficient to support a personal judgment, if it was sufficient to hold property by attachment.[41] It has been held, however, that a cause will be dismissed where there is total want of authority in the person serving the process,[42] or where process is executed out of the jurisdiction of the court;[43] and service of a writ by a summons instead of by copy as required by statute is ground for dismissal.[44] So in case of misnomer of defendant the proper course is to discontinue and commence the action anew by issuing a writ against the true defendant.[45]

suits. Vrooman *v.* Li Po Tai, 113 Cal. 302, 45 Pac. 470.

30. Murray *v.* Gleeson, 100 Cal. 511, 36 Pac. 88. Under this provision the action must be dismissed, where the summons is not served and return made thereon within three years after the action was commenced, if no appearance has been made by defendant or defendants within that period. Sharpstein *v.* Eells, 132 Cal. 507, 64 Pac. 1080; Siskiyou County Bank *v.* Hoyt, 132 Cal. 81, 64 Pac. 118; Peck *v.* Agnew, 126 Cal. 607, 59 Pac. 125; Vrooman *v.* Li Po Tai, 113 Cal. 302, 45 Pac. 470.

Appearance of part of defendants.— Failure to return the summons within the time prescribed by statute authorizes a dismissal as to such defendants as have not appeared, but the action may be prosecuted against those who have made such appearance, provided the court will be authorized to render a judgment against them in the absence of the other defendants. Peck *v.* Agnew, 126 Cal. 607, 59 Pac. 125.

31. The discretion of the court to determine whether there has been an inexcusable delay within the time so prescribed still remains, and each case must be determined upon its own peculiar circumstances. Castro *v.* San Francisco, (Cal. 1894) 35 Pac. 1035; Murray *v.* Gleeson, 100 Cal. 511, 35 Pac. 88; Kreiss *v.* Hotaling, 99 Cal. 383, 33 Pac. 1125.

The only limitation upon this discretion is that it must not be abused. Kreiss *v.* Hotaling, 99 Cal. 383, 33 Pac. 1125.

32. Stanley *v.* Gillen, 119 Cal. 176, 31 Pac. 183.

33. Williams *v.* Campbell, 1 Wash. (Va.) 153.

34. Bailey *v.* Carville, 62 Me. 524; Sargent *v.* Roberts, 52 Me. 590.

On the other hand a failure to make affidavit necessary to issuance of process for arrest, it has been held, is not ground for dismissal. Wann *v.* McGoon, 3 Ill. 74; Haynes *v.* Saunders, 11 Cush. (Mass.) 537.

35. Cheever *v.* Lane, 3 Iowa 296; McAlpin *v.* Jones, 10 La. Ann. 552; Bliss *v.* Connecticut, etc., R. Co., 24 Vt. 428.

36. Phillebart *v.* Evans, 25 Mo. 323.

Where notice is given by publication, advertisement is the substantial process, and the cause will not be dismissed for failure to return summons. Church *v.* Furniss, 64 N. C. 659.

37. Richmond *v.* Whittlesey, 2 Allen (Mass.) 230.

38. Crosby *v.* Harrison, 116 Mass. 114; Beacom *v.* Rogers, 79 Hun (N. Y.) 220, 29 N. Y. Suppl. 507; Fitzgerald, etc., Constr. Co. *v.* Fitzgerald, 137 U. S. 98, 11 S. Ct. 36, 34 L. ed. 608.

39. Killen *v.* Compton, 60 Ga. 116.

40. Rittenour *v.* McCausland, 5 Blackf. (Ind.) 540.

41. Preble *v.* Bates, 37 Fed. 772.

42. Howard *v.* Walker, 39 Vt. 163; Bliss *v.* Connecticut, etc., R. Co., 24 Vt. 428.

43. Williams *v.* Welch, 5 Wend. (N. Y.) 290.

44. Sleeper *v.* Free Baptist Assoc., 58 N. H. 27.

45. Brittin *v.* Shloss, 9 Wkly. Notes Cas. (Pa.) 510.

12. Objections Relating to Parties[46] — **a. Want of Capacity to Sue.** As a general rule want of capacity to sue cannot be taken advantage of by a motion to dismiss or for nonsuit,[47] but it has been held that an action may be dismissed where plaintiff is neither a natural nor an artificial person.[48]

b. Misnomer. The misnomer of a party is not a ground for motion to dismiss or for nonsuit, but should be availed of by plea in abatement.[49]

c. Misjoinder of Parties.[50] At common law, except where the misjoinder appears upon the face of the record,[51] a joinder of too many plaintiffs is a ground of nonsuit on the trial, and this is true whether the action is on contract or sounds in tort.[52] So if too many persons are made defendants in actions on contract plaintiff will be nonsuited,[53] and he cannot avoid the effect of a misjoinder by entering a *nolle prosequi* as to defendant improperly joined, but must discontinue and commence a new action.[54] In actions *ex delicto*, however, a misjoinder of defendants is immaterial.[55] Under the code procedure, in a number of jurisdictions, a misjoinder of parties plaintiff is not a ground of dismissal of the complaint as to all the plaintiffs, if either has shown that he has a good cause of action;[56] but in such case the motion must be for a dismissal of the complaint as

46. **Parties** generally see PARTIES.

47. *Maryland.*— Kettlewell *v.* Peters, 23 Md. 312.

New Jersey.— Hatter *v.* Hosp, 3 N. J. L. J. 152.

New York.— Spooner *v.* Delaware, etc., R. Co., 115 N. Y. 22, 21 N. E. 696; Fink *v.* Manhattan R. Co., 15 Daly 479, 8 N. Y. Suppl. 327, 18 N. Y. Civ. Proc. 141, 24 Abb. N. Cas. 81.

South Carolina.— May *v.* Hancock, 1 Bailey 299. But see Matthews *v.* Cantey, 48 S. C. 588, 26 S. E. 894, holding that in an action by a pledgee to enforce a note and mortgage, where it appeared that the debt secured had been paid in full since the commencement of the action, and that plaintiff had no interest in the notes sued on, it was not reversible error for the court to dismiss the action on motion, although no supplemental pleadings raising such issue had been filed.

Washington.— Dahl *v.* Tibbals, 5 Wash. 259, 31 Pac. 868.

But see Cuppy *v.* Coffman, 82 Iowa 214, 47 N. W. 1005, holding that where an administrator is removed for failure to file his bond, an action by him as such administrator is properly dismissed where no appeal is taken from such order of removal.

See 17 Cent. Dig. tit. "Dismissal and Nonsuit," § 125.

48. Mexican Mill *v.* Yellow Jacket Silver Min. Co., 4 Nev. 40, 97 Am. Dec. 510.

49. Barnes *v.* Perine, 9 Barb. (N. Y.) 202; Myers *v.* Sealy, 5 Rich. (S. C.) 473; Downer *v.* Morrison, 2 Gratt. (Va.) 250. And see Com. *v.* Fredericks, 119 Mass. 199, holding that a misnomer of a defendant in a complaint, which is not apparent on the record, can only be availed of by plea in abatement. But *compare* Rosencrantz *v.* Rogers, 40 Cal. 489, holding that a person not named as defendant in the complaint but served as a party, designated by a fictitious name, under a statute authorizing this practice, when plaintiff is ignorant of defendant's true name, may obtain a dismissal of the complaint on motion, where the complaint does not allege that plaintiff was ignorant of the true name and it could have been ascertained by inquiry, and where plaintiff made no offer in response to the motion to insert the true name in the complaint.

50. **Misjoinder of parties in equity** see EQUITY.

51. Bond *v.* Hilton, 51 N. C. 180, where the error appears on the face of the record it must be taken advantage of by demurrer, or motion in arrest of judgment or writ of error.

52. Knights Templar, etc., Life Indemnity Co. *v.* Gravett, 49 Ill. App. 252; Myers *v.* Myers, 1 Bailey (S. C.) 306; Cheney *v.* Cheney, 26 Vt. 606.

In Louisiana a misjoinder of plaintiffs, as in common-law states, is ground for nonsuit. Dugas *v.* Truxillo, 15 La. Ann. 116.

53. Page *v.* De Leuw, 58 Ill. 85; McIntosh *v.* Ensign, 28 N. Y. 169; Stewart *v.* Glenn, 5 Wis. 14.

After severance.— A judgment as in case of nonsuit may be ordered if plaintiff after severance in an action against two defendants carries on the action against both. Anonymous, 4 Hill (N. Y.) 19.

54. Page *v.* De Leuw, 58 Ill. 85.

Jurisdiction dependent on person improperly joined.— If a plaintiff in order to give jurisdiction to a court in a case where defendant lives in another county joins in the action a person whom he knows is not interested therein, the court will on motion dismiss the action. Bush *v.* Campbell, 26 Gratt. (Va.) 403. See also Dunn *v.* Hazlett, 4 Ohio St. 435.

If an action is brought against one person as agent for another, whose name is stricken from the records, and plaintiff announces that he has no case against the "agent," the entire proceeding may be dismissed. Irvine's Georgia Music House *v.* Wynn, 107 Ga. 402, 33 S. E. 415.

55. Murphy *v.* Orr, 32 Ill. 489.

56. Simar *v.* Canaday, 53 N. Y. 298, 13 Am. Rep. 523; Fuller *v.* Fuller, 5 Hun (N. Y.) 595.

to plaintiff in whom no right of action appears.[57] Furthermore a plaintiff will not be nonsuited because he has brought too many parties into court, whether the action be on contract or tort.[58] The objection must be taken by demurrer or answer or it is waived.[59]

d. Nonjoinder of Parties.[60] In actions at common law, where a person who should be joined as plaintiff is omitted, defendant may demur, move in arrest of judgment, or sue out a writ of error, if the objection appears upon the pleadings.[61] And if it does not appear upon the pleadings but is disclosed on the trial plaintiff will be nonsuited.[62] In case of a defect of parties defendant, however, the objection can be taken by plea in abatement only. The objection cannot be raised by a motion for a nonsuit.[63] Under the provisions of some of the codes, where there is a defect of parties, either plaintiffs or defendants, the objection must be taken by demurrer if apparent on the face of the complaint, and by answer if it does not so appear, otherwise it will be deemed waived.[64]

e. Death or Disability of Party. The death or disability of a party pending proceedings is not a ground for dismissal or nonsuit of an action which may be carried on by, or enforced against, another representing the one deceased or under disability.[65] And especially does this rule apply prior to expiration of the

57. Simar *v.* Canaday, 52 N. Y. 298, 13 Am. Rep. 523.

58. *California.*—Rutenberg *v.* Main, 47 Cal. 213; Gillam *v.* Sigman, 29 Cal. 637; Rowe *v.* Chandler, 1 Cal. 167.

Kentucky.— Hunt *v.* Semonin, 79 Ky. 270.

Montana.— Conklin *v.* Fox, 3 Mont. 208.

New York.— McIntosh *v.* Ensign, 28 N. Y. 169; Marquat *v.* Marquat, 12 N. Y. 336; Brumskill *v.* James, 11 N. Y. 294; Parker *v.* Jackson, 16 Barb. 33; Harrington *v.* Higham, 15 Barb. 524.

South Dakota.— Austin, etc., Mfg. Co. *v.* Heiser, 6 S. D. 429, 61 N. W. 445.

See 17 Cent. Dig. tit. "Dismissal and Nonsuit," § 126.

59. Rutenberg *v.* Main, 47 Cal. 213; Conklin *v.* Fox, 3 Mont. 208.

60. Nonjoinder of parties in equity see EQUITY.

61. Luke *v.* Marshall, 5 J. J. Marsh. (Ky.) 353; Prunty *v.* Mitchell, 76 Va. 169.

62. Holyoke *v.* Loud, 69 Me. 59; Prunty *v.* Mitchell, 76 Va. 169. And see Snyder *v.* Finley, 1 MacArthur (D. C.) 220, holding that where there is a defect of parties plaintiff, defendant may plead in abatement or move for nonsuit at the trial.

If it does not clearly appear whether plaintiff not joined was a party to the contract in suit or a mere agent the court will not grant a motion for nonsuit for non-joinder. Watts *v.* Buck, 1 Strobh. (S. C.) 291.

63. *Arkansas.*—Hamilton *v.* Buxton, 6 Ark. 24; Taylor *v.* Auditor, 2 Ark. 174.

Illinois.— Lurton *v.* Gilliam, 2 Ill. 577, 33 Am. Dec. 430.

Indiana.— Bledsoe *v.* Irvin, 35 Ind. 293; Bragg *v.* Wetzel, 5 Blackf. 95, code has not changed rule.

Maine.— Richmond *v.* Toothaker, 69 Me. 451; Holyoke *v.* Loud, 69 Me. 59; Winslow *v.* Merrill, 11 Me. 127; Harwood *v.* Roberts, 5 Me. 441.

Maryland.— Settig *v.* Birkestack, 38 Md. 158; Merrick *v.* Metropolis Bank, 8 Gill 59.

New Hampshire.— Powers *v.* Spear, 3 N. H. 35.

New York.— Williams *v.* Allen, 7 Cow. 316.

Pennsylvania.— Horton *v.* Cook, 2 Watts 40.

South Carolina.— Exum *v.* Davis, 10 Rich. 357.

Vermont.— Ives *v.* Hulet, 12 Vt. 314; Nash *v.* Skinner, 12 Vt. 219, 36 Am. Dec. 338.

Virginia.— Prunty *v.* Mitchell, 76 Va. 169.

United States.— Gilman *v.* Rives, 10 Pet. 298, 9 L. ed. 432.

England.— Rice *v.* Shute, 5 Burr. 2611, 2 W. Bl. 695; Cabell *v.* Vaughn, 2 Wm. Saund. 291.

See 12 Cent. Dig. tit. "Dismissal and Nonsuit," § 127.

In Louisiana the rule is different, and it has been held that an action may be dismissed for want of proper defendants. Leonora *v.* Scott, 8 La. Ann. 460.

64. Parchen *v.* Peck, 2 Mont. 567; Byxbie *v.* Wood, 24 N. Y. 607; Zabriskie *v.* Smith, 13 N. Y. 322, 64 Am. Dec. 551; Rhodes *v.* Dymock, 33 N. Y. Super. Ct. 141.

Under the Missouri code it is improper to dismiss because all are not made parties who should have been, as the court has power to order others interested to be made parties. Hayden *v.* Marmaduke, 19 Mo. 403.

65. Dixon *v.* Cardozo, 106 Cal. 506, 39 Pac. 857; Norris *v.* Clinkscales, 44 S. C. 315, 22 S. E. 1 (where it is held that the death of the mortgagor is no ground for a nonsuit of a chattel mortgagee's claim, which may be enforced against the executors of the mortgagor); Alexander *v.* Davidson, 2 McMull. (S. C.) 49 (holding that the death of plaintiff in an action at law abates the action, but it is not ground for a nonsuit).

Death of a lessor is not ground for the dismissal of an action of ejectment, as the right to carry it on is in the lessee. Thomas *v.* Kelly, 35 N. C. 43.

Discontinuance on motion of a guardian of an insane person will be granted where plaintiff is placed under guardianship pending an action, and the probate court has decreed that his estate be administered in the insol-

period within which there may be a revivor of the action by or against the representative of the deceased.[66]

13. OBJECTIONS RELATING TO PLEADINGS[67] — a. In General. Where the pleadings are so defective that they fail to state a cause of action against defendant, and the defects are such that they cannot be obviated by subsequent proceedings, a motion for a dismissal or nonsuit will be granted,[68] and the granting of such a motion is not a matter of discretion with the court but a legal right.[69] But a defendant cannot move for a dismissal or nonsuit for the mere insufficiency or uncertainty of the declaration or complaint,[70] where the defects may be obviated by

vent course, under N. H. Comp. St. p. 159, § 30. Jones *v.* Jones, 45 N. H. 123.

66. Bauer *v.* Word, 135 Ala. 430, 33 So. 538, holding that the death of one of the parties pending suit, suggested on the record, is not ground for dismissing such suit before the expiration of twelve months from the date of the suggestion, within which time there could be a revivor of the suit.

Where a suit is partially abated by the death of one of the defendants, the other defendant cannot move to dismiss the bill, the proper course being to move that plaintiff do revive within a limited time. Upper Canada Bank *v.* Nichol, 1 Ch. Chamb. (U. C.) 294. But see Rice *v.* George, 2 Ch. Chamb. (U. C.) 74, in which it was held that where a suit abates by the death of one of the defendants, the other defendant may move to dismiss for want of prosecution without moving that he revive; but if deceased defendant and the surviving defendant be both represented by the same solicitor the order may be to revive or that the bill be dismissed.

67. Pleadings generally see PLEADING.

68. Smith *v.* Walker, 1 Wash. (Va.) 135, a repleader will not be awarded. See also Mason *v.* Lewis, 1 Greene (Iowa) 494, where the court uses *dictum* to the effect that defects sufficient to justify an arrest of judgment may be grounds for a nonsuit.

Thus dismissal or nonsuit has been held to be proper for a failure to allege, at the time of commencing an action by or against the commissioner of highways, under the New York statute, that plaintiff or defendant was a commissioner of highways (Boots *v.* Washburn, 79 N. Y. 207; Albro *v.* Rood, 24 Hun (N. Y.) 72); for failure to allege in a declaration by an assignee on a note, the fact of assignment, date of payment of the note, and a promise to pay (Earhart *v.* Campbell, 8 Fed. Cas. No. 4,241*a*, Hempst. 48); or for failure to allege in a revocatory action the vendor's insolvency (Hart *v.* Bowie, 34 La. Ann. 323).

If a cross complaint cannot be amended so as to make a cause of action its dismissal is not error. Jackson *v.* Finch, 27 Ind. 316.

A petition either original or amended not containing a cause of action may be properly dismissed. Cronin *v.* Gay, 20 Tex. 460.

If the complaint is bad in substance a motion to dismiss may be granted. Tooker *v.* Arnoux, 76 N. Y. 397; Scofield *v.* Whitelegge, 49 N. Y. 259; Coffin *v.* Reynolds, 37 N. Y. 640, 5 Transcr. App. (N. Y.) 74; Reissman *v.* Jacobwitz, 22 Misc. (N. Y.) 551, 49 N. Y. Suppl. 1006; Miller *v.* Rinaldo, 21 Misc. (N. Y.) 470, 47 N. Y. Suppl. 636.

Failure to allege title.— Where in an action to set aside a judgment decreeing the ownership of land to be in defendant plaintiff does not allege ever having had possession of title the action will be dismissed. Ferguson *v.* Thomas, 6 La. Ann. 218.

In an action against officers for false arrest, where the petition shows that the officers acted with probable cause, a judgment dismissing the action will be sustained, although on the trial of the merits as to the other defendant it appears that he did not instigate the arrest and that the officers acted without probable cause. Lyons *v.* Carroll, 107 Ala. 471, 31 So. 760.

69. Tooker *v.* Arnoux, 76 N. Y. 397; Reissman *v.* Jacobwitz, 22 Misc. (N. Y.) 551, 49 N. Y. Suppl. 1006.

70. *Georgia.*— Metropolitan St. R. Co. *v.* Powell, 89 Ga. 601, 16 S. E. 118.

Kentucky.— Hileman *v.* Day Bros. Lumber Co., 111 Ky. 557, 64 S. W. 419, 23 Ky. L. Rep. 758; Hunt *v.* Semonin, 79 Ky. 270.

New Hampshire.—Hart *v.* Chesley, 18 N. H. 373.

New York.— Kelly *v.* Kelly, 3 Barb. 419; Miller *v.* White, 8 Abb. Pr. N. S. 46, holding that an action should not be dismissed at the trial merely for insufficiency of the complaint, if the cause of action is proved, and defendant has not been surprised or prejudiced.

Vermont.— Alexander *v.* School-Dist. No. 6, 62 Vt. 273, 19 Atl. 995.

Washington.— Wilkeson Coal, etc., Co. *v.* Driver, 9 Wash. 177, 37 Pac. 307.

See 17 Cent. Dig. tit. "Dismissal and Nonsuit," §§ 134, 137.

Where allegations will sustain recovery as to part of relief asked, it is error to dismiss the complaint, although insufficient as to the greater part. Matthews *v.* Matthews, 80 Hun (N. Y.) 605, 30 N. Y. Suppl. 449.

When a complaint states a cause of action in any sum, it should not be dismissed on demurrer, although it does not state a cause of action for the full amount claimed. Ingham *v.* Ryan, (Colo. App. 1903) 71 Pac. 899.

Where a petition contained several counts, it is not error to refuse to dismiss the whole case because one count is bad. Woodbridge *v.* Drought, 118 Ga. 671, 45 S. E. 266.

Failure to state cause of action against co-defendant.— When, in an action against two defendants, the complaint only states a cause of action against one of the defendants

amendment,[71] or by giving leave to plead over,[72] or by allowing a continuance,[73] or where the defect may be cured by verdict,[74] or can be taken advantage of by answer, demurrer, motion in arrest of judgment, or objection to the admission of evidence.[75] The underlying principle as shown by the cases is: That if trial may be had on the merits of the case, and the defects in the pleading may be amended or cured by subsequent pleas or proceedings the action should not be dismissed.

b. Omission of Formal Requisites. The omission of formal requisites, such as signing and verifying a petition,[76] properly entitling papers in a cause (if it is apparent to what case they relate),[77] or stating separately and numbering distinct causes of action,[78] unless the omission is in disobedience of an order of the court,[79]

named, the defendant against whom the cause of action is stated is not entitled to have the action dismissed as to him upon the sole ground that no cause of action is stated against his co-defendant. Austin, etc., Mfg. Co. *v.* Heiser, 6 S. D. 429, 61 N. W. 445.

After demurrer to a petition is overruled, the sufficiency of the petition cannot be tested by a motion for a nonsuit. McCandless *v.* Conley, 115 Ga. 48, 41 S. E. 256.

Defects cured by proofs furnished by moving party.— It is not error to deny a motion for nonsuit on the ground that the complaint is defective, where the motion was not made until after the defects had been cured by proof furnished by the moving party without objection. State *v.* Equitable Indemnity Assoc., 18 Wash. 514, 52 Pac. 234.

71. Police Jury *v.* Mahoudeau, 27 La. Ann. 224.

Where at the close of the testimony plaintiff obtained leave to file an amended complaint to correspond with the proofs produced, a motion for nonsuit before the filing of the amended complaint on the ground that the complaint did not state a cause of action should not be granted. Richardson *v.* Carbon Hill Coal Co., 6 Wash. 52, 32 Pac. 1012, 20 L. R. A. 338.

Pleading matters by amendment of the original petition which should be pleaded by supplemental petition does not constitute sufficient cause for dismissal. Seevers *v.* Hamilton, 11 Iowa 66. "So long as the substantial rights of the parties are not prejudiced by allowing amendments — so long as there is a substantial subject matter, or remedy sought — the court should not dismiss the cause, but give proper time, or proper terms, for such amendments, and making up the issues." Harkins *v.* Edwards, 1 Iowa 296, 299.

Where plaintiff declines to amend a complaint which does not state a cause of action, the action may be dismissed on defendant's motion. King *v.* Montgomery, 50 Cal. 115; Chipman *v.* Cornwell, 111 Ga. 862, 36 S. E. 923, holding that where the court passes an order sustaining a motion to dismiss a case on the ground that the petition does not set forth a cause of action, and in such order allows plaintiff a specified time within which to amend, the effect of the order is to take the case out of court and finally dispose of the same unless a proper amendment is filed within the time named in the order.

72. Conger *v.* Judson, 69 N. Y. App. Div. 121, 74 N. Y. Suppl. 504.

73. Bell *v.* Rowland, 9 Iowa 281 (that defendant is taken by surprise by an amendment allowed to plaintiff is not grounds for dismissal, but a continuance should be allowed); Harkins *v.* Edwards, 1 Iowa 296.

74. Jersey Co. *v.* Halsey, 5 N. J. L. 750; Baldwin *v.* O'Brian, 1 N. J. L. 418, 1 Am. Dec. 208; Smith *v.* Walker, 1 Wash. (Va.) 135. And see Mastin *v.* Marlow, 65 N. C. 695; Garrett *v.* Trotter, 65 N. C. 430.

75. *Georgia.*— Metropolitan St. R. Co. *v.* Powell, 89 Ga. 601, 16 S. E. 118; Greenfield *v.* Vason, 74 Ga. 126; Jossey *v.* Stapleton, 57 Ga. 144.

Indiana.— Jackson *v.* Finch, 27 Ind. 316.

Iowa.— State *v.* De Kruif, 72 Iowa 488, 34 N. W. 607.

New Hampshire.— Smith *v.* Piermont, 31 N. H. 343.

New York.— Kelly *v.* Kelly, 3 Barb. 419; Winterson *v.* Eighth Ave. R. Co., 2 Hilt. 389, duplicity in plea.

North Carolina.— Wilson *v.* Sykes, 84 N. C. 215.

Pennsylvania.— McKee *v.* Thompson, Add. 24.

South Carolina.— Boyd *v.* Brent, 3 Brev. 241.

Washington.— Wilkeson Coal, etc., Co. *v.* Driver, 9 Wash. 117, 37 Pac. 307.

See 17 Cent. Dig. tit. "Dismissal and Nonsuit," §§ 134, 137; and, generally, PLEADING.

Defects apparent on the face of the declaration independent of any references to the writ or its services are not the subject of a motion to dismiss. Alexander *v.* School-Dist. No. 6, 62 Vt. 273, 19 Atl. 995.

Dismissing a suit for want of a declaration is error, where there is a declaration, on file and of record, to which a demurrer had been sustained on the ground that the facts stated were insufficient to maintain the action. Hower *v.* Lewton, 18 Fla. 328.

Under the Georgia practice a nonsuit takes place for failure to support the declaration by evidence, and want of necessary averments in a declaration is not cause for a nonsuit, but may be taken advantage of by a demurrer or motion *ore tenus* to dismiss. Anderson *v.* Pollard, 62 Ga. 46.

76. Fritz *v.* Barnes, 6 Nebr. 435.

77. Jansen *v.* Mundt, 20 Nebr. 320, 30 N. W. 53.

78. Commercial Bank *v.* Pfeiffer, 22 Hun (N. Y.) 327.

79. **Refusal to obey** an order of court to separately state and number different causes of action justifies a dismissal. Eisenhour *v.*

is not a ground for dismissal, although it may be ground for a motion to amend,[80] to make the pleading more specific,[81] or to strike it out.[82]

c. Delays or Omissions in Filing or Serving. Delay or omission in filing or serving pleadings within the time prescribed by statute, rules of practice, or order of court is usually a ground for dismissal or judgment as in case of a nonsuit or *non prosequitur*,[83] unless good cause for the default be shown.[84] But a failure to plead to special pleas is not ground for a nonsuit, where trial may be had on other issues pleaded.[85]

d. Variance. A material variance between the writ and declaration brought to the notice of the court by the pleading,[86] may be ground for motion to dis-

Stein, 37 Kan. 281, 15 Pac. 167; Jackson County Com'rs *v.* Hoaglin, 5 Kan. 558; Thompson *v.* Gatlin, 58 Fed. 534, 7 C. C. A. 351.

80. Jansen *v.* Mundt, 20 Nebr. 320, 30 N. W. 53. See, generally, PLEADING.

81. Commercial Bank *v.* Pfeiffer, 22 Hun (N. Y.) 327. See, generally, PLEADING.

82. Fritz *v.* Barnes, 6 Nebr. 435. See, generally, PLEADING.

83. *Alabama.*— McCrory *v.* Boyd, 3 Stew. 279.

District of Columbia.— McIntosh *v.* Moulton, 3 MacArthur 587.

Illinois.— Howell *v.* Albany City Ins. Co., 62 Ill. 50; Downey *v.* Smith, 13 Ill. 671, holding that the declaration must be filed ten days before the second term of the court or defendant will be entitled to a judgment as in the case of a nonsuit.

Iowa.— Hudson *v.* Blanfus, 22 Iowa 323.

New Mexico.— German-American Ins. Co. *v.* Etheridge, 8 N. M. 18, 41 Pac. 535.

New York.— People *v.* Justices Super. Ct., 1 Barb. 478; Luce *v.* Trempert, 9 How. Pr. 212; Littlefield *v.* Murin, 4 How. Pr. 306, 2 Code Rep. 128; Cheetham *v.* Lewis, 3 Cai. 256, Col. & C. Cas. 498.

Pennsylvania.— Susquehanna Mut. F. Ins. Co. *v.* Clinger, 10 Pa. Super. Ct. 92; Waring Bros. *v.* Pennsylvania R. Co., 16 Pa. Co. Ct. 56, 42 Pittsb. Leg. J. 269; Ashton *v.* Bell, 2 Pa. Co. Ct. 483.

Canada.—Somerville *v.* Kerr, 2 Ch. Chamb. (U. C.) 154; Clementson *v.* Cooper [*cited* in Stephens N. Brunsw. Dig. 646]; London Bank *v.* Guarantee Co. of North America, 12 Ont. Pr. 499; McGillivray *v.* McConkey, 6 Ont. Pr. 114; Dunn *v.* McLean, 6 Ont. Pr. 156.

See 17 Cent. Dig. tit. "Dismissal and Nonsuit," § 135.

A failure to furnish defendant a copy of the complaint continuing for forty-nine days is an unreasonable delay in the prosecution of the action authorizing a dismissal thereof, on a failure to pay costs imposed as a condition of further prosecution. Ecles *v.* Debeand. 2 Code Rep. (N. Y.) 144.

Failing to reply to special plea of defendant at the return-term of the writ is not ground for nonsuit, although it may be if he fails to reply instanter at the succeeding term. Kain *v.* May, 5 Sm. & M. (Miss.) 368.

A rule of court prescribing dismissal unless the declaration be filed by the first day of the second term is not mandatory but is simply a privilege granted to defendant to have the case dismissed on motion. Ochus *v.* Sheldon, 12 Fla. 138.

Proceeding to trial against a substituted defendant on the original action without applying for or serving a supplemental complaint on him is good grounds for a dismissal or nonsuit. Wilson *v.* Lawrence, 8 Hun (N. Y.) 593.

Failure to amend within the time limited by order of court is ground for a motion to dismiss. Carr *v.* Moffat, 9 Can. L. J. N. S. 52. See also Chipman *v.* Cornwell, 111 Ga. 862, 36 S. E. 923.

In New York if a copy of the complaint is not served on defendant within twenty days after the first demand therefor, a motion to dismiss for want of service will be granted. Luce *v.* Trempert, 9 How. Pr. (N. Y.) 212. The rule laid down in Littlefield *v.* Murin, 4 How. Pr. (N. Y.) 306, 2 Code Rep. (N. Y.) 128, that the complaint should be served within a reasonable time after demand and that twenty-four hours would ordinarily be sufficient is no longer the law in this state.

In Wisconsin it is held that a discontinuance and not a nonsuit should be granted where plaintiff does not declare within the time prescribed by statute. Hiles *v.* McFarlane, 3 Pinn. (Wis.) 365, 4 Chandl. (Wis.) 89.

Necessity for notice of filing of answer.— Under the rules of practice in the District of Columbia plaintiff's failure to file general replications to defendants' answer within ten days after notice of the filing is not ground for dismissal unless defendants have given the ten days' notice, the ten days to be counted from the time of service of notice upon the plaintiff's solicitor. McIntosh *v.* Moulton, 3 MacArthur (D. C.) 587.

84. McCrory *v.* Boyd, 3 Stew. (Ala.) 279.

An omission to hold the court for any cause does not excuse a failure to file at that term pleadings which may be filed with the clerk. Downey *v.* Smith, 13 Ill. 671; Morrow *v.* Malone, 5 Sneed (Tenn.) 642.

85. McAden *v.* Gibson, 5 Ala. 341 (holding that where the general issue and special pleas are pleaded the fact that plaintiff refuses to reply further to the special pleas after a demurrer to his replication is sustained is not grounds for a nonsuit); Roberts *v.* Albright, 2 Greene (Iowa) 120.

86. Palmer *v.* Lesne, 3 Ala. 741, where it was held that if a variance between the writ and declaration is not brought to the notice

miss,[87] in the absence of a motion to amend.[88] And a material variance between the pleading and proof may also be ground for a motion to dismiss;[89] but not where defendant's counsel disclaims that he has been misled thereby.[90]

e. Prayer For Wrong Relief. A prayer for wrong relief is not ground for a dismissal or nonsuit, if plaintiff states a case entitling him to any relief, legal or equitable.[91]

f. Failure to File or Produce Obligations Sued on or Bill of Particulars. According to some decisions it is not sufficient ground for dismissal that plaintiff has failed to file with his declaration a copy of the obligation or record sued on.[92] In other cases it is held that where an instrument on which an action is founded is not filed and no reason is given for not filing it, unless it is alleged to be lost or destroyed, defendant may after answer move for a dismissal or require the party to file it.[93] Although there cannot be a dismissal on mere failure to file a bill of particulars where such particulars are given with abundant fulness in other matters of record,[94] a failure to file such a bill in disobedience of the court's order may be a ground therefor.[95]

14. WANT OF PROSECUTION — a. General Rule. An action may be dismissed or a nonsuit granted for the failure of plaintiff to prosecute it with due diligence,[96]

of the court by the pleading, the court may grant a new trial for that cause, but cannot order a nonsuit or discontinuance.

87. Windett *v.* Hamilton, 52 Ill. 180; Schoonhoven *v.* Gott, 20 Ill. 46, 71 Am. Dec. 247 (material variance between names); Rogers *v.* Rogers, 4 Johns. (N. Y.) 485. But see McKee *v.* Thompson, 1 Add. (Pa.) 24, where it was held that where the writ charged defendant personally, and the declaration charged him as executor, and alleged a submission by, and an award against, him, as executor, etc., and defendant pleaded to the issue, and the evidence supported the declaration, and the jury found against defendant as executor, such variance between the count and the writ was not a ground for nonsuit but for demurrer, plea in abatement, or motion in arrest of judgment.

88. Windett *v.* Hamilton, 52 Ill. 180.

89. Hart *v.* Chesley, 18 N. H. 373.

In an action for slander evidence that the slanderous words were spoken some time after the time alleged in the declaration constitutes a good ground for a nonsuit. Witherspoon *v.* Isbell, 2 N. C. 16.

90. Lundine *v.* Callaghan, 82 N. Y. App. Div. 621, 81 N. Y. Suppl. 1052.

91. Emery *v.* Pease, 20 N. Y. 62; Ashley *v.* Lehmann, 54 N. Y. App. Div. 45, 66 N. Y. Suppl. 299, 8 N. Y. Annot. Cas. 208.

92. Howe *v.* Frazer, 117 Ill. 191, 7 N. E. 481 [*affirming* 17 Ill. App. 219]; Hopkins *v.* Woodard, 75 Ill. 62; Smith *v.* Blunt, 2 La. 132, holding the failure to annex copies of an authentic act to a petition not grounds for a dismissal.

93. Peake *v.* Bell, 65 Mo. 224; Hannibal, etc., R. Co. *v.* Knudson, 62 Mo. 569; Dyer *v.* Murdock, 38 Mo. 224; Rothwell *v.* Morgan, 37 Mo. 107; McHoney *v.* German Ins. Co., 37 Mo. App. 218.

The want of a state of demand or account filed is ground of nonsuit. Sandford *v.* Hoover, 2 N. J. L. 99.

Failure to produce certain documents originally annexed to the petition may be grounds of dismissal, unless they are shown by affidavit to have been lost and that steps were taken to prove their contents. Tucker *v.* Peebles, 10 La. 403.

94. Gibbs *v.* Detroit Super. Judge, 53 Mich. 496, 19 N. W. 162, where the particulars were set out in the affidavits beginning the action.

95. Lovette *v.* Essig, 92 Mich. 461, 62 N. W. 750, where it was held that where a declaration fails to apprise defendant of the claim against him, plaintiff's refusal to file a bill of particulars caused a virtual discontinuance of his suit which should have been dismissed on defendant's motion, and his joining and striking the jury did not preclude him from objecting to the giving of any evidence by plaintiff.

96. *Alabama.*— *Ex p.* Holton, 69 Ala. 164.

California.— Mowry *v.* Weisenborn, 137 Cal. 110, 69 Pac. 971; Kennedy *v.* Mulligan, 136 Cal. 556, 69 Pac. 291; Siskiyou County Bank *v.* Hoyt, 132 Cal. 81, 64 Pac. 118; Nicol *v.* San Francisco, 130 Cal. 288, 62 Pac. 513; San Jose Land, etc., Co. *v.* Allen, 129 Cal. 247, 61 Pac. 1083; Modoc Land, etc., Co. *v.* Modoc County Super. Ct., 128 Cal. 255, 60 Pac. 848; People *v.* Jefferds, 126 Cal. 296, 58 Pac. 704; Davis *v.* Clark, 126 Cal. 232, 58 Pac. 542; Cooper *v.* Gordon, 125 Cal. 296, 57 Pac. 1006; San Diego First Nat. Bank *v.* Nason, 115 Cal. 626, 47 Pac. 595; Hassey *v.* South San Francisco Homestead, etc., Assoc., 102 Cal. 611, 36 Pac. 945; Kubli *v.* Hawkett, 89 Cal. 638, 27 Pac. 57; Chipman *v.* Hibberd, 47 Cal. 638; Peralta *v.* Mariea, 3 Cal. 185.

Colorado.— Hoy *v.* McConaghy, 14 Colo. 372, 60 Pac. 184; Monteith *v.* Union Pac., etc., R. Co., 13 Colo. App. 421, 58 Pac. 338; Cone *v.* Jackson, 12 Colo. App. 461, 55 Pac. 940.

District of Columbia.— Parsons *v.* Hill, 15 App. Cas. 532.

Indiana.—Cabinet Makers' Union *v.* Indianapolis, 145 Ind. 671, 44 N. E. 757; Lines *v.* Benner, 52 Ind. 195; Rodgers *v.* McLeary, 5 Ind. 236.

Kentucky.— Jenkins *v.* Taylor, 59 S. W.

unless he presents sufficient excuse for failure to prosecute.[97] This power exists independently of statute [98] or rule of court.[99] Where, however, but one of several

853, 22 Ky. L. Rep. 1137; Shortell *v.* Green County, 59 S. W. 522, 22 Ky. L. Rep. 1010.

Maine.— Davis *v.* York County Com'rs, 63 Me. 396; Farrin *v.* Kennebec, etc., R. Co., 36 Me. 34.

Missouri.— Martin *v.* Henley, 13 Mo. 312.

New Jersey.— West *v.* Paige, 9 N. J. Eq. 203; Newark Nat. Banking Co. *v.* Felsner, 9 N. J. L. J. 303.

New York.— Rosenheim *v.* Rosenfield, 83 N. Y. App. Div. 640, 82 N. Y. Suppl. 70; Munson *v.* Munson, 51 N. Y. App. Div. 429, 64 N. Y. Suppl. 662; Jacot *v.* Marks, 46 N. Y. App. Div. 531, 61 N. Y. Suppl. 1040; Graham *v.* Ackley, 21 N. Y. App. Div. 416, 47 N. Y. Suppl. 562; Seymour *v.* Lake Shore, etc., R. Co., 12 N. Y. App. Div. 300, 42 N. Y. Suppl. 92; James *v.* Shea, 28 Hun 74, 2 N. Y. Civ. Proc. 358; Duncan *v.* De Witt, 7 Hun 184; Carter *v.* Clark, 2 Sweeny 189; Vessell *v.* Marx, 10 Misc. 46, 30 N. Y. Suppl. 806; Salters *v.* Pruyn, 15 Abb. Pr. 224; Haberstich *v.* Fischer, 67 How. Pr. 318, 6 N. Y. Civ. Proc. 82; Hawley *v.* Seymour, 8 How. Pr. 96; Cusson *v.* Whalon, 5 How. Pr. 302, Code Rep. N. S. 27; Littlefield *v.* Murin, 4 How. Pr. 306, 2 Code Rep. 128; Baker *v.* Martin, 3 How. Pr. 204; Whitney *v.* Shufelt, 2 How. Pr. 119, 3 Den. 165; Pease *v.* Blossom, 2 How. Pr. 81; Jennings *v.* Fay, Code Rep. N. S. 231; Richmond *v.* Cowles, 2 Hill 359; Potter *v.* Lewis, 18 Wend. 519; Judson *v.* Jones, 12 Wend. 209; McGregor *v.* Cleveland, 10 Wend. 596; Jackson *v.* Thompson, 1 Wend. 76; Wheaton *v.* McGlade, 1 Wend. 34; Gardner *v.* Turner, 9 Johns. 260; Steinbach *v.* Hallett, 1 Johns. 141; Shawe *v.* Colfax, 3 Cai. 98; Brook *v.* Hunt, 3 Cai. 94; Manhattan Co. *v.* Brower, 2 Cai. 381, Col. & C. Cas. 424; Deas *v.* Smith, 1 Cai. 171, Col. & C. Cas. 221; Sheffield *v.* Watson, 1 Cai. 22, Col. & C. Cas. 157.

North Carolina.— Holmes *v.* Williams, 11 N. C. 371.

Pennsylvania.— Neel *v.* McElhenny, 189 Pa. St. 489, 42 Atl. 44; Waring *v.* Pennsylvania R. Co., 176 Pa. St. 172, 35 Atl. 106; Neel *v.* McElhenny, 6 Pa. Dist. 681, 28 Pittsb. Leg. J. N. S. 153.

South Carolina.— Munro *v.* Laurens, 1 McMull. 442; Moses *v.* Boney, 1 Nott & M. 38.

Texas.— Burger *v.* Young, 78 Tex. 656, 15 S. W. 107; Harman *v.* Lawler, 32 Tex. 590; Wright *v.* Thomas, 6 Tex. 420; Hall *v.* Austin, 31 Tex. Civ. App. 626, 73 S. W. 32; Dunham *v.* Murphy, (Civ. App. 1894) 28 S. W. 132.

Washington.— Neff *v.* Neff, 32 Wash. 82, 72 Pac. 1001; Carlson Bros. *v.* Van de Vanter, 19 Wash. 32, 52 Pac. 323.

Wisconsin.— Raymond *v.* Keseberg, 98 Wis. 317, 73 N. W. 1010; Bonesteel *v.* Orvis, 31 Wis. 117; Roberts *v.* Delaney, 2 Wis. 382.

United States.— Colorado Eastern R. Co. *v.* Union Pac. R. Co., 94 Fed. 312, 36 C. C. A. 263.

England.—Ingle *v.* Partridge, 33 Beav. 287; Crick *v.* Hewlett, 27 Ch. D. 354, 53 L. J. Ch. 1110, 51 L. T. Rep. N. S. 428, 32 Wkly. Rep. 922; Ambroise *v.* Evelyn, 11 Ch. D. 759, 48 L. J. Ch. 686, 27 Wkly. Rep. 639; Robinson *v.* Chadwick, 7 Ch. D. 878, 47 L. J. Ch. 607, 38 L. T. Rep. N. S. 415, 26 Wkly. Rep. 556; Woodward *v.* Twinaine, 4 Jur. 120, 9 L. J. Ch. 52, 9 Sim. 301; Magnus *v.* Scotland Nat. Bank, 57 L. J. Ch. 902, 58 L. T. Rep. N. S. 617, 36 Wkly. Rep. 602; Aitken *v.* Dunbar, 46 L. J. Ch. 489, 25 Wkly. Rep. 366; Wakefield *v.* Cruickshank, 41 L. J. Ch. 277, 20 Wkly. Rep. 433; Joyce *v.* Boyle, L. R. 24 Ir. 455; Foott *v.* Benn, L. R. 16 Ir. 247.

Canada.—McFeeters *v.* Dixon, 3 Ch. Chamb. (U. C.) 84; Poole *v.* Poole, 2 Ch. Chamb. (U. C.) 475; Hodgson *v.* Paxton, 2 Ch. Chamb. (U. C.) 398; Upper Canada Min. Co. *v.* Atty.-Gen., 2 Ch. Chamb. (U. C.) 207; Burns *v.* Chisholm, 2 Ch. Chamb. (U. C.) 88; Mulholland *v.* Brent, 2 Ch. Chamb. (U. C.) 31; Davy *v.* Davy, 2 Ch. Chamb. (U. C.) 26; Mallock *v.* Plunkett, 1 Ch. Chamb. (U. C.) 298; Thompson *v.* Hind, 1 Ch. Chamb. (U. C.) 247; Ruttan *v.* Burnham, 1 Ch. Chamb. (U. C.) 191; Landry *v.* Beauchamp, 13 L. Notes (Quebec) 169; Vickery *v.* Price, 19 Nova Scotia 513, 8 Can. L. T. 61; O'Brien *v.* Halifax, 19 Nova Scotia 393, 7 Can. L. T. 435; Simpson *v.* Murray, 13 Ont. Pr. 418; McDougald *v.* Thomson, 13 Ont. Pr. 256 [*distinguishing* Crick *v.* Hewlett, 27 Ch. D. 354, 53 L. J. Ch. 1110, 51 L. T. Rep. N. S. 428, 32 Wkly. Rep. 922; Foley *v.* Lee, 12 Ont. Pr. 371; Roberts *v.* Lucas, 11 Ont. Pr. 3; Carter *v.* Barker, 11 Ont. Pr. 1; Napanee, etc., R. Co. *v.* McDonnell, 10 Ont. Pr. 525; Miles *v.* Roe, 10 Ont. Pr. 218; Bucke *v.* Murray, 9 Ont. Pr. 495; Small *v.* Union Permanent Bldg. Soc., 6 Ont. Pr. 206; Riddell *v.* Ritchie, 6 Ont. Pr. 205; Dunn *v.* McLean, 6 Ont. Pr. 156; Lindsay Petroleum Co. *v.* Pardee, 6 Ont. Pr. 140; Wilson *v.* Black, 6 Ont. Pr. 130; *Re* Western Ins. Co., 6 Ont. Pr. 86; Chapman *v.* Smith, 32 U. C. C. P. 555.

See 17 Cent. Dig. tit. "Dismissal and Nonsuit," § 140 *et seq.*

97. Lander *v.* Flemming, 47 Cal. 614; McLoughlin *v.* King, 56 Ga. 213; Tullis *v.* Henderson, 26 Ill. 442; Kilian *v.* Clark, 9 Ill. App. 426; Champion *v.* Webster, 15 Abb. Pr. (N. Y.) 4; Van Bergen *v.* Palmer, 18 Johns. (N. Y.) 504.

When plaintiff swears to a good case on the merits, the court will in its discretion give him an opportunity to hear his case on the merits, even after an order to dismiss has been properly granted. Rees *v.* Atty.-Gen., 2 Ch. Chamb. (U. C.) 300.

Where a case is removed on petition of defendant to the United States court, and remains there seventeen years, and is actively litigated, and then remanded for want of jurisdiction, defendant cannot move to dismiss for laches. Parker *v.* Clarkson, 39 W. Va. 184, 19 S. E. 431.

98. People *v.* Jefferds, 126 Cal. 296, 58 Pac. 704.

99. Colorado Eastern R. Co. *v.* Union Pac. R. Co., 94 Fed. 312, 36 C. C. A. 263.

defendants moves that an action be dismissed because of inexcusable neglect to prosecute, and the others were not notified, heard, or represented on the motion, the action can be dismissed only as to the moving defendant.[1]

b. Applications of Rule. Within the rule just stated, an action is properly dismissed for want of prosecution where there is no appearance by plaintiff or his counsel when his case is called in its order for trial;[2] where plaintiff fails to take any steps in the action for several years,[3] especially where younger issues have been tried in order during that time,[4] or where a cause is not brought to a hearing within forty days after the service of a notice requiring it to be done under the rule;[5] and leave to plaintiff to amend is no bar to granting defendant's motion to dismiss for lack of prosecution, made shortly thereafter.[6]

c. Excuses For Delay — (i) *Impossibility of Trying Cause.* Where it is impossible to try a cause in its regular order the action will not be dismissed for failure to proceed to trial.[7] And this is so, although the case had been noticed for trial.[8]

1. Paulson *v.* New Jersey, etc., R. Co., 54 N. Y. App. Div. 189, 66 N. Y. Suppl. 364.

2. *Arkansas.*— Ashley *v.* May, 5 Ark. 408.

Georgia.— Calloway *v.* McElmurray, 91 Ga. 166, 17 S. E. 103.

Illinois.— Nieman *v.* Wintker, 85 Ill. 468; Delano *v.* Bennett, 61 Ill. 83.

Minnesota.— Keator *v.* Glaspie, 44 Minn. 448, 47 N. W. 52.

New Jersey.— Smethurst *v.* Harwood, 30 N. J. L. 230; Holliday *v.* Large, 3 N. J. L. 653.

United States.— Patting *v.* Spring Valley Coal Co., 98 Fed. 811, 39 C. C. A. 308.

England.— Armour *v.* Bate, [1891] 2 Q. B. 233, 60 L. J. Q. B. 433, 65 L. T. Rep. N. S. 137, 39 Wkly. Rep. 546; James *v.* Crow, 7 Ch. D. 410, 47 L. J. Ch. 200, 37 L. T. Rep. N. S. 749, 26 Wkly. Rep. 236; Cockle *v.* Joyce, 7 Ch. D. 56, 47 L. J. Ch. 543, 37 L. T. Rep. N. S. 428, 26 Wkly. Rep. 59; *Re* Palmer, 49 L. T. Rep. N. S. 553, 32 Wkly. Rep. 83; Farrell *v.* Wale, 36 L. T. Rep. N. S. 95.

See 17 Cent. Dig. tit. "Dismissal and Nonsuit," § 152.

Question of due diligence one of fact to be shown by proper proof.— An action in the court below cannot be dismissed on motion of defendant, because of plaintiff's failure to prosecute and to enter continuances, where defendant has filed a plea and issue has been joined, although plaintiff fails to give notice of trial for sixteen years, there being no statute or rule of court having the force of a statute requiring a cause to be brought to trial within a given period, under the penalty of forfeiture of the right of further prosecution. Meloy *v.* Keenan, 17 App. Cas. (D. C.) 235. And see Parsons *v.* Hill, 15 App. Cas. (D. C.) 532.

In Louisiana where plaintiff is absent and nothing equivalent to a reconventional demand has been found, the only judgment which can be rendered is one of nonsuit. Saunders *v.* Mangham, 42 La. Ann. 770, 7 So. 715; Phillips *v.* Cassidy, 36 La. Ann. 288; Foster's Succession, 23 La. Ann. 100; Moch *v.* Garthwaite, 11 La. Ann. 287; Dwight *v.* Richard, 4 La. Ann. 240; Dunbar *v.* Mansker, 4 La. Ann. 176; McDonogh *v.* Dutillet, 3 La. Ann. 660.

3. Stith *v.* Jones, 119 N. C. 428, 25 S. E. 1022.

Where a plaintiff neglects for more than two years to bring his case to trial, the court may on motion of defendant and notice to plaintiff dismiss the action. Simmons *v.* Keller, 50 Cal. 38.

4. Seymour *v.* Lake Shore, etc., R. Co., 12 N. Y. App. Div. 300, 42 N. Y. Suppl. 92.

Inference as to trial of younger issues.— Under Gen. Rule Pr. No. 36, providing that a motion to dismiss for failure to prosecute may be made after younger issues shall have been tried in regular order, where movant alleges that plaintiff has wholly failed to prosecute the action, and has taken no steps to bring the issues to trial, the court may infer that the younger issues have been tried. Jacot *v.* Marks, 26 Misc. (N. Y.) 670, 57 N. Y. Suppl. 904. And see Paulson *v.* New Jersey, etc., R. Co., 54 N. Y. App. Div. 189, 66 N. Y. Suppl. 364.

5. Waller *v.* Sammons, 2 How. Pr. (N. Y.) 162.

Discontinuance of summary proceeding notwithstanding stay law.— A summary proceeding by notice and motion will be discontinued, unless some action is had on the notice at the return-term, although the "stay-law" prohibits the rendition of judgment at that term; yet plaintiff may keep alive his notice by having it docketed according to the rule of practice adopted at this term or by some action of the court continuing its existence. *Ex p.* North-East, etc., R. Co., 37 Ala. 679.

6. San Jose Land, etc., Co. *v.* Allen, 129 Cal. 247, 61 Pac. 1083.

7. Waller *v.* Sammons, 2 How. Pr. (N. Y.) 162; Crosby *v.* Taylor, 2 How. Pr. (N. Y.) 72; Hart *v.* Hildreth, 2 Cow. (N. Y.) 511; Currie *v.* Moore, 1 Johns. (N. Y.) 492; Jackson *v.* Weed, 2 Cai. (N. Y.) 94.

Necessity for affidavit.— Judgment as in case of nonsuit will not be granted for neglect in plaintiff to try at the first circuit, unless the affidavit show that there has been a circuit at which plaintiff might have tried his cause. Jackson *v.* Vroman, 6 Cow. (N. Y.) 392; Anonymous, 6 Cow. (N. Y.) 388.

8. Jackson *v.* Weed, 2 Cai. (N. Y.) 94.

(II) *AGREEMENT TO SETTLE.* An action will not be dismissed or a nonsuit granted for want of prosecution where the delay was caused by arrangements between the parties looking to a settlement,[9] or an agreement to arbitrate,[10] or a stipulation to submit the case to the court without a jury, for decision upon documents then on file.[11]

(III) *AWAITING DECISION OF ANOTHER CASE.* It is no excuse for delay in bringing on the trial of a cause at issue that another cause is pending, in which the same principles are involved and the decision of which might aid in the determination of the case at issue. The fact that defendant is the same in both cases is immaterial.[12] Where, however, it appears that a prior suit turning upon the same points has been tried and important questions of law were raised and exceptions taken on the trial, a judgment as in case of nonsuit will not be ordered for failure to proceed to trial, until such questions are determined by the supreme court.[13] So where one by order of the court and not upon his own motion is made a party defendant to an action and properly seeks to enforce certain rights therein, and subsequently for the protection of the same rights brings an action for their enforcement, the complaint in such second action should not be dismissed for failure to prosecute the same until the determination of the first action.[14]

(IV) *DELAY OCCASIONED BY DEFENDANT'S FAULT OR WITH HIS CONSENT.* It is error on the part of the court to allow the dismissal of a case for want of prosecution where the delay has been caused or acquiesced in by defendant,[15] or

9. Martin *v.* Van Bergen, 1 Greene (Iowa) 314; Doyle *v.* O'Farrell, 5 Rob. (N. Y.) 640; Merritt *v.* Seacord, 1 How. Pr. (N. Y.) 95; Mumm *v.* Greenwood, 1 How. Pr. (N. Y.) 32.

Effect of defendant's offer to comply.— Where parties agree to dismiss an action if defendant will execute a mortgage to secure a balance due on the debt sued for after payment of a certain part of the debt, on offering to comply defendant is entitled to a dismissal, although plaintiff refuses to accept the mortgage. Martin *v.* McConnell, 99 Ga. 314, 25 S. E. 699.

Necessity for filing agreement.— It is not an abuse of discretion for a court to dismiss an action for want of prosecution where it was dropped from the calendar nearly three years before by a verbal agreement between the attorneys, not authorized by defendant, to await the determination of another action; there being no agreement filed as provided by Code Civ. Proc. § 283. McLaughlin *v.* Clausen, 116 Cal. 487, 48 Pac. 487.

10. Hall *v.* Miller, 1 How. Pr. (N. Y.) 184.

11. Lardner *v.* Windle, 4 Kan. App. 175, 45 Pac. 945.

12. Hale *v.* Lawrence, 24 N. J. L. 43, 57 Am. Dec. 420.

The pendency of another suit which would give the relief desired but in which no decree has been obtained is not a sufficient answer to a motion to dismiss. Guthrie *v.* Macdonald, 3 Ch. Chamb. (U. C.) 99; Bain *v.* McConnell, 6 Ont. Pr. 113.

13. St. John *v.* Lyon, 2 How. Pr. (N. Y.) 39; Sherman *v.* McMitt, 2 Cow. (N. Y.) 452. And see Campbell *v.* Mumgar, 1 Cai. (N. Y.) 129, Col. & C. Cas. (N. Y.) 200.

14. Fisher *v.* Dusenbury, 47 N. Y. Super. Ct. 488.

15. *Arkansas.*— Guthrie *v.* Field, 15 Ark. 662.

California.— Herman *v.* Pacific Jute Mfg. Co., 131 Cal. 210, 63 Pac. 344; Pardy *v.* Montgomery, (1888) 18 Pac. 330.

Georgia.— Edwards *v.* Daly, 40 Ga. 160; Dixon *v.* Rutherford, 26 Ga. 153.

Mississippi.— Person *v.* Nevitt, 32 Miss. 180.

New York.— Heymer *v.* Arthur, 4 Silv. Supreme 430, 7 N. Y. Suppl. 437; Severin *v.* Hopper, 37 Misc. 863, 76 N. Y. Suppl. 976; Uhlfelder *v.* Dunn, 37 Misc. 843, 76 N. Y. Suppl. 979; Jacot *v.* Marks, 26 Misc. 670, 57 N. Y. Suppl. 904; Harris *v.* Ensign, 1 How. Pr. 103; Pier *v.* Page, 1 How. Pr. 40.

Pennsylvania.— Hillside Coal, etc., Co. *v.* Heermans, 191 Pa. St. 116, 43 Atl. 76.

Wisconsin.— Wagg-Anderson Woolen Co. *v.* Finkelstein, 105 Wis. 589, 81 N. W. 863.

England.— Rawlings *v.* Regent's Canal Ironworks Co., 15 L. T. Rep. N. S. 281.

Canada.—Jeffs *v.* Orr, 2 Ch. Chamb. (U. C.) 273; Proudfoot *v.* Thompson, 1 Ch. Chamb. (U. C.) 367; Shaver *v.* Allison, 1 Ch. Chamb. (U. C.) 203; Rees *v.* Jacques, 1 Grant Ch. (U. C.) 352; Nova Scotia Bank *v.* Barss, 18 Nova Scotia 494, 6 Can. L. T. 540; Waters *v.* Burrill, 6 Ont. Pr. 269.

See 17 Cent. Dig. tit. "Dismissal and Nonsuit," § 147.

Where real defendant has secreted himself or kept away witnesses, a motion for judgment as in case of nonsuit will be denied with costs. Cole *v.* Wright, 1 How. Pr. (N. Y.) 132.

Where plaintiff's witness is secluded by defendant, a motion for judgment as in case of nonsuit will be denied. Grover *v.* Smith, 1 Wend. (N. Y.) 77. And see Sabin *v.* Ames, 1 How. Pr. (N. Y.) 228.

Trial prevented by entry of ne recipiatur.— A nonsuit for not proceeding to trial will not be allowed where defendant at the previous term had prevented a trial by entering

where defendant has been equally negligent in the prosecution of a counter-claim interposed by him.[16]

(v) *STAY OF ACTION.* An action will not be dismissed for failure to proceed where such action is stayed by the acts of defendant,[17] as where defendant by injunction restrains plaintiff from proceeding in the suit,[18] or where the attorneys verbally arrange that a cause shall go over for the circuit.[19]

(vi) *REFERENCE OF ACTION.* In some jurisdictions the practice of moving for judgment as in case of nonsuit for delay in bringing the cause to trial applies only to the disposition of causes noticed and placed upon the calendar for trial and not to causes that have been referred;[20] and a nonsuit is not authorized because a party to a referred cause fails to appear before the referee,[21] or has unreasonably neglected to proceed in the cause.[22] In other jurisdictions the reference of an action for trial and judgment does not deprive the court of the power to order its dismissal for want of diligence in its prosecution before the referee.[23]

(vii) *DEATH OF PARTY.* In some jurisdictions[24] a judgment dismissing an action for want of prosecution is not void, although made after the death of plaintiff and without the substitution of his personal representative.[25]

a *ne recipiatur*, which the circuit judge had refused to take off, it appearing that plaintiff's counsel was not aware of the rule, and that defendant's witnesses were present in court when the cause was reached. Ogdensburgh Bank *v.* Tift, 1 Hill (N. Y.) 222.

Effect of failure to file nisi prius record.— On noticing a cause for trial, unless plaintiff file his *nisi prius* record at the first day of the circuit, defendant may take a rule for a *ne recipiatur* and yet move for judgment as in case of nonsuit. Sage *v.* Robbins, 8 Cow. (N. Y.) 110.

Where cause passed for plaintiff's accommodation not reached.— A cause which is set down for a later day in term to accommodate plaintiff and is afterward not reached may be nonsuited by defendant. Reynolds *v.* Fountain, 4 Hill (N. Y.) 52; Root *v.* ——, 4 Hill (N. Y.) 38.

16. Jacot *v.* Marks, 26 Misc. (N. Y.) 670, 57 N. Y. Suppl. 904.

17. Eisenlord *v.* Clum, 52 Hun (N. Y.) 461, 5 N. Y. Suppl. 512, 17 N. Y. Civ. Proc. 147; Unger *v.* Forty-second St., etc., R. Co., 4 Rob. (N. Y.) 682, 30 How. Pr. (N. Y.) 443; Mills *v.* Chapman, 1 How. Pr. (N. Y.) 102; Jackson *v.* Edwards, 1 Cow. (N. Y.) 596. But see Champlin *v.* Petrie, 4 Wend. (N. Y.) 209 (holding that a defendant may move for judgment as in case of nonsuit in a cause which has been referred, although he has stayed plaintiff's proceedings until security for costs be filed); Moloughney *v.* Kavanagh, 4 Month. L. Bul. (N. Y.) 43.

Where operation of stay is plaintiff's fault. — In James *v.* Shea, 28 Hun (N. Y.) 74, 2 N. Y. Civ. Proc. 358, an action was commenced, issue joined, and a commission with a stay of proceedings was obtained by defendant, which was never returned. The stay of proceedings remained in force for thirteen years without anything being done to vacate it, when it was vacated by consent, and the case was placed on the general calendar, and when reached was marked "Generally reserved." It was held that an order dismissing the complaint was properly granted for unreasonable neglect of plaintiff to proceed with the trial.

18. McDonald *v.* Brace, 2 How. Pr. (N. Y.) 119.

19. Stinnard *v.* New York F. Ins. Co., 1 How. Pr. (N. Y.) 169; Bain *v.* Thomas, Col. & C. Cas. (N. Y.) 360.

20. Kimberly *v.* Parker, 34 How. Pr. (N. Y.) 275; Sheldon *v.* Erie C. Pl., 12 Wend. (N. Y.) 268. But *compare* Ellsworth *v.* Brown, 16 Hun (N. Y.) 1, 56 How. Pr. (N. Y.) 237, holding that where, because of the refusal of a referee to appoint another hearing until his fees be paid, a case has remained for some two years without progress, an application by defendant to have the case dismissed for want of prosecution may properly be granted.

Where both parties notice the cause before a referee (as either may do), neither can charge delay or default upon the other for not bringing on the hearing. Thompson *v.* Krider, 8 How. Pr. (N. Y.) 248.

21. Gamsby *v.* Columbus, 57 N. H. 554; Ray *v.* Austin, 56 N. H. 36.

22. Holmes *v.* Slocum, 6 How. Pr. (N. Y.) 217.

23. Saville *v.* Frisbie, 70 Cal. 87, 11 Pac. 502; Stith *v.* Jones, 119 N. C. 428, 25 S. E. 1022.

24. **But by express statutory provision** in New York a verdict or decision made or given against a party who dies before the rendition thereof is void, and such statute applies to proceedings in an action on the death of a sole plaintiff or defendant. Piering *v.* Henkel, 2 N. Y. Suppl. 413.

25. Wallace *v.* Center, 67 Cal. 133, 7 Pac. 441.

Where administrator fails to have himself made a party in a reasonable time after his qualification the action may be dismissed for want of prosecution, and it is no abuse of discretion by the presiding judge to refuse to reinstate the action in a subsequent motion by the administrator. Anderson *v.* Cary, 89 Ga. 258, 15 S. E. 309.

Discretion of court in case of death before expiration of time to answer interrogatories.

(VIII) *OTHER EXCUSES.* The following have also been held sufficient excuses for failure to prosecute: Sickness;[26] that plaintiff acted under mistake of law or was misled by defendant's action;[27] want of notice as to time of giving deposition;[28] absence of counsel justified by state of the country;[29] prevalence of epidemic interrupting business generally;[30] sickness of attorney and counsel coming too late to employ others;[31] want of papers honestly expected;[32] facts beyond plaintiff's control preventing performance of stipulation as to time of trial;[33] and good reason to believe that he cannot have a fair trial by an impartial jury.[34] But the fact that the cause is one in which a public officer is concerned affords no excuse for failure to go to trial according to notice, and no reason for refusing judgment of nonsuit, it being the duty of public officers to provide other counsel when they cannot themselves attend.[35]

d. Rule or Notice to Plaintiff to Proceed. It is the general practice that the service of a rule or notice to plaintiff to proceed in the cause, or as it is sometimes called a rule to speed the cause, must precede the motion to dismiss for want of prosecution.[36]

e. Duty of Defendant to Notice Cause For Trial. Under a rule of court providing that whenever an issue of fact has been joined and plaintiff fails to bring the same to trial according to the course and practice of the court, defendant may at any time after younger issues have been tried in their regular order move for dismissal, it is not a prerequisite to this right that he should put the cause on the calendar,[37] or even notice the cause for trial.[38] Nevertheless the fact that defendant notices the cause for trial, the same not having been placed on the calendar, does not waive his right to move for a dismissal.[39] Where this rule does not prevail the proper mode of proceeding on defendant's part, if he would expedite the

— Where a plaintiff had refused to answer interrogatories on a commission sued out by defendant under the act of 1853, and the latter without moving to dismiss filed and served interrogatories for a discovery under the act of 1847, allowing sixty days to answer the same, and plaintiff died before the expiration of such time without having answered, the discretion of the trial court in refusing to dismiss for plaintiff's failure to answer will not be disturbed. Bird *v.* Harville, 33 Ga. 459.

26. Memorandum, 16 Fed. Cas. No. 9,410, 1 Cranch C. C. 253.

27. Pickett *v.* Hastings, 39 Cal. 105.

28. Clifford *v.* Allman, 84 Cal. 528, 24 Pac. 292.

29. Darracott *v.* Penington, 34 Ga. 388.

30. Torrey *v.* Morehouse, 1 Johns. Cas. (N. Y.) 242.

31. Jackson *v.* Brown, 1 Cai. (N. Y.) 152.

32. Jackson *v.* Haight, 2 Cai. (N. Y.) 93.

33. Gale *v.* Vernon, 4 Sandf. (N. Y.) 709.

34. Pringle *v.* Huse, 1 Cow. (N. Y.) 432.

35. Anonymous, 2 Cai. (N. Y.) 246.

36. *Georgia.*— Dixon *v.* Rutherford, 26 Ga. 153.

Illinois.— Seavey *v.* Rogers, 69 Ill. 534; White *v.* Hogue, 18 Ill. 150.

Mississippi.— Williams *v.* Montgomery, 10 Sm. & M. 321.

New York.— Robb *v.* Jewell, 6 How. Pr. 276; Jackson *v.* Wilsey, 9 Johns. 268.

Tennessee.— Kain *v.* Ross, 1 Lea 76.

But see Wenn *v.* Adams, 2 Dall. (Pa.) 156, 1 L. ed. 329, where it was held that, on a rule for *non prosequitur*, plaintiff cannot object that he has filed no declaration and that defendant should have taken a rule to declare, thereby compelling plaintiff to proceed without delay.

See 17 Cent. Dig. tit. "Dismissal and Nonsuit," § 151.

Remedy is by forcing plaintiff to trial.— Where sufficient diligence is not being used by plaintiffs to bring a suit to trial, but they duly appear to represent their cause, defendant's remedy is to force them to trial, and not to have the suit dismissed for want of prosecution. Roemer *v.* Shackelford, (Tex. Civ. App. 1892) 23 S. W. 87.

Duty to place on calendar in pursuance of notice.— An order dismissing a complaint is irregular, unless the cause has been placed upon the calendar in pursuance of the notice. Browning *v.* Page, 7 How. Pr. (N. Y.) 487.

37. Israel *v.* Voight, 12 Misc. (N. Y.) 206, 34 N. Y. Suppl. 28; James *v.* Shea, 2 N. Y. Civ. Proc. 358.

38. Roy *v.* Thompson, 8 How. Pr. (N. Y.) 253. But see McCarthy *v.* Hancock, 6 How. Pr. (N. Y.) 28.

39. Israel *v.* Voight, 12 Misc. (N. Y.) 206, 34 N. Y. Suppl. 28; Chilcott *v.* Waddingham, 1 Month. L. Bul. (N. Y.) 50.

Where there is but one defendant.— It has been held that in actions where there is but one defendant his only remedy for the failure of plaintiff to bring the cause to trial is to notice it for trial on his part, and take judgment for dismissal if plaintiff fails to appear when called. Winchell *v.* Martin, 14 Abb. Pr. N. S. (N. Y.) 47.

determination of the cause, is to set it down for trial on his own notice. Then if plaintiff does not choose to try it defendant may move for a dismissal.[40]

15. Neglect to Enter Judgment. Neglect by the party entitled to judgment to demand and have the same entered within a certain time is by statute made a ground for dismissal in some jurisdictions.[41]

16. Other Grounds. It is not a ground for dismissal that a suit was brought in violation of an agreement to give time,[42] that the pleadings admit a set-off in defendant's favor exceeding plaintiff's claim, as shown by his own evidence,[43] or that a demand sued on has been paid off.[44] So where defendant made affidavit that the justice was a material witness and moved for a nonsuit, and plaintiff asked that the statement of the justice might be received as legal evidence, to which defendant refused to accede, it is error to nonsuit plaintiff.[45] When plaintiff accepted a tender, but did not apprise defendant of his intention to abandon the litigation, it was held to be the proper practice for the latter, when the case was called for trial, to move for a dismissal.[46]

J. Procedure to Effect — 1. The Motion — a. Form and Requisites. A motion for nonsuit or dismissal may in some cases be made orally.[47] The motion should state the grounds relied on,[48] so that the attention of the court and the

40. Moeller *v.* Bailey, 14 How. Pr. (N. Y.) 359.

41. Under Code Civ. Proc. § 581, subd. 6, neglect to demand and have the judgment entered for more than six months is ground for dismissal. Rosenthal *v.* McMann, 93 Cal. 505, 29 Pac. 121; Gardner *v.* Tatum, 77 Cal. 458, 19 Pac. 879. But a motion to dismiss an action tried to the court, on the ground that plaintiff has neglected to have judgment entered for more than six months after decision, is not authorized by Code Civ. Proc. § 581, where neither party is entitled to judgment at the time, because written findings have not been prepared and approved by the judge or waived by the parties. Neihaus *v.* Morgan, (Cal. 1896) 45 Pac. 255.

For unreasonable neglect.— Under a statute which provides that an action may be dismissed without a final determination of its merits, for sufficient cause shown, if a plaintiff unreasonably neglects to enter a judgment to which he is entitled defendant may move to dismiss the cause. Deuel *v.* Hawke, 2 Minn. 50.

42. Murdock *v.* Steiner, 45 Pa. St. 349.

43. Noonan *v.* Ilsley, 21 Wis. 138.

44. Hubbs *v.* State, 20 Ind. App. 181, 50 N. E. 402.

45. Van de Veer *v.* Stanton, 1 Cow. (N. Y.) 84.

46. Mela *v.* Geis, 3 N. Y. Civ. Proc. 152.

47. Milton *v.* Denver, etc., R. Co., 1 Colo. App. 307, 29 Pac. 22. As for instance where a motion is based on the ground that the petition states no cause of action. McCook *v.* Crawford, 114 Ga. 337, 40 S. E. 225.

Forms of applications for involuntary dismissal see the following cases:

Idaho.— Hyde *v.* Harkness, 1 Ida. 536.

Kansas.— Downing *v.* W. J. Gow, etc., Mortg. Invest. Co., 53 Kan. 246, 36 Pac. 335.

Maine.— Bray *v.* Libby, 71 Me. 276, 277.

Nebraska.— Jansen *v.* Mundt, 20 Nebr. 320, 322. 30 N. W. 53.

New Hampshire.— Wright *v.* Boynton, 37 N. H. 9, 10, 72 Am. Dec. 319.

New York.— Champlin *v.* Deitz, 37 How. Pr. 214, 220.

Vermont.— Howard *v.* Walker, 39 Vt. 163, 165.

Forms of orders for involuntary dismissal see Wilcher *v.* Outz, 67 Ga. 401, 402; Champlin *v.* Deitz, 37 How. Pr. (N. Y.) 214, 221; Baldwin's Appeal, 112 Pa. St. 213, 5 Atl. 732.

Form of order for involuntary nonsuit see Nicholl *v.* Littlefield, 60 Cal. 238.

48. *California.*— Flynn *v.* Dougherty, 91 Cal. 669, 27 Pac. 1080, 14 L. R. A. 230; Palmer *v.* Marysville Democrat Pub. Co., 90 Cal. 168, 27 Pac. 21; Shain *v.* Forbes, 82 Cal. 577, 23 Pac. 198; Miller *v.* Luco, 80 Cal. 257, 22 Pac. 195; Loring *v.* Stuart, 79 Cal. 200, 21 Pac. 651; Silva *v.* Holland, 74 Cal. 530, 16 Pac. 385; Coffey *v.* Greenfield, 62 Cal. 602; Poehlmann *v.* Kennedy, 48 Cal. 201; People *v.* Banvard, 27 Cal. 470; Kiler *v.* Kimbal, 10 Cal. 267.

Michigan.— Jaquith *v.* Hale, 30 Mich. 163.

Nebraska.— Forbes *v.* McHaffie, 32 Nebr. 742, 49 N. W. 721.

New York.— Dean *v.* Metropolitan El. R. Co., 119 N. Y. 540, 23 N. E. 1054; Webb *v.* Odell, 49 N. Y. 583; Binsse *v.* Wood, 37 N. Y. 526; Booth *v.* Bunce, 31 N. Y. 246; Castle *v.* Duryea, 32 Barb. 480; Williams *v.* Blauvelt, 4 Hill 27; Russell *v.* Barnes, 13 Johns. 156; Jackson *v.* Woodworth, 3 Cai. 136; Gardenier *v.* Buel, 2 Cai. 103; Bangasser *v.* Citizens' Gas Co., 19 Alb. L. J. 400.

Texas.— Pierce *v.* Pierce, 21 Tex. 469.

Canada.— Kay *v.* Sanson, 1 Ch. Chamb. (U. C.) 71.

See 17 Cent. Dig. tit. "Dismissal and Nonsuit," § 162.

Renewal of motion.— A mere motion to dismiss, made at the close of a case, without stating that it is a renewal of a motion previously made on specific grounds, and without claiming that such grounds are still tenable, fails to specify any defect in the proof and is not available on appeal. Lanahan *v.* Henry

opposite party may be particularly directed to the supposed defects.[49] The specific defects sought to be availed of must be pointed out.[50] And no others than those specified will be considered.[51] But if two grounds are stated disjunctively, one of which is good and the other bad, it is error to refuse a dismissal.[52] It is not necessary, however, that a motion for nonsuit should show what the cause of action is.[53] Nor need any specific reference to the writ be made as in a plea in abatement.[54] A motion should not ask to discontinue as to a part of an entire cause of action.[55]

b. Time of Making. A motion to dismiss for want of jurisdiction of the subject-matter may be made at any time before final judgment or decree.[56] But all motions to dismiss for grounds which might be the basis of dilatory pleas must be made within the time allowed for the filing of that class of pleas.[57] Defendant's rights are not enlarged by filing a motion instead of a plea;[58] and the limitations as to time which apply to one mode of taking advantage of error should equally apply to the other.[59] Accordingly motions to dismiss for want of process or service or defects therein must be made within the time allowed for filing pleas in abatement,[60] and cannot be made after pleading to the merits.[61] And a motion to dismiss for want of authority to sue after pleading to the merits is also too late,

Zeltner Brewing Co., 20 Misc. (N. Y.) 551, 46 N. Y. Suppl. 431.

Where two grounds of dismissal are contained in the same sentence, but disjunctively, one bad and the other good, a refusal to dismiss the complaint is error, although the good ground was stated in very general terms. Goodrich *v.* Sweeny, 36 N. Y. Super. Ct. 320.

49. Miller *v.* Luco, 80 Cal. 257, 23 Pac. 195; Coffey *v.* Greenfield, 62 Cal. 602.

50. Forbes *v.* McHaffie, 32 Nebr. 742, 49 N. W. 721.

Illustrations.— Thus in an action for trespass a motion to dismiss the complaint on the ground that plaintiff had not made out a cause of action is too general to raise the question that as plaintiff was not in actual occupancy of the premises he could not maintain the action. Dean *v.* Metropolitan El. R. Co., 119 N. Y. 540, 23 N. E. 1054. And a motion for a nonsuit "because of a variance between the allegations of the complaint and the plaintiff's proofs" will not raise the question that plaintiff should have surrendered certain notes in order to establish the cause of action. Kokomo Strawboard Co. *v.* Inman, 134 N. Y. 92, 31 N. E. 248 [*affirming* 11 N. Y. Suppl. 329].

51. Palmer *v.* Marysville Democrat Pub. Co., 90 Cal. 168, 27 Pac. 21.

52. Goodrich *v.* Sweeny, 36 N. Y. Super. Ct. 320.

53. Griffing *v.* Thurman, 2 How. Pr. (N. Y.) 275.

54. Barnet *v.* Emery, 43 Vt. 178.

55. Matthias *v.* Cook, 31 Ill. 83, where it was said that if the motion were allowed the trial would have progressed to a determination as to the portion of the damages to which pleas had been filed and would have left plaintiff at liberty to maintain another action on that part of the damages for which the suit was continued, thus giving two actions on one entire demand, which is not permissible.

56. Garrett *v.* Trotter, 65 N. C. 430; Blythe *v.* Hinckley, 84 Fed. 246. And see Morris *v.* Gilmer, 129 U. S. 315, 9 S. Ct. 289, 32 L. ed. 690.

57. *Illinois.*—Miller *v.* Metzger, 16 Ill. 390; Randolph *v.* Emerick, 13 Ill. 344; School Trustees *v.* Walters, 12 Ill. 154.

Maine.— Littlefield *v.* Pinkham, 72 Me. 369; Nickerson *v.* Nickerson, 36 Me. 417; Wilson *v.* Nichols, 29 Me. 566.

Maryland.— State *v.* Gittings, 35 Md. 169.

Massachusetts.— Kittridge *v.* Bancroft, 1 Metc. 508.

Vermont.— Snow *v.* Carpenter, 49 Vt. 426; Pollard *v.* Wilder, 17 Vt. 48.

See 17 Cent. Dig. tit. "Dismissal and Nonsuit," § 163.

Extension of time by order.— An order of court after return of summons to a defendant that no default should be entered until further notice extends the time within which he might file a motion to dismiss and excuses the defendant from making a motion within the time required for entering appearances, as provided by statute. Ricker *v.* Gerrish, 124 Mass. 367.

Under the New York statutes and rules of court which provide that if after issue of fact has been joined plaintiff neglects to bring the case to trial defendant may move for an order dismissing the complaint, the motion must be made promptly after default or it will be waived. Champion *v.* Webster, 15 Abb. Pr. (N. Y.) 4. If defendant places the cause on the calendar, and when it is reached neglects to move to dismiss the complaint, he waives his right to move at a special term to dismiss for neglect to prosecute. Miller *v.* Ring, 18 Abb. Pr. (N. Y.) 244.

58. Nickerson *v.* Nickerson, 36 Me. 417.

59. State *v.* Gittings, 35 Md. 169.

60. Nickerson *v.* Nickerson, 36 Me. 417.

61. Paulk *v.* Tanna, 106 Ga. 219, 32 S. E. 99; Lyons *v.* Planters' Loan, etc., Bank, 86 Ga. 485, 12 S. E. 882, 12 L. R. A. 155.

A motion to dismiss for want of legal process and service before pleading is not too late, although made at the second term. Johnson *v.* Shurley, 58 Ga. 417.

unless some excuse is shown for the delay.[62] Wherever the motion is filed within the time allowed for filing a plea in abatement or other dilatory plea it will be in time.[63] After a cause has been remanded from an appellate court pleas in bar pending and undisposed of must be disposed of before a motion to dismiss will be considered.[64]

c. Notice of Motion. Notice of motion for dismissal or nonsuit must always be given when required by statute or rule of court.[65] And irrespective of any statutory requirement it has been held that notice must be given of a motion to dismiss for want of prosecution.[66] On the other hand no formal notice need be given of a motion to dismiss for failure of the complaint to state a cause of action,[67] of a motion by an *amicus curiæ* to dismiss on the ground that the action is fictitious,[68] or of a motion to dismiss for want of equity, made at the hearing.[69] It has been held that a mistake in entitling the notice will not vitiate it if the affidavit annexed thereto is rightly entitled.[70] And the fact that the notice was for judgment of *non prosequitur* instead of nonsuit may be disregarded, where the papers showed that the latter must be the true object of the motion.[71] Notice by mail is insufficient.[72] Where the attorney of record in a suit affecting land lives in another state, service of notice on him at his residence will be sufficient.[73]

d. Renewal of Motion. A motion for a nonsuit, although overruled, may be renewed at a subsequent term,[74] upon leave of court,[75] and such a motion may also, it has been held, be renewed on appeal.[76]

2. Hearing and Determination — a. Discretion of Court. Except where the right to a dismissal or nonsuit is absolute, the court is vested with a large discretion, and its action in regard to an application for dismissal or nonsuit will not be disturbed unless there has been an abuse of such discretion.[77]

b. Questions Considered. Only a judgment of dismissal can be founded upon a motion to dismiss.[78] An issue of fact cannot be adjudicated on a motion to

62. Miller *v.* Metzger, 16 Ill. 390.

What is sufficient excuse for delay.—Where defendants moved on June 3 to dismiss the action on the ground that the attorneys instituting it were without authority, and that defendant was unaware of this before May 23, and it appeared that between the time of the discovery of want of authority and the making of the motion nothing was done which could affect the merits of the case, the motion should not be refused as dilatory, although there had been a prior appeal, reversal, and reinstatement of the action. Bell *v.* Farwell, 189 Ill. 414, 59 N. E. 955.

63. Roberts *v.* Fahs, 32 Ill. 474.

64. U. S. Trust Co. *v.* Territory, 10 N. M. 416, 62 Pac. 987.

65. McIntosh *v.* Moulton, 3 MacArthur (D. C.) 587; Hill *v.* Webber, 50 Mich. 142, 15 N. W. 52. And see Raritan, etc., R. Co. *v.* Shaw, 32 N. J. L. 293.

66. Berggren *v.* Berggren, 24 Nebr. 764, 40 N. W. 284; Delauney *v.* Hermann, 7 Fed. Cas. No. 3,757, Baldw. 132. But see Degraves *v.* Lane, 15 Ves. Jr. 291, 33 Eng. Reprint 764.

Notice on rule to dismiss for failure to file account.— It has been held that where a rule to show cause why a complaint should not be dismissed for plaintiff's failure to file a detailed statement of his account is continued indefinitely, plaintiff is entitled to notice if the rule is fixed thereafter for a designated day. Hennen *v.* New Orleans, etc., R. Co., 20 La. Ann. 544.

67. Brown *v.* Buttz, 15 S. C. 488.

68. Haley *v.* Eureka County Bank, 21 Nev. 127, 26 Pac. 64, 12 L. R. A. 815.

69. Lockard *v.* Lockard, 16 Ala. 423.

70. Ryers *v.* Hillyer, 1 Cai. (N. Y.) 112.

71. Jones *v.* Aldrich, 2 How. Pr. (N. Y.) 159.

72. Hudson *v.* Henry, 1 Cai. (N. Y.) 67.

73. Houston *v.* San Francisco, 47 Fed. 337.

74. Stern *v.* Filene, 14 Allen (Mass.) 161.

Failure to renew motion.— Where an order dismissing a suit commenced by attachment for a defect in the affidavit is set aside, and plaintiff permitted to amend, defendant cannot assign for error the neglect of the court to dismiss the suit, where the motion was not renewed. Frink *v.* King, 4 Ill. 144.

75. Dunn *v.* Meserole, 5 Daly (N. Y.) 434.

76. Wiggins *v.* Vaught, 1 Cheves (S. C.) 91.

77. McDonald *v.* Swett, 76 Cal. 257, 18 Pac. 324; Grigsby *v.* Napa County, 36 Cal. 585, 95 Am. Dec. 213; Larimore *v.* Bobb, 114 Mo. 446, 21 S. W. 922; Moffett, etc., Co. *v.* Peoria Water Co., 83 Hun (N. Y.) 73, 31 N. Y. Suppl. 713.

It is immaterial on which of several grounds specified in a motion for nonsuit the court relies in granting it, if any one of them is sufficient. Brennen *v.* Front St. Cable R. Co., 8 Wash. 363, 36 Pac. 272.

78. Roy *v.* Thompson, 8 How. Pr. (N. Y.) 253, holding that where defendant claims affirmative relief, legal or equitable, the duty of an actor in bringing the cause to trial devolves upon him; and that he can only obtain the relief when the cause is brought

dismiss.[79] Nor can that which goes to the whole merits of the action be tried on a motion to dismiss.[80] Errors in admitting evidence cannot be reviewed on a motion for nonsuit.[81] After a declaration has been amended, a motion to dismiss the action raises no question as to the right to amend, but only concerns the sufficiency of the declaration as amended.[82] When a case is submitted to the court for judgment on the pleadings and the court dismisses the action, plaintiff cannot complain because the court did not consider a demurrer filed by defendant with his answer.[83]

c. Evidence. If a motion to dismiss is based on the insufficiency of the complaint to state a cause of action, it will not be allowed unless the facts on which it was founded are apparent on the record.[84] But if any part of the ground of motion consists of an affirmative fact not apparent on the face of the proceedings, there must be an affidavit or other competent evidence of its existence.[85] For the purpose of ascertaining its jurisdiction by service by publication, the court may hear evidence on a motion to dismiss.[86] On a motion to dismiss a complaint for want of jurisdiction, the reasons for retaining jurisdiction may be set forth in opposing affidavits by defendant.[87] Proof to sustain a motion for discontinuance, on the ground that one of the defendants had settled plaintiff's claim, must be such as would be sufficient to sustain a plea of *puis darrein continuance* or a supplemental answer.[88] On a showing[89] that a suit is being prosecuted without plaintiff's knowledge and authority, suit should be dismissed, unless the attorney discloses who his client is and that he has a beneficial interest.[90]

3. Judgment or Order — a. Nature — (i) *Absolute or Without Prejudice.* Where the dismissal is based on some ground not going to the merits, a decree or order cannot be made precluding the party from again litigating a question touching the merits.[91] The dismissal should be without prejudice when based on a defect of parties,[92] on improper joinder of several causes of action against several

to trial upon his own notice or that of plaintiff.

79. Conger *v.* Dean, 3 Iowa 463, 66 Am. Dec. 93.

80. Linney *v.* Thompson, 44 Kan. 765, 25 Pac. 208; Peck *v.* Barnum, 24 Vt. 75.

Whether plaintiff is holder for value or as agent.— In an action on a note by an indorsee, the question whether plaintiff is the holder as an agent or for value cannot be considered on motion for nonsuit; for in either case he has the title and can maintain an action in his own name. Poorman *v.* Mills, 35 Cal. 118, 95 Am. Dec. 90.

81. O'Connor *v.* Hooper, 102 Cal. 528, 36 Pac. 939.

82. O'Shields *v.* Georgia Pac. R. Co., 83 Ga. 621, 10 S. E. 268, 6 L. R. A. 152.

83. Ellison *v.* Ellison, 11 S. W. 808, 11 Ky. L. Rep. 168.

84. No extrinsic evidence is admissible. Bower *v.* Douglass, 25 Ga. 714; Funk *v.* Israel, 5 Iowa 438. And see McHomey *v.* German Ins. Co., 37 Mo. App. 218.

85. Thus a motion for judgment, as in case of nonsuit, is a special motion, and must be founded upon affidavit showing the defects necessary to entitle the party to his motion. Storey *v.* Child, 2 Mich. 107.

Insufficient affidavit as to effort to locate defendant.— Where to defeat a motion for dismissal an affidavit is offered which shows that affiant made at a time not mentioned unsuccessful efforts to locate defendant, and about nine years after filing the complaint certain other efforts, which were successful, it will be assumed in the absence of a showing to the contrary that both efforts were made at about the same time, and such affidavit will be held insufficient. Diggins *v.* Thornton, 96 Cal. 417, 31 Pac. 289.

86. Welch *v.* Ayres, 43 Nebr. 326, 61 N. W. 635.

87. Dewitt *v.* Buchanan, 54 Barb. (N. Y.) 31.

88. Connors *v.* Titus, 10 Hun (N. Y.) 235.

89. **The mere affidavit** by defendant that he has "reason to believe" that the suit is prosecuted without the authority of plaintiff will not support a motion to dismiss. Valle *v.* Picton, 16 Mo. App. 178.

90. Bell *v.* Farwell, 189 Ill. 414, 59 N. E. 955.

91. Smith *v.* Adams, 24 Wend. (N. Y.) 585. And see Laird *v.* Morris, 23 Nev. 34, 42 Pac. 11.

If issue is joined upon an answer containing matter in abatement and in bar, the jury may be required to find specially upon each issue. If the issue upon the matter in bar is for plaintiff, and that upon the matter in abatement for defendant, a judgment may be rendered dismissing plaintiff's complaint, leaving him to commence a new action. Sweet *v.* Tuttle, 10 How. Pr. (N. Y.) 40.

92. Boyd *v.* Jones, 44 Ark. 314; Eddins *v.* Buck, 23 Ark. 507; Carpenter *v.* Miles, 17 B. Mon. (Ky.) 598; Tandy *v.* Hatcher, 6 Ky. L. Rep. 746.

defendants,[93] or on the fact that plaintiff is a public enemy;[94] where a joint action is improperly brought to recover damages for which the several plaintiffs may maintain separate actions;[95] where the court is without jurisdiction to entertain the suit;[96] where relief is sought on the mistaken assumption of a fact which does not exist, but which is the only ground relied on;[97] where the defense that an action is brought in bad faith and in fraud of another's rights is set up and established;[98] where plaintiff fails to appear, and defendant does not file a counterclaim or set-off;[99] where a case is regularly called for trial and plaintiff refuses to proceed with the trial;[1] where a demurrer to the petition is sustained;[2] where the court has sustained a demurrer to the evidence and overruled a motion for a new trial;[3] or (under a statute expressly so providing) where plaintiff does not prove his cause of action.[4] Where, however, the case made by plaintiff's pleading shows no cause of action and plaintiff does not or cannot amend, the dismissal should be absolute.[5] If the dismissal is absolute where it should be without prejudice, the judgment will be corrected on appeal,[6] even though the complainant does not urge the error.[7]

(II) *CONDITIONAL.* The court may make a dismissal or nonsuit conditional on plaintiff's non-compliance with the terms imposed by its order.[8] Thus the court may instead of dismissing give plaintiff an opportunity to bring his case to trial at a subsequent term, on penalty of dismissal for failure to do so,[9] and may make a dismissal conditional on his refusal to stipulate to pay costs.[10] So where several causes between the same parties and involving the same subject-matter are pending, and plaintiff is nonsuited as to one and refuses to try the others, defendants are entitled to judgment as in case of nonsuit, unless plaintiff stipulates that the causes remaining shall abide the event of the one tried.[11] The conditions so imposed must be strictly complied with,[12] and on failure to do so defendant is enti-

93. Burgett *v.* Allen, 54 Ark. 560, 16 S. W. 573.

94. Hoskins *v.* Gentry, 2 Duv. (Ky.) 285.

95. Paducah *v.* Allen, 49 S. W. 343, 20 Ky. L. Rep. 1342.

96. Lampert *v.* Ravid, 33 Misc. (N. Y.) 115, 67 N. Y. Suppl. 82. And see Strickland *v.* Sloan, (Tex. Civ. App. 1899) 50 S. W. 622, holding that a dismissal should be without prejudice where the amount claimed was fraudulently overstated in order to confer jurisdiction.

97. Chandler *v.* Jenks, 50 Mich. 151, 15 N. W. 60.

98. Loomis *v.* Donovan, 17 Ind. 198.

99. Kansas City, etc., R. Co. *v.* Walker, 50 Kan. 739, 32 Pac. 365.

1. Clark *v.* Dekker, 43 Kan. 692, 23 Pac. 956.

2. Com. *v.* Wood, 16 Ky. L. Rep. 446.

3. National Hotel Co. *v.* Crane Bros. Mfg. Co., 50 Kan. 49, 31 Pac. 682 [*following* Ashmead *v.* Ashmead, 23 Kan. 262].

4. Merkin *v.* Gersh, 30 Misc. (N. Y.) 758, 63 N. Y. Suppl. 75; Voullaire *v.* Wise, 19 Misc. (N. Y.) 659, 44 N. Y. Suppl. 510.

5. State *v.* Baltimore, etc., R. Co., 41 W. Va. 81, 23 S. E. 677.

6. Gregory *v.* Boston Safe-Deposit, etc., Co., 144 U. S. 665, 12 S. Ct. 783, 36 L. ed. 585 [*modifying* 36 Fed. 408]; Harrison *v.* New York Farmers' L. & T. Co., 94 Fed. 728, 36 C. C. A. 443.

7. Harrison *v.* New York Farmers' L. & T. Co., 94 Fed. 728, 36 C. C. A. 443.

8. Clark *v.* Smith, 63 Cal. 385; Tate *v.* Blakeley, 3 Hill (S. C.) 297; Wilkeson Coal, etc., Co. *v.* Driver, 9 Wash. 177, 37 Pac. 307.

9. Wilkes *v.* Phillips, 37 Ga. 588; Anderson *v.* Johnson, 1 Sandf. (N. Y.) 736; Champion *v.* Webster, 15 Abb. Pr. (N. Y.) 4; Crockett *v.* Smith, 14 Abb. Pr. (N. Y.) 62; Perkins *v.* Butler, 42 How. Pr. (N. Y.) 102; Jackson *v.* Meyers, 3 Johns. (N. Y.) 541; Cotes *v.* Thompson, 2 Cai. (N. Y.) 47, Col. & C. Cas. (N. Y.) 329, 344; Otis *v.* Gray, 3 Month. L. Bul. (N. Y.) 12.

Offer to restore to calendar and set down for trial.— In Clare *v.* Crittenden, 11 N. Y. Suppl. 519, an action in which a counterclaim was pleaded, being on the calendar for trial, was reserved, and nothing further was done by either party for nearly three years, when defendant moved to dismiss for want of prosecution. Plaintiff thereupon offered to consent to restore the case to the calendar and set it down for trial at the next term. It was held that the motion to dismiss was properly denied.

10. Corbett *v.* Claflin, 17 Abb. Pr. (N. Y.) 418; Knowles *v.* Poillon, 1 How. Pr. (N. Y.) 252; Rust *v.* Rowe, 1 How. Pr. (N. Y.) 48; Slocum *v.* Watkins, 1 How. Pr. (N. Y.) 42; McGregor *v.* Cleveland, 12 Wend. (N. Y.) 201; Jackson *v.* Leggett, 5 Wend. (N. Y.) 83; Brant *v.* Fowler, 2 Wend. (N. Y.) 284; Martin *v.* Mitchell, Harp. (S. C.) 445.

11. Jackson *v.* Leggett, 5 Wend. (N. Y.) 83; Grant *v.* Fowler, 2 Wend. (N. Y.) 284.

12. Goff *v.* Anderson, 1 How. Pr. (N. Y.) 237.

tled to a judgment as in case of nonsuit, *non prosequitur*, or dismissal,[13] unless plaintiff shows a good excuse for non-compliance.[14] Defendant is not bound to accept a second stipulation to try, although furnished with an excuse by plaintiff; but he may proceed and apply for judgment as in case of nonsuit,[15] which will be granted, unless plaintiff stipulate anew and pay costs.[16] The court may of its own motion dismiss upon non-compliance with such terms,[17] and a decree that unless the complainant amends within a certain time his bill shall be dismissed has been held to operate as a dismissal unless the conditions are complied with.[18]

b. Form. Where a complaint is not in fact dismissed on the merits, judgment should not be entered that it is dismissed "on the merits,"[19] and a dismissal which is not on the merits is usually treated as being without prejudice although not so stated in the order.[20] An order striking a cause from the docket on motion may be regarded as a discontinuance thereof; but on reservation of the right to reinstate the case, should not be construed a dismissal or discontinuance.[21] A judgment or order of dismissal should as a rule state the reasons on which it is founded.[22] The court is not, however, bound to answer specific points raised by counsel, if it grants a nonsuit.[23] Where an action was dismissed for want of prosecution it does not render the judgment of dismissal invalid that no entry was made that plaintiff was called and did not appear.[24] Where defendant moves for a dismissal of an action on the ground of unreasonable neglect to prosecute, and plaintiff objects to the sufficiency of the motion, and submits affidavits in opposition to it, plaintiff is entitled to have his objection and affidavits recited in the order granting defendant's motion.[25] Where a judgment of dismissal failed to include a judgment for costs properly chargeable to plaintiff, the court may cause costs to be included by a *nunc pro tunc* order made at the same term.[26]

c. Entry. Where a defendant has failed to enter up a judgment on *non*

13. Goodenow *v.* Butler, 1 How. Pr. (N. Y.) 82; Smith *v.* Davids, 1 Dall. (Pa.) 410, 1 L. ed. 199.

Performance of first stipulation.— Where plaintiff has brought a cause to trial pursuant to a stipulation and the verdict is set aside and another circuit has passed, he may avoid a judgment as in case of nonsuit by a second stipulation; for, the first stipulation having been performed, he had a right to again stipulate. Baldwin *v.* Tillson, 1 How. Pr. (N. Y.) 173, 1 Den. (N. Y.) 621.

14. Livingston *v.* Delafield, 1 Cai. (N. Y.) 6, Col. & C. Cas. (N. Y.) 147.

15. Farnam *v.* McClure, 7 Wend. (N. Y.) 483; Chadderton *v.* Barkus, 6 Wend. (N. Y.) 521.

May demand a trial or dismissal.— Where a plaintiff agrees to be ready for trial at the next term or dismiss his suit, defendant may demand a trial when the cause is regularly reached or demand a dismissal. Jones *v.* Kimbro, 6 Humphr. (Tenn.) 319.

16. Farnam *v.* McClure, 7 Wend. (N. Y.) 483.

17. Torrey *v.* Slaughter, 104 Ala. 552, 16 So. 423; Torrey *v.* Bishop, 104 Ala. 548, 16 So. 422.

18. Carter *v.* Thompson, 41 Ala. 375.

19. Freeman *v.* U. S. Electric-Light Co., 59 Hun (N. Y.) 341, 13 N. Y. Suppl. 93, 20 N. Y. Civ. Proc. 177; Sanders *v.* Souter, 14 N. Y. Suppl. 33; Peters *v.* Chamberlain, 13 N. Y. Suppl. 94.

20. Timmons *v.* Pine School Tp., 20 Ind. App. 93, 53 N. E. 242; Hilton *v.* Hilton, 110 Ky. 522, 62 S. W. 6, 22 Ky. L. Rep. 1934; Fox *v.* Blue Grass Grocery Co., 61 S. W. 265, 22 Ky. L. Rep. 1695, 60 S. W. 414.

An order dismissing interventions and third oppositions in an action at law, "reserving the rights of said third opponents to assert their respective claims to the funds obtained in this suit, to be asserted at the proper time," is equivalent to a dismissal without prejudice. Gravenberg *v.* Laws, 100 Fed. 1, 40 C. C. A. 240.

21. Ashlock *v.* Com., 7 B. Mon. (Ky.) 44.

22. Pillow *v.* Wade, 31 Ark. 678; Sierra *v.* Slort, 4 Mart. (La.) 587. But see Lyon *v.* Union Mut. L. Ins. Co., 17 N. Y. Suppl. 756.

Recital supporting inference that nonsuit was ordered and not voluntary.— Where defendant moved to strike out plaintiff's declaration, and the entry recites, "which motion being granted by the court, the plaintiff is nonsuited," it cannot be intended that the nonsuit was voluntarily submitted to; but the fair inference is that it was ordered by the court, either as the judgment upon the motion, or for declining to file a new declaration. State Bank *v.* Johnson, 9 Ala. 367.

23. Myers *v.* Girard Ins. Co., 26 Pa. St. 192.

24. Houston *v.* Jennings, 12 Tex. 487.

25. Paulson *v.* New Jersey, etc., R. Co., 54 N. Y. App. Div. 189, 66 N. Y. Suppl. 364.

26. Marine Bank *v.* Mallers, 58 Ill. App. 232.

prosequitur or dismissal at the regular time, he may do so afterward by obtaining leave from the court for that purpose.[27] Where a judgment of dismissal for failure to comply with a rule for costs is insufficient as originally entered by the clerk, he has authority during the term to correct the defect and enter a proper judgment.[28]

K. Matters Working Discontinuance by Operation of Law — 1. Omissions or Irregularities in Proceedings. The following omissions or irregularities in the proceedings, it has been held, will not by operation of law work a discontinuance of the case: Failure of the clerk to docket a case;[29] omission of court or counsel to have a cause docketed and called for trial;[30] entry of default after plea of the general issue, where no *similiter* is on the record;[31] withdrawal of counsel from a case called for trial;[32] change of the terms of court without provision as to cases pending;[33] failure to hold a term of court;[34] failure of a judge to attend a regular term;[35] failure of the court to meet on the day to which it is adjourned;[36] and the illegal discharge by the court of a jury.[37] So it has been held that an action begun by capias is not discontinued by issuing a summons in the same case after it went into effect.[38] A case may, however, be stricken from the trial calendar because the entries of the clerk show that no issue remains for trial.[39]

2. Failure to Renew Process. Where it has been impossible to obtain service of process on a defendant, or it has proved ineffectual to bring him into court, failure to renew the process from time to time until service be obtained will work a discontinuance as to defendant not served,[40] but not as to defendants who have been properly served.[41]

3. Failure to Continue Cause. Although a discontinuance is defined as a chasm or gap left by neglecting a continuance,[42] yet according to numerous decisions

27. Moses *v.* Boney, 1 Nott & M. (S. C.) 38.

Death of defendant before entry.— Where an order for the dismissal of a bill was taken *ex parte*, but before entry defendant died, the order may be entered as of a day antecedent to his death. Griswold *v.* Hill, 11 Fed. Cas. No. 5,834, 1 Paine 483.

28. Edwards *v.* Middleton, 28 Tex. Civ. App. 316, 66 S. W. 570.

29. Doe *v.* Clements, 24 Ala. 354; Wiswall *v.* Glidden, 4 Ala. 357; Davidson *v.* Middleton, 3 Rich. (S. C.) 349.

Failure of the clerk to perform his duty works no prejudice to the parties. Doe *v.* Clements, 24 Ala. 354.

30. Forrester *v.* Forrester, 39 Ala. 320; *Ex p.* Remson, 31 Ala. 270.

31. Brown *v.* Van Braam, 3 Dall. (U. S.) 344, 1 L. ed. 629.

32. Delano *v.* Bennett, 61 Ill. 83.

33. Halderman *v.* Frisbie, 1 Ark. 48; Bennett *v.* Engles, 1 Ark. 29.

Postponement by legislature.— Where an action is continued until the next term of court, but before such time the legislature postpones the term, the cause is not discontinued, for the legislature may change and regulate the terms of court. Clark *v.* State, 4 Ind. 268.

34. Carlisle *v.* Gaar, 18 Ind. 177. See also Arnold *v.* Norton, 42 Ind. 248, where it was held that the failure of a judge of the common pleas to appear at a time fixed for a trial before him of a case pending in the circuit court, whose judge is disqualified to try the case, does not operate as a discontinuance.

35. *Ex p.* Driver, 51 Ala. 41.

36. Mann *v.* Gwinn, 8 Gratt. (Va.) 58. See, however, Allen *v.* Summit Tp. Bd. of Health, 46 N. J. L. 99, where it was held that where a case had been adjourned to a particular time and place, and the justice failed to appear at that time and place, but from his home in another county adjourned the case in the absence of the parties and without defendant's consent to another day, this amounted to a discontinuance of the suit.

37. Ashbaugh *v.* Edgecomb, 13 Ind. 466. See also Maynard *v.* Black, 41 Ind. 310, where it was held that the fact that the court, because one member of the jury is unable to attend, discharges the jury, although both parties are willing to proceed with the remaining eleven jurors, does not operate to discontinue the case, nor render a trial at a subsequent term invalid.

38. Blair *v.* Cary, 9 Wis. 543.

39. Christ *v.* Schell, 26 Fed. 138.

40. Hazelhurst *v.* Morris, 28 Md. 67; Koonce *v.* Pelletier, 115 N. C. 233, 20 S. E. 391; Penniman *v.* Daniel, 91 N. C. 431; Etheridge *v.* Woodley, 83 N. C. 11; Pollard *v.* Huston, 7 Lea (Tenn.) 689; Green *v.* Smith, 4 Coldw. (Tenn.) 436; Armstrong *v.* Harrison, 1 Head (Tenn.) 379; Nicholls *v.* Fearson, 18 Fed. Cas. No. 10,226, 2 Cranch C. C. 526.

41. Governor *v.* Welch, 25 N. C. 249; Pollard *v.* Huston, 7 Lea (Tenn.) 689.

42. Taft *v.* Northern Transp. Co., 56 N. H. 414. See also *supra*, I, B.

Even in defaulted action.— In New Hampshire "a neglect to enter a continuance, even

the failure to enter a formal continuance will not work a discontinuance of a suit,[43] nor will the failure for a number of years to make any entry in a cause save regular continuances at each term.[44] According to other decisions, however, a suit may be discontinued by want of proceeding in the cause,[45] or by the continuance of a suit from term to term without the consent of defendant or other just cause.[46] An action is in effect dismissed by the court where plaintiff's attorneys withdraw their appearance and defendant has plaintiff called and defaulted.[47]

4. Irregularities in Pleading. The fact that a plaintiff demurs to a plea which is defective as being an answer to only a part of the declaration instead of taking judgment for the part unanswered will not as a rule operate as a discontinuance,[48] especially where there are other pleas which answer the whole declaration;[49] nor does a plaintiff discontinue his action by filing one demurrer to pleas in abatement and subsequent pleas;[50] nor does a failure to comply with an order of court directing a party to amend before the first day of the next term or the case to be dismissed operate as a dismissal of the cause.[51] If, however, the plea begins as an answer to but part and in truth answers only part, and plaintiff replies or demurs, the whole action is discontinued.[52] Declining to take issue on pleas which present a full defense to the action will amount to a discontinuance,[53] as will a refusal to join in demurrer when a defendant pleads the general issue

in a defaulted action, by no means puts an end to it; and such actions may always be brought forward." Taft *v.* Northern Transp. Co., 56 N. H. 414, 416.

43. *Alabama.*— *Ex p.* Driver, 51 Ala. 41; Russell *v.* Rolfe, 50 Ala. 56.

Arkansas.— Moreland *v.* Pelham, 7 Ark. 338.

Georgia.— Gilbert *v.* Hardwick, 11 Ga. 599.

Indiana.— Shull *v.* Kennon, 12 Ind. 34.

Tennessee.— Peirce *v.* State Bank, 1 Swan 265.

West Virginia.— Buster *v.* Holland, 27 W. Va. 510.

See 17 Cent. Dig. tit. "Dismissal and Nonsuit," § 155.

44. Gillespie *v.* Bailey, 12 W. Va. 70, 29 Am. Rep. 445.

A general continuance at the end of the term will prevent a discontinuance. Johnston *v.* Ditty, 7 Yerg. (Tenn.) 85; Hale *v.* Burwell, 2 Patt. & H. (Va.) 608.

45. Rutherford *v.* Fen, 20 N. J. L. 299, where it was held that although a discontinuance for want of proceeding in the cause cannot be set up by a defendant as a matter of right *pendente placito*, because the court can continue a cause at pleasure, yet the court in its discretion will consider a cause as discontinued, when plaintiff has left an unreasonable chasm in his proceedings.

Failure to announce ready or move to continue.— Under the twenty-second rule of the superior court, when a case is called for trial the parties shall immediately announce "ready," or move to continue, and if five minutes elapse before the announcement or motion to continue plaintiff's case will be dismissed or defendant's plea stricken. Bailey *v.* Wilner, 107 Ga. 364, 33 S. E. 434.

Failure to take any steps toward maturing a cause.— The failure of plaintiff to take any steps toward maturing a cause against defendant beyond the entrance of a common order for eleven years, there not being during that period even an order of continuance, and no appearance for some years of the case on the docket of the court is a discontinuance of the cause. Virginia Exch. Bank *v.* Hall, 6 W. Va. 447.

46. Paddleford *v.* Bancroft, 22 Vt. 529. In Amis *v.* Koger, 7 Leigh (Va.) 221, notice was given by plaintiff to defendant of a motion to be made at the June term of the county court for judgment for money paid by him as defendant's surety in a forthcoming bond, and the motion was continued without defendant's consent from that term to the August term, passing by the intermediate July term It was held to operate as a discontinuance.

47. Hulman *v.* Benighof, 125 Ind. 481, 25 N. E. 549.

48. *Alabama.*— Mallory *v.* Matlock, 7 Ala. 757.

Arkansas.— Thompson *v.* Kirkpatrick, 18 Ark. 580.

Illinois.— Wells *v.* Mason, 5 Ill. 84; Snyder *v.* Gaither, 4 Ill. 91.

Massachusetts.— Frost *v.* Hammatt, 11 Pick. 70.

Mississippi.— Harrison *v.* Balfour, 5 Sm. & M. 301.

New York.— Sterling *v.* Sherwood, 20 Johns. 204.

See 17 Cent. Dig. tit. "Dismissal and Nonsuit," § 156.

49. Wells *v.* Mason, 5 Ill. 84.

50. Gearhart *v.* Olmstead, 7 Dana (Ky.) 441.

51. Andrews *v.* Richardson, 21 Tex. 287.

52. Warren *v.* Nexsen, 4 Ill. 38.

53. Williams *v.* Brunton, 8 Ill. 600; Earle *v.* Hall, 22 Pick. (Mass.) 102.

Refusal to add similiter.— An issue of fact is not complete without the *similiter*, and a refusal by a plaintiff to add the *similiter* will be a discontinuance of the action. Earle *v.* Hall, 22 Pick. (Mass.) 102.

and files a demurrer.[54] Neglect to file a declaration within the time prescribed by law after the return of the writ also amounts to a discontinuance.[55]

5. Dismissal or Setting Aside of Process. A suit is not discontinued by setting aside the service of the summons,[56] or by an order requiring a new citation because of informality in the original citation;[57] and a dismissal of the bail process by the party is not a dismissal of the suit.[58] Where, however, it is provided by statute that if the court refuse to grant an order of attachment the action shall be dismissed without prejudice to a future action, if the attachment fails, the action fails with it.[59]

6. Removal of Cause. Removal of a cause to a federal court which declines to take jurisdiction and remands the cause does not operate as a discontinuance of the cause.[60]

7. Dismissal or Discontinuance Against Some of Co-Defendants.[61] A continuance of a cause as to one or more of several defendants works a discontinuance of the whole cause.[62] If process is served on only one of two joint defendants, no discontinuance as to the party not served need be entered.[63] A dismissal as to one defendant is also effected, where all the defendants against whom a judgment is rendered, except such defendant, appeal, and plaintiff proceeds to trial in the appellate court without bringing in such defendant;[64] where a declaration is filed against only one of several defendants, pursuant to leave of court to amend after sustaining a demurrer to the original declaration;[65] where, on the second trial of a case, a motion is made by plaintiff to amend the complaint, striking out all allegations making one defendant a party, and presenting issues as to him;[66] where one of the defendants in a joint action confesses judgment, and plaintiff accepts the confession and takes judgment against him separately,[67] where one defendant, in pursuance of a settlement, assigns his interest to complainant and permits the bill to be taken as confessed;[68] where plaintiff does not insist on service of a citation on one of several defendants and proceeds to trial against the others,[69] or where process not being served on one of several defendants, the record recites that those served, naming them, appeared, whereupon came a jury who joined for plaintiff without naming defendants.[70] So where, in an action commenced by attachment against certain persons by name, who are described in the affidavit and writ as constituting a private corporation and who are so named and described as defendants in the margin of the complaint, the complaint declares against the corporation, describing it as composed of the persons so named, the filing and going to trial on such complaint without objection operates as a discontinuance of

54. Furniss *v.* Ellis, 9 Fed. Cas. No. 5,162, 2 Brock. 14.

55. Kennedy *v.* Smith, 2 Bay (S. C.) 414.

Where plaintiff neglects to file his declaration or to appear when called for trial an involuntary nonsuit will result. Holmes *v.* Chicago, etc., R. Co., 94 Ill. 439.

56. East Tennessee, etc., R. Co. *v.* Bayliss, 74 Ala. 150.

57. Lapice *v.* Smith, 13 La. 91, 33 Am. Dec. 555.

58. Walker *v.* Scott, 29 Ga. 392.

59. Seidentopf *v.* Annabil, 6 Nebr. 524. And see Harrison *v.* King, 9 Ohio St. 388.

60. Germania F. Ins. Co. *v.* Francis, 52 Miss. 457, 24 Am. Rep. 674, holding that the cause is deemed to have been all the while pending in the state court, although several years have elapsed.

61. Dismissal or discontinuance as to one of several defendants working a discontinuance of the whole action see *supra*, II, F; III, F.

62. Comstock *v.* Givens, 6 Ala. 95. And see Curtis *v.* Gaines, 46 Ala. 455.

63. If no judgment is rendered against him this is in legal effect a discontinuance as to him. Oliver *v.* Hutto, 5 Ala. 211.

An order of discontinuance as to one not served in an action against several defendants severally liable is valid and operates as a discontinuance as to such defendant, where it is entered upon the common-rule book, although inadvertently not signed by the attorney at the time of the entry. Steele *v.* Kent Cir. Judge, 109 Mich. 647, 67 N. W. 963.

64. Callaghan *v.* Myers, 89 Ill. 566, Walker, J., delivering the opinion of the court.

65. Black *v.* Womer, 100 Ill. 328.

66. Kent *v.* Popham, 6 N. Y. Civ. Proc. 336.

67. Elledge *v.* Bowman, 5 J. J. Marsh. (Ky.) 593.

68. Widner *v.* Lane, 14 Mich. 124.

69. Greenwood *v.* Watts, 1 Tex. App. Civ. Cas. 114.

70. Houston *v.* Ward, 8 Tex. 124.

the action against the individuals, and converts it into an action against the corporation as sole defendant.[71]

L. Discontinuance or Nonsuit on Court's Own Motion. The court may in many instances order a nonsuit or dismiss an action on its own motion,[72] even though it has previously refused a motion for nonsuit by defendant.[73] But where it has jurisdiction of the subject-matter and the parties, and the issues are tried without objection, it will not on its own motion raise objections to its jurisdiction;[74] and where a statute specifies the grounds for nonsuit a court cannot order a nonsuit for other reasons or without complying with the statutory provisions.[75] Nor can a court on its own motion dismiss or nonsuit a case after a plea of set-off has been filed.[76] It is also error for the court to dismiss on its own motion an action because prematurely brought.[77]

M. Operation and Effect — 1. In General. Where a suit is dismissed or a nonsuit ordered, the parties are out of court,[78] and all further proceedings are unauthorized,[79] until the judgment of dismissal or nonsuit is vacated and the cause reinstated.[80] In so far as the particular action is concerned it is the same

71. White *v.* Equitable Nuptial Ben. Union, 76 Ala. 251, 52 Am. Rep. 325.

72. Allgro *v.* Duncan, 24 How. Pr. (N. Y.) 210.

Thus the court may dismiss of its own motion when it has no jurisdiction of the subject-matter (Ellenwood *v.* Marietta Chair Co., 158 U. S. 105, 15 S. Ct. 771, 39 L. ed. 913), where a judgment would be erroneous for want of legal service of process (Mace *v.* Woodward, 38 Me. 426), where the action contravenes public policy (Valentine *v.* Stewart, 15 Cal. 387), or where it appears that both parties litigant are fraudulently concealing the truth, and trying to get an unjust advantage of each other (Hamilton *v.* Hamilton, 13 B. Mon. (Ky.) 502).

73. Couch *v.* Charlotte, etc., R. Co., 22 S. C. 557.

74. Courtney *v.* Neimeyer, 33 Nebr. 796, 51 N. W. 234.

75. McDaniel *v.* Pressler, 3 Wash. 636, 29 Pac. 209. And see Burns *v.* Rodefer, 15 Nev. 59.

Necessity for order to plaintiff to bring in parties.— The court cannot dismiss a proceeding of its own motion for defect of parties without first ordering plaintiff to bring in such parties as are necessary, as provided by Wash. Code Civ. Proc. § 409. Then if plaintiff refuses or neglects to obey such order the proceeding may be dismissed. Harrington *v.* Miller, 4 Wash. 808, 31 Pac. 325.

76. Calhoun *v.* Citizens Banking Co., 113 Ga. 621, 38 S. E. 977.

77. Hanover F. Ins. Co. *v.* Shrader, 11 Tex. Civ. App. 255, 31 S. W. 1100, 32 S. W. 344.

78. Goodrich *v.* Huntington, 11 Ill. 646; Morgan *v.* Campbell, 54 Ill. App. 242; Harrison *v.* McMurray, 71 Tex. 122, 8 S. W. 612.

A judgment of nonsuit against one of several persons joined as plaintiffs terminates the action as to all. Lafoon *v.* Shearin, 95 N. C. 391.

As to one joining plaintiff in amended petition.— On the failure of the original plaintiff to verify an amended petition when required to do so, an order that it be treated as to him as if it had not been filed does not dispose of the action as to one who had without objection by defendant joined plaintiff in the amended petition, and been treated as a party to the action. Harrison *v.* Lebanon Waterworks, 91 Ky. 255, 15 S. W. 522, 12 Ky. L. Rep. 822, 34 Am. St. Rep. 180.

79. *Arkansas.*— Hubbard *v.* Welch, 11 Ark. 151.

California.— O'Shea *v.* Wilkinson, 95 Cal. 454, 30 Pac. 588.

Georgia.— Whatley *v.* Slaton, 36 Ga. 653.

Illinois.— Goodrich *v.* Huntington, 11 Ill. 646.

Louisiana.— State *v.* Read, 52 La. Ann. 1880, 28 So. 255.

New York.— Duryea *v.* Fuechsel, 145 N. Y. 654, 40 N. E. 204.

Texas.— Wooton *v.* Manning, 11 Tex. 327; Wright *v.* Thomas, 6 Tex. 420.

See 17 Cent. Dig. tit. "Dismissal and Nonsuit," § 178.

Effect upon right to adjudication of damages.— After the dismissal of an action for some reason apart from the merits of the case, defendant is not entitled to have his right to damages tried or adjudicated. Campbell *v.* Crone, 10 Nebr. 571, 7 N. W. 334; Collamer *v.* Page, 35 Vt. 387.

When jurisdiction not lost by dismissal or improper designation of defendant.— Where a defendant is sued and summons served on her by her true full name, and she is also mentioned in the pleadings and summons by the initials of her given name, the court does not lose jurisdiction over her by dismissing the action as to the person named and designated by the initial letters of defendant's given name. Nebraska L. & T. Co. *v.* Kroener, 63 Nebr. 289, 88 N. W. 499.

80. *Georgia.*— Calloway *v.* McElmurray, 91 Ga. 166, 17 S. E. 103.

Illinois.— Goodrich *v.* Huntington, 11 Ill. 646.

Maryland.— Ringgold *v.* Emory, 1 Md. 348.

Missouri.— Kelly *v.* Hogan, 16 Mo. 215.

New York.— James *v.* Shea, 28 Hun 74, 2 N. Y. Civ. Proc. 358.

as a judgment for defendant on the merits,[81] and in order to sustain a judgment subsequent to the dismissal the record must show such vacation or such acts of the parties as evince a design to have the cause heard and determined without regard to former proceedings.[82]

2. Effect on Intervention, Cross Complaint, or Counter-Claim. According to some decisions the dismissal on motion of defendant of the main action carries with it the dismissal of an intervention or cross petition filed in the case.[83] According to others if there is an intervener who claims an interest in the matter in dispute adverse to both plaintiff and defendant, and they answer the intervention, raising material issues, and on motion of defendant the court nonsuits plaintiff, the action is still pending as to the issues raised on the intervention, and the court should proceed and try them.[84] So also where plaintiff is nonsuited after filing an answer to a cross complaint, although he can have no relief on account of matters alleged in his complaint, defendant is entitled to have the issues made by his cross complaint and the answer thereto tried and disposed of.[85]

3. Enforcement of Order. If a court orders a nonsuit it is its duty to enforce such order.[86]

N. Setting Aside of Dismissal or Nonsuit and Reinstatement of Cause

— 1. In General. Where a suit has been dismissed or a nonsuit granted such dismissal or nonsuit may be set aside and the cause reinstated by consent,[87] or for good cause shown,[88] and on a denial of such motion an exception may be taken.[89] Where, however, a party submits to a nonsuit and makes no motion to set it aside, the case will not be inquired into in the supreme court.[90] Where a case is dismissed on motion of the clerk for non-payment of the clerk's fee for con-

Pennsylvania.— Gould *v.* Crawford, 2 Pa. St. 89.

Texas.— Harrison *v.* McMurray, 71 Tex. 122, 8 S. W. 612.

United States.— Robinson *v.* Satterlee, 20 Fed. Cas. No. 11,967, 3 Sawy. 134.

See 17 Cent. Dig. tit. "Dismissal and Nonsuit," § 178.

81. Dowling *v.* Polack, 18 Cal. 625; English *v.* Scott, 1 Mo. 495.

82. Goodrich *v.* Huntington, 11 Ill. 646.

83. Walmsley *v.* Whitfield, 24 La. Ann. 258; Lowenstein *v.* Hooker, 71 Miss. 102, 14 So. 531.

Dismissal of a suit in revendication, because of plaintiff's previous sale of his interest in the land, carries with it that of an intervener claiming as his vendee. Barron *v.* Jacobs, 38 La. Ann. 370.

Right of defendant to bring action.—Where plaintiff is nonsuited in an action in which defendant had pleaded a set-off, defendant may afterward bring an action on the demand which he had interposed as a set-off. Chapin Hall Lumber Co. *v.* Dalrymple, 53 N. J. L. 267, 21 Atl. 949.

84. Poehlmann *v.* Kennedy, 48 Cal. 201. See also Marshall *v.* Shueber, 3 Tex. App. Civ. Cas. § 370.

Substitution of interveners for original plaintiff.— Where one sued as administrator upon a note payable to the executors of the deceased, and the executors afterward intervened and the administrators withdrew, stating that the note belonged to the executors in their executive capacity, it was held that the court below erred in dismissing the suit both as to the original plaintiff and as to the interveners. The interveners should have been substituted for the original plaintiff. Batchelor *v.* Douglas, 31 Tex. 182.

85. Warner *v.* Darrow, 91 Cal. 309, 27 Pac. 737.

Defendant free to establish counter-claim.— Where defendant set up a counter-claim, and on the opening of the trial moved to dismiss the complaint on the ground of its insufficiency, to which plaintiff consented, and the motion was sustained, it did not operate as a nonsuit, but left defendant free to establish his counter-claim. Maffett *v.* Thompson, 32 Oreg. 546, 52 Pac. 565, 53 Pac. 854.

Right to recover in answer in reconvention. — In Griffin *v.* Chubb, 16 Tex. 219, plaintiff brought a suit on a claim to recover property. Defendant afterward pleaded in reconvention on a note not due when plaintiff's suit was instituted. Plaintiff's suit was dismissed. It was held that, although plaintiff's suit was dismissed for failure to state a cause of action, defendant had a right to recover in his answer in reconvention.

86. Bassett *v.* Baker, Wright (Ohio) 337; Worden *v.* Smith, Wright (Ohio) 334.

87. Wilson *v.* Fleming, Hard. (Ky.) 253.

Consent necessary to revival.— A case having been called on the first day of the term, and discontinued because neither party appeared, could not be revived on the next day without the consent of both parties. Babcock *v.* Janes, Kirby (Conn.) 361.

88. Lodtman *v.* Schluter, 71 Cal. 94, 16 Pac. 540; Wilson *v.* Fleming, Hard. (Ky.) 253; Harvey *v.* Pollock, 148 Pa. St. 534, 23 Atl. 1127. And see *supra*, III, I.

89. Aiken *v.* Peck, 72 Ga. 434; Harvey *v.* Pollock, 148 Pa. St. 534, 23 Atl. 1127.

90. Crane *v.* Daggett, 10 Mo. 108.

tinuance, plaintiff's remedy is by petition for trial and not by motion to reinstate.[91]

2. Discretion of Court. A motion to set aside a nonsuit or judgment of dismissal and reinstate the case, being usually considered as in the nature of a motion for reconsideration,[92] is addressed to and rests in the discretion of the court[93] before whom the case was heard and by whom it was dismissed or the nonsuit granted,[94] and such discretion will not be controlled unless manifestly abused.[95] Where, however, plaintiff's action is dismissed, but the case is continued as to defendant's counter-claim, the court has no authority at a subsequent term before the issues raised by the counter-claim have been tried to reinstate plaintiff's action upon motion.[96]

3. Time For Setting Aside and Reinstatement. It is competent for a court to reinstate a case during the same term at which it was dismissed.[97] But in accordance with the rule limiting the power of the court over their judgments rendered to the duration of the term at which they are entered[98] the court ordinarily has no power to set aside a dismissal or nonsuit and reinstate the cause at a subsequent term.[99] It has been so held where the cause is dismissed for failure of the

91. Taylor *v.* Burns, 16 R. I. 663, 19 Atl. 241.

92. Central R., etc., Co. *v.* Folds, 86 Ga. 42, 12 S. E. 216.

93. *Alabama.*— Smith *v.* Robinson, 11 Ala. 270.

Georgia.— Bird *v.* Burgsteiner, 113 Ga. 1012, 39 S. E. 425; Ray *v.* Seitz, 106 Ga. 512, 32 S. E. 603; Phillips *v.* Aycock, 89 Ga. 725, 15 S. E. 624; Central R., etc., Co. *v.* Folds, 86 Ga. 42, 12 S. E. 216; Vanzant *v.* Arnold, 31 Ga. 210.

Illinois.— Ilett *v.* Collins, 103 Ill. 74; Combs *v.* Steele, 80 Ill. 101; Rankin *v.* Curtenius, 12 Ill. 334.

Michigan.— Reaume *v.* Wayne Cir. Judge, 130 Mich. 245, 89 N. W. 953; Hoffman *v.* St. Clair Cir. Judge, 37 Mich. 131.

Minnesota.— Dunham *v.* Byrnes, 36 Minn. 106, 30 N. W. 402.

Missouri.— Crane Co. *v.* Hawley, 54 Mo. App. 603.

New York.— Pollock *v.* Wannamaker, 65 How. Pr. 508.

South Carolina.— McDermaid *v.* Earnest, 4 Strobh. 192.

Texas.— George *v.* Taylor, 55 Tex. 97; Osborne *v.* Scott, 13 Tex. 59; Hays *v.* Cage, 2 Tex. 501.

Vermont.— Connecticut, etc., R. Co. *v.* Newell, 31 Vt. 364.

Wisconsin.— Hiles *v.* McFarland, 3 Pinn. 365, 4 Chandl. 89.

United States.— Williams *v.* Sinclair, 29 Fed. Cas. No. 17,737, 3 McLean 289.

Canada.— Rees *v.* Atty.-Gen., 2 Ch. Chamb. (U. C.) 300.

See 17 Cent. Dig. tit. "Dismissal and Nonsuit," § 183.

94. Southern R. Co. *v.* James, 114 Ga. 198, 39 S. E. 849; Montgomery *v.* Vinton, 37 Vt. 514.

Renewal of motion at second trial before another judge.— A motion was made to dismiss a suit and denied, and a bill of exceptions taken *pendente lite*. The trial resulted in a mistrial. At a second trial before another judge the motion was renewed. He refused to consider it. It was held that as the exception to the first decision was then pending and undetermined the second judge was estopped from examining the matter. Runnals *v.* Aycock, 78 Ga. 553, 3 S. E. 657.

95. Southern R. Co. *v.* James, 114 Ga. 198, 39 S. E. 849; Harrison *v.* Tate, 100 Ga. 317, 27 S. E. 179; Bigelow *v.* Kewanee, 17 Ill. App. 631; Osborne *v.* Scott, 13 Tex. 59; Alexander *v.* Smith, 20 Tex. Civ. App. 304, 49 S. W. 916.

96. Rumsey *v.* Kiowa Town Co., 7 Kan. App. 674, 53 Pac. 886.

97. East Genesee, etc., R. Co. *v.* Greene, 95 Ga. 35, 22 S. E. 36; Chicago Cheese Co. *v.* Smith, 94 Ga. 663, 20 S. E. 106; Phillips *v.* Aycock, 89 Ga. 725, 15 S. E. 624; Combs *v.* Steele, 80 Ill. 101; Frink *v.* King, 4 Ill. 144; Brown *v.* Foote, 55 Mo. 178; Chichester *v.* Hastie, 9 S. C. 330.

An order dismissing an action for want of prosecution may be set aside the next day, and the case reinstated on proper terms. Chinn *v.* Bretches, 42 Kan. 316, 22 Pac. 426.

Where the complaint has been dismissed in the course of trial as against one or more defendants, and the case proceeds and further evidence is introduced, the court is powerless to reconsider its order of dismissal and reinstate a successful defendant. Blumenthal *v.* Lewy, 82 N. Y. App. Div. 535, 81 N. Y. Suppl. 528.

98. Jameson *v.* Kinsley, 85 Mo. App. 298.

99. *Georgia.*— Alley *v.* Halcombe, 96 Ga. 810, 22 S. E. 901.

Illinois.— Lill *v.* Stookey, 72 Ill. 495; Smith *v.* Wilson, 26 Ill. 186; Chicago Title, etc., Co. *v.* Chicago, etc., R. Co., 58 Ill. App. 388; Windett *v.* Murphy, 50 Ill. App. 595.

Kansas.—Kauter *v.* Fritz, 5 Kan. App. 756, 47 Pac. 187.

Maine.— Priest *v.* Axon, 93 Me. 34, 44 Atl. 124.

Mississippi.— American Burial Case Co. *v.* Shaughnessy, 59 Miss. 398.

Missouri.— Jameson *v.* Kinsley, 85 Mo. App. 298.

complaint to state a cause of action,[1] or for want of prosecution.[2] Limitations of the rule, however, have been recognized. Thus a suit dismissed for want of prosecution may be reinstated at a subsequent term by consent of parties;[3] and one who is a necessary party but is not made a party may as a matter of right move at a subsequent term to set aside a dismissal.[4] So if the court dismisses a suit which it is incompetent to try, it may be reinstated on motion of plaintiff at a subsequent term.[5] It has also been held that where plaintiff dies before suit is dismissed, a motion at the succeeding term of court is the proper proceeding to have it reinstated.[6] In any event, however, a delay until a subsequent term before moving to reinstate is good ground for a court to refuse to set aside a dismissal and reinstate the case, in the absence of a good excuse for the delay.[7] If a statute requires a motion to reinstate within a year after dismissal, a motion not made within that time will not be entertained.[8]

4. Notice of Motion. While according to some decisions the setting aside of a dismissal or nonsuit at the same term at which entered, being within the discretion of the court, it may act on plaintiff's motion without notice to defendant or without requiring him to show cause against it,[9] the weight of authority is that under any circumstances notice must be given so that defendant may have an opportunity to be heard.[10] And in the absence of a showing to the contrary, it may be presumed that defendant had notice of an order setting aside a judgment of dismissal.[11]

5. Grounds — a. In General. A dismissal or nonsuit will often be set aside

North Carolina.— Arrowood *v.* Greenwood, 50 N. C. 414.

Texas.— Ewing *v.* Perry, 35 Tex. 777.

United States.— Cameron *v.* McRoberts, 3 Wheat. 591, 4 L. ed. 467.

See 17 Cent. Dig. tit. "Dismissal and Nonsuit," § 184.

Too late after one year.— Where an action is dismissed for want of prosecution and not on the merits, the default will not be opened a year afterward, but plaintiff will be left to his remedy by a new action. Gross *v.* Granite State Provident Assoc., 8 Misc. (N. Y.) 530, 28 N. Y. Suppl. 769.

Waiver of irregularity.— Although it is irregular for a court at a subsequent term to set aside a judgment of dismissal of *non prosequitur*, yet the irregularity is cured, if defendant afterward appear to the action. Byrd *v.* McDaniel, 26 Ala. 582; Hair *v.* Moody, 9 Ala. 399.

1. East Tennessee, etc., R. Co. *v.* Greene, 95 Ga. 35, 22 S. E. 36.

2. Chicago, etc., R. Co. *v.* Berg, 57 Ill. App. 521; Woodruff *v.* Matheney, 55 Ill. App. 350; Reynolds *v.* Anspach, 14 Ill. App. 38; Eddelman *v.* McGlathery, 74 Tex. 280, 11 S. W. 1100; Ewing *v.* Perry, 35 Tex. 777. And see West *v.* Noakes, 6 Blackf. (Ind.) 335; Thornton *v.* Corbin, 3 Call (Va.) 221.

Where a clerk by mistake enters a cause as dismissed for want of prosecution, when in fact it was dismissed under a general call of the pending cases, the court has no power at a subsequent term to reinstate the cause, notwithstanding the fact that the error was that of the clerk. Chicago Title, etc., Co. *v.* Chicago, etc., R. Co., 58 Ill. App. 388.

Effect of entry of notice of motion to set aside.— When notice of motion to set aside a judgment of nonsuit is merely entered on the docket, but neither acted on nor called to the attention of the court, a general order that all motions be continued does not continue the motion, so as to authorize the setting aside of the judgment at a subsequent term. Gunnells *v.* State Bank, 18 Ala. 676.

3. Chicago, etc., R. Co. *v.* Berg, 57 Ill. App. 521.

4. Home Ins. Co. *v.* Hollis, 53 Ga. 659.

5. Garrett *v.* Gaines, 6 Tex. 435.

6. Armstrong *v.* Nixon, 16 Tex. 610.

7. Arnold *v.* Kendrick, 50 Ga. 293.

On footing of motion for new trial.— A motion to reinstate a case, made at a term subsequent to that at which the judgment of dismissal was had, stands on the footing of a motion for a new trial, and requires the same excuse for a delay as is required in motions for new trial after the term has passed. Watkins *v.* Brizendine, 111 Ga. 458, 36 S. E. 807; Austin *v.* Markham, 44 Ga. 161.

8. Echols *v.* Brennan, 99 Va. 150, 37 S. E. 786.

9. Smith *v.* Robinson, 11 Ala. 270; Yetzer *v.* Martin, 58 Iowa 612, 12 N. W. 630; Carlton *v.* Miller, 2 Tex. Civ. App. 619, 21 S. W. 697.

In a collateral proceeding failure to give notice has been held not to invalidate the judgment. Davis *v.* Wade, 58 Mo. App. 641.

10. Green *v.* Driskell, 99 Ga. 624, 25 S. E. 938; Robinson *v.* Maghee, 85 Ill. 545; Smith *v.* Wilson, 26 Ill. 186; Morgan *v.* Campbell, 54 Ill. App. 242; Parker *v.* Johnson, 22 Mo. App. 516.

Proceeding by notice of motion and not by order nisi.— Where in a jury case the judge at the trial enters a nonsuit, a notice of motion, and not an order *nisi*, is the proper mode of moving against it. Clarkson *v.* Snider, 10 Ont. 561.

11. Hansen *v.* Bergquist, 9 Nebr. 269, 2 N. W. 858.

where a suit is meritorious and it appears that plaintiff was not culpably negligent,[12] and no injury results to defendant,[13] and it will not require so strong a ground to set aside a nonsuit as to grant a new trial.[14] Thus a cause may be reinstated where there has been surprise,[15] improvident consent to dismissal by attorney,[16] or failure to give bond for costs through ignorance that it would be required;[17] and where defendant has waived service of process, and afterward had the case dismissed for want of service, the court will reinstate the case on being informed of the waiver.[18] So it has been held that where a cause is dismissed for failure of the justice to send up a transcript of the proceedings, the dismissal will be set aside, where the justice makes affidavit that he had sent up the transcript and the affidavit is not controverted.[19] On the other hand the fact that a nonsuit is based on an untenable ground is not a ground to set it aside, if it appears from the facts that there were sufficient reasons for granting it.[20] And a nonsuit will not be set aside where it will serve no good purpose to do so.[21] So a nonsuit granted after evidence given on both sides will not be set aside for that cause alone,[22] on the ground that the judge received evidence prematurely or refused to submit to the jury a question of fact proper for their determination,[23] because he refused to grant an amendment of a declaration,[24] or because plaintiff tried his case on a wrong theory.[25] Granting or refusing a commission is within the discretion of the court, and unless arbitrarily granted or refused is no ground for setting aside a judgment of nonsuit.[26] And the fact that the case was dismissed contrary to agreement is not sufficient where it is not shown that the agreement was one between the parties to the action.[27]

b. In Case of Dismissal or Nonsuit For Want of Prosecution. In order that a dismissal or nonsuit for want of prosecution may be set aside and the suit reinstated plaintiff must show excuse for neglect,[28] or that some casualty, extraneous

12. Davis *v.* Alexander, 27 Ga. 479.

Right to amend on payment of costs.— Where plaintiff in an action for obstructing a right of way did not give notice in his statement of title by adverse user, and on motion of defendant a compulsory nonsuit was entered, plaintiff was entitled to set aside such nonsuit on motion and amend his statement on payment of defendant's costs. Hughes *v.* Snee, 9 Pa. Dist. 526, 31 Pittsb. Leg. J. N. S. 75.

13. Davis *v.* Alexander, 27 Ga. 479; Jackson *v.* Waldron, 5 Fed. 245.

14. McAlister *v.* Williams, 1 Overt. (Tenn.) 119.

15. Fifield *v.* Seeds, 18 N. J. L. 166; Jackson *v.* Waldron, 5 Fed. 245; Williams *v.* Sinclair, 29 Fed. Cas. No. 17,737, 3 McLean 289.

16. Benwood Iron-Works Co. *v.* Tappan, 56 Miss. 659.

17. Edwards *v.* Middleton, 28 Tex. Civ. App. 316, 66 S. W. 570.

18. Humphreys *v.* Humphreys, Morr. (Iowa) 359.

19. Klein *v.* Shields, 3 Tex. App. Civ. Cas. § 207.

20. McBride *v.* Latham, 79 Ga. 661, 4 S. E. 927; Thompkins *v.* Phipps, 68 Ga. 155; Arnold *v.* Kendrick, 50 Ga. 293; Beckwith *v.* Whalen, 5 Lans. (N. Y.) 376; Stevens *v.* Hyde, 32 Barb. (N. Y.) 171.

Where a plaintiff fails to make out a case, it matters not upon what grounds a nonsuit is ordered. Pope *v.* Boyle, 98 Mo. 527, 11 S. W. 1010.

21. Jones *v.* Smith, 14 Ohio 606 (where a verdict for plaintiff would not lay the foundation for a legal judgment); Boyd *v.* Brent, 3 Brev. (S. C.) 241 (where the declaration stated no cause of action and it was clear that plaintiff could not recover); Whitney *v.* U. S., 18 Ct. Cl. 19 (where the cause was barred by the statute of limitations).

22. Fort *v.* Collins, 21 Wend. (N. Y.) 109.

23. Craig *v.* Fanning, 6 How. Pr. (N. Y.) 336.

24. Halifax Banking Co. *v.* Worrall, 16 Nova Scotia 482.

Erroneous decisions of the judge on the trial can only be corrected on a case or bill of exceptions. Craig *v.* Fanning, 6 How. Pr. (N. Y.) 336.

25. Wigton *v.* Bosler, 102 Fed. 70.

26. Wetta *v.* New Orleans, etc., R. Co., 107 La. 383, 31 So. 775.

27. Baltimore, etc., R. Co. *v.* Eggers, 139 Ind. 24, 38 N. E. 466.

28. *Georgia.*— Farr *v.* State, 112 Ga. 540, 37 S. E. 880; Graham *v.* Smith, 80 Ga. 676, 7 S. E. 131; Platen *v.* Chatham County, 60 Ga. 422.

Iowa.— Snell *v.* Iowa Homestead Co., 67 Iowa 405, 25 N. W. 678.

Kentucky.— Beckwith *v.* South Covington, etc., R. Co., 67 S. W. 18, 23 Ky. L. Rep. 2313.

North Carolina.— Stith *v.* Jones, 119 N. C. 428, 25 S. E. 1022.

United States.— Williamson *v.* Bryan, 30 Fed. Cas. No. 17,751, 2 Cranch C. C. 402.

See 17 Cent. Dig. tit. "Dismissal and Nonsuit," § 187.

Delays in mail.— When a case, because of the failure of counsel for plaintiff in error to appear either in person or by brief and

impediment, or unavoidable interference prevented him from duly attending to it.[29] If these facts are shown and it appears he has a meritorious cause of action the court may properly reinstate the cause.[30]

6. Application and Hearing. Applications to set aside a dismissal or nonsuit and reinstate the case should usually be made by motion,[31] or petition,[32] by a party to the suit,[33] setting out the order complained of, and the grounds for vacating the same,[34] and supported by an affidavit or some other evidence of merit,[35] which affidavits if not denied will for the purpose of the motion be taken as true.[36] The question of fraud in the procurement of a discontinuance of an

prosecute the same, is dismissed, it will not even by consent be reinstated on a showing that such counsel mailed his briefs in time to reach the court before the case was called for a hearing, since it must be held that such counsel took the risk of delays in the mail. Farr *v.* State, 112 Ga. 540, 37 S. E. 880. And see Manhattan F. Ins. Co. *v.* Tumlin, 64 Ga. 451.

29. *Nebraska.*— Smith *v.* Pinney, 2 Nebr. 139.

New York.— Clute *v.* Mahon, 58 N. Y. Super. Ct. 568, 9 N. Y. Suppl. 713.

Pennsylvania.— Ribbert *v.* Jackson, 3 Del. Co. 336.

Texas.— Chambers *v.* Shaw, 23 Tex. 165; Smith *v.* Patrick, (Civ. App. 1896) 36 S. W. 762.

United States.— Matthews *v.* U. S., 17 Ct. Cl. 220.

England.— Southampton Steam-boat Co. *v.* Rawlins, 11 Jur. N. S. 230, 34 L. J. Ch. 287, 13 Wkly. Rep. 512.

See 17 Cent. Dig. tit. "Dismissal and Nonsuit," § 187.

30. *Iowa.*— Byington *v.* Quincy, 61 Iowa 480, 16 N. W. 582.

Nebraska.— Lundgren *v.* Erik, 38 Nebr. 363, 56 N. W. 992; Flannagan *v.* Elton, 34 Nebr. 355, 51 N. W. 967; Brusa *v.* Sandwich Mfg. Co., 28 Nebr. 827, 45 N. W. 250.

New Jersey.— Boone *v.* Ridgway, 27 N. J. Eq. 297.

New York.— McEwen *v.* Dimond, 81 N. Y. App. Div. 626, 81 N. Y. Suppl. 365.

South Carolina.— Munro *v.* Laurens, 1 McMull. 442.

Texas.—Smith *v.* Patrick, (Civ. App. 1896) 36 S. W. 762.

See 17 Cent. Dig. tit. "Dismissal and Nonsuit," § 187.

If counsel be detained from court providentially, and in his absence his cause be dismissed for want of prosecution it may be reinstated. Sparks *v.* Maxwell, 41 Ga. 421.

Unavoidable accidents to plaintiff and his witnesses or to his attorney are a reasonable ground for removing a nonsuit, ordered because plaintiff was not ready for trial when the docket was called. Douglass *v.* Frizzle, 2 Bay (S. C.) 417. And see Yetzer *v.* Marlin, 58 Iowa 612, 12 N. W. 630.

Sickness of plaintiff and absence of attorney.— On an application by an administrator to set aside a judgment of dismissal rendered against his decedent, it appeared that decedent was at the time of the dismissal eighty years of age, feeble, and unable to leave the house, and that his attorney was summoned to a distance on account of the illness of his wife. Plaintiff's cause of action was meritorious. It was held that the dismissal should be set aside. Leaming *v.* McMillan, 59 Ark. 162, 26 S. W. 820, 43 Am. St. Rep. 26.

Where delay in appearing only slight.— Where an attorney appears in court five minutes after the dismissal of the cause and rendition of judgment against his client because of the absence of both attorney and client when the case was called for trial, it is not an abuse of discretion for the court, on motion supported by a sufficient affidavit, to vacate the order of dismissal and judgment, and restore the cause to the calendar. Ashton *v.* Dashaway Assoc., (Cal. 1890) 33 Pac. 446.

Where a cause is dismissed owing to violation of verbal agreement between counsel to postpone the trial, the court may reinstate the cause. Oliver *v.* Hart, 35 Ill. 55.

31. *Georgia.*— Smith *v.* Sheffield, 83 Ga. 103, 9 S. E. 791; Aiken *v.* Peck, 72 Ga. 434.

Illinois.— Boyle *v.* Levi, 73 Ill. 175.

Michigan.— Voigt Brewery Co. *v.* Donovan, 103 Mich. 190, 61 N. W. 343.

Nebraska.— Flannagan *v.* Elton, 34 Nebr. 355, 51 N. W. 967.

New York.— Kirby *v.* Sisson, 2 Wend. 550.

See 17 Cent. Dig. tit. "Dismissal and Nonsuit," § 188.

There is no authority for a rule to open a judgment of nonsuit, such a judgment not being within the meaning of any of the acts in regard to the opening of judgments, but the proper and only practice is to apply to the court to take off the nonsuit. Pollock *v.* Harvey, 148 Pa. St. 536, 23 Atl. 1128; Harvey *v.* Pollock, 148 Pa. St. 534, 23 Atl. 1127.

32. Cole *v.* Walker, 7 Kan. 139.

33. Kenyon *v.* Pierce, (R. I. 1896) 34 Atl. 951, where it was held that a motion to take off an entry of discontinuance will be denied where the mover is not a party to the suit.

34. Cole *v.* Walker, 7 Kan. 139.

35. Smith *v.* Sheffield, 83 Ga. 103, 9 S. E. 791.

Necessity for showing of meritorious defense.— An affidavit in support of a motion to set aside an order of dismissal and reinstate the cause, which shows negligence on the part of the applicant, and states that there is a full and complete defense to the suit, but does not show by facts stated that there is a meritorious defense, is insufficient. Bigelow *v.* Kewanee, 17 Ill. App. 631.

36. Flannagan *v.* Elton, 34 Nebr. 355, 51 N. W. 967.

action cannot be tried on affidavits in support of a motion to set it aside.[37] Nor on such a motion will the court take notice of objections to the sufficiency of the declaration.[38] On a motion to set aside a nonsuit, a defendant may object because of the loss of a note declared on, being a note payable to bearer, as an answer to the motion, although at *nisi prius* no such objection was taken, and defendant then set up a defense on the merits, by showing a want of consideration.[39]

7. Imposition of Terms. A court in passing upon an application to set aside a dismissal or nonsuit and reinstate a cause may in its discretion impose reasonable terms as a condition of allowing the same,[40] the most usual being the payment of costs,[41] and the court may also require plaintiff to indemnify defendant, so far as possible, for expenses incurred in the preparation of the trial of the case when regularly called.[42] Whatever conditions are imposed in a reasonable exercise of judicial discretion in setting aside the judgment of nonsuit must be submitted to; but when these conditions are complied with immunity against the judgment exists for all purposes.[43]

8. The Order. A case dismissed cannot be reinstated on the docket by a mere *ex parte* order.[44] Where a motion for a reconsideration of the judgment of dismissal is granted, and defendant then interposes a further defense, the granting of such motion is equivalent to setting aside the judgment of dismissal.[45] Where a judgment containing an order dismissing as to two of the defendants gave judgment by default against the third, an order granting a motion to set aside the judgment does not reach the order of dismissal.[46] When setting aside a nonsuit improvidently moved for and granted, the court may not, in the absence of the other party, order on the trial at the same term.[47]

Contradictory affidavits.— Where such affidavits are contradictory, the court giving preference to those of one party instead of the other cannot be held error. Boyle *v.* Levi, 73 Ill. 175. Nor will it be an abuse of discretion to refuse to set aside a dismissal for failure to file an amended complaint within the required time, where the affidavits of the attorneys as to the existence of an oral stipulation for the extension of the time to file the complaint are contradictory. Rauer *v.* Wolf, 115 Cal. 100, 46 Pac. 902.

37. Voight Brewery Co. *v.* Donovan, 103 Mich. 190, 61 N. W. 343.

38. They properly arise on motion in arrest of judgment. Van Vechten *v.* Graves, 4 Johns. (N. Y.) 403.

39. Kirby *v.* Sisson, 2 Wend. (N. Y.) 550.

40. Roth *v.* Steffe, 9 Lanc. Bar (Pa.) 77; Miller *v.* Earle, (Tex. App. 1891) 15 S. W. 916.

41. *Alabama.*— Parker *v.* Doe, 20 Ala. 251; Reese *v.* Billing, 9 Ala. 263.

Illinois.— Buettner *v.* Percy, 31 Ill. App. 389.

Kentucky.— Dana *v.* Gill, 5 J. J. Marsh. 242, 20 Am. Dec. 255.

New Jersey.— Boone *v.* Ridgway, 27 N. J. Eq. 297.

Ohio.— Lafferty *v.* Ross, Wright 499.

And see Lodtman *v.* Schluter, 71 Cal. 94, 16 Pac. 540.

See 17 Cent. Dig. tit. "Dismissal and Nonsuit," § 189.

Where the court erroneously directs a nonsuit, the cause may be reinstated during the term, without requiring the payment of costs. McGowan *v.* State Bank, 5 Litt. (Ky.) 271.

Compliance with an order requiring payment of costs as a condition of reinstating a cause, or a waiver thereof, will be presumed, where the parties appear and submit the matters of law and fact to the court. Walker *v.* Henry, 36 W. Va. 100, 14 S. E. 440.

Payment not a condition precedent.— Where a nonsuit is ordered to be set aside upon payment of costs, the payment is not a condition precedent to be performed before the full operation of the order. Dana *v.* Gill, 5 J. J. Marsh. (Ky.) 242, 20 Am. Dec. 255. See also Hall *v.* Mackay, 78 Tex. 248, 250, 14 S. W. 615, holding that after the dismissal of a cause, an entry that "said cause be reinstated on the docket upon the condition of plaintiff paying all costs accrued in said cause" does not require such payment as a condition precedent to the reinstatement.

Imposition of terms where United States is plaintiff.— Where a suit brought by the United States is dismissed because plaintiff's attorney is not ready for trial, and makes no showing for a continuance, it is error to impose upon plaintiff, as a condition to its reinstatement, the payment of costs and an attorney's fee, in the absence of a statute authorizing the same. U. S. *v.* Stevens, 8 Utah 3, 28 Pac. 869.

42. McEwen *v.* Dimond, 81 N. Y. App. Div. 626, 81 N. Y. Suppl. 365.

43. Miller *v.* Earle, (Tex. App. 1891) 15 S. W. 916. See also Childs *v.* Mays, 73 Tex. 76, 11 S. W. 154.

44. Lacroix *v.* Bangs, 19 La. Ann. 88.

45. Howell *v.* Mason, 9 Ark. 406.

46. Gibbs *v.* Petree, 7 Tex. Civ. App. 526, 27 S. W. 685.

47. Fifield *v.* Seeds, 18 N. J. L. 166.

9. Waiver of Objections. An exception to the reinstatement of a cause is waived where both parties waive jury, and submit the cause to the court for trial.[48] So the technical error of setting aside a judgment of dismissal without notice to defendant may be waived where the counsel for plaintiff appear to the motion and are heard,[49] or by permitting defendant to be heard upon a motion to reinstate the judgment.[50]

10. Operation and Effect. Where a cause which had been dismissed is reinstated, it stands as if it had never been dismissed,[51] but it cannot be reinstated by subsequent inadvertent signature.[52] So where an order of dismissal has been entered, but is afterward at the same term set aside, and the cause continued for a further hearing, the court does not thereby lose jurisdiction of the parties.[53] The fact that the court has reinstated on the docket a case which has been dismissed does not, however, prevent defendant from pleading and proving on the trial an alleged agreement and settlement, in pursuance of which the case was to be dismissed, and that the entry of dismissal was in fact made in accordance with such contract.[54]

C. Curing or Waiving Discontinuance. The appearance of a party after verdict waives a discontinuance.[55] And a discontinuance caused by plaintiff's failure to take judgment on unanswered counts of his declaration is cured after verdict by the statute of jeofails.[56] So a discontinuance is waived where defendant appears and consents to a continuance after the cause has been discontinued.[57] A motion for a nonsuit for the non-appearance of plaintiff will not be granted if he appears pending the motion.[58]

DISOBEDIENCE. See Contempt.

DISORDERLY. Not regulated by the restraints of morality; not complying with the restraints of order and law;[1] confused or out of order; "lawless" or contrary to law.[2] (Disorderly: Conduct, see Disorderly Conduct. House, see Disorderly Houses.)

48. Prall *v.* Hunt, 41 Ill. App. 140.

49. Chicago, etc., R. Co. *v.* Estes, 71 Iowa 603, 33 N. W. 124.

50. Yetzer *v.* Martin, 58 Iowa 612, 12 N. W. 630.

51. Miller *v.* Earle, (Tex. App. 1891) 15 S. W. 916.

52. Hatch *v.* English, 12 Rob. (La.) 135.

53. Hutchinson Salt, etc., Co. *v.* Baldridge, 53 Kan. 522, 36 Pac. 1005.

54. Baynes *v.* Billups, 48 Ga. 347.

55. Clark *v.* State, 4 Ind. 268. *Compare* American Burial Case Co. *v.* Shaughnessy, 59 Miss. 398, holding that a statute providing that "discontinuances" shall be cured by verdict applies only to technical discontinuances arising from the acts or omissions of the parties or their counsel, and not to formal orders of the court dismissing cases for any cause.

56. Tucker *v.* Zollicoffer, 12 Sm. & M. (Miss.) 591.

The discontinuance of a cause for want of an appearance or proceeding for two terms after the suggestion of the death of a party is cured by the subsequent appearance, trial, and verdict. Brent *v.* Coyle, 3 Fed. Cas. No. 1,837, 2 Cranch C. C. 287.

57. Hayes *v.* Dunn, 136 Ala. 528, 34 So. 944.

58. Wright *v.* Phillips, 2 Greene (Iowa) 191.

1. Webster Dict. [*quoted* in People *v.* Eckman, 63 Hun (N. Y.) 209, 216, 18 N. Y. Suppl. 654].

2. Pratt *v.* Brown, 80 Tex. 608, 614, 16 S. W. 443 [*citing* Webster Dict.].

DISORDERLY CONDUCT

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Breach of the Peace, see Breach of the Peace.

* Author of "Assault and Battery," 3 Cyc. 1014; "Certiorari," 6 Cyc. 730; "Civil Rights," 7 Cyc. 158; "Consolidation and Severance of Actions," 8 Cyc. 589; "Depositions," 13 Cyc. 822; etc.

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I. THE OFFENSE.

A. In General. In its broad sense the term "disorderly conduct" embraces certain minor offenses[1] which are usually defined by statute and consist of dis-

1. See Frankfurter *v.* Bryan, 12 Ill. App. 549; State *v.* Jersey City, 25 N. J. L. 536, 541; Matter of Miller, 1 Daly (N. Y.) 562, 19 Abb. Pr. (N. Y.) 394; People *v.* State Reformatory, 38 Misc. (N. Y.) 233, 77 N. Y. Suppl. 145; *In re* Newkirk, 37 Misc. (N. Y.) 404, 75 N. Y. Suppl. 777; Matter of McMahon, 64 How. Pr. (N. Y.) 285; State *v.* Sherrard, 117 N. C. 716, 23 N. E. 157.

"Any conduct which is contrary to law" may be considered as disorderly conduct. State *v.* Jersey City, 25 N. J. L. 536, 541 [*quoted* in Pratt *v.* Brown, 80 Tex. 608, 614, 16 S. W. 443].

The mere phrase "disorderly conduct," standing alone, without a statement of the particular acts constituting the offense, has no legal meaning and does not state the commission of any criminal act. People *v.* State Reformatory, 38 Misc. (N. Y.) 233, 77 N. Y. Suppl. 145.

The provisions of the N. Y. Consol Act, §§ 1448, 1458, 1459, 1461, which refer to disorderly conduct do not create or define any new offense, but only refer to the common-law offense of breach of the peace. People *v.* State Reformatory, 38 Misc. (N. Y.) 233, 77 N. Y. Suppl. 145.

The New York act of 1860, declaring certain acts to be disorderly conduct (Laws (1860), p. 1013), does not repeal or supersede the act of 1833, chapter 11, which provides that any conduct which in the opinion of the magistrate tends to a breach of the peace may be punished as disorderly conduct. Matter of Miller, 1 Daly (N. Y.) 562, 19 Abb. Pr. (N. Y.) 394.

The statutes now in force in England providing for the arrest and punishment for persons charged with idleness and disorderly conduct, vagrancy, etc., are 5 Geo. IV, c. 83, passed in 1824, and the amendatory acts of 1 & 2 Vict. p. 38; 31 & 32 Vict. p. 52; and 32 & 33 Vict. p. 99. 5 Geo. IV, p. 83, was a revision of preëxisting statutes upon the subject and would seem to have furnished a general outline for legislation of the same class in this country. See Stoutenburgh *v.* Frazier, 16 App. Cas. (D. C.) 229, 48 L. R. A. 220.

At common law any conduct tending to cause or provoke a breach of the peace or to disturb the peace and quiet of communities or to corrupt the morals of the people is indictable as a public offense. People *v.* State Reformatory, 38 Misc. (N. Y.) 233, 77 N. Y.

turbance of the peace and quiet of the public or communities, or families or a class of persons, or conduct which tends to cause or provoke a breach of the peace or corrupt public morals. A wilful or unlawful purpose is not an element of the offense, unless made so by statute.[2] In common parlance, a person guilty of disorderly conduct may be said to be a disorderly person;[3] but where statutes define "a disorderly person" and distinguish acts which may constitute the offense of disorderly conduct, the distinction is to be preserved and the different provisions relative to the different offenses particularly followed.[4]

B. Brawling and Quarreling. Quarreling, brawling, or railing in public is an offense punishable in some jurisdictions as disorderly conduct.[5]

C. Disturbance of Public. To constitute a disturbance of the peace the conduct must tend to or in fact annoy or disturb the community or neighborhood, or the citizens generally or such of them as are present, or it must amount

Suppl. 145; State *v.* Graham, 3 Sneed (Tenn.) 134.

Necessarily one who commits a breach of the peace is guilty of disorderly conduct, but all disorderly conduct is not necessarily a breach of the peace, as where it is merely calculated to disturb or annoy. Mt. Sterling *v.* Holly, 108 Ky. 621, 57 S. W. 491, 22 Ky. L. Rep. 358. Among acts which have been held to constitute disorderly conduct are: Making noises, exclamations, and outcries in the public street by which people are drawn together and the highway obstructed (Com. *v.* Spratt, 14 Phila. (Pa.) 365. And see Rex *v.* Smith, 1 Str. 704; Hall's Case, 1 Vent. 169); reveling or behaving in a boisterous manner (*In re* Began, 12 R. I. 309); calling a non-union workman a scab during a period of public excitement (Com. *v.* Redshaw, 2 Pa. Dist. 96, 12 Pa. Co. Ct. 91); riotously raising a pole in a public street (Com. *v.* Morrison, Add. (Pa.) 274); exhibiting an effigy calculated to provoke a breach of the peace (Com. *v.* Haines, 4 Pa. L. J. Rep. 17, 6 Pa. L. J. 239); depositing an irritant substance so that one may apply it to his person (People *v.* Blake, 1 Wheel. Cr. (N. Y.) 490); purposely driving a heavily loaded wagon over a water hose in use by firemen at a fire (Com. *v.* Moore, 21 Pa. Co. Ct. 321); and the act of an innkeeper in refusing to entertain a traveler (4 Blackstone Comm. 168).

Drunkenness in a public place is *per se* "disorderly conduct" within the meaning of article 363 of the code of criminal procedure. Pratt *v.* Brown, 80 Tex. 608, 614, 16 S. W. 433.

2. See Watson *v.* State, (Tex. Cr. App. 1899) 50 S. W. 340; Grand Rapids *v.* Williams, 112 Mich. 247, 70 N. W. 547, 67 Am. St. Rep. 396, 36 L. R. A. 137. See also Philadelphia *v.* Wards, 1 Phila. (Pa.) 517, where a conviction for discharging a firearm in a city was held to be no violation of an ordinance forbidding the discharge of firearms "wantonly and without reasonable cause."

3. Disorderly persons are a class of persons designated in statutes which provide for their punishment. Bouvier L. Dict. See also *In re* Stegenga, (Mich. 1903) 94 N. W. 385; People *v.* Kelly, 99 Mich. 82, 57 N. W. 1090; Matter of Miller, 1 Daly (N. Y.) 562, 19 Abb. Pr. (N. Y.) 394; People *v.* State Reformatory, 38 Misc. (N. Y.) 233, 77 N. Y. Suppl. 145 *In re* Newkirk, 37 Misc. (N. Y.) 404, 75 N. Y. Suppl. 777. In Aldermen's Cases, 2 Pars. Eq. Cas. (Pa.) 458, 465, it is said: "The term 'disorderly' is certainly very extensive in its signification, and all who violate the peace and good order of society are liable to be punished, either as vagrants, disorderly persons, or for a breach of the public peace."

In New Jersey "all persons who shall use or pretend to use or have any skill in physiognomy, palmistry or like crafty science . . . shall be deemed and adjudged to be disorderly persons." See State *v.* Kenilworth, 69 N. J. L. 244, 54 Atl. 244.

St. 17 Geo. II, c. 5, provided for the punishment among others of disorderly persons.

One who loiters about the streets and barrooms in idleness without apparent habitation and without any means of support is a disorderly person within the common-law definition. *In re* Stegenga, (Mich. 1903) 94 N. W. 385.

The keeper of a saloon to which persons resort for the purpose of playing pool and bagatelle, somtimes for drinks and at other times on terms that the defeated party pay for the use of the gaming apparatus, is a disorderly person. People *v.* Cutler, 28 Hun (N. Y.) 465, 1 N. Y. Cr. 178.

4. Matter of Miller, 1 Daly (N. Y.) 562, 19 Abb. Pr. (N. Y.) 394.

5. Cook *v.* Carrollton, 92 Ga. 558, 17 S. E. 861; State *v.* Rollins, 55 N. H. 101; State *v.* Perkins, 42 N. H. 464. See Jacksonville *v.* Headen, 48 Ill. App. 60.

Habitual use of opprobrious language.— One who in his own dwelling-house is in the habit of using loud and vile language, consisting of opprobrious epithets and exclamations, in such a manner as to attract crowds of persons passing and living in the neighborhood, on Sundays as well as other days, and in the night as well as in the daytime, is within a statute punishing the offense of being a common railer and brawler. Com. *v.* Foley, 99 Mass. 497.

The use of vituperative and threatening words, not profane, in an ordinary tone of voice, to one who does not reply, is insufficient

to a nuisance.[6] It is not necessary, however, that every person in the neighborhood or community should be disturbed.[7] In determining whether there has been a disturbance by the use of inhibited language regard must be had to the persons by and to whom the language was uttered, its character, and the occasion.[8]

D. Offensive Language In or Near Dwelling — 1. In General. In some of the states enactments exist which provide for the punishment of persons who enter into or go sufficiently near the dwelling of another, and use insulting, abusive, or vulgar language in the presence of the family of the occupant or any

to authorize a conviction for quarreling, cursing, and acting otherwise in a disorderly manner. Carr *v.* Conyers, 84 Ga. 287, 10 S. E. 630, 20 Am. St. Rep. 357.

Conteckours (a derivation of contek, a contest, dispute, disturbance, opposition) are defined to be brawlers, disturbers of the peace. Burrill L. Dict.

Brawl and tumult as one offense.— The New Hampshire statute providing that "no person shall make any brawls or tumults, in any street," etc., authorizes the punishment of but one offense. State *v.* Perkins, 42 N. H. 464.

6. *Georgia.*— Daniel *v.* Athens, 110 Ga. 289, 34 S. E. 1016.

Illinois.— Jacksonville *v.* Headen, 48 Ill. App. 60.

Massachusetts.— Com. *v.* Harris, 101 Mass. 29.

Missouri.— St. Charles *v.* Meyer, 58 Mo. 86.

North Carolina.— State *v.* Powell, 70 N. C. 67.

Pennsylvania.— Com. *v.* Spratt, 14 Phila. 365; Com. *v.* Morrison, Add. 274.

England.— Rex *v.* Smith, 1 Str. 704; Hall's Case, 1 Vent. 169.

See 17 Cent. Dig. tit. "Disorderly Persons," § 10.

Riotous conduct.— Riotous, as used in an ordinance making it a misdemeanor to act in a noisy, riotous, or disorderly manner in a public place or private house, is held to have been evidently used in its popular meaning as wanton and boisterous and to have no allusion to the technical crime of riot. State *v.* Kennan, 25 Wash. 621, 66 Pac. 62.

Charivari.— An ordinance making it a misdemeanor to "wilfully disturb the peace . . . by loud or unusual noise" is not violated by persons engaging in a "charivari." St. Charles *v.* Meyer, 58 Mo. 86.

An act done on Sunday does not amount to disorderly conduct because it shocks the religious feelings of another. Simmons, C. J., in Keck *v.* Gainesville, 98 Ga. 423, 25 S. E. 559. An ordinance making it penal to "act in a disorderly manner," or "make any unnecessary noise within the corporate limits, calculated to disturb the peace, quiet or good order of the city" or to "be guilty of disorderly conduct" is not violated by quietly working in a closed church on the Sabbath day, upon the benches therein; the work in question not being itself of such a character, or causing such noise, as would ordinarily disturb any citizen. Keck *v.* Gainesville, 98 Ga. 423, 424, 25 S. E. 559, where the court said: "To constitute a violation of the ordinance, the act must be such as would be disorderly, and the noise such as would be unnecessary and calculated to disturb the peace, quiet and good order of the community on other days of the week as well as on Sunday."

Persons living in residences which abut on a public street are inhabitants of such street, within the meaning of a statute forbidding the use of loud, indecent, or profane language "upon a public street, or near a private house, in a manner calculated to disturb the inhabitants thereof." Keller *v.* State, 25 Tex. App. 325, 8 S. W. 275.

7. State *v.* Fogerson, 29 Mo. 416.

Language addressed to one.— "The peace of a city" may be disturbed by calling a man "a damn fool and a bastard." Topeka *v.* Heitman, 47 Kan. 739, 28 Pac. 1096. The use in the presence of a man of an obscene word in an ordinary tone without anger, and under circumstances not calculated to offend the hearer or cause a breach of the peace, is not "calculated to disturb the peace of the citizen." Daniel *v.* Athens, 110 Ga. 289, 34 S. E. 1016.

Outcries in a public street constitute an indictable nuisance, although but a single person is disturbed, if the other elements of the offense are present. Com. *v.* Oaks, 113 Mass. 8.

Disturbance of single person.— A statute against disturbing the peace of families or neighborhoods is not violated by disturbing the peace of a single individual by the use merely of loud and abusive language. State *v.* Schlottman, 52 Mo. 164.

8. State *v.* Sturges, 48 Mo. App. 263, where evidence that defendant loudly accused a justice, while discharging his official duties, of instituting prosecutions against him, and called him vile names, was held sufficient to warrant a conviction.

Loud talk.— There may be a disturbance of the quiet of a city by loud talk alone. Topeka *v.* Heitman, 47 Kan. 739, 28 Pac. 1096. To constitute the offense under the Missouri statute (Rev. St. (1889) § 3784) it is necessary that the offensive or indecent conversation should be loud. State *v.* Maggard, 80 Mo. App. 286. To call a person a "damned highway robber" in a public restaurant in a voice so loud as to be heard on the street is punishable under an ordinance prohibiting and punishing disorderly conduct. State *v.* Sherrard, 117 N. C. 716, 23 S. E. 157. One who having partaken of intoxicants is a little loud in political discussion, but uses no indecent lan-

member thereof. The object of such statutes is to protect homes from invasion and the occupants thereof from annoyance.[9]

2. THE PERSONS DISTURBED. These statutes contemplate that the persons protected are upon their own premises or in some place where they have a right to be, and are not designed to protect intruders or trespassers.[10]

3. PRESENCE OF FAMILY. The language must be used at a place and in the presence of the persons or some one of them specially mentioned in the statute.[11]

4. USE OF OFFENSIVE LANGUAGE IN OWN DWELLING. Statutes of this character have been held not to comprehend the use of objectionable language by a person in his own house or on his own premises,[12] unless the effect is to disturb the occupants of, or a family residing in, another dwelling.[13]

E. Offensive Language in Presence of Female. To constitute the offense of disorderly language or conduct in the presence and hearing of a female, it is enough that a female was present,[14] and it is immaterial that she may not have heard or witnessed the objectionable language or conduct.[15] So, although it has been held otherwise,[16] it seems to be unimportant that the offender had no knowl-

guage, is not guilty of disorderly conduct. Jacksonville *v.* Headen, 48 Ill. App. 60.

9. Laney *v.* State, 105 Ala. 105, 17 So. 107; McVay *v.* State, 100 Ala. 110, 14 So. 862. In Weaver *v.* State, 79 Ala. 279, a conviction was held to be warranted on proof that defendant whose wife had left him went to a house in which her children by a former marriage resided searching for her, and on being told by one of them not to come there again said: "I'll go where I dam please, and it don't make a dam bit of difference where it is."

In Pennsylvania the charge of going to the house of another, and grossly abusing his family, thereby rendering their lives uncomfortable, is not an indictable offense, but a mere civil injury. Com. *v.* Edwards, 1 Ashm. 46.

10. State *v.* Brumley, 53 Mo. App. 126.

The Missouri statute respecting the disturbance of the peace of a person implies that the person whose peace was disturbed was upon his own premises or in some public place or where he had a right to be. "The life and limbs of a trespasser or law-breaker are under the protection of the law, but this statute could hardly be construed as punishing one as a disturber of his peace who should use rather strong language toward an intruder who had before threatened personal injury, even though, in order to drive him away, such violence was threatened as could result in no bodily harm." State *v.* Lunn, 49 Mo. 90, 91.

11. Bones *v.* State, 117 Ala. 146, 23 So. 485.

Entire family need not be present or within hearing when the language is used. Bones *v.* State, 117 Ala. 146, 23 So. 485.

Language uttered in a highway near enough to the premises of the prosecutor to be distinctly heard and actually heard by his family or by any member thereof will be regarded as having been uttered in their presence. Henderson *v.* State, 63 Ala. 193.

12. McIver *v.* State, 34 Tex. Cr. 214, 29 S. W. 1083.

13. State *v.* Brumley, 53 Mo. App. 126.

Conversation with visitors.— Under the code a conviction may be had, although at the time of the alleged offense defendant was on his own adjacent premises and used the words in ordinary conversation with visitors without any intention of being overheard by his neighbors. Mullens *v.* State, 82 Ala. 42, 2 So. 481, 60 Am. Rep. 731.

Disturbance of occupant of same house.— A conviction for the offense of disorderly conduct by vile or boisterous conduct or profane language is not warranted by evidence that the witness whose family resided in the same house with that of defendant heard defendant in his own room quarreling with his wife, it appearing that the language was not loud, that there was no swearing, and that the only person disturbed was the father of the witness, who was ill. Ellis *v.* Pratt City, 113 Ala. 541, 21 So. 306.

14. McVay *v.* State, 100 Ala. 110, 14 So. 862. See Ivey *v.* State, 61 Ala. 58.

What constitutes presence.— Within the contemplation of the statute, words are used in the presence of a female when used in her hearing. Brady *v.* State, 48 Ga. 311. The words "arrest and be damned," spoken to a female, are indictable under a statute, prohibiting profane language in the presence of a female. Foster *v.* State, 99 Ga. 56, 25 S. E. 613. The words, "If you don't give up my pistol, I'll knock your brains out, by God," addressed to a woman in the house of another, are in violation of the Alabama code. Benson *v.* State, 68 Ala. 513.

15. **Disorderly conduct on street-car.**— Under a statute defining the crime of disorderly conduct, *inter alia*, as "indecent or disorderly conduct in the presence of females on . . . street cars," a conviction is warranted where a man and a woman, in an intoxicated condition, were riding on a street-car, using profane language and kissing and hugging each other to such an extent as to attract the attention of other passengers on the car, on which were also other females, notwithstanding the female passengers may not have heard or witnessed such conduct. Sailors *v.* State, 108 Ga. 35, 33 S. E. 813, 75 Am. St. Rep. 17.

16. Hardin *v.* State, 114 Ga. 58, 39 S. E. 879.

edge of the proximity of a female.[17] Statutes punishing this offense contemplate the use of spoken words only.[18]

F. Eavesdropping. Eavesdropping is an indictable offense at common law.[19] It consists of listening under walls and windows or the eaves of houses, to hearken after discourse, and thereupon to frame slanderous and mischievous tales.[20]

G. Racing on Public Road. In some states engaging in a horse-race on a public road constitutes disorderly conduct.[21]

H. Using Firearms. In some jurisdictions, by statute, the discharge of firearms within the limits of a municipality[22] or along a public road, is punishable as disorderly conduct.[23]

I. Place of Commission. Where by the statute or ordinance denouncing the offense the place of its commission is made an essential element, unless it was there committed there can be no conviction.[24]

17. It will be enough if the language was heard by her. Thomas *v.* State, 92 Ala. 85, 9 So. 398.

18. Williams *v.* State, 117 Ga. 13, 43 S. E. 436; Stevenson *v.* State, 90 Ga. 456, 16 S. E. 95.

19. Com. *v.* Lovett, 4 Pa. L. J. Rep. 5, 6 Pa. L. J. 226; State *v.* Pennington, 3 Head (Tenn.) 299, 75 Am. Dec. 771; State *v.* Williams, 2 Overt. (Tenn.) 108.

20. Com. *v.* Lovett, 4 Pa. L. J. Rep. 5, 6 Pa. L. J. 226; State *v.* Pennington, 3 Head (Tenn.) 299, 75 Am. Dec. 771; State *v.* Williams, 2 Overt. (Tenn.) 108; 4 Blackstone Comm. 268.

Bishop says that eavesdropping consists in the nuisance of hanging about in the dwelling-house of another, hearing detail, and repeating it to the disturbance of the neighborhood. 2 Bishop Cr. L. 274.

N. Y. Pen. Code, § 436, provides that a person who secretly loiters about a building intending to overhear discourse therein and to repeat or publish the same to vex or annoy others is guilty of a misdemeanor.

Overhearing grand jury.— A person who secretly and stealthily approaches near to the room occupied by the grand jury while they are in session for the purpose of overhearing what is there said and done is guilty of eavesdropping. State *v.* Pennington, 3 Head (Tenn.) 299, 75 Am. Dec. 771.

Looking and listening.— Eavesdropping by looking and listening at a window for the purpose of framing slanderous tales is an indictable offense. Com. *v.* Lovett, 4 Pa. L. J. Rep. 5, 6 Pa. L. J. 226.

Peeping into windows.— One who with no legitimate purpose in so doing peeps into the windows in an occupied, lighted residence at hours of the night when people usually retire violates an ordinance providing a punishment for disorderly, indecent, or insulting conduct, and is a disorderly person. Grand Rapids *v.* Williams, 112 Mich. 247, 70 N. W. 547, 67 Am. St. Rep. 396, 36 L. R. A. 137. But see Com. *v.* Mengelt [*cited* in Com. *v.* Lovett, 4 Pa. L. J. Rep. 5, 6 Pa. L. J. 228], where it is said that the offense of eavesdropping consists in listening and not in peeping or looking privily, the latter being held not to be indictable.

21. An act forbidding the running of a horse-race upon a public road contemplates races between all animals of the horse kind and embraces races in which mules take part. Goldsmith *v.* State, 1 Head (Tenn.) 154.

The New York act of 1833 made the riding or driving of a horse through the public streets at a speed in excess of a specified rate disorderly conduct. Matter of Miller, 1 Daly (N. Y.) 562, 19 Abb. Pr. (N. Y.) 394.

The offense is complete, although the meeting was not in pursuance of an agreement, nor was a wager made on the result. Goldsmith *v.* State, 1 Head (Tenn.) 154.

22. Flinn *v.* State, 24 Ind. 286.

The Pennsylvania act of April, 1760, providing that "no person shall shoot or kill with a firearm any dove, etc., in the open streets of Philadelphia, or in the gardens adjoining, or any of the towns or boroughs of this province," is still in force. Com. *v.* Borden, 61 Pa. St. 272.

Want of reasonable cause.— Under the Philadelphia ordinance of July 9, 1821, punishing any person who shall "fire off or discharge, wantonly and without any reasonable cause, any gun," the offense does not consist in discharging firearms in the city, but in doing so without a reasonable cause to justify it. Philadelphia *v.* Wards, 1 Phila. (Pa.) 517.

The shooting of a sling shot in a city is not disorderly conduct, unless it tends to create disorder or disturb the public peace and tranquillity. Kinney *v.* Blackshear, 115 Ga. 810, 42 S. E. 231.

23. Johnson *v.* State, 105 Ala. 113, 17 So. 99; McDade *v.* State, 95 Ala. 28, 11 So. 375.

24. Johnson *v.* State, 105 Ala. 113, 17 So. 99; McDade *v.* State, 95 Ala. 28, 11 So. 375; Ivey *v.* State, 61 Ala. 58; Quin *v.* State, 65 Miss. 479, 4 So. 548.

Public place.— An office of a hotel in a city is a public place within an ordinance making it an offense to wrangle or quarrel in a public place. Howard *v.* Stroud, (Kan. Sup. 1901) 65 Pac. 249.

Public highway.— A railway track is not a public highway within the meaning of a statute prohibiting the use of abusive, etc., language on a public highway near the

J. Who May Commit. The offense of using abusive and insulting language cannot be committed by two, nor can two be jointly indicted therefor.[25] But otherwise as to the offense of racing horses on a public road.[26]

II. INDICTMENT, INFORMATION, OR COMPLAINT.[27]

A. In General. All the facts which by the statute denouncing the offense are made constituents thereof must be appropriately alleged.[28] Thus the character of the language or conversation,[29] the place of the commission of the offense,[30] and

dwelling-house of another. To constitute such a highway there must be a road dedicated to and kept up by the public as distinguished from a private way. Comer *v.* State, 62 Ala. 320. Where several offenses are defined, some of which are complete only when committed on a public street or highway, the place of commission of the others is immaterial. *Ex p.* Foley, 62 Cal. 508.

Dwelling-house.— Where a woman remarries and removes from the residence formerly occupied by herself and husband, leaving her children, who are the heirs of the latter, in the possession of the residence, the premises may properly be described in the indictment as their dwelling-house. Weaver *v.* State, 79 Ala. 279. Where a man leaves his dwelling with no intention of returning, but has not removed his household effects and his wife spends her days in the house and the nights elsewhere while preparing to remove, it not being shown that the husband had acquired a dwelling elsewhere, the house is the dwelling of the husband within the meaning of the statute. Bragg *v.* State, 69 Ala. 204.

"Near" private residence.— A field five hundred yards distant from a private residence is not near the residence, within the contemplation of a statute forbidding the making of a disturbance near a private residence. Elliott *v.* State, 37 Tex. Cr. 514, 40 S. W. 284.

Curtilage in a statute forbidding the use of abusive, vulgar, or insulting language in a dwelling-house or upon the curtilage thereof, includes a yard, garden, or field used in connection with the dwelling, although not inclosed. Ivey *v.* State, 61 Ala. 58.

Presence of female.— The Alabama statute forbidding the use of offensive language in the presence of females prohibits such language without reference to the place of its use. Laney *v.* State, 105 Ala. 105, 17 So. 107; McVay *v.* State, 100 Ala. 110, 14 So. 862. To same effect see *Ex p.* Foley, 62 Cal. 508.

25. Cox *v.* State, 76 Ala. 66.

26. State *v.* Wagster, 75 Mo. 107.

27. Complaints generally see CRIMINAL LAW, 12 Cyc. 291 *et seq.*

Indictments and informations generally see INDICTMENTS AND INFORMATIONS.

Forms of indictments, informations, or complaints set out in whole, in part, or in substance, see the following cases:

Alabama.— McVay *v.* State, 100 Ala. 110, 112, 14 So. 862; Stokes *v.* State, 92 Ala. 73, 74, 9 So. 400, 25 Am. St. Rep. 22.

Arkansas.— Moore *v.* State, 50 Ark. 25, 26, 6 S. W. 17.

California.— *Ex p.* Foley, 62 Cal. 508, 509.

Kansas.— Cottonwood Falls *v.* Smith, 36 Kan. 401, 402, 13 Pac. 576.

Massachusetts.— Com. *v.* Oaks, 113 Mass. 8, 9.

Michigan.— Grand Rapids *v.* Williams, 112 Mich. 247, 248, 70 N. W. 547, 67 Am. St. Rep. 396, 36 L. R. A. 137.

Mississippi.— Woods *v.* State, 67 Miss. 575, 7 So. 495.

Missouri.— State *v.* Hughes, 82 Mo. 86, 87; State *v.* Brumley, 53 Mo. App. 126, 129.

New Hampshire.— State *v.* Batchelder, 5 N. H. 549.

Pennsylvania.— Com. *v.* Mohn, 52 Pa. St. 243, 244, 91 Am. Dec. 153; Com. *v.* Taylor, 5 Binn. 277.

Vermont.— State *v.* Hanley, 47 Vt. 290.

28. Ivey *v.* State, 61 Ala. 58; People *v.* Pratt, 22 Hun (N. Y.) 300.

Revel.— A complaint charging that defendant did "revel, quarrel, commit mischief, and otherwise behave in a disorderly manner" is sufficient to apprise him of the nature of the accusation and to constitute a bar to subsequent proceedings. "Revel" has a definite meaning "to behave in a noisy, boisterous manner, like a bacchanal." *In re* Began, 12 R. I. 309.

It will be sufficient if the indictment contain enough to inform defendant and the court of the precise nature of the charge. State v. Fogerson, 29 Mo. 416.

Form of prosecution.— The Pennsylvania act of April 9, 1760, which provides that any person presuming to shoot at or kill with a firearm any dove, etc., in certain prescribed places shall forfeit a sum stated on conviction, and that one moiety shall he paid to the informer and the other to the overseers, contemplates a proceeding by the commonwealth for a conviction for the offense, and not a *qui tam* action of debt. Com. *v.* Borden, 61 Pa. St. 272.

29. State *v.* James, 37 Mo. App. 214. An information charging disturbance of the peace of a person named "by offensive and indecent conversation" does not charge the offense of disturbing the peace "by loud and offensive or indecent conversation." State *v.* Gallego, 57 Mo. App. 515.

30. Quin *v.* State, 65 Miss. 479, 4 So. 548.

Public place.— Where the statute provides for the punishment of persons who loitering or assembled in certain public places use loud and offensive language, a complaint merely

the persons addressed, referred to, disturbed, or annoyed,[31] must be stated with such sufficient particularity as will show an infraction of the statute;[32] and it is also held that where the offense consists in the use of the prescribed language without provocation, it is incumbent on the prosecution to allege and prove a lack of provocation.[33]

B. Employment of Statutory Language. The authorities are not in accord as to the particularity required in charging the offense. Thus it is held that where the statute denounces but does not define the common-law offense of disorderly conduct, or punishes the offense by its legal designation without enumerating the acts which constitute it, its elements must be set out with substantial cer-

charging the use of such language in the presence of other persons without stating the place of such use is insufficient. Cowell *v.* State, 63 N. J. L. 523, 43 Atl. 436.

Street, lane, or alley.— A complaint on a statute punishing rude, indecent, or disorderly conduct in any street, lane, or alley, etc., must set out the place where the offense was committed. It is not sufficient to charge that the offense was committed openly and in the presence of divers persons. State *v.* Kennison, 55 N. H. 242.

Where people commonly resort.—A description of the place of the alleged disturbance as a place where people "commonly assemble" is equivalent to charging the place to be one where people "commonly resort." Hammond *v.* State, (Tex. Cr. App. 1894) 28 S. W. 204.

Location of house.— An allegation that the disorderly conduct charged was committed "at a house on the corner" of two streets designated within a certain city is a sufficient statement as to the place of the offense. Grand Rapids *v.* Williams, 112 Mich. 247, 70 N. W. 547, 67 Am. St. Rep. 396, 36 L. R. A. 137.

Near dwelling-house.—An indictment charging the use of abusive language near the "premises" of another does not charge the statutory offense of the use of such language at "the dwelling-house of another, or the yard or curtilage thereof, or upon any public highway, or any other place near such premises." State *v.* Moore, (Miss. 1898) 24 So. 308.

31. Citizens.— It is necessary in an indictment for a public nuisance by uttering loud cries and exclamations in a public street to allege that it was to the great damage and common nuisance of all the citizens of the commonwealth there inhabiting, being, and residing. Com. *v.* Oaks, 113 Mass. 8; Com. *v.* Harris, 101 Mass. 39; Com. *v.* Smith, 6 Cush. (Mass.) 80. It is not enough to charge the "disturbance of divers" citizens. Com. *v.* Smith, 6 Cush. (Mass.) 80.

Inhabitants of public street.— An information charging a disturbance of the "inhabitance" of a public street is not vitiated by the misspelling. Keller *v.* State, 25 Tex. App. 325, 8 S. W. 275.

Offensive language to family or female.— An indictment for using abusive, vulgar, or insulting language "in the presence of the family of the owner or possessor thereof, or of any member of his family, or of any female," must aver the presence of some of the persons named. Ivey *v.* State, 61 Ala. 58, 61. Where the offense consists in the use in reference to and in the presence of another or in reference to and in the presence of any member of his family of any abusive language, etc., the indictment must state that the objectionable language was addressed to the party to whom it referred or was used in his presence or the presence of any member of his family. A statement that it was uttered in the presence of others is not sufficient. Peters *v.* State, 66 Wis. 339, 28 N. W. 138. An information under Cal. Pen. Code, § 415, which prohibits the use of "vulgar, profane, or indecent language, within the presence or hearing of women or children, in a loud and boisterous manner," need not allege that the offense was committed on the streets of an incorporated town. *Ex p.* Foley, 62 Cal. 508, 510. A charge that the prescribed language was used in the presence or hearing of "a woman" is a sufficient charge that it was used in the presence or hearing of "a female" the statutory language. Jackson *v.* State, 137 Ala. 80, 34 So. 611. It is necessary to aver that the language in question was heard by the female alleged to have been present when it was spoken. Yancy *v.* State, 63 Ala. 141.

Necessity of naming person referred to.— A complaint under Minn. Laws (1881), c. 134, charging a person with using, "in reference to and in the presence of another, . . . abusive or obscene language, intended or naturally tending to provoke an assault, or any breach of the peace," should state the name (if known) of the person in reference to and in whose presence the language was used. State *v.* Clarke, 31 Minn. 207, 17 N. W. 344.

Person referred to.— An information charging the use of the prescribed language in the presence of a person named in which he was referred to by a vile term sufficiently avers that the language was used concerning him. Menasco *v.* State, 32 Tex. Cr. 582, 25 S. W. 422.

32. If the alleged disorderly conduct consisted of the commission of a common-law offense and there is no prescribed form of indictment by statute, the commission of the offense should be charged as at common law. Goree *v.* State, 71 Ala. 7.

33. Hardin *v.* State, 114 Ga. 58, 39 S. E. 879; Meaders *v.* State, 96 Ga. 299, 22 S. E. 527; Fuller *v.* State, 72 Ga. 213.

tainty, so as to identify it and apprise defendant of what he is charged.[34] On the other hand where the offense consists of disturbing the peace generally, or the peace of a family or class of persons by prescribed acts, language, or conduct there are numerous decisions to the effect that it will be sufficient to charge the offense in the language of the statute, without specification of particular acts done or language used.[35]

c. Duplicity. Two or more unlawful acts, similar in character, differing slightly in degree and shades of meaning, embraced in different sections of the same act, may be embodied as descriptive of one and the same offense and declared against in the same count or complaint.[36]

III. DEFENSES.

The statute of limitations presents a good defense.[37] So the accused may show in defense that the prosecuting witness was not himself in the place at the time.[38] And a party may defend against a charge of eavesdropping by showing that it was by permission.[39] In some states provocation is a good defense to a charge of using abusive language.[40] But it is not a defense to show that the language used was true;[41] that persons present encouraged and countenanced the

34. State *v.* Peirce, 43 N. H. 273. And see State *v.* Rollins, 55 N. H. 101; State *v.* Hetrick, 126 N. C. 977, 35 S. E. 125; Rex *v.* Cooper, 2 Str. 1246. See Chitty Cr. L. 229, 230.

Characterization of noise.— A charge of disturbing the peace of a family, couched in the language of the statute, "by loud and unusual noise," is insufficient, because failing to characterize the noise. State *v.* James, 37 Mo. App. 214.

A charge of uttering loud and offensive language, specifying it, on a day, month, and year stated in a particular public street of a municipality designated, is sufficient as to time, locality, and language used. Bassette *v.* State, 51 N. J. L. 502, 18 Atl. 354.

In Mississippi the indictment must state what constituted the offensive conduct or the nature or character of the conduct. Finch *v.* State, 64 Miss. 461, 1 So. 630, where it said that the general rule that it is sufficient to charge a statutory offense in the language of the statute does not apply when there are in the language of the statute no sufficient words to define any offense.

In Wisconsin the complaint must set forth the abusive language used. Steuer *v.* State, 59 Wis. 472, 18 N. W. 433.

35. *Alabama.*— Weaver *v.* State, 79 Ala. 279; Yancy *v.* State, 63 Ala. 141.

California.— *Ex p.* Foley, 62 Cal. 508.

Kansas.— Topeka *v.* Heitman, 47 Kan. 739, 28 Pac. 1096.

Missouri.— State *v.* Fogerson, 29 Mo. 416; State *v.* Hocker, 68 Mo. App. 415; State *v.* Brumley, 53 Mo. App. 126; State *v.* Ramsey, 52 Mo. App. 668; State *v.* Parker, 39 Mo. App. 116; State *v.* Fare, 39 Mo. App. 110 [*overruling* State *v.* Bach, 25 Mo. App. 554, which held that the information must state the language used or its substance].

Texas.— Foreman *v.* State, 31 Tex. Cr. 477, 20 S. W. 1109 [*disapproving obiter* in Elkins *v.* State, 26 Tex. App. 220, 9 S. W. 491].

See 17 Cent. Dig. tit. "Disorderly Persons," § 10.

The offense of being a common railer and brawler may be charged generally without setting out any distinct acts of railing and brawling. Stratton *v.* Com., 10 Metc. (Mass.) 217; State *v.* Rollins, 55 N. H. 101; State *v.* Perkins, 42 N. H. 464.

36. State *v.* Perkins, 42 N. H. 464.

Illustration.— A complaint which sufficiently charges one offense of disorderly conduct is not bad for duplicity in joining in the same count an insufficient charge of another offense constituting disorderly conduct; but the latter charge may be treated as surplusage. State *v.* Rollins, 55 N. H. 101.

37. Smith *v.* State, 62 Ala. 29.

38. State *v.* Lunn, 49 Mo. 90.

39. It is a good defense to an indictment for eavesdropping at the window of a married woman that the offense was committed by authority of the husband of the woman. Com. *v.* Lovett, 4 Pa. L. J. Rep. 5, 6 Pa. L. J. 226.

40. Collins *v.* State, 78 Ga. 87.

A wrongful trespass upon personal property in the presence of its owner may or may not amount to such provocation as will justify the latter in using to the wrong-doer on the spot opprobrious words or abusive language tending to cause a breach of the peace. Meaders *v.* State, 96 Ga. 299, 22 S. E. 527.

Provocation by third person.— The accused may defend by showing that he was provoked to use the language by another than the person in whose presence the objectionable language was used. Ray *v.* State, 113 Ga. 1065, 39 S. E. 408.

Every threatening or insulting word, gesture, or motion, even toward a peace officer, does not amount to disorderly conduct, for the action may be of such a character or so provoked or conditioned as to be fully justified. Jacksonville *v.* Headen, 48 Ill. App. 60.

41. Dyer *v.* State, 99 Ga. 20, 25 S. E. 609, 59 Am. St. Rep. 228.

illegal act;[42] that the offense was committed during religious worship;[43] that defendant believed himself to be unlawfully deprived of his property;[44] that particular citizens were not disturbed;[45] or that the offense in question included the commission of another like offense.[46] Nor can defendant attack the character of the female in whose presence the alleged offense was committed.[47]

IV. TRIAL.[48]

A. Evidence[49] — **1. In General.** Evidence of any acts or conduct of defendant tending to establish the charge is admissible;[50] and evidence that the offense was committed by defendant's connivance or assent will be sufficient.[51]

2. As to Identity of Offender. Evidence of an attempt to apprehend the accused is admissible for the purpose of identifying him as the offender.[52]

3. As to Place of Offense. The place of the offense must be proved as laid. Thus a charge of committing the offense in the dwelling-house or yard of another is not sustained by proof of its commission outside of but near the yard.[53] And a charge of committing the offense on a public road must be proved by showing that the place was such a road in fact.[54]

4. As to Disturbance. Evidence is admissible to show the inhabitation of the locality in which the disturbance took place;[55] but where the conduct itself constitutes the offense a witness should not be allowed to testify as to whether or not he saw anything indicating annoyance or disturbance of the citizens;[56] nor can individuals testify that they were in the neighborhood and were not disturbed.[57] And in its discretion the trial court may refuse to permit the prosecution to intro-

42. Com. *v.* Harris, 101 Mass. 29.

43. It is no defense to a complaint for beating a drum within the compact part of a town, in violation of statute, that it was done in the performance of religious worship, and caused no actual disturbance of the public peace. State *v.* White, 64 N. H. 48, 5 Atl. 828.

44. Seizure by constable.— Where one is prosecuted for disturbing the peace by using prohibited language near a private house, while in the act of turning loose a mare which a constable had seized, evidence that the constable had no right to seize the mare is immaterial. Watson *v.* State, (Tex. Cr. App. (1899) 50 S. W. 340.

Impounding cattle.— That the wife of the prosecutor who has impounded defendant's cattle demanded payment of the damage done to them and resisted his attempt to retake them does not show sufficient provocation. Ratteree *v.* State, 78 Ga. 335.

45. St. Charles *v.* Meyer, 58 Mo. 86.

46. Disturbance of families by disturbing public.— A prosecution for swearing in a public street, under Tex. Pen. Code, § 314, which establishes a penalty for using loud, indecent, or profane language "upon a public street, or near a private house, in a manner calculated to disturb the inhabitants thereof," is not barred by the fact that defendant may have equally violated the statute by disturbing the inhabitants of private residences. Keller *v.* State, 25 Tex. App. 325, 8 S. W. 275.

47. Golson *v.* State, 86 Ala. 601, 5 So. 799.

48. Trial in criminal cases generally see Criminal Law, 12 Cyc. 504 *et seq.*

49. Evidence in criminal cases generally see Criminal Law, 12 Cyc. 379 *et seq.*

50. People *v.* Elmer, 109 Mich. 493, 67 N. W. 550, advertisement by fortune-teller.

Simultaneous acts.— In a prosecution for using profane language near a private house, evidence that while committing the offense defendant attempted to strike a person named, is admissible as part of the *res gestæ*. Watson *v.* State, (Tex. Cr. App. 1899), 50 S. W. 340.

51. Racing on public road.— An indictment charging that defendant and another made and ran a race in a public road is supported by evidence that a third person rode defendant's horse for him. State *v.* Wagster, 75 Mo. 107.

The confession upon which by statute a justice may convict means a plea of guilty. Bennac *v.* People, 4 Barb. (N. Y.) 164.

52. Grand Rapids *v.* Williams, 112 Mich. 247, 70 N. W. 547, 67 Am. St. Rep. 396, 36 L. R. A. 137, where evidence of an attempt by persons to take hold of and detain one whom they have seen peeping into a window was held to be admissible.

53. Quin *v.* State, 65 Miss. 479, 480, 4 So. 548, where the court said: "If the indictment had charged the abusive language used by the appellant to have been uttered near the premises of Mr. Jones, the conviction might be sustained."

54. To authorize a conviction for shooting along a public road in violation of statute, the evidence must show that the place of the alleged shooting was a public road in fact. Johnson *v.* State, 105 Ala. 113, 17 So. 99; McDade *v.* State, 95 Ala. 28, 11 So. 375.

55. Keller *v.* State, 25 Tex. App. 325, 8 S. W. 275.

56. Com. *v.* Harris, 101 Mass. 29.

57. State *v.* Fogerson, 29 Mo. 416, although such testimony has been permitted to weaken the force of evidence as to the of-

duce in rebuttal additional evidence as to the disturbance charged.[58] However, the evidence must show with reasonable certainty that the language or conduct complained of was calculated to disturb the community.[59] But it is unnecessary to prove that any particular individual was disturbed.[60]

5. As to Language Used. A witness may repeat the language alleged to have been used,[61] or one present or near the scene of the alleged offense may state that he did not hear the language imputed,[62] or may give his opinion as to whether the language could have been heard by others.[63] But it is improper to permit a witness to characterize the language as abusive or insulting.[64] The exact language charged need not be proved, but a conviction will be warranted by evidence of the use of language similar or substantially similar to that set forth.[65] But proof of the use of loud language will not support a charge of using loud and offensive language.[66]

6. As to Want of Provocation. If it is an element of the offense that the opprobrious words must have been uttered without provocation, in addition to proving their use the state must show that there was no provocation therefor.[67]

7. Of Mitigating Circumstances. To mitigate the offense of using abusive or offensive language to a female, defendant may show that the woman in question habitually indulged in like language generally or in defendant's presence.[68]

B. Election by Prosecution. Where specific acts of disorderly conduct have been proven, the prosecution cannot be compelled to elect upon which it will ask a conviction.[69]

C. Instructions.[70] If from the testimony it is doubtful whether the language proved was calculated to disturb any person, the jury should be instructed that they cannot convict unless they believe beyond a reasonable doubt that the language had that effect.[71] And an erroneous instruction which warrants a conviction, although the complaining witness was not within the peace, is not cured by further instructing the jury that they cannot convict, unless he was within the

fensive character of the noise charged. St. Charles *v.* Meyer, 58 Mo. 86.

58. St. Charles *v.* Meyer, 58 Mo. 86.

59. Wallace *v.* State, 33 Tex. Cr. 178, 26 S. W. 68.

An indictment for exhibiting a stuffed figure representing a person with intent to provoke the neighborhood is not supported by proof of the exhibition of an effigy of a different character. Com. *v.* Haines, 4 Pa. L. J. Rep. 17, 6 Pa. L. J. 239.

An indictment for uttering loud cries and exclamations in a public street to the damage and common nuisance of all the citizens, etc., is supported by proof of acts tending to annoy all citizens which do in fact annoy any one present and not favoring them. Com. *v.* Oaks, 113 Mass. 8.

Railing and brawling.— Evidence of loud and violent language used by defendant in his own house with persons with whom he engaged in altercations will sustain a charge of being a common railer and brawler, if with other evidence it shows that defendant was accustomed to use immoderate and vituperative language so publicly and frequently as to be a common disturber of the public peace. Com. *v.* Foley, 99 Mass. 497.

Evidence of the habitual use of profane language is evidence of disorderly conduct, hence such evidence is admissible on the trial of one accused of being an idle and disorderly person. Com. *v.* Murray, 14 Gray (Mass.) 397.

60. State *v.* Fogerson, 29 Mo. 416.

61. Jackson *v.* State, 137 Ala. 80, 34 So. 611.

62. Cox *v.* State, 76 Ala. 66.

63. On a prosecution for the use of profane and insulting language, etc., a party present at the time may be permitted to testify that from the distance which certain females were from the scene in his opinion they could have heard the language used. McVay *v.* State, 100 Ala. 110, 14 So. 862.

64. Jackson *v.* State, 137 Ala. 80, 34 So. 611.

65. Benson *v.* State, 68 Ala. 544; Dyer *v.* State, 99 Ga. 20, 25 S. E. 609, 59 Am. St. Rep. 228.

66. Mullen *v.* State, 67 N. J. L. 451, 51 Atl. 461.

67. Fuller *v.* State, 72 Ga. 213.

68. Golson *v.* State, 86 Ala. 601, 5 So. 799.

69. People *v.* Elmer, 109 Mich. 493, 67 N. W. 550, where specific acts of pretending to tell fortunes were testified to.

70. Instructions in criminal cases see Criminal Law, 12 Cyc. 611 *et seq.*

71. Williams *v.* State, (Tex. Cr. App. 1896) 34 S. W. 926.

It is error to instruct that if a certain woman was near enough to hear abusive language, it was immaterial whether or not she actually heard it, where the uncontradicted evidence showed that no females were present. McVay *v.* State, 100 Ala. 110, 14 So. 862.

peace.[72] But there is no error in refusing to give a special charge as to a matter fully covered by a general charge already given,[73] or in refusing to charge specially that to convict the jury must believe that abusive language was addressed to a particular person in a manner calculated to provoke a breach of the peace, where there is no evidence that the language in question was addressed to such person.[74]

D. Province of Jury.[75] It is for the jury to determine from the evidence whether or not the language imputed to defendant was insulting or vulgar,[76] or his acts or conduct were calculated or tended to disturb,[77] or provoke a breach of the peace;[78] also whether there was a provocation for the language used, and if so, whether it was sufficient to justify its use.[79]

E. Conviction.[80] The conviction must be for the offense charged or one which is made an offense by the laws of the state.[81] A mere designation of defendant in the language of the statute as a disorderly person is not sufficient.[82] The record should state the proceedings, the circumstances, and the evidence, so as to show that the proceedings were regular and the conclusions of the magistrate justified.[83]

V. COMMITMENT.[84]

A commitment for disorderly conduct should state the particular act constituting the offense.[85] A commitment for disorderly conduct until security for

72. State *v.* Brumley, 53 Mo. App. 126.

73. Foreman *v.* State, 31 Tex. Cr. 477, 20 S. W. 1109.

74. Watson *v.* State, (Tex. Cr. App. 1899) 50 S. W. 340.

75. Questions of law and fact in criminal cases generally see CRIMINAL LAW, 12 Cyc. 587 *et seq.*

76. Carter *v.* State, 107 Ala. 146, 18 So. 232.

77. Keller *v.* State, 25 Tex. App. 325, 8 S. W. 275; McCandless *v.* State, 21 Tex. App. 411, 2 S. W. 811.

78. People *v.* Murray, 54 Hun (N. Y.) 406, 7 N. Y. Suppl. 548.

79. Hanson *v.* State, 114 Ga. 104, 39 S. E. 942; Ray *v.* State, 113 Ga. 1065, 39 S. E. 408; Echols *v.* State, 110 Ga. 257, 34 S. E. 289; Williams *v.* State, 105 Ga. 608, 31 S. E. 738; Dyer *v.* State, 99 Ga. 20, 25 S. E. 609, 59 Am. St. Rep. 228; Meaders *v.* State, 96 Ga. 299, 22 S. E. 527.

Trespass.—When in a prosecution for using abusive and insulting language a trespass is alleged by the accused as his provocation for so doing, it should be left to the jury to determine whether or not there was in fact such a trespass, and if so, whether or not it was in their judgment sufficient to justify the language used. Meaders *v.* State, 96 Ga. 299, 22 S. E. 527. Wrongfully entering and taking possession of the place of business of another in his absence, remaining in possession until his return, and refusing to leave when requested to do so by him, raises a question for the jury whether there is such provocation as to justify the owner in using to the wrongdoer, on his refusal to leave, opprobrious words and abusive language tending to cause a breach of the peace. Williams *v.* State, 105 Ga. 608, 31 S. E. 738.

80. Conviction in criminal cases generally see CRIMINAL LAW, 12 Cyc. 769 *et seq.*

81. *In re* Newkirk, 37 Misc. (N. Y.) 404, 75 N. Y. Suppl. 777.

A conviction for discharging firearms within the limits of a city does not show the violation of an ordinance forbidding the discharge of firearms "wantonly and without reasonable cause." Philadelphia *v.* Wards, 1 Phila. (Pa.) 517.

82. Matter of Travis, 55 How. Pr. (N. Y.) 347.

Disorderly persons.— Where an indictment under the New Jersey statute of 1898, concerning disorderly persons, charged that defendants uttered loud and indecent remarks concerning the complainant, a conviction in the record reciting "Upon the law and testimony, I convicted the defendants of being disorderly persons, as charged," was held not to find defendants guilty of any offense. State *v.* Regan, 67 N. J. L. 106, 50 Atl. 591.

83. Matter of Travis, 55 How. Pr. (N. Y.) 347.

In New York the magistrate is required "to make up, sign and file in the county clerk's office a record of the conviction of such offender as a disorderly person, specifying generally the nature and circumstances of the offense." Matter of Travis, 55 How. Pr. 347.

84. Commitment in criminal cases generally see CRIMINAL LAW, 12 Cyc. 312 *et seq.*

Form of commitment see People *v.* McCormach, 4 Park. Cr. (N. Y.) 9, 14.

Commitment until sureties to keep the peace are found see Matter of Miller, 1 Daly (N. Y.) 562, 19 Abb. Pr. (N. Y.) 394; Doyle Case, 19 Abb. Pr. (N. Y.) 269; People *v.* Brown, 23 Wend. (N. Y.) 47. And see, generally, BREACH OF THE PEACE.

85. People *v.* State Reformatory, 38 Misc. (N. Y.) 233, 77 N. Y. Suppl. 145. But see Matter of Miller, 1 Daly (N. Y.) 562, 19 Abb. Pr. (N. Y.) 394.

good behavior is furnished without qualification as to time is void. It must be for a specified time.[86]

VI. PUNISHMENT.[87]

The punishment or place of confinement is usually prescribed by the statute defining the offense or by general statutes respecting like offenses.[88] If no punishment is prescribed the offense is punishable as a misdemeanor at common law.[89]

VII. REVIEW.[90]

The remedy of a person deeming himself aggrieved by a conviction for disorderly conduct is by appeal or certiorari.[91]

A warrant issued on the conviction of a disorderly person summarily need only recite the offense, conviction, and sentence. Bennac *v.* People, 4 Barb. (N. Y.) 31. A commitment simply stating that defendant was "duly convicted before me," etc., without stating any facts, is insufficient. Matter of Travis, 55 How. Pr. (N. Y.) 347.

86. In New York, since the enactment of the penal code, magistrates may commit persons for disorderly conduct, in default of bail. Neither the penal code nor the code of criminal procedure limits the powers of magistrates in this class of cases. Matter of McMahon, 64 How. Pr. 285. A commitment for disorderly conduct until the party shall find security for his good behavior, without qualification as to time, is void. It should be limited to a specified period, not exceeding twelve months. Matter of Miller, 1 Daly 562, 19 Abb. Pr. 394.

Failure to provide for security.— The commitment by a city magistrate of the city of New York of a person on a summary conviction of disorderly conduct, for a fixed period without permitting the taking of sureties for good behavior, is unauthorized. Matter of Motley, 24 Misc. (N. Y.) 488, 53 N. Y. Suppl. 878.

87. Punishment in criminal cases generally see CRIMINAL LAW, 12 Cyc. 953 *et seq.*

88. A sentence upon one convicted of disorderly conduct which imposes a fine of ten dollars and costs taxed at fourteen dollars and fourteen cents and commits defendant to the county jail until the payment of such fine and costs is not in violation of the Kansas constitution, because an excessive, cruel, and unusual punishment. *In re* McCort, 52 Kan. 18, 34 Pac. 456. The penalty provided by the Pennsylvania act for shooting at or killing any pigeon, dove, etc., within certain places is measured by the number of shots fired and not by the number of birds killed. Com. *v.* Borden, 61 Pa. St. 272. A sentence of imprisonment to a house of correction inflicted upon a person convicted under the Michigan act No. 264 of 1889 relating to disorderly persons is not an excessive and unauthorized punishment. People *v.* Kelly, 99 Mich. 82, 57 N. W. 1090. Where an act concerning disorderly persons provides for their commitment on conviction to the workhouse if no workhouse exists within the county either by erection, purchase, or designation of a part of the county jail the act is not enforceable and a commitment to the county jail is illegal and void. Fairbanks *v.* Sheridan, 43 N. J. L. 484.

In New York the confinement of disorderly persons in the Albany county penitentiary is proper and lawful, notwithstanding section 892 of the code of criminal procedure, providing for their committal to the jail of the county, as the laws of 1847, chapter 183, was not repealed thereby. People *v.* Baker, 10 Abb. N. Cas. 210; People *v.* Coffee, 62 How. Pr. 445.

89. Redman *v.* State, 33 Ala. 428, an indictment for horse-racing on a public road in violation of a statute which prescribed no punishment therefor.

90. Review in criminal cases generally see CRIMINAL LAW, 12 Cyc. 792 *et seq.*

91. The provision of N. Y. Laws (1882), c. 410 (N. Y. City Consol. Act, § 1456), that "any appeal from or amendment to said order [of conviction of the person as a disorderly person] shall be exclusively for the action of the court of special sessions," does not preclude an appeal. People *v.* Vitan, 10 N. Y. Suppl. 909, 20 Abb. N. Cas. 298, 8 N. Y. Cr. 25. Under N. Y. Laws (1860), c. 508, § 4, providing that after the conviction of any person by a magistrate as a disorderly person, "any appeal from or amendment to said order shall be exclusively for the action of the Court of Special Sessions," the supreme court is not precluded from reviewing the decisions of the court of special sessions upon a common-law certiorari. People *v.* Public Charity Com'rs, 9 Hun 212. If the magistrate acted erroneously or upon insufficient evidence the remedy is not by habeas corpus but by certiorari. Matter of Miller, 1 Daly (N. Y.) 562, 19 Abb. Pr. (N. Y.) 394. Since the amendment of N. Y. Code Cr. Proc. § 515, in 1844, certiorari does not lie to review a determination by a police magistrate committing a person for disorderly conduct, but the only remedy is an appeal. People *v.* Murray, 62 Hun 30, 16 N. Y. Suppl. 325 [*distinguishing* People *v.* Walsh, 33 Hun 345, 2 N. Y. Cr. 325].

DISORDERLY HOUSES

By Ernest H. Wells*

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* Author of "Contribution," 9 Cyc. 792; "Court Commissioners," 11 Cyc. 622; "Dueling," 14 Cyc. 1111.

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CROSS-REFERENCES

For Matters Relating to:
Disorderly House:
As a Nuisance Generally, see NUISANCES.
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Kept by Corporation, see CORPORATIONS.
Kept For Sale of Liquor, see INTOXICATING LIQUORS.
Gambling House as Statutory Offense, see GAMING.
Nuisance in GENERAL, see NUISANCES.
For General Matters Relating to Criminal Law and Criminal Procedure, see CRIMINAL LAW.

I. GENERAL NATURE AND CHARACTER.

A. Definitions. A disorderly house is a house in which people abide or to which they resort to the disturbance of the neighborhood or for purposes which are injurious to the public morals, health, convenience, or safety.[1] The word "house," used in the terms "disorderly house," "bawdy-house," or "house of ill-fame," has been held to include in its meaning a single room in a house,[2] a boat on a river,[3] a covered wagon drawn from place to place,[4] a canvas tent,[5] or any building.[6]

B. Considered as a Nuisance — 1. IN GENERAL. Such a house constituted a public nuisance at common law.[7]

2. OF WHAT THE NUISANCE CONSISTS. The nuisance may generally be said to consist in drawing together dissolute persons engaged in unlawful or immoral

1. See Cheek *v.* Com., 79 Ky. 359.

Other definitions are: "[A house] kept for the purpose of public prostitution" (Thompson *v.* State, 2 Tex. App. 82, 83), or "as a common resort for prostitutes and vagabonds" (Springer *v.* State, 16 Tex. App. 591, 592; Tex. Pen. Code, art. 339. See also White Pen. Code Tex. art. 359).

"A house or place to which people resort to the disturbance of persons lawfully in the place, or the disturbance of the neighborhood." Price *v.* State, 96 Ala. 1, 44, 11 So. 128 [*citing* 1 Bishop Cr. L. § 1046].

"Any place of public resort, in which illegal practices are habitually carried on, or when it becomes the habitual resort of thieves, drunkards, prostitutes, or other idle, vicious, and disorderly persons, who gather together there for the purpose of gratifying their own depraved appetites, or to make it a rendezvous where plans may be concocted for depredations upon society, and to disturb either its peace or its rights of property." State *v.* Williams, 30 N. J. L. 102, 110.

"A place where illegal practices are habitually carried on." *In re* Charge to Grand Jury, 10 N. J. L. J. 116.

"The term 'disorderly house,' as defined by the common law, is one of very wide meaning, and includes any house or place, the inmates of which behaved so badly as to make it a nuisance." State *v.* Grosofski, 89 Minn. 343, 345, 94 N. W. 1077. And see State *v.* Maxwell, 33 Conn. 259; Rhodes *v.* Com., 15 Ky. L. Rep. 333; Bouvier L. Dict. "So of one which is kept in such a way as to disturb or scandalize the public generally, or the inhabitants of a particular neighborhood, or the passers-by." And the term "disorderly house" has been held to have the same meaning in the city ordinance. Hawkins *v.* Lutton, 95 Wis. 493, 497, 70 N. W. 483, 60 Am. St. Rep. 131.

2. People *v.* Buchanan, 1 Ida. 681; 1 Hawkins P. C. c. 74. See State *v.* Garity, 46 N. H. 61; Reg. *v.* Peirson, 2 Ld. Raym. 1197, 1 Salk. 382.

3. State *v.* Mullen, 35 Iowa 199.

4. State *v.* Chauvet, 111 Iowa 687, 83 N. W. 717, 82 Am. St. Rep. 539, 51 L. R. A. 630. See also Tracy *v.* State, (Tex. Cr. App. 1901) 61 S. W. 127.

5. Killman *v.* State, 2 Tex. App. 222, 28 Am. Rep. 432.

6. **Any building** kept and used as a shelter for disorderly persons and conduct may be a disorderly house. State *v.* Powers, 36 Conn. 77.

"Houses" includes "house." State *v.* Main, 31 Conn. 572, construing Conn. Rev. St. tit. 6, § 89.

Two stories of a building may be treated as one building in charging one with keeping a house of ill fame. State *v.* Lee, 80 Iowa 75, 45 N. W. 545, 20 Am. St. Rep. 401.

7. Price *v.* State, 96 Ala. 1, 11 So. 128; State *v.* Bailey, 21 N. H. 343; People *v.* Carey, 4 Park. Cr. (N. Y.) 238; 4 Blackstone Comm. 167. The common-law offense was not repealed by Mass. Pub. St. c. 101, § 6, making all places resorted to for prostitution, lewdness, etc., common nuisances, nor by c. 207, § 13, prescribing the punishment for keeping a house of ill fame. Com. *v.* Goodall, 165 Mass. 588, 43 N. E. 520.

For matters relating to nuisances generally see NUISANCES.

It is in the aspect of a nuisance that the law takes cognizance of the existence of a house so conducted. Palfus *v.* State, 36 Ga. 280; Hunter *v.* Com., 2 Serg. & R. (Pa.) 298. See Main *v.* State, 42 Ind. 327, 13 Am. Rep. 364.

The nuisance does not belong to that class which can be abated.— See *infra*, XV. **But** see *infra*, XVII.

practices thereby endangering the public peace.[8] And to constitute a disorderly house there must be an habitual violation of the law.[9] Boisterous and noisy conduct is not a necessary element of the nuisance; the peace and quiet of the neighborhood need not be disturbed.[10] Nor is it necessary that all or a great many persons in the neighborhood should see or hear what goes on in and about the house.[11] The objectionable or immoral conduct even need not be seen from the exterior of the house.[12]

8. *Alabama.*— Price *v.* State, 96 Ala. 1, 11 So. 128.

Arkansas.— Thatcher *v.* State, 48 Ark. 60, 2 S. W. 343.

Massachusetts.— Com. *v.* Cobb, 120 Mass. 356.

Minnesota.— State *v.* Ireton, 89 Minn. 340, 94 N. W. 1078.

New Hampshire.— State *v.* McGregor, 41 N. H. 407.

New Jersey.— See State *v.* Williams, 30 N. J. L. 102.

New York.— See King *v.* People, 83 N. Y. 587.

North Carolina.— See State *v.* Boyce, 32 N. C. 536.

United States.— U. S. *v.* Gray, 26 Fed. Cas. No. 15,251, 2 Cranch C. C. 675.

See 17 Cent. Dig. tit. "Disorderly Houses," § 1 *et seq.*

"The common injury flows from the evil influence it exerts — from the temptations and opportunities for the commission of crime it affords." Hickey *v.* State, 53 Ala. 514, 517. See also Thatcher *v.* State, 48 Ark. 60, 2 N. W. 343.

9. Wilson *v.* Com., 12 B. Mon. (Ky.) 2; Brown *v.* State, 49 N. J. L. 61, 7 Atl. 340; Dunnaway *v.* State, 9 Yerg. (Tenn.) 350. See also Overman *v.* State, 88 Ind. 6.

A single instance or a single act would not render a person guilty of keeping a house indictable as a public nuisance. Hickey *v.* State, 53 Ala. 514, 518.

In the absence of a statute making each day a disorderly house is kept a separate offense, the offense is a continuing one. Reed *v.* State, (Tex. Cr. App. 1895) 29 S. W. 1085.

Particular acts of disorder do not render a house a common disorderly house. People *v.* Clark, 1 Wheel. Cr. (N. Y.) 288, 292, note [*citing* 3 City Hall Rec. (N. Y.) 134].

Under Iowa Code (1873), § 4091, however, declaring a house "where drunkenness, quarreling, fighting, or breaches of the peace are carried on or permitted, to the disturbance of others" to be a nuisance, the keeping of which is punishable as an offense, one may be convicted, on proof that he kept the place described, and that drunkenness, quarreling, and fighting were carried on there with his permission on a single occasion, although the indictment may charge that such acts were committed on more than one occasion. State *v.* Pierce, 65 Iowa 85, 21 N. W. 195.

10. *Alabama.*— Price *v.* State, 96 Ala. 1, 11 So. 128.

Arkansas.— Thatcher *v.* State, 48 Ark. 60, 2 S. W. 343.

Kentucky.— See Cheek *v.* Com., 79 Ky. 359.

Massachusetts.— Com. *v.* Cobb, 120 Mass. 356.

Minnesota.— State *v.* Ireton, 89 Minn. 340, 94 N. W. 1078.

New Jersey.— See State *v.* Williams, 30 N. J. L. 102.

New York.— King *v.* People, 83 N. Y. 587; People *v.* Rowland, 1 Wheel. Cr. 286. See People *v.* Carey, 4 Park. Cr. 238.

Ohio.— Brown *v.* Toledo, 5 Ohio S. & C. Pl. Dec. 210.

England.— Greig *v.* Bendeno, E. B. & E. 133, 27 L. J. M. C. 294, 6 Wkly. Rep. 474, 96 E. C. L. 133.

See 17 Cent. Dig. tit. "Disorderly Houses," § 1 *et seq.*

Contra.— Under an ordinance providing for the punishment of any person found in a disorderly house or place, in a house of ill fame, or in a place resorted to for purposes of prostitution, the term "disorderly house" denotes a house in which people abide, or to which they resort, disturbing by their noise the order and tranquillity of the neighbors not necessarily a house of prostitution. Hawkins *v.* Lutton, 95 Wis. 492, 70 N. W. 483, 60 Am. St. Rep. 131. And see State *v.* Evans, 27 N. C. 603, 608, where the court seems to think noise and actual disorder necessary. See also Palfus *v.* State, 36 Ga. 280.

The decency of a neighborhood is habitually disturbed when unbecoming acts are of common occurrence at a house therein, although they are not so notorious as to disturb the public peace or quiet. State *v.* Ireton, 89 Minn. 340, 94 N. W. 1078.

11. Price *v.* State, 96 Ala. 1, 11 So. 128, where it was held that it is not necessary that more than one person should be actually disturbed. See also Com. *v.* Hopkins, 133 Mass. 381, 43 Am. Rep. 527; Com. *v.* Oaks, 113 Mass. 8, holding that if the house is of such a character that any citizen passing would have been annoyed by it and if the annoyance is of such a character that it would worry any person passing it is a nuisance. But *compare* State *v.* Wright, 51 N. C. 25, where upon a charge for keeping a disorderly house, it appearing that defendant lived in the country, remote from any public road, and that loud noises and uproar were often kept up by his five sons when drunk, whom he did not encourage (save by getting drunk himself), but would sometimes endeavor to quiet, by which disorder only two families in a thickly settled neighborhood were disturbed, such conduct was held not to amount to a common nuisance.

12. Reg. *v.* Rice, L. R. 1 C. C. 21, 10 Cox C. C. 155, 12 Jur. N. S. 126, 35 L. J. M. C.

II. KINDS OF DISORDERLY HOUSES.

A. Specific Kinds — 1. Those Nuisances Per Se — a. In General. The specific kinds of disorderly houses which are regarded in law as nuisances *per se* are bawdy-houses[13] and gaming-houses.[14]

b. Bawdy-House — (I) *Definition.* A bawdy-house or house of ill fame[15] is a house or place kept for the shelter and convenience of persons desiring unlawful sexual intercourse and in which such intercourse is practised.[16]

(II) *Why Considered a Nuisance.* A bawdy-house was a public nuisance at common law, because it drew together lewd and debauched persons, thus tending to disturb the peace and to increase immorality among the people.[17]

(III) *Number of Women Inhabiting or Frequenting.* It would therefore logically follow that a bawdy-house must be a place or resort for or a habitation of more than one woman.[18] Nevertheless a house where only one woman

93, 13 L. T. Rep. N. S. 382, 14 Wkly. Rep. 56. See King *v.* People, 83 N. Y. 587. And *compare* State *v.* Ireton, 89 Minn. 340, 94 N. W. 1078.

13. See *infra*, II, A, 1, b.

14. See *infra*, II, A, 1, c.

"In its more enlarged sense it (the term disorderly house) includes bawdy-houses, common gaming-houses, and places of like character." Cheek *v.* Com., 79 Ky. 359, 362.

15. The term "house of ill fame," in its ordinary use, is synonymous with "bawdy-house." McAlister *v.* Clark, 33 Conn. 91. See Century Dict. But in some states which have a statute forbidding the keeping of a "house of ill-fame, resorted to for prostitution or lewdness," it is held that the term means a house which has a bad reputation besides being actually a bawdy-house. State *v.* Blakesley, 38 Conn. 523; Cadwell *v.* State, 17 Conn. 467; People *v.* Gastro, 75 Mich. 127, 42 N. W. 937.

16. People *v.* Hampton, 4 Utah 258, 9 Pac. 508; Givens *v.* Van Studdiford, 86 Mo. 149, 56 Am. Rep. 421; King *v.* People, 83 N. Y. 587; People *v.* Clark, 1 Wheel. Cr. (N. Y.) 288, 290 note.

"At common law a 'bawdy-house' or a "house of ill fame," in the popular sense of the terms, is a species of disorderly house, and is indictable as a nuisance." Henson *v.* State, 62 Md. 231, 232, 50 Am. Rep. 204 [*citing* 3 Greenleaf Ev. § 184; 2 Wharton Cr. L. § 2392]. The common-law offense of keeping a disorderly house is made out by proof that such house was resorted to by immoral persons for the purpose of prostitution. Com. *v.* Goodall, 165 Mass. 588, 43 N. E. 520; Barnesciotta *v.* People, 10 Hun (N. Y.) 137. See Jacobowsky *v.* People, 6 Hun (N. Y.) 524.

Jacob's definition, "a house of ill-fame, kept for the resort and commerce of lewd people of both sexes," is followed closely in Rhodes *v.* Com., 15 Ky. L. Rep. 333; State *v.* Horn, 83 Mo. App. 47; State *v.* Evans, 27 N. C. 603. Bouvier adopts Jacob's definition, but inserts the word "unlawful" before "commerce." Bouvier's definition is adopted in Betts *v.* State, 93 Ind. 375, 376; Harwood *v.* People, 26 N. Y. 190, 191, 84 Am. Dec. 175. And see 5 Cyc. 676.

Can. Cr. Code, § 195, defines bawdy-house as "a house, room, set of rooms or place of any kind kept for purposes of prostitution."

Under N. Y. Pen. Code, § 322, defining a keeper of a disorderly house as one "who keeps a house of ill-fame or assignation of any description, or a house or place for persons to visit for unlawful sexual intercourse, or for any lewd, obscene or indecent purpose, or disorderly house, or a house commonly known as a stale beer dive," a charge of "keeping a disorderly house" necessarily implies keeping a place where persons are permitted to meet for unlawful sexual intercourse. People *v.* Board of Excise, 17 Misc. (N. Y.) 98, 100, 40 N. Y. Suppl. 741.

When the house of a person is the resort of prostitutes, plying their vocation, with his knowledge, this constitutes a bawdy-house. King *v.* People, 83 N. Y. 587.

17. State *v.* Main, 31 Conn. 572; Jacobowsky *v.* People, 6 Hun (N. Y.) 524; State *v.* Plant, 67 Vt. 454, 32 Atl. 237, 48 Am. St. Rep. 821. See McAlister *v.* Clark, 33 Conn. 91. See also 3 Coke Inst. 205; Hawkins P. C. c. 74; Jacob L. Dict.

Under Hawaiian statute see Provisional Government *v.* Wery, 9 Hawaii 228.

18. State *v.* Evans, 27 N. C. 603. See also State *v.* Lee, 80 Iowa 75, 45 N. W. 545, 20 Am. St. Rep. 401 (holding that illicit intercourse with the proprietor alone will not make the place of such intercourse a bawdy-house); Singleton *v.* Ellison, [1895] 1 Q. B. 607, 18 Cox C. C. 79, 59 J. P. 119, 64 L. J. M. C. 123, 72 L. T. Rep. N. S. 236, 15 Reports 201, 43 Wkly. Rep. 426 [*followed* in Rex *v.* Young, 6 Can. Cr. Cas. 42, 14 Manitoba 58] (holding that a female cannot be convicted of unlawfully keeping a bawdy-house, under § 198, or § 783, of the criminal code, unless it is shown that the house or room in question is occupied or resorted to by more than one female for purposes of prostitution).

A place where one woman has been accustomed to receive men is not a brothel, within the meaning of Cr. L. Amendm. Act (1885),

resides or resorts has been not infrequently held to be a bawdy-house or a house of ill fame.[19]

(IV) *NUMBER OF COPULATIONS.* A single illicit copulation within a house would not make such house a house of ill fame.[20]

(V) *NEED NOT BE OPENLY CONDUCTED.* It is not necessary that the house should be conducted openly or notoriously to constitute a nuisance.[21]

(VI) *KEEPING A MISDEMEANOR.* The keeping of such a house constituted a misdemeanor at common law.[22]

c. Gaming-House — (I) *IN GENERAL — DEFINITION.* A gaming-house is a house where gaming is practised; a gambling-house.[23] This constituted a nuisance at common law,[24] for it offered great temptation to idleness and tended to draw together disorderly persons to the encouragement of immorality and breaches of the peace.[25]

§ 13. Singleton *v.* Ellison, [1895] 1 Q. B. 607, 18 Cox C. C. 79, 59 J. P. 119, 64 L. J. M. C. 123, 72 L. T. Rep. N. S. 236, 15 Reports 201, 43 Wkly. Rep. 426.

19. People *v.* Slater, 119 Cal. 620, 51 Pac. 957; People *v.* Buchanan, 1 Ida. 681; 1 Hawkins P. C. c. 74. And see Reg. *v.* Peirson, 2 Ld. Raym. 1197, 1 Salk. 382. A man may be guilty of keeping a house of ill fame, although the illicit intercourse is had only with his wife, and she is the only female inmate. State *v.* Young, 96 Iowa 262, 65 N. W. 160, 59 Am. St. Rep. 371 [*distinguishing* State *v.* Lee, 80 Iowa 83, 45 N. W. 545, 20 Am. St. Rep. 401].

Under Tex. Pen. Code (1895), art. 359, which provided that "a disorderly house is one kept for prostitution, or where prostitutes are permitted to resort or reside for the purpose of plying their vocation," a conviction for keeping a disorderly house may be had, although the house is inhabited by only one prostitute, if the essential elements of the offense are proved. Remey *v.* State, (Tex. Cr. App. 1898) 45 S. W. 489.

20. State *v.* Garing, 74 Me. 152, where a statute forbade the keeping of a house of ill fame, "resorted to for prostitution and lewdness." See also State *v.* Lee, 80 Iowa 75, 45 N. W. 545, 20 Am. St. Rep. 401. But see *contra, dictum* in State *v.* Russell, 95 Iowa 406, 64 N. W. 281. In State *v.* Irvin, 117 Iowa 469, 91 N. W. 760.

The house must be kept as a place of "resort" for such purpose. Com. *v.* Lambert, 12 Allen (Mass.) 177. But in State *v.* Lee, 80 Iowa 75, 83, 45 N. W. 545, 20 Am. St. Rep. 401, the court said that the place needed not to be used habitually or for any considerable length of time.

21. It is sufficient if the house is commonly resorted to for illicit copulation with the inmates. De Forest *v.* U. S., 11 App. Cas. (D. C.) 458.

In Mass. Gen. St. c. 87, §§ 6, 7, forbidding the keeping of a house for prostitution or lewdness, "lewdness" includes illicit intercourse, whether public or private, and not merely public indecency. Com. *v.* Lambert, 12 Allen (Mass.) 177.

22. State *v.* Porter, 38 Ark. 637; Rogers *v.* People, 9 Colo. 450, 12 Pac. 843, 59 Am. Rep. 146; De Forest *v.* U. S., 11 App. Cas. (D. C.) 458; People *v.* Sadler, 97 N. Y. 146.

The common-law offense is not abrogated by statute unless the intent so to do is manifest. *Ex p.* Birchfield, 52 Ala. 377 (Ala. Rev. Code, § 3630); Jennings *v.* Com., 17 Pick. (Mass.) 80 (Mass. St. (1793) c. 59, § 18). See also Com. *v.* Smith, 138 Mass. 489, holding that it was a misdemeanor, although by statute it was punished by imprisonment in jail not exceeding two years.

Early licensing. — It was always held infamous to keep a bawdy-house; yet some of our historians mention bawdy-houses, brothel-houses, or stews publicly allowed here in former times, till the reign of Henry VIII, by whom they were suppressed; and writers assign the number to be eighteen thus allowed on the bank-side in Southwark. Jacob L. Dict.

23. Century Dict. [*quoted* in Miller *v.* State, 35 Tex. Cr. 650, 651, 34 S. W. 959].

Other definitions are: "A house or room whose use is intended to facilitate gaming purposes, and where sporting characters are invited to congregate for illegal amusement and gaming, or to take money or other thing of value upon trials of chance, skill, or endurance. The house or room must be specially set aside and devoted to the purpose of gaming." Miller *v.* State, 35 Tex. Cr. 650, 651, 34 S. W. 959 [*citing* People *v.* Weithoff, 51 Mich. 203, 213, 16 N. W. 442, 47 Am. Rep. 557].

A house "that is set apart and run or conducted by its owner or proprietor for the profits to be derived from the games there played, whether lawful or unlawful." Miller *v.* State, 35 Tex. Cr. 650, 651, 34 S. W. 959.

Gambling and gaming-houses under statutory provisions see GAMING.

24. Vanderworker *v.* State, 13 Ark. 700; State *v.* Layman, 5 Harr. (Del.) 510; Lord *v.* State, 16 N. H. 325, 41 Am. Dec. 729; U. S. *v.* Ismenard, 26 Fed. Cas. No. 15,450, 1 Cranch C. C. 150. See also King *v.* People, 83 N. Y. 587. And *compare* Provisional Government *v.* Wery, 9 Hawaii 228.

25. Vanderworker *v.* State, 13 Ark. 700; McClean *v.* State, 49 N. J. L. 471, 9 Atl. 681; People *v.* Clark, 1 Wheel. Cr. (N. Y.) 288, 291 note. See People *v.* Jackson, 3 Den. (N. Y.) 101, 45 Am. Dec. 449; Rex *v.* Rogier, 1 B. & C. 272, 2 D. & R. 431, 25 Rev. Rep. 393, 8 E. C. L. 117; Rex *v.* Dixon, 10 Mod. 335; 1 Hawkins P. C. c. 75, § 6.

(II) *Pool-Rooms.* A place of public resort kept for the sale of pools upon horse-races is a disorderly house.[26]

(III) *Room For Selling Lottery Tickets.* The keeping of a room or place for the sale of tickets in lotteries not authorized by law is not indictable at common law.[27]

(IV) *Room For Betting on Fluctuations in Stocks.* A house wherein the keepers permit persons to habitually assemble and engage in wagering money on the prospective fluctuations in the stock market is a common gaming-house.[28]

(V) *Place Where Loser Pays For Drinks or For Use of Table.* A house where it is permitted to play cards for drinks or cigars,[29] or a public saloon where it is permitted to play bagatelle or pool for drinks or for the payment for use of the table or instrument of play,[30] is a gaming-house.

2. Those Nuisances Per Accidens — a. In General. The other specific kinds of disorderly houses are nuisances only as they are conducted in a manner to annoy the public;[31] this class includes tippling-houses,[32] playhouses, or theaters[33] and bowling-alleys.[34]

b. Tippling-House — (I) *In General.* A tippling-house or a place where intoxicating liquors are sold[35] is not a nuisance *per se* at common law. It becomes

A house in which a faro table is kept for the purpose of common gambling is *per se* a nuisance, notwithstanding a tax is imposed on such tables, and has been paid by the owner thereof, and this, although the tax was plainly imposed to suppress the use of such instruments. State *v.* Doon, R. M. Charlt. (Ga.) 1.

Gambling permitted in an inn renders the keeper indictable (Butler's Case, 1 City Hall Rec. (N. Y.) 66); and a licensed grocery has been held to be an inn or tavern within the meaning of a statute prohibiting gambling in such a house (Cuscadden's Case, 2 City Hall Rec. (N. Y.) 53).

Playing at cards, dice, and other games of chance, merely for the purposes of recreation, and without any view to inordinate gain, is regarded at common law as innocent. People *v.* Clark, 1 Wheel. Cr. (N. Y.) 288, 291 note.

26. Cheek *v.* Com., 79 Ky. 359, 2 Ky. L. Rep. 339; Haring *v.* State, 51 N. J. L. 386, 17 Atl. 1079; State *v.* Lovell, 39 N. J. L. 463. And see Rex *v.* Hanrahan, 5 Can. Cr. Cas. 430. In McClean *v.* State, 49 N. J. L. 471, 9 Atl. 681, a pool-room was held to be a nuisance, although a statute making betting on horse-racing a criminal offense had been repealed.

27. For in such a case there is no tendency to make idle, dissolute people congregate. People go there one at a time and there is no tendency toward a breach of the peace. People *v.* Jackson, 3 Den. (N. Y.) 101, 45 Am. Dec. 449.

28. Kneffler *v.* Com., 94 Ky. 359, 22 S. W. 446, 15 Ky. L. Rep. 176. But see People *v.* Todd, 51 Hun (N. Y.) 446, 4 N. Y. Suppl. 25, 6 N. Y. Cr. 203, where it was held that keeping a room where wagers are made as to the fluctuations in the prices of stocks bought and sold in the New York Stock Exchange as indicated by stock quotation ticker, did not violate N. Y. Pen. Code, § 343, which provides that "a person who keeps a room, shed, tenement, tent, booth, building, float or vessel, or any part thereof, to be used for gambling or for any purpose, or in any manner forbidden by this chapter, . . . is guilty of a misdemeanor;" and this although the contracts so made on such wagers were not enforceable at law as being wagering contracts. People *v.* Todd, 51 Hun (N. Y.) 446, 449, 4 N. Y. Suppl. 25, 6 N. Y. Cr. 203. In 1889 the above provision was amended by adding thereto the words: "or for making any wagers or bets made to depend upon any lot, chance, casualty, unknown or contingent event, or on the future price of stock, bonds, securities, commodities or property of any description whatever, or for making any contract or contracts for or on account of any money, property or thing in action so bet or wagered." Under the statute so amended, the person who kept a room under practically the same circumstances as in the above case was convicted of keeping a gambling or betting establishment. People *v.* Wade, 59 N. Y. Suppl. 846, 848.

29. State *v.* Maurer, 7 Iowa 406; Hitchins *v.* People, 39 N. Y. 454.

Playing cards for beer, to be purchased and paid for by the loser, is gaming. Brown *v.* State, 49 N. J. L. 61, 7 Atl. 340.

30. People *v.* Cutler, 28 Hun (N. Y.) 465, under N. Y. Code Cr. Proc. § 899. See also Lyner's Case, 5 City Hall Rec. (N. Y.) 136; People *v.* Clark, 1 Wheel. Cr. (N. Y.) 288, 391 note. But see People *v.* Sergeant, 8 Cow. (N. Y.) 139, where it was held that a billiard room where the loser paid for the table was not a gaming-house. See also *infra*, II, A, 2, d.

31. See People *v.* Clark, 1 Wheel. Cr. (N. Y.) 288, 290 note.

Blackstone says: "All disorderly inns or ale-houses, bawdy-houses, gaming-houses, stage plays, unlicensed booths and stages for rope-dancers, mountebanks, and the like, are public nuisances." 4 Blackstone Comm. 167.

32. See *infra*, II, A, 2, b.

33. See *infra*, II, A, 2, c.

34. See *infra*, II, A, 2, d.

35. **Definition.** A tippling-house has been defined as: "A place of public resort, where spirituous, fermented, or other intoxicating

a nuisance only when it is kept in a disorderly manner, to the annoyance of the neighborhood.[36] A person who keeps such a place and allows drunken, disorderly characters to congregate in it who drink, curse, or use foul language, shout and quarrel by day or by night is guilty of maintaining a nuisance.[37] A statute providing that every sale of intoxicating liquor without a license[38] constitutes the offense of keeping a disorderly house does not prevent a prosecution for the common-law offense of keeping a tippling-house.[39]

(II) *SALE OF LIQUOR ON SUNDAY.* The habitual sale of intoxicants on Sunday on the vendor's premises constitutes a nuisance.[40]

(III) *DISORDERLY CONDUCT IN AND NEAR HOUSE.* The law holds the keeper liable for the disorderly conduct in and about the house,[41] and even for disorderly acts outside the house by persons who became intoxicated therein.[42]

liquors are sold and drank in small quantities, without having a license therefor." Emporia *v.* Volmer, 12 Kan. 622, 632; Anderson L. Dict. [*quoted* in Mohrman *v.* State, 105 Ga. 709, 714, 32 S. E. 143, 70 Am. St. Rep. 74, 43 L. R. A. 398].

"A place where intoxicating drinks are sold in drams of small quantities to be drunk on the premises." Black L. Dict. [*quoted* in Mohrman *v.* State, 105 Ga. 709, 714, 32 S. E. 143, 70 Am. St. Rep. 74, 43 L. R. A. 398].

"A place where spirituous liquors are sold and drank in violation of law." Bouvier L. Dict. [*quoted* in Emporia *v.* Volmer, 12 Kan. 622, 632; Harney *v.* State, 8 Lea (Tenn.) 113, 119].

"A public drinking house" (Koop *v.* People, 47 Ill. 327, 329), where intoxicating liquor is either sold by drams to the public, or else given away and imbibed" (Anderson L. Dict. [*quoted* in Mohrman *v.* State, 105 Ga. 709, 714, 32 S. E. 143, 70 Am. St. Rep. 74, 43 L. R. A. 398]).

"Tippling houses are common drinking houses, kept for lucre and gain, where all people may, if they will, resort and drink *ad libitum*. To make a tippling house it is not necessary that in fact one or more shall have actually drank there frequently to excess. It is sufficient that the place be one which, for lucre or gain, is kept for common drinking or tippling, whether in fact it attracts customers or not, or whether such customers drink to excess or not, &c." Werner *v.* Washington, 29 Fed. Cas. No. 17,416*a*, 2 Hayw. & H. 175, 183.

"Tippling-shop" and "disorderly house," have in the law well settled and well defined meanings, and those meanings are not identical, nor is either necessarily included in the other. Emporia *v.* Volmer, 12 Kan. 622, 633.

36. Com. *v.* McDonough, 13 Allen (Mass.) 581. See also, generally, INTOXICATING LIQUORS.

"Before the 5 & 6 Eliz. 6. it was lawful for any one to keep an ale-house without licence, for it was a means of livelihood, which any one was free to follow. But if it was disorderly kept, it was indictable as a nuisance." Stephens *v.* Watson, 1 Salk. 45.

"A man might keep an orderly house, yet be selling therein large quantities of spirits. The men might get drunk outside the house and there be noisy, or, if drunk inside, yet not noisy, the house would be no nuisance." Northern Pac. R. Co. *v.* Whalen, 3 Wash. Terr. 452, 462, 17 Pac. 890.

37. State *v.* Buckley, 5 Harr. (Del.) 508; Nace *v.* State, 117 Ind. 114, 19 N. E. 729; State *v.* Mullikin, 8 Blackf. (Ind.) 260; Bloomhuff *v.* State, 8 Blackf. (Ind.) 205; State *v.* Bertheol, 6 Blackf. (Ind.) 474, 39 Am. Dec. 442; State *v.* Thornton, 44 N. C. 252; U. S. *v.* Bede, 24 Fed. Cas. No. 14,558; U. S. *v.* Benner, 24 Fed. Cas. No. 14,569, 5 Cranch C. C. 347; U. S. *v.* Columbus, 25 Fed. Cas. No. 14,841, 5 Cranch C. C. 304; U. S. *v.* Elder, 25 Fed. Cas. No. 15,039, 4 Cranch C. C. 507. See also State *v.* Pierce, 65 Iowa 85, 21 N. W. 195; Hawkins P. C. c. 78.

Dancing and tippling.— A person who keeps a house wherein he allows tippling, dancing, or both, to be carried on in such a manner as to be an annoyance to the neighborhood is guilty of keeping a disorderly house. People *v.* Carey, 4 Park. Cr. (N. Y.) 238.

One who entertains company occasionally for compensation is not the keeper of a public inn and he cannot be charged with keeping a disorderly house because some of his guests are annoyed by the gambling, drinking, and fighting of the others. State *v.* Mathews, 19 N. C. 424.

A calaboose kept by an incorporated town for the confinement of drunken and disorderly persons is not a disorderly house. Paris *v.* People, 27 Ill. 74.

Quantity of liquor sold is immaterial. Cable *v.* State, 8 Blackf. (Ind.) 531.

38. See Provisional Government *v.* Wery, 9 Hawaii 228.

39. Parker *v.* State, 62 N. J. L. 801, 45 Atl. 1092 [*affirming* 61 N. J. L. 308, 39 Atl. 651].

40. The vendor may be indicted for keeping a disorderly house, notwithstanding he may also be indicted for each specific act of selling. State *v.* Williams, 30 N. J. L. 102. See also U. S. *v.* Bede, 24 Fed. Cas. No. 14,558; U. S. *v.* Benner, 24 Fed. Cas. No. 15,569, 5 Cranch C. C. 347.

41. State *v.* Burchinal, 4 Harr. (Del.) 572.

42. State *v.* Webb, 25 Iowa 235. At any rate this is so if such acts occurred by his permission or were occasioned by the business he was carrying on in the building. The fact that some of the liquor sold was taken away from the place and drunk elsewhere is immaterial. State *v.* Pierce, 65 Iowa 85, 21 N. W. 195.

c. Playhouse or Theater. At common law it was held that playhouses having been introduced with the laudable design of recommending virtue and exposing vice and folly were not nuisances *per se*, but might become so only through their management.[43]

d. Bowling-Alleys. The better rule is that a bowling-alley is not a nuisance *per se* at common law,[44] but it constitutes a nuisance when kept to the disturbance of the neighborhood, particularly at night.[45]

B. The Common Disorderly House. A disorderly house which cannot be considered as one of the specific kinds above enumerated and considered is called herein a common disorderly house.[46]

III. KEEPING AND KEEPERS.

A. Necessary and Unnecessary Elements of Keeping — 1. KNOWLEDGE OF KEEPER. The person accused of keeping a disorderly house must have knowl-

Disorder on the roads or lots adjoining a house where intoxicants are sold to slaves is the same nuisance as if the disorder had actually occurred within the house. Henry *v.* Com., 9 B. Mon. (Ky.) 361. But in Iowa the keeping for sale of native wine of his own manufacture by defendant who lived on a farm and the fact that persons buying the same at his house drank it and became intoxicated while in the highways leading therefrom, and by noisy and riotous conduct disturbed the neighbors living from one-half to one and one-half miles from defendant's house do not authorize the conviction of defendant for keeping a nuisance. State *v.* Dieffenbach, 47 Iowa 638.

43. People *v.* Clark, 1 Wheel. Cr. (N. Y.) 288, 292 note; People *v.* Baldwin, 1 Wheel. Cr. (N. Y.) 279; 1 Hawkins P. C. c. 75, § 7. See also Provisional Government *v.* Wery, 9 Hawaii 228; White Pen. Code Tex. art. 362.

44. State *v.* Hall, 32 N. J. L. 158, where the court criticizes the opinion of Cowen, J., in Tanner *v.* Albion, 5 Hill (N. Y.) 121, 40 Am. Dec. 337 [*citing* 1 Hawkins P. C. c. 32, § 16, and *relying* on Rex *v.* Hall, 2 Keb. 846], which held that a bowling-alley kept for gain or hire was a public nuisance at common law, although gambling therein be expressly prohibited.

Within Mass. Rev. St. c. 50, § 17, making it penal for any unlicensed person, for hire or reward, to suffer any persons to resort to any house used and kept by him "for the purpose of playing at billiards, cards or dice, or any other unlawful game, the game of bowls and nine-pins is an 'unlawful game.'" Com. *v.* Goding, 3 Metc. (Mass.) 130.

45. Hackney *v.* State, 8 Ind. 494 (under a declaratory statute); Bloomhuff *v.* State, 8 Blackf. (Ind.) 205; State *v.* Haines, 30 Me. 65.

That it is a custom of the establishment for the loser to pay for the use of the alley makes the place disorderly as a gaming-house. State *v.* Hall, 32 N. J. L. 158.

That it is kept in connection with a saloon does not necessarily make it a disorderly house. State *v.* Hall, 32 N. J. L. 158.

A billiard room is not necessarily a nuisance, and where there is no disturbance it cannot be a nuisance unless it be a tavern where, by statute, the mere keeping of a table is made so. People *v.* Sergeant, 8 Cow. (N. Y.) 139.

46. Thus a house where prostitutes assemble or resort is a disorderly house (Doyle *v.* Levy, 89 Hun (N. Y.) 350, 35 N. Y. Suppl. 434), especially if they conduct themselves in a lewd manner in the house (Golden *v.* State, 34 Tex. Cr. 143, 29 S. W. 779). Under 23 & 24 Vict. c. 27, § 32, providing that "every person licensed to keep a refreshment house under this Act who shall knowingly suffer prostitutes, thieves or drunken and disorderly persons to assemble at or continue in or upon his premises" is liable to a penalty recoverable before justices, the court said: "It would be sufficient to warrant a conviction if the magistrates found that prostitutes assembled as such." Belasco *v.* Hannant, 3 B. & S. 13, 9 Cox C. C. 203, 8 Jur. N. S. 1226, 31 L. J. M. C. 225, 6 L. T. Rep. N. S. 577, 10 Wkly. Rep. 867, 113 E. C. L. 13. And especially this would seem to be true if they have met for the purposes of prostitution or other disorderly conduct. Greig *v.* Bendeno, E. B. & E. 133, 27 L. J. M. C. 294, 6 Wkly. Rep. 474, 96 E. C. L. 133. But under a statute defining a disorderly house as "one kept for the purpose of public prostitution, or as a common resort for prostitutes and vagabonds," an information cannot be sustained against a saloon in which liquors, ices, and other things are sold, and to which good citizens resort for legitimate purposes, although the saloon is made an habitual place of resort by prostitutes and vagabonds, who, while there, behave themselves with propriety. Under the statute the house must be kept for the purpose of public prostitution, or as a common resort for prostitutes and vagabonds. McElhaney *v.* State, 12 Tex. App. 231 [*distinguishing* Couch *v.* State, 24 Tex. 557; Brown *v.* State, 2 Tex. App. 189]. See also Harmes *v.* State, 26 Tex. App. 190, 9 S. W. 487, 8 Am. St. Rep. 470.

A bar-room and dance hall, with music, kept with intent to bring together and entertain prostitutes and men desirous of their com-

edge of the character of the house and must have consented to its use to authorize his conviction.[47]

2. Control or Management. To hold a person liable for keeping a disorderly house he must have had in whole or in part the control or management of the premises.[48]

3. Keeping For Gain. In the absence of a statutory provision to that effect it is not necessary that the house should be kept for purposes of gain.[49]

B. Aiding and Abetting. A person who aids in keeping or lends his assistance in maintaining a disorderly house is by common-law principles in respect to misdemeanors guilty as keeper.[50] Accordingly one who leases his house to another to be kept as a disorderly house which is actually so kept with his knowledge[51] is, under common-law principles as to misdemeanors, guilty as

pany, if such persons habitually assemble there to drink and dance together, may be a disorderly house, although the house is quietly kept and no conspicuous improprieties are permitted within it. Beard *v.* State, 71 Md. 275, 17 Atl. 1044, 17 Am. St. Rep. 536, 4 L. R. A. 675.

47. State *v.* Schaffer, 74 Iowa 704, 39 N. W. 89; State *v.* Wells, 46 Iowa 662.

Presumption of knowledge.— It has been held that a proprietor of a house is presumed to have knowledge of that which goes on in his house and that if persons continually resort to his house for immoral purposes he will be held responsible. De Forest *v.* U. S., 11 App. Cas. (D. C.) 458.

Under Ga. Rev. Code (1895), §§ 4462, 4536, defining a lewd house, "or house for the practice of fornication or adultery, by himself, herself or others," a man is guilty of keeping such house, if his wife or daughter practises therein open and notorious lewdness in his presence without his dissent. Scarborough *v.* State, 46 Ga. 26.

48. Com. *v.* Cobb, 120 Mass. 356; State *v.* Horn, 83 Mo. App. 47. And see Tracey *v.* State, 42 Tex. Cr. 494, 61 S. W. 127; Carlton *v.* State, (Tex. Cr. App. 1899) 51 S. W. 213.

By "keeping" is meant having the government of and exercising control and direction over the house and the conduct of the inmates thereof. Nelson *v.* Territory, 5 Okla. 512, 49 Pac. 920.

If a house used as a gaming-house has been under the control of the owner, it is immaterial that he has rented it to another for two years prior to the indictment. Scott *v.* State, 29 Ga. 263.

The president of a joint stock company which owned a house where betting on horse-races was carried on in the state of New York and on races on local tracks was held as keeper of a betting house. Rex *v.* Hanrahan, 5 Can. Cr. Cas. 430, construing Can. Cr. Code (1892), §§ 197, 204.

Holding oneself out as keeper is sufficient. See State *v.* Hand, 7 Iowa 411, 71 Am. Dec. 453; Reg. *v.* Spooner, 32 Ont. 451, 4 Can. Cr. Cas. 209.

Merely residing in a bawdy-house is not "keeping." Toney *v.* State, 60 Ala. 97; Nelson *v.* Territory, 5 Okla. 512, 49 Pac. 320; Moore *v.* State, 4 Tex. App. 127.

A clerk or servant who has entire control of the premises is guilty of "keeping." Com. *v.* Burke, 114 Mass. 261; Com. *v.* Dowling, 114 Mass. 259; Com. *v.* Kimball, 105 Mass. 465.

49. *Arkansas.*— State *v.* Porter, 38 Ark. 637.

Georgia.— Scarborough *v.* State, 46 Ga. 26.

Iowa.— State *v.* Lee, 80 Iowa 75, 45 N. W. 545, 20 Am. St. Rep. 401.

Massachusetts.— Com. *v.* Wood, 97 Mass. 225.

Minnesota.— State *v.* Smith, 29 Minn. 193, 12 N. W. 524.

New Hampshire.— State *v.* Bailey, 21 N. H. 343.

Vermont.— State *v.* Nixon, 18 Vt. 70, 46 Am. Dec. 135.

See 17 Cent. Dig. tit. "Disorderly Houses," § 5.

"If a person for amusement only, keeps a house as a public resort, for practices injurious to public morals or destructive of public quiet, he is indictable." State *v.* Parks, 61 N. J. L. 438, 439, 39 Atl. 1023 [*citing* State *v.* Williams, 30 N. J. L. 102].

50. *Georgia.*— Clifton *v.* State, 53 Ga. 241.

Kentucky.— Com. *v.* Kellar, 8 Ky. L. Rep. 537.

Massachusetts.— Com. *v.* Gannett, 1 Allen 7, 79 Am. Dec. 693.

New Jersey.—Engeman *v.* State, 54 N. J. L. 257, 23 Atl. 679.

England.— Wilson *v.* Stewart, 3 B. & S. 913, 9 Cox C. C. 354, 9 Jur. N. S. 1130, 32 L. J. M. C. 198, 8 L. T. Rep. N. S. 277, 11 Wkly. Rep. 640, 113 E. C. L. 913.

The relation of master and servant is not sufficient to establish the accusation of aiding and abetting. On the other hand the relation would not prevent the establishment of the accusation. Wilson *v.* Stewart, 3 B. & S. 913, 9 Cox C. C. 354, 9 Jur. N. S. 1130, 32 L. J. M. C. 198, 8 L. T. Rep. N. S. 277, 11 Wkly. Rep. 640, 113 E. C. L. 913. Under a statute which provides that the "owners, lessees and tenants" of disorderly houses shall be punished, a servant of the owner of such a house, merely taking care of the place, cannot be punished. Mitchell *v.* State, 34 Tex. Cr. 311, 30 S. W. 810.

51. Necessity of knowledge see Rhodes *v.* Com., 7 Ky. L. Rep. 520.

Knowledge of keeper see *supra*, III, A, 1.

Subsequent knowledge.— Where by statute the owner is required upon learning of the unlawful use of the house by the lessee to

keeper;[52] and by the same principle the owner's agent who rents a house knowing that it is to be used for a disorderly house is guilty as keeper.[53] But it has been held that one cannot be indicted as keeper where leasing a house for such purposes and under such conditions is itself a specific offense.[54]

C. Marital Relation in Connection With Keeping. A wife as well as a husband may be indicted for keeping a disorderly house,[55] whether she be living with[56] or apart from him.[57] The presumption of coercion on the part of the husband does not prevail in cases of this kind.[58]

IV. LETTING AS A SEPARATE OFFENSE.

Letting a house with the intent that it should be used for purposes of prostitution has been held upon common-law principles a separate offense in some jurisdictions;[59] in others it is not considered a specific offense at common law.[60] In any event the house must be actually used for such purpose, or there is no offense.[61]

proceed immediately to prevent such use or to be deemed guilty of keeping the house, it is not a sufficient compliance with the code simply to request the tenant to vacate. He must take such action as will reasonably prevent such use. Willis *v.* State, 34 Tex. Cr. 148, 29 S. W. 787. And *compare* Reg. *v.* Barrett, 9 Cox C. C. 255, L. & C. 263, 32 L. J. M. C. 36, 7 L. T. Rep. N. S. 435, 11 Wkly. Rep. 124.

52. Rhodes *v.* Com., 10 Ky. L. Rep. 722; Com. *v.* Kellar, 8 Ky. L. Rep. 537; People *v.* Erwin, 4 Den. (N. Y.) 129. And see Reg. *v.* Roy, 3 Can. Cr. Cas. 472, 9 Quebec Q. B. 312, under a statutory provision. But see Reg. *v.* Barrett, 9 Cox C. C. 255, L. & C. 263, 32 L. J. M. C. 36, 7 L. T. Rep. N. S. 435, 11 Wkly. Rep. 124, where it was held that defendant was not guilty of keeping a common bawdy-house, or of being an accessary thereto.

Renting to lodgers.— One is guilty of keeping a house of ill fame if she lets her rooms to prostitutes for prostitution, or knowingly permits them to be used and resorted to for that purpose, although the occupants were merely boarders or lodgers and were not employed to ply their business by her as mistress of the house. State *v.* Smith, 15 R. I. 24, 22 Atl. 1119. But see Reg. *v.* Stannard, 9 Cox C. C. 405, L. & C. 349, 33 L. J. M. C. 61, 9 L. T. Rep. N. S. 428, 12 Wkly. Rep. 208.

Permitting.— Where the owner of a house knowingly permits prostitutes, who are inmates, to ply their vocation in the house, he is guilty of the statutory offense of keeping a disorderly house, although there is no actual lease or rental to the inmates. Stratton *v.* State, (Tex. Cr. App. 1898) 44 S. W. 506.

53. Troutman *v.* State, 49 N. J. L. 33, 6 Atl. 618; Lowenstein *v.* People, 54 Barb. (N. Y.) 299. See also Cahn *v.* State, 110 Ala. 56, 20 So. 380.

One who has authority to let a tenement to receive the rents has control within the meaning of Me. Rev. St. c. 17, § 4. State *v.* Frazier, 79 Me. 95, 8 Atl. 347.

54. State *v.* Pearsall, 43 Iowa 630.

Letting as a separate offense see *infra*, IV.

55. State *v.* Bentz, 11 Mo. 27; Reg. *v.* Williams, 10 Mod. 63, 1 Salk. 384. And see Hawkins P. C. c. 1, § 12; c. 74.

The relation relevant to the issue.— On cross-examination the question whether defendants, a man and a woman, charged as keepers, were married was asked, and was considered relevant to the issue. Com. *v.* Whipple, 181 Mass. 343, 61 N. E. 919.

56. Com. *v.* Cheney, 114 Mass. 281 [*citing* Com. *v.* Tryon, 99 Mass. 442]; Rex *v.* Dixon, 10 Mod. 335.

57. Com. *v.* Lewis, 1 Metc. (Mass.) 151.

58. See Com. *v.* Lewis, 1 Metc. (Mass.) 151; 1 Russell Crimes (1st ed.) 26. A married woman may be convicted of keeping a disorderly house if she acts of her own free will and without any coercion by her husband. Com. *v.* Hopkins, 133 Mass. 381, 43 Am. Rep. 527.

A husband who lives with his wife in the house and off the proceeds of the business, although the wife owns the bawdy-house and conducts the business, is guilty of keeping a bawdy-house. Hunter *v.* State, 14 Ind. App. 683, 43 N. E. 452. See *infra*, VII, A, 3.

59. Territory *v.* Stone, 2 Dak. 155, 4 N. W. 697; Harlow *v.* Com., 11 Bush (Ky.) 610; Ross *v.* Com., 2 B. Mon. (Ky.) 417; Smith *v.* State, 6 Gill (Md.) 425.

The leading case, Com. *v.* Harrington, 3 Pick. (Mass.) 26, reached this conclusion on the principle that he who aids another to commit a misdemeanor is himself guilty of one, as in the case of Rex *v.* Philipps, 6 East 464, 2 Smith K. B. 550, where the court held an endeavor to provoke another to commit the misdemeanor of sending a challenge to fight a duel was itself a misdemeanor.

60. State *v.* Lewis, 5 Mo. App. 465 (holding that defendant should have been charged as keeper); Brockway *v.* People, 2 Hill (N. Y.) 558 [*criticizing* Com. *v.* Harrington, 3 Pick. (Mass.) 26, and *explained* in People *v.* Erwin, 4 Den. (N. Y.) 129, on the ground that defendant was not charged as keeper]. See also State *v.* Wheatley, 4 Lea (Tenn.) 230; and *supra*, III.

61. Bourlier *v.* Com., 10 Ky. L. Rep. 154.

By the New York penal code a man is equally guilty whether as lessor or as

And where letting a house, knowing that it is to be kept for prostitution, has been held an offense,[62] it is necessary that the landlord should have knowledge of the intended use of the house to hold him criminally liable.[63]

V. FREQUENTING.

Living in a bawdy-house was indictable at common law;[64] and by statute it is sometimes made an offense to frequent disorderly houses.[65] A single visit to a house is not sufficient to constitute the offense of frequenting.[66]

VI. CONSTRUCTION OF STATUTES, CHARTERS, AND ORDINANCES.[67]

A. Conflicting Laws — 1. SUSTAINING. The usual rule of statutory construction that repeals of statutes by implication are not favored,[68] or that where there are two statutes relating to the same subject and both can be given effect both must stand, applies to the construction of statutes relating to disorderly houses.[69]

2. LOCAL AND GENERAL. The principle of statutory construction that, if a special provision applicable to a particular object or locality be inconsistent with a general law, the former must prevail is applied to a comparison of duly authorized municipal ordinances with general statutes.[70] The law applicable to the

keeper. People *v.* O'Melia, 22 N. Y. Suppl. 465.

Letting rooms to prostitutes for quiet and decent occupation, or permitting a house to be visited by disreputable people, if they visit it for innocent and proper purposes, is not a crime. See State *v.* Smith, 15 R. I. 24, 22 Atl. 1119.

62. Rhodes *v.* Com., 15 Ky. L. Rep. 333; Ford *v.* Com., 11 Ky. L. Rep. 860, holding that the fact that the contract for rent was made with a person other than the occupant was immaterial.

The legislature intended to define all crimes in the code and there is no provision in the code against an owner who leases his house to a tenant who the owner knows intends to keep it for public prostitution, although there is a special provision against renting a house for purposes of gaming. An owner cannot therefore be held under such a charge, although the rule seems to be different at common law. Albertson *v.* State, 5 Tex. App. 89. See White Pen. Code Tex. art. 361, where the offense is now provided against.

63. Frederick *v.* Com., 4 B. Mon. (Ky.) 7, 8 [*citing* Ross *v.* Com., 2 B. Mon. (Ky.) 417]. See McAlister *v.* Clark, 33 Conn. 91.

Actual knowledge of unlawful acts within the house is not necessary. His knowledge may be presumed from the reputation of the house. Graeter *v.* State, 105 Ind. 271, 4 N. E. 461.

Prerequisite to prosecution.— The ordinance of a city which authorizes the prosecution of the owner of a house on conviction of his tenant for keeping a disorderly house imports that no such prosecution can be had until after the conviction and due notification. Baton Rouge *v.* Crémonini, 36 La. Ann. 247.

64. 4 Blackstone Comm. 64. *Contra,* People *v.* Ah Ho, 1 Ida. 691, where it is also said that it is not an offense under a statute which allows a city to prohibit by ordinance living in a bawdy-house within the city limits until such ordinance has been passed.

An inmate of a bawdy-house is not a patron under a statute declaring it an offense to patronize a bawdy-house. Raymond *v.* People, 9 Ill. App. 344.

65. *Ex p.* Ah Lit, 26 Fed. 512, where it is held that the rule of strict construction of penal statutes is applied to statutes against frequenting opium dens.

66. State *v.* Ah Sam, 14 Oreg. 347, 13 Pac. 303.

A single copulation of an unmarried woman and a male person does not make the woman a prostitute, within Ind. Rev. St. (1881) § 2002, prohibiting association with prostitutes or frequenting gambling-houses with prostitutes. Fahnestock *v.* State, 102 Ind. 156, 1 N. E. 372.

67. See, generally, MUNICIPAL CORPORATIONS; STATUTES.

68. People *v.* Hanrahan, 75 Mich. 611, 42 N. W. 1124, 4 L. R. A. 751. See also *Ex p.* Garza, 28 Tex. App. 381, 13 S. W. 779, 19 Am. St. Rep. 845.

69. People *v.* Gustin, 57 Mich. 407, 24 N. W. 156.

Where two sections of general statutes are enacted at the same time, one providing imprisonment in jail for keeping a bawdy-house, the other declaring all buildings, places, or tenements resorted to for prostitution or lewdness to be common nuisances and providing punishment by fine or imprisonment for keeping or maintaining such nuisances, a keeper of a house of ill fame may be proceeded against under either section. Com. *v.* Ballou, 124 Mass. 26.

70. The power given to the city council of St. Louis, "by ordinance not inconsistent with any law of the State . . . to regulate bawdy houses," operated as a repeal of the general statutes prohibiting them in respect to the city of St. Louis. And a city ordinance licensing them is valid under the charter notwithstanding the general inhibition of the statute. State *v.* Clarke, 54 Mo. 17, 14 Am. Rep. 471 [*followed* in State *v.*

locality will not be allowed to repeal the general law unless such an intention is plain.[71]

3. Later and Former. The rule that of several conflicting statutes the latest in time may prevail is applicable, although the latest statute be but a municipal charter.[72]

B. Statutes Giving Power to Municipal Corporations. The right to regulate or suppress disorderly houses and powers incidental thereto may be delegated by statute to a municipality.[73] But the power conferred upon the municipality must be exercised in a reasonable manner.[74]

C. Statute Imposing Two Penalties. An act which prescribes two different penalties for keeping a disorderly house is not void for uncertainty when the penalties are designed, one for one kind of a disorderly house, another for another kind.[75]

VII. DEFENSES.

A. To Charge of Keeping — 1. In General. That defendant endeavored to prevent certain affrays and breaches of the peace is no defense to the charge of keeping a disorderly house.[76] Nor is it a defense that defendant did not know the reputation of the persons who came to his house.[77]

2. License. A license granted by a municipality is a complete defense to a charge of keeping a house of ill fame.[78]

De Bar, 58 Mo. 395, which held that a repeal of such a provision by an amendment of the charter of the corporation does not revive the general statute]. See also Rogers *v.* People, 9 Colo. 450, 2 Pac. 843, 59 Am. Rep. 146.

Contrary doctrine.— In *Ex p.* Garza, 28 Tex. App. 381, 13 S. W. 779, 19 Am. St. Rep. 845, a clause of the charter giving the city the right to suppress, regulate, and inspect all such houses was held not to give the city a right to license them. Particularly was this thought to be so by the court, from the fact that the charter in question expressly gave the city power to license certain occupations, but made no mention of the power to license these houses. In Michigan the court said that to hold that a municipal ordinance relating to houses of ill fame superseded the general law was absurd. People *v.* Mallette, 79 Mich. 600, 44 N. W. 962. But an ordinance which includes more acts as disorderly than the general law is not void where those acts peculiar to the ordinance could be expunged without invalidating it. St. Ignace *v.* Snyder, 75 Mich. 649, 42 N. W. 1130.

71. *Ex p.* Garza, 28 Tex. App. 381, 13 S. W. 779, 19 Am. St. Rep. 845.

72. Thus where by the penal code the keeping of a bawdy-house is an indictable offense and subsequently by a charter the city is empowered to license bawdy-houses the charter prevails. Davis *v.* State, 2 Tex. App. 425 [*citing* Dwarris St. 156; Sedgwick St. & Const. L. 100].

A reduction of the punishment by the subsequent statute repeals the former. Com. *v.* Davis, 11 Gray (Mass.) 48.

Where two sections of a statute relate to distinct offenses: the first to keeping a house of ill fame, the second to the offense of resorting to or being an inmate of such a house, a subsequent act relating exclusively to the matter in the first offense does not affect the second section, although by the title of the amending act it would appear that the entire act was intended to be amended. State *v.* Richards, 76 Wis. 354, 44 N. W. 1104.

73. A statute which makes it an offense to keep a bawdy-house within any part of the limits of a designated city "other than that prescribed by ordinance" simply confers upon the municipality the right to make it an offense to keep such a house; it does not create such an offense. People *v.* Ah Ho, 1 Ida. 691; People *v.* Buchanan, 1 Ida. 681.

74. Thus where a power to impose fines with a maximum limit for a breach of its regulations is delegated to a municipal corporation, an ordinance imposing a fine for visiting bawdy-houses is void unless the penalty fixed is reasonable. *In re* Ah You, 88 Cal. 99, 25 Pac. 974, 22 Am. St. Rep. 280, 11 L. R. A. 408. But an ordinance providing a penalty of a fine not exceeding five hundred dollars, or imprisonment not exceeding three months, or both, for visiting a house of ill fame is valid, and not in conflict with the general laws of the state. *Ex p.* Johnson, 73 Cal. 228, 15 Pac. 43.

75. *Ex p.* Garza, 28 Tex. App. 381, 13 S. W. 779, 19 Am. St. Rep. 845.

76. Price *v.* State, 96 Ala. 1, 11 So. 128; Com. *v.* Cobb, 120 Mass. 356.

Request to be notified of unlawful acts.— It is no defense that defendant in good faith had requested the officials who attended his theater to notify him of any violation of law by any of his women. Johnson *v.* State, (Tex. Cr. App. 1893) 21 S. W. 929.

77. Price *v.* State, 96 Ala. 1, 11 So. 128.

78. Davis *v.* State, 2 Tex. App. 425.

But a license to run a saloon is not a defense to a charge of keeping a disorderly house where facts constituting the nuisance are proved. State *v.* McGahan, 48 W. Va. 438, 37 S. E. 573.

3. THAT WIFE WAS OWNER AND MANAGER. To a charge of keeping a house of ill fame, where it appeared that defendant lived and exercised acts of control there, it was no defense that the house was owned by his wife and that she also lived there and carried on the business and received all the profits.[79]

B. To Charge of Letting — 1. WRITTEN REQUEST TO VACATE. A written request by the owner to vacate is not a defense to the charge of letting a house to be used as a disorderly house, where the statute requires him, upon learning of the unlawful use, to proceed immediately to prevent such use.[80]

2. THAT WIFE WAS OWNER. Where by law the husband has control of the wife's separate property, it is no defense to the charge against him as owner for permitting a building to be used as a disorderly house that it was his wife's separate property.[81]

VIII. JURISDICTION.[82]

A. Of Degree of Offense. A court which has jurisdiction of all crimes under the degree of felony has jurisdiction of the offense of keeping a disorderly house.[83]

B. Territorial. Disorderly houses situated in the stream of the Mississippi river are within the jurisdiction of the district court of the state of Iowa in the counties bordering on the river.[84]

IX. DISQUALIFICATION OF JUDGE.[85]

The fact that a judge attended a meeting between the county and district judges called for the purpose of devising ways and means for suppressing gaming and disorderly houses does not disqualify him from sitting in the trial of one accused of keeping a disorderly house.[86]

79. This was on the common-law theory that the husband controlled the acts of the wife; and the statute making the wife's property independent of the control of her husband did not affect the husband's right to control his family. Com. *v.* Wood, 97 Mass. 225.

80. Willis *v.* State, 34 Tex. Cr. 148, 29 S. W. 787.

Notifying officers.— Where a tenant, contrary to the intention of his landlord, uses his premises for a house of ill fame, the latter would be protected from the penalty of such a by-law, if, when such improper use came to his knowledge, he should lay the matter before the proper prosecuting officers and request them to procure an abatement of the nuisance. See McAlister *v.* Clark, 33 Conn. 91.

81. Willis *v.* State, 34 Tex. Cr. 148, 29 S. W. 787.

82. **Jurisdiction** generally see CRIMINAL LAW.

83. Com. *v.* Smith, 138 Mass. 489, municipal court of Boston.

Jurisdiction of quarter-session for borough. — St. 25 Geo. II, c. 36, which provides for the prosecution for keeping a disorderly house "at the next general or quarter sessions of the peace, or at the next assizes to be holden for the county in which such parish or place does lie," does not mean only "at the quarter sessions or assizes for the county" and therefore does not exclude the quarter-sessions for a borough from having jurisdiction. Reg. *v.* Charles, 9 Cox C. C. 18, 7 Jur. N. S. 1308, 31 L. J. M. C. 69, 5 L. T. Rep. N. S. 328, 10 Wkly. Rep. 62.

As to the jurisdiction of a magistrate to try the offense of keeping a bawdy-house see Rex *v.* Keepin, 4 Can. Cr. Cas. 494 [*modifying* 34 Nova Scotia 442]. And see Reg. *v.* Spooner, 32 Ont. 451, 4 Can. Cr. Cas. 209. Keeping a common gaming-house see Reg. *v.* France, 7 Quebec Q. B. 83.

84. And this is true, although such houses may be situated beyond the *medium filum aquæ* and near to the land of the state of the opposite shore. State *v.* Mullen, 35 Iowa 199.

That the nuisance is within the jurisdiction of the court should appear upon trial. State *v.* McGahan, 48 W. Va. 438, 37 S. E. 573.

85. **Disqualification of judge** generally see JUDGES.

86. Even though it was stated that the accused was brought under discussion and condemnation at the meeting. Dailey *v.* State, (Tex. Cr. App. 1900) 55 S. W. 821, 823 [*citing* Benson *v.* State, 39 Tex. Cr. 56, 44 S. W. 167, 1091]. In this case the court discussing the question and speaking through Davidson, P. J., said: "The tenth bill recites that, on account of a certain meeting between the county and district judges, and perhaps others, called for the purpose of devising ways and means for suppressing gaming and disorderly houses, the county judge who tried this case disqualified himself. It is also stated that this particular defendant was brought under discussion and condemnation at said meeting. This would not disqualify the county judge."

X. NUMBER OF DEFENDANTS.

Any number of persons in the same venue and having no community of interest may be included in the same indictment in which it is stated that they "severally" kept, etc.[87]

XI. INDICTMENT, INFORMATION, OR COMPLAINT.[88]

A. In General — 1. MISJOINDER. A count for a nuisance at common law by keeping a disorderly house may be joined in the same indictment with a count under a statute which defines a house used as a bawdy-house, for illegal gaming, and for illegal sale of intoxicating liquors, as a nuisance.[89] Where two counts charging defendant with letting a house knowing that the lessee intended to use it as a bawdy-house are joined to a third count charging that after having let the same defendant did knowingly permit the lessee to so use the same, the indictment does not charge two distinct offenses.[90]

2. DUPLICITY. An indictment which avers in one count the statutory offense of maintaining a nuisance by keeping a house of ill fame and the common-law offense of keeping a bawdy-house, with the usual common-law averments, is not duplicitous.[91] Where several ways are set forth in the same statute by which the offense connected with the existence of a disorderly house may be committed and all are embraced in the same general definition and made punishable in the same

87. People *v.* Clark, 1 Wheel. Crim. (N. Y.) 288, 292 note; State *v.* McDowell, Dud. (S. C.) 346.

Frequenting opium den see Com. *v.* Kane, 173 Mass. 477, 53 N. E. 919.

88. For forms of indictments, informations, or complaints see the following cases:

Alabama.— Cahn *v.* State, 110 Ala. 56, 57, 20 So. 380; Price *v.* State, 96 Ala. 1, 4, 11 So. 128; Toney *v.* State, 60 Ala. 97.

Arkansas.— Thatcher *v.* State, 48 Ark. 60, 62, 2 S. W. 343; State *v.* Porter, 38 Ark. 637.

Connecticut.— State *v.* De Ladson, 66 Conn. 7, 8, 33 Atl. 531.

Florida.— King *v.* State, 17 Fla. 183, 188.

Georgia.— Scarborough *v.* State, 46 Ga. 26.

Indiana.— Graeter *v.* State, 105 Ind. 271, 273, 4 N. E. 461.

Iowa.— State *v.* Toombs, 79 Iowa 741, 742, 45 N. W. 300; State *v.* Odell, 42 Iowa 75.

Kentucky.— Harlow *v.* Com., 11 Bush 610, 611; Com. *v.* Davis, 9 Ky. L. Rep. 494.

Maine.— State *v.* Osgood, 85 Me. 288, 27 Atl. 154; State *v.* Stanley, 84 Me. 555, 556, 24 Atl. 983; State *v.* Boardman, 64 Me. 523, 524; State *v.* Homer, 40 Me. 438, 439.

Maryland.— Board *v.* State, 71 Md. 275, 276, 17 Atl. 1044, 17 Am. St. Rep. 536, 4 L. R. A. 675; Smith *v.* State, 6 Gill 425.

Massachusetts.— Com. *v.* Kane, 173 Mass. 477, 53 N. E. 919; Com. *v.* Bulman, 118 Mass. 456, 19 Am. Rep. 469; Com. *v.* Taylor, 14 Gray 26.

Michigan.—Palmer *v.* People, 43 Mich. 414, 415, 5 N. W. 450.

Minnesota.— State *v.* Grosofski, 89 Minn. 343, 344, 9 N. W. 1077.

Missouri.— State *v.* Bregard, 76 Mo. 322.

New Hampshire.— State *v.* McGregor, 41 N. H. 407, 409.

New York.— People *v.* Klock, 48 Hun 275, 16 N. Y. St. 565; People *v.* Hatter, 22 N. Y. Suppl. 688, 689; People *v.* Hulett, 15 N. Y. Suppl. 630; Harwood *v.* People, 16 Abb. Pr. 430, 432.

North Carolina.— State *v.* Patterson, 29 N. C. 70, 45 Am. Dec. 506.

Oklahoma.— Swaggart *v.* Territory, 6 Okla. 344, 346, 50 Pac. 96.

Pennsylvania.— Com. *v.* Stewart, 1 Serg. & R. 342.

Texas.— State *v.* Flynn, 35 Tex. 354, 355; Bass *v.* State, (Cr. App. 1902) 66 S. W. 558; Callaghan *v.* State, 36 Tex. Cr. 536, 38 S. W. 188; Mansfield *v.* State, (Cr. App. 1894) 24 S. W. 901, 902. And see White Pen. Code Tex. § 564.

Vermont.— State *v.* Nixon, 18 Vt. 70, 71, 46 Am. Dec. 135.

Washington.— State *v.* Brown, 7 Wash. 10, 11, 34 Pac. 132.

United States.— U. S. *v.* Columbus, 25 Fed. Cas. No. 14,841, 5 Cranch C. C. 304.

England.— Rex *v.* Higginson, 2 Burr. 1232, 1233.

Canada.— Reg. *v.* Williams, 37 U. C. Q. B. 540. And see 2 Chitty Cr. L. 39 *et seq.*

89. Com. *v.* Kimball, 7 Gray (Mass.) 328 [*citing* 1 Chitty Cr. L. 248] (the case is really *dictum*, however, for a *nolle prosequi* was entered on the first count); State *v.* Bean, 21 Mo. 269.

90. State *v.* Abrahams, 6 Iowa 117, 71 Am. Dec. 399.

91. It being manifest that the offense under the statute is intended to be charged and that it is plainly charged, other expressions in the indictment which are not essential to a distinct statement of the offense may be regarded as useless and rejected as surplusage where none of them is in conflict with the general purpose of the prosecution or inconsistent with an accurate description of the particular offense

manner, they are not distinct offenses; a count therefore which charges them conjunctively is not duplicitous.[92]

3. FOLLOWING LANGUAGE OF STATUTE. An indictment which charges the offense of keeping a disorderly house in the terms of the statute is generally sufficient.[93]

which is complained of. Com. *v.* Hart, 10 Gray (Mass.) 465.

92. Schulze *v.* State, (Tex. Cr. App. 1900) 56 S. W. 918, holding that an indictment for keeping a disorderly house, following the language of the statute, charging that at a certain time defendant was the tenant and lessee of a certain house, etc., and that he "did then and there unlawfully keep, was concerned in keeping, and knowingly permitted to be kept, the said house, etc., for prostitution," is good. Schulze *v.* State, (Tex. Cr. App. 1900) 56 S. W. 918.

Where a statute sets out a number of uses by which a house or place may become a nuisance, an indictment charging in one count the keeping of such place in a number of or in all of such ways is not bad for duplicity. Although each of such uses might be criminal in its nature, yet they are not charged as distinct offenses, but only as forming the elements which make up the single offense of a nuisance. Therefore an indictment under such a statute which charges that the defendant "did keep and maintain a certain building, to wit: a dwelling-house, used as a house of ill fame, resorted to for prostitution, lewdness, and for illegal gaming, and used for the illegal sale of intoxicating liquors, the said building so used as aforesaid being then and there a common nuisance," etc., is not bad for duplicity. Com. *v.* Kimball, 7 Gray (Mass.) 328. See also Com. *v.* Ballou, 124 Mass. 26. In State *v.* Brady, 16 R. I. 51, 52, 12 Atl. 238, an indictment which charged in one count that defendant did "keep and maintain a certain grog shop and tippling shop and building, place, and tenement used for the illegal sale and the illegal keeping of intoxicating liquors, and for the habitual resort of intemperate, idle, dissolute, noisy, and disorderly persons, to the great damage and common nuisance of all good citizens of this State, against the form of the statute," was held not duplicitous.

Charging in one count that defendant kept a disorderly house to the encouragement of idleness, gaming, fighting, and disturbing the peace does not charge two offenses, viz.: (1) the keeping of the kind of house designated, and (2) fighting, disturbing the peace, etc. "The substantive part of the offense is that defendant kept a disorderly house to the encouragement of idleness, gaming, fighting, etc., and not that she kept a house of that kind and also indulged in drinking, disturbing the peace, etc." Howard *v.* People, 27 Colo. 396, 400, 61 Pac. 595.

House and place.— A count which charges that defendant kept a "lewd house" and "place" for the practice of fornication is not duplicitous. Howard *v.* People, 27 Colo. 396, 61 Pac. 595.

Owner, tenant, and lessee.— In a prosecution for keeping a disorderly house, a complaint is not defective because it alleges in the same count that defendant was the owner, tenant, and lessee of the house. Merrell *v.* State, (Tex. Cr. App. 1895) 29 S. W. 41.

Prostitution "and" lewdness.— An information under a statute against keeping "a house of ill-fame, resorted to for prostitution or lewdness," which charges that the house was kept "for the purposes of prostitution and lewdness," is not duplicitous. King *v.* State, 17 Fla. 183; State *v.* Beebe, 115 Iowa 128, 88 N. W. 358.

Prostitution "or" lewdness.— An indictment which charges that the house was resorted to for prostitution "or" lewdness, instead of for prostitution "and" lewdness, is not duplicitous, since it follows the language of the statute. State *v.* Toombs, 79 Iowa 741, 45 N. W. 300.

93. Howard *v.* People, 27 Colo. 396, 61 Pac. 595; State *v.* Toombs, 79 Iowa 741, 45 N. W. 300; State *v.* Alderman, 40 Iowa 375; State *v.* Homer, 40 Me. 438; State *v.* Bregard, 76 Mo. 322. See also Brooks *v.* State, 4 Tex. App. 567; Killman *v.* State, 2 Tex. App. 222, 28 Am. Rep. 432 (where the offense was charged in the terms of the statute and the indictments were held sufficient); Brown *v.* State, 2 Tex. App. 189.

Where "to keep a house of ill fame resorted to for the purpose of prostitution or lewdness," is by statute made of itself a distinct punishable offense, an indictment which charges the offense in such terms is sufficient without alleging that the house was resorted to by divers persons, men as well as women, or that defendant kept it for lucre or gain (Com. *v.* Ashley, 2 Gray (Mass.) 356); without alleging that the act was done feloniously (State *v.* Beebe, 115 Iowa 128, 88 N. W. 358); without defining the meaning of the term "house of ill fame" (Betts *v.* State, 93 Ind. 375); or without concluding according to the common-law form, to the "common nuisance," etc. (State *v.* Stevens, 40 Me. 559).

Opium den.— A complaint under the Massachusetts statute "to provide for the seizure and disposition of property found where opium is smoked or sold, or given away to be sold, or for the arrest and punishment of persons there found present," need only follow the words of the statute in describing the offense and the implements and preparations found, and the place need not be alleged to be a resort for smoking opium; such allegations not being required by the statute. Com. *v.* Kane, 173 Mass. 477, 53 N. E. 919.

Failure to charge statutory offense.—Under a Texas statute which provides a penalty for "any owner, lessee, or tenant" who shall keep a disorderly house, an indictment which fails to allege that the accused was the owner, lessee, or tenant of the house in ques-

Where a statute uses disjunctive language in defining an offense, an indictment under it may be drawn in the conjunctive.[94]

4. Allegation as to Place. The place of the house should be correctly laid;[95] but it need not be alleged with any great particularity as to the exact location. Thus neither the house nor the lot on which it is situated need be named;[96] nor is any description of the realty[97] nor of the street[98] in which it is situated necessary. If the place is alleged to be in a city within the jurisdiction of the court,[99] or even in the county where the prosecution is commenced,[1] it is sufficient. In some jurisdictions no location whatever need be alleged.[2] But some particular house must be designated.[3]

5. Allegation as to Time — a. Of Keeping — (I) *In General.* The indictment must show a day certain on which the alleged offense was committed.[4] If a house or place has acquired a character of being disorderly, the charge of keeping the place on a single day may be sufficient.[5]

(II) *The Continuando.* Continuity being an element of the offense of keeping a disorderly house, it must be alleged.[6] The *continuando* should be laid by alleging the divers other days which must be alleged with the same exactness

tion is fatally defective. Lamar *v.* State, 30 Tex. App. 693, 18 S. W. 788.

94. State *v.* Bregard, 76 Mo. 322. See also State *v.* Beebe, 115 Iowa 128, 88 N. W. 358. See *supra*, XI, A, 4.

95. People *v.* Clark, 1 Wheel. Cr. (N. Y.) 288, 292 note [*citing* 3 City Hall Rec. (N. Y.) 128].

96. Sprague *v.* State, (Tex. Cr. App. 1898) 44 S. W. 837.

97. Johnson *v.* State, 13 Ind. App. 299, 41 N. E. 550.

98. State *v.* Stevens, 40 Me. 559.

99. Com. *v.* Shea, 150 Mass. 314, 23 N. E. 47; Com. *v.* Donovan, 16 Gray (Mass.) 18. See also Wells *v.* Com., 12 Gray (Mass.) 326.

1. State *v.* Raymond, 86 Mo. App. 537. The information described the parties as of the township of East Whitby, and had "county of Ontario" in the margin. It charged that they kept a house of ill fame, but did not expressly allege that they did so in that township or county. The evidence, however, showed that their place at which such house was kept was in East Whitby, in which the justices had jurisdiction. It was held sufficient. Reg. *v.* Williams, 37 U. C. Q. B. 540. But in State *v.* McLaughlin, 160 Mo. 33, 60 S. W. 1075, holding that where a statute makes it a felony to display the sign of an honest occupation on a house used as a common assignation house, an indictment which states that the house on which the sign was displayed was in G county, without any further description, is fatally defective, as defendant was entitled to a particular description.

2. Harlow *v.* Com., 11 Bush (Ky.) 610. In Sparks *v.* State, 59 Ala. 82, 86, it was said: "An averment of the particular parish in which the house was situate, was contained in the form of indictment at common law. . . . Whether it was a necessary averment, on authority, it is difficult to say. . . . There occurs to us no sound reason for requiring an averment of the particular locality of the house, except as a statement of the venue of the offense. The statute dispenses with allegations of venue, requiring that on the trial it should be proved. . . . It is an intendment, or implication of law, that the offense stated in any indictment was committed in the county in which the indictment is found."

No greater preciseness than would be required in arson or burglary is needed to describe the location of the house in an information for letting a house to be used as a bawdy-house. People *v.* Saunders, 29 Mich. 269.

3. Northern Pac. R. Co. *v.* Whalen, 3 Wash. Terr. 452, 17 Pac. 890.

Frequenting opium den.— In a prosecution, under a statute, for being present at "any place, house, building, or tenement" where and when implements for smoking opium and preparations of opium are found, a complaint describing the place as "the rooms designated as suite two in the first story of the building situated and numbered sixty-three in Emerald Street in said city of Boston" is sufficient. Com. *v.* Kane, 173 Mass. 477, 481, 53 N. E. 919.

4. See Wells *v.* Com., 12 Gray (Mass.) 326. *Contra*, State *v.* Wister, 62 Mo. 592.

5. State *v.* Reckards, 21 Minn. 47.

6. Hickey *v.* State, 53 Ala. 514.

Sufficient allegation.— An indictment for keeping a disorderly house, which charges that the house complained of was kept and maintained on a certain day, "and on other days before and since, and at which men and women of evil fame met and congregated, and there remained, both by day and night," gambling, quarreling, drinking, etc., sufficiently alleges a repetition of continuance of the alleged disorder. Com. *v.* Myers, 56 S. W. 412, 21 Ky. L. Rep. 1770.

Insufficient allegation.— As the offense of keeping a disorderly house consists of a repetition of improper conduct amounting to a common nuisance, an indictment charging a person with keeping a disorderly house "on the —— days of ——, 1894, and before the finding of this indictment," without containing any words charging a repetition or fre-

which is required in alleging a single day,[7] and such exactness may be obtained by alleging that the offense was committed on a day certain and divers other days between two days certain.

b. Of Leasing. An indictment for letting a place to be used for purposes of prostitution must allege some day as the time of making the lease.[8]

B. For Keeping Disorderly House[9]**— 1. In General — a. Connecting Defendant With Keeping.** The indictment must connect defendant with the keeping of the house at the time said house is alleged to be disorderly.[10]

b. Allegation of Defendant's Knowledge. It has been held that in an indictment, under an ordinance declaratory of the common law, for keeping a common disorderly house no *scienter* need be alleged, for the specific charge of the offense contains within its terms the knowledge of the purpose.[11]

quency of the acts of disorder, etc., is insufficient. Com. *v.* Bessler, 97 Ky. 498, 30 S. W. 1012, 17 Ky. L. Rep. 357.

7. Wells *v.* Com., 12 Gray (Mass.) 326.

Between a particular day and a previous day certain.— An indictment for keeping a house of ill fame may charge the offense as committed on a particular day, and divers days between that and another day previous thereto. People *v.* Russell, 110 Mich. 46, 67 N. W. 1099.

Between a particular day and a subsequent day certain.— A complaint charging that defendant, on a particular day, "and on divers other days and times between that day and the day of making the complaint, . . . did keep a certain house of ill-fame, there situate," etc., sufficiently alleges the time when the offense was committed. Com. *v.* Shea, 150 Mass. 314, 23 N. E. 47; Com. *v.* Langley, 14 Gray (Mass.) 21; State *v.* Bailey, 21 N. H. 343; Rex *v.* Higginson, 2 Burr. 1232. See 2 Chitty Cr. L. 40.

On a day certain and on divers other days and times during the same month.— Where defendant was convicted before a magistrate of the city of Halifax of the offense of keeping a disorderly house on the 21st day of April, 1901, and on divers other days and times during the month of April, 1901, it was held on habeas corpus that the offense as charged did not constitute more than one offense, and the word "keeping" implied a continuing offense. Rex *v.* Keeping, 34 Nova Scotia 442.

On a particular day and on previous days. — Where the time is alleged to have been on a particular day and on certain days and times before that day it is sufficient. Reg. *v.* Williams, 37 U. C. Q. B. 540.

In Massachusetts it has been held that it is no objection to a complaint for keeping and maintaining a tenement used as a house of ill fame and for the illegal sale and illegal keeping of intoxicating liquors that the time of the continuance of the offense as alleged in the complaint extends beyond a period of six months. Com. *v.* Clark, 145 Mass. 251, 13 N. E. 888.

8. An averment that defendant, on the 15th day of April, 1853, and during the five months next preceding that day, was in possession of a certain tenement, and then and there let the same, etc., is not sufficiently specific. The reference by the words "then and there" is necessarily to the whole time mentioned and not to any particular day. Com. *v.* Moore, 11 Cush. (Mass.) 600 [*citing* Archbold Cr. Pl. 37; 1 Chitty Cr. L. 217; 2 Hale P. C. 177]. *Contra,* Smith *v.* State, 6 Gill (Md.) 425.

9. Averments as to time of keeping see *supra,* XI, A, 5, a.

10. People *v.* Miller, 81 N. Y. App. Div. 255, 80 N. Y. Suppl. 1070, 17 N. Y. Cr. 263. Under a statute providing that "[all houses] . . . used as a place of resort, where women are employed to draw custom, dance, or for purposes of prostitution . . . are nuisances," an information which charges that defendant kept a house which was then "used as a place of resort where women are employed to draw custom and to dance" is insufficient, in that it does not allege that women were employed to draw custom and to dance at the time defendant was said to have kept the house. State *v.* Brown, 7 Wash. 10, 34 Pac. 132.

Under a statute which declares a penalty for "any owner, lessee, or tenant" who shall keep a disorderly house, an indictment for that offense is fatally defective which fails to allege that the accused was the owner, lessee, or tenant of the house. Lamar *v.* State, 30 Tex. App. 693, 18 S. W. 788.

11. Brown *v.* Toledo, 5 Ohio S. & C. Pl. Dec. 210. In Com. *v.* Davis, 9 Ky. L. Rep. 494, it was held that an averment that accused "maintains a certain common house of ill-fame, . . . resorted to for the purposes of prostitution and lewdness, and in said house, for lucre and gain certain persons whose names to the grand jury are unknown, as well men as women of evil fame and repute and name, and of dishonest conversation to frequent and come together did cause," sufficiently charges that accused knew the character of those he thus caused to assemble. But see People *v.* Miller, 81 N. Y. App. Div. 255, 80 N. Y. Suppl. 1070, 17 N. Y. Cr. 263, where an information which did not show defendant's knowledge of the disorderly character of the house in question or of the disorderly conduct of certain women who were found therein, was held insufficient, under N. Y. Code Cr. Proc. §§ 148, 149, which provide that when an information is laid before a magistrate he must take the depositions of the witnesses, which must set forth the facts stated by the prosecutor and his

c. Allegation of Keeping For Gain. An allegation that the house is kept for lucre is not material and need not be made.[12]

d. That House Was "Resorted to." The averment that a house or tenement is "used" for the purposes forbidden by the statute is not equivalent to an averment that it was "resorted to," the term used by the statute.[13]

e. Concluding "to the Common Nuisance," Etc. At common law an indictment for keeping a bawdy-house should conclude "to the common nuisance," etc.;[14] but an indictment at common law charging the keeping of "a common gaming-house" is not vitiated for not concluding "to the common nuisance," etc.[15]

2. Common Disorderly House — a. General Charge Insufficient. A general charge of the offense, without specifying particular acts of disorder, is not good.[16]

b. Common-Law Form. The common-law form of indictment for keeping a common[17] disorderly house alleges the bringing together of certain ill-disposed persons of evil name and fame and then sets out the disorderly acts within or about the house.[18]

witnesses tending to establish the commission of the crime and the guilt of defendant.

12. Com. *v.* Ashley, 2 Gray (Mass.) 356. See also State *v.* Bailey, 21 N. H. 343; State *v.* Parks, 61 N. J. L. 438, 39 Atl. 1023.

13. Com. *v.* Stahl, 7 Allen (Mass.) 304. *Contra,* State *v.* Brady, 16 R. I. 51, 12 Atl. 238.

14. State *v.* Stevens, 40 Me. 559. See 1 Chitty Cr. L. 245.

Under statutes prohibiting "houses of ill fame resorted to" where the statute is entitled "Of offenses against chastity, morality, and decency," such a conclusion is not necessary. The offense is keeping a house not as "a common nuisance," but as an offense against "chastity," etc. Moreover the offense was charged in the language of the statute. State *v.* Stevens, 40 Me. 559. Under a statute, however, which declares a house of ill fame, "resorted to," etc., a nuisance, an indictment for keeping such a house which does not allege it to be a common nuisance is insufficient (Com. *v.* Davis, 11 Gray (Mass.) 48); but if the indictment alleges that the house was kept to the common nuisance of all good citizens, it need not expressly allege that defendant kept a common nuisance (Wells *v.* Com., 12 Gray (Mass.) 326 [*distinguishing* Com. *v.* Davis, 11 Gray (Mass.) 48, where the words, "to the common nuisance," etc., did not appear]). See Com. *v.* Hart, 10 Gray (Mass.) 465, where indictment charged the keeping of the nuisance and concluded "to the common nuisance."

"Did greatly annoy passers," etc.— An indictment charging defendant with keeping a house on the highway in the city of Houston, in the county of Harris, "as, and for a resort for evil-disposed, drunken and disorderly persons; and said house was then and there, with the consent of said John Flynn, defendant, resorted to by persons" who, by loud talking, swearing, etc., did greatly annoy passers upon the highway and citizens in the neighborhood, sufficiently charges a common nuisance under Paschal Dig. art. 2034. State *v.* Flynn, 35 Tex. 354.

"To the disturbance of others."— An indictment alleging that defendant kept a house of ill fame, resorted to for the purpose of prostitution and lewdness, "and at which prostitution and lewdness were carried on and permitted, to the disturbance of others," sufficiently charges the offense of nuisance under Iowa Code (1873), § 4091. State *v.* Odell, 42 Iowa 75; State *v.* Alderman, 40 Iowa 375.

15. As the offense in its own nature imports that it is a nuisance. Rex *v.* Dixon, 10 Mod. 335, 337, where it is said: "Besides, the word 'common' [in the averment] supplies this defect, if it were one." See also State *v.* Wilson, 93 N. C. 608, holding that an indictment charging the keeping of an "ill-governed" house, and omitting to state that it was "to the common nuisance," etc., may sustain a conviction for keeping a "disorderly house."

16. Hosea *v.* State, 47 Ind. 180; Leary *v.* State, 39 Ind. 544; Frederick *v.* Com., 4 B. Mon. (Ky.) 7. See also Lowe *v.* State, 4 Tex. App. 34. *Contra,* State *v.* Dame, 60 N. H. 479, 49 Am. Rep. 331.

17. Omitting word "common."— The omission to allege the house to be a "common" disorderly house does not vitiate an indictment at common law for keeping a disorderly house. U. S. *v.* Columbus, 25 Fed. Cas. No. 14,841, 5 Cranch C. C. 304.

For averment of nuisance see *supra,* XI, B, 1, e.

18. For forms of such indictment see the the following cases:

Alabama.— Cahn *v.* State, 110 Ala. 56, 20 So. 380; Price *v.* State, 96 Ala. 1, 11 So. 128.

Arkansas.— Thatcher *v.* State, 48 Ark. 60, 2 S. W. 343.

Kentucky.— See Com. *v.* Davis, 9 Ky. L. Rep. 494, for an indictment following closely the common-law form for charging the keeping a bawdy-house.

Minnesota.— State *v.* Grosofski, 89 Minn. 343, 94 N. W. 1077, where the common-law form is substantially followed, the indictment ending with "by which the peace, comfort or decency of a neighborhood is habitually disturbed." These last words are in the terms of the statute defining the offense of keeping a disorderly house.

c. Charging Statutory Offense. As has been stated, a charge in the language of the statute is usually sufficient.[19]

d. Averments as to Frequenters and Inmates. It is not necessary to allege the character of the persons who frequent the house.[20] Nor is it necessary that the indictment for keeping a common disorderly house[21] or a bawdy-house[22] should state the names of frequenters or of inmates[23] of the house.

3. BAWDY-HOUSE. An indictment at common law[24] for keeping a bawdy-house which does not aver that the persons who frequented the house were of both sexes insufficiently charges the keeping of a bawdy-house.[25] Under a statute which provides that if any person shall maintain and keep a lewd house or place for the practice of fornication or adultery, etc., an indictment for keeping a lewd house, not alleging that the house was kept for purposes of fornication by the owner or any one else, is not good.[26]

4. GAMING-HOUSE. By the better opinion an indictment which charges generally the offense of keeping a gaming-house is insufficient without stating what was transacted at the house.[27] At common law the indictment should charge

Pennsylvania.— Com. *v.* Stewart, 1 Serg. & R. 342.

England.— See Rex *v.* Higginson, 2 Burr. 1232. See also 2 Chitty Cr. L. 40.

An indictment charging that defendant kept "a disorderly tenement" charges no offense known to the common law. Nor is any offense against the statutory law of Massachusetts thereby charged. Com. *v.* Wise, 110 Mass. 181. See also Com. *v.* Stahl, 7 Allen (Mass.) 304.

An insufficient common-law indictment for keeping a bawdy-house — insufficient for not alleging that the persons who resorted to the house were of both sexes — is sufficient to charge the keeping of a common disorderly house. State *v.* Evans, 27 N. C. 603 [*citing* 2 Chitty Cr. L. 40].

19. See *supra*, XI, A, 3.

For form of complaint under N. Y. Pen. Code, § 322, see People *v.* Hulett, 15 N. Y. Suppl. 630. Under the statute defining a disorderly house, it is sufficient to charge that the house was kept for the purposes of public prostitution. Loraine *v.* State, 22 Tex. App. 640, 3 S. W. 340; Thompson *v.* State, 2 Tex. App. 82.

Place for fighting game cocks.— An indictment which alleges that defendant did keep a certain common, ill governed, and disorderly house, and, being proprietor of said house, did keep and use a room therein, and did "then and there willfully permit the same to be used and occupied for baiting and fighting certain birds, to wit, game-cocks," is sufficient to charge the offense of keeping a place for fighting any bird or animal, which is made a misdemeanor by N. Y. Pen. Code, § 665. People *v.* Klock, 48 Hun (N. Y.) 275.

20. State *v.* Dame, 60 N. H. 479, 49 Am. Rep. 331. But see State *v.* Brown, 7 Wash. 10, 34 Pac. 132, holding that an information for keeping a disorderly house where women are employed to draw custom and to dance, which does not show that the conduct, character, or conversation was improper or morally corrupting to the frequenters is defective; for the statute intended to suppress places conducted in a manner to outrage decency, not to condemn the employment of women, in all cases, even for the purpose of drawing custom and dancing regardless of the effect thereof upon the community.

21. State *v.* Patterson, 29 N. C. 70, 45 Am. Dec. 506; Brown *v.* Toledo, 5 Ohio S. & C. Pl. Dec. 210.

22. State *v.* Beebe, 115 Iowa 128, 88 N. W. 358.

23. State *v.* Raymond, 86 Mo. App. 537. See State *v.* Patterson, 29 N. C. 70, 45 Am. Dec. 506.

24. N. Y. Code Cr. Proc. § 899, providing for compelling disorderly persons to give security for their good behavior does not abolish or supersede the common-law remedy by indictment against one keeping a bawdy-house. "The two proceedings have different ends in view." People *v.* Sadler, 97 N. Y. 146.

25. State *v.* Evans, 27 N. C. 603. But *compare* Rhodes *v.* Com., 10 Ky. L. Rep. 722, where an indictment containing substantially the usual common-law averments for a disorderly house and averring that "men and women" of evil name were caused to come together therein has been held a sufficient indictment for keeping a bawdy-house.

Charging defendant's knowledge see People *v.* Miller, 81 N. Y. App. Div. 255, 80 N. Y. Suppl. 1070, 17 N. Y. Cr. 263. See also *supra*, XI, B, 1, b, (I).

For substance of allegations in an indictment for this offense see Harwood *v.* People, 16 Abb. Pr. (N. Y.) 430.

For sufficiency of indictment under Iowa code see State *v.* Russell, 95 Iowa 406, 64 N. W. 281.

The indictment need not be quashed for this defect see *supra*, note 18.

For averment of nuisance see *supra*, XI, B, 1, c.

26. Jordan *v.* State, 60 Ga. 656. *Contra*, Clifton *v.* State, 53 Ga. 241. See Com. *v.* Lavonsair, 132 Mass. 1, as to the question under what statute an offense was charged by a complaint which alleged that defendant kept "a certain common nuisance to wit, a certain house of ill fame," etc.

27. See Vanderworker *v.* State, 13 Ark. 700. In People *v.* Jackson, 3 Den. (N. Y.)

defendant as keeper of a "common gaming-house."[28] In such an indictment it is not essential to set out what particular games were carried on in the house by its patrons.[29] A common-law indictment for keeping a "common gaming-house" is not vitiated by concluding "against the form of the statute."[30]

5. TIPPLING-HOUSE. An information for keeping a tippling-house or a house in which intoxicating liquors are sold need not allege that the disorderly conduct was caused by defendant's sale of liquors or was the result thereof.[31]

6. DISORDERLY THEATER. An indictment which charges that defendant was the owner and manager of a theater and dance house where liquors are sold and that he unlawfully employs therein lewd women and prostitutes is sufficient.[32]

C. For Letting House Used as Disorderly House[33] — 1. AVERMENTS AS TO LESSOR. Some authorities hold that an indictment at common law against one who leases a house for bawdy purposes must charge him as a keeper of the house;[34] others that he may be charged simply as lessor.[35] An indictment for letting a house for purposes of prostitution must aver that defendant was the owner or controller of the property when it was let.[36] Again where a statute provides that it is sufficient to show that a building is generally reputed in the neighborhood to be a place of assignation for men and women, in a prosecution against the owner of such building it is not necessary to allege knowledge of such use.[37]

2. AVERMENTS AS TO LESSEE. The indictment should give the name of the lessee or state some reason for not giving it, and it must aver that the lessee

101, 103, 45 Am. Dec. 449, Bronson, C. J., said: "I do not think the general charge would be enough in an indictment at the common law," and cited Archbold Cr. Pl. 600, and 3 Chitty Cr. L. 673, 674, to the effect that precedents require further allegations such as "that the defendant did cause and procure divers idle and evil disposed persons to frequent the house, and play at illegal games, &c.; and sometimes, disturbances and breaches of the peace are added." See *supra*, XI, B, 2. And see State *v.* Maurer, 7 Iowa 406, for an indictment held to sufficiently charge the keeping of a gaming-house.

28. An averment in an indictment that a person has kept and maintained a tenement used for illegal gaming is insufficient. Com. *v.* Stahl, 7 Allen (Mass.) 303. See Archbold Cr. Pl. (5th Am. ed.) 637.

29. Vanderworker *v.* State, 13 Ark. 700. And *compare* People *v.* Jackson, 3 Den. (N. Y.) 101, 45 Am. Dec. 449, holding that an indictment which charges that defendant kept a common gaming-house; to-wit, a place where tickets in unauthorized lotteries were sold, is bad. A place where tickets in lotteries are sold is not a gaming-house, admitting that a general charge of keeping a common gaming-house is sufficient. The latter part of the count cannot be rejected as surplusage for it tells what was meant by the general charge.

30. Vanderworker *v.* State, 13 Ark. 700; Rex *v.* Dixon, 10 Mod. 335. See also *supra*, XI, B, 1, e.

31. Joseph *v.* State, 42 Ind. 370. See also Huber *v.* State, 25 Ind. 175.

32. Callaghan *v.* State, 36 Tex. Cr. 536, 38 S. W. 188, under article 341*a* of the old penal code. See White Pen. Code Tex. art. 362, for section relating to the subject.

For form of indictment against owner of a disorderly theater see White Pen. Code Tex. § 580.

33. Averments as to time of leasing see *supra*, XI, A, 5, b.

34. State *v.* Lewis, 5 Mo. App. 465. See People *v.* Erwin, 4 Den. (N. Y.) 129 [*explaining* Brockway *v.* People, 2 Hill (N. Y.) 558].

35. Smith *v.* State, 6 Gill (Md.) 425. See Com. *v.* Harrington, 3 Pick. (Mass.) 26. See *supra*, III; IV. But *compare* Taylor *v.* Com., 1 Duv. (Ky.) 160, holding that an indictment alleging that defendant did "suffer and permit an indecent and disorderly house to be kept on his plantation or premises" is insufficient. It is neither charged with sufficient certainty that defendant kept the house, nor that he leased it to another knowing the purpose for which it was intended to be used, nor that the house was within his occupancy and control.

36. Bourlier *v.* Com., 10 Ky. L. Rep. 154.

37. State *v.* Allen, 6 Ohio S. & C. Pl. Dec. 43, 3 Ohio N. P. 201.

For form of indictment held sufficient as charging an offense under the statute see Swaggart *v.* Territory, 6 Okla. 344, 50 Pac. 96.

Indictment which substantially follows prescribed form is sufficient. Mansfield *v.* State, (Tex. Cr. App. 1894) 24 S. W. 901. And see *supra*, XI, A, 5.

Sufficiency on motion in arrest.— On a motion in arrest of judgment, if the indictment is found to contain all the essential elements of the offense, even though to some extent defectively stated, it will be held sufficient. Graeter *v.* State, 105 Ind. 271, 4 N. E. 461. See also Harlow *v.* Com., 11 Bush (Ky.) 610.

accepted the lease.[38] Where the use and occupation of the house by the tenant is shown by the indictment, an averment in so many words that the house was in fact so used and occupied is not necessary.[39]

D. For Frequenting Disorderly House — 1. BAWDY-HOUSE. An indictment[40] at common law for frequenting and haunting houses of ill fame must expressly charge that "the defendant, knowing the house to be a house of ill fame, did openly and notoriously haunt and frequent the same."[41]

2. OPIUM DEN. Unless the statute requires it,[42] it is not necessary to allege who is the keeper of the opium den, or that defendant was knowingly, willingly, or wantonly present;[43] nor need the mode of using the drug[44] or the instruments or preparations for smoking[45] be specified or described. Under a statute which forbids the resorting to a house, room, or apartment kept "to be used as a place of resort," an indictment is fatally defective which attempts to charge the offense without the words "a place of resort."[46] Under a statute which makes it unlawful for any person to frequent an opium den, an indictment which charges that defendant on or about a day named did unlawfully and feloniously enter and frequent, etc., is sufficient.[47]

E. Variance Between Complaint and Information. An information which charges the keeping of a house on a particular day and on divers other days between that day and a date mentioned is not invalidated by the fact that the complaint before the justice charged the offense as having been committed on the particular day only.[48]

XII. BILL OF PARTICULARS.

Where the keeping of a bawdy-house is charged with substantially the same particularity as in the common-law form, a motion for a bill of particulars will be overruled.[49]

XIII. VARIANCE BETWEEN ALLEGATIONS AND PROOF.

A variance between the allegation and proof of the exact location of the house,[50] or as to the precise date of leasing a house to be used as a disorderly house, may

38. Com. *v.* Moore, 11 Cush. (Mass.) 600. See also Smith *v.* State, 6 Gill (Md.) 425.

39. Crofton *v.* State, 25 Ohio St. 249, where the indictment charged the owner of a certain house with knowingly permitting one M to use and occupy the same for the purpose of prostitution.

40. Complaint under a statute.— Where the statute by the terms of its punishment puts the offense of living in a bawdy-house among misdemeanors the accused may be prosecuted upon a complaint under oath. An indictment on information is not necessary. Webber *v.* Harding, 155 Ind. 408, 58 N. E. 533.

41. Brooks *v.* State, 2 Yerg. (Tenn.) 482 [*citing* 4 Blackstone Comm. 64].

42. A charge in the language of the statute is generally sufficient. See *supra*, XI, A, 3.

43. Com. *v.* Kane, 173 Mass. 477, 52 N. E. 919.

44. Therefore an objection to an indictment which charges defendant with resorting to such a place for the purpose of indulging in the use of opium by "smoking or otherwise" is fatal on account of being in the disjunctive, and is untenable. It is the intent to use opium that gives character to the act. The words "by smoking or otherwise" are wholly unessential and may be rejected as surplusage. State *v.* On Gee How, 15 Nev. 184.

45. Com. *v.* Kane, 173 Mass. 477, 52 N. E. 919.

46. State *v.* On Gee How, 15 Nev. 184.

47. State *v.* Ah Sam, 14 Oreg. 347, 13 Pac. 303. It was objected in this case that "frequent" meant "habit," which could not be contracted in one day. The court said this was a question of evidence, not of pleading; that in cases where the offense is in its nature continuing from day to day a particular act so to speak may be constituted out of the series of minor acts which minor acts may be committed on different days. There being no impossibility in law that all may really occur on one day, the allegation of a single day is sufficient.

48. The allegation in the information followed the proofs taken on examination. It is permissible thus to fix the date by the date shown on examination. People *v.* Russell, 110 Mich. 46, 67 N. W. 1099.

49. State *v.* Hendricks, 15 Mont. 194, 39 Pac. 93, 48 Am. St. Rep. 666.

50. Johnson *v.* State, 13 Ind. App. 299, 41 N. E. 550.

Variance as to street in which house is.— Where defendant is charged by information with having kept a bawdy-house on "Sixth"

not be fatal.[51] So where an indictment charges the keeping of a disorderly house there is no variance where the proof shows only a part of the house was kept by the accused.[52]

XIV. EVIDENCE.

A. Admissibility — 1. To Show Keeping — a. In General — (I) *Confining Proof to Allegations.* Keeping a bawdy-house being a local offense, under an indictment which describes the offense as committed in a certain town, the prosecution is confined in its proof to the town;[53] and under an indictment containing a single count it is error to admit proof of the keeping of more than one house in the town.[54] So under an indictment for keeping a tippling-house, evidence that the upper rooms of the house were rented to, used, and kept by a certain woman as a bawdy-house is inadmissible.[55] But proof of events[56] occurring in the house and of its reputation[57] prior to the time covered by the indictment is competent, if such proof is confined to the time within the period of limitation and is not within the time of a previous conviction or acquittal.[58]

(II) *Admissions or Confessions.* The admissions of defendant may be received in evidence to show his connection with the house[59] or to show the character of the house.[60]

(III) *Acts Done Outside House.* Whether the disorderly conduct of persons who are outside the house is admissible may depend upon various considerations, such as the distance from the house at which they occurred[61] or the nature of the conduct.[62] But where defendant is charged as keeper, acts done by him

street, and the proof is that the house is on "North Sixth" street, the variance is immaterial, and cannot prejudice the rights of defendant. State *v.* Hendricks, 15 Mont. 194, 39 Pac. 93, 48 Am. St. Rep. 666.

51. Com. *v.* Harrington, 3 Pick. (Mass.) 26. But it is reprehensible to give a date which is unreasonably remote from the true one, although the variance may not be such as to lead to a reversal for receiving the proof. People *v.* Saunders, 29 Mich. 269.

52. State *v.* Main, 31 Conn. 572; Com. *v.* Bulman, 118 Mass. 456, 19 Am. Rep. 469.

53. State *v.* Nixon, 18 Vt. 70, 46 Am. Dec. 135, holding that it cannot prove an offense merely within the county.

54. State *v.* Plant, 67 Vt. 454, 32 Atl. 237, 48 Am. St. Rep. 821, for there could not be a conviction, upon a single count, of keeping a bawdy-house at two different places. The keeping at each place is a distinct offense.

55. Frederick *v.* Com., 4 B. Mon. (Ky.) 7.

56. Cadwell *v.* State, 17 Conn. 467; Parker *v.* People, 94 Ill. App. 648; U. S. *v.* Burch, 24 Fed. Cas. No. 14,683, 1 Cranch C. C. 36; U. S. *v.* McCormick, 26 Fed. Cas. No. 15,661, 4 Cranch C. C. 104.

Where various acts of disorder are set out in an information for keeping a disorderly house, evidence of other disorderly acts not set out may be admissible. Thus where it was set out that drinking, carousing, and swearing were permitted, to the annoyance, etc., evidence of "shooting, yelling, and laughing" is pertinent. Garrison *v.* State, 14 Ind. 287.

57. Sprague *v.* State, (Tex. Cr. App. 1898) 44 S. W. 837.

58. U. S. *v.* McCormick, 26 Fed. Cas. No. 15,661, 4 Cranch C. C. 104.

Evidence that defendant had rented the house several months prior to the time of the indictment and had ever since occupied it is competent to prove that she was keeper. Lowe *v.* State, 4 Tex. App. 34. And see *infra*, XIV, B, 1.

59. Com. *v.* Bunnell, 20 Pa. Super. Ct. 51. See also Sullivan *v.* State, 75 Wis. 650, 44 N. W. 647.

Statements by defendant about her arrest years before upon a charge of prostitution and about her husband who was not living in the house are not admissible upon a trial for keeping a bawdy-house. People *v.* Pinkerton, 79 Mich. 110, 44 N. W. 180.

60. Com. *v.* Dam, 107 Mass. 210.

Statements made by defendant away from house.— Testimony that a few days before his arrest defendant was traveling on a railroad; that he had with him two women, whom he admitted to be prostitutes; and that he said he was taking them to the house in question is admissible, as it tended to show that the house was a bawdy-house. Sullivan *v.* State, 75 Wis. 650, 44 N. W. 647.

61. State *v.* McGahan, 48 W. Va. 438, 37 S. E. 573, acts not in the vicinity.

Considerable distance away.— In an indictment for keeping a disorderly house, evidence is admissible of what was said and done by disturbers of the peace in the highway at a considerable distance from the house, and not in the presence of defendant or any of his family. Com. *v.* Davenport, 2 Allen (Mass.) 299.

62. State *v.* Pierce, 65 Iowa 85, 21 N. W. 195 (appearance of intoxication after leaving the house); State *v.* Robertson, 86 N. C. 628, 630 [*citing* State *v.* Thornton, 44 N. C. 252] (keeper joining in disorderly acts).

outside and away from the house in furtherance of the management or of the conducting of the house are admissible.[63] So where one accused of being a keeper of a disorderly house defends on the theory that he is only a creditor of the person he alleges to be the real proprietor, written securities showing the alleged relation of debtor and creditor are admissible.[64]

b. Common Disorderly House. Evidence of the annoyance which a disorderly house causes a neighborhood is admissible.[65] So evidence that defendant secreted a person in his house whom an officer of the law was seeking is admissible to show that a house is disorderly.[66]

c. Bawdy-House — (I) *FREQUENTING BY MEN.* The fact that men frequented the place at all hours of the day and of the night[67] and evidence of their number, their purpose in going and what they did there[68] are admissible upon a trial for keeping a bawdy-house.

(II) *REPUTATION OF HOUSE.* Under common-law principles it would seem that evidence of the general reputation of a house would be inadmissible upon the issue of whether it is a bawdy-house, and so quite a number of authorities hold;[69] but very many authorities hold that the reputation of the house is admis-

Acts of unchastity by frequenters elsewhere.— Upon trial for maintaining a disorderly house by permitting lewd persons to frequent it, evidence, not only of the bad reputation of the women resorting there, but of special acts of unchastity committed by them elsewhere than on the premises in question, is admissible. If not competent, the error in the admission of such evidence is cured if defendant himself proves that the women were street-walkers, of bad reputation, and that they had been seen in houses of prostitution. Beard *v.* State, 71 Md. 275, 17 Atl. 1044, 17 Am. St. Rep. 536, 4 L. R. A. 675. See *infra*, XIV, B, 1, c, (I), (A).

63. State *v.* McGregor, 41 N. H. 407. See also Sullivan *v.* State, 75 Wis. 650, 44 N. W. 647.

Acts of ownership.— That witness took an acknowledgment of a deed conveying the property to defendant and that defendant rendered the property to the assessor of taxes were held admissible to show ownership in defendant. Hamilton *v.* State, (Tex. Cr. App. 1900) 60 S. W. 39.

64. Stone *v.* State, 22 Tex. App. 185, 2 S. W. 585.

65. Berry *v.* People, I N. Y. Cr. 43 [*affirmed* in 77 N. Y. 588] (disturbance occasioned by the noise in such house); State *v.* Robertson, 86 N. C. 628 (annoyance to women passing).

Complaint in neighborhood.— Under an indictment for keeping a disorderly house, a witness for the prosecution cannot be asked "whether the house was not a matter of general complaint by the neighbors, as disturbing them." Com. *v.* Stewart, 1 Serg. & R. (Pa.) 342. And *compare* State *v.* Foley, 45 N. H. 466.

66. "The act gives color to the other acts — stamps the temper with which they are done." Mahalovitch *v.* State, 54 Ga. 217.

Knowledge of owner.— That owner lived in a building adjoining the one in question and the latter was visited by lewd women is admissible to prove owner's — defendant's — knowledge. Forbes *v.* State, 35 Tex. Cr. 24, 29 S. W. 784.

Showing the locus in quo.— Testimony of a witness that he could not identify the land on which the house in question stood from the recitals made in a deed to defendant, but nevertheless he could tell from the references within the instrument that the land described in the deed was the same as that upon which defendant lived is not objectionable, especially where there is not any question as to the *locus in quo* of the alleged disorderly house. Ross *v.* State, (Tex. Cr. App. 1902) 70 S. W. 543.

67. Com. *v.* Eagler, 10 Kulp (Pa.) 107.

68. Com. *v.* Sarves, 17 Pa. Super. Ct. 407.

69. *Alabama.*— Toney *v.* State, 60 Ala. 97; Sparks *v.* State, 59 Ala. 82; Wooster *v.* State, 55 Ala. 217.

Illinois.— Parker *v.* People, 94 Ill. App. 648.

Iowa.— State *v.* Lyon, 39 Iowa 379.

Maine.— State *v.* Boardman, 64 Me. 523.

Maryland.— Henson *v.* State, 62 Md. 231, 50 Am. Rep. 204.

Mississippi.— Handy *v.* State, 63 Miss. 207, 56 Am. Rep. 803.

New York.— People *v.* Mauch, 24 How. Pr. 276.

Oklahoma.— Nelson *v.* Territory, 5 Okla. 512, 49 Pac. 920.

United States.— U. S. *v.* Jourdine, 26 Fed. Cas. No. 15,499, 4 Cranch C. C. 338 [*overruling* U. S. *v.* Gray, 3 Fed. Cas. No. 15,251, 2 Cranch C. C. 675]; U. S. *v.* Rollinson, 27 Fed. Cas. No. 16,191, 2 Cranch C. C. 13.

See 17 Cent. Dig. tit. "Disorderly Houses," § 22.

"The offence does not consist in keeping a house reputed to be a brothel or bawdy-house, but in keeping one that is actually such." Henson *v.* State, 62 Md. 231, 233, 50 Am. Rep. 204.

Hearsay.— Evidence of the reputation of the house is inadmissible, because it is mere hearsay. "The house must be proved to be a house of ill-fame by facts and not by fame,"

sible.[70] And evidence of the reputation of the house before the day alleged in the indictment or information has been held admissible,[71] but not of its reputation subsequently.[72] Where a statute forbids the keeping of a "house of ill fame," some authorities hold that proof of the "ill fame" is material;[73] but others hold that the term "house of ill fame" is merely descriptive of the character of the house and does not refer to the repute of the house and that therefore the rule against admitting such hearsay evidence is not thereby changed.[74]

for the terms "house of ill fame," and "bawdy-house" are synonymous, "ill fame" describing the character of the house, not its reputation, and the gist of the offense consists in the use of the house, not in its reputation. State *v.* Boardman, 64 Me. 523.

70. *Colorado.*— Howard *v.* People, 27 Colo. 396, 61 Pac. 595.

Dakota.— Territory *v.* Stone, 2 Dak. 155, 4 N. W. 697; Territory *v.* Chartrand, 1 Dak. 379, 46 N. W. 583.

Florida.— King *v.* State, 17 Fla. 183.

Georgia.— Hogan *v.* Smith, 76 Ga. 82.

Idaho.— Territory *v.* Bowen, 2 Ida. (Hasb.) 640, 23 Pac. 82; People *v.* Buchanan, 1 Ida. 681.

Indiana.— Graeter *v.* State, 105 Ind. 271, 4 N. E. 461; Betts *v.* State, 93 Ind. 375.

Kentucky.— Burton *v.* Com., 4 Ky. L. Rep. 532.

Louisiana.— State *v.* West, 46 La. Ann. 1009, 15 So. 418; State *v.* Mack, 41 La. Ann. 1079, 6 So. 808.

Minnesota.— State *v.* Bresland, 59 Minn. 281, 61 N. W. 450; State *v.* Smith, 29 Minn. 193, 12 N. W. 524.

Nebraska.— Drake *v.* State, 14 Nebr. 535, 17 N. W. 117.

Pennsylvania.— Com. *v.* Bunnell, 20 Pa. Super. Ct. 51; Com. *v.* Sarves, 17 Pa. Super. Ct. 407; Com. *v.* Murr, 7 Pa. Super. Ct. 391.

South Carolina.— State *v.* McDowell, Dudley 346.

Texas.— Sprague *v.* State, (Cr. App. 1898) 44 S. W. 837; Golden *v.* State, 34 Tex. Cr. 143, 29 S. W. 779; Cook *v.* State, 22 Tex. App. 511, 3 S. W. 749. See Allen *v.* State, 15 Tex. App. 320.

Wisconsin.— State *v.* Brunell, 29 Wis. 435.

United States.— U. S. *v.* Gray, 26 Fed. Cas. No. 15,251, 2 Cranch C. C. 675.

See 17 Cent. Dig. tit. "Disorderly Houses," § 22.

Common reputation is a legitimate source from which to draw proof to fix the character of the house, but the evidence must directly connect the person charged with the offense committed. The testimony in this case goes to show that the reputation of the house was established by another proprietor and at an anterior time. Sara *v.* State, 22 Tex. App. 639, 3 S. W. 339. See also Loraine *v.* State, 22 Tex. App. 640, 3 S. W. 340.

By statute in a number of the states such testimony is admissible. See State *v.* Lee, 80 Iowa 75, 45 N. W. 545, 20 Am. St. Rep. 401; Shaffer *v.* State, 87 Md. 124, 39 Atl. 313. Such a statute is not in conflict with the constitutional provision which secures to all persons prosecuted for crimes the right to be confronted with the witnesses against them, since it is the fact that the reputation exists which is put in proof, and the persons testifying as to this fact are the witnesses, and not the people whose utterances created the reputation. State *v.* Waldron, 16 R. I. 191, 14 Atl. 847.

Reputation among commercial travelers has been held to be admissible. State *v.* Lee, 80 Iowa 75, 45 N. W. 545, 20 Am. St. Rep. 401.

71. People *v.* Gastro, 75 Mich. 127, 42 N. W. 937.

72. Brady *v.* State, (Tex. Cr. App. 1900) 57 S. W. 647.

73. Cadwell *v.* State, 17 Conn. 467, holding that evidence as to the reputation of the house at a time previous to the taking effect of the statute fairly conduces to show the reputation afterward and does not give the statute an *ex post facto* operation.

74. Parker *v.* People, 94 Ill. App. 648; State *v.* Plant, 67 Vt. 454, 32 Atl. 237, 48 Am. St. Rep. 821.

Effect of discontinuance of former trial as to admissibility of evidence of reputation before then.—Where a prosecution for the keeping of the same house of ill fame by the accused at a former time had previously been brought, and on payment of the cost by the accused had been discontinued by the attorney for the state, it was held that this constituted no objection to evidence in a later prosecution as to the reputation of the house at the time of and prior to the former prosecution. The *nolle* like a nonsuit or a discontinuance in a civil suit left the matter just where it stood before the commencement of the prosecution, and payment of costs had no effect upon the legal operation of the proceedings. State *v.* Main, 31 Conn. 572.

Evidence as to reputation on cross-examination.— Where witnesses testify on direct examination that the house in question did not have the reputation of a house of ill fame, it is proper on a cross-examination to show that they were not likely by occupation, habit, interest, or relations to know of its reputation. State *v.* Lee, 80 Iowa 75, 45 N. W. 545, 20 Am. St. Rep. 401. Where a witness of defendant, who was charged with keeping a house of ill fame, gave evidence in chief that defendant was reputed to be a charitably disposed person, was kind to those who were sick and in distress, and that he had never seen anything out of the way at her house, it was in the discretion of the court to allow such witness to be questioned on cross-examination as to the reputation of the house, and the admission of such questions was not reversible error. State *v.* Beebe, 115 Iowa 128, 88 N. W. 358.

(III) *Reputation of Inmates and Frequenters.* In a prosecution for keeping a bawdy-house evidence of the general reputation of its inmates and frequenters is admissible to show the character of the house.[75] To prove the general reputation of the inmates, the record of former convictions of defendants is admissible.[76] The reputation which an inmate or frequenter held prior to the time laid in the indictment is admissible to show the character such person held within the time laid in the indictment.[77]

(IV) *Reputation of Defendant* — (A) *In General.* Evidence of the bad character of defendant, as well as evidence of the want of chastity on the part of defendant is generally held incompetent,[78] but there are some authorities to the

75. *Alabama.*— Cahn *v.* State, 110 Ala. 56, 20 So. 380 (character of women occupying rooms in house); Toney *v.* State, 60 Ala. 97; Wooster *v.* State, 55 Ala. 217.

Colorado.— Howard *v.* People, 27 Colo. 396, 61 Pac. 595.

Connecticut.— State *v.* Main, 31 Conn. 572.

Florida.— King *v.* State, 17 Fla. 183.

Georgia.— McCain *v.* State, 57 Ga. 390.

Idaho.— See People *v.* Buchanan, 1 Ida. 681.

Indiana.— Graeter *v.* State, 105 Ind. 271, 4 N. E. 461; Betts *v.* State, 93 Ind. 375; Whitlock *v.* State, 4 Ind. App. 432, 30 N. E. 934.

Iowa.— State *v.* Lyon, 39 Iowa 379.

Kentucky.— Rhodes *v.* Com., 10 Ky. L. Rep. 722.

Louisiana.— State *v.* West, 46 La. Ann. 1009, 15 So. 418.

Maine.— State *v.* Boardman, 64 Me. 523.

Maryland.— Shaffer *v.* State, 87 Md. 124, 39 Atl. 313.

Massachusetts.— Com. *v.* Clark, 145 Mass. 251, 13 N. E. 888; Com. *v.* Gannett, 1 Allen 7, 79 Am. Dec. 693; Com. *v.* Kimball, 7 Gray 328.

Michigan.— People *v.* Russell, 110 Mich. 46, 67 N. W. 1099.

Missouri.— Clementine *v.* State, 14 Mo. 112.

Montana.— State *v.* Hendricks, 15 Mont. 194, 39 Pac. 93, 48 L. R. A. 666.

Nebraska.— Drake *v.* State, 14 Nebr. 535, 17 N. W. 117.

New Hampshire.— State *v.* McGregor, 41 N. H. 407.

New York.— Harwood *v.* People, 26 N. Y. 190, 84 Am. Dec. 175; People *v.* Hulett, 15 N. Y. Suppl. 630.

Oklahoma.— Nelson *v.* Territory, 5 Okla. 512, 49 Pac. 920.

Pennsylvania.— Com. *v.* Bunnell, 20 Pa. Super. Ct. 51; Com. *v.* Eagler, 10 Kulp 107; Com. *v.* Noonan, 15 Phila. 372. See Com. *v.* Murr, 7 Pa. Super. Ct. 391.

Texas.— Sylvester *v.* State, 42 Tex. 496; Sprague *v.* State, (Cr. App. 1898) 44 S. W. 837; Golden *v.* State, 34 Tex. Cr. 143, 29 S. W. 779.

Wisconsin.— State *v.* Brunell, 29 Wis. 435.

United States.— U. S. *v.* McDowell, 26 Fed. Cas. No. 15,671, 4 Cranch C. C. 423; U. S. *v.* Stevens, 27 Fed. Cas. No. 16,391, 4 Cranch C. C. 341.

See 17 Cent. Dig. tit. "Disorderly Houses," § 23.

Character of inmates is admissible under a general charge in the indictment for keeping such a house. State *v.* McDowell, Dudley (S. C.) 346, 349 [*quoting* Clarke *v.* Perian, 2 Atk. 333, 9 Mod. 346, 26 Eng. Reprint 603].

Character of men who frequent the house is admissible. Howard *v.* People, 27 Colo. 396, 61 Pac. 595; Clementine *v.* State, 14 Mo. 112.

In a prosecution for keeping a disorderly house, it is competent to prove that the house was frequented by noisy and disreputable people. Com. *v.* Noonan, 15 Phila. (Pa.) 372.

The fact that the inmates were daughters of the keeper and on account of that relation were entitled to remain in the house did not authorize them to turn it into a brothel nor destroy the inferential effect of their lewd conduct as tending to show the character of the house. Evidence of their general reputation was admissible. State *v.* Horn, 83 Mo. App. 47.

76. State *v.* Barnard, 64 Mo. 260, where defendants had not appealed.

77. People *v.* Russell, 110 Mich. 46, 67 N. W. 1099. Where the prosecutor offered a witness to prove that divers persons of lewd and dissolute character, for two years next previous to the time when the statute went into operation, resorted to the house in question for the purpose of prostitution and lewdness, among whom was M, a lewd person, who died before the passage of the statute — this testimony being offered in connection with other evidence, by which the prosecutor claimed to have proved that the same persons, or persons of a similar character, resorted to that house, after the passage of the statute — it was held that the testimony of this witness, in connection with the evidence which accompanied it, fairly conduced to prove the character of the house and the purpose for which it was kept, after the statute took effect, and was therefore admissible. Cadwell *v.* State, 17 Conn. 467.

78. *Iowa.*— State *v.* Hand, 7 Iowa 411, 71 Am. Dec. 453.

Louisiana.— State *v.* Mack, 41 La. Ann. 1079, 6 So. 808.

Massachusetts.— Rex *v.* Doaks, Quincy 90.

Montana.— State *v.* Hendricks, 15 Mont. 194, 39 Pac. 93, 48 Am. St. Rep. 666.

Texas.— Gamel *v.* State, 21 Tex. App. 357, 17 S. W. 158; Burton *v.* State, 16 Tex. App. 153.

contrary.[79] The fact that a certain person is the keeper of a disorderly house cannot be shown by general reputation.[80]

(B) *Former Convictions of Similar Offenses.* To prove reputation, where reputation is admissible, evidence of defendant's conviction for offenses of the same general character has been held admissible.[81] Where, however, the record shows that defendant has appealed from the judgment and there is no evidence as to the determination of the appeal, it is error to admit the judgment.[82]

(V) *Acts and Conversation of Inmates and Frequenters*—(A) *In General.* The character of the conversation in and about the house[83] of the women who frequent it and their acts[84] are admissible in evidence.

(B) *Of Defendant.* Evidence of defendant's own lewd conduct in the house in the presence of inmates and visitors is competent.[85]

(VI) *Facts Showing Defendant's Knowledge of Character of House.* Rumor as to the character of the house, the keeper's conversation with the

United States.— U. S. *v.* Jourdine, 26 Fed. Cas. No. 15,499, 4 Cranch C. C. 338; U. S. *v.* Nailor, 27 Fed. Cas. No. 15,853, 4 Cranch C. C. 372.

See 17 Cent. Dig. tit. "Disorderly Houses," § 21.

79. Whitlock *v.* State, 4 Ind. App. 432, 30 N. E. 934; Dailey *v.* State, (Tex. Cr. App. 1900) 55 S. W. 823. Since the keeper is an inmate, evidence of her reputation is admissible. Howard *v.* People, 27 Colo. 396, 61 Pac. 595; State *v.* Hendricks, 15 Mont. 194, 39 Pac. 93, 48 Am. St. Rep. 666.

Admissible upon a proper foundation.— When it has been shown on trial of a person accused of keeping a bawdy-house that the inmates of the house have reputations for unchastity and that the house is frequented by dissolute persons, the reputation of defendant for unchastity is admissible. Sparks *v.* State, 59 Ala. 82.

A petition of citizens of the community to the city council, in part of which petition defendant is referred to as a lewd woman, is inadmissible to establish her general reputation. Howard *v.* People, 27 Colo. 396, 61 Pac. 595.

The admission of evidence as to the financial standing and visible means of support of defendant, although erroneous, is not prejudicial. Bigby *v.* State, 5 Tex. App. 101.

80. Allen *v.* State, 15 Tex. App. 320.

81. Howard *v.* People, 27 Colo. 396, 61 Pac. 595.

To increase penalty.— A former conviction of a different although similar offense is inadmissible to increase penalty. State *v.* Holmes, 56 Iowa 588, 9 N. W. 894, 41 Am. Rep. 121.

82. And the error is not cured by an instruction that if an appeal were still pending the facts shown by the records would not authorize a conviction. State *v.* Barnard, 64 Mo. 260. But evidence that defendant had on a previous charge been arrested on a warrant and that after that time he had kept the women, who were shown to be prostitutes, concealed in his house is proper. Harwood *v.* People, 16 Abb. Pr. (N. Y.) 430.

83. State *v.* Garing, 75 Me. 591 (where what was said by the inmates in the presence of the mistress was admitted); State *v.* Boardman, 64 Me. 523; Com. *v.* Dam, 107 Mass. 210; Com. *v.* Kimball, 7 Gray (Mass.) 328.

Conversation not in presence of keeper.— Testimony of an omnibus driver that he took women to the house, and that a woman there told him, if he "saw any boys that wanted to come over to fetch them," is competent, although the conversation was not had in defendant's presence, since it tended to show the character of the women who frequented the house and their purpose in going there. State *v.* Toombs, 79 Iowa 741, 45 N. W. 300. See charge given in Com. *v.* Sliney, 126 Mass. 49.

Evidence of conversations held by men immediately after coming out of the house, and not in the presence of defendant or any of the inmates, as to what had taken place in the house is inadmissible. Com. *v.* Harwood, 4 Gray (Mass.) 41, 64 Am. Dec. 49.

Quarrel between man and woman — Epithets.— Evidence that a woman who frequented defendant's house, and whose reputation for chastity had been shown to be bad, had quarreled with a man, whom she accused of calling her a whore, and that defendant was present and had taken from the man a poker which he held in his hand was competent to show the character of the women in the house and the character of their conversation. Whitlock *v.* State, 4 Ind. App. 432, 30 N. E. 934.

84. State *v.* Main, 31 Conn. 572.

"Staying with a man."— Testimony of a woman that she went to the house with a man, whom she did not know, to get a drink; that they got a room, and remained an hour; that she "stayed with him" [witness understanding what the expression meant]; that the man offered to keep her, and pay her board, and something more; and that the traverser was not present, and witness did not see him is admissible to show that the house was kept for the resort and unlawful commerce of lewd persons. Herzinger *v.* State, 70 Md. 278, 17 Atl. 81.

85. State *v.* Smith, 29 Minn. 193, 12 N. W. 524. But not of lascivious acts by the accused while she was merely a lodger, before she was mistress of the house. Rex *v.* Doaks, Quincy (Mass.) 90.

visitors,[86] and the fact that the inmates had been convicted on a charge of being prostitutes and that defendant had gone bail for them[87] are admissible to show defendant keeper's knowledge of the character of his house.

d. Gaming-House. The acts of betting and gaming by the inmates and frequenters and what was said at the time as a part of those acts are admissible to establish the character of the house, irrespective of whether the alleged keeper was present or not.[88] Under an indictment against the keeper of a room in which common gaming is carried on for keeping a disorderly house, evidence of his keeping a faro bank therein may be given.[89]

e. Theater. Upon trial for conducting a theater in a disorderly manner, that defendant had been granted a license to give theatrical entertainments is immaterial;[90] and the rules and regulations posted in the house and the fact that the plays seen there are played at other theaters are inadmissible.[91] So the fact that defendant had repeatedly discharged disreputable employees upon having notice of their character is inadmissible.[92]

2. Where Defendant Is Charged as Lessor. Upon a trial for leasing a house to be used as a house of prostitution, the evil repute of the lessee and of her visitors and inmates is admissible to show the guilty knowledge of the lessor.[93]

B. Sufficiency — 1. Of Proof of Keeping — a. In General — (I) *Proof of All Allegations.* It is not necessary to prove all the facts alleged in the indictment, but only such as are material.[94] So where in an indictment for keeping a disorderly house it is charged in the same count that the house is several of the different specific kinds of a disorderly house, it is not necessary to prove every kind alleged.[95]

(II) *Connecting Defendant With House.* The evidence must sufficiently connect defendant with the keeping of the house,[96] and must be clearly enough

86. Graeter *v.* State, 105 Ind. 271, 4 N. E. 461; State *v.* Wells, 46 Iowa 662.

87. Harwood *v.* People, 26 N. Y. 190, 16 Abb. Pr. (N. Y.) 430, 84 Am. Dec. 175.

88. Bindernagle *v.* State, 60 N. J. L. 307, 37 Atl. 619.

89. U. S. *v.* Milburn, 26 Fed. Cas. No. 15,767, 4 Cranch C. C. 719.

90. Berry *v.* People, 77 N. Y. 588, 1 N. Y. Cr. 43.

91. Berry *v.* People, 77 N. Y. 588, 1 N. Y. Cr. 43.

92. Johnson *v.* State, (Tex. Cr. App. 1893) 21 S. W. 929.

93. People *v.* Saunders, 29 Mich. 269.

Proof that during the two years prior to the renting in question the house had been kept by the tenant to whom defendant lessor had made the demise as a house of prostitution and that defendant on sundry occasions had been there during such years is admissible to show defendant's *scienter*. Troutman *v.* State, 49 N. J. L. 33, 6 Atl. 618.

94. *Georgia.*— Heard *v.* State, 113 Ga. 444, 39 S. E. 118.

Indiana.— Dutton *v.* State, 2 Ind. App. 448, 28 N. E. 995.

Iowa.— State *v.* Schafer, 74 Iowa 704, 39 N. W. 89.

New Hampshire.— Lord *v.* State, 16 N. H. 325, 41 Am. Dec. 729.

United States.— U. S. *v.* Bede, 24 Fed. Cas. No. 14,558.

See 17 Cent. Dig. tit. "Disorderly Houses," § 26 *et seq.*

Descriptio personæ.— In an indictment for keeping a house of ill fame, the description of defendant as "wife of" a certain person is *descriptio personæ*, and need not be proved. Com. *v.* Lewis, 1 Metc. (Mass.) 151.

Proving allegation "to the common nuisance," etc.— Where a statute declares that a house or building which is used for any of several different purposes is a nuisance, it is not necessary to prove the concluding averment of the indictment "to the great injury and common nuisance," etc., further than to prove the acts set out by the statute as constituting the nuisance. Com. *v.* Buxton, 10 Gray (Mass.) 9.

95. **Proof of one kind** is sufficient. People *v.* Carey, 4 Park. Cr. (N. Y.) 238.

96. People *v.* Wright, 90 Mich. 362, 51 N. W. 517; Bindernagle *v.* State, 61 N. J. L. 259, 38 Atl. 973, 39 Atl. 360; Hamilton *v.* State, (Tex. Cr. App. 1900) 60 S. W. 39.

Control and management by defendant.— Evidence that defendant was occupying the house, and using it as his own, and exercising the control over it that men usually have over their own houses, is sufficient to authorize the jury to find that he kept the house. State *v.* Wells, 46 Iowa 662.

Defendant shown to be one of two keepers. — Proof of defendant being the keeper of a disorderly house is sufficiently made when it is shown that the house is kept by him and another. People *v.* Thurston, 2 Wheel. Cr. (N. Y.) 518.

In the capacity defined by statute.— Where a statute prescribes a penalty against one "as owner, tenant, or lessee" of a house that is

shown to overcome the presumption of defendant's innocence.[97] Common reputation or rumor, when admissible, is not sufficient to prove that the accused is the keeper of the house in question.[98]

b. Common Disorderly House — (i) *Jurisdiction and Venue.* It must appear upon trial that the offense was committed within the jurisdiction of the court.[99]

(ii) *Resort of Bad Characters.* To sustain an indictment for keeping a common disorderly house, it is sufficient to show that it is the resort of immoral persons, as drunkards and prostitutes,[1] particularly when such persons were there guilty of immoral,[2] lascivious,[3] or indecent[4] acts or used obscene or indecent language.[5] It is unnecessary to prove that the objectionable, disorderly, or lewd conduct in the house was visible from the exterior.[6] The common-law offense of keeping a disorderly house is sufficiently proved by showing that it was resorted to by persons for the purpose of prostitution.[7]

bawdy or similarly disorderly, evidence of a connection with the house which does not amount to any of the said capacities is insufficient. Humphries *v.* State, (Tex. Cr. App. 1902) 68 S. W. 631. See also Cook *v.* State, 42 Tex. Cr. 539, 61 S. W. 307.

Owner's agent having control.— Under Tex. Code Cr. Proc. (1895) art. 426, providing that where one person owns the property and another has control of the same, the ownership thereof may be alleged to be in either, an allegation of ownership in defendant in an indictment for permitting a disorderly house to be kept on the premises was sustained by the evidence that he was the agent of the owner and rented the same. Flynn *v.* State, 35 Tex. Cr. 220, 32 S. W. 1041 [*distinguishing* Mitchell *v.* State, 34 Tex. Cr. 311, 30 S. W. 810, where it was held that if defendant was but a servant (not owner, lessee, or tenant as was alleged) she would not be guilty, which principle the court affirms in this case].

Ownership by one who claims to be only servant.— Where there was evidence that the person accused of maintaining a lewd house was jointly interested with his alleged employer in the business carried on, and that the accused lived in the house, collected the rents, and exercised acts of ownership about the building, and had stated before the trial that he was a partner with the other person, a verdict of conviction will not be set aside, although defendant claimed that he was merely his servant. Ponder *v.* State, 115 Ga. 831, 42 S. E. 224.

97. Morse *v.* State, (Tex. Cr. App. 1898) 47 S. W. 989. The court said this was not a stronger case than Ramey *v.* State, 39 Tex. Cr. 200, 45 S. W. 489. See also Rabb *v.* State, (Tex. App. 1890) 13 S. W. 1000.

Presumptive evidence is sufficient to prove that defendant is the keeper of a gaming-house. State *v.* Worth, R. M. Charlt. (Ga.) 5.

98. Loraine *v.* State, 22 Tex. App. 640, 3 S. W. 340; Sara *v.* State, 22 Tex. App. 639, 3 S. W. 339; Burton *v.* State, 16 Tex. App. 156.

99. State *v.* McGahan, 48 W. Va. 438, 37 S. E. 573.

1. Cahn *v.* State, 110 Ala. 56, 20 So. 380. *Compare* State *v.* Calley, 104 N. C. 858, 10 S. E. 455, 17 Am. St. Rep. 704.

2. Com. *v.* Cardoze, 119 Mass. 210.

Prostitutes present not misbehaving.— Defendant kept a house, as he was licensed to do, for the purpose of selling beer, cigars, etc., and for a variety theater. He had disreputable women in his employment, and such women visited his house for the purpose of seeing the theatrical performances, and buying beer, etc., but not for the purpose of prostitution. It was held that a conviction could not be sustained. Johnson *v.* State, 28 Tex. App. 562, 13 S. W. 1005.

3. Brown *v.* State, (Tex. Cr. App. 1898) 48 S. W. 176.

4. Ahr *v.* State, (Tex. Cr. App. 1895) 31 S. W. 657.

Disorderly theater — Defendant's knowledge of character of women employed.— On the prosecution of the manager of a theater for keeping a disorderly house, under a statute forbidding a manager of a theater to employ prostitutes in his theater, the state proved that the women employed in the theater were prostitutes, and had borne that reputation for several years before their employment by defendant; that their reputations for chastity were not only bad, but it had been so testified to in trials in defendant's presence, while he had them in his employ; and that after the theater was over it was their custom to conduct themselves in an indecent manner with the patrons. It was held that such facts warranted a conviction, without positive proof of actual knowledge by defendant of the acts and doings of the women he employed, since the law requires him to use reasonable diligence to ascertain their character, and all that the state need do is to prove facts which would put a reasonable man on notice. Johnson *v.* State, 32 Tex. Cr. 504, 24 S. W. 411.

5. Couch *v.* State, 24 Tex. 557.

6. Reg. *v.* Rice, L. R. 1 C. C. 21, 10 Cox C. C. 155, 12 Jur. N. S. 126, 35 L. J. M. C. 93, 13 L. T. Rep. N. S. 382, 14 Wkly. Rep. 56.

7. Com. *v.* Goodall, 165 Mass. 588, 43 N. E. 520; Barnesciotta *v.* People, 10 Hun (N. Y.) 137; Reg. *v.* Rice, L. R. 1 C. C. 21, 10 Cox

(III) *DISTURBANCE OF NEIGHBORHOOD.* It is not necessary to prove that all persons in the neighborhood or that all who passed the alleged disorderly house were annoyed.[8] Evidence of crowds of disorderly persons going in and out of[9] or remaining in and about the house[10] and causing frequent annoyance to the neighborhood is sufficient to sustain the charge of keeping a disorderly house.

c. Bawdy-House — (I) *NECESSARY PROOF* — (A) *A Resort.* In a prosecution under a statute for keeping a "house of ill-fame resorted to for purposes of prostitution" it is necessary to prove that the house was the actual resort of evil persons for the lewd purposes set out in the law;[11] but such a statute does not require that the house be used habitually or for any considerable length of time for the prohibited purposes.[12] Evidence of frequent acts of prostitution by defendant with men who resorted there and of the repute of house as being a bawdy-house is sufficient without showing that other lewd women resorted there.[13] It is not necessary to prove acts of copulation.[14]

(B) *Proof of Ill Fame.* Where a statute prohibits the keeping of a house of ill fame resorted to for prostitution and lewdness, it has been held in a few jurisdictions that it is necessary to prove ill fame, that is, the bad reputation of, as well as the actual character of, the house.[15]

(C) *Notice to Quit.* Where an ordinance provides for a fine for each day's persistence in the use of a house after receipt of a notice from the mayor of the

C. C. 155, 12 Jur. N. S. 126, 35 L. J. M. C. 93, 13 L. T. Rep. N. S. 382, 14 Wkly. Rep. 56. See Jacobowsky *v.* People, 6 Hun (N. Y.) 524.

A conviction of keeping a disorderly house, under Tex. Pen. Code (1895), arts. 359, 361, defining such house as one in which prostitutes are permitted to ply their vocation, is sustained by evidence that there was a social gathering of men only at defendant's store; that a woman came there, and was taken by defendant to his residence, a short distance away, where she remained until midnight, engaged in acts of prostitution with such of the persons at the store as came there; that defendant was at the residence at about eleven o'clock; that the persons at the store knew of the woman's presence and acts; and that defendant admitted to a witness that he knew thereof — although he testifies that he did not know of her conduct until midnight, and then made her leave. Stokeley *v.* State, 37 Tex. Cr. 638, 40 S. W. 971.

8. Com. *v.* Davenport, 2 Allen (Mass.) 299; State *v.* Robertson, 86 N. C. 628.

9. Com. *v.* Davenport, 2 Allen (Mass.) 299.

10. State *v.* McGahan, 48 W. Va. 438, 37 S. E. 573.

11. State *v.* Haberle, 72 Iowa 138, 33 N. W. 461; People *v.* Pinkerton, 79 Mich. 110, 44 N. W. 180. And see State *v.* Calley, 104 N. C. 858, 10 S. E. 455, 17 Am. St. Rep. 704; Smalley *v.* State, 11 Tex. App. 147.

Bad reputation of the men resorting to the house need not be shown if they resorted to the place for the purpose prohibited by the statute. People *v.* Russell, 110 Mich. 46, 67 N. W. 1099.

A single illicit copulation within the house is not sufficient to prove that the house is "resorted to" for such purposes. State *v.* Lee, 80 Iowa 75, 45 N. W. 545, 20 Am. St. Rep. 401; People *v.* Gastro, 75 Mich. 127, 42 N. W. 937.

Two copulations with a servant in his own home does not warrant the conviction of the householder under Iowa Code, § 4943, which provides that any person who, for the purpose of prostitution or lewdness, resorts to, uses, occupies, or inhabits any house of ill fame or place kept for such purpose" shall be punished, etc. State *v.* Irvin, 117 Iowa 469, 91 N. W. 760.

Where a detective sent by officers of the law was the only person proved to have been to such a house for such a purpose, it is not sufficiently shown that the house "is resorted to for the purpose of prostitution." People *v.* Pinkerton, 79 Mich. 110, 44 N. W. 180. See *supra*, II, A, 1, b, (IV).

12. State *v.* Lee, 80 Iowa 75, 45 N. W. 545, 20 Am. St. Rep. 401. In Com. *v.* Gallagher, 1 Allen (Mass.) 592, proof of maintaining the nuisance for two hours was sufficient.

13. People *v.* Mallette, 79 Mich. 600, 44 N. W. 962. But see charge to jury in State *v.* Lee, 80 Iowa 75, 45 N. W. 545, 20 Am. St. Rep. 401, where it was said that intercourse with the defendant keeper alone was not sufficient. See *supra*, note 62, p. 503.

14. Betts *v.* State, 93 Ind. 375; State *v.* Schaffer, 74 Iowa 704, 39 N. W. 89; State *v.* Brunell, 29 Wis. 435. See Drake *v.* State, 14 Nebr. 535, 17 N. W. 117. *Contra*, McCain *v.* State, 57 Ga. 390, where an instruction upon a trial for keeping a lewd house for the practice of fornication or adultery that lewdness must be proved to have been carried on in the house was approved.

15. State *v.* Blakesley, 38 Conn. 523; Cadwell *v.* State, 17 Conn. 467; People *v.* Pinkerton, 79 Mich. 110, 44 N. W. 180, especially where the only evidence of ill repute is given by officers who appear not impartial. *Contra*, State *v.* Lee, 80 Iowa 75, 45 N. W. 545, 20 Am. St. Rep. 401, holding that where a statute makes the reputation of the house competent evidence in such cases, it does not thereby make it necessary to prove the reputation of the house.

city, it is necessary, to authorize the fines for keeping such a house, to prove that the notice was given and that the house was used for the prohibited purposes.[16]

(II) *Unnecessary Proof*—(A) *Keeping For Gain.* To sustain an indictment for keeping a house of ill fame, it is not necessary to prove that it was kept for lucre or gain.[17]

(B) *Conducting Openly.* It is not necessary to prove that the house was conducted openly and notoriously; it being a nuisance *per se*,[18] it is sufficient if it is carried on in private.[19]

(III) *Proof of Aiding and Abetting.* Proof that the accused aided or assisted others in keeping a house of ill fame sufficiently sustains an information charging the keeping of such a house.[20]

(IV) *Reputation of House and Frequenters.* Although a few cases hold that the reputation of a house is sufficient proof of its being bawdy,[21] the general rule is that such evidence is not alone sufficient to determine its character;[22] but where, besides the ill repute of the house, there is evidence of its being resorted to by women of bad reputation and by men, the proof is sufficient to draw an inference as to the bawdy character of the house.[23]

(V) *Proof of Allegations as to Time.* Where the indictment specifies the time during which a house of ill fame was kept, proof of keeping upon any day within such time is sufficient.[24]

d. Gaming-House. An indictment for keeping a gaming-house is supported by evidence that defendant kept a house in which cards or dominoes were habitually played for meats and drinks.[25]

e. Tippling-House. In a prosecution for keeping a tippling-house, it is not necessary to prove that defendant knew of the alleged annoyance to the neighborhood.[26] Evidence of the sale of liquor without a license together with evidence

Under a statute which provides for the punishment of every person who shall keep "a disorderly house," it is not necessary to show that the house had acquired the reputation of being a disorderly house. State *v.* Maxwell, 33 Conn. 259.

16. State *v.* Finnegan, 50 La. Ann. 549, 23 So. 621. See *infra*, note 50, p. 514.

17. State *v.* Clark, 78 Iowa 492, 43 N. W. 273; Com. *v.* Wood, 97 Mass. 225.

18. See *supra*, II, A, 1, b.

19. McCain *v.* State, 57 Ga. 390.

20. People *v.* Wright, 90 Mich. 362, 51 N. W. 517, construing Howell St. Mich. § 9545.

21. See People *v.* Buchanan, 1 Ida. 681; Morris *v.* State, 38 Tex. 603; Sara *v.* State, 22 Tex. App. 639, 3 S. W. 339; Stone *v.* State, 22 Tex. App. 185, 2 S. W. 585.

22. State *v.* Hendricks, 15 Mont. 194, 39 Pac. 93, 48 Am. St. Rep. 666; State *v.* Foley, 45 N. H. 466; Nelson *v.* Territory, 5 Okla. 512, 49 Pac. 920; State *v.* Brunell, 29 Wis. 435.

23. Territory *v.* Chartrand, 1 Dak. 379, 46 N. W. 583; Winslow *v.* State, 5 Ind. App. 306, 32 N. E. 98; State *v.* Lee, 80 Iowa 75, 45 N. W. 545, 20 Am. St. Rep. 401; State *v.* Toombs, 79 Iowa 741, 45 N. W. 300; State *v.* Brunell, 29 Wis. 435. On a trial for keeping a bawdy-house, there was evidence that defendant kept a boarding-house and saloon; that the second story of the house was frequented by men of questionable character; that a woman of notoriously bad repute for chastity drank and played cards with the callers upstairs; that there was a bed upstairs, to the joint occupancy of which with herself she occasionally invited callers. It was held that the evidence supported a conviction. State *v.* Dudley, 56 Mo. App. 450. Indeed it has been held sufficient proof of the character of the house that it was resorted to by women of lewd reputations and by men, without any proof of the reputation of the house. State *v.* Schaffer, 74 Iowa 704, 39 N. W. 89; Nelson *v.* Territory, 5 Okla. 512, 49 Pac. 920.

Sign displayed on house contrary to statute — Knowledge on part of defendant. Where by statute it is a felony to display the sign of an honest occupation on a house used as a bawdy-house, whereby any decent person may be inveigled into such house, and where upon trial for such an offense there is evidence tending to prove bawdy conduct of some of his female boarders, defendant's knowledge of such conduct must be proved; but it is not necessary upon such a trial to prove that some decent person was inveigled into the house; for the offense consists in displaying the sign. State *v.* McLaughlin, 160 Mo. 33, 60 S. W. 1075.

24. Com. *v.* Langley, 14 Gray (Mass.) 21. And *compare* Harris *v.* State, (Tex. App. 1890) 13 S. W. 608, where there was a failure of proof of keeping during the time specified in the indictment.

25. Lord *v.* State, 16 N. H. 325, 41 Am. Dec. 729.

26. Cable *v.* State, 8 Blackf. (Ind.) 531.

that persons of ill repute were permitted to remain upon the premises and become intoxicated is sufficient.[27]

2. Of Proof of Letting — a. Necessary Proof. In a prosecution for leasing premises to be used as a bawdy-house or as a common disorderly house, it is necessary to prove that defendant knew for what purpose his house was to be used,[28] that he was the owner or had control of the house,[29] and that the house actually was of the character alleged.[30]

b. Reputation of House, Lessee, and Inmates. As when keeping a bawdy-house was the subject of the criminal charge,[31] so also, when leasing or permitting a house to be used as a bawdy-house is the offense to be tried, the evil repute of the house is not sufficient to substantiate such charge;[32] nor is evidence of the bad reputation of the lessee and of other women seen in the house sufficient.[33]

3. Proof of Being Inmate or Frequenter. The charge of being found in a reputed house of prostitution is sustained by proof of defendant's having daily sexual intercourse there with men and by her giving the money thus earned to the person who placed her in the house.[34]

XV. TRIAL.

In most respects trials upon indictments for keeping disorderly houses and kindred offenses are governed by the same principles of law as any other criminal

27. Jannone *v.* State, (N. J. Sup. 1900) 45 Atl. 1032.

28. State *v.* Leach, 50 Mo. 535; Drake *v.* State, 14 Nebr. 535, 17 N. W. 117; State *v.* Williams, 30 N. J. L. 102.

A refusal to reënter and take possession upon being notified of the use to which his premises are being used by his lessee is not sufficient to support a conviction of the owner who had leased his property innocently and in good faith. Crofton *v.* State, 25 Ohio St. 249.

The continued receipt of rent, and a persistence in enlarging the term of a disorderly tenant who earns the means of paying rent by misconduct visible to the landlord, may amount to very satisfactory evidence that the latter procures and sanctions the disorderly conduct. State *v.* Williams, 30 N. J. L. 102.

When the owner had been in court when his tenant was arraigned for keeping a bawdy-house and when the owner had been actually notified that his tenant was keeping a bawdy-house in his property, the owner's knowledge of the use of his premises was sufficiently proved. People *v.* Wallach, 15 N. Y. Suppl. 226.

Where it is shown that the reputation of the house is notorious in the neighborhood in which defendant resides, a *prima facie* case of knowledge is established, and it devolves on defendant to show that he had no knowledge. Graeter *v.* State, 105 Ind. 271, 4 N. E. 461.

29. Rhodes *v.* Com., 12 Ky. L. Rep. 717.

30. That is, a house alleged to be rented as a bawdy-house must be shown to be one in fact. Drake *v.* State, 14 Nebr. 535, 17 N. W. 117.

Actual use of a house as a bawdy-house must be shown either directly or by circumstances of sufficient significance. The evil reputation of the lessee, her visitors, and inmates, are not sufficient to show the actual use of the premises. People *v.* Saunders, 29 Mich. 269.

Opium joint.— Where a statute makes it a misdemeanor to maintain a place where opium is smoked by other persons, it is necessary to prove that others than defendant keeper of such place did the smoking. People *v.* Reed, 46 N. Y. App. Div. 625, 61 N. Y. Suppl. 520, 14 N. Y. Cr. 326.

31. See *supra*, XIV, B, 1, c, (IV).

32. See Drake *v.* State, 14 Nebr. 535, 17 N. W. 117.

33. People *v.* Saunders, 29 Mich. 269. See also Drake *v.* State, 14 Nebr. 535, 17 N. W. 117.

"It was enough that, in addition to the bad reputation which the house was shown to bear, notwithstanding no family lived in it, some of its rooms were supplied with beds and some little furniture, and the walls hung with indecent pictures; that it had a bar at which intoxicating drinks were sold, and was the resort, especially on Sabbath days and in the night-time, of men and women of lewd and lascivious character, many of the women being known prostitutes and keepers and occupants of places of ill fame in the city of Lincoln, who, while visiting this house, indulged in drunken revelry and licentious practices fit only for a brothel, which the evidence of what transpired there clearly shows it to have been." Drake *v.* State, 14 Nebr. 535, 538, 17 N. W. 117.

Amount of rent.— Where there is no evidence to show that the rent received for the house is extravagant, the jury cannot infer guilt from the amount of rent. People *v.* Saunders, 29 Mich. 269.

34. People *v.* State Reformatory, 37 Misc. (N. Y.) 92, 74 N. Y. Suppl. 752. See Reg. *v.* St. Clair, 27 Ont. App. 308, for sufficient proof of being an inmate.

Frequenting.— Defendant was sixty-nine years old, infirm, and unable to earn his live-

prosecutions;[35] this applies to the order of making proof;[36] to questions of fact for the consideration of the jury;[37] to the necessity, validity, and effect of instructions given to the jury,[38] such as instructions defining the offense,[39]

lihood, and was a man of good morals and a church member. One of his children, with whom he was living, turned him out of the house, and he thereupon conveyed all his property, worth about one thousand five hundred dollars, to a prostitute, under an agreement whereby she was to give him three meals a day, furnish him a room in which to sleep, and upon his death inter him decently by the side of his wife's grave; and he was to do as much work for her as his strength would permit. Pursuant to said agreement, he took up his residence at her home, commonly known as a house of ill fame, and used for purposes of prostitution. Whether or not he knew of the character of the woman and her house when he made the arrangement did not fully appear; but he had sold her vegetables at her house for two or three years prior thereto. It was not shown that he was connected with any lewdness, that he was guilty of any acts of carnal intercourse, or that he actively participated in any acts of prostitution. It was held that a conviction under Ind. Rev. St. (1881) § 2002, as amended by Acts (1889), 337, for frequenting and visiting a house of ill fame, and associating with "females known or reputed as prostitutes," was warranted by the evidence. Weideman *v.* State, 4 Ind. App. 397, 30 N. E. 920.

35. See CRIMINAL LAW, 12 Cyc. 504 *et seq.*

36. **Order of proof.**— The necessary proof of defendant's connection with the house may be shown at any time before the closing of prosecution's evidence. Bindernagle *v.* State, 60 N. J. L. 307, 37 Atl. 619, holding that it is not necessary that defendant's connection with the house be shown before proof of acts within the house which tend to prove its character.

37. **Questions for jury.**—Whether the proof is sufficient to establish the existence of a disorderly house, or whether it is sufficient to charge defendant, alleged to be the keeper, with the management and control of the house, are questions which are solely within the province of the jury to determine. Bindernagle *v.* State, 60 N. J. L. 307, 37 Atl. 619. Whether satisfactory evidence has been produced to show that defendant, the alleged keeper of a disorderly house, has been guilty of habitually permitting such acts, sufficient occurrence of which would bring the house within the definition of a disorderly house, is a question for the jury. Brown *v.* State, 49 N. J. L. 61, 7 Atl. 340.

38. See CRIMINAL LAW, 12 Cyc. 611 *et seq.*

Instructions must be responsive to the indictment or information. Ross *v.* State, (Tex. Cr. App. 1896) 33 S. W. 972. And see Rhodes *v.* Com., 12 Ky. L. Rep. 717, instruction as to a "disorderly house" upon a charge of "keeping a bawdy-house." But see Bass *v.* State, (Tex. Cr. App. 1902) 66 S. W. 558 (instructions fuller than the charge in the complaint); Dailey *v.* State, (Tex. Cr. App. 1900) 55 S. W. 821 (presenting two phases of the same statute).

As to time.— Where an indictment alleges the keeping of a disorderly house from Oct. 22, 1887, and on each day thereafter, to Oct. 28, 1887, it is error for the court to instruct the jury that the indictment charges the keeping of the house from Oct. 8 to Jan. 31, 1888. Fleming *v.* State, 28 Tex. App. 234, 12 S. W. 605.

"Concerned in" keeping under a charge of keeping.— Upon a trial for keeping a disorderly house, the jury were instructed as follows: "If the jury believe from the evidence that the defendant did, in Hunt county, Texas, on or about the fourth day of May, 1886, either alone or in connection with another, keep a disorderly house, or was in any way concerned in keeping a disorderly house, you will find him guilty, and assess his punishment," etc. It was held correct, because keeping and being concerned in keeping a disorderly house amount to one and the same thing, within the meaning of the law. Stone *v.* State, 22 Tex. App. 185, 2 S. W. 585. In Ross *v.* State, (Tex. Cr. App. 1902) 70 S. W. 543, a charge predicated on the idea that defendant was "concerned in keeping" when the evidence showed only that defendant was owner and keeper worked no harm to defendant.

39. **Defining offense.**— Although it is the duty of the court to define the crime to the jury (Nelson *v.* Territory, 5 Okla. 512, 49 Pac. 920), a formal definition is not required; it is sufficient to inform the jury with sufficient fulness and accuracy what acts constitute the offense (State *v.* Clark, 78 Iowa 492, 43 N. W. 273). And *compare* Bass *v.* State, (Tex. Cr. App. 1902) 66 S. W. 558 (instruction not misleading as to knowledge of defendant); Sparks *v.* State, (Tex. Cr. App. 1899) 51 S. W. 1120 (instruction not confining crime to limits set by statute).

A definition which is not technically correct is not necessarily error if not misleading. State *v.* Toombs, 79 Iowa 741, 45 N. W. 300.

Defining term "common prostitute."— Under the statute punishing keepers of disorderly houses there was no error in refusing to define the term "common prostitute," the offense under the statute not requiring that prostitution should be plied indiscriminately by the inmates. Dailey *v.* State, (Tex. Cr. App. 1900) 55 S. W. 821.

"Pimp" wrongly defined.— It is error to charge, in a prosecution for keeping a house of ill fame, that "a pimp is a man who has intercourse with a loose woman, and usually she is taking care of him and supporting him"; and that the fact that defendant called a man "her pimp" established "a case of unwarranted sexual intercourse," the definition being erroneous, and the instruction in-

instructions upon the evidence generally,[40] instructions weighing the evidence,[41] charges according to request,[42] or instructions constituting harmless error;[43] to the validity and effect of verdicts;[44] to the validity and effect of judgments and convictions;[45] to motions in arrest of judgment;[46] to motions for new trial,[47] etc.

vading the province of the jury. People *v.* Gastro, 75 Mich. 127, 42 N. W. 937.

Refusing to instruct as to the meaning of the word "prostitution," in a prosecution for keeping a disorderly house for the purpose of public prostitution, is not a fatal error. The meaning of the word is too well understood. Bigby *v.* State, 5 Tex. App. 101.

Whole charge to be considered.— In determining whether the court has properly defined the offense in its charge to the jury, the instructions must be considered as a whole, not in fragmentary parts. Territory *v.* Chartrand, 1 Dak. 379, 46 N. W. 583; People *v.* Russell, 110 Mich. 46, 67 N. W. 1099.

40. Instructions on the evidence.— Instructions should not be so framed that the jury can infer all the elements of the offense from a proof of part of them. O'Brien *v.* People, 28 Mich. 213.

41. Weighing the evidence.— It is error in the course of the instructions for the court to invade the province of the jury by weighing the evidence (People *v.* Gastro, 75 Mich. 127, 42 N. W. 937; Stone *v.* State, 22 Tex. App. 185, 2 S. W. 585. And see People *v.* Wells, 112 Mich. 648, 71 N. W. 176, as to conduct of defendant and associates on the street; Forbes *v.* State, 35 Tex. Cr. 24, 29 S. W. 784, as to weight of particular acts of prostitution); or by showing how it regards certain evidence (State *v.* Emblem, 44 W. Va. 521, 29 S. E. 1031).

Instruction foreclosing inquiry as to character of a house.— Upon a prosecution under Iowa Code, § 4939, for keeping a house of ill fame, the court instructed that in considering whether the house was a house of ill fame the jury should carefully consider its reputation, the actions of those visiting it, the time they did so, the reputation of the inmates of the house as well as the reputation of those who visited the house, and all the facts and circumstances shown in evidence, and from these determine the real character of the house "charged in the indictment to be a house of ill fame." It was held that the contention that the instruction foreclosed all inquiry regarding the character of the house was without merit and that the instruction was correct. State *v.* Beebe, 115 Iowa 128, 88 N. W. 358.

42. Charging according to request.— Proper requests to charge the jury as to matters not touched upon by the court in its general instructions should be granted. Gamel *v.* State, 21 Tex. App. 357, 17 S. W. 158. Where, however, the general instructions embrace substantially, but in different language, all the material instructions requested by defendant, he has no ground of exception. Com. *v.* Cobb, 120 Mass. 356; Stratton *v.* State, (Tex. Cr. App. 1898) 44 S. W. 506; Johnson *v.* State, (Tex. Cr. App. 1893) 21 S. W. 929.

43. Harmless error.— An instruction which is impertinent or is an inapplicable statement of the law is not reversible error where it could not have misled the jury and where the law was elsewhere fully and accurately stated. Graeter *v.* State, 105 Ind. 271, 4 N. E. 461; State *v.* Russell, 95 Iowa 406; 64 N. W. 281; State *v.* Hendricks, 15 Mont. 194, 39 Pac. 93, 48 Am. St. Rep. 666; Ross *v.* State, (Tex. Cr. App. 1902) 70 S. W. 543.

Cautionary instruction as to real issue.— On a prosecution for keeping a house of ill fame, evidence having been elicited affecting defendant's character for chastity, and that she had been charged with selling liquor illegally, a cautionary instruction that, "however bad she may be, or however guilty of other offenses, the question for you to determine is whether she is guilty of the offense charged," was not improper. People *v.* Wells, 112 Mich 648, 71 N. W. 176.

Erroneous instruction as to amount of fine. — On a trial for keeping a disorderly house, the punishment for which is fixed by Tex. Pen. Code, art. 341, at a fine of not less than one hundred dollars, nor more than five hundred, it was error to instruct the jury if they found defendant guilty, to assess his fine at two hundred dollars. Holland *v.* State, (Tex. Cr. App. 1895) 29 S. W. 786.

44. Verdict.— Upon an indictment charging that defendant kept a disorderly house to the common nuisance, etc., a verdict that "defendant kept a disorderly house and disturbed his neighbors" is bad. Hunter *v.* Com., 2 Serg. & R. (Pa.) 298.

45. On a verdict finding the accused guilty of keeping a disorderly house a judgment decreeing the establishment to be a nuisance and ordering the sheriff to abate it is void. Brooks *v.* State, 4 Tex. App. 567. *Compare* State *v.* Mullen, 35 Iowa 199.

A conviction for keeping a disorderly house which does not name a place where the offense was committed is void on its face for uncertainty. And if the conviction contains no adjudication of forfeiture of the fine imposed it is defective. Reg. *v.* Cyr, 12 Ont. Pr. 24.

Form of judgment see People *v.* Buchanan, 1 Ida. 681; Reg. *v.* Munro, 24 U. C. Q. B. 44.

46. A motion in arrest of judgment will not be sustained because the proof on the trial did not show that the house charged to have been disorderly was situated in the ward of the city that was alleged. Jacobowsky *v.* People, 6 Hun (N. Y.) 524.

47. A motion for a new trial upon an affidavit that affiant was defendant's husband living with her prior and subsequent to the time she was alleged to have kept the house will not be granted. Curry *v.* State, (Tex. Cr. App. 1893) 24 S. W. 516.

Appeal.— A prosecution for being an inmate of a bawdy-house is under Can. Cr.

XVI. PUNISHMENT.

At common law the keeping of a bawdy-house was punished with fine and imprisonment, and such other infamous punishment as the pillory, etc., as the court in its discretion should inflict.[48] The punishment of one convicted of keeping a disorderly house or of a kindred offense is now generally regulated by statute.[49]

XVII. SUPPRESSION.

A house used for prostitution in the city of New Orleans, without the limits prescribed by ordinance, may be proceeded against and closed to such purposes and its occupants forced to remove, on notice from the mayor to that effect.[50]

DISORDERLY PERSON. In common parlance, a person guilty of disorderly conduct.[1] (See, generally, BREACH OF THE PEACE; DISORDERLY CONDUCT; DISORDERLY HOUSES; VAGRANCY.)

DISPARAGEMENT. In old English law, an injury by union or comparison with some person or thing of inferior rank or excellence.[2] (Disparagement: Of Title, see ESTOPPEL; LANDLORD AND TENANT.)

Code (1892), § 783, not under the vagrancy act and no appeal lies under § 808. Reg. *v.* Nixon, 19 Can. L. T. 344.

Removal by certiorari.— Under 25 Geo. 2, c. 36, § 10, which enacts "that no indictment which shall . . . be preferred against any person for keeping a bawdy house, gaming house, or other disorderly house, shall be removed by any writ of certiorari into any other court; but such indictment shall be heard, tried and finally determined, at the same general or quarter sessions or assizes, where such indictment shall have been preferred (unless the Court shall think proper, upon cause shown, to adjourn the same), any such writ or allowance thereof notwithstanding," no indictment for keeping a disorderly house can be removed by certiorari, whether the indictment is at the prosecution of a constable or at the instance of a private individual. Reg. *v.* Sanders, 9 Q. B. 235, 237, 10 Jur. 1080, 15 L. J. M. C. 158, 58 E. C. L. 235.

48. 5 Bacon Abr. 146; 1 Hawkins P. C. c. 74; Jacob L. Dict.

Under Alabama code.— The punishment for the common-law offense of keeping a bawdy-house not being "particularly specified" in the revised code, the court on conviction may properly award the punishment authorized by section 3754 thereof. *Ex p.* Birchfield, 52 Ala. 377.

49. U. S. *v.* Marshall, 6 Mackey (D. C.) 34; State *v.* Grosofski, 89 Minn. 343, 94 N. W. 1077. And see Reg. *v.* Stafford, 1 Can. Cr. Cas. 239.

Nuisance abated — Nominal fine.— On a conviction for keeping a disorderly house, if the nuisance is abated, a nominal fine only will be inflicted, unless the case demands exemplary punishment. People *v.* Brougham, 1 Wheel. Cr. (N. Y.) 40.

Place of serving sentence see Huber *v.* Robinson, 23 Ind. 137.

Punishment may be modified where the actual knowledge of the keeper is not shown. People *v.* Miller, 15 N. Y. Suppl. 516.

Punishment not excessive.— A verdict assessing a fine of three hundred dollars and costs, or in default of payment thereof within ten days work in the chain gang for twelve months, for openly and notoriously maintaining a lewd house, is not excessive. McCain *v.* State, 57 Ga. 390. So a penalty of fifty dollars imposed by an ordinance for the maintenance of a building as a house of ill fame is not excessive. McAlister *v.* Clark, 33 Conn. 91.

50. New Orleans *v.* Chappuis, 105 La. 206, 29 So. 723, holding, however, that whenever a house is denounced as one of ill fame, and notice to vacate is given, the occupant is entitled to raise and have tried the issue of the immoral use of the premises, or the character of the house, before conviction for not moving can legally be made.

If immediately upon receipt of the notice the occupants alter their conduct and abandon their occupation, they cannot be forced to move. New Orleans *v.* Chappuis, 105 La. 179, 29 So. 721.

Bond by defendant.— Where the offense charged in a complaint is that of keeping a house of bawdry, and the accused is found guilty of that specific offense alone, an order requiring the accused to give bonds not to keep or frequent houses of bawdry is illegal, and a bond in conformity thereto is void. Darling *v.* Hubbell, 9 Conn. 350. And see BREACH OF THE PEACE, 5 Cyc. 1028.

1. Matter of Miller, 1 Daly (N. Y.) 562, 566.

2. Black L. Dict.

"**Inequality of fortune never constituted 'disparagement.'** Thereby was contemplated some personal or social defect or disqualification, such as deformity, lunacy, disease, villenage, alienage or corruption of blood. . . . In no sense, analogous to the ancient import of the term, could the marriage of

DISPARATA NON DEBENT JUNGI. A maxim meaning "Dissimilar things ought not to be joined."[3]

DISPAUPER. To deprive of the privilege of suing *in forma pauperis*.[4] (See, generally, Costs.)

DISPENSARY. A room or place for the distribution of medicine.[5] (Dispensary Act: In General, see Intoxicating Liquors. Interference With Interstate Commerce, see Commerce.)

DISPENSATIO EST MALI PROHIBITI PROVIDA RELAXATIO, UTILITATE SEU NECESSITATE PENSATA; ET EST DE JURE DOMINO REGI CONCESSA, PROPTER IMPOSSIBILITATEM PRÆVIDENDI DE OMNIBUS PARTICULARIBUS. A maxim meaning "A dispensation is the provident relaxation of a *malum prohibitum* weighed from utility or necessity; and it is conceded by law to the king on account of the impossibility of foreknowledge concerning all particulars."[6]

DISPENSATIO EST VULNUS, QUOD VULNERAT JUS COMMUNE. A maxim meaning "A dispensation is a wound, which wounds common law."[7]

DISPENSATION. A relaxation of law for the benefit or advantage of an individual.[8] (See, generally, Exemptions.)

DISPENSE.[9] To deal out, to distribute, to give.[10]

DISPLACE. To disrate;[11] to remove from a place of honor or profit; to take the place of.[12]

DISPLAY. To show; expose to the view; exhibit to the eyes.[13] (See Delineation.)

DISPONE. In Scotch law, sometimes used in the sense of Alienate,[14] *q. v.*

DISPONET. As used in ecclesiastical law, to have the disposal or administration of a thing.[15]

DISPOSAL.[16] A word often used in the sense of regulating, ordering, conducting, and government;[17] and sometimes used as equivalent to Distribution,[18] *q. v.*

the female plaintiff with her first husband have been deemed a marriage in disparagement." Shutt *v.* Carloss, 36 N. C. 232, 240 [*citing* Coke Litt. 80, 81, 82].

3. Bouvier L. Dict.

4. Webster Int. Dict.

5. Dilworth *v.* Stamp Commissioner, [1899] A. C. 99, 107, 68 L. J. P. C. 1, 79 L. T. Rep. N. S. 473, 47 Wkly. Rep. 337.

As defined by statute, the term means a dispensary house for the medical officer of any dispensary district, etc. 42 & 43 Vict. (1879) c. 25, subs. 2.

"There, of course, may be dispensaries for the disposition of the commodities other than these liquors, but when reference is made to them by the use of the word 'dispensary,' there must be some express differentiation else the reference will be understood to be to dispensaries of liquors." Mitchell *v.* State, 134 Ala. 392, 401, 32 So. 687. See also State *v.* Aiken, 42 S. C. 222, 226, 20 S. E. 221, 26 L. R. A. 345.

6. Black L. Dict.

7. Black L. Dict.

8. Bouvier L. Dict.

"A dispensation or licence properly passeth no Interest, nor alters or transfers Property in any thing, but only makes an Action lawful, which without it had been unlawful." Thomas *v.* Sorrell, Vaugh. 330, 351 [*quoted* in Baldwin *v.* Taylor, 166 Pa. St. 507, 511, 31 Atl. 250].

9. May mean "suspend." Bayard *v.* Baker, 76 Iowa 220, 222, 40 N. W. 818. See also Pittsburg *v.* Danforth, 56 N. H. 272, 274.

10. Johnson *v.* Chattanooga, 97 Tenn. 247, 251, 36 S. W. 1092.

11. Black L. Dict. [*citing* Potter *v.* Smith, 103 Mass. 68, 69].

12. English L. Dict.

13. Century Dict.

"The term 'display' used in the statute [relating to unmailable matter] . . . is as applicable to the word 'delineations' as it is to writing or printing." U. S. *v.* Dodge, 70 Fed. 235, 236.

14. *In re* Queensberry Leases, 1 Bligh 339, 406, 4 Eng. Reprint 127.

"Disponee" construed by statute see 10 & 11 Vict. c. 48, § 22; 31 & 32 Vict. c. 101, § 3.

"Disponer" construed by statute see 10 & 11 Vict. c. 48, § 22; 31 & 32 Vict. c. 101, § 3.

15. Smith *v.* Bonhoof, 2 Mich. 115, 121.

16. The word is one of broad significance and varied in meaning. Koerner *v.* Wilkinson, 96 Mo. App. 510, 517, 70 S. W. 509.

"The word has no technical meaning." Trutch *v.* Bunnell, 11 Oreg. 58, 64, 4 Pac. 588, 50 Am. Rep. 456.

"Gift" may be included within the meaning of the term. Reg. *v.* Walsh, 1 Can. Cr. Cas. 109, 110.

"A power to mortgage is neither necessarily implied in the word 'disposal,' nor does its association with the word 'sale' indicate that any such interpretation can be legitimately put upon it." Trutch *v.* Bunnell, 11 Oreg. 58, 64, 4 Pac. 588, 50 Am. Rep. 456.

17. Baggett *v.* Meux, 1 Coll. Ch. 138, 151, 8 Jur. 391, 13 L. J. Ch. 228, 28 Eng. Ch. 138, meaning little, if anything, more than "management."

18. Goldberg *v.* Kidd, 5 S. D. 169, 179, 58 N. W. 574, applied to the disposal of town lots.

DISPOSE.[19] Generally used in connection with the preposition "of" and means to determine the fate of; to exercise the power of control over; to fix the condition, application, employment, etc., of; to direct or assign for a use;[20] to exercise finally one's powers of control over; to pass over into the control of another.[21] Also to ALIENATE[22] (*q. v.*) or direct the ownership of property[23] as disposed by will;[24] to assign property to a use;[25] to bestow;[26] to collect;[27] CONVEY,[28] *q. v.*; to effectually transfer;[29] to exchange for other property;[30] to get rid of;[31] to give;[32] to part with;[33] to part with the right to, or ownership of property, in other words, a change of property;[34] to relinquish;[35] to sell;[36] to sell at

19. "Is capable of a double meaning."—Crooke *v.* Kings County, 97 N. Y. 421, 441.

Compared with "assigned" and "secreted" see Guile *v.* McNanny, 14 Minn. 520, 100 Am. Dec. 244.

"Disposing of the case" employed in a statute see Jackson, etc., St. R., etc., Co. *v.* Simmons, 107 Tenn. 392, 396, 64 S. W. 705.

Hiding the dead body of a child between the bed and mattrass is a sufficient "disposing" of the body under a statute prescribing a punishment for such offense. Reg. *v.* Goldthorpe, C. & M. 335, 336, 2 Moody 244, 41 E. C. L. 186.

"Manage, dispose, and divide" as used in a statute in relation to common lands see Rogers *v.* Goodwin, 2 Mass. 475, 477.

"Sold, leased, or disposed of" used in reference to Indian reservations see Love *v.* Pamplin, 21 Fed. 755, 760.

20. Webster Dict. [*quoted* in Koerner *v.* Wilkinson, 96 Mo. App. 510, 517, 70 S. W. 509; Swenson *v.* Kleinschmidt, 10 Mont. 473, 482, 26 Pac. 198, dissenting opinion].

21. Herold *v.* State, 21 Nebr. 50, 56, 31 N. W. 258 (dissenting opinion); Webster Dict. [*quoted* in Koerner *v.* Wilkinson, 96 Mo. App. 510, 517, 70 S. W. 509].

22. U. S. *v.* Hacker, 73 Fed. 292, 294 [*citing* Taylor *v.* Kymer, 3 B. & Ad. 320, 1 L. J. K. B. 114, 23 E. C. L. 145]; Abbott L. Dict. [*quoted* in Pearre *v.* Hawkins, 62 Tex. 434, 437]; Webster Dict. [*quoted* in Koerner *v.* Wilkinson, 96 Mo. App. 510, 517, 70 S. W. 509; Waddell's Appeal, 84 Pa. St. 90, 96].

23. Abbott L. Dict. [*quoted* in Pearre *v.* Hawkins, 62 Tex. 434, 437].

24. Smith *v.* Becker, 62 Kan. 541, 547, 64 Pac. 70, 53 L. R. A. 141 [*quoting* Bouvier L. Dict.], dissenting opinion. See also Mace *v.* Mace, 95 Me. 283, 286, 49 Atl. 1038 (construing "found and disposed of by my executor" as used in a will); Woodbridge *v.* Jones, 183 Mass. 549, 553, 67 N. E. 878 (to the effect that the word "dispose" in a will includes a conveyance absolute and in fee simple); Benz *v.* Fabian, 54 N. J. Eq. 615, 620, 35 Atl. 760 (construing "dispose of as she may think proper" as used in a will); Stevens *v.* Flower, 46 N. J. Eq. 340, 341, 19 Atl. 777 (construing "dispose of all or any part thereof at her discretion" as used in a will); King *v.* Ackerman, 2 Black (U. S.) 408, 415, 17 L. ed. 292 (construing "dispose as he may think proper" as used in a will). But see Smith *v.* Becker, 62 Kan. 541, 542, 64 Pac. 70, 53 L. R. A. 141, where it is said that these words will not pass property by descent.

25. Abbott L. Dict. [*quoted* in Pearre *v.* Hawkins, 62 Tex. 434, 437].

26. Abbott L. Dict. [*quoted* in Pearre *v.* Hawkins, 62 Tex. 434, 437]; Webster Dict. [*quoted* in Koerner *v.* Wilkinson, 96 Mo. App. 510, 517, 70 S. W. 509].

27. Fling *v.* Goodall, 40 N. H. 208, 219, as to dispose of a note by collecting it.

28. Cook *v.* Burnham, 3 Kan. App. 27, 44 Pac. 447. See also Hunt *v.* Hunt, 11 Nev. 442, 449.

29. U. S. *v.* Hacker, 73 Fed. 292, 294 [*citing* Taylor *v.* Kymer, 3 B. & Ad. 320, 1 L. J. K. B. 114, 23 E. C. L. 145]. And see Howard *v.* Caperon, 3 Tex. App. Civ. Cas. § 313 [*citing* Pearre *v.* Hawkins, 62 Tex. 434], where it is said: "The word 'dispose' has a broader signification than the word 'transfer.' A fraudulent transfer of property is a fraudulent disposition of it."

As used in a statute the words mean the transfer of the land to some other person, not the application of it to purposes different from that for which the land was originally obtained. Astley *v.* Manchester, etc., R. Co., 2 De G. & J. 453, 464, 4 Jur. N. S. 567, 27 L. J. Ch. 478, 6 Wkly. Rep. 561, 59 Eng. Ch. 359.

30. Sprecht *v.* Parsons, 7 Utah 107, 108, 25 Pac. 730.

31. Herold *v.* State, 21 Nebr. 50, 56, 31 N. W. 258 (dissenting opinion); Webster Dict. [*quoted* in Koerner *v.* Wilkinson, 96 Mo. App. 510, 517, 70 S. W. 509; *In re* Olson, (S. D.) 1903) 94 N. W. 421, 422].

32. Franklin *v.* State, 12 Md. 236, 248 [*citing* Johnson Dict.; Todd Dict.; Walker Dict.].

33. Herold *v.* State, 21 Nebr. 50, 56, 31 N. W. 258 (dissenting opinion); Webster Dict. [*quoted* in Koerner *v.* Wilkinson, 96 Mo. App. 510, 517, 70 S. W. 509; Waddell's Appeal, 84 Pa. St. 90, 96; *In re* Olson, (S. D. 1903) 94 N. W. 421, 422].

"Dispose" of a seat in a stock exchange see Clute *v.* Loveland, 68 Cal. 254, 259, 9 Pac. 133.

34. Reynolds *v.* State, 73 Ala. 3, 4.

35. Webster Dict. [*quoted* in *In re* Olson, (S. D. 1903) 94 N. W. 421, 422].

36. Webster Dict. [*quoted* in Waddell's Appeal, 84 Pa. St. 90, 96]. See also Cook *v.* Burnham, 3 Kan. App. 27, 44 Pac. 447; Hunt *v.* Hunt, 11 Nev. 442, 449; Matter of Hesdra, 20 N. Y. Suppl. 79, 81, 2 Connoly Surr. (N. Y.) 514. But see Sheffield *v.* Orrery, 3 Atk. 282, 287, 26 Eng. Reprint 965, where it is said: "Dispose [of all real and personal property, as used in a will] does not import to sell, but to manage to the best advantage for the family."

Applied to spirituous liquors.—In State *v.* Deusting, 33 Minn. 102, 103, 22 N. W. 442,

auction;[37] to sell for cash or on time;[38] to transfer to any person or to put into the hands of another, or to put away by any means.[39] The term imports finality.[40]

DISPOSED OF. Among its dictionary meanings, the term implies bargain, alienation, passing from one into the control of another, parting with.[41]

DISPOSING CAPACITY. See WILLS.

DISPOSING MIND. See WILLS.

DISPOSITION.[42] DISPOSAL, *q. v.*; plan or arrangement for the disposal, distribution, or alienation of something; definite settlement with regard to some matter; ultimate destination.[43] In Scotch law, a unilateral deed by which a property right is transferred.[44] (Disposition: Of Person — Arrested, see ARREST; BAIL; CRIMINAL LAW; Convicted, see BAIL; CONVICTS; CRIMINAL LAW; PRISONS; REFORMATORIES. Of Property[45] — By Deed, see DEEDS; By Sale, see SALES; VENDOR AND PURCHASER; By Will, see WILLS. See also DISPOSAL; DISPOSE.)

DISPOSSESSED. Deprived of possession or occupancy.[46]

DISPOSSESSION.[47] The act of putting out of possession.[48] (See DISSEIZIN.)

DISPROVE. To prove to be false or erroneous.[49]

53 Am. Rep. 12, the court, in speaking of an ordinance which provided that "no person shall sell, vend, deal in, or dispose of any spirituous, vinous, fermented, or malt liquors," etc., said: "The terms 'dispose of' are meant to include other forms of disposal than indicated by the preceding words in the ordinance, though consistent with them as respects its intent and purpose."

Considered with reference to public lands see Andrew *v.* Auditor, 5 Ohio S. & C. Pl. Dec. 242, 251; U. S. *v.* Gratiot, 14 Pet. (U. S.) 526, 538, 10 L. ed. 573.

May be of broader import than "sell." Noyes *v.* Lane, 1 S. D. 125, 127, 45 N. W. 327. See also Builders', etc., Supply Co. *v.* Lucas, 119 Ala. 202, 209, 24 So. 416; Auerbach *v.* Hitchcock, 28 Minn. 73, 74, 9 N. W. 79; Hill *v.* Sumner, 132 U. S. 118, 123, 10 S. Ct. 42, 33 L. ed. 284; Phelps *v.* Harris, 101 U. S. 370, 380, 25 L. ed. 855; Platt *v.* Union Pac. R. Co., 99 U. S. 48, 25 L. ed. 424.

May import power to mortgage. Platt *v.* Union Pac. R. Co., 99 U. S. 48, 67, 25 L. ed. 424. But see dissenting opinion of Bradley, J., where it is said: "The criticism that the words 'sold or disposed of' mean something more than 'sold,' and can only mean a mortgage of the lands, I do not conceive to be just, but rather as sticking in the bark." See also Rutherford Land, etc., Co. *v.* Sanntrock, 60 N. J. Eq. 471, 473, 46 Atl. 648.

37. Fling *v.* Goodall, 40 N. H. 208, 219.

38. Sprecht *v.* Parsons, 7 Utah 107, 108, 25 Pac. 730.

39. Johnson Dict. [*quoted* in People *v.* Rathbun, 21 Wend. (N. Y.) 509, 527].

40. Rutherford Land, etc., Co. *v.* Sanntrock, 60 N. J. Eq. 471, 473, 46 Atl. 648.

41. Gould *v.* Head, 41 Fed. 240, 245 [*citing* Webster Dict.], where it is said: "Of course, the import of this term may be so limited by its context and its cognates as not to extend to a conveyance or sale of property."

As used in attachment statutes.— "The word 'disposed' . . . was, we think, intended to cover and does cover all such alienations of property as may be made in ways not otherwise pointed out in the statute; for example, such as pledges, gifts, pawns, bailments and other transfers and alienations as may be effected by mere delivery, and without the use of any writing, assignment or conveyance." Bullene *v.* Smith, 73 Mo. 151, 161. See, generally, ATTACHMENT.

As used in a will the term implies a transfer or disposition by will. Crane's Appeal, 2 Root (Conn.) 487, 488. See, generally, WILLS.

42. **Not synonymous with "character"** see 6 Cyc. 892 note 37.

43. Century Dict. And see Hecker *v.* New York Balance Dock Co., 24 Barb. (N. Y.) 215, 221, where the term was applied to vessels.

"Disposition" as used in a contract see Bonito *v.* Mosquera, 2 Bosw. (N. Y.) 401, 431.

"Final disposition" of a claim against the federal government under a statute see *Ex p.* Russell, 13 Wall. (U. S.) 664, 669, 20 L. ed. 632.

44. English L. Dict.

45. **Fraudulent disposition** of property see ASSIGNMENTS FOR BENEFIT OF CREDITORS; ATTACHMENT; BANKRUPTCY; FRAUDULENT CONVEYANCES; INSOLVENCY.

46. Webster Unabr. Dict. [*quoted* in Mattoon *v.* Munroe, 21 Hun (N. Y.) 74, 81].

47. **Distinguished from disseizin.**— In Draper *v.* Monroe, 18 R. I. 398, 400, 28 Atl. 340 [*quoting* 4 Kent Comm. 482], it is said: "There was a distinction between dispossession and disseisin; for disseisin was a wrong to the freehold, and made in defiance and contempt of the true owner. It was an open, exclusive, adverse entry and expulsion; whereas dispossession might be by right or by wrong; and it was necessary to look at the intention, in order to determine the character of the act." See also Slater *v.* Rawson, 6 Metc. (Mass.) 439, 444; Smith *v.* Burtis, 6 Johns. (N. Y.) 197, 217, 5 Am. Dec. 218. See *infra*, note 67.

48. Webster Unabr. Dict. [*quoted* in Mattoon *v.* Munroe, 21 Hun (N. Y.) 74, 81].

49. Irsch *v.* Irsch, 12 N. Y. Civ. Proc. 181, 182.

DISPUTABLE PRESUMPTIONS. Inferences of law which hold good until they are invalidated by proof or a stronger presumption.[50] (See, generally, EVIDENCE.)

DISPUTE. As a noun, a conflict or CONTEST,[51] *q. v.*; sometimes used in the sense of CONTROVERSY,[52] *q. v.* As a verb, to argue, to reason, to discuss.[53] (Dispute: Amount in, to Determine Jurisdiction, see APPEAL AND ERROR; COURTS; JUSTICES OF THE PEACE. Civil Action in General, see ACTIONS. Submission of — To Arbitrators, see ARBITRATION AND AWARD; To Court Without Action, see SUBMISSION OF CONTROVERSY.)

DISPUTED. Contested; resisted.[54]

DISQUALIFICATION. That which disqualifies or incapacitates.[55] (Disqualification: Of Arbitrator, see ARBITRATION AND AWARD. Of Auditor, see ACCOUNTS AND ACCOUNTING; REFERENCES. Of Corporate Officer, see CORPORATIONS. Of Elector, see ELECTIONS. Of Judge, see JUDGES. Of Juror, see JURIES. Of Justice, see JUSTICES OF THE PEACE. Of Officer, see OFFICERS. Of Referee, see REFERENCES. Of Witness, see WITNESSES.)

DISQUALIFIED. Ineligible.[56]

DISQUALIFY. In its natural and ordinary sense to incapacitate, to disable, to divest or deprive of qualifications;[57] to deprive of the qualities or properties necessary for any purpose; to render unfit; to incapacitate; to deprive of legal capacity, power or right; to disable.[58]

DISQUALIFYING OPINION. A fixed, absolute, positive, definite, settled, decided, inconsiderate opinion.[59]

DISQUE. A term used to describe a form of electric battery.[60] (See, generally, PATENTS.)

DISREGARD. As a noun, a word sometimes used in the sense of regret.[61] As a verb, to omit to regard or take notice of; overlook.[62]

DISSECT. To cut apart or to pieces.[63]

DISSECTION. The act of dissecting or cutting in pieces an animal or vegetable for the purpose of ascertaining the structure and uses of its parts; anatomy;[64]

50. Bouvier L. Dict. [*quoted* in Brandt *v.* Morning Journal Assoc., 81 N. Y. App. Div. 183, 185, 80 N. Y. Suppl. 1002].

51. Standard Dict. [*quoted* in State *v.* Guinotte, 156 Mo. 513, 519, 57 S. W. 281, 50 L. R. A. 787].

As used in a will see Brecken *v.* Wright, 1 Haz. & W. (Pr. Edw. Isl.) 267, 269.

"Dispute as to the amount of any compensation" as used in statute relating to sewers see Bradby *v.* Board of Health, 3 C. L. R. 771, 4 E. & B. 1014, 1020, 1 Jur. N. S. 778, 24 L. J. Q. B. 239, 3 Wkly. Rep. 413, 82 E. C. L. 1014.

52. Keith *v.* Levi, 2 Fed. 743, 745, 1 McCrary 343.

53. Webster Dict. [*quoted* in Brecken *v.* Wright, 1 Haz. & W. (Pr. Edw. Isl.) 267, 269].

54. Webster Int. Dict. And see Hoyt *v.* Bonnett, 50 N. Y. 538, 543 ("disputed" by an executor); Noyes *v.* Phillips, 57 Vt. 229, 230 ("disputed" claims); Chicago, etc., R. Co. *v.* Clark, 92 Fed. 968, 985, 35 C. C. A. 120 ("disputed" demand).

55. Century Dict.

56. Carroll *v.* Green, 148 Ind. 362, 364, 47 N. E. 223 [*citing* Soule Synonyms]. And see Matter of Tyers, 41 Misc. (N. Y.) 378, 380, 84 N. Y. Suppl. 934.

57. *In re* Maguire, 57 Cal. 604, 606, 40 Am. Rep. 125.

58. *In re* Maguire, 57 Cal. 604, 606, 40 Am. Rep. 125 [*quoting* Webster Dict., and *citing* Worcester Dict.].

59. Thompson & M. Juries, § 211 [*quoted* in State *v.* Hebert, 104 La. 227, 228, 28 So. 898; State *v.* Williams, 49 La. Ann. 1148, 1152, 22 So. 759], as applied to opinions of jurors.

60. "And [it] is used to distinguish is from the prism and other forms of porous-cup batteries." Leclanche Battery Co. *v.* Western Electric Co., 23 Fed. 276, 277.

61. People *v.* Compton, 123 Cal. 403, 409, 56 Pac. 44.

62. Century Dict.

A report "that he 'disregards' the evidence of the returns [made by a commissioner] . . . does not mean that he rules it to be inadmissible, . . . but he means that as a judge of facts he finds it untrustworthy and uninstructive for good reasons, which he gives." National Bank of Commerce *v.* New Bedford, 175 Mass. 257, 260, 56 N. E. 288.

"Disregard the statute of limitations" as used in a will see Campbell *v.* Shotwell, 51 Tex. 27, 35.

63. Wehle *v.* U. S. Mutual Acc. Assoc., 11 Misc. (N. Y.) 36, 38, 31 N. Y. Suppl. 865 [*citing* 2 Wharton & S. Med. Jur. (3d ed.) § 1010, subs. 4].

"Examine" is not a synonymous term. Sudduth *v.* Travelers' Ins. Co., 106 Fed. 822, 823.

64. Rhodes *v.* Brandt, 21 Hun (N. Y.) 1, 3.

the cutting apart of a dead body, or the cutting of it into pieces.[65] (See, generally, DEAD BODIES).

DISSEISINAM SATIS FACIT, QUI UTI NON PERMITTIT POSSESSOREM, VEL MINUS COMMODE, LICET OMNINO NON EXPELLAT. A maxim meaning "He makes disseisin who does not permit the possesser to enjoy, or make his enjoyment less useful, although he does not expel him altogether."[66]

DISSEIZIN.[67] A tortious ouster;[68] an ouster of the rightful owner of the seizin;[69] the wrongful ouster of the rightful tenant from the possession and an usurpation of the freehold;[70] a privation of seizin, the act of wrongfully depriving a person of the seizin of land;[71] putting a man out of possession;[72] putting a man out of seisin;[73] a wrongful putting out of him that is actually[74] seised of a freehold;[75] the wrongful entry upon, and ouster of, one seized of the freehold;[76] the act of divesting the owner of his seisin and possession of the land, and substituting in its place the ownership and possession of the disseisor;[77] the term applies to an estate gained by wrong and injury.[78] There is a disseizin where a man entereth into any lands or tenements where his entrance is not congeable and ousted him who hath the freehold;[79] or where one enters intending to usurp the possession and to oust another of his freehold.[80] There are two kinds of disseisin: a disseisin at the election of the owner of the land, and a disseisin in spite of the true owner.[81] (Disseizin: Basis of Adverse Possession, see ADVERSE POSSESSION.

65. Sudduth *v.* Travelers' Ins. Co., 106 Fed. 822, 823.

66. Bouvier L. Dict. [*citing* Coke Litt. 331; Bracton lib. 4, tr. 2].

67. Distinguished from "dispossession" see Slater *v.* Rawson, 6 Metc. (Mass.) 439, 444 [*citing* Coke Litt. 153*b*, 181*a*]; Doe *v.* Thompson, 5 Cow. (N. Y.) 371, 374; Smith *v.* Burtis, 6 Johns. (N. Y.) 197, 217, 5 Am. Dec. 218; Draper *v.* Monroe, 18 R. I. 398, 401, 28 Atl. 340 [*quoting* 4 Kent Comm. 482]; Taylor *v.* Horde, 1 Burr. 60, 111 [*quoting* Coke Litt. 153*b*]; and *supra*, note 47.

"Every disseizin is a trespass, but every trespass is not a disseizin." Worcester *v.* Lord, 56 Me. 265, 269, 96 Am. Dec. 456 [*quoting* 4 Kent Comm. 486]; Towle *v.* Ayer, 8 N. H. 57, 60; Doe *v.* Barnes, 2 N. Brunsw. 426, 431.

68. Smith *v.* Burtis, 6 Johns. (N. Y.) 197, 216, 5 Am. Dec. 218.

69. Worcester *v.* Lord, 56 Me. 265, 268, 96 Am. Dec. 456.

70. Griffith *v.* Huston, 7 J. J. Marsh. (Ky.) 385, 390.

71. Roberts *v.* Niles, 95 Me. 244, 245, 49 Atl. 1043 [*citing* Bouvier L. Dict.; Rapalje & L. L. Dict.].

72. Unger *v.* Mooney, 63 Cal. 586, 590, 49 Am. Rep. 100 [*quoting* Coke Litt. 153].

73. Taylor *v.* Horde, 1 Burr. 60, 111 [*quoting* Coke Litt. 153*b*].

74. Hoey *v.* Furman, 1 Pa. St. 295, 300, 44 Am. Dec. 129 [*citing* 3 Blackstone Comm. 169; Coke Litt. 277*a*].

75. Mitchell *v.* Warner, 5 Conn. 497, 518 [*citing* 1 Inst. 277]; 3 Blackstone Comm. [*quoted* in Unger *v.* Mooney, 63 Cal. 586, 590, 49 Am. Rep. 100; Altschul *v.* O'Neill, 35 Oreg. 202, 207, 58 Pac. 95].

76. People *v.* Van Rensselaer, 8 Barb. (N. Y.) 189, 194 [*citing* Coke Litt. 277].

77. Clapp *v.* Bromagham, 9 Cow. (N. Y.) 530, 552.

78. Slater *v.* Rawson, 6 Metc. (Mass.) 439, 444 [*citing* Coke Litt. 153*b*, 181*a*]; Doe *v.* Thompson, 5 Cow. (N. Y.) 371, 374; Smith *v.* Burtis, 6 Johns. (N. Y.) 197, 217, 5 Am. Dec. 218; Draper *v.* Monroe, 18 R. I. 398, 401, 28 Atl. 340.

79. Coke Litt. 181*a* [*quoted* in Unger *v.* Mooney, 63 Cal. 586, 590, 49 Am. Rep. 100; Bates *v.* Norcross, 14 Pick. (Mass.) 224, 228; Towle *v.* Ayer, 8 N. H. 57, 60; Altschul *v.* O'Neill, 35 Oreg. 202, 207, 58 Pac. 95; Taylor *v.* Horde, 1 Burr. 60, 111].

80. Spalding *v.* Mayhall, 27 Mo. 377, 379; Coke Litt. 153*b* [*quoted* in Moody *v.* Fleming, 4 Ga. 115, 120, 48 Am. Dec. 210; Bond *v.* O'Gara, 177 Mass. 139, 144, 58 N. E. 275, 83 Am. St. Rep. 265; Parker *v.* Banks, 79 N. C. 480, 485; Doe *v.* Barnes, 2 N. Brunsw. 426, 430]; 1 Greenleaf Cruise 51 [*quoted* in Worcester *v.* Lord, 56 Me. 265, 268, 96 Am. Dec. 456].

81. Porter *v.* Hammond, 3 Me. 188, 189. See also the following cases:

California.— Unger *v.* Mooney, 63 Cal. 586, 590, 49 Am. Rep. 100.

New Hampshire.— Towle *v.* Ayer, 8 N. H. 57, 60.

New York.— Varick *v.* Jackson, 2 Wend. 166, 203, 19 Am. Dec. 571; Smith *v.* Burtis, 6 Johns. 197, 215, 5 Am. Dec. 218.

North Carolina.—Parker *v.* Banks, 79 N. C. 480, 485 [*citing* Bradstreet *v.* Huntington, 5 Pet. (U. S.) 402, 440, 8 L. ed. 170; Coke Litt. 153].

United States.— Prescott *v.* Nevers, 19 Fed. Cas. No. 11,390, 4 Mason 326, 329.

England.— Taylor *v.* Horde, 1 Burr. 60, 111 [*citing* Blunden *v.* Baugh, Cro. Car. 302, 303].

Canada.— Doe *v.* Barnes, 2 N. Brunsw. 426, 431 [*citing* Blundell *v.* Baugh, W. Jones 315].

Necessity of force.— In Clapp *v.* Bromagham, 9 Cow. (N. Y.) 530, 552, it is said: "In its origin, when the seisin constituted the title of the owner to his freehold, it was the forcible expulsion of the tenant, or the wrongful entry upon him, and the forcible

Between Cotenants, see TENANCY IN COMMON. Ground For Ejectment, see EJECTMENT. Ground For Trespass — In General, see TRESPASS; To Try Title, see TRESPASS TO TRY TITLE.)

DISSEIZOR. A term applied to one who enters intending to usurp the possession, and to oust another of his freehold.[82]

DISSENT. Contrariety of opinion; refusal to agree with something already stated or adjudged or to an act previously performed.[83] (Dissent: Of Judge or Justice, see APPEAL AND ERROR; COURTS.)

DISSENTING OPINION. The opinion in which a judge announces his dissent from the conclusions held by the majority of the court, and expounds his own views.[84] (See, generally, APPEAL AND ERROR; COURTS.)

DISSIMILIUM DISSIMILIS EST RATIO. A maxim meaning "Of dissimilars the rule is dissimilar." [85]

DISSIMULATIONE TOLLITUR INJURIA. A maxim meaning "Injury is removed by being passed over or forgiven." [86]

DISSIMULTANEOUS.[87] A term used when two or more occurrences or happenings are successive,— that is to say, with an interval between each two in succession.[88]

DISSIMULTANEOUSLY. A word sometimes used in the sense of successively.[89]

DISSIPATED MAN. A man who uses intoxicating drinks frequently and excessively; in plainer terms, one who is often intoxicated.[90] (See DIPSOMANIA; and, generally, DRUNKARDS.)

DISSOLUTION. In general, a dissolving; a breaking up; destroying. As applied to contracts, the annulling of a contract by relieving the parties of its provisions. As applied to corporations, the extinguishment of its existence in the manner prescribed by law.[91] As applied to marriages, a divorce.[92] In practice, the act of rendering a legal proceeding null, abrogating or revoking it; unloosing its constraining force.[93] (Dissolution: Of Association, see ASSOCIATIONS. Of Attachment, see ATTACHMENT. Of Bank, see BANKS AND BANKING. Of

holding by the intruder, which was called a disseisin; and in those days, force would naturally be employed to effect a change of possession by a wrong doer." But see Small *v.* Procter, 15 Mass. 495, 498, where it is said: "Disseisin does not necessarily imply a forcible entry, or an actual ouster by violence or fraud."

Necessity of freehold estate.— The term is strictly applicable only to freehold estates. Spalding *v.* Mayhall, 27 Mo. 377, 379; Warren *v.* Ritter, 11 Mo. 354, 356.

Necessity of ouster and substitution of tenants.— It has been said that "every entry is no disseizin, unless there be an ouster of the freehold." Towle *v.* Ayer, 8 N. H. 57, 60 [*citing* Coke Litt. 153*b*, 181*a*]; Smith *v.* Burtis, 6 Johns. (N. Y.) 197, 216, 5 Am. Dec. 218; Altschul *v.* O'Neill, 35 Oreg. 202, 207, 58 Pac. 95. See also Stetson *v.* Veazie, 11 Me. 408, 410; Taylor *v.* Horde, 1 Burr. 60, 107 [*quoted* in Altschul *v.* O'Neill, 35 Oreg. 202, 207, 58 Pac. 95]; 3 Blackstone Comm. 169 [*quoted* in Warren *v.* Ritter, 11 Mo. 354, 356]; Cruise Dig. 15 [*quoted* in McCall *v.* Neely, 3 Watts (Pa.) 69, 71], in all of which similar language is used.

Necessity of overt and notorious acts see Ball *v.* Palmer, 81 Ill. 370, 372 [*citing* Warfield *v.* Lindell, 38 Mo. 561, 90 Am. Dec. 443]; Little *v.* Libby, 2 Me. 242, 247, 11 Am. Dec. 68; and, generally, ADVERSE POSSESSION.

82. Carpenter *v.* Coles, 75 Minn. 9, 77 N. W. 424.

"A person who is in possession of the land demanded in a writ of entry, claiming an estate of freehold therein, may be considered as a disseisor for the purpose of trying the right, irrespective of the manner of his original entry therein." Mass. Rev. Laws (1902), c. 179, § 5.

83. Black L. Dict.

84. Black L. Dict.

85. Black L. Dict.

86. Trayner Leg. Max.

87. "The adjectives 'simultaneous' or 'dissimultaneous' are words of comparison." Brush Electric Co. *v.* Western Electric Co., 69 Fed 240, 244.

"Dissimultaneous arc-forming separation" as used in a patent see Brush Electric Co. *v.* Western Electric Co., 69 Fed. 240, 244.

88. Brush Electric Co. *v.* Western Electric Co., 69 Fed. 240, 244.

89. Brush Electric Co. *v.* Western Electric Light, etc., Co., 43 Fed. 533, 537.

90. State *v.* Pratt, 34 Vt. 323, 325.

91. English L. Dict. And see Lyons-Thomas Hardware Co. *v.* Perry Stove Mfg. Co., 86 Tex. 143, 155, 24 S. W. 16, 22 L. R. A. 802, where it is said to be "that result which follows the expiration of time limited by its charter, or the result of a judgment of a court of competent jurisdiction declaring the dissolution."

92. *In re* Wood, 137 Cal. 129, 132, 69 Pac. 900.

93. Black L. Dict.

Building and Loan Association, see BUILDING AND LOAN SOCIETIES. Of Charitable Society, see CHARITIES. Of Contract, see CONTRACTS. Of Corporation — Generally, see CORPORATIONS; Ground For Abatement, see CORPORATIONS. Of Drainage District, see DRAINS. Of Foreign Corporation, see FOREIGN CORPORATIONS. Of Garnishment, see GARNISHMENT. Of Injunction, see INJUNCTIONS. Of Joint Stock Company, see JOINT STOCK COMPANIES. Of Lien by Adjudication of Bankruptcy, see BANKRUPTCY. Of Municipal Corporation, see MUNICIPAL CORPORATIONS. Of Partnership, see PARTNERSHIP. Of School-District, see SCHOOLS AND SCHOOL-DISTRICTS.)

DISSOLVE.[94] To disband.[95] (See DISSOLUTION.)

DISSOLVING A CORPORATION. A phrase sometimes used as synonymous with annulling the charter or terminating the existence of the corporation, and sometimes as meaning merely a judicial act which alienates the property and suspends the business of the corporation, without terminating its existence.[96] (See CORPORATIONS.)

DISTANCE. See BOUNDARIES.

DISTILLATION.[97] The conversion of any substance into vapor in a vessel so arranged that the vapors are condensed[98] and collected again in a vessel apart.[99]

DISTILLED SPIRITS.[1] The product of distillation.[2] And under statutory

94. "Dissolving bond" as used in attachment proceedings see Sanger *v.* Hibbard, 2 Indian Terr. 547, 550, 53 S. W. 330.

95. Briggs *v.* Borden, 71 Mich. 87, 90, 38 N. W. 712.

96. *In re* Independent Ins. Co., 13 Fed. Cas. No. 7,017, Holmes 103, 109. As used in the latter sense the court said: "This is paralysis, not necrosis,— a suspension of corporate action, not a cessation of corporate life."

97. "The word is derived from the Latin '*dis*,' and '*stillo*,' 'I drop,' meaning originally to drop or fall in drops, and is very applicable to the process [of distillation] since the condensation generally takes place dropwise." U. S. *v.* One Still, 27 Fed. Cas. No. 15,956.

98. The term embraces "condensation," according to its scientific as well as its popular sense. It is its primary meaning, and more nearly expresses the full sense of the term as it is used in scientific works, and in the statutes of the United States, than the mere generation of vapor. U. S. *v.* One Still, 27 Fed. Cas. No. 15,956.

99. U. S. *v.* One Still, 27 Fed. Cas. No. 15,956 [*quoting* Ure Dict. Manufactures and Arts, Suppl. p. 454; and *citing* 7 New Am. Encycl.; Stockhardt Princ. Chem. p. 42; Webster Dict.; Worcester Dict.], where it is said: "This definition accords with that which I find in every dictionary and scientific work which I have consulted."

"The distillation of spirituous liquors is performed by a double process: by the application of heat to a still containing the material. The product of the first process, after running through the still, is commonly called low wines, or singlings; the low wines undergo a second process of distillation, by which spirits are produced; they are to be proof of the first, second, third or fourth degree, as defined and required by law. These are marketable, and here the process ends." U. S. *v.* Tenbroek, 2 Wheat. (U. S.) 248, 258, 4 L. ed. 231 [*cited* in Schuylkill Nav. Co. *v.* Moore, 2 Whart. (Pa.) 477, 493].

"The mere rectifying of spirits, distilled from domestic materials, is not distilling spirituous liquors from domestic materials." U. S. *v.* Tenbroek, 28 Fed. Cas. No. 16,446, Pet. C. C. 180, 181.

1. Compared with "ethyl alcohol" and "spirits of wine."— "While, in a strictly chemical sense, the terms 'ethyl alcohol' and 'spirits of wine' are generic terms, and the term 'distilled spirits,' as defined by [statute] . . . when used in that sense, would be generic, and not necessarily confined to the product of distillation, still, the term 'distilled spirits' has also an ordinary and literal meaning, which implies distillation, and, when it is used in the latter sense, it is confined to the product of distillation." U. S. *v.* Anthony, 24 Fed. Cas No. 14,460, 14 Blatchf. 92.

"The terms 'spirituous liquors' or 'distilled spirits,' and 'malt liquors,' [as used in the statute] are not used as synonymous. On the contrary, they are treated as different substances, and in the system of revenue restrictions, in providing for their manufacture and sale, they are regarded as distinct." Sarlls *v.* U. S., 152 U. S. 570, 572, 14 S. Ct. 720, 38 L. ed. 556.

"Apple brandy" may be embraced within the term "spirits distilled." U. S. *v.* Ridenour, 119 Fed. 411, 416.

"Whiskey is distilled liquor." Caldwell *v.* State, 43 Fla. 845, 30 So. 814, 815 [*citing* Bishop St. Cr. § 1038]; State *v.* Williamson, 21 Mo. 496, 498.

"Domestic distilled spirits, as used [in the statute] . . . does not include patent or proprietary medicinal preparations manufactured and sold in good faith for curative or health-imparting properties, although they may contain a large percentage of distilled spirits as one of the essential ingredients of the preparation." U. S. *v.* Wilson, 69 Fed. 144, 145.

2. U. S. *v.* Anthony, 24 Fed. Cas. No. 14,460, 14 Blatchf. 92, construing U. S. Rev. St. (1898) § 3296 [U. S. Comp. St. (1901) p. 2136].

provisions, the term may include as well rectified as non-rectified spirits.[3] (See INTERNAL REVENUE; INTOXICATING LIQUORS; TAXATION.)

DISTILLER. A person whose occupation is to extract spirits by distillation.[4]

DISTILLERY. A place or building where alcoholic liquors are distilled or manufactured.[5]

DISTILLERY BONDED WAREHOUSE. A term which means not only a bonded warehouse kept at the distillery, but a bonded warehouse, wherever kept, or by whomsoever owned, in which the products of the distillery are stored pursuant to the laws of the United States government and under the supervision of its officers.[6]

DISTINCT. Separate or different,— not the same.[7] (See DISTINCTLY.)

DISTINCT FARMS. Separate farms or different farms.[8]

DISTINCTIVE. See TRADE-MARKS AND TRADE-NAMES.

DISTINCTLY. Clearly, explicitly, definitely, precisely, unmistakably.[9] (See DISTINCT.)

DISTINCT PARCEL OF REAL PROPERTY. As defined by statute, a part of the property which is or may be set off by boundary lines, as distinguished from an undivided share or interest therein.[10]

DISTINGUENDA SUNT TEMPORA; ALIUD EST FACERE, ALIUD PERFICERE. A maxim meaning "Times are to be distinguished;[11] it is one thing to do, another to complete."[12]

DISTINGUENDA SUNT TEMPORA; DISTINGUE TEMPORA, ET CONCORDABIS LEGES. A maxim meaning "Times are to be distinguished; distinguish times, and you will make laws agree."[13]

DISTINGUISH. To point out an essential difference; to prove a case, cited as applicable, inapplicable.[14]

3. Boyd *v.* U. S., 3 Fed. Cas. No. 1,749, 14 Blatchf. 317, 319.

4. Johnson *v.* State, 44 Ala. 414, 416 [*citing* Webster Dict.].

"A chemist is a distiller, if he chooses to manufacture his own spirits of wine, instead of buying them." Atty.-Gen. *v.* Bailey, 16 L. J. Exch. 63, 16 M. & W. 74, 76.

As defined by the federal statutes see U. S. *v.* Ridenour, 119 Fed. 411, 416; *In re* One Vaporizer, 18 Fed. Cas. No. 10,537, 2 Ben. 438; U. S. *v.* Frerichs, 25 Fed. Cas. No. 15,166, 16 Blatchf. 547, 548; U. S. *v.* One Still, 27 Fed. Cas. No. 15,956; U. S. *v.* Wittig, 28 Fed. Cas. No. 16,748, 2 Lowell 466.

Manufacturer of apple brandy may be a distiller within the meaning of the statute. U. S. *v.* Ridenour, 119 Fed. 411, 416.

5. "And not every building where the process of distillation is used." Atlantic Dock Co. *v.* Libby, 45 N. Y. 499, 502.

"Distillery or place of manufacture" as used in a statute see Com. *v.* Holland, 104 Ky. 323, 47 S. W. 216, 20 Ky. L. Rep. 581.

6. Louisville *v.* Louisville Public Warehouse Co., 107 Ky. 184, 53 S. W. 291, 293, 21 Ky. L. Rep. 867.

"Distillery warehouse" see U. S. *v.* Powell, 14 Wall. (U. S.) 493, 494, 20 L. ed. 726.

7. Larzelere *v.* Starkweather, 38 Mich. 96, 104.

"Distinct and expensive work on the road" as used in a statute see St. Louis, etc., R. Co. *v.* People, 200 Ill. 365, 367, 65 N. E. 715.

"Distinct municipal corporation for school purposes" see McLaughlin *v.* Shelby Tp., 52 Ind. 114, 117 [*cited* in State *v.* Ogan, 159 Ind. 119, 121, 63 N. E. 227, where it is said: "The word 'distinct,' as used in the statute, is used to differentiate the school corporation from the civil corporation, and not to separate school corporations into distinct classes"].

8. Larzelere *v.* Starkweather, 38 Mich. 96, 104. See also Worley *v.* Naylor, 6 Minn. 192, where, under a statute which provides that "if the mortgaged premises consist of distinct farms," etc., the court said: "The use of the term 'distinct,' . . . must mean a separation by some natural means or boundary, or by intervening space, and not simply a portion which may be described by arbitrary imaginary lines."

9. Perugi *v.* State, 104 Wis. 230, 242, 80 N. W. 593, 76 Am. St. Rep. 865 [*citing* Century Dict.].

"Distinctly and definitely specified" as used in reference to the purposes of a corporation see Bird *v.* Daggett, 97 Mass. 494, 496.

"Distinctly marked" used in reference to a mining claim see Gleeson *v.* Martin White Min. Co., 13 Nev. 442, 456.

"Distinctly refer to the cause of action" as used in pleading see Crasto *v.* White, 5 N. Y. Suppl. 718, 719.

10. N. Y. Code Civ. Proc. (1899) § 3343, subs. 16.

11. Adams Gloss.

Quoted in Bloss *v.* Tobey, 2 Pick. (Mass.) 320, 327; Owens *v.* Methodist Episcopal Church Missionary Soc., 14 N. Y. 380, 393, 67 Am. Dec. 160; Porter's Case, 1 Coke 22*a*, 24*b*.

12. Wharton L. Lex.

13. Wharton L. Lex.

14. Wharton L. Lex.

DISTRACTED. Disordered in intellect; deranged; mad; frantic.[15]

DISTRAIN. To take as a pledge property of another and keep the same until he performs his obligation, or until the property is replevied by the sheriff.[16] (See DISTRESS.)

DISTRAINING. Taking of personal property by a distress.[17] (See DISTRESS.)

DISTRAINOR. One who takes possession of personal property by a distress.[18] (See DISTRESS.)

DISTRESS. A state of danger or necessity;[19] a situation of misfortune or calamity.[20] Technically, a remedy[21] — summary in its nature, and extraordinary in its character — a process whereby a personal chattel is taken from the possession of one to secure satisfaction for a demand.[22] (Distress: For Rent, see LANDLORD AND TENANT. For Taxes, see TAXATION. Of Trespassing Animal, see ANIMALS. Replevin of Goods Distrained, see REPLEVIN. Wrongful, see TRESPASS.)

DISTRIBUTED. Used with reference to personal property, divided.[23] (See DISTRIBUTION.)

"**Distinguishing mark**" used in connection with election ballots see Tombaugh *v.* Grogg, 156 Ind. 355, 361, 59 N. E. 1060; and, generally, ELECTIONS.

15. Century Dict.

"**Distracted person**" used in a statute relative to property see Snyder *v.* Snyder, 142 Ill. 60, 64, 31 N. E. 303.

16. Bouvier L. Dict. [*quoted* in Ackerman *v.* Delude, 29 Hun (N. Y.) 137, 138]. *Compare* Byers *v.* Ferguson, 41 Oreg. 77, 80, 65 Pac. 1067, 68 Pac. 5, where it is said: "While the word 'distrain' originally meant the taking of the property of another as security for the performance of some obligation (3 Blackstone Comm. 231) the term 'distrained,' as used in the section of the statute quoted, undoubtedly signifies the holding of the personal property of another for any purpose whatever."

17. Boyd *v.* Howden, 3 Daly (N. Y.) 455, 457, where this is said to be "a right which existed at common law, by which a party might take the personal property of another into his possession, and hold it as a pledge or security until he obtained satisfaction, by the payment of a debt, the discharge of some duty, or reparation for an injury done; with the right, in certain cases, to sell it to obtain satisfaction, of which the impounding of cattle for *damage feasant*, or the taking by the landlord [of] the goods and chattels of the tenant upon the premises, for the non-payment of rent, are familiar examples."

18. Boyd *v.* Howden, 3 Daly (N. Y.) 455, 457.

19. Webster Dict. [*quoted* in The Saehelm, 99 Fed. 456, 458, 39 C. C. A. 600].

20. Standard Dict. [*quoted* in The Saehelm, 99 Fed. 456, 458, 39 C. C. A. 600].

"A vessel . . . is also in distress when wrecked, and needing salvage service." The Saehelm, 99 Fed. 456, 458, 39 C. C. A. 600.

21. **It is not an action.** Hewitson *v.* Hunt, 8 Rich. (S. C.) 106, 110.

Distress at common law is said to be "the taking of a personal chattel out of the possession of a wrongdoer, into the custody of the party injured, to procure satisfaction for the wrong committed" (Hard *v.* Nearing, 44 Barb. (N. Y.) 472, 488 [*citing* 3 Blackstone Comm. 6]); the act of taking possession of personal property to hold as a pledge for the payment of a debt, the discharge of a duty, or for reparation of some injury done (Boyd *v.* Howden, 3 Daly (N. Y.) 455, 457), as "a pledge, taken out of the hands and possession of the tenant by the landlord, and kept by the latter until the tenant entitled himself to get it back again" (Alway *v.* Anderson, 5 U. C. Q. B. 34, 46).

"**Distresses seem to have originated** from two more ancient remedies of the common law. By the process of *gavelet* and *cessavit* the landlord could seize the land itself for rent in arrear, and hold it until payment was made. These processes have been obsolete for ages, and exist only in the memory of legal antiquaries. When they fell into disuse, distresses appear to have arisen, whereby instead of seizing the land, the lord seized all the movables upon the land, and held them until he received payment. In process of time, he was authorized by statute to make sale of them, and in this way we have the modern distraint." Emig *v.* Cunningham, 62 Md. 458, 461.

Compared with replevin see Hewitson *v.* Hunt, 8 Rich. (S. C.) 106, 110.

Distinguished from "execution" see Boyd *v.* Howden, 3 Daly (N. Y.) 455, 457.

"**The terms 'sufficient distress,'** in the grant, [in a lease] are not equivalents for 'sufficient property to satisfy the rent.' They refer to property not only sufficient in kind and value, for that purpose, but which, in addition, is subject by law to be distrained and sold, in satisfaction of the rent in arrears." Van Rensselaer *v.* Snyder, 13 N. Y. 299, 303 [*quoted* in Hosford *v.* Ballard, 39 How. Pr. (N. Y.) 162, 167].

"**A warrant of distress** is nothing but a power of attorney." Bagwell *v.* Jamison, Cheves (S. C.) 249, 252.

22. Hewitson *v.* Hunt, 8 Rich. (S. C.) 106, 110.

23. Chighizola *v.* Le Baron, 21 Ala. 406, 412.

The term "distribute" is as applicable to money as "descend" is to land. Grider *v.* McClay, 11 Serg. & R. (Pa.) 224, 232, construing the word as used in "shall distribute

DISTRIBUTABLE. Capable of being distributed.[24]

DISTRIBUTEES.[25] Such persons only as come within the statute of distribution and take intestate estates;[26] the persons, who are entitled, under the statute of distribution, to the personal estate of one, who is dead intestate.[27] (See DISTRIBUTION.)

DISTRIBUTION. In general, the act of dividing or making an apportionment.[28] As applied to a publication like a newspaper or periodical, the term imports a delivery to persons who have bought or otherwise become entitled to the same.[29] (Distribution: Of Assets — Of Bank, see BANKS AND BANKING; Of Corporation, see CORPORATIONS; Of Partnership, see PARTNERSHIP. Of Estate — Assigned, see ASSIGNMENTS FOR BENEFIT OF CREDITORS; Of Bankrupt, see BANKRUPTCY; Of Decedent, see DESCENT AND DISTRIBUTION; EXECUTORS AND ADMINISTRATORS; Of Insolvent, see INSOLVENCY. Of Proceeds — Of Creditor's Suit, see CREDITORS' SUITS; Of Property Fraudulently Conveyed, see FRAUDULENT CONVEYANCES; Of Sale Under Attachment, see ATTACHMENT; Of Sale on Execution, see EXECUTIONS; Of Sale on Foreclosure, see MORTGAGES; Of Sale Under Admiralty Decree, see ADMIRALTY; Of Sale Under Mechanic's Lien, see MECHANICS' LIENS; Of Sale Under Order of Court, see EXECUTORS AND ADMINISTRATORS; JUDICIAL SALES; Of Vessel in Proceedings For Limitation of Owner's Liability, see SHIPPING.)

DISTRIBUTIVE JUSTICE. That virtue whose object it is to distribute rewards and punishment to each one according to his merits, observing a just proportion by comparing one person or fact with another.[30] (See COMMUTATIVE JUSTICE.)

DISTRIBUTIVE SHARE. The share which a person takes in personal property in case of intestacy.[31] (See DISTRIBUTION; and, generally, DESCENT and DISTRIBUTION.)

DISTRICT.[32] A defined portion of the state.[33] In some cases the word may be

surplus." See also McDowell *v.* Addams, 45 Pa. St. 430, 434, where it is said: "The word 'distributed,' as used in the statute, generally applies to the personalty."

"Laid" and "distributed" as used in a contract for grading, etc., see Morgan *v.* Baltimore, 58 Md. 509, 519.

24. Webster Int. Dict.

25. **The word "distributee" is now in common use** among the legal profession. Henry *v.* Henry, 31 N. C. 278, 280. But see p. 285 (where Ruffin, C. J., in dissenting opinion, said: "But 'distributees' is not a word at all known in the law or the language"); Croom *v.* Herring, 11 N. C. 393, 398 (where it is said: "Distributee is sometimes used, but scarcely ever without an apology for it; a term of our own coinage, which is not to be found in Johnson's Dictionary, in Jacob's Law Dictionary, nor in any other that I know of").

26. Wolf *v.* Griffin, 13 Ill. App. 559, 560.

27. Henry *v.* Henry, 31 N. C. 278, 279.

"Distributable surplus" used in a statute relative to distribution of property of an intestate see Knight *v.* Oliver, 12 Gratt. (Va.) 33, 38; Williams *v.* Stonestreet, 3 Rand. (Va.) 559, 564.

"Distributable property" of a railroad company consists of the roadbed, rolling-stock and other movable property. State *v.* Metropolitan St. R. Co., 161 Mo. 188, 197, 61 S. W. 603. And see Kansas City, etc., R. Co. *v.* King, 120 Fed. 614, 621, 57 C. C. A. 278, where it is said that such property consists of "roadbed, rolling stock, franchise, choses in action, and personal property having no actual *situs*."

28. *In re* Creighton, 12 Nebr. 280, 282, 11 N. W. 313.

"Distribution policy plan" as used in life insurance see Horton *v.* New York L. Ins. Co., 151 Mo. 604, 610, 52 S. W. 356.

"A scheme for the distribution of prizes by chance" see Fleming *v.* Bills, 3 Oreg. 286, 291.

"Subject to the distribution of the legal heirs" as used in a deed see Sasser *v.* McWilliams, 73 Ga. 678, 683.

29. Dawley *v.* Alsdorf, 25 Hun (N. Y.) 226, 227.

30. Bouvier L. Dict. [*quoted* in Bowman *v.* McLaughlin, 45 Miss. 461, 495].

31. *In re* Vowers, 45 Hun (N. Y.) 418, 420, per Learned, J., dissenting opinion. See also Taft *v.* Taft, 163 Mass. 467, 468, 40 N. E. 860.

That the distributive share of the personal property to which an alien is entitled may be recovered by him see 2 Cyc. 108 note 94.

32. **Compared with and distinguished from "state" and "territory"** see Hughes *v.* Ewing, 93 Cal. 414, 419, 28 Pac. 1067; Silver Bow County *v.* Davis, 6 Mont. 306, 310, 12 Pac. 688; Com. *v.* Dumbald, 97 Pa. St. 293, 304.

33. Webster Dict. [*quoted* in Chicago, etc., R. Co. *v.* Oconto, 50 Wis. 189, 195, 6 N. W. 607, 36 Am. Rep. 840].

In its ordinary meaning the word is commonly and properly used to designate any one of the various divisions or subdivisions

used in the sense of region, section of the country, or locality occupied,[34] and may be given the same meaning as county.[35] As defined by statute, the term includes township, village, city, or ward, as the case may be.[36] (District: Attorney, see PROSECUTING ATTORNEYS. Clerk, see CLERKS OF COURTS. Court, see COURTS. Drainage and Reclamation, see DRAINS. Election, see ELECTIONS. Highway, see STREETS AND HIGHWAYS. Irrigation, see WATERS. Judge, see JUDGES. Levee, see LEVEES. School, see SCHOOLS AND SCHOOL-DISTRICTS. Taxing, see TAXATION.)

DISTRICT ATTORNEY. See PROSECUTING ATTORNEYS.

DISTRICT CLERK. See CLERKS OF COURTS.

DISTRICT COLLECTOR. The sheriff of a county not under township organization.[37]

DISTRICT COURT. See COURTS.

DISTRICTIO NON POTEST ESSE, NISI PRO CERTIS SERVITIIS. A maxim meaning "Goods cannot be distrained except for certain services."[38]

DISTRICT JUDGE. See JUDGES.

DISTRICT OF ALASKA. As defined in a customs revenue act, the term includes that portion of the sea along its coasts, which lies inside of a line drawn from the promontory of Point Hope, to the Cape Prince of Wales.[39]

into which the state is divided for political or other purposes, and may refer either to a congressional, judicial, senatorial, representative, school or road district, depending always upon the connection in which it is used. Olive *v.* State, 11 Nebr. 1, 13, 7 N. W. 444. And see Ohio, etc., R. Co. *v.* People, 119 Ill. 207, 212, 10 N. E. 545.

"District meetings" of towns see Comstock *v.* Lincoln School Committee, 17 R. I. 827, 829, 24 Atl. 145.

"Localities" or "district" as used in a statute relative to the classified civil service refer to some political subdivision of the state created and existing by legislative act at the time the registration lists are furnished. People *v.* Shea, 73 N. Y. App. Div. 232, 235, 76 N. Y. Suppl. 679.

"Port" and "district" as used in a customs revenue act are often used as of the same import. Ayer *v.* Thacher, 2 Fed. Cas. No. 684, 3 Mason 153, 155.

"'Taxing district' is a phrase long known in our elementary treatises, judicial discussions, and statutory enactments, to describe the territory or region into which, for the purpose of assessment merely, a State, county, town, or other political district, is divided." Sharpleigh *v.* Surdam, 21 Fed. Cas. No. 12,711, 1 Flipp. 472, 476. See also Keely *v.* Sanders, 99 U. S. 441, 448, 25 L. ed. 327, where the word "district" in an act providing for the collection of taxes was declared to mean simply a "part" or "portion" of a state, or, a "taxing district" and not a large political division.

34. Sharpleigh *v.* Surdam, 21 Fed. Cas. No. 12,711, 1 Flipp. 472, 475.

35. State *v.* McDonald, 109 Wis. 506, 514, 85 N. W. 502.

An area larger or smaller than a county, however, may be intended by the use of this word. State *v.* Kemp, 34 Minn. 61, 62, 24 N. W. 349; Union Pac. R. Co. *v.* Ryan, 113 U. S. 516, 524, 5 S. Ct. 601, 28 L. ed. 1098.

May be used as coördinate with "county." State *v.* Bunker, 38 Kan. 737, 741, 17 Pac. 651 [*quoted* in State *v.* Knapp, 40 Kan. 148, 150, 19 Pac. 728].

36. Minn. St. (1894) § 1511.

37. Ryan *v.* People, 117 Ill. 486, 491, 6 N. E. 37, construing a statute relating to taxation.

38. Peloubet Leg. Max. [*citing* Halkerstine 39].

39. The Louisa Simpson, 15 Fed. Cas. No. 8,533, 2 Sawy. 57, 70.

DISTRICT OF COLUMBIA

By Henry Campbell Black*

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I. ESTABLISHMENT OF THE DISTRICT.

A. Constitutional Provision. The constitution of the United States provided for the establishment of a seat of government by vesting in congress exclusive jurisdiction and control over a district (not exceeding ten miles square) to be acquired by cession from particular states and accepted by congress.[1]

B. Operation and Effect of Cessions. The cessions of territory, for this purpose, made by the states of Maryland and Virginia, and accepted by congress in 1790, and the organization of a government for the ceded district in 1801, had the effect of transferring to the United States the political and sovereign jurisdiction over the territory affected, and terminated the political and proprietary rights of those states in the same,[2] as also their power to legislate for the ceded district,[3] and the political rights, derived from citizenship in one or the other of those states, of such persons as were residents in the ceded territory at the time of the separation,[4] but had no effect on private rights of property or contract,[5] nor on the jurisdiction of the state courts over pending suits.[6]

C. Retrocession to Virginia. The portion of territory granted by Virginia was afterward retroceded to that state by the United States, so that the District, as at present constituted, lies wholly within the exterior boundaries of the original state of Maryland.[7]

D. Official Designation. The territory thus ceded to the national government was at first styled the "Territory of Columbia," but its official designation, as declared by an act of congress, is now "the District of Columbia."[8]

E. Seat of National Government. Congress has enacted that the District of Columbia "shall be the permanent seat of Government of the United States," and that "all offices attached to the seat of Government shall be exercised in the District of Columbia, and not elsewhere, except as otherwise expressly provided by law."[9]

1. U. S. Const. art. 1, § 8.

2. Shoemaker *v.* U. S., 147 U. S. 282, 13 S. Ct. 361, 37 L. ed. 170; O'Neal *v.* Brown, 18 Fed. Cas. No. 10,511, 1 Cranch C. C. 69.

Control of Potomac river.— The compact between Maryland and Virginia, made in 1786, in respect to the free navigation of the Potomac river, was a compact between the two states, as such, the citizens of each being entitled individually to the benefit of it, but not being individually parties to it. This compact could be modified or annulled at the will of the two states, and when they ceded the District of Columbia to the United States, there vested in congress, after the cession, the power to do whatever the legislatures of the two states could have done, in respect to that portion of the river within the District, subject only to the limitations imposed by the act of cession. Georgetown *v.* Alexandria Canal Co., 12 Pet. (U. S.) 91, 9 L. ed. 1012.

3. Young *v.* Alexandria Bank, 4 Cranch (U. S.) 384, 2 L. ed. 655; U. S. *v.* Farrell, 25 Fed. Cas. No. 15,074, 5 Cranch C. C. 311.

4. Reily *v.* Lamar, 2 Cranch (U. S.) 344, 2 L. ed. 300.

5. Mutual Assur. Soc. *v.* Watts, 1 Wheat. (U. S.) 279, 4 L. ed. 91; Korn *v.* Virginia Mut. Assur. Soc., 6 Cranch (U. S.) 192, 3 L. ed. 195.

6. Van Ness *v.* U. S. Bank, 13 Pet. (U. S.) 17, 10 L. ed. 38.

7. 9 U. S. St. at L. 35.

Validity of the act of retrocession see Phillips *v.* Payne, 92 U. S. 130, 23 L. ed. 649.

8. 20 U. S. St. at L. 102.

9. U. S. Rev. St. (1878) §§ 1795, 1796 [U. S. Comp. St. (1901) p. 1229].

II. POLITICAL STATUS AND GOVERNMENT.

The District of Columbia, under its present form of government, is neither a sovereignty, a territory, nor a department of the United States government; it is simply a municipal corporation, with such powers and liabilities as are common to municipal corporations in general, except in so far as it may be affected by acts of congress.[10]

III. POWERS OF CONGRESS.

A. Jurisdiction in General. The United States possesses complete jurisdiction, both of a political and municipal nature, over the District of Columbia,[11] and the constitutional grant to congress of exclusive legislative authority for the District carries with it all those incidental powers which are necessary to its complete and effectual execution.[12]

B. Legislative Authority. The legislative powers of the District, as a municipal corporation, are vested in congress,[13] and congress in legislating for the District may exercise all legislative powers on all subjects which the legislature of a state might exercise within the state,[14] including the power to enact such

10. McBride *v.* Ross, 13 App. Cas. (D. C.) 576; Washington, etc., R. Co. *v.* District of Columbia, 136 U. S. 653, 10 S. Ct. 1075, 34 L. ed. 549; Metropolitan R. Co. *v.* District of Columbia, 132 U. S. 1, 10 S. Ct. 19, 33 L. ed. 231. See 20 U. S. St. at L. 102.

As successor to previous corporations.— The municipal corporation created under the name of the District of Columbia by act of congress in 1871 (16 U. S. St. at L. 419 [U. S. Comp. St. (1901) p. 677]) succeeded to the property and liabilities of the corporations which were thereby abolished. District of Columbia *v.* Cluss, 103 U. S. 705, 26 L. ed. 455.

The statute of limitations in force in the District is applicable to all corporations, including the District itself in its character as a municipal corporation. Metropolitan R. Co. *v.* District of Columbia, 132 U. S. 1, 10 S. Ct. 19, 33 L. ed. 231.

Status as a state.— The District of Columbia is not a "state" in the sense of being one of the constituent members of the Union (Hooe *v.* Jamieson, 166 U. S. 395, 17 S. Ct. 596, 41 L. ed. 1049; Metropolitan R. Co. *v.* District of Columbia, 132 U. S. 1, 10 S. Ct. 19, 33 L. ed. 231; Cameron *v.* Hodges, 127 U. S. 322, 8 S. Ct. 1154, 32 L. ed. 132; Hepburn *v.* Ellzey, 2 Cranch (U. S.) 445, 2 L. ed. 332); but in a broader sense the District, being a separate political community, exercising legislative powers, may be regarded as a "state" within the meaning of that term as used in an act of congress (Talbot *v.* Silver Bow County, 139 U. S. 438, 11 S. Ct. 594, 35 L. ed. 210) or a treaty (De Geofroy *v.* Riggs, 133 U. S. 258, 10 S. Ct. 295, 33 L. ed. 642).

11. Parsons *v.* District of Columbia, 170 U. S. 45, 18 S. Ct. 521, 42 L. ed. 943 [*citing* Bauman *v.* Ross, 167 U. S. 548, 17 S. Ct. 966, 42 L. ed. 270; Shoemaker *v.* U. S., 147 U. S. 282, 13 S. Ct. 361, 37 L. ed. 170; Gibbons *v.* District of Columbia, 116 U. S. 404, 6 S. Ct. 427, 29 L. ed. 680; Mattingly *v.* District of Columbia, 97 U. S. 687, 24 L. ed. 1098]. And see Kendall *v.* U. S., 12 Pet. (U. S.) 524, 9 L. ed. 1181.

Jurisdiction vested on Monday, Dec. 1, 1800, the day on which by law the District became the seat of government. U. S. *v.* Hammond, 26 Fed. Cas. No. 15,293, 1 Cranch C. C. 15.

12. Cohens *v.* Virginia, 6 Wheat. (U. S.) 264, 5 L. ed. 257.

13. District of Columbia *v.* Bailey, 171 U. S. 161, 18 S. Ct. 868, 43 L. ed. 118.

14. Capital Traction Co. *v.* Hof, 174 U. S. 1, 19 S. Ct. 580, 43 L. ed. 873.

Dual capacity of congress.— In making laws for the District of Columbia congress still remains the legislative branch of the United States government; so that its acts are laws of the United States. Cohens *v.* Virginia, 6 Wheat. (U. S.) 264, 5 L. ed. 257.

Taxation.— The power of "exclusive legislation" includes the power to tax. But congress, in laying taxes in the District, is not territorially restricted as is the legislature of a state. That is, to justify such taxation it is not required to be for District purposes only, but may be for any or all of the purposes for which congress may lawfully exercise the power of taxation. Loughborough *v.* Blake, 5 Wheat. (U. S.) 317, 5 L. ed. 98. See *infra*, IX, B.

Assessments for improvements.— The power of congress to legislate for the District includes the power to provide for the assessment, on abutting lands and lands benefited, of half or more of the damages for and in respect of land condemned for the opening of streets. Wight *v.* Davidson, 181 U. S. 371, 21 S. Ct. 616, 45 L. ed. 900. See *infra*, VII, D.

Chartering corporations.— Although the power of congress, under the constitution, to create a private corporation has been denied, yet in its capacity as the local legislature of the District it may charter such a corpora-

police regulations as may be necessary to protect the public peace, morals, safety, health, and comfort.[15]

C Constitutional Limitations. The power of congress to legislate for the District is so far limited that all the guaranties of the constitution respecting life, liberty, and property are applicable to the District, and are equally for the benefit and protection of its citizens as for those of the several states.[16]

IV. LOCAL LAW AND GOVERNMENT.

A. What Laws in Force. The laws in force in the District of Columbia include (except in so far as they are inconsistent with the code enacted in 1901, or have been modified or replaced by its provisions) the common law of England and all British statutes in force in Maryland at the date of the establishment of the District government, Feb. 27, 1801,[17] the principles of equity and admiralty, the constitution, all general acts of congress which are not locally inapplicable in the District,[18] all acts of congress which are by their terms made applicable to the District and to other places under the jurisdiction of the United States[19] and the code itself. The general laws and acts of Maryland which were in force at the time of the cession were held to remain as the law of the District, except where repealed or modified by acts of congress;[20] but these statutes, as well as the acts of the old legislative assembly of the District of Columbia, and the acts of congress previously enacted for the District alone, were repealed, with certain exceptions and reservations, by the code of 1901.[21]

B. Delegation of Legislative Power to District. The constitutional provision that congress shall "exercise exclusive legislation" over the District of Columbia is understood to prevent that body from delegating general legislative power to the authorities of the District;[22] but this does not stand in the way of its granting to the local authorities such powers as state legislatures may grant to their municipalities, that is, the right to make ordinances or by-laws.[23]

tion within and for the District. Daly *v.* U. S. National L. Ins. Co., 64 Ind. 1.

Confirmation of invalid proceedings.— In legislating for the District, congress has power to confirm proceedings which without such confirmation would be void, provided no intervening rights are thereby impaired. Mattingly *v.* District of Columbia, 97 U. S. 687, 24 L. ed. 1098.

15. Moses *v.* U. S., 16 App. Cas. (D. C.) 428, 50 L. R. A. 532; Lansburgh *v.* District of Columbia, 11 App. Cas. (D. C.) 512. See *infra*, IV, D.

The act of congress of 1893, regulating the sale of intoxicating liquors in the District of Columbia, does not apply to the congressional restaurants located and conducted in the capitol building under the rules and regulations of congress. Page *v.* District of Columbia, 20 App. Cas. (D. C.) 469.

16. Moses *v.* U. S., 16 App. Cas. (D. C.) 428, 50 L. R. A. 532.

Trial by jury.— The constitutional provisions securing the right of trial by jury, whether in civil or criminal cases, are applicable to the District. Capital Traction Co. *v.* Hof, 174 U. S. 1, 19 S. Ct. 580, 43 L. ed. 873; Callan *v.* Wilson, 127 U. S. 540, 8 S. Ct. 1301, 32 L. ed. 223; *In re* Dana, 7 Fed. Cas. No. 3,554, 7 Ben. 1.

17. State *v.* Cummings, 33 Conn. 260, 89 Am. Dec. 208; De Forest *v.* U. S., 11 App. Cas. (D. C.) 458.

The statute of Elizabeth against covinous and fraudulent conveyances was in force in the District (Cathcart *v.* Robinson, 5 Pet. (U. S.) 264, 8 L. ed. 120) until superseded by provisions of the code of 1901 covering substantially the same ground (D. C. Code, §§ 1116–1122).

The rule in Shelley's case was introduced into Maryland as part of the common law, and has continued in force in that state and in the District. De Vaughn *v.* Hutchinson, 165 U. S. 566, 17 S. Ct. 461, 41 L. ed. 827. But *compare* D. C. Code, § 1027.

18. D. C. Rev. St. § 93; D. C. Code, § 1; Chase *v.* U. S., 7 App. Cas. (D. C.) 149; *Ex p.* Norvell, 20 D. C. 348.

19. See District of Columbia *v.* Baker-smith, 18 App. Cas. (D. C.) 574; Edmonds *v.* Baltimore, etc., R. Co., 114 U. S. 453, 5 S. Ct. 1098, 29 L. ed. 216.

20. Thaw *v.* Falls, 136 U. S. 519, 10 S. Ct. 1037, 34 L. ed. 531; U. S. *v.* Eliason, 16 Pet. (U. S.) 291, 10 L. ed. 968; Kendall *v.* U. S., 12 Pet. (U. S.) 524, 9 L. ed. 1181; *Ex p.* Watkins, 7 Pet. (U. S.) 568, 8 L. ed. 786; U. S. *v.* Simms, 1 Cranch (U. S.) 252, 2 L. ed. 98; *In re* Wolf, 27 Fed. 606; Chesapeake, etc., Canal Co. *v.* Key, 5 Fed. Cas. No. 2,649, 3 Cranch C. C. 599.

21. D. C. Code, § 1636.

22. Smith *v.* Olcott, 19 App. Cas. (D. C.) 61; Roach *v.* Van Riswick, MacArthur & M. (D. C.) 171.

23. Cooper *v.* District of Columbia, MacArthur & M. (D. C.) 250; Welch *v.* Cook, 97

C. Criminal Law. The United States has a criminal, common-law jurisdiction in the District, exercisable in the courts thereof.[24] Criminal offenses and violations of laws of the United States applicable to the District, committed in the District, are crimes against the United States, not against the District, and are to be prosecuted by the United States district attorney, while violations of municipal ordinances or police regulations are to be prosecuted by the city solicitor.[25]

D. Police Regulations. The commissioners of the District of Columbia are expressly authorized to make and enforce all such reasonable and usual police regulations as they may deem necessary for the protection of the lives, limbs, health, comfort, and quiet, of all persons and the protection of all property within the District.[26] It is essential to the validity of such regulations that they should be reasonable and not unnecessarily vexatious or oppressive. They cannot be sustained if their effect is unlawfully to deprive individuals of the use and enjoyment of their property, or to interfere with the owner's rights therein without

U. S. 541, 24 L. ed. 1112; Washington *v.* Eaton, 29 Fed. Cas. No. 17,228, 4 Cranch C. C. 352.

24. U. S. *v.* Watkins, 28 Fed. Cas. No. 16,649, 3 Cranch C. C. 441.

25. Metropolitan R. Co. *v.* District of Columbia, 132 U. S. 1, 10 S. Ct. 19, 33 L. ed. 231; Baker *v.* Washington, 7 D. C. 134; U. S. *v.* Hoskins, 5 Mackey (D. C.) 478; D. C. Code, § 932.

26. 27 U. S. St. at L. 394. See also 21 U. S. St. at L. 318; 20 U. S. St. at L. 131.

In pursuance of this and similar grants of power, rules in the nature of police regulations have been made by the commissioners, and sustained as valid by the courts, regulating the management of vehicles, including bicycles, on the public streets, their permissible rate of speed, etc. (Moore *v.* District of Columbia, 12 App. Cas. (D. C.) 537, 41 L. R. A. 208); hacks and other public carriages, hack-stands in the streets, and the rates of fare (District of Columbia *v.* Hazel, 16 App. Cas. (D. C.) 283; Callan *v.* District of Columbia, 16 App. Cas. (D. C.) 271; Dennison *v.* Gavin, 3 MacArthur (D. C.) 265); theaters, shows, and exhibitions, so far as necessary to protect the public (District of Columbia *v.* Saville, 1 MacArthur (D. C.) 581, 29 Am. Rep. 616); the collection and disposition of garbage (Dupont *v.* District of Columbia, 20 App. Cas. (D. C.) 477); the places where the stands of licensed vendors shall or shall not be located (Montz *v.* District of Columbia, 20 App. Cas. (D. C.) 568); the sites where fish may be cleaned and packed, and prohibiting the use of other sites for that purpose (Lambell *v.* Washington, 14 Fed. Cas. No. 8,025, 1 Hayw. & H. (D. C.) 25); and the qualifications required to entitle a person to engage in the trade of plumbing (U. S. *v.* Ross, 5 App. Cas. (D. C.) 241. And see U. S. *v.* Ludlow, 15 Wash. L. Rep. 792). It has also been held permissible to regulate the movement of railway locomotives and trains within the District (Baltimore, etc., R. Co. *v.* District of Columbia, 10 App. Cas. (D. C.) 111), and provide a penalty for crossing a public street with an engine or cars in the daytime without having a flagman stationed at the crossing (Smith *v.* Stoutenburgh, 8 App. Cas. (D. C.) 510). The police power also extends to prohibiting lotteries and other forms of gaming within the District (Hall *v.* Washington, 11 Fed. Cas. No. 5,953, 4 Cranch C. C. 722; Thompson *v.* Milligan, 23 Fed. Cas. No. 13,969, 2 Cranch C. C. 207); prohibiting the keeping of dogs within the city without a license and requiring a fee for such license (Washington *v.* Lynch, 29 Fed. Cas. No. 17,231, 5 Cranch C. C. 498. *Compare* Washington *v.* Meigs, 1 MacArthur (D. C.) 53); prohibiting emission of dense or thick black or gray smoke (Sinclair *v.* District of Columbia, 20 App. Cas. (D. C.) 344; Bradley *v.* District of Columbia, 20 App. Cas. (D. C.) 169; Moses *v.* U. S., 16 App. Cas. (D. C.) 428, 50 L. R. A. 532); requiring security for good behavior from persons guilty of grossly indecent language or behavior in the public streets (*Ex p.* Reed, 20 Fed. Cas. No. 11,634, 4 Cranch C. C. 582); and requiring licenses for certain occupations deemed proper subjects for police supervision (Cooper *v.* District of Columbia, MacArthur & M. (D. C.) 250). But the joint resolution of congress above referred to does not authorize the commissioners to punish persons selling liquor without a license. *In re* Sullivan, 21 D. C. 139.

Building regulations.— There is no limitation upon the character and extent of the building regulations which the commissioners may make and enforce under this act. The terms of the statute are broad enough to include every form of regulation which they may deem advisable, and which may reasonably be considered as relating to the proper subject. Halpine *v.* Barr, 21 D. C. 331; Fowler *v.* Saks, 7 Mackey (D. C.) 570; U. S. *v.* Cole, 7 Mackey (D. C.) 504. But when application is made for a permit to erect buildings, and the proposed buildings conform to all the requirements of the building regulations proper, in respect to materials, provisions for safety, and sanitary conditions, it is the duty of the commissioners to issue the permit on the payment of the lawful fees, and they cannot arbitrarily

due process of law;[27] nor are they valid if they amount to an interference with, or restriction upon, interstate commerce.[28]

V. OFFICERS AND EMPLOYEES.[29]

A. Commissioners. The executive authority of the District is vested in a board of three commissioners, one of whom is to be an officer of the engineer corps of the United States army, and the others citizens of the United States and actual and permanent residents of the District for at least three years before their appointment. The engineer commissioner is detailed for service by the president, and the civilian commissioners are appointed by the president and confirmed by the senate for a term of three years.[30]

B. Inferior Administrative Officers. Provision has been made by statute for such other officers as are necessary to operate the various departments and functions of the District as a municipal corporation, some of whom are to be appointed by the president, others by the commissioners.[31] A clerk or other administrative officer appointed by, or holding office under, the commissioners is a subordinate officer of the municipality; he cannot be regarded as an officer of the United States.[32]

C. Judicial Officers. The judicial system of the District of Columbia includes a court of appeals, a supreme court,[33] a police court for the trial of petty offenses and violations of municipal regulations, consisting of two judges learned in the law, appointed by the president for a term of six years,[34] and ten justices of the peace, appointed by the president for a term of four years, unless sooner removed as provided by law, who have a limited jurisdiction in civil cases only.[35]

D. Marshal. The marshal of the District of Columbia is appointed by the president, and it is provided by law that he shall serve for the same term, take the same oath, give bond with security in the same manner, and have generally within the District, in addition to the powers and duties imposed upon him by

refuse or withhold it. Macfarland *v.* U. S., 18 App. Cas. (D. C.) 554.

27. District of Columbia *v.* Sargeant, 17 App. Cas. (D. C.) 264; Moore *v.* District of Columbia, 12 App. Cas. (D. C.) 537, 41 L. R. A. 208; U. S. *v.* Ross, 5 App. Cas. (D. C.) 241; Fulton *v.* District of Columbia, 2 App. Cas. (D. C.) 431; District of Columbia *v.* Saville, 1 MacArthur (D. C.) 581, 29 Am. Rep. 616; Carey *v.* Washington, 5 Fed. Cas. No. 2,404, 5 Cranch C. C. 13.

28. *In re* Hennick, 5 Mackey (D. C.) 489; Stoutenburgh *v.* Hennick, 129 U. S. 141, 9 S. Ct. 256, 32 L. ed. 637.

29. Liability for torts of officers see *infra*, X, B, 1.

30. 20 U. S. St. at L. 102.

Majority rule.— The commissioners act as a board, and (except in the few cases where a statute expressly requires their unanimous agreement) any two of them may exercise the powers conferred upon the commissioners generally, in the absence of the third, or even against his expressed wish and vote, if present and participating in the proceedings. McBride *v.* Ross, 13 App. Cas. (D. C.) 576.

31. See 20 U. S. St. at L. 102, providing for the detailing of not more than two officers of the engineer corps to act as assistants to the engineer commissioner in the discharge of his special duties, and directing the commissioners to appoint a physician to act as health officer together with a proper number of clerks for such officer and not more than six sanitary inspectors, and nineteen school trustees.

Building inspector.— The power to issue building permits is vested in the inspector of buildings, to the exclusion of the commissioners. U. S. *v.* District of Columbia, 5 Mackey (D. C.) 389.

Sinking fund commissioners.— The offices of sinking fund commissioners of the District of Columbia were abolished by 20 U. S. St. at L. 102, establishing a permanent form of government for the District, and their duties and powers transferred to the treasurer of the United States, "who shall perform the same in accordance with the provisions of existing laws. The treasurer is not entitled to the former salary of a commissioner acting as treasurer, as he does not hold the former office but merely performs additional duties. Wyman *v.* U. S., 26 Ct. Cl. 103.

32. Donovan *v.* U. S., 21 Ct. Cl. 120.

33. Jurisdiction, powers, and procedure of these courts see COURTS.

34. D. C. Code, §§ 42–59.

35. D. C. Code, §§ 3–41. See Baker *v.* Dennison, 3 MacArthur (D. C.) 430; Wise *v.* Withers, 3 Cranch (U. S.) 331, 2 L. ed. 457; Marbury *v.* Madison, 1 Cranch (U. S.) 137, 2 L. ed. 60.

the code of the District, the same powers and perform the same duties as provided for by the general statutes relating to marshals of the United States.[36]

E. Appointment and Removal of Inferior Officers and Employees. The commissioners are empowered by law to abolish any office, to consolidate two or more offices, reduce the number of employees, remove from office, and make appointments to any office under them authorized by law.[37] But this does not give them power to abolish any office of the District government which is not held "under them," or the right of appointment to which is vested in the president or in any other officer of the general government.[38]

VI. PUBLIC BUILDINGS AND PROPERTY.

A. Of the United States. The buildings and grounds of the United States, situated in the District of Columbia, as distinguished from those belonging to or employed for the uses of the District government, are not under the care and control of the District, but are placed in charge of the chief of engineers of the United States army.[39] In particular the capitol, with the grounds surrounding it, has its own separate police force,[40] although in emergencies the police force of the District may be employed in assisting to preserve order or enforce the laws.[41]

B. Of the District. The public property, parks, grounds, streets, highways, and bridges of the District, and buildings used by the District for carrying on its municipal or governmental functions, such as the administrative offices of the District, the police courts, the public schools, and the stations of the police and fire departments, are under the care and control of the commissioners.[42]

VII. STREETS, HIGHWAYS, AND BRIDGES.[43]

A. Title to Streets. In the District of Columbia the title to the public

36. D. C. Code, § 186.

As to the powers, duties, and liabilities of the marshal under former statutes see Washington County Levy Ct. *v.* Ringgold, 5 Pet. (U. S.) 451, 8 L. ed. 188; Brent *v.* Justices of Peace, 4 Fed. Cas. No. 1,840, 1 Cranch C. C. 434; *Ex p.* Ringgold, 20 Fed. Cas. No. 11,841, 3 Cranch C. C. 86; Ringgold *v.* Lewis, 20 Fed. Cas. No. 11,847, 3 Cranch C. C. 367; Swann *v.* Ringgold, 23 Fed. Cas. No. 13,674, 4 Cranch C. C. 238; U. S. *v.* McDonald, 26 Fed. Cas. No. 15,669, 1 Cranch C. C. 78; U. S. *v.* Williams, 28 Fed. Cas. No. 16,714, 5 Cranch C. C. 400; U. S. *v.* Williams, 28 Fed. Cas. No. 16,715, 5 Cranch C. C. 619; Williams *v.* Craven, 29 Fed. Cas. No. 17,719, 2 Cranch C. C. 60.

37. 20 U. S. St. at L. 102.

Who eligible as policemen.— It was formerly provided, by D. C. Rev. St. § 354, that no person should be appointed a policeman or watchman on the police force of the District of Columbia except an honorably discharged soldier or sailor of the United States; but this was repealed by the comprehensive grant of powers to the commissioners, contained in the organic act of 1878, and they now have full power to appoint as policemen persons who have not served in the army or navy (Hutton *v.* District of Columbia, 20 D. C. 58; District of Columbia *v.* Hutton, 143 U. S. 18, 12 S. Ct. 369, 36 L. ed. 60).

Removal of policemen and firemen.— The commissioners have authority to remove a police officer or fireman without preferring charges against him, and without a notice or hearing. Hines *v.* District of Columbia, MacArthur & M. (D. C.) 141; Meredith *v.* District of Columbia, 3 MacArthur (D. C.) 52; Eckloff *v.* District of Columbia, 135 U. S. 240, 10 S. Ct. 752, 34 L. ed. 120 [*affirming* 4 Mackey (D. C.) 572].

38. *In re* Fire Commissioner, 16 Op. Atty.-Gen. 179.

39. U. S. Rev. St. (1878) § 1797 [U. S. Comp. St. (1901) p. 1229].

40. U. S. Rev. St. (1878) §§ 1822–1826 [U. S. Comp. St. (1901) pp. 1243, 1244].

41. U. S. Rev. St. (1878) § 1819 [U. S. Comp. St. (1901) p. 1240], providing that "all laws and regulations of the District of Columbia for the preservation of the public peace and order shall extend to the Capitol Square, whenever application for the same is requested by the presiding officer of either House of Congress, or by the Chief of Engineers in charge of public buildings and grounds." See also D. C. Code, § 888, providing that all policemen and watchmen having authority to make arrests in the District of Columbia are instructed to be watchful for persons committing trespasses in the capitol grounds, and to arrest them forthwith.

42. See District of Columbia *v.* Johnson, 1 Mackey (D. C.) 51; Wilson *v.* District Com'rs, 3 MacArthur (D. C.) 473; Georgetown *v.* Chew, 10 Fed. Cas. No. 5,345, 5 Cranch C. C. 508.

43. **Liability for damages from defects in streets** see *infra*, X, B, 2.

streets is not in the abutting property-owners, subject to a public easement of passage; but in the United States, which is the absolute and unqualified owner of the same in fee.[44]

B. Street Parking and Park System. The commissioners have been vested with the jurisdiction and control of the street parking in the streets and avenues of the District, but the park system of the District, that is, the reservations, public squares, and the like, is under the exclusive control and charge of the chief of engineers of the United States army.[45]

C. Care and Control of Streets. The commissioners are vested with the care and control of the streets, avenues, and highways of the District,[46] and all the bridges in the District, except the aqueduct bridge across Rock creek.[47] But congress has reserved to itself the right to designate the routes of steam railroads through the city and to decide which streets they may use for their tracks and for other purposes.[48]

D. Opening and Improving Streets. Although the title to the streets in the District is in the United States, congress has power to provide that the cost of opening new streets or of highway improvements in the district shall be defrayed, not by the general government, but by the District, or wholly or in part by assessment upon the owners of lands benefited by the improvement.[49] As to improvements upon existing streets and highways, the commissioners, in virtue of their control over the public ways, have power to determine when and how, and with what materials the same shall be paved, and to change the character of pavements already laid.[50] They may also under certain conditions order the improvement or repair of alleys and sidewalks, the laying of sewers, or the con-

44. Baumann *v.* Ross, 167 U. S. 548, 17 S. Ct. 966, 42 L. ed. 270; Potomac Steam-Boat Co. *v.* Upper Potomac Steam-Boat Co., 109 U. S. 672, 3 S. Ct. 445, 27 L. ed. 1070; Van Ness *v.* Washington, 4 Pet. (U. S.) 232, 7 L. ed. 842.

Encroachment a purpresture.— The United States having the legal title to and the control of the streets of Washington, an unauthorized encroachment upon them is a purpresture, which the government may prevent or remove by mandatory proceedings in equity. U. S. *v.* Cole, 7 Mackey (D. C.) 504.

Temporary obstruction.— A permanent occupation of a street in Washington by a booth or building is prohibited by the laws and regulations, but not a mere temporary obstruction by goods or the like in front of a store. District of Columbia *v.* Monroe, MacArthur & M. (D. C.) 348.

The holders of lots on the line of Water street in the city of Washington are not entitled to riparian rights, or to rights of private property in the waters or the reclaimed lands between Water street and the navigable channels of the Potomac river, unless they can show valid grants from congress, or from the city under the authority of congress, or such long and notorious possession of defined parcels as to justify the courts, under the doctrine of prescription, in inferring grants; for the intention, never departed from since the first conception of the city, was to establish such a street along the water front for a common access thereto. Morris *v.* U. S., 174 U. S. 196, 19 S. Ct. 649, 43 L. ed. 946.

45. 30 U. S. St. at L. 570 [U. S. Comp. St. (1901) p. 1251].

46. McBride *v.* Ross, 13 App. Cas. (D. C.) 576; Bates *v.* District of Columbia, 7 Mackey (D. C.) 76.

The commissioners may grant licenses for the temporary occupation by an individual of portions of a public street or avenue, or of the parking thereon, and may revoke such license in their discretion, and upon such revocation may obtain a mandatory injunction requiring such licensee to remove any structures or obstructions placed by him in the space affected. McBride *v.* Ross, 13 App. Cas. (D. C.) 576.

47. Smith *v.* District of Columbia, 12 App. Cas. (D. C.) 33.

48. Edmonds *v.* Baltimore, etc., R. Co., 114 U. S. 453, 5 S. Ct. 1098, 29 L. ed. 216. And see Hopkins *v.* Baltimore, etc., R. Co., 6 Mackey (D. C.) 311.

49. Bauman *v.* Ross, 167 U. S. 548, 17 S. Ct. 966, 42 L. ed. 270. And see Macfarland *v.* Byrnes, 19 App. Cas. (D. C.) 531; Alley *v.* Lyon, 3 Mackey (D. C.) 457; U. S. *v.* Edmunds, 3 Mackey (D. C.) 142.

50. District of Columbia *v.* Metropolitan R. Co., 8 App. Cas. (D. C.) 322; District of Columbia *v.* Washington, etc., R. Co., 4 Mackey (D. C.) 214; Johnston *v.* New York First Nat. Bank, 3 Mackey (D. C.) 96.

Assessment on street railways.— "When any street or avenue through which a street-railway runs shall be paved, such railway company shall bear all of the expense for that portion of the work lying between the exterior rails of the tracks of such roads, and for a distance of two feet from and exterior to such track or tracks on each side thereof, and of keeping the same in repair." 20 U. S. St. at L. 102, c. 180, § 5.

struction of new sidewalks or new curbing, assessing upon abutting property-owners half the cost of such improvements.[51] For work to be done in opening or repairing streets or sewers or other public works, the cost of which may exceed one thousand dollars, the commissioners are required to advertise for bids; and contracts for such work may be awarded only by the unanimous vote of the commissioners, and all such contracts must be copied into a book kept for that purpose and be signed by the commissioners.[52]

E. Grading. The power to grade and regrade the public streets of the District is a continuing one, to be exercised whenever the health, improvement, and prosperity of the city make it necessary,[53] and the District is not answerable for consequential injuries to the property of individuals unless negligence or a corrupt design to inflict damage is shown.[54]

VIII. PUBLIC IMPROVEMENTS.

Except in regard to the repair and improvement of existing streets, public improvements in the District of Columbia are undertaken only under authority of acts of congress, which generally prescribe their extent and cost, the manner of assessing and collecting the expense, and the method and detail of construction, except in so far as the supervision of detail may be left to the commissioners.[55]

51. See 26 U. S. St. at L. 293; 26 U. S. St. at L. 1062, under which improvements of the kinds enumerated in the text may be ordered by the commissioners, in their discretion, without application on the part of interested property-owners, whenever the same shall in their opinion be necessary for the public health, safety, or comfort.

Permit system.—Improvements of the kinds enumerated may also be ordered by the commissioners upon the written request of a majority of the property-owners in the block or square to be affected, upon published notice, and after opportunity given to interested parties to appear and be heard in opposition. In relation to this method of assessment, congress has full power to authorize the assessment to be made on the adjacent proprietors, and it is not necessary that the tax should be a general one throughout the city. Willard *v.* Presbury, 14 Wall. (U. S.) 676, 20 L. ed. 719. And see Danenhower *v.* District of Columbia, 7 Mackey (D. C.) 99. But the municipal authorities cannot direct that the entire expense of street improvements shall be charged on abutting property; half the cost must be borne by the municipality. Young *v.* District of Columbia, MacArthur & M. (D. C.) 30. It has also been held that an abutting property-owner who has neither joined in the request for the improvement, nor acquiesced therein in such a manner as to estop him from denying that it was done with his assent, cannot lawfully be charged with any portion of the cost. Allman *v.* District of Columbia, 3 App. Cas. (D. C.) 8. At any rate such an assessment will be adjudged invalid on certiorari where the record does not show that any request was ever made by any one for the improvement, or that it was ever ordered by the commissioners. Keyser *v.* District of Columbia, 3 App. Cas. (D. C.) 31. It is essential to the validity of the assessment that notice should be given to an assessed property-owner at some serviceable stage of the proceedings; notice of the levy of the assessment after the improvement has been made is not sufficient. Allman *v.* District of Columbia, 3 App. Cas. (D. C.) 8. After an assessment has been paid the commissioners have no power, because of mistakes therein, to make another, although payment was made by a person who did not own the property. Danenhower *v.* District of Columbia, 7 Mackey (D. C.) 99. The assessment must be for the improvement specified in the contract therefor; and the commissioners have no power to add charges for items not named in the original assessment (Schneider *v.* District of Columbia, 7 Mackey (D. C.) 252); nor will the courts sustain the validity of an assessment levied on property not adjacent to the improvement made (Great Falls Ice Co. *v.* District of Columbia, 19 D. C. 327).

52. 20 U. S. St. at L. 102. And see Windsor *v.* District of Columbia, 7 Mackey (D. C.) 96; Young *v.* District of Columbia, MacArthur & M. (D. C.) 30.

53. Smoot *v.* Washington, 22 Fed. Cas. No. 13,133*a*, 2 Hayw. & H. (D. C.) 122.

54. Herring *v.* District of Columbia, 3 Mackey (D. C.) 572; District of Columbia *v.* Baltimore, etc., R. Co., 1 Mackey (D. C.) 314; Smith *v.* Washington City, 20 How. (U. S.) 135, 15 L. ed. 858 [*affirming* 22 Fed. Cas. No. 13,123*b*, 2 Hayw. & H. (D. C.) 220].

Congress may authorize property-owners to prosecute suits against the District for damages sustained by reason of a change of grade; and in such case the District cannot render the act of congress barren by setting up the general rule of law as to the liability of municipal corporations in such circumstances. Carroll *v.* District of Columbia, 22 Ct. Cl. 104.

55. Aqueduct.—Congress had power to construct an aqueduct drawing its supply of water for the city of Washington from

IX. FISCAL MANAGEMENT.

A. Appropriations. The commissioners are required to submit annually to the secretary of the treasury estimates of the moneys needed for the expenses of the government of the District for the ensuing fiscal year. After the secretary has considered and passed upon such estimates, he must return a statement of the items and amounts approved by him to the commissioners, who then submit the same to congress. To the extent to which congress shall approve of the said estimates, congress appropriates the amount of fifty per cent thereof, and the remaining half is levied and assessed on the taxable property in the District, other than the property of the United States and of the District.[56]

B. Taxation. The power of congress to exercise exclusive jurisdiction in all cases whatever within the District of Columbia, includes the power of taxation.[57] By the provisions of the organic act of 1878 the rate of taxation in any one year on real and personal property must not exceed one dollar and fifty cents on every hundred dollars of taxable value.[58] Subject to existing statutes the commissioners are authorized to make regulations prescribing the times for the payment of taxes and the duties of the assessors and collectors in relation thereto.[59]

sources within the limits of the state of Maryland, and using and occupying the land for that purpose in Maryland by permission and consent of the state. Reddall *v.* Bryan, 14 Md. 444, 74 Am. Dec. 550.

Water-main tax.— Notice to a property-owner is not necessary to sustain a water-main tax, under an act of congress providing that all assessments for laying water-mains in the District shall be at a specified rate per front foot on abutting lots, and giving the commissioners power to lay water-mains whenever they deem it necessary for the public safety, comfort, or health. Parsons *v.* District of Columbia, 170 U. S. 45, 18 S. Ct. 521, 42 L. ed. 943.

Public parks.— The fact that a public park in the District is dedicated by the act of congress creating it to the use and enjoyment of the people of the United States does not take it out of the rule as to special assessments applicable in the case of streets and highways; and such assessments, to aid in its purchase and improvement, may constitutionally be levied on property specially benefited. Wilson *v.* Lambert, 168 U. S. 611, 18 S. Ct. 217, 42 L. ed. 599.

Platting subdivisions.—While the commissioners of the District may be compelled by mandamus to take cognizance of, and consider and pass judgment upon, plats of subdivisions submitted to them, the judgment itself cannot be dictated or coerced. Ross *v.* U. S., 7 App. Cas. (D. C.) 1.

56. 20 U. S. St. at L. 102.

Unexpended appropriations.— All balances of appropriations for the District of Columbia which remain unexpended at the end of two years from the close of the fiscal year for which such appropriations were made must be covered into the treasury, one half to the credit of the surplus fund and one half to the credit of the general fund of the District. 25 U. S. St. at L. 793.

United States not liable for officer's salary. — The statutory agreement that the United States will pay one half of the approved estimates of expenses of the District, and the appropriations therefor, do not render the United States liable directly to the creditors of the District for the debts and liabilities of the corporation. The salary of a judge of a court of the District is an obligation of the District, not a debt of the United States; and consequently if the appropriation made by congress is not sufficient to pay it he cannot maintain an action against the United States. Bundy *v.* U. S., 21 Ct. Cl. 429.

57. Parsons *v.* District of Columbia, 170 U. S. 45, 18 S. Ct. 521, 42 L. ed. 943; Wilson *v.* Lambert, 168 U. S. 611; Baumann *v.* Ross, 167 U. S. 548; Shoemaker *v.* U. S., 147 U. S. 282; Willard *v.* Presbury, 14 Wall. (U. S.) 676; Loughborough *v.* Blake, 5 Wheat. (U. S.) 317.

A direct tax may be imposed on the District in proportion to the census. Loughborough *v.* Blake, 5 Wheat. (U. S.) 317, 5 L. ed. 98.

Congress may exempt from taxation certain classes of property or tax them at a lower rate than other property. Gibbons *v.* District of Columbia, 116 U. S. 404, 6 S. Ct. 427, 29 L. ed. 680.

Occupation tax.— Under the general powers conferred on the District by the organic act, it may tax vocations and require returns, and test their accuracy by inspection. District of Columbia *v.* Waggaman, 4 Mackey (D. C.) 328.

Franchise tax.— The tax laws of the District do not, in terms or by implication, authorize the District to tax a corporate franchise. Alexandria Canal, etc., Co. *v.* District of Columbia, 5 Mackey (D. C.) 376.

58. 20 U. S. St. at L. 102.

This limitation is confined to taxes on real and personal property, and does not apply to taxes on employments or occupations. Cooper *v.* District of Columbia, MacArthur & M. (D. C.) 250.

59. 20 U. S. St. at L. 102.

As to the levy, assessment, and collection of taxes generally see TAXATION.

All taxes collected in the District are directed to be paid into the treasury of the United States, and disbursed for the expenses of the District on itemized vouchers which shall have been audited and approved by the auditor for the District and certified by the commissioners or a majority of them.[60]

C. District Expenses and Charges. The commissioners are authorized to apply the taxes and other revenues of the District to the payment of the current expenses thereof, including the public schools, the fire department, and the police.[61] But the revenues of the District, including both the amount raised by taxation and that contributed by congress in the form of appropriations, are to be expended only for the uses and purposes of the municipal government of the District,[62] and cannot be diverted to purposes connected with the public buildings or other property of the United States not controlled or used by the municipality.[63]

D. Indebtedness and Bonds. Bonds to secure the indebtedness of the District of Columbia can be issued only under authority of an act of congress.[64] Various issues have been authorized from time to time,[65] but the organic act of 1878 provided that there should be no increase of the amount of the total indebtedness of the district at the time of its adoption.[66]

E. Certificates of Indebtedness. The former board of public works of the District (now abolished and their powers transferred to the commissioners) issued certificates of indebtedness, secured upon assessments for public improvements levied but not yet collected. These were negotiable, and although primarily payable out of such assessments, also imposed a direct liability on the District in case of neglect or failure to collect the assessments.[67] But the organic act of 1878 provides that the commissioners shall have no power to anticipate taxes by a sale or hypothecation of any such taxes or evidences thereof.[68]

X. CLAIMS AGAINST DISTRICT.

A. Contracts. The commissioners have no authority to make any contract or incur any obligation, except such as are expressly provided by law and approved by congress.[69] It is specially provided that contracts for the construc-

For matters peculiar to the methods and proceedings followed in the District the following authorities may be consulted:

Assessment.— 22 U. S. St. at L. 568; Bensinger *v.* District of Columbia, 6 Mackey (D. C.) 285; Semmes *v.* McKnight, 21 Fed. Cas. No. 12,653, 5 Cranch C. C. 539.

Equalization and review.— Alexandria Canal, etc., Co. *v.* District of Columbia, 5 Mackey (D. C.) 376.

Collection of delinquent taxes.— 19 U. S. St. at L. 396; Beale *v.* Burchell, 2 Fed. Cas. No. 1,157, 5 Cranch C. C. 310; Ross *v.* Holtzman, 20 Fed. Cas. No. 12,075, 3 Cranch C. C. 391; Whelan *v.* Washington, 29 Fed. Cas. No. 17,503, 3 Cranch C. C. 292.

Tax-sale and redemption of real estate.— Wall *v.* District of Columbia, 6 Mackey (D. C.) 194; King *v.* District of Columbia, MacArthur & M. (D. C.) 36; Georgetown *v.* U. S. Bank, 10 Fed. Cas. No. 5,343, 4 Cranch C. C. 176; Oneale *v.* Caldwell, 18 Fed. Cas. No. 10,515, 3 Cranch C. C. 312; Rodbird *v.* Rodbird, 20 Fed. Cas. No. 11,988, 5 Cranch C. C. 125.

60. 20 U. S. St. at L. 102.

61. 20 U. S. St. at L. 102.

62. See Washington County Levy Ct. *v.* Washington, 15 Fed. Cas. No. 8,306, 2 Cranch C. C. 175.

63. See Washington County Levy Ct. *v.* Ringgold, 15 Fed. Cas. No. 8,305, 2 Cranch C. C. 659 [*affirmed* in 5 Pet. (U. S.) 451, 8 L. ed. 188].

64. And see Grant *v.* Cooke, 7 D. C. 165; Taylor *v.* District of Columbia, 17 Ct. Cl. 367.

65. See 26 U. S. St. at L. 1103; 21 U. S. St. at L. 9; 18 U. S. St. at L. 120.

66. 20 U. S. St. at L. 102.

67. District of Columbia *v.* Lyon, 161 U. S. 200, 16 S. Ct. 450, 40 L. ed. 670; Gleason *v.* District of Columbia, 127 U. S. 133, 8 S. Ct. 1118, 32 L. ed. 92; Gleason *v.* District of Columbia, 19 Ct. Cl. 430; Laughlin *v.* District of Columbia, 17 Ct. Cl. 376; Fendall *v.* District of Columbia, 16 Ct. Cl. 106.

68. 20 U. S. St. at L. 102.

69. 20 U. S. St. at L. 102.

Submission to arbitration.— The commissioners have no power to bind the District by a common-law submission of a pending suit for breach of contract to a referee. District of Columbia *v.* Bailey, 171 U. S. 161, 18 S. Ct. 868, 43 L. ed. 118.

Payment in bonds.— The District commissioners cannot agree that payment shall be made to a contractor in bonds of the District "at their market value at the New York Exchange at the date of each settlement;" but it must be at their par value. Taylor *v.* District of Columbia, 17 Ct. Cl. 367.

Employment of architect.— Where the authorities of the District have power to erect a public school they may employ an architect

tion, improvement, alteration, and repair of streets, avenues, highways, alleys, gutters, and sewers, and all work of like nature, shall be made only with the official, unanimous consent of the commissioners, and recorded in a book kept for that purpose and signed by the commissioners.[70] But where work done under a contract with the District was authorized by law, and has been accepted, used, and controlled by the District for the benefit of the public, the contractor may recover on his contract, although the agents of the District neglected their duty in complying with the forms prescribed by law in making it.[71]

B. Torts — 1. Torts of Officers. The District of Columbia is liable in damages for injuries to individuals caused by the unlawful or tortious acts of its officers or employees, or by their carelessness or incompetence, in the same manner and to the same extent as other municipal corporations.[72]

2. Damages From Defects in Streets. The District of Columbia is responsible for the safe condition of its streets, alleys, public roads, bridges, and public sidewalks; and an action will lie against it to recover damages for injuries received in consequence of their imperfect or unsafe condition, provided it is shown that the District had notice of the defect or that it was so notorious and conspicuous in its character that the authorities charged with the inspection of the streets, etc., would in the proper performance of their duties have known of it.[73]

to prepare the plans and specifications and to superintend its construction, and bind the District to pay him for his services. District of Columbia *v.* Cluss, 103 U. S. 705, 26 L. ed. 445.

70. 20 U. S. St. at L. 102.

Contracts of board of public works.— Under the former organization of the District government, the power to make contracts for public improvements was vested in the board of public works; and it was provided by law that "all contracts made by the said board of public works shall be in writing, and shall be signed by the parties making the same, and a copy thereof shall be filed in the office of the secretary of the District." Act Cong. Feb. 21, 1871, § 37. Under this provision it was held that the statutory powers of the board were vested in its members jointly and not severally, and that a contract was not valid unless signed by the members of the board, or a majority of them; neither the vice-president, the secretary, nor any other officer having power to bind the board by a contract, unless specially authorized thereto by the board. Sawyer *v.* District of Columbia, 2 MacArthur (D. C.) 509; Brown *v.* District of Columbia, 127 U. S. 579, 8 S. Ct. 1314, 32 L. ed. 262; Shipman *v.* District of Columbia, 119 U. S. 148, 7 S. Ct. 134, 30 L. ed. 337; Brown *v.* District of Columbia, 19 Ct. Cl. 445; Neuchatel Paving Co. *v.* District of Columbia, 17 Ct. Cl. 386. Further the provision that the contract must be in writing was held to be mandatory, and an oral promise or agreement by the board or any of its officers could not be enforced against the District. Ballard *v.* District of Columbia, 3 MacArthur (D. C.) 49; Barnard *v.* District of Columbia, 127 U. S. 409, 8 S. Ct. 1202, 32 L. ed. 207; O'Hare *v.* District of Columbia, 18 Ct. Cl. 646; Neuchatel Paving Co. *v.* District of Columbia, 17 Ct. Cl. 386. But in a case where a contract awarded by the board was not reduced to writing until long after the work under it was begun, and when it was put into writing one of the three who signed on behalf of the board was no longer a member thereof, it was held that even if the written contract was invalid because it was not executed by a majority of the five members of the board it was effective as embodying the parties' understanding of the parol contract. Shipman *v.* District of Columbia, 119 U. S. 148, 7 S. Ct. 134, 30 L. ed. 337. The board of public works had no power or authority, after a contract was once awarded and duly executed, to increase the sum to be paid to the contractor, by entries on its minutes or directions to its subordinates, and the District was not bound by any such action. Barnes *v.* District of Columbia, 22 Ct. Cl. 366.

71. Campbell *v.* District of Columbia, 2 MacArthur (D. C.) 533, suit upon an account for labor done and materials furnished.

The omission of the seal of the District from a contract which the commissioners executed as for the District, with their signatures and seals, will not prevent the instrument from binding the District as a specialty. District of Columbia *v.* Camden Iron Works, 181 U. S. 453, 21 S. Ct. 680, 45 L. ed. 948.

72. District of Columbia *v.* McElligott, 117 U. S. 621, 6 S. Ct. 884, 29 L. ed. 946; Roth *v.* District of Columbia, 16 App. Cas. (D. C.) 323; Grumbine *v.* Washington, 2 MacArthur (D. C.) 578.

73. District of Columbia *v.* Payne, 13 App. Cas. (D. C.) 500; District of Columbia *v.* Sullivan, 11 App. Cas. (D. C.) 533; District of Columbia *v.* Boswell, 6 App. Cas. (D. C.) 402; Costello *v.* District of Columbia, 21 D. C. 508; Larmon *v.* District of Columbia, 5 Mackey (D. C.) 330; Woodbury *v.* District of Columbia, 5 Mackey (D. C.) 127; McGill *v.* District of Columbia, 4 Mackey (D. C.) 70, 54 Am. Rep. 256; Clark *v.* District of Columbia, 3 Mackey (D. C.) 79; District of Columbia *v.* Woodbury, 136 U. S. 450, 10 S. Ct. 990, 34 L. ed. 472; Barnes *v.* District of Columbia, 91 U. S. 540, 23 L. ed. 440; Weightman *v.* Washington Corp., 1 Black (U. S.) 39, 17 L. ed. 52.

C. Audit of Claims. The revenues of the District, raised by taxation of persons and property, may be disbursed for the expenses of the District only on itemized vouchers which shall have been audited and approved by the auditor for the District and certified by the commissioners or a majority of them.[74]

D. Suits Against District. The District of Columbia, in its character of a municipal corporation, is liable to suit at the instance of private individuals.[75] Such suits are properly brought against the District, and jurisdiction is acquired by the service of process on the commissioners, or any one of them, they being the executive officers of the corporation for such purposes.[76] It is provided by an act of congress that the attorney-general shall have the same power to interpose counter-claims in suits against the District of Columbia as in cases where the United States is a party.[77]

DISTRICT SEWER. A sewer constructed or acquired under authority of ordinances, within the limits of an established sewer district.[1]

DISTRICT TREASURY. The county treasury in counties not under township organization.[2]

DISTRINGAS. Literally, "you restrain, detain, distrain, hinder." A writ commanding a sheriff to distrain for a debt or appearance; a chancery process to compel the appearance of a corporation in certain cases; an execution in detinue and assise of nuisance.[3] (Distringas: Against — Corporation, see CORPORATIONS; Sheriff, see SHERIFFS AND CONSTABLES. To Enforce — Judgment in Detinue, see DETINUE; Payment of Costs, see COSTS. See also DISTRESS.)

DISTURB.[4] Primarily to throw into disorder or confusion; to derange; to interrupt the settled state of; to excite from a state of rest.[5]

DISTURBANCE.[6] Anything which throws into confusion things settled, which interrupts the movements, pursuits or thoughts of another.[7] (Disturbance: Of Common, see COMMON LANDS. Of Easement, see EASEMENTS. Of Peace, see BREACH OF THE PEACE. Of Public Assemblage, see DISTURBANCE OF PUBLIC MEETINGS.)

74. 20 U. S. St. at L. 102.

Former board of audit.— An act of congress in 1874 constituted the controllers of the treasury a board to "audit for settlement all the unfunded or floating debt of the District of Columbia." This did not make it a board of arbitration, and no finality attached to its findings, so that the disallowance of a claim by the board would not prevent the claimant from maintaining an action against the District. District of Columbia *v.* Cluss, 103 U. S. 705, 26 L. ed. 455; Neitzey *v.* District of Columbia, 17 Ct. Cl. 111. And see Strong *v.* District of Columbia, 1 Mackey (D. C.) 265.

75. McBride *v.* Ross, 13 App. Cas. (D. C.) 576; Metropolitan R. Co. *v.* District of Columbia, 132 U. S. 1, 10 S. Ct. 19, 33 L. ed. 231.

76. 18 U. S. St. at L. 116.

The commissioners of the District do not succeed the late board of public works as parties to a suit in equity, where no process has been issued or served upon them; and a rule upon them to show cause in such suit should be discharged. Tompkins *v.* Mandel, 3 MacArthur (D. C.) 268.

77. See U. S. Rev. St. (1878) § 1061 [U. S. Comp. St. (1901) p. 737]. On the construction and application of this provision see Lyons *v.* District of Columbia, 19 Ct. Cl. 642; Morgan *v.* District of Columbia, 19 Ct. Cl. 164; Campbell *v.* District of Columbia, 18 Ct. Cl. 193; Neitzey *v.* District of Columbia, 17 Ct. Cl. 111.

1. Prior *v.* Buehler, etc., Constr. Co., 170 Mo. 439, 443, 71 S. W. 205.

2. Ryan *v.* People, 117 Ill. 486, 491, 6 N. E. 37, construing a statute relating to taxation.

3. English L. Dict.

Writ of distringas nuper vice comitem see Doe *v.* Miller, 6 U. C. Q. B. 426, 458.

4. "The word . . . has a well known legal significance." State *v.* Stuth, 11 Wash. 423, 425, 39 Pac. 665.

5. Watkins *v.* Kaolin Mfg. Co., 131 N. C. 536, 540, 42 S. E. 983 [*quoting* Webster Dict.].

6. "Intimidating, alarming, and disturbing, in the sense the words are obviously used by the legislature, as well as according to their legal signification, imply the use of physical force or menace, and involve a breach of the peace." Embry *v.* Com., 79 Ky. 439, 441.

7. Varney *v.* French, 19 N. H. 233, 237, where it is said: "So if it distract his [a person's] attention, call his mind off from one train of thought, and divert it to another, it may be said to disturb him. A thousand things might or might not disturb others, in fact, according to their then existing pursuit, and this renders it an extremely difficult thing to lay down a general rule, which shall definitely settle what is or is not a disturbance."

DISTURBANCE OF PUBLIC MEETINGS

By Louis Lougee Hammon*

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CROSS-REFERENCES

For Matters Relating to:

Civil Liability of Offender, see Religious Societies.

Expulsion of Offender:

From Religious Meeting, see Religious Societies.

From Theater, see Theaters and Shows.

General Matters Relating to Criminal Law and Criminal Procedure, see Criminal Law.

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I. WHAT CONSTITUTES OFFENSE.

A. In General. The offense of disturbing a public meeting is but slightly developed at common law, and it is not clear to what meetings the law affords its protection, nor what acts of disturbance are penalized. In America, however, this question is of minor importance, since in most if not all the states, the offense has been defined by statute.[1]

B. Meetings Protected and Requisites Thereof — 1. In General. In some states it is declared by statute to be a penal offense to disturb any lawful and peaceable assembly,[2] including meetings for amusement[3] and for moral and benevolent purposes,[4] political meetings,[5] temperance meetings,[6] and schools.[7]

2. Religious Meetings — a. In General. The disturbance of a meeting for religious worship is an offense at common law, and is indictable as such in the United States.[8]

1. See cases cited *infra*, I, B, 1, 2.

Sufficiency of definition.—A statute providing that any person who shall "molest or disturb" any meeting of inhabitants of the state met together for any lawful purpose shall be fined sufficiently defines the crime. State *v.* Oskins, 28 Ind. 364 [*overruling* Marvin *v.* State, 19 Ind. 181]. And the same is true of a statute providing that every person who shall disturb any religious society when meeting together in public worship shall be fined. State *v.* Stuth, 11 Wash. 423, 39 Pac. 665.

Ordinance defining offense see MUNICIPAL CORPORATIONS.

2. Com. *v.* Porter, 1 Gray (Mass.) 476 (*dictum*); Von Rueden *v.* State, 96 Wis. 671, 71 N. W. 1048.

Disturbance of auction sales see AUCTIONS AND AUCTIONEERS, 4 Cyc. 1047.

3. Com. *v.* Porter, 1 Gray (Mass.) 476 (*dictum*); Anderson *v.* State, (Tex. Cr. App. 1892) 20 S. W. 358.

4. State *v.* Gager, 28 Conn. 232; Rex *v.* Lavoie, 6 Can. Cr. Cas. 39, 21 Quebec Super. Ct. 128.

A meeting for culture in sacred music is not a meeting "for the promotion of a moral and benevolent object." State *v.* Gager, 28 Conn. 232.

A political meeting is not a meeting for moral or benevolent purposes. Rex *v.* Lavoie, 6 Can. Cr. Cas. 39, 21 Quebec Super. Ct. 128.

5. Com. *v.* Porter, 1 Gray (Mass.) 476 (*dictum*); Rex *v.* Lavoie, 6 Can. Cr. Cas. 39, 21 Quebec Super. Ct. 128.

Town-meetings.—An indictment lies at common law for disorderly behavior at a town-meeting. Com. *v.* Hoxey, 16 Mass. 385.

6. Com. *v.* Porter, 1 Gray (Mass.) 476, where it was held that a statute enacted to prevent the disturbance of schools and public meetings, and providing for the punishment of every person who shall wilfully interrupt or disturb any school or other assembly of people met for a lawful purpose, includes temperance meetings.

7. State *v.* Spray, 113 N. C. 686, 18 S. E. 700.

A singing school is within the protection of a statute prohibiting the disturbance of schools (State *v.* Gager, 26 Conn. 607); and also, it seems, within the protection of a statute making it an offense to disturb "any meeting . . . for any lawful purpose" (State *v.* Oskins, 28 Ind. 364).

Private writing schools are also within the protection of the statute. State *v.* Leighton, 35 Me. 195.

A school not in session is not protected by statute from disturbance. State *v.* Gager, 28 Conn. 232.

There must be a teacher to constitute a school. A meeting of persons to sing together for their common improvement in the art of singing, but without a teacher, is not a school. State *v.* Gager, 28 Conn. 232.

School directors' meetings.—Maliciously to disturb a meeting of school directors is indictable at common law. Campbell *v.* Com., 59 Pa. St. 266.

School as meeting for moral or benevolent object see *supra*, note 4.

School as religious meeting see *infra*, note 8.

8. *Alabama.*—Talladega *v.* Fitzpatrick, 133 Ala. 613, 32 So. 252.

Delaware.—State *v.* Smith, 5 Harr. 490.

North Carolina.—State *v.* Jasper, 15 N. C. 323.

South Carolina.—Graham *v.* Bell, 1 Nott & M. 278, 9 Am. Dec. 687.

United States.—U. S. *v.* Brooks, 24 Fed. Cas. No. 14,655, 4 Cranch C. C. 427.

See 17 Cent. Dig. tit. "Disturbance of Public Assemblage," § 1.

Statutes.—At common law it is a crime to disturb persons assembled for worship. In England statutes were passed to protect dissenters in their worship, because their assembly was unlawful; but in the United States such legislation is not required. In most of the states, however, statutes have been passed for the protection of persons assembled for worship and for the punishment of their disturbers. State *v.* Wright, 41 Ark. 410, 48 Am. Rep. 43. It is an indictable offense at common law to disturb divine services notwithstanding the statute declares the penalty and points out the remedy. Talladega *v.* Fitzpatrick, 133 Ala. 613, 32 So. 252;

b. Commencement of Services. It is an offense to disturb the meeting even though the services have not begun.[9]

c. Close of Services. The meeting is protected from unlawful disturbance, not only until the services have closed and the congregation are dismissed, but until there is a dispersion of the people, and they cease to be a congregation.[10]

d. Persons Not Taking Part in Services. It constitutes the offense to disturb persons present at the meeting, although they are not taking part in the services.[11]

People *v.* Crowley, 23 Hun (N. Y.) 412; People *v.* Degey, 2 Wheel. Cr. (N. Y.) 135.

Necessity of congregation.— The statute does not punish the disturbance of "religious worship." The offense is the disturbance of a "congregation assembled for religious worship." Hunt *v.* State, (Tex. Cr. App. 1896) 34 S. W. 750.

Organization or incorporation of congregation.— An unorganized body assembled in good faith for religious worship is within the terms of a statute prohibiting unusual business within a mile of a camp-meeting without the permission of the authorities in charge. Com. *v.* Bearse, 132 Mass. 542, 42 Am. Rep. 450. And all religious societies, without regard to whether they are incorporated, are within the terms of a statute prohibiting a disturbance of their meetings. State *v.* Stuth, 11 Wash. 423, 39 Pac. 665.

Citizenship of congregation.— In Indiana it is an essential factor in the crime that the persons collected together for religious worship were to a substantial extent inhabitants of the state. Cooper *v.* State, 75 Ind. 62.

Name, creed, and mode of worship.— The protection of the law extends to all, irrespective of creed, opinion, or mode of worship, if not indecent or unlawful. Thus Salvation Army meetings are protected. Hull *v.* State, 120 Ind. 153, 22 N. E. 117. And see Rex *v.* Wroughton, 3 Burr. 1683. And any assembly met for public worship is protected, although the members are of different creeds and have no distinctive name. State *v.* Ringer, 6 Blackf. (Ind.) 109.

Object of meeting.— If the purpose of a meeting be solely for instruction in the art of singing, although confined to the singing of sacred songs, the meeting is not protected (Adair *v.* State, 134 Ala. 183, 32 So. 326. And see Green *v.* State, (Tex. Cr. App. 1900) 56 S. W. 915); nor is a business meeting of members or officers of a religious society (State *v.* Fisher, 25 N. C. 111. *Contra*, Hollingsworth *v.* State, 5 Sneed (Tenn.) 518), although it be opened with religious exercises (Wood *v.* State, 11 Tex. App. 318). A Sunday-school is protected (Martin *v.* State, 6 Baxt. (Tenn.) 234; *dictum* in State *v.* Stuth, 11 Wash. 423, 39 Pac. 665); but not a Sunday-school celebration and Christmas-tree service, although speeches be made on the subject of Sunday-schools and public morality (Layne *v.* State, 4 Lea (Tenn.) 199); nor is a political meeting protected as one for religious worship (Rex *v.* Lavoie, 6 Can. Cr. Cas. 39, 21 Quebec Super. Ct. 128).

Place of meeting.— A religious meeting is protected, although it be not held in a church, chapel, or meeting-house permanently set apart by a religious society for worship. State *v.* Swink, 20 N. C. 492.

Lawful conduct of meeting.—It is an essential element of the offense that the congregation disturbed should have been conducting themselves in a lawful manner. Kizzia *v.* State, 38 Tex. Cr. 319, 43 S. W. 86; Hunt *v.* State, (Tex. Cr. App. 1896) 34 S. W. 750; Nash *v.* State, 32 Tex. Cr. 368, 24 S. W. 32; Mullinix *v.* State, 32 Tex. Cr. 116, 22 S. W. 407.

9. State *v.* Ramsay, 78 N. C. 448, holding that if the congregation have assembled, a person who by speaking without leave prevents the services from taking place is indictable. It is sufficient if, at the time of the disturbance, the congregation are in the act of gathering together at the place of worship. Lancaster *v.* State, 53 Ala. 398, 25 Am. Rep. 625; Love *v.* State, 35 Tex. Cr. 27, 29 S. W. 790. A considerable number of the congregation must, however, be collected at or about the time when worship is to be commenced, and in the place where it is to be had, in order to make a disturbance of them indictable. State *v.* Bryson, 82 N. C. 576.

10. Lancaster *v.* State, 53 Ala. 398, 25 Am. Rep. 625; State *v.* Lusk, 68 Ind. 264; State *v.* Snyder, 14 Ind. 429; Williams *v.* State, 3 Sneed (Tenn.) 313. And see Wall *v.* Lee, 34 N. Y. 141. *Contra*, State *v.* Jones, 53 Mo. 486.

Applications of rule.— Although the congregation have been dismissed, it is an offense to create a disturbance while a portion of the people still remain in the house, and before a reasonable time has elapsed for their dispersal (Kinney *v.* State, 38 Ala. 224), or while they remain assembled around the house to administer to the wants of their domestic animals and to prepare and eat their own meals (Minter *v.* State, 101 Ga. 743, 30 S. E. 989). A meeting is not protected, however, where the services have been concluded ten minutes, and the lights in the church have been extinguished, and some of the congregation have gone home and others are on the way or in the act of leaving (State *v.* Davis, 126 N. C. 1059, 35 S. E. 600), although in Texas it has been held that the meeting is protected so long as any part of the congregation remain on the premises (Love *v.* State, 35 Tex. Cr. 27, 29 S. W. 790; Dawson *v.* State, 7 Tex. App. 59). A disturbance of a camp-meeting at night, after the congregation have dispersed and the people have retired to rest, is not within the prohibition of the law. State *v.* Edwards, 32 Mo. 548. *Contra*, Com. *v.* Jennings, 3 Gratt. (Va.) 624.

11. Adair *v.* State, 134 Ala. 183, 32 So. 326.

C. What Constitutes Disturbance — 1. General Rules. What shall constitute an interruption or disturbance of a public meeting cannot easily be brought within a definition applicable to all cases. It must depend somewhat upon the nature and character of the meeting, and the purpose for which it is held, and much also on the usage and practice governing there.[12] To constitute

Withdrawal from meeting.— Persons who have withdrawn from the meeting may still form a part of it, if the withdrawal was for a temporary purpose, and they intend to return, and are in close proximity; and there is no presumption that persons sitting outside of the meeting-house engaged in conversation not connected with worship or loitering outside of the house are not a part of the assembly. Adair *v.* State, 134 Ala. 183, 32 So. 326.

12. Com. *v.* Porter, 1 Gray (Mass.) 476.

A meeting is "disturbed" when it is agitated, aroused from a state of repose, molested, interrupted, hindered, perplexed, disquieted, or diverted from the object of the assembly. Richardson *v.* State, 5 Tex. App. 470.

"Disturbance" is any conduct which, being contrary to the usages of the particular sort of meeting and class of persons assembled, interferes with its due progress and services, or is annoying to the congregation in whole or in part. State *v.* Stuth, 11 Wash. 423, 39 Pac. 665.

Particular acts of disturbance.— Disturbance of a religious meeting may consist in boisterous language and conduct (Stewart *v.* State, 31 Ga. 232; Cantrell *v.* State, (Tex. Cr. App. 1895) 29 S. W. 42), cracking and eating nuts (Hunt *v.* State, 3 Tex. App. 116, 30 Am. Rep. 126), cursing at the church door (Holmes *v.* State, 39 Tex. Cr. 231, 45 S. W. 487, 73 Am. St. Rep. 921), entering with a cigar in the mouth and refusing to remove the hat on request (Hull *v.* State, 120 Ind. 153, 22 N. E. 117), wearing a false mustache (Williams *v.* State, 83 Ala. 68, 3 So. 743), or deriding and making sport of the faith and practices of the congregation (Chisholm *v.* State, (Tex. Cr. App. 1894) 24 S. W. 646). So it is a disturbance for a person who has been expelled from membership in a church to insist upon stating his grievances at a subsequent meeting for worship. State *v.* Ramsay, 78 N. C. 448. But to sing in church as a choir, although in violation of the orders of the pastor, is not a disturbance. Com. *v.* McDole, 2 Pa. Dist. 370.

"Rude or indecent behavior."— The words "indecently acting," in a statute penalizing the disturbance of religious worship by such conduct, are used in a relative sense, and signify any conduct which, being contrary to the usages of the particular class of worshipers, interferes with their services or annoys the congregation; and accordingly they embrace talking or whispering so as to disturb the congregation, and also any attempt to interrupt the communion of the Lord's Supper. Nichols *v.* State, 103 Ga. 61, 29 S. E. 431. However, a person is not guilty of "rude or indecent behavior" where he merely strikes back at another by whom he is insulted and assaulted, although he might have avoided a continuance of the difficulty by withdrawing from it without peril to himself. Reeves *v.* State, 96 Ala. 33, 11 So. 296. See, however, Goulding *v.* State, 82 Ala. 48, 2 So. 478.

Selling goods near meeting.—In some states it is made a penal offense by statute to maintain booths for the sale of refreshments within a prohibited distance of an assembly gathered for worship, with an exception in favor of those carrying on a preëstablished business, and those having obtained permission from persons in charge of the meeting. These statutes are constitutional. Com. *v.* Bearse, 132 Mass. 542, 42 Am. Rep. 450; State *v.* Cate, 58 N. H. 240; State *v.* Read, 12 R. I. 137. However, so much of the Pennsylvania statute as provides for the forfeiture and summary sale of articles offered for sale in violation of the act is unconstitutional. Kramer *v.* Marks, 64 Pa. St. 151; Fetter *v.* Wilt, 46 Pa. St. 457. The prohibition is generally directed in terms against the sale of any articles of traffic, with a special enumeration of intoxicating liquors; and is usually construed to penalize the sale, not only of liquors, but of any other article of traffic. State *v.* Solomon, 33 Ind. 450; Rogers *v.* Brown, 20 N. J. L. 119; Riggs *v.* State, 7 Lea (Tenn.) 475. *Contra*, Kramer *v.* Marks, 64 Pa. St. 151; Fetter *v.* Wilt, 46 Pa. St. 457. The sale of merchandise is the gist of the offense; it is immaterial whether the sale disturbs the assembly. State *v.* Cate, 58 N. H. 240. If in fact the assembly is disturbed by the noise made by those who attend the sale, the seller is guilty of disturbing the meeting, although the disturbance is not occasioned by his own acts. West *v.* State, 9 Humphr. (Tenn.) 66. Where a statute contains a proviso that nothing therein shall be construed to prevent persons from pursuing their ordinary business at their usual place of doing business, or from selling victuals at their usual place of abode, the negative averments of a criminal complaint referring to the proviso must be proved by the state. State *v.* Read, 12 R. I. 135.

Intruding in meeting-house.— In Tennessee it is made a misdemeanor by statute to move into any building belonging to a religious assembly without leave from the person in charge. McGuire *v.* State, 3 Heisk. 104.

Participation in disturbance.— Where a number of persons talk and laugh among themselves so that a meeting is disturbed, the act of one is the act of all, and any one may properly be convicted. McAdoo *v.* State, (Tex. Cr. App. 1896) 35 S. W. 966. And where a camp-meeting was disturbed at two A. M., and defendant was found with others

a disturbance of a religious assembly it is not necessary that the services shall have been discontinued because of the improper conduct;[13] nor is it necessary that the members of a congregation whose attention was distracted by the improper conduct should have been annoyed thereby.[14]

2. Proximate Cause of Disturbance. To amount to the offense, the improper conduct must have been the proximate cause of the disturbance of the meeting.[15]

3. Preventing Meeting. To prevent persons from assembling as a body is not a disturbance of a meeting.[16]

4. Extent of Disturbance. The offense of disturbing a religious meeting may consist in disturbing not only the congregation, but also the minister or clerk[17] or any member of the congregation.[18]

D. Intention, Wilfulness, and Malice. If the natural tendency of an act is to disturb a meeting, and it does in fact disturb it, an intention to disturb is not a necessary factor in the crime.[19] It is sufficient if the act itself was done intentionally, since in such a case the law presumes an intent to disturb the meeting,[20] and this presumption cannot be rebutted by proof of a secret intention not to

who were disturbing it, and failed to explain his being out at that hour, his conviction was justified. Ball *v.* State, 67 Miss. 358, 7 So. 353. However, the fact that defendant was one of a number of persons outside of the building who disturbed the meeting by their conduct is not sufficient to connect him with the offense. Brown *v.* State, 46 Ala. 175; Miller *v.* State, 83 Ind. 334.

Notice to desist.— The penalty imposed by Mass. St. (1875) c. 75, § 6, for disorderly behavior in town-meetings, does not attach unless the offender persists in such behavior after notice from the moderator, and does not withdraw from the meeting after being requested so to do by the moderator. Com. *v.* Hoxey, 16 Mass. 385.

Acts constituting other offenses.—Where a person disturbs a meeting by fighting, the state may elect to prosecute him for disturbing the meeting rather than for the assault and battery. Wright *v.* State, 8 Lea (Tenn.) 563. Acts amounting in fact to the disturbance of a public meeting oftentimes constitute another offense also. For assault and battery generally see Assault and Battery. Breach of the peace generally see Breach of the Peace. Carrying weapons into assembly see Weapons. Disorderly conduct generally see Disorderly Conduct. Drunkenness generally see Drunkards. Nuisance in general see Nuisances. Riot in general see Riot. Unlawful assembly in general see Unlawful Assembly.

13. Johnson *v.* State, 92 Ala. 82, 9 So. 539, where it is held that a meeting is "disturbed" if an intoxicated person goes into a church and uses profane language in a low tone, thus attracting the attention of the congregation and minister, although he does not thereby interrupt the services.

14. Holt *v.* State, 1 Baxt. (Tenn.) 192; McElroy *v.* State, 25 Tex. 507.

15. State *v.* Kirby, 108 N. C. 772, 12 S. E. 1045, holding that to engage in a fight outside of a church is not a disturbance of public worship, where the meeting was not interrupted until a third person reported the fight to the congregation. And interference with the wagon of a person attending religious services is not a disturbance of the assembly, although the owner, apprehending that some mischief might be done to the vehicle, left the assembly for the purpose of preventing it, where he had no knowledge that the act was being, or had been, committed, until he reached the conveyance. Cox *v.* State, 136 Ala. 94, 34 So. 168.

16. Davis *v.* State, (Miss. 1894) 16 So. 377; Com. *v.* Underkoffer, 11 Pa. Co. Ct. 589, holding that to lock the door of a church before the congregation has assembled and thereby keep them out is not a disturbance of religious worship. And to take possession of a school-house when there are no pupils present, and to forbid the teacher to use the building, although the school is thereby prevented from assembling, is not a wilful disturbance of the school. State *v.* Spray, 113 N. C. 686, 18 S. E. 700. *Contra*, Douglass *v.* Barber, 18 R. I. 459, 28 Atl. 805.

Claim of ownership of building as justification for excluding assembly see *infra*, I, E, 3.

17. People *v.* Crowley, 23 Hun (N. Y.) 412; People *v.* Degey, 2 Wheel. Cr. (N. Y.) 135; U. S. *v.* Brooks, 24 Fed. Cas. No. 14,655, 4 Cranch C. C. 427.

18. State *v.* Wright, 41 Ark. 410, 48 Am. Rep. 43; Nichols *v.* State, 103 Ga. 61, 29 S. E. 431; Cockreham *v.* State, 7 Humphr. (Tenn.) 11.

A finding that the congregation were disturbed is justified by evidence that two members were disturbed by defendant's conduct. McElroy *v.* State, 25 Tex. 507.

To disturb one member of a congregation is an offense, under Tex. Pen. Code, art. 180, forbidding the disturbance, not only of the congregation, but of any part thereof. Young *v.* State, (Tex. Cr. App. 1898) 44 S. W. 507; McVea *v.* State, 35 Tex. Cr. 1, 26 S. W. 834.

19. Talladega *v.* Fitzpatrick, 133 Ala. 613, 32 So. 252; Salter *v.* State, 99 Ala. 207, 13 So. 535. See, however, Com. *v.* Phillips, 11 Ky. L. Rep. 370.

20. Wright *v.* State, 8 Lea (Tenn.) 563.

Inference of intent.— An intent to disturb a religious meeting may be inferred from conduct whose natural tendency is to disturb

interrupt the assembly.[21] However, the act of disturbance must have been intentional, and its natural tendency must have been to disturb the meeting.[22] Consequently if the act was done, not by design, but through accident or mistake, there is no crime.[23] In many states the statutes make wilfulness an essential element of the offense of disturbing public worship.[24] In some states malice is made an element of the offense by statute.[25]

E. Justification and Excuse — 1. In General. Various facts may or may not excuse or justify the disturbance of a public meeting according to the circumstances of the particular case.[26]

it. West *v.* State, 9 Humphr. (Tenn.) 66; McElroy *v.* State, 25 Tex. 507; Friedlander *v.* State, 7 Tex. App. 204.

Primary and secondary intent.—Where the meeting was interrupted by defendant's engaging in a fight, it is immaterial that his primary intent was not to interrupt the meeting, but to commit an assault and battery. Wright *v.* State, 8 Lea (Tenn.) 563.

21. Williams *v.* State, 83 Ala. 68, 3 So. 743; State *v.* Jacobs, 103 N. C. 397, 9 S. E. 404 (*dictum*); State *v.* Ramsay, 78 N. C. 448. See, however, State *v.* Linkhaw, 69 N. C. 214, 12 Am. Rep. 645.

22. Lancaster *v.* State, 53 Ala. 398, 25 Am. Rep. 625.

23. Talladega *v.* Fitzpatrick, 133 Ala. 613, 32 So. 252; Com. *v.* Porter, 1 Gray (Mass.) 476.

24. *Alabama.*— Brown *v.* State, 46 Ala. 175.

Iowa.— State *v.* Stroud, 99 Iowa 16, 68 N. W. 450.

Kentucky.— See Com. *v.* Phillips, 11 Ky. L. Rep. 370.

Massachusetts.— Com. *v.* Porter, 1 Gray 476.

Missouri.— State *v.* Jones, 53 Mo. 486; State *v.* Bankhead, 25 Mo. 558.

Tennessee.— State *v.* Townsell, 3 Heisk. 6.

Texas.— Prucell *v.* State, (App. 1892) 19 S. W. 605; Wood *v.* State, 16 Tex. App. 574; Magee *v.* State, 7 Tex. App. 99; Richardson *v.* State, 5 Tex. App. 470.

See 17 Cent. Dig. tit. "Disturbance of Public Assemblage," § 1 *et seq.*

The word "wilful," as used in these statutes, is synonymous with "intentional," "designed," or "without lawful excuse." Williams *v.* State, 83 Ala. 68, 3 So. 743; Goulding *v.* State, 82 Ala. 48, 2 So. 478; Harrison *v.* State, 37 Ala. 154. "Wilful" means "with evil intent or without reasonable grounds for believing the act to be lawful" (Holmes *v.* State, 39 Tex. Cr. 231, 45 S. W. 487, 73 Am. St. Rep. 921); "without reasonable ground for believing the act to be lawful, or a reckless disregard of the rights of others" (Finney *v.* State, 29 Tex. App. 184, 15 S. W. 175); or evil intent or legal malice or without reasonable grounds for believing the act to be lawful (Wood *v.* State, 16 Tex. App. 574). "Unlawfully" is not a synonym of "wilfully." State *v.* Hopper, 27 Mo. 599; State *v.* Townsell, 3 Heisk. (Tenn.) 6.

Wilfulness may include legal malice (Wood *v.* State, 16 Tex. App. 574), although legal malice is not a necessary element of it (Holmes *v.* State, 39 Tex. Cr. 231, 45 S. W. 487, 73 Am. St. Rep. 921. *Contra,* State *v.* Dahlstrom, (Minn. 1903) 95 N. W. 580).

Presumption of wilfulness.— If a person curses in church in a manner calculated to disturb the congregation, the presumption is that the disturbance was wilful and wanton. Harvey *v.* State, (Tex. Cr. App. 1898) 44 S. W. 151.

Wilfully, maliciously, or contemptuously.— Where the statute uses the terms "wilfully," "maliciously," or "contemptuously" in the disjunctive, the offense is complete if either of those elements was present. State *v.* Karnes, 51 Mo. App. 293.

Recklessness or carelessness.— It is not sufficient that the act was done recklessly or carelessly. Harrison *v.* State, 37 Ala. 154. An act may, however, have been done wilfully, although carelessly and recklessly. Consequently the offense may be committed, although the acts complained of were done through carelessness or recklessness. Johnson *v.* State, 92 Ala. 82, 9 So. 539; Finney *v.* State, 29 Tex. App. 184, 15 S. W. 175.

25. State *v.* Jones, 53 Mo. 486; State *v.* Bankhead, 25 Mo. 558; McElroy *v.* State, 25 Tex. 507. And see Com. *v.* Phillips, 11 Ky. L. Rep. 370.

Presumption of malice.— Where a person disturbs a congregation by disorderly conduct and profane language, the presumption is, in the absence of evidence to the contrary, that he acted maliciously. McElroy *v.* State, 25 Tex. 507.

26. Harrison *v.* State, 37 Ala. 154, where it is held that the fact that similar acts of disturbance had been perpetrated in the same church by others without reproof is no defense. Nor is it an excuse that one who has obtained permission to speak at a meeting is not called to order or otherwise interrupted while indulging in offensive discourse. Lancaster *v.* State, 53 Ala. 398, 28 Am. Rep. 625. And in a prosecution under a statute making it a penal offense to carry on unusual business within a mile of a camp-meeting without the permission of the authorities in charge, it is no defense that defendant had received no notice of the proposed meeting. Com. *v.* Bearse, 132 Mass. 542, 42 Am. Rep. 450.

Provocation.— Where the leader of a religious meeting indulged in personal criticism of defendant and denied him the privilege of speaking in his defense, and then indulged in further abusive language, whereupon defendant, upon again being denied the right to speak, left the meeting, a conviction was not justified. State *v.* Dahlstrom, (Minn. 1903)

2. Intoxication. Intoxication is not an excuse for disturbing a religious meeting.[27]

3. Authority or Right. The disturbance of a meeting may be justified when the accused acts under lawful authority[28] or in the exercise of a lawful right,[29] such as for instance the right of self-defense.[30]

II. PROCEDURE.

A. Indictment and Information[31] — **1. Form in General.** The indictment must set out the offense with sufficient definiteness to establish its identity.[32] It

95 N. W. 580. And see Nash *v.* State, 32 Tex. Cr. 368, 24 S. W. 32. However, provocation does not justify a person in disturbing a meeting by calling another a liar. Calvert *v.* State, 14 Tex. App. 154. Provocation as mitigating punishment see *infra*, II, D.

27. Johnson *v.* State, 92 Ala. 82, 9 So. 539.

28. *Ex p.* McNair, 13 Nebr. 195, 13 N. W. 172, 42 Am. Rep. 765, where it is held that a statute prohibiting the sale of articles of traffic within three miles of any religious assembly, in any field or woodland, without a permit from the managers of the assembly, is not infringed by one duly licensed by the authorities of a village to sell such articles at a camp-meeting within the village boundaries. However, if defendant asserts a license from the managers of the assembly, the burden is on him to show that it was granted by persons authorized to issue it, and he does not prove this merely by the failure of the government to show that the assembly had an organization which established and governed it. Com. *v.* Bearse, 132 Mass. 542, 42 Am. Rep. 450.

Officers performing duties.— The disturbance of a public school is justified where the accused acted in pursuance of an order of the school-board, of which he was a member, and in the honest discharge of what he supposed to be his official duty, although as a matter of law the board was not vested with power to make the order. Bays *v.* State, 6 Nebr. 167. Nor is it an offense for the officers of a church to attempt, in a quiet, peaceful, and orderly manner, to protect the congregation from imposition and perhaps serious detriment by refusing to permit the services to be led by a suspended minister. Richardson *v.* State, 5 Tex. App. 470. So where a minority of the congregation who have been expelled from membership assemble in the church building to worship the officers of the church may use such means, not amounting to needless force, as is necessary to prevent the intrusion, without being guilty of disturbing public worship. Morris *v.* State, 84 Ala. 457, 4 So. 628. However, the sexton of the society that owns a church is not justified in interrupting the meeting of another congregation because it is an interference with the rights of a third congregation duly licensed to hold meetings there, where the licensee makes no objection. Dorn *v.* State, 4 Tex. App. 67. Right to exclude trespassers see also *infra*, note 29. Preventing assembly as disturbance of meeting see *supra*, I, C, 3.

Permission to speak.— No permission given a person to speak at a meeting by the leader of the services can justify or excuse acts or words which offend the order or decorum essential to christian worship. Lancaster *v.* State, 53 Ala. 398, 28 Am. Rep. 625.

29. State *v.* Schieneman, 64 Mo. 386, holding that a statute protecting religious assemblages does not allow the streets of a city to be blockaded by a religious meeting, and that a person who drives through a street to the disturbance of an assemblage is not guilty of an offense.

Right to exclude trespassers.— If a person refuses to let the congregation enter the usual place of assembly because he in good faith, although mistakenly, believes that he has a right to exclude them as owner of the premises, he is not criminally liable unless he maintains his supposed right in a disorderly manner. State *v.* Jacobs, 103 N. C. 397, 9 S. E. 404. However, it is no justification for moving into a building belonging to a religious society without leave, in violation of law, where the legal title of the society was perfect, and it was in possession, that plaintiff has an equitable title to the premises, since it was not intended by the legislature that questions of title to real estate should be tried in a prosecution for that offense. McGuire *v.* State, 3 Heisk. (Tenn.) 104. Right of church officers to exclude trespassers, see *supra*, note 28. Preventing assembly as disturbance of meeting see *supra*, I, C, 3.

Privileges of membership.— A member of the assemblage, although he be a member of the particular religious organization having control of the services, is bound to regard its peace and order. Lancaster *v.* State, 53 Ala. 398, 25 Am. Rep. 625; State *v.* Ramsay, 78 N. C. 448.

30. Wood *v.* State, 11 Tex. App. 318, holding that a member of a congregation may defend himself against an assault made upon him during the services by another member, even though the services are thereby interrupted. *Contra*, it seems, Graham *v.* Bell, 1 Nott & M. (S. C.) 278, 9 Am. Dec. 687. However, one who wilfully and intentionally engages in a fight without lawful excuse or necessity at or near the place at which people are engaged in worship, whereby they are disturbed, is guilty of disturbing religious worship, although he did not bring on the difficulty or strike the first blow. Goulding *v.* State, 82 Ala. 48, 2 So. 478. See, however, Reeves *v.* State, 96 Ala. 33, 11 So. 296.

31. **Indictment and information** generally see Indictments and Informations.

32. State *v.* Fugitt, 66 Mo. App. 625; State *v.* Kindrick, 21 Mo. App. 507.

is ordinarily sufficient, however, to frame the indictment in the language of the statute or in terms of equivalent import in all cases where the statute so far individuates the offense that the offender has proper notice, from the mere adoption of the statutory terms, as to what the offense he is to be tried for really is.[33]

2. Particular Allegations — a. Existence and Purpose of Meeting. The indictment must allege the existence of a meeting which defendant is charged with disturbing.[34] And so too the indictment must allege the purpose for which the meeting was assembled[35] with sufficient particularity to bring the disturbance within the prohibition of the statute defining the offense.

For forms of indictment for unlawfully disturbing an assembly see Kidder *v.* State, 58 Ind. 68; People *v.* Crowley, 23 Hun (N. Y.) 412; State *v.* Yarborough, 19 Tex. 161.

Conformity between information and complaint.— An information charging that defendant alone committed the offense by loud and vociferous talking and by assaulting a person named may be based on a complaint that the offense was committed by defendant and that person by loud and vociferous talking and by assaulting each other. Wood *v.* State, 11 Tex. App. 318. An information with full and proper averments charging that defendant, on a day named, unlawfully and wilfully disturbed a congregation assembled for religious worship, etc., taken in connection with an affidavit that defendant, on that day, "did commit the offense of disturbing religious worship," etc., is sufficient to support the conviction. Phants *v.* State, 2 Tex. App. 398.

Common-law offense.— An indictment concluding *contra formam statuti* may be maintained if the facts charged amount to an offense at common law, although not within the purview of any statute. Com. *v.* Hoxey, 16 Mass. 385.

33. Smith *v.* State, 63 Ala. 55; Minter *v.* State, 104 Ga. 743, 30 S. E. 989; Howard *v.* State, 87 Ind. 68; State *v.* Stubblefield, 32 Mo. 563; State *v.* McDaniel, 40 Mo. App. 356; State *v.* Hynes, 39 Mo. App. 569.

As against a motion to quash, it is sufficient to charge the offense in the language of the statute or in terms substantially equivalent thereto. Blake *v.* State, 18 Ind. App. 280, 47 N. E. 942.

Statutory form.— Where an indictment is not framed on the form given by statute, it must aver every material constituent of the offense, excepting the statements of venue and of time; and this is true, although the statutory form omits material constituents of the offense and the indictment alleges every material fact which the form contains. Smith *v.* State, 63 Ala. 55.

34. Smith *v.* State, 63 Ala. 55, holding that an indictment which fails to conform with the statute creating the offense for want of an averment that the persons disturbed were met in "public assembly," and which fails to conform with the statute prescribing a form of indictment for want of an averment that there was an "assemblage" of people, is insufficient. So an indictment charging the disturbance of a "congration" of people met for religious worship is bad. State *v.* Mitchell, 25 Mo. 420. And a complaint charging a wilful disturbance of a school must allege that the school was in session at the time of the disturbance. State *v.* Gager, 28 Conn. 232.

35. State *v.* Fisher, 25 N. C. 111.

Lawful purpose.— The indictment must allege that the meeting disturbed was held for a lawful purpose. State *v.* Steele, 74 Mo. App. 5. But an information for disturbing "any meeting of inhabitants of this State met together for any lawful purpose" need not state what the particular purpose was. Howard *v.* State, 87 Ind. 68, 69; Blake *v.* State, 18 Ind. App. 280, 47 N. E. 942.

Religious worship.— The indictment should charge that the assembly had met for divine worship, divine service, religious worship or service, or something of the same import. State *v.* Fisher, 25 N. C. 111. But an averment that the congregation were assembled for religious worship sufficiently alleges that they were "attending [a] protracted or other religious meeting." State *v.* Yarborough, 19 Tex. 161. And where a complaint alleges the exposure for sale of refreshments within the prohibited distance of the camp-meeting of a certain conference, being then and there a religious society holding a camp-meeting, it is not necessary to allege that the meeting was called for a "purpose connected with the object for which the society was organized." State *v.* Read, 12 R. I. 135.

Social and moral purposes.— An indictment charging the disturbance of a meeting at a church for social and moral purposes need not set forth the purpose of the meeting with greater particularity. Com. *v.* Gennerette, 10 Pa. Super. Ct. 598.

Name of society.— An indictment for disturbing a religious society at worship need not state the name of the society. State *v.* Ringer, 6 Blackf. (Ind.) 109.

Following language of statute.— A complaint alleging the offense in the language of the statute is sufficient, although it does not show the purpose of the assembly. Von Rueden *v.* State, 96 Wis. 671, 71 N. W. 1048.

Lawful conduct of meeting.— An indictment must allege that the congregation disturbed were conducting themselves in a lawful manner. Kizzia *v.* State, 38 Tex. Cr. 319, 43 S. W. 86; Mullinix *v.* State, 32 Tex. Cr. 116, 22 S. W. 407. And an allegation that the meeting disturbed was "assembled for religious worship in a lawful manner" is not a sufficient allegation that the congregation were "assembled for religious worship and

b. Disturbance, and Acts Constituting Same — (I) *FACT OF DISTURBANCE.* The indictment must allege that the meeting was in fact disturbed by the act complained of.[36]

(II) *MANNER OF DISTURBANCE* — (A) *In General.* An indictment for disturbing a public meeting should show what the disturbance was. It should allege the manner or means by which the meeting was disturbed.[37] It is sufficient, however, to describe the acts of disturbance in general terms. The indictment need not enter into details.[38]

conducting themselves in a lawful manner." Kizzia *v.* State, 38 Tex. Cr. 319, 320, 43 S. W. 86.

36. State *v.* Bankhead, 25 Mo. 558.

Sales of goods near religious meeting.— However, a complaint or indictment under a statute prohibiting unusual traffic within a certain distance of a religious meeting need not allege that the sales disturbed the assembly, disturbance not being an element of the offense. State *v.* Cate, 58 N. H. 240; Riggs *v.* State, 7 Lea (Tenn.) 475.

37. *Arkansas.*— Stratton *v.* State, 13 Ark. 688; Fletcher *v.* State, 12 Ark. 169; State *v.* Minyard, 12 Ark. 156.

Missouri.— State *v.* Bankhead, 25 Mo. 558.

Nebraska.— Jones *v.* State, 28 Nebr. 495, 44 N. W. 658, 7 L. R. A. 325.

Pennsylvania.— Com. *v.* McDole, 2 Pa. Dist. 270.

Texas.— Thompson *v.* State, 16 Tex. App. 159 [*distinguishing* Kindred *v.* State, 33 Tex. 67, which was based on a statute materially different].

See 17 Cent. Dig. tit. "Disturbance of Public Assemblage," § 10.

If the disturbance is by acting, the indictment should indicate in general terms, without going into details, the character of the disturbing acts, as by hissing, applauding, laughing, disorderly moving about, or any other disturbing conduct that may be described in general terms. State *v.* Hinson, 31 Ark. 638.

In Virginia, however, an indictment for disturbing a religious congregation need not set up the means of disturbance. Com. *v.* Daniels, 2 Va. Cas. 402.

Charge in disjunctive.— Where a statute provides that "any person who, by loud or vociferous talking or swearing, or by any other noise, wilfully disturbs any congregation" is punishable, an indictment charging all the prohibited acts in a single count must use the conjunctive "and" instead of the disjunctive "or" employed in the statute. Copping *v.* State, 7 Tex. App. 61, 62.

38. Thompson *v.* State, 16 Tex. App. 159. See, however, Rex *v.* Cheere, 4 B. & C. 902, 7 D. & R. 461, 4 L. J. K. B. O. S. 79, 10 E. C. L. 851, a case of disturbance by threats.

Illustrations.— An indictment for disturbing a meeting by profane discourse need not set out the language used, either in detail or in substance. State *v.* Ratliff, 10 Ark. 536; State *v.* McDaniel, 40 Mo. App. 356. If the disturbance is by abusive language, the words spoken or the character of the language used need not be alleged, since mere noise by any kind of talking may disturb a congregation. State *v.* Hinson, 31 Ark. 638. An indictment charging that the offense was committed "by cursing and quarreling and fighting and discharging a loaded pistol, and by boisterous conduct and by otherwise indecently acting" sufficiently describes the mode of disturbance. Huffman *v.* State, 95 Ga. 469, 20 S. E. 216. An indictment charging that the accused "by cursing and using profane and obscene language, and by being intoxicated, and by fighting, and by loud talking, and by . . . otherwise indecently acting, did interrupt and disturb a congregation of persons, . . lawfully assembled for divine service" is sufficient without specifying the precise language alleged to have been used by the accused, or designating the person with whom he fought. Minter *v.* State, 104 Ga. 743, 744, 30 S. E. 989. An indictment in two counts alleging first, that defendants "did then and there, in a tumultuous and boisterous manner, and by indecently acting, disturb a congregation of persons lawfully assembled for divine service" at a certain church; and second, that they "did then and there indecently act and attempt to prevent the administration of the holy sacrament" at said church is sufficient on general demurrer as against an objection that the first count should have set out the particular act which was tumultuous and boisterous, and that the second count should have particularized the act of indecency. Hicks *v.* State, 60 Ga. 464.

Assaulting member of congregation.— Under a statute describing two classes of offenses: First, the disturbance of a congregation met for religious worship, by making a noise or by rude and indecent behavior, or by profane discourse either within the place of worship or so near to it as to disturb the meeting; and second, the threatening or assaulting of any person there being, an indictment is insufficient to charge an offense of the second class where it attempts to charge an offense of the first class and only describes the assault as the means of disturbance. State *v.* Bankhead, 25 Mo. 558.

Conduct "calculated to disturb."—Where a statute makes it an offense to disturb any congregation by acting in any way that is calculated to disturb them, an indictment alleging that defendant disturbed the congregation by laughing and talking, etc., is insufficient without averring that the conduct was calculated to produce a disturbance. State *v.* Booe, 62 Ark. 512, 37 S. W. 47.

Proximate cause of disturbance.— An indictment charging that defendant did disturb an assembly "by rude and indecent conduct, bidding defiance to teacher and school di-

(B) *Following Language of Statute.* If the statute defining the offense describes the various ways in which it is unlawful to disturb a meeting, it is sufficient to charge a disturbance in the language of the statute, without further specifying the means of interruption.[39]

(C) *Duplicity.* An indictment in a single count charging various means by which a meeting was disturbed is not bad for duplicity.[40] And an indictment for disturbing a religious meeting may charge defendant in the same count with disturbing both the society and its members.[41]

c. Intention, Wilfulness, and Malice. While as a rule where the evil intent accompanying an act is necessary to constitute it a crime the intent must be alleged in the indictment,[42] yet it is sufficient to allege it in the prefatory part of the pleading.[43] In those jurisdictions where wilfulness is an essential element of the offense, the indictment must charge that the offense was wilfully done.[44] So too in those states where malice is an element of the offense the indictment must allege that the acts were done maliciously.[45]

rectors, and refusing to obey the orders of either, thereby interfering with the literary exercises of the school" sufficiently shows that the disturbance was caused by rude and indecent conduct. Robertson *v.* State, 99 Tenn. 180, 41 S. W. 441.

39. State *v.* Minyard, 12 Ark. 156; Minter *v.* State, 104 Ga. 743, 30 S. W. 989; Com. *v.* Gennerette, 10 Pa. Super. Ct. 598.

If the statute does not particularize the means of disturbance, an indictment which merely follows the language of the statute is insufficient. Conerly *v.* State, 66 Miss. 96, 5 So. 625. *Contra*, Jones *v.* State, 28 Nebr. 495, 44 N. W. 658, 7 L. R. A. 325; Kindred *v.* State, 33 Tex. 67.

Sales of goods near religious meeting.— An indictment under a statute making it a misdemeanor to "expose to sale or gift any spirituous liquors or any provisions or other articles of traffic" within one mile of a worshiping assembly, and not at the person's usual place of business, need not specify the articles charged to have been sold. It is sufficient if it follows the words of the statute. Riggs *v.* State, 7 Lea (Tenn.) 475.

Surplusage.— An indictment charging that defendant disturbed a congregation assembled for religious worship "by loud and vociferous talking and swearing" is sufficient, although the quoted words are not found in the statute describing the offense. Lockett *v.* State, 40 Tex. 4.

40. State *v.* McDaniel, 40 Mo. App. 356, holding that an information charging that defendant disturbed a congregation by making a loud noise, by rude and indecent behavior, and by profane discourse describes but one offense. And an indictment under a statute providing that "any person who, by loud and vociferous talking or swearing, or by any other noise, wilfully disturbs any congregation" is punishable, may in a single count embrace all the prohibited acts. Copping *v.* State, 7 Tex. App. 61, 62.

Surplusage.— An indictment charging the disturbance of a congregation by the use of a described indecent gesture is not bad for duplicity, because it also charges a disturbance by talking and laughing, the latter being mere surplusage. State *v.* Bledsoe, 47 Ark. 233, 1 S. W. 149. Nor is an indictment for disturbing a congregation by profanely swearing and "by talking and laughing aloud" bad for duplicity, the latter words being merely surplusage. State *v.* Horn, 19 Ark. 578.

41. State *v.* Ringer, 6 Blackf. (Ind.) 109.

42. See, generally, INDICTMENTS AND INFORMATIONS.

Sufficiency of allegation.— An information charging that defendant "did use loud and profane language, and did smoke cigarettes, and did refuse to leave said room when requested so to do" by the officer in charge of religious worship sufficiently shows that defendant's acts were done with intent to create a disturbance. State *v.* Stuth, 11 Wash. 423, 425, 39 Pac. 665.

43. State *v.* Hynes, 39 Mo. App. 569.

44. State *v.* Stroud, 99 Iowa 16, 68 N. W. 450; Com. *v.* Phillips, 11 Ky. L. Rep. 370; State *v.* Townsell, 3 Heisk. (Tenn.) 6. And see State *v.* Hopper, 27 Mo. 599.

Contrary to statute.— An information charging a disturbance "contrary to the statute" does not supply an omitted averment that the acts were wilfully done. State *v.* Stroud, 99 Iowa 16, 68 N. W. 450.

Unlawfulness.— An indictment alleging that the acts were "unlawfully" done is not equivalent to a charge that they were done wilfully. State *v.* Townsell, 3 Heisk. (Tenn.) 6.

Sufficiency of allegation.— An information charging that defendant "did use loud and profane language, and did smoke cigarettes, and did refuse to leave said room when requested so to do" by the officer in charge of religious worship sufficiently shows that defendant's acts were done wilfully. State *v.* Stuth, 11 Wash. 423, 425, 39 Pac. 665.

45. Com. *v.* Phillips, 11 Ky. L. Rep. 370.

Wilfully, maliciously, or contemptuously.— In Missouri the indictment should charge that the disturbance was done "wilfully, maliciously, or contemptuously." State *v.* Hopper, 27 Mo. 599; State *v.* Bankhead, 25 Mo. 558. An indictment is sufficient in this state which alleges that defendant "wilfully" dis-

d. Place of Offense. By the weight of authority an indictment for disturbing religious worship need not specify either the locality of the church in which the congregation was assembled or its name,[46] it being sufficient if it shows that the offense was committed within the territorial jurisdiction of the court.

e. Time of Offense. The indictment should specify the time when the offense was committed.[47]

3. VARIANCE. All material facts charged by the indictment must be proved as laid.[48] A variance between the indictment and the proof in respect to the purpose of the meeting[49] or the manner or means of the disturbance[50] is fatal. It is

turbed the meeting, however, since the statute sets forth those words in the disjunctive. State *v.* Karnes, 51 Mo. App. 293.

46. State *v.* Smith, 5 Harr. (Del.) 490; Minter *v.* State, 104 Ga. 743, 30 S. E. 989; Bush *v.* State, 5 Tex. App. 64; Corley *v.* State, 3 Tex. App. 412. *Contra*, State *v.* Fugitt, 66 Mo. App. 625; State *v.* Stegall, 65 Mo. App. 243; State *v.* Kindrick, 21 Mo. App. 507. And see Stratton *v.* State, 13 Ark. 688.

At or near place of worship.— The indictment need not aver that the act was done "at or near" the place of worship. Warren *v.* State, 3 Heisk. (Tenn.) 269 [*overruling* State *v.* Doty, 5 Coldw. (Tenn.) 33].

Character of place of meeting.— In Missouri the indictment must allege that the place where the congregation met was set apart for religious worship. State *v.* Schieneman, 64 Mo. 386; State *v.* Ellis, 71 Mo. App. 269; State *v.* Fugitt, 66 Mo. App. 625; State *v.* Stegall, 65 Mo. App. 243; State *v.* Kindrick, 21 Mo. App. 507. This is sufficiently alleged, however, by an averment that the congregation met for religious worship "at the Methodist Episcopal Church" in a certain town and county. State *v.* Karnes, 51 Mo. App. 293. In Texas the indictment must allege that the congregation was assembled at one of the places of meeting mentioned in the statute. State *v.* McClure, 13 Tex. 23. This is sufficiently done by an averment that the congregation was assembled for the purpose of worship in a certain house for religious worship, a "meeting-house" being one of the places mentioned in the statute. State *v.* Yarborough, 19 Tex. 161.

47. Stratton *v.* State, 13 Ark. 688.

In Alabama this rule has been modified by statute. Smith *v.* State, 63 Ala. 55.

Indictment void in part.— An indictment laying the time of the disturbance on a certain day, and on "other" days both before and after, is void only as to the uncertain days and is sufficient as to the day specified. State *v.* Jasper, 15 N. C. 323.

48. Jones *v.* State, 28 Nebr. 495, 44 N. W. 658, 7 L. R. A. 325, holding that if a complaint for disturbing religious worship alleges that defendant was not a member of the religious society in session and had no right to be present at the meeting those facts must be proved.

Joint wrong-doers.—Where two are charged in one count with disturbing a congregation of persons assembled for divine worship, the evidence of guilt must apply to the same transaction in order to convict both. Two separate acts of disturbance done by defendants respectively at different times, although on the same day, will not support the indictment. Jackson *v.* State, 87 Ga. 432, 13 S. E. 689. However, an allegation that defendant "acted together with" another in the commission of the offense is surplusage, and proof that he acted alone is not a variance. Finney *v.* State, 29 Tex. App. 184, 15 S. W. 175.

49. Kidder *v.* State, 58 Ind. 68, where it was held that if an indictment charges the disturbance of an assembly met to transact business matters relating to a church, proof of the disturbance of a meeting for religious worship does not sustain a conviction. And where a statute distinguishes between a congregation assembled for religious worship and one assembled for the purpose of conducting a Sunday school, a charge of disturbing a congregation assembled for religious worship is not sustained by proof of disturbing a Sunday school. Hubbard *v.* State, 32 Tex. Cr. 389, 24 S. W. 30. So an allegation that refreshments were exposed to sale within the prohibited distance from a camp-meeting of a certain conference, which was then and there a religious society holding such camp-meeting, must be proved as laid. State *v.* Read, 12 R. I. 135.

Progress of services.— If an indictment charges the disturbance of a congregation actually engaged in worship, it is a variance to show a disturbance merely of persons assembled for such worship. State *v.* Bryson, 82 N. C. 576.

Name of society.— It is no ground for quashing the complaint that it referred to the "Rhode Island and Eastern Connecticut Advent Christian Conference" as the "Rhode Island, Easton, Connecticut Advent Christian Conference." State *v.* Read, 12 R. I. 135.

50. Stratton *v.* State, 13 Ark. 688; State *v.* Jones, 53 Mo. 486; State *v.* Sherrill, 46 N. C. 508; Lyons *v.* State, 25 Tex. App. 403, 8 S. W. 643.

Issues.— Under an indictment alleging a disturbance "by talking, and by loud talking, and by using profane language, . . . and by then and there being, intoxicated, and by otherwise indecently acting, striking matches, smoking a pipe, making indecent and vulgar noises by laughing aloud," etc., the jury are not restricted to the consideration of vulgar noises made by laughing aloud, there being evidence of indecent and vulgar noises. Taffe *v.* State, 90 Ga. 459, 16 S. E. 204.

Conjunctive allegation of means of disturbance.— Where a statute contains disjunctive

a fatal defect also if the state fails to prove that the offense was committed within the territorial jurisdiction of the court;[51] and an allegation charging the disturbance of a congregation assembled at a named church is matter of local description identifying the particular congregation alleged to have been disturbed, and must be proved as laid.[52] However, an indictment which charges defendant in the same count with disturbing a religious society and its members while at worship is sustained by proof that he disturbed either.[53]

B. Evidence.[54] The rules of evidence prevailing generally in criminal prosecutions are applicable in prosecutions for disturbing a public meeting.[55]

clauses specifying the prohibited ways in which a religious meeting may be disturbed, and the indictment in one count alleges a violation of those clauses conjunctively, the state may proceed upon either of the alternative clauses. Copping *v.* State, 7 Tex. App. 61.

51. State *v.* Kindrick, 21 Mo. App. 507.

52. Minter *v.* State, 104 Ga. 743, 30 S. E. 989.

The general rule of criminal procedure is that place is essential only on the question of jurisdiction, and, even where it is incorrectly stated, yet if the evidence establishes that the offense was committed within the jurisdiction of the court, the variance will not be fatal. Where, however, the place is stated in the indictment as matter of local description and not as venue it must be proved as laid. Minter *v.* State, 104 Ga. 743, 30 S. E. 989.

Assembly near place named in indictment. — A charge that the accused disturbed a meeting assembled "at" a named building is sustained by proof that he disturbed a meeting assembled at a bush arbor near such building, both places being within the jurisdiction of the court. McCright *v.* State, 110 Ga. 261, 34 S. E. 368; Minter *v.* State, 104 Ga. 743, 30 S. E. 989. However, an indictment for disturbing a congregation assembled "in" a certain church is not sustained by proof of the disturbance of a congregation assembled in the open air at a place temporarily prepared for worship, about forty yards from the meeting-house. Stratton *v.* State, 13 Ark. 688.

53. State *v.* Ringer, 6 Blackf. (Ind.) 109.

Surplusage.—Where an information charges that defendant disturbed a meeting met for religious worship, an allegation that certain persons in particular were disturbed is surplusage and need not be proved. Hull *v.* State, 120 Ind. 153, 22 N. E. 117.

54. Evidence in criminal cases generally see CRIMINAL LAW.

55. Lewis *v.* State, 33 Tex. Cr. 618, 28 S. W. 465, where it is held that in order to show accused's mental condition, and also to affect the weight of his testimony, the state may prove that he had been drinking at the time of the disturbance.

Character of accused.— An accused may put in evidence of his good character, but until he does so the state may not prove his bad character as a disturber of religious assemblages. Harrison *v.* State, 37 Ala. 154. And if the accused puts his character in issue, the inquiry on the part of the state must be confined to a time antecedent to the time when the offense is alleged to have been committed. Brown *v.* State, 46 Ala. 175.

Hearsay.— Testimony that the preacher ceased preaching and spoke to defendant and others participating in the disturbance about their talking is not inadmissible as hearsay. McAdoo *v.* State, (Tex. Cr. App. 1896) 35 S. W. 966.

Declarations of accused.— The state may show declarations and conduct of defendant during the services tending to show wilfulness on his part in doing the act causing the disturbance. Adair *v.* State, 134 Ala. 183, 32 So. 326. Thus declarations of defendant before going to church and after his arrival there that he was going to stay there until he got satisfaction are admissible to support a charge of wilful disturbance. Price *v.* State, 107 Ala. 161, 18 So. 130. And evidence that after the sermon was concluded defendant stated that if the preacher fooled with him he would shoot him was admissible to show that his talking during the sermon was maliciously done. McAdoo *v.* State, (Tex. Cr. App. 1896) 35 S. W. 966.

Admissions of accused.— Where defendant understood that a remark addressed to him referred to a probable prosecution for disturbing a meeting, his answer that if the preacher fooled with him he would shoot him is a passive admission that he was connected with the disturbance. McAdoo *v.* State, (Tex. Cr. App. 1896) 35 S. W. 966.

Conclusions of witnesses.— Testimony that the manner in which defendant called witness a liar was calculated to disturb the congregation (Calvert *v.* State, 14 Tex. App. 154) or that the witness was disturbed by defendant's conduct (Morris *v.* State, 84 Ala. 457, 4 So. 628. And see Taffe *v.* State, 90 Ga. 459, 16 S. E. 204) is inadmissible as calling for a conclusion. However, testimony that defendant "caused general confusion, excitement, and disturbance" is not merely the witness' opinion (Lewis *v.* State, 33 Tex. Cr. 618, 28 S. W. 465); nor is testimony that defendant "was talking mad," and that he and another "looked like they were trying to fight" (Reeves *v.* State, 96 Ala. 33, 11 So. 296); and accordingly either is admissible.

Competency of witness.— The complainant in a prosecution for disturbing a religious meeting in violation of the Pennsylvania act of March 16, 1847, is a competent witness, since no part of the fine is payable to him.

C. Trial[56] — **1. Questions For Jury.** It is within the province of the jury to determine whether at the time of the disturbance there was in fact a meeting of people,[57] whether the persons disturbed were in fact a part of the meeting,[58] whether the meeting was in fact one of those to which the law extends its protection,[59] whether the meeting in question was in fact disturbed,[60] whether the particular acts were sufficient in fact to constitute a disturbance,[61] and whether the disturbance was in fact intentional or wilful.[62] All these are questions for the jury to determine under proper instructions from the court.

2. Instructions.[63] The rules of law concerning instructions to the jury in criminal prosecutions in general are applicable in prosecutions for disturbing a public meeting.[64]

D. Mitigation of Punishment.[65] Facts not justifying or excusing the dis-

Com. *v.* Cane, 2 Pars. Eq. (Pa.) 265. See, generally, Witnesses.

Usage of congregation.— Where a person who has been expelled from membership in a church disturbs a subsequent meeting by interrupting the services to state his grievances, the state may show that it was not the usage in that church for expelled members to do so. State *v.* Ramsay, 78 N. C. 448.

56. Trial of criminal cases generally see Criminal Law.

57. State *v.* Snyder, 14 Ind. 429, where it is held that the question whether a congregation was still "met together" or dispersed after the benediction is one for the jury under proper instructions as to the protection afforded by the statute.

58. Adair *v.* State, 134 Ala. 183, 32 So. 326, where it is held that the question whether persons outside of the meeting-house constituted a part of the assembly, and the question whether persons had withdrawn themselves from the meeting so as no longer to constitute a part of it, were for the jury.

59. State *v.* Norris, 59 N. H. 536, where it is held that where the principal object of a camp-meeting was the inculcation of principles of temperance and abstinence from intoxicating liquors, and each session was opened by prayer and the reading of the scriptures, and the meeting consisted of addresses on that subject, and the singing of temperance and religious hymns, it was a question for the jury whether the meeting was "convened for the purpose of religious worship," within the terms of the statute.

60. Harrison *v.* State, 37 Ala. 154.

61. Talladega *v.* Fitzpatrick, 133 Ala. 613, 32 So. 252.

Where the law does not define what shall be deemed a disturbance, it must be decided as a question of fact in each particular case. Com. *v.* Porter, 1 Gray (Mass.) 476.

62. Harrison *v.* State, 37 Ala. 154; Wright *v.* State, 8 Lea (Tenn.) 563.

63. Instructions in criminal cases generally see Criminal Law.

64. Williams *v.* State, 83 Ala. 68, 3 So. 743, holding that a general charge should be construed as a whole and in connection with the uncontradicted evidence in the particular case; and that if, so construed, it asserts the law correctly, a disconnected sentence, although it may not express all the constituents of the offense, will not work a reversal.

Assumption of facts in issue.— Where defendant denies making any disturbance, it is error for the court in the instructions to assume that the acts complained of were evil and unlawful. Harvey *v.* State, (Tex. Cr. App. 1898) 44 S. W. 151.

Conformity to evidence.— Evidence that the disturbance occurred in the church during services, as well as just outside of the church immediately after services, justifies a charge that the statute protects a congregation so long as any of them are on the ground, either before, during, or after service. Love *v.* State, 35 Tex. Cr. 27, 29 S. W. 790.

Conformity to issues.— A request for instructions predicated upon a disturbance of a meeting, the disturbance of which was not charged in the indictment, is properly refused. Freeman *v.* State, (Tex. Cr. App. 1898) 44 S. W. 170.

Misleading instructions.—A charge that the word "interrupt," as used in the statute, means anything done by the accused which takes the attention of the hearers from the services or the discourse of a minister is bad as tending to mislead the jury by withdrawing their attention from wilfulness as an element of the offense. Brown *v.* State, 46 Ala. 175.

Presentation of defendant's theory.—Where the evidence is conflicting as to whether the meeting was one held for religious worship, defendant is entitled to a charge presenting his theory of the case. Green *v.* State, (Tex. Cr. App. 1900) 56 S. W. 915. So where a member of the church had prayed for defendant by name as being a very wicked and mean person, and defendant had appealed in vain to a deacon to put a stop to it, whereupon defendant protested against the person in question taking any further part in the services, he was entitled to an instruction that to be protected from disturbance the congregation must have been conducting itself in a lawful manner. Nash *v.* State, 32 Tex. Cr. 368, 24 S. W. 32.

Harmless error.— Although a disturbance occurred in the house and during services, it is harmless error to charge that the congregation were protected so long as any of them were on the ground before or after the meeting. Freeman *v.* State, (Tex. Cr. App. 1898) 44 S. W. 170.

65. Punishment generally see Criminal Law.

turbance of a public meeting may nevertheless operate in mitigation of punishment.[66]

DITCH.[1] A drain;[2] a hollow space in the ground, natural or artificial, where water is collected or passes off.[3] (Ditch: As Boundary, see BOUNDARIES. See also, generally, DRAINS; WATERS.)

DITTO MARKS. Marks which are generally understood to mean, "the same as above."[4]

DIV. An abbreviation of DIVISION,[5] *q. v.*

DIVE. A place of infamous resort.[6] (See, generally, DISORDERLY HOUSES; NUISANCES.)

DIVERS. Several; sundry; more than one, but not a great number.[7]

DIVERSION. The act of turning aside from a course.[8] (Diversion: Of Negotiable Instrument, see COMMERCIAL PAPER. Of Waters, see NAVIGABLE WATERS; WATERS.)

DIVERSION OF STREAM. In a technical sense, the turning of the stream, or a part of it, as such, from its accustomed direction — its natural course.[9] (See, generally, WATERS.)

66. Calvert *v.* State, 14 Tex. App. 154, holding that where a meeting was disturbed by defendant's calling witness a liar, defendant may show in mitigation of punishment that the witness gave him provocation for the remark.

Insanity.— It does not mitigate the offense of disturbing religious worship that the person conducting the meeting was insane. Freeman *v.* State, (Tex. Cr. App. 1898) 44 S. W. 170.

Provocation as justification or excuse see *supra*, I, E, 1.

1. Distinguished from "sewer" see State Bd. of Health *v.* Jersey City, 55 N. J. Eq. 116, 124, 35 Atl. 835.

"A ditch, . . . is not a building, or a wharf, and in no sense can it be designated a superstructure." Ellison *v.* Jackson Water Co., 12 Cal. 542, 555 [*quoted* in Horn *v.* Jones, 28 Cal. 194, 203].

2. Byrne *v.* Keokuk, etc., R. Co., 47 Mo. App. 383, 389; State Bd. of Health *v.* Jersey City, 55 N. J. Eq. 116, 124, 35 Atl. 835. And see Briar *v.* Job's Creek Drainage Dist., 185 Ill. 257, 260, 56 N. E. 1042, where it is said: "The word 'ditch,' . . . [when used in an act for the construction of drains, ditches, etc.] shall be held to include any drain or water-course." But in Byrne *v.* Keokuk, etc., R. Co., 47 Mo. App. 383, 389, it is also said: "The statute uses the words 'drain' and 'ditch.' In common parlance the two words are used interchangeably, but technically speaking each has its own appropriate meaning, when used in certain connections. The word ditch is mostly used to designate a trench on the surface of the ground, and the word drain is commonly used in connection with a sewer, sink or other under-surface drain."

"The words 'ditch' and 'drain' have no technical or exact meaning." Goldthwait *v.* East Bridgewater, 5 Gray (Mass.) 61, 64.

3. Goldthwait *v.* East Bridgewater, 5 Gray (Mass.) 61, 64 [*quoted* in Fiske *v.* Wetmore, 15 R. I. 354, 359, 5 Atl. 375, 10 Atl. 627, 629]; Byrne *v.* Keokuk, etc., R. Co., 47 Mo. App. 383, 389.

4. New England L. & T. Co. *v.* Avery, (Tex. Civ. App. 1897) 41 S. W. 673, 675. See also Atkins *v.* Hinman, 7 Ill. 437, 443; Steinmetz *v.* Versailles, etc., Turnpike Co., 57 Ind. 457, 460.

"These marks [" or "] are in general use, and are generally well understood. They are as much a part of the English language as are punctuation marks, such as the comma, semicolon, colon, and period. These are often given an important, and sometimes a controlling, part in the construction of general writings, and in the interpretation of legal documents and of statutes and constitutions." Hughes *v.* Powers, 99 Tenn. 480, 484, 42 S. W. 1. See also Miller *v.* Wild Cat Gravel Road Co., 52 Ind. 51, 59 [*citing* Quackenbos Comp. and Rhet.], where it is said that double commas placed under such words, in the articles of an association, "are, by common usage, equivalent to the repetition of the words 'Howard county, Indiana.'" Also "This is sanctioned, not only by common usage, but by standard literary authority."

5. West Chicago St. R. Co. *v.* People, 155 Ill. 299, 304, 40 N. E. 599.

6. *In re* Gartenstein, 15 Pa. Co. Ct. 612, 614.

7. Century Dict. And see Com. *v.* Butts, 124 Mass. 449, 452 [*citing* Com. *v.* Green, 122 Mass. 333; Com. *v.* Hussey, 111 Mass. 432] ("divers promissory notes"); Munro *v.* Alaire, 2 Cai. (N. Y.) 320, 326 ("divers other matters"); State *v.* Hodgson, 66 Vt. 134, 148, 28 Atl. 1089 ("divers times"); U. S. *v.* La Coste, 26 Fed. Cas. No. 15,548, 2 Mason 129 ("divers days and times").

8. English L. Dict.

"Diversion of attention" as used in an action for negligence see Guhl *v.* Whitcomb, 109 Wis. 69, 74, 85 N. W. 142, 83 Am. St. Rep. 889.

"[The] non-surrender of [an] . . . antecedent note is a 'diversion,' defeating any recovery." Ives *v.* Jacobs, 1 N. Y. Suppl. 330, 331 [*citing* Wardell *v.* Howell, 9 Wend. (N. Y.) 170, 172].

9. Parker *v.* Griswold, 17 Conn. 288, 299, 42 Am. Dec. 739.

DIVERSITY OF PERSON. The plea of a prisoner in bar of execution that he is not the person convicted.[10] (See, generally, CRIMINAL LAW.)

DIVERSO INTUITU. In a different view or point of view; with a different view, design, or purpose; by a different course or process.[11]

DIVERT. To turn aside.[12] (See DIVERSION.)

DIVES' COSTS. A term applied to costs allowed to a person suing or defending *in forma pauperis*.[13] (See, generally, COSTS.)

DIVIDE. To make something into smaller parts, and not to enlarge.[14] With reference to real estate, to make partition of; and with reference to personalty, to DISTRIBUTE,[15] *q. v.* (See DIVIDED; DIVISION; and, generally, DESCENT AND DISTRIBUTION.)

DIVIDED. Distributed.[16] (Divided: Court, see APPEAL AND ERROR; COURTS. Ownership, see ADJOINING LANDOWNERS. See also DIVIDE; and, generally, DESCENT AND DISTRIBUTION; WILLS.)

DIVIDED REPUTATION. The result of conflicting evidence as to a general reputation.[17] (See, generally, CRIMINAL LAW; EVIDENCE.)

DIVIDE ET IMPERA, CUM RADIX ET VERTEX IMPERII IN OBEDIENTIUM CONSENSU RATA SUNT. A maxim meaning "Divide and govern, since the foundation and crown of empire are established in the consent of the obedient."[18]

DIVIDEND.[19] In general, something to be divided;[20] a fund to be divided,[21] not the share of any particular partner or person in that fund;[22] a sum to be

"The mere abstraction of water can hardly be called a diversion of it." Fernald *v.* Knox Woolen Co., 82 Me. 48, 57, 19 Atl. 93, 7 L. R. A. 459.

10. Bouvier L. Dict. [*citing* 4 Stephen Comm. 368].

11. Bouvier L. Dict. And see De Wolf *v.* Rabaud, 1 Pet. (U. S.) 476, 500, 7 L. ed. 227; Inman *v.* Barnes, 13 Fed. Cas. No. 7,048, 2 Gall. 315, 318; Rex *v.* Ely, 1 W. Bl. 71, 89.

12. Fernald *v.* Knox Woolen Co., 82 Me. 48, 57, 19 Atl. 93, 7 L. R. A. 459.

13. Carson *v.* Pickersgill, 14 Q. B. D. 859, 49 J. P. 612, 54 L. J. Q. B. 484, 486, 52 L. T. Rep. N. S. 950, 33 Wkly. Rep. 589.

14. Matter of McGinness, 13 Misc. (N. Y.) 714, 719, 35 N. Y. Suppl. 820, where the court also says: "'To divide the same into such further and other counties and districts' [as used in a statute] cannot be construed to mean the power to rearrange county lines."

An agreement to "divide the proceeds of a contract" for work may constitute a partnership. Rogers *v.* Waltz, 12 Montg. Co. Rep. (Pa.) 160, 161. See also PARTNERSHIP.

15. Seeds *v.* Burk, 181 Pa. St. 281, 286, 37 Atl. 511.

"Divide" as used in a will see Gilmer *v.* Gilmer, 42 Ala. 9, 18.

"Divide" does not necessarily imply equality of division in respect to property devised by will. Mills *v.* Farmer, 1 Meriv. 55, 102, 19 Ves. Jr. 483, 13 Rev. Rep. 247, 34 Eng. Reprint 595.

Used with "devise" in a will.—"The words 'divide' and 'devise' are both used in the will — the former confined to an act to be done by the executor — and it would be a strained construction to say that in the codicil the testator intended by the use of the word 'divide' to do more than authorize a change in the division of that portion of the estate already devised by the will to the widow and children." Boyd *v.* Boyd, 2 Fed. 138, 145, 1 McCrary 268.

16. Duffield *v.* Morris, 8 Watts & S. (Pa.) 348, 349, as used in a will.

"Divided among them according to law" as used in a will see Pruden *v.* Paxton, 79 N. C. 446, 448, 28 Am. Rep. 333.

"Equally to be divided between them" as used in a will see Emerson *v.* Cutler, 14 Pick. (Mass.) 108, 114.

17. Jackson *v.* Jackson, 82 Md. 17, 34, 33 Atl. 317, 318, 34 L. R. A. 773, where it is said: "[It] is not a distinct, substantive, provable fact, for it is a mere deduction from proved facts."

18. Wharton L. Lex.

19. **"'Dividends' is a word of very general and indefinite meaning.** It has, in law, no particular and technical signification." University *v.* North Carolina R. Co., 76 N. C. 103, 105, 22 Am. Rep. 671 [*quoted* in *In re* Hinckel Brewing Co., 124 Fed. 702, 703]. It "carries no spell with it. Applicable to various subjects, it is not intelligible without knowing the matter to which it is meant as referring, and of course, where there is a context, it is liable to be affected by that context." Henry *v.* Great Northern R. Co., 1 De G. & J. 606, 642, 3 Jur. N. S. 1133, 27 L. J. Ch. 1, 6 Wkly. Rep. 87, 58 Eng. Ch. 470.

"Income" may mean the same thing as "dividends." Reed *v.* Head, 6 Allen (Mass.) 174, 177 [*cited* in Heighe *v.* Littig, 63 Md. 301, 304, 52 Am. Rep. 510].

20. Lockhart *v.* Van Alstyne, 31 Mich. 76, 79, 18 Am. Rep. 156.

21. Henry *v.* Great Northern R. Co., 1 De G. & J. 606, 636, 3 Jur. N. S. 1133, 27 L. J. Ch. 1, 6 Wkly. Rep. 87, 58 Eng. Ch. 470. Black L. Dict. [*quoted* in *In re* Fielding, 96 Fed. 800, 801, 3 Am. Bankr. Rep. 135].

22. Henry *v.* Great Northern R. Co., 1 De G. & J. 606, 636, 3 Jur. N. S. 1133, 27 L. J. Ch. 1, 6 Wkly. Rep. 87, 58 Eng. Ch. 470, where it is said: "And strict language would require us to speak, not of the divi-

divided into equal parts, or one to be distributed proportionately;[23] a portion of the principal or profits divided among several owners of a thing;[24] a part or share;[25] an equitable share of surplus;[26] the share of one of the individuals among whom a sum is to be divided; a share or portion;[27] a share, the part allotted in division; the interest paid on the public funds;[28] and in either case the definition carries with it the idea of the division of a fund owned by several parties, and the dividend is the aliquot portion of the estate of the common owners.[29] If unqualified, the term signifies dividends payable in money.[30] In old English law, the term denotes one part of an indenture.[31] (Dividend: On Claims — Against Assigned Estate, see ASSIGNMENTS FOR BENEFIT OF CREDITORS; In Bankruptcy Proceeding, see BANKRUPTCY; In Insolvency Proceeding, see INSOLVENCY. On Corporate Stock — In General, see CORPORATIONS; Of Bank, see BANKS AND BANKING; Of Building and Loan Association, see BUILDING AND LOAN SOCIETIES; Taxation of, see TAXATION.)

DIVIDEND AMONG PREFERENCE STOCK-HOLDERS EXCLUSIVELY. A term which is understood to imply that the sum divided has been realized as profits, though the earnings do not yield a dividend to the stockholders in general.[32] (See, generally, CORPORATIONS.)

DIVIDEND-PAYING STOCK. A term used to characterize the whole capital stock, and to express its quality.[33] (See, generally, CORPORATIONS.)

DIVINATIO, NON INTERPRETATIO EST, QUÆ OMNINO RECEDIT A LITERA. A maxim meaning "That is guessing, not interpretation, which altogether departs from the letter."[34]

DIVISIBILIS EST SEMPER DIVISIBILIS. A maxim meaning "A thing divisible may be forever divided."[35]

DIVISIBLE CONTRACT. See CONTRACTS.

DIVISION. The act of dividing or separating into parts any entire body; the state of being divided; that which divides or separates; that which keeps apart; partition;[36] the separation of any entire body into parts.[37] In English law, one of the smaller subdivisions of a county.[38] (Division: Fence, see ANIMALS. Line, see BOUNDARIES. Of County, see COUNTIES. Of Damages, see COLLISION. Of Municipal Corporation, see MUNICIPAL CORPORATIONS. Of Opinion, see APPEAL AND ERROR; COURTS. Of Profits, see PARTNERSHIP. Of School-District, see SCHOOLS AND SCHOOL-DISTRICTS. Of Town, see TOWNS. Wall, see PARTY WALLS.)

DIVISIONAL COURTS. Courts in England, consisting of two or (in special

dend which any shareholder receives, but of his aliquot portion of the dividend."

23. Century Dict. [*quoted* in *In re* Hinckel Brewing Co., 124 Fed. 702, 703].

24. Bouvier L. Dict. [*quoted* in Com. *v.* Erie, etc., R. Co., 10 Phila. (Pa.) 465, 466; *In re* Fielding, 96 Fed. 800, 801, 3 Am. Bankr. Rep. 135].

25. Webster Dict. [*quoted* in Com. *v.* Erie, etc., R. Co., 10 Phila. (Pa.) 465, 466].

26. Fuller *v.* Metropolitan L. Ins. Co., 70 Conn. 647, 673, 41 Atl. 4.

27. Century Dict. [*quoted* in *In re* Hinckel Brewing Co., 124 Fed. 702, 703].

28. Wharton L. Dict. [*quoted* in *In re* Hinckel Brewing Co., 124 Fed. 702, 703].

29. *In re* Fielding, 96 Fed. 800, 801, 3 Am. Bankr. Rep. 135.

"Dividends do not constitute a part of the corpus of an estate any more than interest on money constitutes a portion of the principal invested." Heighe *v.* Littig, 63 Md. 301, 305, 52 Am. Rep. 510.

30. Spooner *v.* Phillips, 62 Conn. 62, 68, 24 Atl. 524, 16 L. R. A. 461 [*quoted* in Smith *v.* Hooper, 95 Md. 16, 26, 51 Atl. 844, 54 Atl. 95].

31. Black L. Dict.

32. Lockhart *v.* Van Alstyne, 31 Mich. 76, 79, 18 Am. Rep. 156 [*quoted* in Long *v.* Guelph Lumber Co., 31 U. C. C. P. 129, 135].

33. Struthers *v.* Clark, 30 Pa. St. 210, 213.

34. Burrill L. Dict. [*citing* Bacon Max. 18].

Applied in Jaquith *v.* Hudson, 5 Mich. 123, 136; Smith *v.* Jersey, 3 Bligh 290, 347, 4 Eng. Reprint 610.

35. Black L. Dict.

36. Webster Dict. [*quoted* in McKinney *v.* Griggs, 5 Bush (Ky.) 401, 415, 96 Am. Dec. 360].

37. Livermore *v.* Phillips, 35 Me. 184, 188 [*quoted* in Starks *v.* New Sharon, 39 Me. 368, 372], where it is said: "It does not include the idea of preservation of any previous organization, form or shape."

Division of mankind considered in connection with a statute relative to naturalization see *In re* Saito, 62 Fed. 126, 127.

38. Black L. Dict.

cases) more judges of the high court of justice, sitting to transact certain kinds of business which cannot be disposed of by one judge.[39] (See, generally, COURTS.)

DIVISION OF AN INHERITANCE. As defined by statute, the distribution of the property inherited among the heirs, giving to each the portion he is entitled to, according to the will of the deceased, or in the manner prescribed by law.[40] (See, generally, DESCENT AND DISTRIBUTION; WILLS.)

"County, riding, or division," as used in a statute see Evans *v.* Stevens, 4 T. R. 459, 462.

39. Black L. Dict.
40. N. M. Comp. Laws (1897), § 2027.

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Adultery After Invalid Divorce, see ADULTERY.
Agreement For Separation, see HUSBAND AND WIFE.
Annulment of Marriage, see MARRIAGE.
Bill or Note Given to Facilitate Divorce, see COMMERCIAL PAPER.
Child Born After Divorce, see BASTARDS.
Discharge in Bankruptcy Affecting Alimony, see BANKRUPTCY.
Effect of Divorce on Rights:
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Curtesy, see CURTESY.
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Under Life-Insurance Policy, see LIFE INSURANCE.
Under Will, see WILLS.
Enforcement of Separate Maintenance, see HUSBAND AND WIFE.
Husband and Wife in General, see HUSBAND AND WIFE.
Marriage in General, see MARRIAGE.
Writ of Assistance in Divorce Suit, see ASSISTANCE, WRIT OF.

I. DEFINITION.

Divorce is a legislative or judicial act by which a marriage relation is either dissolved or partially suspended.[1] In the United States the term is generally used as implying the validity of the marriage, and does not therefore include the judicial annulment of an invalid marriage;[2] but in England the term seems now to be applied both to decrees of nullity and to decrees of dissolution of marriage.[3] As used in this article and for the most part in all recent statutes and decisions, it includes the judicial separation of the parties and the absolute dissolution of the marriage, but excludes an adjudication to the effect that no valid marriage ever existed.[4]

II. ORIGIN AND EXISTENCE.

A. Among the Ancients. Wherever among the ancients the institution of matrimony has existed, there has been a definite recognition of the right of either one or both of the parties to dissolve the relation, either by the act of one or both more or less formally executed or by the judicial decree of some magistrate or tribunal of competent jurisdiction.[5]

1. Abbott L. Dict.; 2 Bishop Marr. Div. & Sep. § 469; Black L. Dict.; Bouvier L. Dict.

2. Bouvier L. Dict. 593; Shelford Marr. & Div. 366. And see Abbott L. Dict. 394. See also MARRIAGE.

Divorce suit.— In a statute respecting the competency of a husband to testify in his own behalf in a "divorce suit," however, these words have been held to include an action for nullity of marriage. Foss *v.* Foss, 12 Allen (Mass.) 26.

3. Black L. Dict.; Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85).

4. See Abbott L. Dict.

5. Schouler Husb. & W. § 489.

Among the Hebrews the husband could put away his wife by a written bill of divorcement, given into her hand before sending her away. Deut. xxiv, vs. 1–4. See also Woolsey Div. & Div. Leg. 15, 17. Other biblical references to divorces among the Jews are Deut. xxii, vs. 13–19, 28, 29; Ezekiel xxiii, vs. 45, 46; Jeremiah iii, v. 8; Malachi ii, vs. 11, 16.

Among the Greeks divorce was frequent and easy. Woolsey Div. & Div. Leg. 29–31.

The early Romans held inviolable the family tie. Marriage was solemnized by universally observed formality and was sustained and respected out of regard for ancient form and the stability of family life. 4 Gibbon Rome, c. 44; Schouler Husb. & W. § 5; Woolsey Div. & Div. Leg. 34. For nearly five hundred years subsequent to the

B. Among Modern Christian Nations. All christian nations by more or less rigid laws have limited and controlled the dissolution or suspension of the marriage relation. In countries whose governments are influenced by the church of Rome no divorces are permitted without special sanction of the pope;[6] but in other countries courts are clothed with power to grant divorces for causes prescribed by legislative enactment.[7] In the United States there is a lamentable diversity in the law of divorce in the several states, caused in the main by the difference in the statutory grounds for divorce and the different rules which exist as to the residence of the parties and the effect of the decree upon the validity of a remarriage of either one or the other of the divorced parties.[8]

III. KINDS.

A. Legislative Divorce — 1. DEFINITION. A legislative divorce is one granted by the legislature or by a court acting in a special case under authority granted by a special act of the legislature.[9]

2. LEGISLATIVE POWER — a. General Rules. The power to grant a divorce from the bonds of matrimony has been exercised by the parliament of England from an early period,[10] and this example was followed by the legislative assemblies of the colonies in America.[11] It seems to be established by the weight of authority that a legislature has power to grant divorces[12] unless expressly prohibited by consti-

foundation of ancient Rome there is no recorded instance of a divorce (Schouler Husb. & W. §§ 5, 489), although, as suggested by Prof. Woolsey, this absence of recorded cases may be due to the existence of family courts which apparently had jurisdiction over divorce cases. Woolsey Div. & Div. Leg. 40. Toward the end of the republic public opinion had ceased to frown upon divorce; the remedy was available to husband or wife and for slight cause, and although regulated by statute was easily procured with little or no formality. 4 Gibbon Rome, c. 44; 2 Kent Comm. 103.

6. 2 Kent Comm. 104.

In Austria divorces between protestants may be had, not only for several substantial causes, but at the request of both parties, on the ground of unconquerable aversion. See 2 Turnbull Austria 509.

7. Code Napoleon, arts. 233, 275–297, regarded marriage only as a civil contract, and allowed divorce not only for several reasonable causes, such as adultery and grievous injuries, to be submitted to a judicial tribunal, but also without cause and founded merely upon mutual consent. This consent was, however, subjected to several restraints which created great and serious checks upon the abuse of the privilege. After the restoration of the Bourbon dynasty, the law of divorce was changed, and in 1816 it was confined to a judicial separation from bed and board.

8. **Grounds for divorce** see *infra*, VII.
Domicile of parties see *infra*, V, C.
Right to remarry see *infra*, XV, G, 1, d.
Effect of foreign divorce see *infra*, XXI.

9. Teft *v.* Teft, 3 Mich. 67.

10. The first application for parliamentary action in respect to a divorce is said to have been made by Lord de Roos in 1669. MacQueen Parl. Pr. 471, 551. The first genuine example, however, of a dissolution of the marriage relation by an act of parliament was that of the Countess of Macclesfield, passed in 1697. See MacQueen Husb. & W. 164.

11. Maynard *v.* Hill, 125 U. S. 190, 8 S. Ct. 723, 31 L. ed. 654. See also Starr *v.* Pease, 8 Conn. 541; Crane *v.* Meginnis, 1 Gill & J. (Md.) 463, 19 Am. Dec. 237.

In New York "during the period of our colonial government, for more than one hundred years preceding the Revolution, no divorce took place in the colony of New York; and for many years after New York became an independent state, there was not any lawful mode of dissolving a marriage in the lifetime of the parties, but by a special act of the legislature." 2 Kent Comm. 97.

In Pennsylvania this power has been exercised from the earliest period by the legislature of the province and by that of the state under the constitutions of 1776 and 1790. Cronise *v.* Cronise, 54 Pa. St. 255.

12. *Connecticut.*— Starr *v.* Pease, 8 Conn. 541.

Iowa.— Levins *v.* Sleator, 2 Greene 604.

Kentucky.— Cabell *v.* Cabell, 1 Metc. 319; Gaines *v.* Gaines, 9 B. Mon. 295, 48 Am. Dec. 425; Berthelemy *v.* Johnson, 3 B. Mon. 90, 38 Am. Dec. 179; Maguire *v.* Maguire, 7 Dana 181.

Maine.— Adams *v.* Palmer, 51 Me. 480; Opinion of Justices, 16 Me. 479.

Maryland.— Wright *v.* Wright, 2 Md. 429, 56 Am. Dec. 723; Crane *v.* Meginnis, 1 Gill & J. 463, 19 Am. Dec. 237.

Pennsylvania.— Cronise *v.* Cronise, 54 Pa. St. 255; Jones *v.* Jones, 12 Pa. St. 350, 51 Am. Dec. 611.

United States.—Maynard *v.* Hill, 125 U. S. 190, 8 S. Ct. 723, 31 L. ed. 654 [*affirming* 2 Wash. Terr. 321, 5 Pac. 717].

tution.[13] It has been held that the division of a state government into three departments, and the implied inhibition through that cause upon the legislative department to exercise judicial functions does not affect or exclude legislative control over the marriage relation,[14] but the contrary view has been taken[15] where jurisdiction to grant divorces for the same cause has been conferred by general statute upon the judiciary.[16] So constitutional prohibitions against laws impairing the obligation of contracts do not apply to marriages and thus restrict the power of the legislature to grant divorces.[17]

b. Estoppel to Deny Validity. Although the courts of the state have declared legislative divorces unconstitutional, yet where the parties to such a divorce live apart for a long period of time thereafter and each remarries each is estopped from interfering with the affairs of the other.[18]

c. Operation of Decision Against Legislative Power. Where the legislature has long exercised the power to grant divorces, a subsequent decision of the courts denying its power will not invalidate previous legislative divorces.[19]

3. Requisites — a. Cause. A legislative divorce is founded upon the mere will or discretion of the legislature, and may be effectual, although no cause therefor be shown.[20] Where, however, the power of the legislature to grant divorces is limited by the constitution to certain grounds, an inquiry into them is a necessary duty to prevent injustice.[21]

Contra.— Bingham *v.* Miller, 17 Ohio 445, 49 Am. Dec. 471.

See 17 Cent. Dig. tit. "Divorce," § 15.

13. Teft *v.* Teft, 3 Mich. 67 (holding that a constitutional prohibition of legislative divorces prevents the enactment of a special act authorizing a court to grant a divorce between certain parties upon terms and for a particular cause not included within the general statutes); Carson *v.* Carson, 40 Miss. 349 (where a constitutional provision that divorces shall not be granted except in cases provided by law by suit in chancery was held to prohibit the legislature from granting divorces).

Dissolution of marriage under general act. — A statute providing that a sentence of imprisonment for life shall dissolve the marriage of the person sentenced without any judgment of divorce or other legal process is not in conflict with a constitutional provision against legislative divorces. State *v.* Duket, 90 Wis. 272, 63 N. W. 83, 48 Am. St. Rep. 928, 31 L. R. A. 515.

In Massachusetts and New Hampshire constitutional provisions are to the effect that matrimonial causes shall be heard and determined by the "governor and council" or by "the superior court," "until the legislature shall by law make other provision." These provisions deprive the legislature of the power of granting divorces by special act. See Sparhawk *v.* Sparhawk, 116 Mass. 315; White *v.* White, 105 Mass. 325, 7 Am. Rep. 526; Shannon *v.* Shannon, 2 Gray (Mass.) 285; Clark *v.* Clark, 10 N. H. 380, 34 Am. Dec. 165.

14. Adams *v.* Palmer, 51 Me. 480; Maynard *v.* Hill, 125 U. S. 190, 8 S. Ct. 723, 31 L. ed. 654.

15. Ponder *v.* Graham, 4 Fla. 23; Bryson *v.* Bryson, 44 Mo. 232; Bryson *v.* Bryson, 17 Mo. 590; Bryson *v.* Campbell, 12 Mo. 498; State *v.* Fry, 4 Mo. 120; Bingham *v.* Miller, 17 Ohio 445, 49 Am. Dec. 471; *In re* Christiansen, 17 Utah 412, 53 Pac. 1003, 70 Am. St. Rep. 794, 41 L. R. A. 504.

16. Opinion of Justices, 16 Me. 479. See also Townsend *v.* Griffin, 4 Harr. (Del.) 440; Maynard *v.* Hill, 125 U. S. 190, 8 S. Ct. 723, 31 L. ed. 654. *Contra*, Wright *v.* Wright, 2 Md. 429, 56 Am. Dec. 723.

In Pennsylvania this limitation upon the legislative power is imposed by express provision of constitution. See Cronise *v.* Cronise, 54 Pa. St. 255; Jones *v.* Jones, 12 Pa. St. 350, 51 Am. Dec. 611.

17. Berthelemy *v.* Johnson, 3 B. Mon. (Ky.) 90, 38 Am. Dec. 179; Maguire *v.* Maguire, 7 Dana (Ky.) 181; Adams *v.* Palmer, 51 Me. 480; Clark *v.* Clark, 10 N. H. 380, 34 Am. Dec. 165; Maynard *v.* Hill, 125 U. S. 190, 8 S. Ct. 723, 31 L. ed. 654. *Contra*, Pouder *v.* Graham, 4 Fla. 23. See also *infra*, IV, B, 3.

18. Richeson *v.* Simmons, 47 Mo. 20.

19. Bingham *v.* Miller, 17 Ohio 445, 49 Am. Dec. 471.

20. Gaines *v.* Gaines, 9 B. Mon. (Ky.) 295, 48 Am. Dec. 425; Maynard *v.* Hill, 125 U. S. 190, 2 S. Ct. 723, 31 L. ed. 654, where it is said that if it is within the competency of a legislature to grant a divorce the court cannot inquire into its motives in passing the act.

21. Roberts *v.* Roberts, 54 Pa. St. 265; Cronise *v.* Cronise, 54 Pa. St. 255; Jones *v.* Jones, 12 Pa. St. 350, 51 Am. Dec. 611.

Presumption as to cause.— Special divorce laws are *prima facie* founded on sufficient cause not within the jurisdiction of the courts. This cause is inquirable into as a fact when not set forth in the act. Philadelphia *v.* Thiele, 10 Phila. (Pa.) 205.

Fraudulent divorce.— The courts in considering the validity of a legislative divorce cannot admit evidence to show that the divorce was obtained by fraud or falsehood or that one of the members of the legislature

b. Notice to Parties. The legislature may, without notice to either party, exercise its constitutional power to grant divorces.[22]

4. Effect on Property Rights. A legislative divorce differs from a judicial divorce in that the former cannot divest vested property rights not pertaining to the marriage relation, while the latter may.[23] It cannot provide for the maintenance of the wife by an allowance in the nature of alimony, or direct the payment of money to the wife out of the husband's estate.[24] As to all rights dependent upon the marriage relation itself, however, a legislative divorce has the same effect as a judicial divorce.[25]

B. Judicial Divorce. A judicial divorce is one granted by the sentence of a court of justice pursuant to general law. It may be either absolute or limited. An absolute divorce or a divorce *a vinculo matrimonii* is one which terminates the marriage relation, and is a creature of statute.[26] A limited divorce or divorce *a mensa et thoro* is one which suspends the marriage relation and modifies its duties and obligations, leaving the bond in full force.[27] It is sometimes called "a judicial separation," leaving the term "divorce" to include the absolute dissolution of a marriage.[28] Prior to the enactment of "The Matrimonial Causes Act," in England, a divorce *a mensa et thoro* was the only divorce known to the ecclesiastical law.[29] In many of the states this kind of divorce has been abolished.[30] Absolute and limited divorces differ in operation and effect. The modes of procedure prescribed by the several statutes where both kinds of divorce are allowed are, however, similar down to the time of making the decree, from which point they differ.[31]

IV. NATURE.

A. As Dissolution or Suspension of Status. The courts have now for the most part abandoned the definition of marriage which treats it as a contract and have come to regard it as a status.[32] This distinction is important in considering

misrepresented the facts. Jones *v.* Jones, 12 Pa. St. 350, 51 Am. Dec. 611.

22. Wright *v.* Wright, 2 Md. 429, 56 Am. Dec. 723; Cronise *v.* Cronise, 54 Pa. St. 255; Maynard *v.* Valentine, 2 Wash. Terr. 3, 3 Pac. 195; Maynard *v.* Hill, 125 U. S. 190, 8 S. Ct. 723, 31 L. ed. 654 [*affirming* 2 Wash. Terr. 321, 5 Pac. 717].

23. Crane *v.* Meginnis, 1 Gill & J. (Md.) 463, 19 Am. Dec. 237; Holmes *v.* Holmes, 4 Barb. (N. Y.) 295 (holding that as respects property, the contract of marriage must stand upon the same footing as other contracts); Philadelphia *v.* Thiele, 10 Phila. (Pa.) 205.

24. Townsend *v.* Griffin, 4 Harr. (Del.) 440; Jackson *v.* Sublett, 10 B. Mon. (Ky.) 467; Gaines *v.* Gaines, 9 B. Mon. (Ky.) 295, 48 Am. Dec. 425 (holding that a suit for alimony is not barred by a legislative divorce obtained pending the action); Crane *v.* Meginnis, 1 Gill & J. (Md.) 463, 19 Am. Dec. 237 (where it was also held that the wife could maintain a subsequent action in the courts for alimony).

25. Starr *v.* Pease, 8 Conn. 541; Levins *v.* Sleator, 2 Greene (Iowa) 604, holding that a legislative divorce bars the right of dower as effectually as if the divorce had been decreed by a court.

26. Wait *v.* Wait, 4 N. Y. 95.

Confirmation by legislature.—In some states the decree of divorce must be confirmed by the legislature. However, it does not become ineffectual because the act of the legislature confirming it is not passed at the first general assembly held after its rendition (Harrison *v.* Harrison, 19 Ala. 499); and legislative ratification will be presumed, where the decree is collaterally assailed after a lapse of twenty years and it appears that the husband married again and lived with his second wife until his death (Wilson *v.* Holt, 83 Ala. 528, 3 So. 321, 3 Am. St. Rep. 768).

27. People *v.* Cullen, 153 N. Y. 629, 47 N. E. 894, 44 L. R. A. 420.

28. See statutes of the different states.

29. Head *v.* Head, 2 Ga. 191; Wait *v.* Wait, 4 N. Y. 95.

The common-law or canon-law doctrine of divorce, limiting its remedial scope to separation *a mensa et thoro*, obtains in South Carolina. McCreery *v.* Davis, 44 S. C. 195, 22 S. E. 178, 51 Am. St. Rep. 794, 28 L. R. A. 655.

30. Bauman *v.* Bauman, 13 Ark. 320, 68 Am. Dec. 171; Barrere *v.* Barrere, 4 Johns. Ch. (N. Y.) 187; Evans *v.* Evans, 1 Hagg. Cons. 35, 4 Eng. Eccl. 310, 349.

31. Wood *v.* Wood, 54 Ark. 172, 15 S. W. 459; Wagner *v.* Wagner, 36 Minn. 239, 30 N. W. 766.

Operation and effect of divorce see *infra*, XV, G, 1, 2.

32. *Alabama.*— Green *v.* State, 58 Ala. 190, 29 Am. Rep. 739.

California.— *In re* James, 99 Cal. 374, 33 Pac. 1122, 37 Am. St. Rep. 60.

many questions pertaining to the law of divorce. It bears directly upon the nature of the remedy and the right thereto, and upon the validity and effect of statutes regulating the subject.[33]

B. As Subject to Control of State — 1. In General. A divorce cannot be had except in that court upon which the state has conferred jurisdiction, and it can be had for those causes only, and with those formalities only, which the state has by statute prescribed.[34]

2. Consent of State. Marriage being a status based upon public necessity and controlled by the sovereign will for the benefit of society at large, its dissolution cannot be effected by the mere act or consent of the parties,[35] and the state may intervene by its prosecuting officer or through a power vested in the court itself to prevent such a dissolution where it should not be decreed, although the party against whom the suit is brought may not object thereto.[36]

Connecticut.— Allen *v.* Allen, 73 Conn. 54, 46 Atl. 242, 84 Am. St. Rep. 135, 49 L. R. A. 142.

Georgia.— Askew *v.* Dupree, 30 Ga. 173.

Indiana.— Noel *v.* Ewing, 9 Ind. 37.

Kentucky.— Maguire *v.* Maguire, 7 Dana 181.

Maine.— Gregory *v.* Gregory, 78 Me. 187, 3 Atl. 280, 57 Am. Rep. 792; Adams *v.* Palmer, 51 Me. 480.

Massachusetts.— Watkins *v.* Watkins, 135 Mass. 83; Sewall *v.* Sewall, 122 Mass. 156, 23 Am. Rep. 299.

Missouri.— Ellison *v.* Martin, 53 Mo. 575.

New York.— Moot *v.* Moot, 37 Hun 288; Campbell *v.* Crampton, 8 Abb. N. Cas. 363.

Rhode Island.— Ditson *v.* Ditson, 4 R. I. 87.

Wisconsin.— Cook *v.* Cook, 56 Wis. 195, 14 N. W. 33, 443, 43 Am. Rep. 706.

United States.—Maynard *v.* Hill, 125 U. S. 190, 8 S. Ct. 723, 31 L. ed. 654.

England.— Niboyet *v.* Niboyet, 4 P. & D. 11, 48 L. J. P. 1, 39 L. T. Rep. N. S. 486, 27 Wkly. Rep. 203.

See also Marriage.

Contra.— McCreery *v.* Davis, 44 S. C. 195, 22 S. E. 178, 51 Am. St. Rep. 794, 28 L. R. A. 655.

Statutes declaring marriage a civil contract so far as its validity is concerned do not thereby make it synonymous with the word "contract" employed in the common law or statutes. Wade *v.* Kalbfleisch, 58 N. Y. 282, 17 Am. Rep. 250.

33. Newman's Estate, 75 Cal. 213, 16 Pac. 887, 7 Am. St. Rep. 146; Rigney *v.* Rigney, 127 N. Y. 408, 28 N. E. 405, 24 Am. St. Rep. 462; R. F. H. *v.* S. H., 40 Barb. (N. Y.) 9.

Impairment of obligation of contract see *supra*, III, A, 2; *infra*, IV, B, 3.

34. Dennis *v.* Dennis, 68 Conn. 186, 36 Atl. 34, 57 Am. St. Rep. 95, 34 L. R. A. 449; De Meli *v.* De Meli, 5 N. Y. Civ. Proc. 306, 67 How. Pr. (N. Y.) 20.

Courts vested with jurisdiction see *infra*, V, A, B.

Grounds for divorce see *infra*, VII.

35. *Alabama.*— Powell *v.* Powell, 80 Ala. 595, 1 So. 549.

Connecticut.— Allen *v.* Allen, 73 Conn. 54, 46 Atl. 242, 84 Am. St. Rep. 135, 49 L. R. A. 142; Dennis *v.* Dennis, 68 Conn. 186, 36 Atl. 34, 57 Am. St. Rep. 95, 34 L. R. A. 449.

Kentucky.— Maguire *v.* Maguire, 7 Dana 181.

New York.— Wade *v.* Kalbfleisch, 58 N. Y. 282, 17 Am. Rep. 250; Van Veghten *v.* Van Veghten, 4 Johns. Ch. 501; Williamson *v.* Williamson, 1 Johns. Ch. 488.

Ohio.— Smith *v.* Smith, Wright 644.

Rhode Island.— Ditson *v.* Ditson, 4 R. I. 87.

United States.—Maynard *v.* Hill, 125 U. S. 190, 8 S. Ct. 723, 31 L. ed. 654.

England.— Hall *v.* Hall, 33 L. J. P. & M. 65, 9 L. T. Rep. N. S. 810, 3 Swab. & Tr. 347, holding that society has an interest in the maintenance of the marriage tie, which the collusion or negligence of the parties cannot impair.

Marriage among the Indian tribes, however, must generally be considered as taking place in a state of nature, and if, according to the usages and customs of the particular tribe, the parties are authorized to dissolve it at pleasure, the right of dissolution will be considered a term of the contract; and either party may take advantage of this term unless it be expressly or impliedly waived by them; or they may perhaps acquire such relations to society as will give permanency to the contract and take from them the right to annul it. Wall *v.* Williams, 11 Ala. 826.

36. Berthelemy *v.* Johnson, 3 B. Mon. (Ky.) 90, 38 Am. Dec. 179 (as to necessity of consent of commonwealth); Earle *v.* Earle, 43 Oreg. 293, 72 Pac. 976 (holding that where plaintiff sought divorce on grounds of desertion, but her own evidence showed her guilty of misconduct amounting to cause for divorce, the state being a party defendant to the suit, as required by statute, the court rightfully refused relief, notwithstanding default by the husband); Dismukes *v.* Dismukes, 1 Tenn. Ch. 266.

There are three parties to every application for divorce. Although upon its face a controversy between the parties of record only, it is in fact a triangular suit, *sui generis*, the government occupying the position of a third party without counsel, it being the duty of the court to protect its interests.

3. Constitutionality of Statutes. Marriage being a status, legislation affecting or annulling the marriage relation is not within the terms of a constitutional provision against legislative impairment of contracts.[37] The legislature cannot, however, constitutionally discriminate as to the persons entitled to the remedy.[38]

4. Construction of Statutes. Divorce statutes should not be construed in a spirit of improper liberality, nor with a view to defeating the desired ends; but as in the case of other statutes the object should be to ascertain the legislative intent and carry it faithfully into execution.[39] Where a statute of one state is adopted by another, it is to be taken in the latter with the settled construction previously given it in the former.[40]

5. Operation of Statutes.[41] Where a statute merely changes and simplifies the form of the remedy or otherwise merely affects the remedy it will apply in actions pending at the time of its passage.[42]

C. As Affected by Public Policy — 1. In General. Notwithstanding the diversity of the divorce laws in the several states of this country and England, it is conceded in all jurisdictions that public policy, good morals, and the interests of society require that the marriage relation should be surrounded with every safeguard and its severance allowed only in the manner prescribed and for the causes specified by law.[43]

2. Judicial Discretion. In furtherance of public policy courts necessarily exercise to a large extent a judicial discretion.[44]

D. As Affected by Ecclesiastical Law. Although ecclesiastical courts

McIntyre *v.* McIntyre, 9 Misc. (N. Y.) 252, 30 N. Y. Suppl. 200. See also Allen *v.* Allen, 73 Conn. 54, 46 Atl. 242, 84 Am. St. Rep. 135, 49 L. R. A. 142.

Collusion as defeating divorce see *infra*, VIII, I.

Intervention by state see *infra*, IX, B, 2, b, (III).

37. Tolen *v.* Tolen, 2 Blackf. (Ind.) 407, 21 Am. Dec. 743; State *v.* Duket, 90 Wis. 272, 63 N. W. 83, 48 Am. St. Rep. 928, 31 L. R. A. 515. See also Constitutional Law, 8 Cyc. 992.

Legislative divorce as impairing obligation of contract see *supra*, III, A, 2, a.

38. Middleton *v.* Middleton, 54 N. J. Eq. 692, 35 Atl. 1065, 37 Atl. 1106, 55 Am. St. Rep. 602, 36 L. R. A. 221, holding that a statute permitting a person who has conscientious scruples against absolute divorce to secure a limited divorce with special consequences as to property rights is class legislation. See, generally, Constitutional Law, 8 Cyc. 1051.

39. Duhme *v.* Duhme, 3 Ohio Dec. (Reprint) 95, 3 Wkly. L. Gaz. 187.

Strict construction.— The code in reference to divorce should be strictly enforced and the requirements fully observed. Smith *v.* Smith, 4 Greene (Iowa) 266.

Exercise of discretion.— It has been held that where the legislative grant of divorce jurisdiction is permissive only, the courts will incline to exercise a judicial discretion in accordance with the policy of the statute, and will withhold a judgment of divorce in cases not within the benefits of the statute on their merits. Dutcher *v.* Dutcher, 39 Wis. 651. See also *infra*, IV, C, 2; VII, A, 2, b.

40. Dutcher *v.* Dutcher, 39 Wis. 651.

41. Operation of statute as to: Jurisdiction see *infra*, V, B, 3. Grounds of divorce see *infra*, VII, A, 3.

42. Inskeep *v.* Inskeep, 5 Iowa 204; Wales *v.* Wales, 119 Mass. 89; Sparhawk *v.* Sparhawk, 114 Mass. 355; Bigelow *v.* Bigelow, 108 Mass. 38; Jamison *v.* Ramsey, 128 Mich. 315, 87 N. W. 260.

43. Halls *v.* Cartwright, 18 La. Ann. 414; Dickenson *v.* Dickenson, 1 Del. Co. (Pa.) 293; Broughton *v.* Broughton, 1 Del. Co. (Pa.) 273.

Exclusiveness of statutory grounds of divorce see *infra*, VII, A, 2.

44. *Kansas.*— Ashmead *v.* Ashmead, 23 Kan. 262.

Kentucky.— Locke *v.* Locke, 14 Ky. L. Rep. 143.

New York.— Winans *v.* Winans, 124 N. Y. 140, 26 N. E. 293; Sullivan *v.* Sullivan, 41 N. Y. Super. Ct. 519; Williamson *v.* Williamson, 1 Johns. Ch. 488, holding that a decree is not granted as of course in all cases where sufficient grounds are alleged and proved.

Vermont.— Burton *v.* Burton, 58 Vt. 414, 5 Atl. 281.

Wisconsin.— Dutcher *v.* Dutcher, 39 Wis. 651, holding that while as between the parties the rules of pleading and practice will be enforced in divorce suits as in other cases, they may be relaxed in favor of defendant when the public interest is involved.

Where, however, a statutory ground of divorce exists, the court has no power arbitrarily to deny a divorce. Morris *v.* Morris, 60 Mo. App. 86; Crump *v.* Morgan, 38 N. C. 91, 40 Am. Dec. 447.

Discretion as to: Absolute or limited divorce see *infra*, XV, A, 1, b. Grounds of divorce see *infra*, VII, A, 2, b.

have never been established in any of the United States,[45] yet, by the weight of authority, the state courts, in the exercise of divorce jurisdiction, will follow the doctrines established by the ecclesiastical courts in so far as they are consistent with existing constitutional or statutory provisions and the general spirit of our laws.[46]

E. Extent of Remedy — **1. In General.** The matters which may be litigated in connection with a suit for a divorce are only such as relate to or grow out of the marriage relation.[47]

2. Rights of Third Persons. The rights of third persons respecting the property involved in a divorce suit are not to be litigated unless they have conspired to defeat the complainant's claims for alimony or to defraud her of her marital interests in her husband's property.[48]

F. Procedure[49] — **1. Nature of Suit For Divorce** — **a. In General.** A suit for divorce cannot be classified with other actions or proceedings but is *sui*

45. See *infra*, V, A, 2.

46. *Alabama.*— Lovett *v.* Lovett, 11 Ala. 763; Moyler *v.* Moyler, 11 Ala. 620.

Arkansas.— Bauman *v.* Bauman, 18 Ark. 320, 68 Am. Dec. 171.

California. — Sharon *v.* Sharon, 67 Cal. 185, 7 Pac. 456, 635, 8 Pac. 709; Morris *v.* Morris, 14 Cal. 76, 73 Am. Dec. 615.

Connecticut. — Shaw *v.* Shaw, 17 Conn. 189.

Delaware.— Jeans *v.* Jeans, 2 Harr. 38.

Georgia.— McGee *v.* McGee, 10 Ga. 477.

Kentucky.— Thornberry *v.* Thornberry, 2 J. J. Marsh. 322.

Maryland.— J. G. *v.* H. G., 33 Md. 401, 3 Am. Rep. 183.

Massachusetts.— Morrison *v.* Morrison, 142 Mass. 361, 8 N. E. 59, 56 Am. Rep. 688; Robbins *v.* Robbins, 140 Mass. 528, 4 N. E. 837, 54 Am. Rep. 488, both holding that the legislature intended to adopt the general principles that governed the ecclesiastical courts, so far as applicable and reasonable.

Nevada.— Wuest *v.* Wuest, 17 Nev. 217, 30 Pac. 886.

Pennsylvania.— Roe *v.* Roe, 29 Pittsb. Leg. J. 319.

Texas.— Nogees *v.* Nogees, 7 Tex. 538, 58 Am. Dec. 78.

Vermont.— Le Barron *v.* Le Barron, 35 Vt. 365, holding that the court may, unless otherwise directed by statute, apply the settled rules and practice of the ecclesiastical courts.

See 17 Cent. Dig. tit. "Divorce," § 4.

In New York the ecclesiastical law of England relative to divorce was never adopted, and the statutes of that state upon the subject are original and exclusive regulations (Erkenbrach *v.* Erkenbrach, 96 N. Y. 456; Griffin *v.* Griffin, 47 N. Y. 134; Jones *v.* Jones, 90 Hun 414, 35 N. Y. Suppl. 877; Blanc *v.* Blanc, 67 Hun 384, 22 N. Y. Suppl. 264; Dickinson *v.* Dickinson, 63 Hun 516, 18 N. Y. Suppl. 485; Chamberlain *v.* Chamberlain, 63 Hun 96, 17 N. Y. Suppl. 578; Perry *v.* Perry, 2 Paige 501; Burtis *v.* Burtis, 1 Hopk. 557, 14 Am. Dec. 563); but even in this state the courts have been guided by the decisions of the ecclesiatical courts (Griffin *v.* Griffin, 47 N. Y. 134; Wood *v.* Wood, 2 Paige 108; Lewis *v.* Lewis, 3 Johns. Ch. 519; Denton *v.* Denton, 1 Johns. Ch. 364; Mix *v.* Mix, 1 Johns. Ch. 108), not, however, upon the theory that the court was vested with the jurisdiction of the ecclesiastical courts of England in matrimonial cases, but upon the ground that when jurisdiction was conferred by statute in those actions for divorce which by the English law are solely cognizable in the ecclesiastical courts, the grant of that jurisdiction carried with it by implication the incidental powers which were indispensable to its proper exercise and not in conflict with statutory regulations on the same subject (Devanbagh *v.* Devanbagh, 5 Paige 554, 28 Am. Dec. 443). In Higgins *v.* Sharp, 164 N. Y. 4, 58 N. E. 9, it was suggested that while the jurisdiction of the state courts in matrimonial actions is purely statutory, yet the practice of the ecclesiastical courts in England to allow alimony and counsel fees in proper cases is one of the incidents which necessarily follows that jurisdiction.

47. Peck *v.* Peck, 66 Mich. 586, 33 N. W. 893; Dunbar *v.* Dunbar, 4 Ohio Dec. (Reprint) 237, 1 Clev. L. Rep. 148.

Rescission of conveyance.— A mortgage claimed to have been given under duress in part payment of a claim for alimony cannot be set aside on motion in divorce proceedings; but a regular action must be brought for that purpose, the form of a divorce suit not being appropriate to determine rights of property. Semrow *v.* Semrow, 23 Minn. 214.

Incidental relief see *infra*, XV, A, 2.

48. *Alabama.*— Turner *v.* Turner, 44 Ala. 437.

Illinois.— Draper *v.* Draper, 68 Ill. 17.

Michigan.— Peck *v.* Peck, 66 Mich. 586, 33 N. W. 893.

New York.— Van Duzer *v.* Van Duzer, 6 Paige 366, 31 Am. Dec. 257.

Washington.— Prouty *v.* Prouty, 4 Wash. 174, 29 Pac. 1049.

Wisconsin.— Damon *v.* Damon, 28 Wis. 510.

Third persons as parties defendant see *infra*, IX, B, 2.

49. Operation of statute on procedure see *supra*, IV, B, 5.

generis.[50] It is not an action of contract but resembles more an action of tort[51] or a criminal action;[52] yet it is regarded as a civil case.[53]

b. Proceeding In Rem. In many states a divorce action is deemed a proceeding *in rem* so far as it affects the status of the parties, the custody of their minor children, and the service of summons by publication on a non-resident defendant.[54] This question is of importance in determining the jurisdiction of courts in divorce actions, and the effect of judgments against non-resident parties, and is hereinafter fully considered.[55]

2. Practice — a. In General. Proceedings in divorce should be conducted as in other cases unless there is a different provision by statute.[56]

b. In Equity. Where courts of chancery are vested by statute with divorce jurisdiction, as is the case in many of the states, divorce suits are to be conducted according to the rules of practice prevailing in ordinary suits in equity, unless the statute otherwise provides.[57]

50. Mangels *v.* Mangels, 6 Mo. App. 481. And see Musselman *v.* Musselman, 44 Ind. 106, holding that a proceeding for a divorce is not a civil action within the meaning of the statutory provision for a change of venue in civil actions, and that a party to a divorce suit is not entitled to a trial by jury as a matter of right as in a civil action.

An action for divorce is so far special that all the provisions of the Indiana Divorce Act are to be given their full force unaffected by the code. Morse *v.* Morse, 25 Ind. 156; Ewing *v.* Ewing, 24 Ind. 468. See also the language of Lord Broughton in Warrender *v.* Warrender, 2 Cl. & F. 488, 6 Eng. Reprint 1239.

51. R. F. H. *v.* S. H., 40 Barb. (N. Y.) 9 (holding that under a statute permitting a counter-claim in an action arising out of the contract set forth in the complaint as the foundation of plaintiff's claim or connected with the subject of action, defendant in an action for divorce on the ground of adultery cannot set up by way of counter-claim adultery by plaintiff and procure a judgment of divorce against plaintiff. But by N. Y. Code Civ. Proc. §§ 544, 770, the rule is changed and such a counter-claim may now be set up. Blanc *v.* Blanc, 67 Hun (N. Y.) 384, 22 N. Y. Suppl. 264.

A contrary rule prevails in California. Mott *v.* Mott, 82 Cal. 413, 22 Pac. 1140, holding that, although marriage creates a status, an action for a divorce is nevertheless an action of contract within the meaning of the statute providing for the filing of a counter complaint seeking affirmative relief.

Right to interpose counter-claim or cross bill see *infra*, XII, E.

52. Barber *v.* Root, 10 Mass. 260; O'Bryan *v.* O'Bryan, 13 Mo. 16, 53 Am. Dec. 128; Matchin *v.* Matchin, 6 Pa. St. 332, 47 Am. Dec. 466; Dorsey *v.* Dorsey, 7 Watts (Pa.) 349, 32 Am. Dec. 767, all holding that divorce laws apply not so much to contractual relations between the parties as to the relative duties of the parties and their standing and conduct in society. And see Musselman *v.* Musselman, 44 Ind. 106.

Quasi-criminal.— A suit for divorce is in its nature a quasi-criminal proceeding, although not brought in the name of the state. Stafford *v.* Stafford, 41 Tex. 111.

53. Herron *v.* Herron, 16 Ind. 129, 130, where a statute conferring jurisdiction on a court in "all civil cases, except for slander, libel, breach of marriage contract, or where the title to real estate shall be in issue" was held to include an action for divorce. See also Ellis *v.* Hatfield, 20 Ind. 101; Hurt *v.* Hurt, 2 Lea (Tenn.) 176.

54. Newman's Estate, 75 Cal. 213, 16 Pac. 887, 7 Am. St. Rep. 146; Roth *v.* Roth, 104 Ill. 35, 44 Am. Rep. 81; Ellison *v.* Martin, 53 Mo. 575; Gibbs *v.* Gibbs, 26 Utah 382, 73 Pac. 641, holding, however, that where defendant appears and joins issue by answer, the nature of the proceeding is thereby changed to one *in personam*.

A contrary rule exists in New York, where it is held that the marriage relation is not *res* within the state of a party invoking the jurisdiction of a court to dissolve it, so as to authorize the court to bind the absent party, a citizen of another state. Atherton *v.* Atherton, 155 N. Y. 129, 49 N. E. 933, 63 Am. St. Rep. 650, 40 L. R. A. 291 [*affirming* 82 Hun 179, 31 N. Y. Suppl. 977]; De Meli *v.* De Meli, 120 N. Y. 485, 24 N. E. 996, 17 Am. St. Rep. 652; Jones *v.* Jones, 108 N. Y. 415, 15 N. E. 707, 2 Am. St. Rep. 447. In the case of Rigney *v.* Rigney, 127 N. Y. 408, 28 N. E. 405, 24 Am. St. Rep. 462 [*reversing* 53 Hun 457, 6 N. Y. Suppl. 141], it was held that, although an action for a divorce is in the nature of a proceeding *in rem* or quasi *in rem* in so far as it affects the marital status of the parties, as to alimony and costs it is a proceeding *in personam*.

Custody of children after divorce or pending proceedings see *infra*, XX.

55. Residence of parties as jurisdictional fact see *infra*, V, C.

Service of process on non-resident see *infra*, X, D.

Extent of relief granted against non-resident see *infra*, V, C, 3, c.

56. Reed *v.* Reed, (Mo. App. 1902) 70 S. W. 505.

57. *Iowa*.— Hobart *v.* Hobart, 45 Iowa 501; Wadsworth *v.* Wadsworth, 40 Iowa 448.

Mississippi.— Fulton *v.* Fulton, 36 Miss. 517.

Missouri.— Mangels *v.* Mangels, 6 Mo. App. 481.

G. Law Governing Remedy. The dissolubility of a marriage depends on the law, not of the place where the marriage was celebrated, but of the place where the parties have their domicile.[58]

V. JURISDICTION.

A. At Common Law — 1. In General. The power to grant a divorce is a statutory and not a common-law power.[59]

2. Ecclesiastical Courts. At the time of the establishment of the United States as an independent nation and the adoption of the common law of England by the several states, matrimonial causes in England were within the exclusive jurisdiction of the ecclesiastical courts. These courts derived their commissions from the church, and in the determination of matrimonial causes the canonical law was applied almost entirely.[60] Ecclesiastical courts were not established in

Montana.— Black *v.* Black, 5 Mont. 15, 2 Pac. 317.

Pennsylvania.— Toone *v.* Toone, 10 Phila. 174.

Tennessee.— Richmond *v.* Richmond, 10 Yerg. 343.

Utah.— Cast *v.* Cast, 1 Utah 112.

Virginia.— Latham *v.* Latham, 30 Gratt. 307.

See 17 Cent. Dig. tit. "Divorce," § 2.

58. *Alabama.*— Thompson *v.* State, 28 Ala. 12 (holding that a husband has a right to emigrate and acquire a new domicile, and he thereby acquires as a consequence the right of having his matrimonial status controlled by the laws and judicial tribunals of the country of his new domicile, although his wife remains behind); Harrison *v.* Harrison, 19 Ala. 499 (holding that an absolute divorce regularly granted by the proper tribunal in Alabama is not invalid because the laws of the state in which the marriage was celebrated do not allow a divorce *a vinculo matrimonii*).

Georgia.— Standridge *v.* Standridge, 31 Ga. 223.

Indiana.— Tolen *v.* Tolen, 2 Blackf. 407, 21 Am. Dec. 742.

Louisiana.—D'Auvilliers *v.* D'Auvilliers, 32 La. Ann. 605.

Massachusetts.— Harteau *v.* Harteau, 14 Pick. 181, 25 Am. Dec. 372; Barber *v.* Root, 10 Mass. 260.

Missouri.— State *v.* Fry, 4 Mo. 120.

New Hampshire.— Clark *v.* Clark, 8 N. H. 21.

New York.— Kinnier *v.* Kinnier, 45 N. Y. 535, 6 Am. Rep. 132.

Pennsylvania.— Dorsey *v.* Dorsey, 7 Watts 349, 32 Am. Dec. 767.

Rhode Island.— Ditson *v.* Ditson, 4 R. I. 87.

Wisconsin.— Hubbell *v.* Hubbell, 3 Wis. 662, 62 Am. Dec. 702.

England.— See Goulder *v.* Goulder, [1892] P. 240, 61 L. J. P. & Adm. 117; Bonaparte *v.* Bonaparte, [1892] P. 402, 62 L. J. P. & Adm. 1, 67 L. T. Rep. N. S. 531, 1 Reports 490; Harvey *v.* Farnie, 5 P. D. 153; Shaw *v.* Gould, L. R. 3 H. L. 55, 37 L. J. Ch. 433, 18 L. T. Rep. N. S. 833; Shaw *v.* Atty.-Gen., L. R. 2 P. 156, 39 L. J. P. & M. 81, 23 L. T. Rep. N. S. 322, 18 Wkly. Rep. 1145, all of which seem to modify the former English doctrine as expressed in Lolley *v.* Lolley, 2 Cl. & F. 567, 6 Eng. Reprint 1268, R. & R. 177; McCarthy *v.* Decaix, 2 Russ. & M. 614, 39 Eng. Reprint 528; Conway *v.* Beazley, 3 Hagg. Eccl. 639, 5 Eng. Eccl. 242; Warrender *v.* Warrender, 2 Cl. & F. 488, 6 Eng. Reprint 1239; Tovey *v.* Lindsay, 1 Dow. 117, 3 Eng. Reprint 643.

See 17 Cent. Dig. tit. "Divorce," § 3.

Place of: Commission of offense as affecting jurisdiction see *infra*, V, E. Marriage as affecting jurisdiction see *infra*, V, D.

59. *Connecticut.*—Steele *v.* Steele, 35 Conn. 48.

District of Columbia.— Hatfield *v.* Hatfield, 6 D. C. 80.

Georgia.— McGee *v.* McGee, 10 Ga. 477.

Illinois.—Hamaker *v.* Hamaker, 18 Ill. 137.

Kentucky.— Maguire *v.* Maguire, 7 Dana 181; Thornberry *v.* Thornberry, 2 J. J. Marsh. 322; Butler *v.* Butler, 4 Litt. 201.

Massachusetts.— Robbins *v.* Robbins, 140 Mass. 528, 5 N. E. 837, 54 Am. Rep. 488; Sparhawk *v.* Sparhawk, 116 Mass. 315.

New York.— Higgins *v.* Sharp, 164 N. Y. 4, 58 N. E. 9; Erkenbrach *v.* Erkenbrach, 96 N. Y. 456; Brinkley *v.* Brinkley, 50 N. Y. 184, 10 Am. Rep. 460; Griffin *v.* Griffin, 47 N. Y. 134; Jones *v.* Jones, 90 Hun 414, 35 N. Y. Suppl. 877; Dickinson *v.* Dickinson, 63 Hun 516, 18 N. Y. Suppl. 485; Wells *v.* Wells, 10 N. Y. St. 248; Klein *v.* Klein, 42 How. Pr. 166; Jarvis *v.* Jarvis, 3 Edw. 462.

Ohio.— Olin *v.* Hungerford, 10 Ohio 268; Cronin *v.* Potters' Co-Operative Co., 11 Ohio Dec. (Reprint) 748, 29 Cinc. L. Bul. 52.

Oregon.— Northcut *v.* Lemery, 8 Oreg. 316.

Pennsylvania.— Roe *v.* Roe, 29 Pittsb. Leg. J. 319.

Utah.— Cast *v.* Cast, 1 Utah 112.

Vermont.— Le Barron *v.* Le Barron, 35 Vt. 365.

See 17 Cent. Dig. tit. "Divorce," § 1.

The common law is at variance with the dissolution of marriage by divorce. McCreery *v.* Davis, 44 S. C. 195, 22 S. E. 178, 51 Am. St. Rep. 794, 28 L. R. A. 655.

60. 2 Pollock & M. Hist. Eng. L. 366. See 1 Pollock & M. Hist. Eng. L. 127.

any of the United States as a part of its judicial system,[61] and consequently up to the time of the creation of courts with a jurisdiction in divorce actions, ecclesiastical law relating to divorce remained unadministered for want of a tribunal.[62]

3. Courts of Equity. The remedy of divorce, so far as it may be said to be of statutory origin, is not within the inherent jurisdiction of courts of equity.[63]

4. Federal Courts. The federal courts have disclaimed jurisdiction upon the subject of divorce, or for the allowance of alimony either as an original equity proceeding or as an incident to a divorce action.[64] They will, however, entertain a bill to restrain the enforcement of a judgment of divorce obtained by imposition and fraud,[65] or to enforce payment of alimony decreed by a state court where the husband has removed to another state and is thus beyond the jurisdiction of the court granting the decree.[66]

B. By Statute — 1. In General. Jurisdiction in divorce cases in the United States is usually vested in the law or the equity courts or both, according to the nature of the judicial systems in existence in the particular states,[67] although in a few states probate courts have been vested therewith.[68] The exercise of jurisdiction

61. Godwin *v.* Lunan, Jeff. (Va.) 96. And see Burtis *v.* Burtis, 1 Hopk. (N. Y.) 557, 14 Am. Dec. 563.

62. Erkenbrach *v.* Erkenbrach, 96 N. Y. 456; Griffin *v.* Griffin, 47 N. Y. 134; Burtis *v.* Burtis, 1 Hopk. (N. Y.) 557, 14 Am. Dec. 563, where it is stated that no divorce took place in the colony of New York during more than one hundred years preceding the time when the colony became a state, and that the only divorces which ever took place in the colony were the four granted by Governor Lovelace in 1670 and 1672. See also Kenyon *v.* Kenyon, 3 Utah 431, 24 Pac. 829; Hopkins *v.* Hopkins, 39 Wis. 167; Barker *v.* Dayton, 28 Wis. 367.

63. Griffin *v.* Griffin, 47 N. Y. 134; Jones *v.* Jones, 90 Hun (N. Y.) 414, 35 N. Y. Suppl. 877. *Contra*, Sharon *v.* Sharon, 67 Cal. 185, 7 Pac. 456, 635, 8 Pac. 709 (where an action for divorce was held to be a case in equity within the meaning of a constitutional provision conferring appellate jurisdiction on the supreme court); *In re* Christiansen, 17 Utah 412, 53 Pac. 1003, 70 Am. St. Rep. 794, 41 L. R. A. 504 [impliedly *overruling* Kenyon *v.* Kenyon, 3 Utah 431, 24 Pac. 829], holding that the granting of divorces belongs to chancery jurisdiction, which was conferred in general terms on the supreme and district courts by the Organic Act, and that the territorial law conferring jurisdiction on probate courts is invalid. See, however, *infra*, V, B, 2.

Nullity of marriage.— A different rule apparently exists as to the jurisdiction of courts of equity with respect to suits to annul marriages for original defects. Those courts have frequently assumed jurisdiction in such cases. Helms *v.* Franciscus, 2 Bland (Md.) 544, 20 Am. Dec. 402; Perry *v.* Perry, 2 Paige (N. Y.) 501; Wrightman *v.* Wrightman, 4 Johns. Ch. (N. Y.) 343. See also Marriage.

64. Barber *v.* Barber, 21 How. (U. S.) 582, 16 L. ed. 226, where the conclusion is reached that as the jurisdiction of chancery in England did not extend to or embrace the subjects of divorce and alimony, and as the jurisdiction of the courts of the United States in chancery is bound by that of chancery in England, all power or cognizance with respect to those subjects by the courts of the United States in chancery is equally excluded. See also Johnson *v.* Johnson, 13 Fed. 193; *In re* Hobbs, 12 Fed. Cas. No. 6,550, 1 Woods 537.

Removal from state to federal court.— A divorce proceeding cannot be removed to a federal court upon the application of plaintiff, although defendant filed a cross bill under which the payment of alimony was ordered. Chappell *v.* Chappell, 86 Md. 532, 39 Atl. 984. See also Bowman *v.* Bowman, 30 Fed. 849.

65. McNeil *v.* McNeil, 78 Fed. 834.

66. Cheever *v.* Wilson, 9 Wall. (U. S.) 108, 19 L. ed. 604; Barber *v.* Barber, 21 How. (U. S.) 582, 16 L. ed. 226; Hekking *v.* Pfaff, 82 Fed. 403; Bunnell *v.* Bunnell, 25 Fed. 214.

67. *Indiana.*— Ewing *v.* Ewing, 24 Ind. 468; Smith *v.* Smith, 4 Blackf. 132; Varner *v.* Varner, 3 Blackf. 163.

Kentucky.— Johnson *v.* Johnson, 12 Bush 485.

Louisiana.— Rowley *v.* Rowley, 19 La. 557.

Maryland.— Brown *v.* Brown, 2 Md. Ch. 316.

Mississippi.— Clark *v.* Slaughter, 38 Miss. 64.

North Carolina.— Barringer *v.* Barringer, 69 N. C. 179.

Pennsylvania.— Light *v.* Light, 17 Serg. & R. 273.

Tennessee.— Hurt *v.* Hurt, 2 Lea 176.

Utah.— Cast *v.* Cast, 1 Utah 112.

See 17 Cent. Dig. tit. "Divorce," §§ 198, 199.

Exercise of jurisdiction in both equity and law.— Under a statute conferring upon the superior courts exclusive jurisdiction in divorce cases and also in equity cases, a superior court which grants equitable relief prayed in a petition for divorce may also as a legal remedy grant the divorce, exercising in the one case its chancery powers and in the other its power as a court of law. Schooler *v.* Schooler, 77 Ga. 601.

68. Stebbins *v.* Anthony, 5 Colo. 348; Amy *v.* Amy, 12 Utah 278, 42 Pac. 1121. See, however, *supra*, note 63.

in divorce cases must conform with the statutory requirements,[69] and it depends upon the causes named in the statute.[70]

2. Construction of Statutes. A statute conferring general equity and law jurisdiction in civil cases upon certain courts includes actions for divorce.[71] It is generally otherwise where the statute limits jurisdiction to civil cases in which the amount in controversy does not exceed a sum specified.[72] If causes for divorce are specified by statute but no court is designated in terms to take jurisdiction thereof, it is the duty of superior courts of general jurisdiction to take cognizance of divorce cases so that the statute may not fail for want of a proper tribunal.[73] A statute permitting appeals to a supreme court whose duty it is to make such a decree as shall be just "according to the facts ascertained in the superior court" confers only appellate jurisdiction of divorce cases.[74]

3. Operation of Statutes. A statute conferring jurisdiction to grant divorces under certain conditions is not ordinarily given a retrospective operation.[75] It has been held that the repeal of all statutes relating to divorce deprives the courts of their jurisdiction in divorce actions, and terminates their jurisdiction even in pending actions unless the repealing act contains a saving clause.[76]

4. Validity of Statutes. The legislature cannot confer jurisdiction retrospectively so as to give vitality to a decree of divorce which is otherwise void for

69. *Alabama.*— Crossman *v.* Crossman, 33 Ala. 486.

Georgia.— Parish *v.* Parish, 32 Ga. 653.

New York.— *In re* Lawrence, 18 Abb. Pr. 347; Jarvis *v.* Jarvis, 3 Edw. 462.

Oregon.— Northcut *v.* Lemery, 8 Oreg. 316.

Pennsylvania.—Reeves *v.* Reeves, 12 Phila. 188.

70. Palmer *v.* Palmer, 1 Paige (N. Y.) 276; Burtis *v.* Burtis, 1 Hopk. (N. Y.) 557, 14 Am. Dec. 563. See also *infra*, VII, A, 2.

Specific cause in statute.— Where the offense charged is of a character which is provided for in the statute as a specific cause for divorce, the degree of the offense must be measured by the statute, and where it does not come up to that standard the courts have no right to say that an offense of the same character, but less in degree, shall be sufficient to dissolve the marriage contract. Birkby *v.* Solomons, 15 Ill. 120. See also Hamaker *v.* Hamaker, 18 Ill. 137.

71. *Colorado.*—Stebbins *v.* Anthony, 5 Colo. 348.

Indiana.— Ewing *v.* Ewing, 24 Ind. 468; Ellis *v.* Hatfield, 20 Ind. 101; Herron *v.* Herron, 16 Ind. 129.

Kentucky.— Johnson *v.* Johnson, 12 Bush 485.

Maryland.— Bayly *v.* Bayly, 2 Md. Ch. 326.

New York.— Forrest *v.* Havens, 38 N. Y. 469; Forrest *v.* Forrest, 25 N. Y. 501 [*affirming* 6 Duer 102]; Kamp *v.* Kamp, 46 How. Pr. 143.

Tennessee.— Hurt *v.* Hurt, 2 Lea 176.

Utah.— Cast *v.* Cast, 1 Utah 112.

Wisconsin.— State *v.* Smith, 19 Wis. 531.

See, however, *supra*, V, A, 3.

72. Heatherwick *v.* Heatherwick, 32 Ill. 73. Where, however, a statute gives a court jurisdiction in all actions at law or in equity wherein the debt or sum claimed does not exceed two thousand dollars, it has jurisdiction of an action for divorce if the amount of property involved does not exceed that sum. Stebbins *v.* Anthony, 5 Colo. 348. And see State *v.* Smith, 19 Wis. 531. *Contra*, Clemons *v.* Heelan, 52 Nebr. 287, 72 N. W. 270.

73. Cast *v.* Cast, 1 Utah 112.

74. Holloman *v.* Holloman, 22 N. C. 270.

75. Jarvis *v.* Jarvis, 3 Edw. (N. Y.) 462, holding that a statute providing that where the marriage has taken place out of the state and the parties have become and remain inhabitants of the state at least one year, and the wife is an actual resident at the time of exhibiting her complaint, a limited divorce may be granted, is not to be construed retrospectively, and therefore, although a husband and wife who had been married out of the state resided in the state several years before the statute was passed, yet where the wife only had been a resident after the statute took effect, the court had no jurisdiction.

76. Grant *v.* Grant, 12 S. C. 29, 32 Am. Rep. 506.

Saving clause.— Where a statute which authorized the court to decree a divorce from bed and board with alimony for cruel treatment by the husband was repealed by an act providing that the repeal should not affect any cause pending at the time of its passage, but that such cause should be concluded agreeably to the provisions of the repealing act, and the latter act did not authorize a divorce from bed and board or alimony but authorized a divorce *a vinculo matrimonii* for the same causes for which a divorce from bed and board was authorized by the act repealed, it was held that the court in a suit pending at the time of the repealing act might decree a divorce *a vinculo* but could not decree a divorce from bed and board or grant alimony. Smith *v.* Smith, 3 Serg. & R. (Pa.) 248. See also Hunt *v.* Hunt, 9 Hun (N. Y.) 622 [*affirmed* in 72 N. Y. 217, 28 Am. Rep. 129]; Hicks *v.* Hicks, 79 Wis. 465, 48 N. W. 495.

want of jurisdiction over the person of defendant.[77] It may, however, authorize an absolute divorce for an offense which at the time of its commission was ground for a limited divorce only.[78]

C. Residence of Parties[79]— **1. In General.** The courts of a state have no jurisdiction to decree a divorce between parties who do not reside therein.[80]

2. Residence of Plaintiff — a. In General. Under the statutes of nearly if not all the states plaintiff must ordinarily be a resident of the state at the time the action is commenced.[81]

b. Separate Residence of Wife. The domicile of the wife is for general purposes determined by that of the husband.[82] By leaving him, however, if for just cause,[83] she may acquire a residence in another state, in which she may maintain an action for divorce.[84] By thus acquiring a foreign residence, however, the

77. Israel *v.* Arthur, 7 Colo. 5, 1 Pac. 438; *In re* Christiansen, 17 Utah 412, 53 Pac. 1003, 70 Am. St. Rep. 794, 41 L. R. A. 504.

78. Hunt *v.* Hunt, 9 Hun (N. Y.) 622 [*affirmed* in 72 N. Y. 217]. See also Smith *v.* Smith, 3 Serg. & R. (Pa.) 248.

79. Operation of statute relating to residence see *supra*, note 75.

Residence as affecting validity of foreign divorce see *infra*, XXI, C, 3.

80. House *v.* House, 25 Ga. 473; Maguire *v.* Maguire, 7 Dana 181; People *v.* Dawell, 25 Mich. 247, 12 Am. Rep. 260; Hare *v.* Hare, 10 Tex. 355.

81. *Arkansas.*— Wood *v.* Wood, 54 Ark. 172, 15 S. W. 459.

Colorado.—Branch *v.* Branch, (Sup. 1902) 71 Pac. 632; Cairns *v.* Cairns, 29 Colo. 260, 68 Pac. 233, 93 Am. St. Rep. 55.

District of Columbia.— Blandy *v.* Blandy, 20 App. Cas. 535.

Illinois.— Way *v.* Way, 64 Ill. 406.

Kentucky.— See Maguire *v.* Maguire, 7 Dana 181.

Minnesota.— Thelan *v.* Thelan, 75 Minn. 433, 78 N. W. 108.

Missouri.— Kruse *v.* Kruse, 25 Mo. 68; Pate *v.* Pate, 6 Mo. App. 49.

New Hampshire.— Burgess *v.* Burgess, 71 N. H. 293, 51 Atl. 1074; Fellows *v.* Fellows, 8 N. H. 160.

New Jersey.— Yates *v.* Yates, 13 N. J. Eq. 280.

New York.— McNeil *v.* McNeil, 3 Edw. 550.

North Carolina.— Moore *v.* Moore, 130 N. C. 333, 41 S. E. 943.

Ohio.— Jacob *v.* Jacob, Wright 631.

Oklahoma.— Beach *v.* Beach, 4 Okla. 359, 46 Pac. 514.

Pennsylvania.— English *v.* English, 19 Pa. Super. Ct. 586; Ralston *v.* Ralston, 13 Phila. 30.

Rhode Island.— Ditson *v.* Ditson, 4 R. I. 87.

Wisconsin.— Dutcher *v.* Dutcher, 39 Wis. 651.

See 17 Cent. Dig. tit. "Divorce," § 210.

Statutory exceptions.— In the District of Columbia, where the cause complained of occurred within the district and the offending party resides there, the court may grant a divorce, although petitioner is a non-resident. Smith *v.* Smith, 4 Mackey 255. In Massachusetts the courts have jurisdiction of a libel for divorce brought by a husband residing in another state for an offense committed in Massachusetts when both parties resided there; the wife having since remained there. Watkins *v.* Watkins, 135 Mass. 83.

82. Smith *v.* Smith, 19 Nebr. 706, 28 N. W. 296.

83. Loker *v.* Gerald, 157 Mass. 42, 31 N. E. 709, 34 Am. St. Rep. 252, 16 L. R. A. 497; Burlen *v.* Shannon, 115 Mass. 438; Suter *v.* Suter, 72 Miss. 345, 16 So. 673; Hunt *v.* Hunt, 72 N. Y. 217, 28 Am. Rep. 129; Cheeley *v.* Clayton, 110 U. S. 701, 4 S. Ct. 328, 28 L. ed. 298, all holding that if the wife wrongfully leaves the husband she cannot acquire a separate legal residence. See also Smith *v.* Smith, 43 La. Ann. 1140, 10 S. E. 248; Ditson *v.* Ditson, 4 R. I. 87. *Contra*, by statute, Johnson *v.* Johnson, 57 Kan. 343, 46 Pac. 700.

84. *Alabama.*— Turner *v.* Turner, 44 Ala. 437; Hanberry *v.* Hanberry, 29 Ala. 719; Harrison *v.* Harrison, 20 Ala. 629, 56 Am. Dec. 227.

California.— Moffatt *v.* Moffatt, 5 Cal. 280.

Illinois.— Hill *v.* Hill, 166 Ill. 54, 46 N. E. 751; Chapman *v.* Chapman, 129 Ill. 386, 21 N. E. 806; Lanzovert *v.* Lanzovert, 14 Ill. App. 653; Derby *v.* Derby, 14 Ill. App. 645.

Indiana.— Jenness *v.* Jenness, 24 Ind. 355, 87 Am. Dec. 335; Tolen *v.* Tolen, 2 Blackf. 407, 21 Am. Dec. 743.

Kansas.— Dunn *v.* Dunn, 59 Kan. 773, 52 Pac. 69.

Kentucky.— Hall *v.* Hall, 102 Ky. 297, 43 S. W. 429, 19 Ky. L. Rep. 1312.

Louisiana.— Smith *v.* Smith, 43 La. Ann. 1140, 10 So. 248.

Maine.— Harding *v.* Alden, 9 Me. 140, 23 Am. Dec. 549.

Massachusetts.— Shaw *v.* Shaw, 98 Mass. 158; Harteau *v.* Harteau, 14 Pick. 181, 25 Am. Dec. 372.

New Hampshire.— Shute *v.* Sargent, 67 N. H. 305, 36 Atl. 282; Hopkins *v.* Hopkins, 35 N. H. 474; Payson *v.* Payson, 34 N. H. 518; Masten *v.* Masten, 15 N. H. 159.

New Jersey.— Tracy *v.* Tracy, 62 N. J. Eq. 807, 48 Atl. 533.

New York.— Atherton *v.* Atherton, 155 N. Y. 129, 49 N. E. 933, 63 Am. St. Rep.

wife does not lose her right to sue for a divorce in the state of the husband's domicile;[85] and if the husband leaves the wife and acquires a domicile elsewhere, she may remain and sue for a divorce in the state of his former domicile[86] or she may sue in the state to which he removes.[87]

c. Domicile of Origin. Every person is deemed to have a domicile, and, until another is acquired elsewhere, to retain the domicile of his origin.[88]

650, 40 L. R. A. 291; Gray *v.* Gray, 143 N. Y. 354, 38 N. E. 301; Hunt *v.* Hunt, 72 N. Y. 217, 28 Am. St. Rep. 129; Hewes *v.* Hewes, 61 Hun 625, 16 N. Y. Suppl. 119; Matter of Colebrook, 26 Misc. 139, 55 N. Y. Suppl. 861; Gebhard *v.* Gebhard, 25 Misc. 1, 54 N. Y. Suppl. 406; Mellen *v.* Mellen, 10 Abb. N. Cas. 329.

North Carolina.— Arrington *v.* Arrington, 102 N. C. 491, 9 S. E. 200; Schonwald *v.* Schonwald, 55 N. C. 367; Irby *v.* Wilson, 21 N. C. 568.

Pennsylvania.— Reel *v.* Elder, 62 Pa. St. 308, 1 Am. Rep. 414; Colvin *v.* Reed, 55 Pa. St. 375; Ames *v.* Ames, 7 Pa. Super. Ct. 456, 21 Pa. Co. Ct. 257; Gale *v.* Gale, 13 Wkly. Notes Cas. 111; Taylor *v.* Taylor, 1 Chest. Co. Rep. 485; Cain *v.* Cain, 5 Lanc. L. Rev. 373.

Rhode Island.— White *v.* White, 18 R. I. 292, 27 Atl. 506; Ditson *v.* Ditson, 4 R. I. 87.

Texas.— Jones *v.* Jones, 60 Tex. 451.

Wisconsin.— Dutcher *v.* Dutcher, 39 Wis. 651; Craven *v.* Craven, 27 Wis. 418; Phillips *v.* Phillips, 22 Wis. 256; Hubbell *v.* Hubbell, 3 Wis. 662, 62 Am. Dec. 702; Manley *v.* Manley, 3 Pinn. 390, 4 Chandl. 96.

United States.— Cheeley *v.* Clayton, 110 U. S. 701, 4 S. Ct. 328, 28 L. ed. 298; Cheever *v.* Wilson, 9 Wall. 108, 124, 19 L. ed. 604; Barber *v.* Barber, 21 How. 582, 16 L. ed. 226; Bennett *v.* Bennett, 3 Fed. Cas. No. 1,318, Deady 299.

See 17 Cent. Dig. tit. "Divorce," § 217.

Contra.— Burton *v.* Burton, 21 Wkly. Rep. 648.

Residence and domicile distinguished.— The domicile of the husband is the only domicile of the wife, and she cannot change it without his consent. She may, however, leave him and change her residence. Harrison *v.* Harrison, 20 Ala. 629, 56 Am. Dec. 227; Bowman *v.* Bowman, 24 Ill. App. 165 (holding that a wife may be an actual resident of the state, although she has no domicile there, and that if while she is an actual resident the offense which supplies her ground of divorce is committed, thereafter her actual residence becomes her separate and legal domicile); Johnson *v.* Johnson, 12 Bush (Ky.) 485; Maguire *v.* Maguire, 7 Dana (Ky.) 181 (holding that wherever the domicile of a husband is, there also in legal contemplation is that of the wife, although she may have separated from him and have an actual residence elsewhere; but that a wife residing in a state in which her husband was never domiciled is entitled to sue there for a divorce).

85. Sewall *v.* Sewall, 122 Mass. 156, 23 Am. Rep. 299; Masten *v.* Masten, 15 N. H. 159. See also Boreing *v.* Boreing, 71 S. W. 431, 24 Ky. L. Rep. 1288, where it was held that a wife living separate from her husband for five years does not lose her residence in the state of his domicile, for the purpose of an action for divorce, by going into other states to teach and to do other work in order to support herself. *Contra*, Dutcher *v.* Dutcher, 39 Wis. 651.

86. Burtis *v.* Burtis, 161 Mass. 508, 37 N. E. 740. See also Vischer *v.* Vischer, 12 Barb. (N. Y.) 640 (holding that if the husband and wife are living separate by the decree of a competent court, a change of the domicile of the husband does not change that of the wife); Hollister *v.* Hollister, 6 Pa. St. 449 (holding that the removal of husband and wife to another state does not bar a divorce suit brought by her in Pennsylvania for causes occurring there prior to the removal, if she has returned and resided there for one year prior to filing the libel).

87. Greene *v.* Greene, 11 Pick. (Mass.) 410. See, however, Schonwald *v.* Schonwald, 55 N. C. 367, where it is held that the three years' residence required by statute of the petitioner must be an actual residence, and that when the wife sues, the rule that her domicile is that of her husband will not avail instead of an actual residence.

88. Shaw *v.* Shaw, 98 Mass. 158 (holding that a domicile once existing cannot be lost by mere abandonment even when coupled with the intent to acquire a new one, but continues till a new one is in fact gained); De Meli *v.* De Meli, 120 N. Y. 485, 24 N. E. 996, 17 Am. St. Rep. 652 [*affirming* 5 N. Y. Civ. Proc. 306, 67 How. Pr. 20]; Matter of Morrison, 52 Hun (N. Y.) 102, 5 N. Y. Suppl. 90.

Abandonment of former residence.— One who leaves New Jersey to seek a more congenial climate and finds employment in another state where he marries and remains for more than six years, except for a period of three months spent on a visit to New Jersey, abandons his residence in that state, although he testifies that he is and has always considered himself a citizen thereof. Firth *v.* Firth, 50 N. J. Eq. 137, 24 Atl. 916. Where a resident of New York left his wife and resided abroad for twenty-nine years except for a short period spent in a visit to New York he lost his residence in that state. Williamson *v.* Parisien, 1 Johns. Ch. (N. Y.) 389. However, a temporary absence does not effect a change of domicile. Burtis *v.* Burtis, 161 Mass. 508, 37 N. E. 740; Harris *v.* Harris, 83 N. Y. App. Div. 123, 82 N. Y. Suppl. 568; Fickle *v.* Fickle, 5 Yerg. (Tenn.) 203; Haymond *v.* Haymond, 74 Tex. 414, 12 S. W. 90.

d. Sufficiency — (i) *GENUINENESS.* Nothing short of an actual residence in the state where the suit is brought with the intention of establishing a permanent residence there will satisfy the requirements of the statute as to residence.[89] Thus the courts will not take jurisdiction if the residence in the state is taken up for

Acquisition of new residence.— Residence is acquired by living in a certain place with no present or definite intention of removing therefrom. Tracy *v.* Tracy, 62 N. J. Eq. 807, 48 Atl. 533. Temporary absences do not preclude the acquisition of a residence. Summerville *v.* Summerville, 31 Wash. 411, 72 Pac. 84. Thus, one who leaves the state of his domicile and takes up his residence in Washington as a government employee, where he marries and resides for ten years except for summer vacations spent at his original home and elsewhere, thereby acquires a residence in the District of Columbia. Bradstreet *v.* Bradstreet, 18 D. C. 229. So where a husband came into the state more than two years before filing a bill for divorce with the intention of becoming a resident, and still entertains that intention, he is a resident, although on several occasions he was absent on visits to his former home. Albee *v.* Albee, 141 Ill. 550, 31 N. E. 153. See also Larquié *v.* Larquié, 40 La. Ann. 457, 4 So. 335. And where a husband and wife come into a state with the intention of making it a permanent home, the fact that they spend their winters in another state is not inconsistent with their residence in the former. Morehouse *v.* Morehouse, 70 Conn. 420, 39 Atl. 516. However, the fact that a man carries on business in England does not render him a *bona fide* resident thereof where his domicile of origin was in Ireland and he still carries on business and keeps a residence there. Manning *v.* Manning, L. R. 2 P. & D. 223, 40 L. J. P. & M. 18, 24 L. T. Rep. N. S. 196, 19 Wkly. Rep. 479. Nor is length of time alone sufficient to effect a change of domicile. There must be a *bona fide* permanent intent, *animus et factum.* Vischer *v.* Vischer, 12 Barb. (N. Y.) 640.

Change of residence pending suit see *infra,* V, C, 2, e.

89. *New Jersey.*—McShane *v.* McShane, 45 N. J. Eq. 341, 19 Atl. 465 (holding that the fact that plaintiff has been at a hotel in the state "off and on" for several years is not enough to establish a fixed domicile there); Steele *v.* Steele, 26 N. J. Eq. 85 (holding that the fact that petitioner "was stopping" at a certain hotel in the state "at the time of the commencement of this suit" does not show residence there); Coddington *v.* Coddington, 20 N. J. Eq. 263.

North Carolina.—Schonwald *v.* Schonwald, 55 N. C. 367.

North Dakota.— Smith *v.* Smith, 10 N. D. 219, 86 N. W. 721.

Oklahoma.— Beach *v.* Beach, 4 Okla. 359, 46 Pac. 514.

Washington.— Van Alstine *v.* Van Alstine, 23 Wash. 310, 63 Pac. 243.

Wisconsin.— Dutcher *v.* Dutcher, 39 Wis. 651 (holding that such a residence is required as would make a man a qualified elector of the state); Hall *v.* Hall, 25 Wis. 600 (holding that a residence sufficient to render a man subject to taxation and process is requisite).

England.— Burton *v.* Burton, 21 Wkly. Rep. 648, holding that a transitory residence is not sufficient to enable the courts to take jurisdiction.

See 17 Cent. Dig. tit. "Divorce," § 218 *et seq.*

The word "residence" as used in a divorce statute should be construed as though it were "domicile." Hamill *v.* Talbott, 81 Mo. App. 210; De Meli *v.* De Meli, 120 N. Y. 485, 24 N. E. 996, 17 Am. St. Rep. 652; Graham *v.* Graham, 9 N. D. 88, 81 N. W. 44; Smith *v.* Smith, 7 N. D. 404, 75 N. W. 783. *Contra,* Way *v.* Way, 64 Ill. 406. See also *supra,* note 84; and DOMICILE. However a mere legal residence in a state with an actual residence out of it is not sufficient. Tipton *v.* Tipton, 87 Ky. 243, 8 S. W. 440, 10 Ky. L. Rep. 252.

Presumption as to residence.— The place where a person lives is *prima facie* his residence. Tracy *v.* Tracy, 62 N. J. Eq. 807, 48 Atl. 533.

An intention to remain in a place and make it a fixed place of abode is a necessary element of residence. Way *v.* Way, 64 Ill. 406; Whitcomb *v.* Whitcomb, 46 Iowa 437; Hinds *v.* Hinds, 1 Iowa 36; Grover *v.* Grover, 63 N. J. Eq. 771, 50 Atl. 1051; Sweeney *v.* Sweeney, 62 N. J. Eq. 357, 50 Atl. 785. See, however, Pohlman *v.* Pohlman, 60 N. J. Eq. 28, 46 Atl. 658.

Time of forming intent.— If the statute requires two years' residence by plaintiff, he must have formed an intention to make the state his permanent residence two years before bringing suit. It is not sufficient that he has resided in the state two years if the intention was not formed that length of time before suit brought. Hooker *v.* Hooker, (N. J. Ch. 1897) 37 Atl. 773.

Alien resident.— Under a statute providing that no person shall be entitled to a divorce unless a *bona fide* resident and citizen of the state for one year prior to the commencement of the action, a *bona fide* resident of the state for one year who was foreign born but who had duly declared his intention to become a citizen of the United States may maintain an action for a divorce. Cairns *v.* Cairns, 29 Colo. 260, 68 Pac. 233, 93 Am. St. Rep. 55.

Residence during voyage.— The mere fact that plaintiff was sailing on the high seas is not inconsistent with a claim of residence in a port of one of the United States during that time, since the vessel may have been

the sole purpose of obtaining a divorce which the laws of plaintiff's former domicile do not allow, and there is no intention to make the state a permanent residence after the divorce is obtained,[90] although the fact that the liberal divorce laws of a state induce plaintiff to acquire a residence there does not make him any the less a domiciled inhabitant if he goes into the state with the intention of making it a permanent home.[91]

(II) *Cohabitation.* In some states, unless the marriage occurred within the state, the parties must have cohabited within the state as man and wife else the court cannot take jurisdiction.[92]

(III) *Period of Residence.* The statutes conferring jurisdiction in divorce cases usually provide that plaintiff shall not only be a resident of the state, but also that his residence shall have continued for a certain length of time, which varies in the different jurisdictions.[93] In exceptional cases, however, the statutes allow an action to be brought by one who has not resided in the state for the time otherwise prescribed,[94] and moreover it has been held that want of residence of

registered at the United States custom-house at that port and sailing under the flag of the United States. De Tolna *v.* De Tolna, 135 Cal. 575, 67 Pac. 1045.

90. *Illinois.*— Way *v.* Way, 64 Ill. 406.

Iowa.— Whitcomb *v.* Whitcomb, 46 Iowa 437; Smith *v.* Smith, 4 Greene 266.

Massachusetts.— See Com. *v.* Kendall, 162 Mass. 221, 38 N. E. 504.

Michigan.— Colburn *v.* Colburn, 70 Mich. 647, 38 N. W. 607.

New Jersey.— Wallace *v.* Wallace, 62 N. J. Eq. 509, 50 Atl. 788; McGean *v.* McGean, 60 N. J. Eq. 21, 46 Atl. 656; Winship *v.* Winship, 16 N. J. Eq. 107; Brown *v.* Brown, 14 N. J. Eq. 78.

North Dakota.— Graham *v.* Graham, 9 N. D. 88, 81 N. W. 44; Smith *v.* Smith, 7 N. D. 404, 75 N. W. 783.

Presumption against residence.— Where suit is brought on the ground of desertion promptly on the expiration of an alleged residence in the state for the necessary two years, and where the desertion commenced while the applicant was a resident of a state whose laws do not grant an absolute divorce on that ground, a presumption arises against the existence of such a residence as is necessary to give jurisdiction of the matrimonial status of complainant. Hunter *v.* Hunter, 64 N. J. Eq. 277, 53 Atl. 221; Williams *v.* Williams, 3 R. I. 185.

91. *Michigan.*— Colburn *v.* Colburn, 70 Mich. 647, 38 N. W. 607.

New Jersey.— Wallace *v.* Wallace, (Err. & App. 1903) 54 Atl. 433 [*reversing* 62 N. J. Eq. 509, 50 Atl. 788]. See also Hunter *v.* Hunter, 64 N. J. Eq. 277, 53 Atl. 221; Pohlman *v.* Pohlman, 60 N. J. Eq. 28, 46 Atl. 658.

New York.— Matter of Hall, 61 N. Y. App. Div. 266, 70 N. Y. Suppl. 406, holding that the fact that a person removes to another state for the purpose of procuring a divorce is not inconsistent but rather accords with the purpose of acquiring a domicile there.

North Dakota.— Graham *v.* Graham, 9 N. D. 88, 81 N. W. 44.

Rhode Island.— Fosdick *v.* Fosdick, 15 R. I. 130, 23 Atl. 140.

92. Calef *v.* Calef, 54 Me. 365, 92 Am. Dec. 549; Goodwin *v.* Goodwin, 45 Me. 377.

Cohabitation as affecting requisite period of plaintiff's residence in state see *infra*, note 94.

93. See statutes of the several states.

Limited divorce.— One year's residence of complainant is not necessary previous to an application for a divorce *a mensa et thoro*. It is necessary only where the application is for a divorce *a vinculo matrimonii*. Stokes *v.* Stokes, 1 Mo. 320.

Construction of statute.—Ala. Code, § 1492, providing that no bill can be filed for a divorce for voluntary abandonment unless complainant has been a resident of the state for three years next preceding is not affected by section 1485, bestowing jurisdiction to divorce persons for voluntary abandonment for two years next preceding the filing of the bill, nor by section 1494, providing that, where defendant is a non-resident, complainant must have been a *bona fide* resident of the state for one year next preceding the filing of the bill; the latter section referring to suits for other causes than voluntary abandonment, which, except in case of defendant's non-residence, allow the immediate filing of the bill. Davis *v.* Davis, 132 Ala. 219, 31 So. 473.

Repeal of statute.— A statute requiring five years' residence is not repealed by an act authorizing divorce for desertion for a term of three years. Brown *v.* Brown, 14 N. J. Eq. 78.

94. See statutes of the several states.

Residence at time of offense.— If plaintiff was a resident of the state at the time the offense was committed, he may sue for a divorce, although he has not resided there for the time otherwise prescribed. Sawtell *v.* Sawtell, 17 Conn. 284 (holding, however, under a statute requiring petitioner to have resided in the state three years before the date of the petition unless the cause of divorce has arisen subsequent to his removal to the state, that if the cause of divorce arises in another state before petitioner's removal, its subsequent continuance in Connecticut down to the date of the petition does not

plaintiff in the state for the time prescribed by statute is a personal disability which may be cured, and hence is matter in abatement and not in bar of the action.[95]

e. Change of Residence Pendente Lite. A change of residence by a plaintiff after the commencement of the suit and before its trial does not deprive the court of jurisdiction.[96]

3. Residence of Defendant — a. In General. The residence of plaintiff and not that of defendant gives jurisdiction in divorce cases; and by the weight of authority the courts may entertain a divorce suit by a resident against a non-resident, although the service of process is constructive or is made outside of the state and defendant does not appear.[97]

bring the case within the exception of the statute so as to authorize an action before the expiration of the three years); Way *v.* Way, 64 Ill. 406; Bowman *v.* Bowman, 24 Ill. App. 165. In some states this exception obtains only in cases of adultery committed while plaintiff was a resident of the state. Thelen *v.* Thelen, 75 Minn. 433, 78 N. W. 108; Dutcher *v.* Dutcher, 39 Wis. 651. If the parties were non-residents when the offense was committed, plaintiff must have resided within the jurisdiction for the length of time prescribed in ordinary cases. Hatfield *v.* Hatfield, 6 D. C. 80.

Place of commission of offense.— If the offense was committed within the state, plaintiff may sue without first having lived in the state the length of time otherwise prescribed. Way *v.* Way, 64 Ill. 406. If, however, the offense was committed in another jurisdiction, plaintiff must have resided within the state for the length of time prescribed in ordinary cases. Blandy *v.* Blandy, 20 App. Cas. (D. C.) 535.

Cohabitation within state.— Mass. Gen. St. c. 107, §§ 11, 12, provide that except when the libellant has resided in the state five consecutive years next preceding the time of filing the libel no divorce can be granted for any cause occurring in any other state unless before such cause occurred the parties had lived together as husband and wife in Massachusetts, and one of them lived there when the cause occurred. Shaw *v.* Shaw, 98 Mass. 158. That both parties have lived in the state separately is not sufficient to give the court jurisdiction. Weston *v.* Weston, 143 Mass. 274, 9 N. E. 557 [impliedly *overruling* Eaton *v.* Eaton, 122 Mass. 276]; Schrow *v.* Schrow, 103 Mass. 574. The statute does not deprive a wife of a right to a divorce where she and her husband had cohabited together in the state, although they subsequently removed to another state before the cause of action accrued, the wife having subsequently returned and taken up her residence in the state. Brett *v.* Brett, 5 Metc. (Mass.) 233. Where libellant has resided in the state for the statutory period of time before suing for divorce, the court has jurisdiction, although the parties have never lived together as husband and wife within the state. Franklin *v.* Franklin, 154 Mass. 515, 28 N. E. 681, 26 Am. St. Rep. 266, 13 L. R. A. 843.

Necessity of cohabitation in state where marriage was foreign see *supra*, V, C, 2, d, (II).

Discretion of court.— Under a statute permitting the court to exercise the discretion of dispensing with the three years' residence of plaintiff, the court will entertain petitions for divorce where the applicants have not resided in the state for three years if the court has jurisdiction over the parties and the offense was committed in the state or was a cause of divorce under the laws of the state where it was committed. Williams *v.* Williams, 3 R. I. 185.

95. Dutcher *v.* Dutcher, 39 Wis. 651.

96. Waltz *v.* Waltz, 18 Ind. 449, the statute authorizing a divorce in a proper case if plaintiff was a resident "at the time of the filing of such petition."

97. *Alabama.*— Harrison *v.* Harrison, 19 Ala. 499.

Indiana.— McFarland *v.* McFarland, 40 Ind. 458; Ewing *v.* Ewing, 24 Ind. 468.

Indian Territory.— White *v.* White, 2 Indian Terr. 35, 47 S. W. 355.

Kentucky.— Rhyms *v.* Rhyms, 7 Bush 316.

Louisiana.— Butler *v.* Washington, 45 La. Ann. 279, 12 So. 356, 19 L. R. A. 814, the marriage having taken place within the state.

Texas.— Trevino *v.* Trevino, 54 Tex. 261, holding that where the marriage has been solemnized in Texas and the offense was committed there, the courts of that state may grant a divorce, although at the time of trial defendant was a non-resident.

Wisconsin.— Hubbell *v.* Hubbell, 3 Wis. 662, 62 Am. Dec. 702.

See 17 Cent. Dig. tit. "Divorce," §§ 211, 215.

Although defendant never resided in the state, yet the courts may take jurisdiction. Thompson *v.* State, 28 Ala. 12; Tolen *v.* Tolen, 2 Blackf. (Ind.) 407, 21 Am. Dec. 742; Ditson *v.* Ditson, 4 R. I. 87; Gleason *v.* Gleason, 4 Wis. 64; Manley *v.* Manley, 3 Pinn. 390, 4 Chandl. 96.

On the contrary, it is the rule in some states that where the offense occurred without the state, and respondent is domiciled in another state and has neither appeared or been served with process within the state, the court has no jurisdiction to grant a divorce. Allison *v.* Allison, 2 Pa. Co. Ct. 671, 18 Wkly. Notes Cas. (Pa.) 508; Nigh *v.* Nigh, 2 Pa. Co. Ct. 574; Taylor *v.* Taylor, 1 Chest. Co. Rep. (Pa.) 485; McCarthy *v.* McCarthy, 31

b. As Cross Complainant. A statute making residence of plaintiff a prerequisite to the exercise of divorce jurisdiction does not preclude a non-resident defendant from filing a cross bill and obtaining a decree of divorce against plaintiff.[98] Nor will a non-resident defendant be deprived of his right to relief on a cross bill by a dismissal or discontinuance of the original petition.[99]

c. Extent of Jurisdiction Over Non-Resident. The weight of authority is in favor of confining the jurisdiction of the court in a divorce case, where defendant is a non-resident and has not been personally served within the state and does not appear, to a determination of the status of the parties.[1]

4. Residence at Time of Offense.[2] A court otherwise having jurisdiction may in some states grant a divorce, although the parties resided in another state at the time of the offense complained of,[3] in the absence of statute to the contrary.[4] In

Pittsb. Leg. J. N. S. 100. And the courts of England have no jurisdiction to entertain a petition for divorce against a husband who is a resident of Ireland. Burton *v.* Burton, 21 Wkly. Rep. 648.

Service of process on non-resident see *infra*, X, D.

98. *Illinois.*— Sterl *v.* Sterl, 2 Ill. App. 223.

Indiana.— Jenness *v.* Jenness, 24 Ind. 355, 87 Am. Dec. 335.

Kentucky.— Barrett *v.* Barrett, 11 Ky. L. Rep. 287.

Massachusetts.— Watkins *v.* Watkins, 135 Mass. 83.

Michigan.— Clutton *v.* Clutton, 108 Mich. 267, 66 N. W. 52, 31 L. R. A. 160.

New Jersey.—Abele *v.* Abele, 62 N. J. Eq. 644, 50 Atl. 686.

Washington.— Ferry *v.* Ferry, 9 Wash. 239, 37 Pac. 431.

See 17 Cent. Dig. tit. "Divorce," § 213.

Contra.— Valk *v.* Valk, 18 R. I. 639, 29 Atl. 499.

99. Watkins *v.* Watkins, 135 Mass. 83; Abele *v.* Abele, 62 N. J. Eq. 644, 50 Atl. 686.

1. *California.*— De la Montanya *v.* De la Montanya, 112 Cal. 101, 44 Pac. 345, 53 Am. St. Rep. 165, 32 L. R. A. 82.

Delaware.— Townsend *v.* Griffin, 4 Harr. 440.

Indiana.— Beard *v.* Beard, 21 Ind. 321.

Iowa.— Kline *v.* Kline, 57 Iowa 386, 10 N. W. 825, 42 Am. Rep. 47.

Maine.— Harding *v.* Alden, 9 Me. 140, 23 Am. Dec. 549.

Maryland.— Garner *v.* Garner, 56 Md. 127.

Missouri.— Hamill *v.* Talbott, 81 Mo. App. 210, holding that a court may proceed to annul the status of a non-resident, but cannot fix his collateral rights of property unless he has been served with process within the jurisdiction.

New York.— Rigney *v.* Rigney, 127 N. Y. 408, 28 N. E. 405, 24 Am. St. Rep. 462.

Ohio.— Doerr *v.* Forsythe, 50 Ohio St. 726, 35 N. E. 1055, 40 Am. St. Rep. 703, where it was said that a decree of divorce cannot affect the property rights of a non-resident defendant existing in the state of which he remains a resident.

Utah.— Gibbs *v.* Gibbs, 26 Utah 382, 73 Pac. 641.

See also *supra*, IV, F, 1. b.

Contra.— Wesner *v.* O'Brien, 56 Kan. 724, 44 Pac. 1090, 54 Am. St. Rep. 604, 32 L. R. A. 289; Roe *v.* Roe, 52 Kan. 724, 35 Pac. 808, 39 Am. St. Rep. 367; Boggers *v.* Boggers, 6 Baxt. (Tenn.) 299. See also Goore *v.* Goore, 24 Wash. 139, 63 Pac. 1092.

Jurisdiction over non-resident as to: Alimony see *infra*, XIX, A, 6, a, (III), (A). Custody of children see *infra*, XX, A, 2. Remarriage see *infra*, XV, G, 1, d, (I).

2. **Residence at time of offense as affecting length of residence required of plaintiff** see *supra*, V, C, 2, d, (III), note 94.

3. Tolen *v.* Tolen, 2 Blackf. (Ind.) 407, 21 Am. Dec. 742; Colbun *v.* Colbun, 70 Mich. 647, 38 N. W. 607 (holding that desertion in another state need not have continued for two years after the removal of plaintiff to Michigan if he has been a resident of that state for the requisite one year); Hare *v.* Hare, 10 Tex. 355 (holding that although the parties resided abroad at the time of the desertion of one by the other, yet if subsequently the innocent party becomes an inhabitant of the state and the desertion continues it is ground for divorce).

Construction of statute.— Where a statute authorizes a divorce for a desertion which has taken place "in any other state," it does not include a desertion occurring in a foreign country. Bishop *v.* Bishop, 30 Pa. St. 412.

4. Sanders *v.* Sanders, 29 N. J. Eq. 410; Coddington *v.* Coddington, 20 N. J. Eq. 263; Yates *v.* Yates, 13 N. J. Eq. 280, all holding, under a statute requiring a residence of three years, and in cases of desertion a residence "at the time of the desertion complained of," that a residence during the whole three years of the desertion is necessary.

Continuing injury.— Where a statute requires in order to give jurisdiction that the parties or one of them must have been an inhabitant of the state at the time of the injury complained of, an incurable impotence existing at the time of the marriage is a continuing injury and gives jurisdiction, although neither of the parties was an inhabitant of the state when the marriage was contracted. A. B. *v.* C. B., 34 N. J. Eq. 43. See, however, Brett *v.* Brett, 5 Metc. (Mass.) 233, holding that a statute providing that no divorce shall be decreed for any cause which shall have occurred in any other state or

other states there is no jurisdiction where at the time the cause of divorce arose the parties were domiciled in another state.[5]

D. Place of Marriage.[6] If the court otherwise has jurisdiction of the cause and the parties it may decree a divorce, although the marriage was celebrated in another state.[7]

country unless one of the parties was then living in Massachusetts, precludes a divorce in favor of a wife who was deserted by her husband in another state where both then resided, although she subsequently removed to Massachusetts and the desertion continued for more than five years and up to the time when she filed her bill. See also *supra*, note 3; V, C, 2, d, (III) note 94.

Time of abandonment.— Where a husband had no fixed domicile, and after he left the wife in New York for France she returned to Kentucky and there continuously resided, and he did not support her, it was presumed that his intention to abandon her was formed upon her return to Kentucky, and accordingly the courts of that state had jurisdiction, under Ky. Gen. St. c. 52, § 4, providing that no divorce shall be granted for an act done outside of the state unless the party complaining has an actual residence in the state at the time of the doing of the act, or unless such act by the laws of the state where it was done is a cause for divorce. Perzel *v.* Perzel, 91 Ky. 634, 15 S. W. 658, 12 Ky. L. Rep. 879. Where, however, a wife, after abandoning petitioner in another jurisdiction, came into the District of Columbia, from which she wrote him letters reproaching him for ill treatment and bringing to his mind the causes which compelled her to abandon him finally and indicating that such was her determination when she left him, such letters do not show that her intention to desert petitioner was not definitely formed until after her arrival in the District and thus show that the desertion occurred there. Blandy *v.* Blandy, 20 App. Cas. (D. C.) 535. See also Hick *v.* Hick, 5 Bush (Ky.) 670.

5. *Louisiana.*— Nicholas *v.* Maddox, 52 La. Ann. 1493, 27 So. 966; Muller *v.* Hilton, 13 La. Ann. 1, 71 Am. Dec. 504; Edwards *v.* Green, 9 La. Ann. 317, all holding that parties who did not contract marriage under or with reference to the laws of the state cannot sue there for a divorce on grounds which occurred in another state before they acquired a residence in Louisiana.

Massachusetts.— Harteau *v.* Harteau, 14 Pick. 181, 25 Am. Dec. 372, holding that where a cause of divorce arose in another state, in which the parties at the time resided and in which the husband has since continued to reside, and the laws of that state do not admit of divorce for such cause, the courts of Massachusetts have no jurisdiction to decree a divorce on that ground after the wife's removal to Massachusetts, although the parties resided there at the time of their marriage.

New Hampshire.— Norris *v.* Norris, 64 N. H. 523, 15 Atl. 19; Foss *v.* Foss, 58 N. H. 283; Frost *v.* Frost, 17 N. H. 251; Batchelder *v.* Batchelder, 14 N. H. 380; Greenlaw *v.* Greenlaw, 12 N. H. 200; Clark *v.* Clark, 8 N. H. 21, all holding that a divorce will not be decreed for a cause which arose out of the state at a time when neither party had a domicile in the state.

New York.— Holmes *v.* Holmes, 4 Lans. 388 (holding that the court has no jurisdiction over transgressions committed before the parties have acquired a domicile within the state); Mix *v.* Mix, 1 Johns. Ch. 204 (holding that to give the court jurisdiction to decree a divorce on the ground of adultery where the marriage was solemnized abroad, both parties must have been inhabitants of the state at the time the adultery was committed).

Pennsylvania.— Dorsey *v.* Dorsey, 7 Watts 349, 32 Am. Dec. 767, where it is held that a resident of Pennsylvania cannot obtain a divorce there upon a cause which was committed in another state in which the parties at the time were domiciled. See also Hollister *v.* Hollister, 6 Pa. St. 449; Burdick *v.* Burdick, 2 Pa. Dist. 622; Addis *v.* Addis, 20 Pa. Co. Ct. 365; Flower *v.* Flower, 17 Lanc. L. Rev. 108; Com. *v.* Taylor, 14 Lanc. Bar 134; Ramsey *v.* Ramsey, 1 Leg. Chron. 55; McCarthy *v.* McCarthy, 31 Pittsb. Leg. J. N. S. 100.

See 17 Cent. Dig. tit. "Divorce," § 214.

Presumption as to residence.— Where the status of the parties as residents of the state is established at a time prior to the commission of the offense, a continuance of such status will be presumed, in the absence of evidence to the contrary; and this presumption is supported by the fact that the parties are shown to have been residents of the state immediately after the offense and at the time of the commencement of the action. Harris *v.* Harris, 83 N. Y. App. Div. 123, 82 N. Y. Suppl. 568.

6. **Place of marriage as affecting necessity of cohabitation** within state see *supra*, V, C, 2, d, (II).

7. *Indiana.*— Tolen *v.* Tolen, 2 Blackf. 407, 21 Am. Dec. 742.

Louisiana.— D'Auvilliers *v.* D'Auvilliers, 32 La. Ann. 605.

Massachusetts.— Harteau *v.* Harteau, 14 Pick. 181, 25 Am. Dec. 372.

New York.— Bierstadt *v.* Bierstadt, 29 N. Y. App. Div. 210, 51 N. Y. Suppl. 862.

Pennsylvania.— Dorsey *v.* Dorsey, 7 Watts 349, 32 Am. Dec. 767.

Rhode Island.— Ditson *v.* Ditson, 4 R. I. 87.

Texas.— Hare *v.* Hare, 10 Tex. 355.

Wisconsin.— Hubbell *v.* Hubbell, 3 Wis. 662, 62 Am. Dec. 702.

England.— Ratcliff *v.* Ratcliff, 5 Jur. N. S. 714, 29 L. J. P. & M. 171, 1 Swab. & Tr. 467, 7

E. Place of Commission of Offense.[8] If the court otherwise has jurisdiction of the cause, the fact that the offense was committed without the state does not affect the question of jurisdiction.[9] On the other hand the court will not assume jurisdiction merely because the offense was committed within the jurisdiction if the parties are non-residents.[10]

F. Jurisdiction by Consent or Waiver.[11] Jurisdiction over the subject-matter of an action for divorce cannot be acquired by consent or waiver of the parties.[12]

VI. VENUE.

A. Residence as Fixing Venue — **1. Residence of Plaintiff.** The statutes in some states allow or require the suit to be brought in the county where the injured party resides.[13]

Wkly. Rep. 726; Gillis *v.* Gillis, Ir. R. 8 Eq. 597.

Law of domicile as governing questions affecting divorce see *supra*, IV, G.

8. Place of offense as affecting length of residence required of plaintiff see *supra*, V, C, 2, d, (III), note 94.

9. *Alabama.*— Hanberry *v.* Hanberry, 29 Ala. 719.

Arkansas.— Thompson *v.* State, 28 Ala. 12, holding that under the statutes of Arkansas, the fact that the cause of divorce commenced out of the state and was not continued or completed there would not render void a decree there obtained by a husband who had resided an entire year in that state.

Indiana.— Tolen *v.* Tolen, 2 Blackf. 407, 21 Am. Dec. 742.

Iowa.— Smith *v.* Smith, 4 Greene 266.

Louisiana.— D'Auvilliers *v.* D'Auvilliers, 32 La. Ann. 605.

Maine.— Harding *v.* Alden, 9 Me. 140, 23 Am. Dec. 549.

Massachusetts.— Harteau *v.* Harteau, 14 Pick. 181, 25 Am. Dec. 372; Squire *v.* Squire, 3 Mass. 184, holding that the court may grant a divorce, although the offense was committed outside of the state, where libellant lived in the state at the time of the offense.

Mississippi.— Jones *v.* Jones, 67 Miss. 195, 6 So. 712, 19 Am. St. Rep. 299.

New Hampshire.— Payson *v.* Payson, 34 N. H. 518; Frary *v.* Frary, 10 N. H. 61, 32 Am. Dec. 395.

New York.— Holmes *v.* Holmes, 4 Lans. 388, 57 Barb. 305.

Pennsylvania.—Austin *v.* Austin, 4 Pa. Co. Ct. 368; Taylor *v.* Taylor, 1 Chest. Co. Rep. 485.

Rhode Island.— Ditson *v.* Ditson, 4 R. I. 87.

Texas.—Jones *v.* Jones, 60 Tex. 451; Shreck *v.* Schreck, 32 Tex. 578, 5 Am. Rep. 251.

West Virginia.— State *v.* Goodrich, 14 W. Va. 834.

Wisconsin.— Gleason *v.* Gleason, 4 Wis. 64; Hubbell *v.* Hubbell, 3 Wis. 662, 62 Am. Dec. 702; Manley *v.* Manley, 3 Pinn. 390, 4 Chandl. 96.

England.— Brodie *v.* Brodie, 30 L. J. P. & M. 185, 4 L. T. Rep. N. S. 307, 2 Swab. & Tr. 259, 9 Wkly. Rep. 815; Ratcliff *v.* Ratcliff, 5 Jur. N. S. 714, 29 L. J. P. & M. 171, 1 Swab. & Tr. 467, 7 Wkly. Rep. 726.

See 17 Cent. Dig tit. "Divorce," § 206.

10. Hatfield *v.* Hatfield, 6 D. C. 80.

11. Waiver of objections to: Process see *infra*, X, G. Venue see *infra*, VI, C.

12. Smith *v.* Smith, 10 N. D. 219, 86 N. W. 721 (holding that an admission in the answer that plaintiff is a *bona fide* resident does not preclude the court from inquiring into that fact); Beach *v.* Beach, 4 Okla. 359, 46 Pac. 514 (holding that the court may inquire into the matter of plaintiff's residence as a jurisdictional fact, although the parties do not raise the question); Schlicter *v.* Schlicter, 10 Phila. (Pa.) 11; Kenyon *v.* Kenyon, 3 Utah 431, 24 Pac. 829 (holding that objection to want of jurisdiction of the subject-matter may be first made after defendant has answered. See also XXI, C, 2. See, however, Dutcher *v.* Dutcher, 39 Wis. 651, holding that even if a defense on the ground of plaintiff's non-residence were in the nature of a plea to the jurisdiction it would have to be pleaded specially.

Appearance of a non-resident defendant cannot invest a court with jurisdiction of a suit for divorce instituted by a person who has no *bona fide* domicile within the state. Andrews *v.* Andrews, 188 U. S. 14, 23 S. Ct. 237, 47 L. ed. 366 [*affirming* 176 Mass. 92, 57 N. E. 333]. And see Maguire *v.* Maguire, 7 Dana (Ky.) 181.

In any event, where the facts necessary to give the court jurisdiction are stated in a bill for divorce and are denied by answer, the question of jurisdiction becomes one of fact to be determined on the hearing; and when in the trial the want of jurisdiction appears, it is the duty of the court to dismiss the bill. Way *v.* Way, 64 Ill. 406.

13. *Arkansas.*—Wood *v.* Wood, 54 Ark. 172, 15 S. W. 459.

Illinois.— Way *v.* Way, 64 Ill. 406.

Iowa.— Smith *v.* Smith, 4 Greene 266.

Louisiana.— Glaude *v.* Peat, 43 La. Ann. 161, 8 So. 884, holding that a husband may sue in the parish in which he resides, although the wife lives in another.

Maine.— See Harding *v.* Alden, 9 Me. 140, 23 Am. Dec. 549, holding that a libel for divorce for adultery may be tried in the county where the injured party lived at the time of the offense.

Massachusetts.— See Squire *v.* Squire, 3

2. Residence of Defendant. In some states the suit is allowed or required to be brought in the county of defendant's residence.[14]

3. Sufficiency of Residence — a. General Rules. The residence which will determine venue must be actual residence in the county where the suit is brought.[15] The residence need not, however, have continued for any particular length of time,[16] in the absence of statute to the contrary.[17]

b. Separate Residence of Wife.[18] The domicile of the husband determines that of the wife,[19] but for the purpose of fixing the venue of an action of divorce a wife living apart from her husband may acquire a separate residence where she may sue.[20]

B. Place of Offense as Fixing Venue. The place where the offense was committed has no bearing on the question of venue. It is immaterial that the offense occurred in a county other than that in which the suit is brought.[21]

C. Waiver of Objections. If defendant is a resident of the state and fails to appear,[22] or appears and answers without objection to the local jurisdiction of the court,[23] objections to the venue are waived.

Mass. 184 (holding that where respondent has no settled place of residence, libellant may sue in the county where she resided at the time the offense was committed); Lane *v.* Lane, 2 Mass. 167 (holding that where the parties have no permanent place of residence the libel may be filed in the county where libellant dwells after separation).

New York.— See Hall *v.* Hall, 6 N. Y. St. 92, holding that the jurisdiction of the probate court of Utah is local, and that plaintiff must reside in the county where the action is brought.

Pennsylvania.— Thompson *v.* Thompson, 2 Pa. Co. Ct. 573; Sherwood's Appeal, (1886) 4 Atl. 455; Knowles *v.* Knowles, 31 Pittsb. Leg. J. N. S. 100; Austin *v.* Austin, 4 C. Pl. 67, holding, however, that where respondent is not within the county and is not personally served, full measure of proof of his residence within the state will be required in order that the court may be satisfied that it has jurisdiction.

Washington.— Bachelor *v.* Bachelor, 30 Wash. 639, 71 Pac. 193.

14. Wiley *v.* Wiley, 27 Ala. 704; Reese *v.* Reese, 23 Ala. 785 (both cases holding that a statute permitting a divorce bill to be filed in the county where complainant resides does not take away the right to file it in the county where defendant resides); Barton *v.* Barton, 74 Ga. 761; McConnell *v.* McConnell, 37 Nebr. 57, 55 N. W. 292; Brown *v.* Brown, 10 Nebr. 349, 6 N. W. 397.

In Massachusetts it is provided by statute that when a libellant has left the county in which the parties have lived together, and the adverse party still lives there, the libel should be heard and determined in the county in which the parties last lived together. Banister *v.* Banister, 150 Mass. 280, 22 N. E. 900; Richardson *v.* Richardson, 2 Mass. 153; Moore *v.* Moore, 2 Mass. 117.

15. Wood *v.* Wood, 54 Ark. 172, 15 S. W. 459.

Absence on official duty does not necessarily deprive a party of his residence. Carpenter *v.* Carpenter, 30 Kan. 712, 2 Pac. 122, 46 Am. Rep. 108.

Imprisonment.— A person does not lose his residence in one county by imprisonment in another county. Barton *v.* Barton, 74 Ga. 761.

16. Gooding *v.* Gooding, 42 S. W. 1123, 19 Ky. L. Rep. 967; Wright *v.* Genesee Cir. Judge, 117 Mich. 244, 75 N. W. 465.

17. Haymond *v.* Haymond, 74 Tex. 414, 4 S. W. 90; Bachelor *v.* Bachelor, 30 Wash. 639, 71 Pac. 193.

Separate residence of wife.— Under a statute requiring proceedings for divorce to be had in the county where complainant has resided for one year prior to the commencement of the action, where a woman has not resided in the state for the required period, the fact that her husband has lived in the county for that time will not enable her to maintain the action. Wood *v.* Wood, 54 Ark. 172, 15 S. W. 459.

18. Residence of wife as jurisdictional fact see *supra*, V, C, 2, b.

19. Glande *v.* Peat, 43 La. Ann. 161, 8 So. 884. See, however, Wood *v.* Wood, 54 Ark. 172, 15 S. W. 459.

20. *Georgia.*— Gilmer *v.* Gilmer, 32 Ga. 685.

Kentucky.— Johnson *v.* Johnson, 12 Bush 485.

New York.— Vence *v.* Vence, 15 How. Pr. 497.

Pennsylvania.— Cain *v.* Cain, 5 Lanc. L. Rev. 373.

Tennessee.— Walton *v.* Walton, 96 Tenn. 25, 33 S. W. 561; Person *v.* Person, 6 Humphr. 148.

Texas.— Jones *v.* Jones, 60 Tex. 451.

See 17 Cent. Dig. tit. "Divorce," § 228.

Contra.— Smith *v.* Morehead, 59 N. C. 360.

21. Smith *v.* Smith, 4 Greene (Iowa) 266; Smith *v.* Smith, 11 Pa. Co. Ct. 465; Jones *v.* Jones, 60 Tex. 451.

22. Tudor *v.* Tudor, 101 Ky. 530, 41 S. W. 768, 19 Ky. L. Rep. 747.

23. Lewis *v.* Lewis, 9 Ind. 105 (holding that the failure of the petition to allege plaintiff's residence in the county cannot be taken advantage of for the first time on the trial); Johnson *v.* Johnson, 12 Bush

D. Change of Venue. The provisions of practice acts relating to a change of venue in civil actions or special proceedings apply to divorce cases,[24] in the absence of provisions inconsistent therewith in the statutes relating to procedure in divorce actions, in which case the latter control.[25] In some states defendant is entitled to a change of venue to the county of his residence.[26]

VII. GROUNDS.

A. Legislative Control — 1. Power to Prescribe Grounds. The legislature has power to prescribe the causes affording grounds for divorce.[27]

2. Exclusiveness of Statutory Grounds — a. In General. The causes for divorce are prescribed by statute, and the courts have no inherent power to grant a divorce upon a ground not specified.[28] Thus in the absence of statute the court cannot grant a divorce either for alienation of the affections of one spouse or both,[29] or as a rule for antenuptial incontinence of a spouse,[30] for impotency or physical incapacity of either party arising after marriage,[31] for inability of the spouses to

(Ky.) 485; Newbold's Appeal, 2 Wkly. Notes Cas. (Pa.) 472 (holding that after the report of an examiner is filed and a rule is taken to show cause why a decree should not be entered, it is too late for defendant to object that plaintiff is not a resident of the county in which the suit is brought); Gibbs *v.* Gibbs, (Utah 1903) 73 Pac. 641. See, however, Way *v.* Way, 64 Ill. 406; Sommers *v.* Sommers, 16 Ill. App. 77.

24. *California.*— Warner *v.* Warner, 100 Cal. 11, 34 Pac. 523; Usher *v.* Usher, (1894) 36 Pac. 8.

Colorado.— People *v.* Second Judicial Dist. Ct., 30 Colo. 123, 69 Pac. 597.

Illinois.— McPike *v.* McPike, 10 Ill. App. 332.

Indiana.— Powell *v.* Powell, 104 Ind. 18, 3 N. E. 639.

Minnesota.—Hurning *v.* Hurning, 80 Minn. 373, 83 N. W. 342.

See 17 Cent. Dig. tit. "Divorce," § 231.

25. Powell *v.* Powell, 104 Ind. 118, 3 N. E. 639; Musselman *v.* Musselman, 44 Ind. 106; Pfueller *v.* Snohomish County Super. Ct., 14 Wash. 115, 44 Pac. 123.

26. Usher *v.* Usher, (Cal. 1894) 36 Pac. 8; Warner *v.* Warner, 100 Cal. 11, 34 Pac. 523 (both cases holding that a statute providing that a divorce cannot be granted unless plaintiff has been a resident of the county "in which the action is brought for three months preceding the commencement of the action" does not prevent a change of the place of trial to the county in which defendant resides); Stimson *v.* Stimson, 9 N. Y. Suppl. 238 (holding that where neither party to an action for divorce is a resident of the county wherein the action is brought, defendant's motion to change the venue to the county of his residence must prevail against plaintiff's counter motion to retain the venue for convenience of witnesses). See, however, Bachelor *v.* Bachelor, 30 Wash. 639, 71 Pac. 193.

27. Carson *v.* Carson, 40 Miss. 349 (holding that where a constitution limits the granting of divorces to cases provided for by law by suit in chancery, the legislature has implied authority to provide by law in what cases divorces may be obtained); Hickman *v.* Hickman, 1 Wash. 257, 24 Pac. 445, 22 Am. St. Rep. 148. See also *supra*, IV, B.

28. Palmer *v.* Palmer, 1 Paige (N. Y.) 276; Burtis *v.* Burtis, 1 Hopk. (N. Y.) 557, 14 Am. Dec. 563. See also Hamaker *v.* Hamaker, 18 Ill. 137, 65 Am. Dec. 705; Vignos *v.* Vignos, 15 Ill. 186.

A constitutional grant of jurisdiction to a court of "all cases of divorce" only includes cases upon grounds for which the statute authorizes a divorce. Grant *v.* Grant, 12 S. C. 29, 32 Am. Rep. 506; Sharman *v.* Sharman, 18 Tex. 521.

29. Brainard *v.* Brainard, Brayt. (Vt.) 55.

30. *California.*— Baker *v.* Baker, 13 Cal. 87.

District of Columbia.— Farr *v.* Farr, 2 MacArthur 35.

Georgia.— Stanley *v.* Stanley, 115 Ga. 990, 42 S. E. 374.

New Jersey.— Carris *v.* Carris, 24 N. J. Eq. 516; Hedden *v.* Hedden, 21 N. J. Eq. 61.

Oregon.— Smith *v.* Smith, 8 Oreg. 100.

Texas.— Griggs *v.* Griggs, (Civ. App. 1901) 61 S. W. 941.

Pregnancy at time of marriage: As fraud see *infra*, VII, B, 2, b, (III). As matrimonial incapacity see *infra*, note 63.

31. *Illinois.*— Griffeth *v.* Griffeth, 162 Ill. 368, 44 N. E. 820.

Kansas.— Powell *v.* Powell, 18 Kan. 371, 26 Am. Rep. 774.

Maine.— Chase *v.* Chase, 55 Me. 21.

Maryland.— J. G. *v.* H. G., 33 Md. 401, 3 Am. Rep. 183.

New Hampshire.—Bascomb *v.* Bascomb, 25 N. H. 267.

New York.— Devanbagh *v.* Devanbagh, 5 Paige 554, 28 Am. Dec. 443.

Pennsylvania.— Berger *v.* Berger, 23 Pa. Co. Ct. 232.

Impotency arising from idiocy is no cause for divorce. Norton *v.* Norton, 2 Aik. (Vt.) 188. The report of this case seems to warrant the conclusion that the ground upon which the opinion rested was the fact that

live together,[32] for incompatibility of temper,[33] for the refusal of a spouse to cohabit,[34] or for the violation of an antenuptial agreement.[35]

b. Discretion of Court. In some states, however, courts are authorized to grant divorces, either absolute or limited, in their discretion.[36] The discretion thus conferred is a sound, legal discretion, and it cannot be exercised arbitrarily or without limitation.[37] In some states a divorce may thus be granted only for common-law or canon-law or statutory causes.[38] In others a divorce may thus be granted only for causes not otherwise specified in the statute.[39]

3. Operation of Statute. A statute declaring the causes for which divorces may be granted is ordinarily to be given a prospective operation only and does not authorize a divorce for a specified cause which occurred before the statute was enacted.[40] If, however, it appears to have been the intention of the legislature that the act should have a retrospective operation then the courts will give it that effect,[41] in the absence of a constitutional provision against retrospec-

the impotency had arisen since the marriage. Bascomb *v.* Bascomb, 25 N. H. 267.

Voluntary castration by the husband after marriage is not a ground for divorce at the instance of the wife. Berger *v.* Berger, 23 Pa. Co. Ct. 232.

Antenuptial impotency see *infra*, VII, B, 3.

32. De Meli *v.* De Meli, 5 N. Y. Civ. Proc. 306, 67 How. Pr. (N. Y.) 20.

33. Trowbridge *v.* Carlin, 12 La. Ann. 882; Vandyke *v.* Vandyke, 8 Pa. Co. Ct. 283.

34. De Meli *v.* De Meli, 5 N. Y. Civ. Proc. 306, 67 How. Pr. (N. Y.) 20; McDougall *v.* McDougall, 5 Wash. 802, 32 Pac. 749.

Refusal to cohabit: As cruelty see *infra*, VII, C, 4, b, (VIII). As desertion see *infra*, VII, C, 5, b, (II), (B).

35. Owen *v.* Owen, 90 Iowa 365, 57 N. W. 887.

36. See statutes of the different states.

In Connecticut no such power is conferred on the superior courts. Benton *v.* Benton, 1 Day 111.

37. *Illinois.*— Birkby *v.* Solomons, 15 Ill. 120.

Indiana.— Ruby *v.* Ruby, 29 Ind. 174; Ritter *v.* Ritter, 5 Blackf. 81.

Kentucky.— Zumbiel *v.* Zumbiel, 113 Ky. 841, 69 S. W. 708, 24 Ky. L. Rep. 590 (holding, under St. § 2121, providing that "judgment for separation or divorce from bed and board may also be rendered for any of the causes which allow divorce, or for such other cause as the court, in its discretion, may deem sufficient," that if complainant does not show the existence of the statutory grounds specifically relied on, the court may, under a prayer for general relief, grant a divorce from bed and board, if the facts shown, being necessarily and incidentally involved in the main charge, are such as to warrant such an exercise of judgment in the sound legal discretion of the chancellor); Irwin *v.* Irwin, 96 Ky. 318, 28 S. W. 664, 30 S. W. 417, 16 Ky. L. Rep. 657; Shrock *v.* Shrock, 4 Bush 682; Kefauver *v.* Kefauver, 57 S. W. 467, 22 Ky. L. Rep. 386; Freeman *v.* Freeman, 13 S. W. 246, 11 Ky. L. Rep. 822; Meadows *v.* Meadows, 13 Ky. L. Rep. 45.

Maine.— Motley *v.* Motley, 31 Me. 490.

Washington.— Stanley *v.* Stanley, 24 Wash. 460, 64 Pac. 732; Colvin *v.* Colvin, 15 Wash. 490, 46 Pac. 1029.

Illustrations.— The court may grant a divorce for extreme neglect of a wife bordering on cruelty (Irwin *v.* Irwin, 96 Ky. 318, 28 S. W. 664, 30 S. W. 417, 16 Ky. L. Rep. 657); for an unfounded charge of unchastity against a wife (Kefauver *v.* Kefauver, 57 S. W. 467, 22 Ky. L. Rep. 386), or for sodomy committed by the husband (Poler *v.* Poler, 32 Wash. 400, 73 Pac. 372). But a divorce may not be granted for insanity (Lloyd *v.* Lloyd, 66 Ill. 87; Curry *v.* Curry, Wils. (Ind.) 236), nor because the parties quarrel and live unhappily together (Stanley *v.* Stanley, 24 Wash. 460, 64 Pac. 732).

Review of exercise of discretion see *infra*, XVII, I, 5.

38. Lloyd *v.* Lloyd, 66 Ill. 87; Hamaker *v.* Hamaker, 18 Ill. 137, 65 Am. Dec. 705.

By the common or canon law the only grounds for absolute divorce are precontract, consanguinity, affinity, and corporeal infirmity. Head *v.* Head, 2 Ga. 191; Harman *v.* Harman, 16 Ill. 85.

39. Elwell *v.* Elwell, 32 Me. 337; Motley *v.* Motley, 31 Me. 490; Stanley *v.* Stanley, 24 Wash. 460, 64 Pac. 732.

40. *Georgia.*— Buckholtz *v.* Buckholtz, 24 Ga. 238.

Iowa.— McCraney *v.* McCraney, 5 Iowa 232, 68 Am. Dec. 702.

Maine.— Given *v.* Marr, 27 Me. 212; Sherburne *v.* Sherburne, 6 Me. 210.

Massachusetts.— Burt *v.* Burt, 168 Mass. 204, 46 N. E. 622.

Mississippi.— Carson *v.* Carson, 40 Miss. 349.

Ohio.— Scott *v.* Scott, 6 Ohio 534.

See 17 Cent. Dig. tit. "Divorce," § 26.

41. Carson *v.* Carson, 40 Miss. 349. See also Hunt *v.* Hunt, 9 Hun (N. Y.) 622 [*affirmed* in 72 N. Y. 217]; Jones *v.* Jones, 2 Overt. (Tenn.) 2, 5 Am. Dec. 645; Cole *v.* Cole, 27 Wis. 531.

Legislative intent.— The legislative intent as to the retroactive effect must clearly appear. Sherburne *v.* Sherburne, 6 Me. 210; Giles *v.* Giles, 22 Minn. 348; Jarvis *v.* Jarvis, 3 Edw. (N. Y.) 462. See, generally, STATUTES.

tive[42] or *ex post facto*[43] laws. So a statute saving pending actions from the effect of a repeal of a previous act permitting a divorce on specified grounds will be given effect according to the intent of the legislature.[44]

B. Antenuptial Grounds — 1. IN GENERAL. Many statutory causes of divorce existing at the time of the marriage are in some states grounds for suits for the annulment of the marriage and therefore are not within the scope of this article.[45] Even where such grounds are made causes of divorce, decrees in suits therefor are in most cases the same in effect as decrees of nullity.[46]

2. FRAUD AND DURESS — a. In General. In a number of states fraud or duress in procuring a marriage is made a ground for divorce by statute.[47]

b. Character of Fraud — (I) *IN GENERAL.* The fraud that will constitute ground for divorce must be in a matter essential to the validity of the marriage itself.[48]

(II) *CONCEALMENT OF UNCHASTITY.* The concealment by the wife of the fact that she had committed fornication before marriage is not fraud constituting ground for divorce.[49] If, however, the wife was pregnant by another man at the time of the marriage, and she concealed that fact from the husband, he is entitled to a divorce for fraud,[50] unless he had himself had intercourse with her prior to

42. Clark *v.* Clark, 10 N. H. 380, 34 Am. Dec. 165. See also CONSTITUTIONAL LAW, 8 Cyc. 1017.

43. Greenlaw *v.* Greenlaw, 12 N. H. 200 (where a statute prescribing as a ground for divorce conviction and imprisonment for a crime or the commission of a crime was held applicable only to actions for divorce because of a conviction and imprisonment or because of a crime committed subsequently to its passage); Dickinson *v.* Dickinson, 7 N. C. 327, 9 Am. Dec. 608 (where a statute declaring adultery to be a ground of divorce was held to be *ex post facto* and void as to cases of adultery committed before its passage, for the reason that adultery was punishable as a crime prior to the statute, and the statute added to this liability a deprivation of marital rights, thus increasing the punishment for the offense). *Compare* Elliott *v.* Elliott, 38 Md. 357.

Causes not criminal.— Where the cause of divorce prescribed by the statute is not criminal, the statute is not within the constitutional prohibition against *ex post facto* laws. It may be retrospective in its operation and partake of all the mischief of an *ex post facto* law, but if it is intended to have a retroactive effect and such purpose is clearly expressed, the courts cannot refuse to apply it according to the intent of the legislature. Carson *v.* Carson, 40 Miss. 349. See also Jones *v.* Jones, 2 Overt. (Tenn.) 2, 5 Am. Dec. 645; Cole *v.* Cole, 27 Wis. 531. And see CONSTITUTIONAL LAW, 8 Cyc. 1028.

44. Dabney *v.* Dabney, 20 App. Cas. (D. C.) 440. See also Smith *v.* Smith, 3 Serg. & R. (Pa.) 248.

45. See MARRIAGE.

46. Benton *v.* Benton, 1 Day (Conn.) 111; Ferlat *v.* Gojon, Hopk. (N. Y.) 478. *Compare* Guilford *v.* Oxford, 9 Conn. 321.

An existing marriage absolutely prohibits and avoids a subsequent marriage. The statutes in many states, however, make an existing marriage a cause of divorce, but a decree in a divorce suit can have no other effect than to declare the subsequent marriage void. See Moore *v.* Moore, 102 Tenn. 148, 52 S. W. 778.

Consanguinity and affinity are made causes of divorce in some states by statutes declaratory of the common or canon law, and the proceedings thereunder are practically the same as in the ecclesiastical courts, and the decree is a nullification of the marriage *ab initio*.

Physical incapacity as a cause for divorce must exist at the time of marriage and hence tends to vitiate the marriage as a fraud upon the injured party. A decree in a suit upon such a ground declares the marriage void *ab initio* and is in effect a decree of nullity. Chase *v.* Chase, 55 Me. 21; J. G. *v.* H. G., 33 Md. 401, 3 Am. Rep. 183; Bascomb *v.* Bascomb, 25 N. H. 267; Devanbagh *v.* Devanbagh, 5 Paige (N. Y.) 554, 28 Am. Dec. 443. See *infra*, VII, B, 3.

47. See cases cited *infra*, note 48 *et seq.*

48. Benton *v.* Benton, 1 Day (Conn.) 111 (holding that the statute does not authorize a divorce in a case where the marriage was entered into for the purpose of avoiding process and with the intention of desertion immediately after marriage); Ott *v.* Ott, 3 Ohio S. & C. Pl. Dec. 684 (where it was held not sufficient to establish fraud that one of the parties persuaded the other to make a false affidavit in order to procure the marriage certificate).

49. Allen's Appeal, 99 Pa. St. 196, 44 Am. Rep. 101.

Birth of illegitimate child.— The fact that the wife who has borne an illegitimate child before her marriage conceals that fact from her husband is no ground for a divorce. Smith *v.* Smith, 8 Oreg. 100.

50. *California.*— Baker *v.* Baker, 13 Cal. 87.

New Jersey.— Carris *v.* Carris, 24 N. J. Eq. 516.

the marriage[51] or knew her to be unchaste,[52] in which case her false assurances of non-pregnancy afford him no ground for relief.

(III) *Misrepresentations as to Pregnancy.* If at the time of the marriage the husband knew of the wife's pregnancy he is not entitled to a divorce because of her false assurances that he caused it,[53] at least unless he was deceived thereby.[54]

(IV) *Misrepresentations as to Person or Property.* False representations as to name, character, fortune, social standing, or previous marital experience do not justify a divorce as for fraud.[55]

c. Character of Duress. A divorce will not be decreed on the ground of duress unless it appear that the marriage was contracted under force or threat of bodily harm.[56]

3. Impotency and Physical Incapacity — a. In General. Antenuptial impotency is not a ground for divorce unless made so by statute.[57] Statutes permitting a divorce for this cause exist in many states, however.[58]

b. What Constitutes. Impotency is an incurable incapacity that admits neither copulation nor procreation; the copulation contemplated being *copula vera* and not partial, imperfect, or unnatural.[59] It must be incurable,[60] and render com-

North Carolina.— Barden *v.* Barden, 14 N. C. 548.

Ohio.— Morris *v.* Morris, Wright 630.

Pennsylvania.— Allen's Appeal, 99 Pa. St. 196, 44 Am. Rep. 101.

51. Seilheimer *v.* Seilheimer, 40 N. J. Eq. 412, 2 Atl. 376; Carris *v.* Carris, 24 N. J. Eq. 516; Long *v.* Long, 77 N. C. 304, 24 Am. Rep. 449 (holding that the husband must show that he himself is not the father of the child); Hoffman *v.* Hoffman, 30 Pa. St. 417.

52. Crehore *v.* Crehore, 97 Mass. 330, 93 Am. Dec. 98, holding that where a man marries a woman with full knowledge that she is unchaste, the concealment of her pregnancy and the assurance that she is not pregnant is not such fraud as will warrant a divorce.

53. Foss *v.* Foss, 12 Allen (Mass.) 26; States *v.* States, 37 N. J. Eq. 195; Scroggins *v.* Scroggins, 14 N. C. 535; Hoffman *v.* Hoffman, 30 Pa. St. 417; Bartholomew *v.* Bartholomew, 14 Pa. Co. Ct. 230.

54. Todd *v.* Todd, 149 Pa. St. 60, 24 Atl. 128, 17 L. R. A. 320.

55. Klein *v.* Wolfsohn, 1 Abb. N. Cas. (N. Y.) 134 (character and property); Clarke *v.* Clarke, 11 Abb. Pr. (N. Y.) 228 (previous marriage and divorce); Meyer *v.* Meyer, 7 Ohio Dec. (Reprint) 563, 3 Cinc. L. Bul. 985, 1 Clev. L. Rep. 347 (name, fortune, and social standing).

56. Honnett *v.* Honnett, 33 Ark. 156, 34 Am. Rep. 39 (holding that where the seducer of a woman was told by her brother-in-law that if he did not marry her he would never marry another woman and that the community would lynch him, but there was no restraint nor threat of present bodily harm, there was no duress); Frost *v.* Frost, 42 N. J. Eq. 55, 6 Atl. 282 (where it was held that a marriage to prevent the institution of proceedings for an abortion attempted by the husband upon the wife, who had been seduced by him, was not dissoluble for duress); Seyer *v.* Seyer, 37 N. J. Eq. 210 (holding that a marriage was not procured by duress where the husband was arrested on a charge of seducing the wife, who was a prostitute with whom he had had intercourse, and who was alleged to be, but in fact was not, a minor, and excessive bail was demanded, and the magistrate, the constable, and a minister urged the marriage).

Arrest under a false charge and a threat of imprisonment is duress and a ground for divorce. Pyle *v.* Pyle, 10 Phila. (Pa.) 58.

Inducement to marriage.— Although threats of bodily harm were made to compel the marriage, yet if the husband entered into it for other reasons, as to protect the wife and her family from disgrace, it is not ground for divorce. Todd *v.* Todd, 149 Pa. St. 60, 24 Atl. 128, 17 L. R. A. 320.

57. Burtis *v.* Burtis, Hopk. (N. Y.) 557, 14 Am. Dec. 563.

58. See cases cited *infra*, note 59 *et seq.*

Impotency subsequently arising as ground for divorce see *supra*, VII, A, 2, a.

59. Griffeth *v.* Griffeth, 162 Ill. 368, 44 N. E. 820; J. G. *v.* H. G., 33 Md. 401, 3 Am. Rep. 183; Payne *v.* Payne, 46 Minn. 467, 49 N. W. 230, 24 Am. St. Rep. 240.

"Naturally impotent" in a statute means incurable impotency. A. C. *v.* B. C., 10 Wkly. Notes Cas. (Pa.) 569. The words "natural" and "incurable" in a statute have the same or a similar meaning as applied to impotency. Ferris *v.* Ferris, 8 Conn. 166; Griffeth *v.* Griffeth, 162 Ill. 368, 376, 44 N. E. 820; Kempf *v.* Kempf, 34 Mo. 211.

60. *Alabama.*— Anonymous, 35 Ala. 226.

Connecticut.— Ferris *v.* Ferris, 8 Conn. 166.

Illinois.— Griffeth *v.* Griffeth, 162 Ill. 368, 44 N. E. 820; Lorenz *v.* Lorenz, 93 Ill. 376.

Maryland.— J. G. *v.* H. G., 33 Md. 401, 3 Am. Rep. 183.

Nebraska.— Berdolt *v.* Berdolt, 56 Nebr. 792, 77 N. W. 399.

New Hampshire.— Bascomb *v.* Bascomb, 25 N. H. 267.

New York.— Morrell *v.* Morrell, 17 Hun 324; Devanbagh *v.* Devanbagh, 6 Paige 175.

plete sexual intercourse practically impossible.[61] Thus absence of conceptive power or barrenness does not constitute impotency if there is complete power of copulation.[62] Physical incapacity as a statutory ground for divorce is generally construed to mean impotency.[63]

4. Mental Incapacity — a. In General. Mental incapacity at the time of marriage does not afford the sane party ground for divorce,[64] unless it is made a ground of divorce by statute, as is the case in some states.[65]

b. What Constitutes. Under a statute authorizing divorce for insanity existing at the time of marriage, it is not sufficient to show occasional spells of insanity before marriage.[66] The incapacity must be such as would render the party incapable of making a contract.[67]

C. Post-Nuptial Grounds — 1. Adultery[68] — a. In General. In every state and country where divorce is recognized as a remedy for marital wrongs adultery constitutes a cause therefor, although in a few states the adultery must have existed in a more or less aggravated form.[69]

b. What Constitutes. Adultery as used in divorce law means the voluntary sexual intercourse of a married person with one not the husband or wife of the

England.— S. *v.* E., 9 Jur. N. S. 698, 32 L. J. P. & M. 153, 8 L. T. Rep. N. S. 643, 3 Swab. & Tr. 240, 12 Wkly. Rep. 19.

Impotency caused by self-abuse.— A wife is entitled to a divorce for impotency of the husband where through long-continued indulgence in self-abuse he has become so perverted in mind and body as to be deprived of the desire and ability to perform the act of coition, and efforts have been made to cure him and he would not exercise moral restraint over himself. Griffeth *v.* Griffeth, 162 Ill. 368, 44 N. E. 820. *Compare* S. *v.* E., 9 Jur. N. S. 698, 32 L. J. P. & M. 153, 8 L. T. Rep. N. S. 643, 3 Swab. & Tr. 240, 12 Wkly. Rep. 19.

61. Anonymous, 89 Ala. 291, 7 So. 100, 18 Am. St. Rep. 116, 7 L. R. A. 425; J. G. *v.* H. G., 33 Md. 401, 3 Am. Rep. 183; G. *v.* G., L. R. 2 P. 287, 40 L. J. P. & M. 83, 25 L. T. Rep. N. S. 510, 20 Wkly Rep. 103; S. *v.* E., 9 Jur. N. S. 698, 32 L. J. P. & M. 153, 2 Swab. & Tr. 240, 8 L. T. Rep. N. S. 643, 12 Wkly. Rep. 19; Lewis *v.* Hayward, 35 L. J. P. & M. 105.

62. Anonymous, 89 Ala. 291, 7 So. 100, 18 Am. St. Rep. 116, 7 L. R. A. 425; Jorden *v.* Jorden, 93 Ill. App. 633; Payne *v.* Payne, 46 Minn. 467, 49 N. W. 230, 24 Am. St. Rep. 240; Deane *v.* Aveling, 1 Rob. Eccl. 299. See also Barrenness, 5 Cyc. 620.

63. Anonymous, 89 Ala. 291, 7 So. 100, 18 Am. St. Rep. 116, 7 L. R. A. 425.

Incurable disease.— However, under a statute authorizing a divorce where at the time of marriage either party was physically incapable of entering into the marriage state, it is sufficient if at the time of the marriage the wife was afflicted with chronic syphilis. Ryder *v.* Ryder, 66 Vt. 158, 28 Atl. 1029, 44 Am. St. Rep. 833.

Matrimonial incapacity as a ground of divorce may consist in a woman's pregnancy by another than the husband at the time of the marriage. Caton *v.* Caton, 6 Mackey (D. C.) 309.

64. Hamaker *v.* Hamaker, 18 Ill. 137, 65 Am. Dec. 705.

65. Brown *v.* Westbrook, 27 Ga. 102.

Insanity as ground of nullity see Marriage.

66. Smith *v.* Smith, 47 Miss. 211, holding that occasional spells of insanity before marriage and ultimate permanent insanity several years afterward, together with evidence of hereditary taint in the family of defendant, do not warrant a divorce. See also Hamaker *v.* Hamaker, 18 Ill. 137, 65 Am. Dec. 705.

67. Anonymous, 4 Pick. (Mass.) 32.

68. **Adultery as cruelty** see *infra*, VII, C, 4, b, (IV), (C), (2).

Defenses to adultery: Agreement for separation see *infra*, VIII, D. Antenuptial knowledge of unchastity see *infra*, VIII, E. Coercion see *infra*, VIII, C, 1, a. Misconduct of husband of offender see *infra*, VIII, C, 1, d. Mistake see *infra*, VIII, C, 1, b. Prior divorce see *infra*, VIII, C, 1, c. Want of mental capacity see *infra*, VIII, B. And see generally *infra*, VIII.

69. Living in adultery with another constitutes the offense in some states. In these states a single act of adultery by a married man is not sufficient. Booth *v.* Booth, 12 Ky. L. Rep. 988; Long *v.* Long, 9 N. C. 189, so holding, although by such single act he contracts an infectious disease which he communicates to his wife. Where the divorce can be had for adultery only when either party has separated from the other and is living in adultery, it must appear that the adultery was committed after the separation. Miller *v.* Miller, 78 N. C. 102 (holding the adultery insufficient where it was committed by the husband in his home while he and his wife were living together, although it occurred during the wife's absence and was concealed from her and only discovered afterward and then discontinued); Hansley *v.* Hansley, 32 N. C. 506.

Being kept by a concubine in her own house is keeping her within La. Act (1827), No. 73, allowing a divorce for adultery where the husband has kept a concubine in his own house or openly in any other house. Adams *v.* Hurst, 9 La. 243.

offender.[70] Sexual intercourse by the husband with a woman other than his wife is adultery affording ground for divorce, although the woman is unmarried.[71] In some jurisdictions, however, a distinction is made between adultery by the wife and adultery by the husband.[72]

2. Bigamy. Bigamy is by statute in some jurisdictions made a ground for divorce.[73]

3. Conviction of Crime — a. In General. By the statutes of many of the states conviction of felony or infamous crime,[74] or imprisonment for a certain number of years in a state prison or penitentiary,[75] is declared to be a ground for divorce. Except as so declared by statute no divorce can be had for any such cause.[76]

b. Conviction Out of State. Unless otherwise expressed in the statute[77] a conviction and imprisonment without the state is not a cause for divorce.[78]

c. Finality of Conviction. Pending the hearing of an appeal or exceptions the conviction cannot be urged as a ground for divorce.[79]

4. Cruelty — a. Statutory Provisions. Cruelty is a common statutory ground

70. 1 Bishop Marr. & Div. § 1502.

Unfaithfulness to the marriage bed is what the statutes afford relief against. Smitherman *v.* State, 27 Ala. 23.

Sodomy is not adultery. Anonymous, 3 Ohio S. & C. Pl. Dec. 450, 2 Ohio N. P. 342. Sodomy as cruelty see *infra*, VII, C, 4, h, (IV), (C), (6), (b).

71. Pickett *v.* Pickett, 27 Minn. 299, 7 N. W. 144; State *v.* Armstrong, 4 Minn. 335. It is otherwise in some states with reference to adultery as a crime. See Adultery.

72. Matchin *v.* Matchin, 6 Pa. St. 332, 47 Am. Dec. 466, where it is said that the offense is a social as well as a moral one; and that it is agreed by the civilians to be less grievous to the sufferer, although not less immoral, when it is committed by the husband, whose transgression cannot impose a supposititious off-spring on the wife, than it is when committed by the wife, whose transgression may effect that result.

73. See statutes of the different states.

Foreign marriage.— If the bigamy relied on took place abroad, it is necessary to give formal proof of the marriage law of the country where it took place. Burt *v.* Burt, 29 L. J. P. & M. 133, 2 L. T. Rep. N. S. 439, 2 Swab. & Tr. 88, 8 Wkly. Rep. 552.

Right of lawful spouse to divorce.— In Pennsylvania a divorce may be had by the injured party to the first marriage as well as by the other party to the bigamous marriage. Ralston *v.* Ralston, 2 Pa. Dist. 241, which arose under a statute providing that "when a marriage hath been, . . . contracted between any two persons; and it shall be judged . . . that he or she hath knowingly entered into a second marriage, in violation of the previous vow he or she hath made to the former wife or husband whose marriage is still subsisting, . . . it shall and may be lawful for the innocent and injured person to obtain a divorce from the bond of matrimony." In Tennessee, however, a statute providing that if either party to a marriage has knowingly entered into a second marriage in violation of the subsisting one, "this shall be a cause for divorce from the bonds of matrimony," is held not to give the innocent party to the first marriage a ground of divorce in addition to adultery, but merely to give a ground of divorce to the innocent party to the second marriage. Moore *v.* Moore, 102 Tenn. 148, 52 S. W. 778. See also *supra*, note 46.

74. See statutes of different states.

Burglary has been held to be an infamous crime within the statute. Hess *v.* Hess, 8 Pa. Dist. 451, 22 Pa. Co. Ct. 135. *Contra*, Nevergold *v.* Nevergold, 20 Pa. Co. Ct. 108.

Manslaughter, being a felony, is within the meaning of the term "infamous crime," as used in the statute. Sutherlin *v.* Sutherlin, 27 Ind. App. 301, 61 N. E. 206.

Commission of infamous crime and flight from justice by the husband is made a cause of divorce in Louisiana. J. F. C. *v.* M. E., 6 Rob. 135.

75. See statutes of different states.

Indeterminate sentence.— Where a husband has been sentenced to the state prison for a maximum term of six years and a minimum term of three years, under a statute authorizing a prison commission to parol a prisoner after the expiration of the minimum term, upon certain conditions and to rearrest him if the conditions are violated, prior to the expiration of the maximum term, the wife may obtain a divorce, under Mass. Pub. St. c. 146, § 2, giving her the right to a divorce where her husband is sentenced to state prison for five years or more. Oliver *v.* Oliver, 169 Mass. 592, 48 N. E. 843.

76. Sharman *v.* Sharman, 18 Tex. 521.

77. Frantz *v.* Frantz, 11 Pa. Co. Ct. 467.

78. Leonard *v.* Leonard, 151 Mass. 151, 23 N. E. 732, 21 Am. St. Rep. 437, 6 L. R. A. 632; Klutts *v.* Klutts, 5 Sneed (Tenn.) 423.

Conviction in a federal court for the district of Massachusetts, and imprisonment in the state's prison in that state under sentence on that conviction, do not constitute a cause for divorce in New Hampshire. Martin *v.* Martin, 47 N. H. 52.

79. Rivers *v.* Rivers, 60 Iowa 378, 14 N. W. 774; Vinsant *v.* Vinsant, 49 Iowa 639; Cone *v.* Cone, 58 N. H. 152.

for divorce, either absolute or limited.[80] The statutes differ in their language. In many the offense is described as "extreme cruelty"[81] or as "cruel and inhuman treatment"[82] or language having a similar import, and in others the conduct constituting the offense is described in more or less detail.[83]

b. What Constitutes — (I) *Preliminary Considerations* — (A) *In General.* In view of the great diversity in the language of the several statutes, it is impossible to frame a definition of cruelty which will be of universal application.[84] It has frequently been defined as actual, personal violence, or conduct causing a reasonable apprehension of it, or such a course of treatment as endangers life, limb, or health and renders cohabitation unsafe.[85] In determining what conduct constitutes cruelty, regard must be had to the provisions of the statutes and the circumstances of each particular case, keeping always in view the physical and mental condition of the parties and their character and social status.[86] It is thus

Indeterminate sentence see *supra*, note 75.

80. See statutes of the different states.

81. See statutes of Arizona, California, Colorado, Delaware, Florida, Illinois, Kansas, Maine, Massachusetts, Michigan, Montana, Nebraska, Nevada, New Hampshire, New Jersey, North Dakota, Ohio, Oklahoma, Rhode Island, and South Dakota.

82. See statutes of Arkansas, Indiana, Kentucky, Minnesota, Mississippi, New Mexico, Oregon, Wisconsin, and Wyoming.

83. See statutes of the different states.

In New York the statute authorizes a separation for such conduct on the part of the husband as may render it unsafe and improper for the wife to cohabit with him. The words "unsafe and improper" imply "cruelty" and include actual, personal violence or threats creating a reasonable apprehension of bodily harm, rendering it unsafe for a wife to remain with a husband. Mason *v.* Mason, 1 Edw. 278.

84. Fleming *v.* Fleming, 95 Cal. 430, 30 Pac. 566, 29 Am. St. Rep. 124.

85. *Alabama.*— Hughes *v.* Hughes, 44 Ala. 698; Hughes *v.* Hughes, 19 Ala. 307; Moyler *v.* Moyler, 11 Ala. 620.

California.— Morris *v.* Morris, 14 Cal. 76, 73 Am. Dec. 615.

Florida.— Palmer *v.* Palmer, 26 Fla. 215, 7 So. 864.

Georgia.— Ring *v.* Ring, 118 Ga. 183, 44 S. E. 861, 62 L. R. A. 878; Odom *v.* Odom, 36 Ga. 286.

Iowa.—Vanduzer *v.* Vanduzer, 70 Iowa 614, 31 N. W. 956; Cole *v.* Cole, 23 Iowa 433.

Kentucky.— Thornberry *v.* Thornberry, 2 J. J. Marsh. 322.

Maryland.— Hawkins *v.* Hawkins, 65 Md. 104, 3 Atl. 749.

Massachusetts.— Ford *v.* Ford, 104 Mass. 198.

New York.— Perry *v.* Perry, 2 Paige 501.

Ohio.— Duhme *v.* Duhme, 3 Ohio Dec. (Reprint) 95, 3 Wkly. L. Gaz. 186.

Pennsylvania.— Richards *v.* Richards, 1 Grant 389; Com. *v.* Porter, 4 Pa. Dist. 503; Butler *v.* Butler, 1 Pars. Eq. Cas. 329; Butler *v.* Butler, 8 Pittsb. Leg. J. 390; Holland *v.* Holland, 4 Leg. Gaz. 372.

Texas.— Nogees *v.* Nogees, 7 Tex. 538, 58 Am. Dec. 78.

Wisconsin.— Beyer *v.* Beyer, 50 Wis. 254, 6 N. W. 807, 36 Am. Rep. 848.

England.— Tomkins *v.* Tomkins, 1 Swab. & Tr. 168.

See 17 Cent. Dig. tit. "Divorce," §§ 62, 64.

Extreme cruelty is the infliction of grievous bodily injury or grievous mental suffering upon the other by one party to the marriage. Cal. Civ. Code, § 94.

Resort to ecclesiastical law.— Where the statute does not define cruelty resort must be had to judicial precedent (Hawkins *v.* Hawkins, 65 Md. 104, 3 Atl. 749), and the term should be given the same interpretation as was given it in the ecclesiastical courts of England (Morris *v.* Morris, 14 Cal. 76, 73 Am. Dec. 615; Shaw *v.* Shaw, 17 Conn. 189, Tayman *v.* Tayman, 2 Md. Ch. 393; Coles *v.* Coles, 2 Md. Ch. 341). In these courts a series of acts of personal violence, a menace to the safety of life, limb, or health, or any determined threats of serious bodily hurt have always been held ground for divorce. Hawkins *v.* Hawkins, 65 Md. 104, 3 Atl. 749; Tayman *v.* Tayman, 2 Md. Ch. 393; Coles *v.* Coles, 2 Md. Ch. 341; Barrere *v.* Barrere, 4 Johns. Ch. (N. Y.) 187.

86. *California.*— Flemming *v.* Flemming, 95 Cal. 430, 30 Pac. 566, 29 Am. St. Rep. 124; Barnes *v.* Barnes, 95 Cal. 171, 30 Pac. 298, 16 L. R. A. 660.

Illinois.— Maddox *v.* Maddox, 189 Ill. 152, 59 N. E. 599, 82 Am. St. Rep. 431, 52 L. R. A. 628; Ward *v.* Ward, 103 Ill. 477.

Iowa.— Berry *v.* Berry, 115 Iowa 543, 88 N. W. 1075.

Nevada.— Kelly *v.* Kelly, 18 Nev. 49, 1 Pac. 194, 51 Am. Rep. 732.

New Jersey.— Cook *v.* Cook, 11 N. J. Eq. 195; Graecen *v.* Graecen, 2 N. J. Eq. 459.

Texas.— Huilker *v.* Huilker, 64 Tex. 1.

England.— Evans *v.* Evans, 4 Eng. Eccl. 310, 1 Hagg. Const. 35; Power *v.* Power, 11 Jur. N. S. 800, 34 L. J. P. & M. 137, 12 L. T. Rep. N. S. 824, 4 Swab. & Tr. 177, 13 Wkly. Rep. 1113; Swatman *v.* Swatman, 4 Swab. & Tr. 135; Tomkins *v.* Tomkins, 1 Swab. & Tr. 168.

Social condition and refinement.— The social position of the parties and the degree of their refinement should be considered in de-

difficult to enunciate general rules which will control the determination of the question. It is established in all jurisdictions, however, that mere want of congeniality [87] or incompatability of temper [88] and the consequent wranglings of the parties will not justify a charge of cruelty on the part of either.[89] Nor is jealousy [90] or overbearing conduct [91] on the part of the husband ground for divorce. The conduct of one of the parties must at least be such as to render cohabitation intolerable to the other;[92] and, although in some states actual bodily harm or apprehension thereof need not be shown, there must have been such treatment as so to destroy the peace of mind and happiness of the injured party as to endanger the health or utterly to defeat the legitimate objects of marriage.[93]

termining whether the conduct complained of is legal cruelty.

Alabama.— David *v.* David, 27 Ala. 222, holding that between persons of education and refinement the slightest blow in anger might be cruelty, while between persons of a different character and walk in life it might not mar to any great extent their conjugal relations or materially interfere with their happiness.

Georgia.— Odom *v.* Odom, 36 Ga. 286.

Iowa.— Douglass *v.* Douglass, 81 Iowa 258, 47 N. W. 92; Knight *v.* Knight, 31 Iowa 451, holding that a gentle, fragile, submissive woman might be entitled to a divorce for causes which would scarcely furnish an Amazon just cause for complaint.

Louisiana.— Lauber *v.* Mast, 15 La. Ann. 593.

Michigan.— Kline *v.* Kline, 50 Mich. 438, 15 N. W. 541; Bennett *v.* Bennett, 24 Mich. 482 (where a divorce was refused because it did not appear that complainant was a person of such sensitive nature and refinement as would be likely to be affected to the degree of extreme cruelty by the use of profane, obscene, and insulting language); Briggs *v.* Briggs, 20 Mich. 34.

Nebraska.— Shuster *v.* Shuster, (1902) 92 N. W. 203.

New York.— Whispell *v.* Whispell, 4 Barb. 217, holding, however, that while want of cultivation may excuse a coarse expression it does not justify indecent conduct or obscene language.

North Carolina.— Taylor *v.* Taylor, 76 N. C. 433.

Pennsylvania.— Dickenson *v.* Dickenson, 1 Del. Co. 293.

Tennessee.— Payne *v.* Payne, 4 Humphr. 500, 40 Am. Dec. 660.

England.— Westmeath *v.* Westmeath, 2 Hagg. Eccl. 1, 4 Eng. Eccl. 238, holding that blows between parties in the lower and higher stations of life bear different aspects.

See 17 Cent. Dig. tit. "Divorce," § 66.

87. Connor *v.* Connor, 107 La. 453, 31 So. 766; Ogden *v.* Herbert, 49 La. Ann. 1714, 22 So. 919; Coles *v.* Coles, 2 Md. Ch. 341; Colvin *v.* Colvin, 15 Wash. 490, 46 Pac. 1029.

88. Incompatibility of temper as cause for divorce see *supra*, VII, A, 2, a.

89. Shaw *v.* Shaw, 17 Conn. 189; Freeborn *v.* Freeborn, 168 Mass. 50, 46 N. E. 428; Bean *v.* Bean, 11 Lanc. Bar (Pa.) 138; Colvin *v.* Colvin, 15 Wash. 490, 46 Pac. 1029.

The causes must be grave and weighty and such as show an absolute impossibility that the duties of the married life can be discharged. Schindel *v.* Schindel, 12 Md. 294; Rayner *v.* Rayner, 49 Mich. 600, 14 N. W. 562; Kennedy *v.* Kennedy, 60 How. Pr. (N. Y.) 151. Mere austerity of temper, petulance of manner, rudeness of language, a want of civil attention and accommodation, even occasional sallies of passion, if they do not threaten bodily harm, do not amount to legal cruelty. The suffering party must bear in some degree the consequences of an injudicious connection; must subdue by decent resistance, or by prudent conciliation; and if this cannot be done, must suffer in silence. Evans *v.* Evans, 1 Hagg. Const. 35, 4 Eng. Eccl. 310, per Sir William Scott. See also the following cases:

Arkansas.— Cate *v.* Cate, 53 Ark. 484, 14 S. W. 675.

California.— Waldron *v.* Waldron, 85 Cal. 251, 24 Pac. 649, 658, 9 L. R. A. 487.

Kentucky.— Finley *v.* Finley, 9 Dana 52, 33 Am. Dec. 528.

Maryland.— Hawkins *v.* Hawkins, 65 Md. 104, 3 Atl. 749; Childs *v.* Childs, 49 Md. 509.

Mississippi.— Kenley *v.* Kenley, 2 How. 751.

New Hampshire.— Poor *v.* Poor, 8 N. H. 307, 29 Am. Dec. 664.

New York.— De Meli *v.* De Meli, 67 How. Pr. 20; Barrere *v.* Barrere, 4 Johns. Ch. 187.

90. Boon *v.* Boon, 12 Oreg. 437, 8 Pac. 450, holding that a husband's jealousy and constant surveillance of the wife is not cruelty in the absence of malice.

91. Hall *v.* Hall, 59 N. J. Eq. 402, 45 Atl. 690; Johnson *v.* Johnson, 107 Wis. 186, 83 N. W. 291, 81 Am. St. Rep. 836.

The unreasonable exercise of the husband's authority in regard to his wife's social intercourse with her relatives and friends, excluding them from his house and forbidding her to visit them, does not constitute cruelty. Shaw *v.* Shaw, 17 Conn. 189.

92. Trowbridge *v.* Carlin, 12 La. Ann. 882; Bailey *v.* Bailey, 121 Mich. 236, 80 N. W. 32; Hoyt *v.* Hoyt, 56 Mich. 50, 22 N. W. 105; Bean *v.* Bean, 11 Lanc. Bar (Pa.) 138; Edwards *v.* Edwards, 3 Pittsb. (Pa.) 333.

93. *Iowa.*— Felton *v.* Felton, 94 Iowa 739, 62 N. W. 677.

Kansas.— Avery *v.* Avery, 33 Kan. 1, 5 Pac. 418, 52 Am. Rep. 523; Carpenter *v.* Car-

(B) *Single Acts of Cruelty.* A single act of cruelty does not ordinarily constitute ground for divorce,[94] although a fixed or persistent habit of cruelty need not appear.[95]

(C) *Intention, Wilfulness, and Malice.* Ordinarily intention, wilfulness, or malice is a necessary element of the cruel treatment which the law recognizes as a ground for divorce.[96]

penter, 30 Kan. 712, 2 Pac. 122, 46 Am. Rep. 108.

Kentucky.— Beall *v.* Beall, 80 Ky. 675; Shrout *v.* Shrout, 12 Ky. L. Rep. 470.

Louisiana.— Olberding *v.* Gohres, 107 La. 715, 31 So. 1028; Rowley *v.* Rowley, 19 La. Ann. 558.

Nebraska.— Ellison *v.* Ellison, 65 Nebr. 412, 91 N. W. 403.

Wisconsin.— Reinhard *v.* Reinhard, 96 Wis. 555, 71 N. W. 803, 62 Am. St. Rep. 65; Hacker *v.* Hacker, 90 Wis. 325, 63 N. W. 278; Wachholz *v.* Wachholz, 75 Wis. 377, 44 N. W. 506; Crichton *v.* Crichton, 73 Wis. 59, 40 N. W. 638; Freeman *v.* Freeman, 31 Wis. 235.

94. *Iowa.*— Felton *v.* Felton, 94 Iowa 739, 62 N. W. 677.

Kentucky.— Finley *v.* Finley, 9 Dana 52, 33 Am. Dec. 528.

Louisiana.— Rowley *v.* Rowley, 19 La. Ann. 558; Cooper *v.* Cooper, 10 La. 249; Tourné *v.* Tourné, 9 La. 452; Fleytas *v.* Pigneguy, 9 La. 419.

Maryland.— Hoshall *v.* Hoshall, 51 Md. 72, 34 Am. Rep. 298; Daiger *v.* Daiger, 2 Md. Ch. 335.

New Hampshire.— Jenness *v.* Jenness, 60 N. H. 211, holding that a single instance of neglect to furnish a wife with necessaries or with medical assistance, unaccompanied by circumstances showing danger or reasonable apprehension of danger to her life or health, do not as a matter of law constitute extreme cruelty.

New York.— Barrere *v.* Barrere, 4 Johns. Ch. 187.

North Carolina.— Joyner *v.* Joyner, 59 N. C. 322, 82 Am. Dec. 421.

Pennsylvania.— Hardie *v.* Hardie, 162 Pa. St. 227, 29 Atl. 886, 25 L. R. A. 697; Nye's Appeal, 126 Pa. St. 341, 17 Atl. 618; Richards *v.* Richards, 37 Pa. St. 225; Lloyd *v.* Lloyd, 2 Woodw. 481.

See, however, Albert *v.* Albert, 5 Mont. 577, 6 Pac. 23, 51 Am. Rep. 86 (holding that a single act of whipping the wife may be ground for divorce); Miller *v.* Miller, 72 Tex. 250, 12 S. W. 167.

Probability of repetition.— A single act of aggravated cruelty with such precedent or attendant circumstances as to satisfy the court that such acts are likely to be repeated may warrant a divorce.

Montana.— Albert *v.* Albert, 5 Mont. 577, 6 Pac. 23, 51 Am. Rep. 86.

New Hampshire.— Poor *v.* Poor, 8 N. H. 307, 29 Am. Dec. 664.

New Jersey.— Cook *v.* Cook, 11 N. J. Eq. 195.

Texas.— Huilker *v.* Huilker, 64 Tex. 1.

Wisconsin.— Beyer *v.* Beyer, 50 Wis. 254, 6 N. W. 807, 36 Am. Rep. 848.

England.— Reeves *v.* Reeves, 32 L. J. P. & M. 178, 8 L. T. Rep. N. S. 174, 3 Swab. & Tr. 139, 10 Wkly. Rep. 111.

See 17 Cent. Dig. tit. "Divorce," § 63.

Aggravating circumstances.— A single instance of brutally beating the wife, accompanied with brutal neglect and abandonment, authorizes a divorce. Itzkowitz *v.* Itzkowitz, 33 N. Y. App. Div. 244, 53 N. Y. Suppl. 356. So a husband who, after working his pregnant wife in the field, violently seizes her and drives her and her baby away from home with curses is guilty of cruelty entitling her to a divorce, although no other act of violence is shown. Huilker *v.* Huilker, 64 Tex. 1.

Extreme and repeated cruelty.— Under the Illinois statute, which requires that the cruelty must be "extreme and repeated," there must be more than one act of actual physical violence to constitute the offense. Fritz *v.* Fritz, 138 Ill. 436, 28 N. E. 1058, 32 Am. St. Rep. 156, 14 L. R. A. 685; Youngs *v.* Youngs, 130 Ill. 230, 22 N. E. 806, 17 Am. St. Rep. 313, 6 L. R. A. 548; Embree *v.* Embree, 53 Ill. 394; De la Hay *v.* De la Hay, 21 Ill. 252; Vignos *v.* Vignos, 15 Ill. 186; Werres *v.* Werres, 102 Ill. App. 360. Two distinct acts of personal violence are sufficient (Farnham *v.* Farnham, 73 Ill. 497; Sharp *v.* Sharp, 16 Ill. App. 348), although occurring on the same day (Campbell *v.* Campbell, 27 Ill. App. 309); but the offense is not established by two acts of cruelty with a lapse of eight years between (Shorediche *v.* Shorediche, 115 Ill. 102, 3 N. E. 736).

95. Mahone *v.* Mahone, 19 Cal. 626, 81 Am. Dec. 91; Day *v.* Day, 56 N. H. 316 (holding that two assaults by a husband upon his wife, although not of a very aggravated nature, followed by violent and abusive language and indecent epithets, and conduct terrifying to her and their children, is cruelty for which she is entitled to a divorce); Lockwood *v.* Lockwood, 2 Curt. Eccl. 281, 7 Eng. Eccl. 114; Dysart *v.* Dysart, 1 Rob. Eccl. 106 (both cases holding that where defendant has occasionally lost control of himself, and when under the sway of passion has been led to the commission of acts which render further cohabitation unsafe, plaintiff is entitled to relief). See, however, Doyle *v.* Doyle, 26 Mo. 545, where it was held that the attention of the court should not be confined to the acts alleged as a ground for divorce, but the inquiry must involve the conduct of the parties for the period during which it is alleged that the misconduct took place, and that cruelty in most cases must be evidenced rather by general conduct than by particular acts.

96. *Connecticut.*— Shaw *v.* Shaw, 17 Conn. 189.

(D) *Permitting Cruelty by Third Persons.* If a husband permits those under his authority so to conduct themselves toward his wife as seriously to impair her health, it constitutes cruelty on his part entitling her to a divorce.[97] So if a wife actively aids her children in their cruelty toward her husband she is chargeable therewith.[98]

(II) *Acts of Violence.* Continued acts of personal violence producing physical pain or bodily injury and a fear of future danger are unquestionably acts of cruelty for which a divorce may be granted.[99] Actual violence to constitute ground for divorce must be attended with danger to life, limb, or health, or be such as to cause reasonable apprehension of danger.[1] It is not every slight violence committed against the wife by the husband, even in anger, which will authorize a divorce.[2] Much less will slight acts of violence by a wife from which

Georgia.— Ring *v.* Ring, 118 Ga. 183, 44 S. E. 861, 62 L. R. A. 878.

Iowa.— Ennis *v.* Ennis, 92 Iowa 107, 60 N. W. 228; Maben *v.* Maben, 72 Iowa 658, 34 N. W. 462, holding that if the alleged cruelty was unintentional, and there is no likelihood of its repetition, the court may refuse to interfere.

Massachusetts.— W—— *v.* W——, 141 Mass. 495, 6 N. E. 541, 55 Am. Rep. 491; Ford *v.* Ford, 104 Mass. 198.

North Carolina.— Miller *v.* Miller, 78 N. C. 102; Everton *v.* Everton, 50 N. C. 210.

Oregon.— Beckley *v.* Beckley, 23 Oreg. 226, 31 Pac. 470.

Presumption of intent.— A husband who is habitually harsh toward his wife cannot explain away serious bodily injuries inflicted upon her by saying that they were unintentionally caused in playfulness. Goodrich *v.* Goodrich, 44 Ala. 670; Johnson *v.* Johnson, (Cal. 1894) 35 Pac. 637; Matthai *v.* Matthai, 49 Cal. 90.

Intention, wilfulness, or malice as element of cruelty by: Communication of disease see *infra*, VII, C, 4, b, (VI), (A). Failure to provide necessaries of life see *infra*, VII, C, 4, b, (V), note 31. False charges of adultery see *infra*, VII, C, 4, b, (IV), (C), (4), (a). Sexual excess see *infra*, VII, C, 4, b, (VI), (B).

97. Day *v.* Day, 84 Iowa 221, 50 N. W. 979; Dakin *v.* Dakin, (Nebr. 1901) 95 N. W. 781; Hall *v.* Hall, 9 Oreg. 452.

It is not ground for divorce if the failure of the husband to restrain such conduct results more from weakness of discipline than from cruelty. Tourné *v.* Tourné, 9 La. 452.

98. Menzer *v.* Menzer, 83 Mich. 319, 47 N. W. 219, 21 Am. St. Rep. 605, where the mother aided her daughter in the preparation of a scurrilous communication to a disreputable paper, falsely charging her husband with offensive conduct.

99. *Alabama.*— Turner *v.* Turner, 44 Ala. 437; King *v.* King, 28 Ala. 315; Moyler *v.* Moyler, 11 Ala. 620.

California.— Eidenmuller *v.* Eidenmuller, 37 Cal. 364.

Colorado.— Sylvis *v.* Sylvis, 11 Colo. 319, 17 Pac. 912.

Georgia.— Ogmore *v.* Ogmore, 41 Ga. 46; Gholston *v.* Gholston, 31 Ga. 625.

Indiana.— Mercer *v.* Mercer, 114 Ind. 558, 17 N. E. 182.

Iowa.— Sackrider *v.* Sackrider, 60 Iowa 397, 14 N. W. 736; Sesterhen *v.* Sesterhen, 60 Iowa 301, 14 N. W. 333.

Louisiana.— Armant *v.* Armant, 4 La. Ann. 137, blows.

Maryland.— Ricketts *v.* Ricketts, 4 Gill 105.

Massachusetts.— Jefferson *v.* Jefferson, 168 Mass. 456, 47 N. E. 123; French *v.* French, 4 Mass. 587.

Minnesota.— Westphal *v.* Westphal, 81 Minn. 242, 85 N. W. 988.

Mississippi.—Holmes *v.* Holmes, Walk. 474.

Missouri.— Strahorn *v.* Strahorn, 82 Mo. App. 580.

Montana.— Albert *v.* Albert, 5 Mont. 577, 6 Pac. 23, 51 Am. Rep. 86.

Nebraska.— Tietken *v.* Tietken, 60 Nebr. 138, 82 N. W. 367.

New Jersey.—Tyrrell *v.* Tyrrell, (Ch. 1886) 3 Atl. 266; Thomas *v.* Thomas, 20 N. J. Eq. 97.

New York.— Itzkowitz *v.* Itzkowitz, 33 N. Y. App. Div. 244, 53 N. Y. Suppl. 356; Perry *v.* Perry, 2 Barh. Ch. 285.

North Carolina.— Scoggins *v.* Scoggins, 85 N. C. 347; Taylor *v.* Taylor, 76 N. C. 433.

Ohio.— Jones *v.* Jones, Wright 244.

Oregon.— O'Brien *v.* O'Brien, 36 Oreg. 92, 57 Pac. 374, 58 Pac. 892.

Tennessee.— Young *v.* Young, (Ch. App. 1900) 57 S. W. 438.

Virginia.— Owens *v.* Owens, 96 Va. 191, 31 S. E. 72; Henninger *v.* Henninger, 90 Va. 271, 18 S. E. 193.

See 17 Cent. Dig. tit. "Divorce," § 67.

Actual violence in connection with: False charges of adultery see *infra*, VII, C, 4, b, (IV), (C), (4), (a), note 18. Offensive language see *infra*, VII, C, 4, b, (IV), (C), (5), note 27.

1. Morris *v.* Morris, 14 Cal. 76, 73 Am. Dec. 615; Vanduzer *v.* Vanduzer, 70 Iowa 614, 31 N. W. 956; Whaley *v.* Whaley, 68 Iowa 647, 27 N. W. 809; Knight *v.* Knight, 31 Iowa 451; O'Connor *v.* O'Connor, 109 N. C. 139, 13 S. E. 887; Everton *v.* Everton, 50 N. C. 202.

Mere blows not resulting in bodily harm or in apprehension thereof and causing but slight unhappiness do not constitute cruelty. Nogees *v.* Nogees, 7 Tex. 538, 58 Am. Dec. 78.

2. *Florida.*—Donald *v.* Donald, 21 Fla. 571.

the husband can easily protect himself constitute cruelty entitling him to a divorce.[3]

(III) *Conduct Exciting Fear of Harm* — (A) *In General.* Actual violence is not a necessary element of cruelty as a ground for divorce. Any conduct justifying a reasonable apprehension of bodily harm is sufficient,[4] since the courts interfere not so much to punish an offense already committed as to relieve the injured party from future harm.[5] For the same reason there must exist a probability that future harm will ensue, else a divorce cannot be granted.[6]

(B) *Threats.* Words of menace importing actual danger of bodily harm may justify the granting of a divorce,[7] if of such a character as to impress upon the person to whom they are addressed a feeling that they are seriously meant and are to be followed by actual bodily harm.[8]

(IV) *Conduct Causing Mental Suffering* — (A) *In General.* The doctrine was formerly declared that cruelty as a ground for divorce could not exist if the suffering produced was merely mental. Actual violence or conduct reasonably tending to occasion an apprehension thereof was regarded as an essential element of cruelty. The effect which mental suffering might have on the

Illinois.— Henderson *v.* Henderson, 88 Ill. 248.

Iowa.— Whaley *v.* Whaley, 68 Iowa 647, 27 N. W. 809.

Kentucky.— Finley *v.* Finley, 9 Dana 52, 33 Am. Dec. 528.

New York.— Barrere *v.* Barrere, 4 Johns. Ch. 187, per Chancellor Kent.

Pennsylvania.— Richards *v.* Richards, 1 Grant 389.

3. Aurand *v.* Aurand, 157 Ill, 321, 41 N. E. 859; Hitchins *v.* Hitchins, 140 Ill. 326, 29 N. E. 888; De la Hay *v.* De la Hay, 21 Ill. 252; Peavey *v.* Peavey, 76 Iowa 443, 41 N. W. 67; Perry *v.* Perry, 1 Barb. Ch. (N. Y.) 516.

Violent and outrageous conduct on the part of a wife toward her husband, rendering the proper discharge of the duties of married life impossible, is cruelty on her part, however. Lynch *v.* Lynch, 33 Md. 328; Torlotting *v.* Torlotting, 97 Mo. App. 183, 70 S. W. 941; Heilbron *v.* Heilbron, 158 Pa. St. 297, 27 Atl. 967, 38 Am. St. Rep. 845.

4. Fanner *v.* Fanner, 86 Ala. 322, 5 So. 434; Smedley *v.* Smedley, 30 Ala. 714; Morris *v.* Morris, 14 Cal. 76, 73 Am. Dec. 615.

5. Black *v.* Black, 30 N. J. Eq. 215; English *v.* English, 27 N. J. Eq. 579; Close *v.* Close, 25 N. J. Eq. 504; Cook *v.* Cook, 11 N. J. Eq. 195; Neeld *v.* Neeld, 4 Hagg. Eccl. 263, 265; Kenrick *v.* Kenrick, 4 Hagg. Eccl. 114; Harris *v.* Harris, 2 Phillim. 111.

6. Burton *v.* Burton, 52 N. J. Eq. 215, 27 Atl. 825.

7. *Alabama.*— Smedley *v.* Smedley, 30 Ala. 714; Hughes *v.* Hughes, 19 Ala. 307.

Iowa.—Sackrider *v.* Sackrider, 60 Iowa 397, 14 N. W. 736; Wheeler *v.* Wheeler, 53 Iowa 511, 5 N. W. 689, 36 Am. Rep. 240; Cole *v.* Cole, 23 Iowa 433; Caruthers *v.* Caruthers, 13 Iowa 266; Beebe *v.* Beebe, 10 Iowa 133.

Massachusetts.— Bailey *v.* Bailey, 97 Mass. 373.

Michigan.— Taylor *v.* Taylor, 73 Mich. 266, 41 N. W. 413; Goodman *v.* Goodman, 26 Mich. 417.

New Hampshire.— Harratt *v.* Harratt, 7 N. H. 196, 26 Am. Dec. 730.

New Jersey.— Black *v.* Black, 30 N. J. Eq. 215; Cook *v.* Cook, 11 N. J. Eq. 195; Graecen *v.* Graecen, 2 N. J. Eq. 459.

New York.— Kennedy *v.* Kennedy, 73 N. Y. 369; Davies *v.* Davies, 55 Barb. 130; Whispell *v.* Whispell, 4 Barb. 217; Ruckman *v.* Ruckman, 58 How. Pr. 278; Mason *v.* Mason, 1 Edw. 278.

North Carolina.— Little *v.* Little, 63 N. C. 22.

Pennsylvania.— Sower's Appeal, 89 Pa. St. 173; Breinig *v.* Meitzler, 23 Pa. St. 156; Howe *v.* Howe, 16 Pa. Super. Ct. 193; Butler *v.* Butler, 1 Pars. Eq. Cas. 329.

Wisconsin.— Freeman *v.* Freeman, 31 Wis. 235.

England.— Hulme *v.* Hulme, 2 Add. Eccl. 27; Houliston *v.* Smyth, 3 Bing. 127, 11 E. C. L. 70, 2 C. & P. 22, 12 E. C. L. 429, 38 L. J. C. P. O. S. 200, 10 Moore C. P. 482, 28 Rev. Rep. 609; D'Aguilar *v.* D'Aguilar, 1 Hagg. Eccl. 773, 3 Eng. Eccl. 329; Birch *v.* Birch, 42 L. J. P. & M. 23; Carpenter *v.* Carpenter, Milw. 159; Otway *v.* Otway, 2 Phillim. 95; Cousen *v.* Cousen, 11 Jur. N. S. 656, 34 L. J. P. & M. 139, 12 L. T. Rep. N. S. 712, 4 Swab. & Tr. 164.

Contra.— Maddox *v.* Maddox, 189 Ill. 152, 59 N. E. 599, 82 Am. St. Rep. 431, 52 L. R. A. 628; Vignos *v.* Vignos, 15 Ill. 186; Hill *v.* Hill, 2 Mass. 150, all holding that threatening language does not constitute "extreme cruelty."

Threats made to third persons and communicated to the wife, exciting in her a fear of danger, afford her ground for relief. Hollister *v.* Hollister, 6 Pa. St. 449; D'Aguilar *v.* D'Aguilar, 1 Hagg. Eccl. 773, 3 Eng. Eccl. 329.

8. Close *v.* Close, 24 N. J. Eq. 338; Whispell *v.* Whispell, 4 Barb. (N. Y.) 217; McBride *v.* McBride, 9 N. Y. Suppl. 827; Anonymous, 17 Abb. N. Cas. (N. Y.) 231; Ruckman *v.* Ruckman, 58 How. Pr. (N. Y.) 278; Breinig *v.* Meitzler, 23 Pa. St. 156.

Threats of violence, when none was offered, have been held not to constitute a ground of divorce. Carlisle *v.* Carlisle, 99 Iowa 247, 68 N. W. 681; Freerking *v.* Freerking, 19

injured party's health was not taken into consideration. And this doctrine still obtains in some states, either by force of precedent or by statute.[9] In the greater number of jurisdictions, however, the doctrine has been repudiated on principle or abrogated by statute, and cruelty justifying a divorce may consist of any treatment which occasions mental suffering in such a degree as to impair the innocent party's health.[10]

(B) *Degree of Suffering.* Mental suffering is not a ground of divorce unless

Iowa 34; Shell *v.* Shell, 2 Sneed (Tenn.) 716.

9. Wood *v.* Wood, 80 Ala. 254; Folmar *v.* Folmar, 69 Ala. 84; Hughes *v.* Hughes, 44 Ala. 698; Moyler *v.* Moyler, 11 Ala. 620; Shaw *v.* Shaw, 17 Conn. 189; Fizette *v.* Fizette, 146 Ill. 328, 34 N. E. 799; Fritz *v.* Fritz, 138 Ill. 436, 28 N. E. 1058, 32 Am. St. Rep. 156, 14 L. R. A. 685; Henderson *v.* Henderson, 88 Ill. 248; Embree *v.* Embree, 53 Ill. 394; Ratts *v.* Ratts, 11 Ill. App. 366.

In Kentucky the doctrine has been recognized (Thornberry *v.* Thornberry, 2 J. J. Marsh. 322), but it seems to have been abrogated by statute (see *infra*, note 10).

In Maine and Massachusetts "extreme cruelty" implies personal violence intentionally inflicted so serious as to endanger life, limb, or health, or to create a reasonable apprehension thereof. Holyoke *v.* Holyoke, 78 Me. 404, 6 Atl. 827; Ford *v.* Ford, 104 Mass. 198. However, the grounds for divorce have been enlarged by statute in those states. See *infra*, note 10.

In New York, Wisconsin, and England the doctrine stated in the text was once recognized. Davies *v.* Davies, 55 Barb. (N. Y.) 130, 37 How. Pr. (N. Y.) 45; Walton *v.* Walton, 32 Barb. (N. Y.) 203, 20 How. Pr. (N. Y.) 347 (*semble*); Whispell *v.* Whispell, 4 Barb. (N. Y.) 217; De Meli *v.* De Meli, 67 How. Pr. (N. Y.) 20; Ruckman *v.* Ruckman, 58 How. Pr. (N. Y.) 278; Johnson *v.* Johnson, 4 Wis. 135; Evans *v.* Evans, 1 Hagg. Const. 35, 4 Eng. Eccl. 310; Milford *v.* Milford, 37 L. J. P. & M. 77; Hudson *v.* Hudson, 3 Swab. & Tr. 314, 12 Wkly. Rep. 354; Tomkins *v.* Tomkins, 1 Swab. & Tr. 168. But it seems to have been abandoned in the later cases in those jurisdictions. See *infra*, note 10.

10. *Arkansas.*— Cate *v.* Cate, 53 Ark. 484, 14 S. W. 675; Haley *v.* Haley, 44 Ark. 429; Rose *v.* Rose, 9 Ark. 507.

California.— Barnes *v.* Barnes, 95 Cal. 171, 30 Pac. 298, 16 L. R. A. 660; Powelson *v.* Powelson, 22 Cal. 358.

Colorado.— Ward *v.* Ward, 25 Colo. 33, 52 Pac. 1105; Rosenfeld *v.* Rosenfeld, 21 Colo. 16, 40 Pac. 49; Sylvis *v.* Sylvis, 11 Colo. 319, 17 Pac. 912.

District of Columbia.— Ogden *v.* Ogden, 17 App. Cas. 104.

Florida.— Williams *v.* Williams, 23 Fla. 324, 2 So. 768 (*semble*); Donald *v.* Donald, 21 Fla. 571.

Georgia.— Glass *v.* Wynn, 76 Ga. 319.

Iowa.— Wells *v.* Wells, 116 Iowa 59, 89 N. W. 98; Sylvester *v.* Sylvester, 109 Iowa 401, 80 N. W. 547; Blair *v.* Blair, 106 Iowa 269, 76 N. W. 700; Aitchison *v.* Aitchison, 99 Iowa 93, 68 N. W. 573; Day *v.* Day, 84 Iowa 221, 50 N. W. 979; Dolittle *v.* Dolittle, 78 Iowa 691, 43 N. W. 616, 6 L. R. A. 187; Wheeler *v.* Wheeler, 53 Iowa 511, 5 N. W. 689, 36 Am. Rep. 240; Cole *v.* Cole, 23 Iowa 433.

Kansas.— Avery *v.* Avery, 33 Kan. 1, 5 Pac. 418, 52 Am. Rep. 523; Carpenter *v.* Carpenter, 30 Kan. 712, 2 Pac. 122, 46 Am. Rep. 108.

Kentucky.— See Beall *v.* Beall, 80 Ky. 675, 676, a case decided under Gen. St. c. 52, art. 3, subd. 2, which authorizes a divorce to the wife for "habitual behavior towards her by the husband for not less than six months, in such cruel and inhuman manner as to indicate a settled aversion to her, or to destroy permanently her peace and happiness."

Louisiana.— Tourné *v.* Tourné, 9 La. 452.

Maine.— Holyoke *v.* Holyoke, 78 Me. 404, 6 Atl. 827.

Massachusetts.—Bailey *v.* Bailey, 97 Mass. 373.

Michigan.— Bailey *v.* Bailey, 121 Mich. 236, 80 N. W. 32; Whitacre *v.* Whitacre, 64 Mich. 232, 31 N. W. 327; Warner *v.* Warner, 54 Mich. 492, 20 N. W. 557; Whitmore *v.* Whitmore, 49 Mich. 417, 13 N. W. 800; Palmer *v.* Palmer, 45 Mich. 150, 7 N. W. 760, 40 Am. Rep. 461; Goodman *v.* Goodman, 26 Mich. 417.

Minnesota.— Marks *v.* Marks, 56 Minn. 264, 57 N. W. 651, 45 Am. St. Rep. 466, 62 Minn. 212, 64 N. W. 561.

Nebraska.— Ellison *v.* Ellison, 65 Nebr. 412, 91 N. W. 403; Berdolt *v.* Berdolt, 56 Nebr. 792, 77 N. W. 399.

Nevada.— Reed *v.* Reed, 4 Nev. 395.

New Hampshire.— Robinson *v.* Robinson, 66 N. H. 600, 23 Atl. 362, 49 Am. St. Rep. 632, 15 L. R. A. 121; Jones *v.* Jones, 62 N. H. 463.

New Jersey.— Black *v.* Black, 30 N. J. Eq. 215.

New York.—Atherton *v.* Atherton, 82 Hun 179, 31 N. Y. Suppl. 977 [*affirmed* in 155 N. Y. 129, 49 N. E. 933, 63 Am. St. Rep. 650, 40 L. R. A. 291]; Lutz *v.* Lutz, 9 N. Y. Suppl. 858; Bihin *v.* Bihin, 17 Abb. Pr. 19. And see Fowler *v.* Fowler, 11 N. Y. Suppl. 419, 19 N. Y. Civ. Proc. 282.

North Dakota.— Mahnken *v.* Mahnken, 9 N. D. 188, 82 N. W. 870.

Ohio.— Green *v.* Green, 9 Ohio Dec. (Reprint) 564, 15 Cinc. L. Bul. 113.

Oklahoma.— Beach *v.* Beach, 4 Okla. 359, 46 Pac. 514.

Pennsylvania.— Barnsdall *v.* Barnsdall, 171 Pa. St. 625, 33 Atl. 343; Jones *v.* Jones,

it has seriously impaired complainant's health or threatens the impairment thereof. Treatment causing mere unhappiness, accompanied by no ill effects on the health, actual or threatened, is not cruelty such as to justify a divorce.[11]

(c) *Illustrations*—(1) ABUSE OF CHILDREN. While a husband may use force in protecting himself from unreasonable interference by the wife in the proper chastisement of their child,[12] yet if he maltreats the child solely to give the mother pain and as a result her health is impaired it is legal cruelty.[13]

(2) ADULTERY AND LEWD ASSOCIATION. Adultery does not constitute cruelty as a ground for divorce;[14] but it is cruelty toward a wife for a husband to express his preference for, and openly consort with, lewd women,[15] or to threaten or attempt to commit adultery.[16]

(3) ATTEMPTS TO ENTRAP. The conduct of either husband or wife in maliciously concocting schemes to entrap one or the other into the appearance of having committed adultery for the purpose of securing evidence to be used in a suit for divorce is cruelty which entitles the injured party to a divorce.[17]

66 Pa. St. 494; Butler *v.* Butler, 1 Pars. Eq. Cas. 329.

Texas.— Shreck *v.* Shreck, 32 Tex. 578, 5 Am. Rep. 251; Wright *v.* Wright, 6 Tex. 3; Sheffield *v.* Sheffield, 3 Tex. 79.

Virginia.— Kinsey *v.* Kinsey, 90 Va. 16, 17 S. E. 819; Myers *v.* Myers, 83 Va. 806, 6 S. E. 630; Latham *v.* Latham, 30 Gratt. 307.

Wisconsin.— Reinhard *v.* Reinhard, 96 Wis. 555, 71 N. W. 803, 65 Am. St. Rep. 66; Hacker *v.* Hacker, 90 Wis. 325, 63 N. W. 278; Wachholz *v.* Wachholz, 75 Wis. 377, 44 N. W. 506; Crichton *v.* Crichton, 73 Wis. 59, 40 N. W. 638; Freeman *v.* Freeman, 31 Wis. 235.

England.— Kelly *v.* Kelly, L. R. 2 P. & D. 59, 39 L. J. P. & M. 28, 22 L. T. Rep. N. S. 308, 18 Wkly. Rep. 767; Bethune *v.* Bethune, [1891] P. 205, 60 L. J. P. 18, 63 L. T. Rep. N. S. 259; Walmesley *v.* Walmesley, 69 L. T. Rep. N. S. 152, 1 Reports 529.

11. *Colorado.*— Rosenfeld *v.* Rosenfeld, 21 Colo. 16, 40 Pac. 49; Sylvis *v.* Sylvis, 11 Colo. 319, 17 Pac. 912.

District of Columbia.— Ogden *v.* Ogden, 17 App. Cas. 104; Densmore *v.* Densmore, 6 Mackey 544.

Iowa.— McKee *v.* McKee, 77 Iowa 464, 42 N. W. 372; Maben *v.* Maben, 72 Iowa 658, 34 N. W. 462; Vanduzer *v.* Vanduzer, 70 Iowa 614, 31 N. W. 956; Knight *v.* Knight, 29 Iowa 599; Cole *v.* Cole, 23 Iowa 433; Beebe *v.* Beebe, 10 Iowa 133.

Minnesota.—Marks *v.* Marks, 56 Minn. 264, 57 N. W. 651, 45 Am. St. Rep. 466, 62 Minn. 212, 64 N. W. 561.

Nevada.— Reed *v.* Reed, 4 Nev. 395.

New Hampshire.— Hart *v.* Hart, 68 N. H. 478, 39 Atl. 430; Jones *v.* Jones, 62 N. H. 463; Harratt *v.* Harratt, 7 N. H. 196, 26 Am. Dec. 730.

North Dakota.— Mahnken *v.* Mahnken, 9 N. D. 188, 82 N. W. 870.

Texas.— McKay *v.* McKay, 34 Tex. Civ. App. 629, 60 S. W. 318; Jones *v.* Jones, (Civ. App. 1897) 41 S. W. 413.

Virginia.— Myers *v.* Myers, 83 Va. 806, 6 S. E. 630; Latham *v.* Latham, 30 Gratt. 307.

Washington.— Branscheid *v.* Branscheid, 27 Wash. 368, 67 Pac. 812.

Wisconsin.— Johnson *v.* Johnson, 107 Wis. 186, 83 N. W. 291, 81 Am. St. Rep. 836.

Effect of false charges on health see *infra*, note 22.

In California the statute defines extreme cruelty as "the infliction of grievous bodily injury, or grievous mental suffering, upon the other by one party to the marriage." Consequently if the conduct causes grievous mental suffering it is ground for divorce, although it does not have an injurious effect on plaintiff's health. Smith *v.* Smith, 119 Cal. 183, 48 Pac. 730, 51 Pac. 183; Barnes *v.* Barnes, 95 Cal. 171, 30 Pac. 298, 16 L. R. A. 660 [*overruling* Waldron *v.* Waldron, 85 Cal. 251, 24 Pac. 649, 858, 9 L. R. A. 487].

Test of mental suffering.— The question is not whether the treatment could reasonably be expected seriously to injure the health or endanger the reason of a person of ordinary intelligence and mental strength, but whether it has in fact had that effect upon the health or reason of the person complaining. Robinson *v.* Robinson, 66 N. H. 600, 23 Atl. 362, 49 Am. St. Rep. 632, 15 L. R. A. 121; Mahnken *v.* Mahnken, 9 N. D. 188, 82 N. W. 870.

12. Loring *v.* Loring, 17 Tex. Civ. App. 95, 42 S. W. 642.

13. Dunlap *v.* Dunlap, 49 La. Ann. 1696, 22 So. 929; Everton *v.* Everton, 50 N. C. 202; Suggate *v.* Suggate, 5 Jur. N. S. 127, 28 L. J. P. & M. 46, 1 Swab. & Tr. 489. See also Cooper *v.* Cooper, 78 Mich. 316, 44 N. W. 381.

Lewd and indecent conduct of the husband toward a young daughter of the wife by a former husband is not "cruel and inhuman treatment" however. Cline *v.* Cline, 10 Oreg. 474.

14. Haskell *v.* Haskell, 54 Cal. 262.

15. Zumbiel *v.* Zumbiel, 69 S. W. 708, 24 Ky. L. Rep. 590; McClung *v.* McClung, 40 Mich. 493.

The wife must know of such conduct else it does not constitute cruelty. Lenning *v.* Lenning, 176 Ill. 180, 52 N. E. 46.

16. Gholston *v.* Gholston, 31 Ga. 625.

17. Van Voorhis *v.* Van Voorhis, 94 Mich. 60, 53 N. W. 964; Graecen *v.* Graecen, 2 N. J. Eq. 459; Uhlmann *v.* Uhlmann, 17 Abb. N. Cas. (N. Y.) 236; Thomas *v.* Thomas,

(4) False Charges — (a) Of Adultery. False charges of adultery made by either the husband or the wife maliciously and without probable cause constitutes legal cruelty,[18] and the same is true where a husband falsely and without justifica-

2 Coldw. (Tenn.) 123. See also Fowler *v.* Fowler, 11 N. Y. Suppl. 419, 19 N. Y. Civ. Proc. 282. See, however, Blair *v.* Blair, 106 Iowa 269, 76 N. W. 700, where it was held that the fact that a husband attempts to hire another to compromise his wife is not "such cruel and inhuman conduct as to endanger the life of the plaintiff," so as to warrant a divorce on that ground.

18. *California.*— Andrews *v.* Andrews, 120 Cal. 184, 52 Pac. 298; Powelson *v.* Powelson, 22 Cal. 358.

Indiana.— Driver *v.* Driver, (Sup. 1898) 52 N. E. 401; Graft *v.* Graft, 76 Ind. 136.

Iowa.—Haight *v.* Haight, (1900) 82 N. W. 443; Evans *v.* Evans, 82 Iowa 462, 48 N. W. 809.

Kansas.— Carpenter *v.* Carpenter, 30 Kan. 712, 2 Pac. 122, 46 Am. Rep. 108.

Kentucky.— Trapp *v.* Trapp, 46 S. W. 213, 20 Ky. L. Rep. 335.

Michigan.— Van Voorhis *v.* Van Voorhis, 94 Mich. 60, 53 N. W. 964; Whitmore *v.* Whitmore, 49 Mich. 417, 13 N. W. 800. See also Goodman *v.* Goodman, 26 Mich. 417.

Minnesota.— Wagner *v.* Wagner, 36 Minn. 239, 30 N. W. 766.

Nebraska.— Berdolt *v.* Berdolt, 56 Nebr. 792, 77 N. W. 399.

Nevada.— Kelly *v.* Kelly, 18 Nev. 49, 1 Pac. 194, 51 Am. Rep. 732.

New Jersey.— Smith *v.* Smith, 40 N. J. Eq. 566, 5 Atl. 109.

New York.— Straus *v.* Straus, 67 Hun 491, 22 N. Y. Suppl. 567; Fowler *v.* Fowler, 11 N. Y. Suppl. 419, 19 N. Y. Civ. Proc. 282; Uhlman *v.* Uhlman, 17 Abb. N. Cas. 236; Kennedy *v.* Kennedy, 60 How. Pr. 151.

Oregon.— Crow *v.* Crow, 29 Oreg. 392, 45 Pac. 761; Herberger *v.* Herberger, 16 Oreg. 327, 14 Pac. 70; Eggerth *v.* Eggerth, 15 Oreg. 626, 16 Pac. 650; McMahon *v.* McMahon, 9 Oreg. 525.

Tennessee.— Thomas *v.* Thomas, 2 Coldw. 123.

Texas.— Williams *v.* Williams, 67 Tex. 198, 2 S. W. 823; Bahn *v.* Bahn, 62 Tex. 518, 50 Am. Rep. 539; Jones *v.* Jones, 60 Tex. 451; Pinkard *v.* Pinkard, 14 Tex. 356, 65 Am. Dec. 129.

England.— See Bray *v.* Bray, 1 Hagg. Eccl. 163, 3 Eng. Eccl. 76.

See 17 Cent. Dig. tit. "Divorce," § 69.

On the contrary some courts hold that false charges of infidelity are not of themselves ground for divorce. Folmar *v.* Folmar, 69 Ala. 84; Holyoke *v.* Holyoke, 78 Me. 404, 6 Atl. 827; Cheatham *v.* Cheatham, 10 Mo. 296 [*overruling* Lewis *v.* Lewis, 5 Mo. 278]. The later case of Clinton *v.* Clinton, 60 Mo. App. 296, holding that charges of infidelity are ground for divorce is based on Lewis *v.* Lewis, 5 Mo. 278. See, however, Hooper *v.* Hooper, 19 Mo. 355.

Charges by wife.— If the false charge is made by the wife, however, the husband is not entitled to a divorce as for cruelty, unless he shows that from his temperament or calling the charges produced or were likely to produce mental suffering beyond the ordinary effect which such a charge would naturally have upon a man. McAlister *v.* McAlister, 71 Tex. 695, 10 S. W. 294.

Implied charges.— Where the husband had so conducted himself toward his wife in the street as to have her taken by a passer-by as a prostitute, this, as the leading fact in a series of wrongful acts, was accepted as adequate foundation for a divorce. Milner *v.* Milner, 31 L. J. P. 159, 4 Swab. & Tr. 240.

Charges after separation.— If the charge was made while the parties were living apart it is not cruelty. De Meli *v.* De Meli, 67 How. Pr. (N. Y.) 20, 5 N. Y. Civ. Proc. 306 (*semble*); Beach *v.* Beach, 4 Okla. 359, 46 Pac. 514. *Contra,* Smith *v.* Smith, 8 Oreg. 100.

Charges as element of cruelty.— False charges of infidelity made in connection with offensive language or acts of violence or conduct creating a reasonable apprehension of violence constitute cruelty, although the charges might not of themselves justify a divorce.

California.— Smith *v.* Smith, 119 Cal. 183, 48 Pac. 730, 51 Pac. 183; Bryan *v.* Bryan, 137 Cal. xix, 70 Pac. 304.

Connecticut.— Morehouse *v.* Morehouse, 70 Conn. 420, 39 Atl. 516.

Georgia.— Myrick *v.* Myrick, 67 Ga. 771.

Illinois.— Ward *v.* Ward, 103 Ill. 477.

Iowa.— Shook *v.* Shook, 114 Iowa 592, 87 N. W. 680; Doolittle *v.* Doolittle, 78 Iowa 691, 43 N. W. 616, 6 L. R. A. 187; Wheeler *v.* Wheeler, 53 Iowa 511, 5 N. W. 689, 36 Am. Rep. 240.

Kentucky.— Harl *v.* Harl, 73 S. W. 756, 24 Ky. L. Rep. 2163; Zumbiel *v.* Zumbiel, 69 S. W. 708, 24 Ky. L. Rep. 590.

Michigan.— Cooper *v.* Cooper, 78 Mich. 316, 44 N. W. 381; Taylor *v.* Taylor, 73 Mich. 266, 41 N. W. 413; Walsh *v.* Walsh, 61 Mich. 554, 28 N. W. 718; Palmer *v.* Palmer, 45 Mich. 150, 7 N. W. 760, 40 Am. Rep. 461.

Missouri.— Allen *v.* Allen, 31 Mo. 479.

Nebraska.— Walton *v.* Walton, 57 Nebr. 102, 77 N. W. 392.

Nevada.— Gardner *v.* Gardner, 23 Nev. 207, 45 Pac. 139.

New Jersey.— Black *v.* Black, 30 N. J. Eq. 215; Thomas *v.* Thomas, 20 N. J. Eq. 97; Cook *v.* Cook, 11 N. J. Eq. 195; Graecen *v.* Graecen, 2 N. J. Eq. 459.

New York.— Waltermire *v.* Waltermire, 110 N. Y. 183, 17 N. E. 739; Kennedy *v.* Kennedy, 73 N. Y. 369.

Pennsylvania.— Oxley *v.* Oxley, 191 Pa. St. 434, 43 Atl. 340; Mason *v.* Mason, 131 Pa. St. 161, 18 Atl. 1021.

Tennessee.— Lyle *v.* Lyle, 86 Tenn. 372, 6 S. W. 878.

tion and therefore maliciously denies the paternity of a child to which his wife has given birth.[19] If the false accusations are wantonly and maliciously made in a pleading in a divorce suit and thus become a matter of public record, their formal nature aggravates the cruelty.[20] However, false charges of adultery do not constitute cruelty unless made in bad faith and without grounds for believing them to be true. If the person accused had been guilty of indiscreet conduct so that the other spouse was justified in believing the charge to be true, the accusation, although false, affords no ground for divorce.[21]

(b) Of Other Crimes. A false and malicious charge of crime resulting in mental suffering to the injured party constitutes cruelty,[22] unless the charge has

Texas.— Cartwright *v.* Cartwright, 18 Tex. 626.

Washington.— Lee *v.* Lee, 3 Wash. 236, 28 Pac. 355.

19. Driver *v.* Driver, (Ind. Sup. 1898) 52 N. E. 401; Avery *v.* Avery, 33 Kan. 1, 5 Pac. 418, 52 Am. Rep. 523; Green *v.* Green, 131 N. C. 533, 42 S. E. 954, 92 Am. St. Rep. 788; Lyle *v.* Lyle, 86 Tenn. 372, 6 S. W. 878.

20. *California.*— De Haley *v.* Haley, 74 Cal. 489, 16 Pac. 248, 5 Am. St. Rep. 460.

Kentucky.—Rogers *v.* Rogers, 17 S. W. 573, 13 Ky. L. Rep. 526.

Minnesota.— Wagner *v.* Wagner, 36 Minn. 239, 30 N. W. 766.

Oregon.— Smith *v.* Smith, 8 Oreg. 100.

Pennsylvania.— Barber *v.* Barber, 2 Am. L. J. N. S. 193.

Texas.— See Jones *v.* Jones, 60 Tex. 451; Simons *v.* Simons, 13 Tex. 468, both cases holding that false charges in a bill of divorce in connection with false charges otherwise made constitute cruelty.

Charge of antenuptial pregnancy.— A false and malicious charge by a husband in a cross bill filed by him for divorce that his wife was pregnant by someone other than himself when he married her and that she concealed the fact from him tends to cause the wife "grievous mental suffering" and is a sufficient ground to sustain a subsequent bill by the wife for divorce. Haley *v.* Haley, (Cal. 1887) 14 Pac. 92. *Compare* Blair *v.* Blair, 106 Iowa 269, 76 N. W. 700, where it was held that the conduct of the husband in making public in his pleadings and in the trial the fact that the wife had lived in adultery with another man before their marriage was not such cruel and inhuman treatment as to authorize a divorce.

21. *Georgia.*— Fuller *v.* Fuller, 108 Ga. 256, 33 S. E. 865.

Illinois.— Nullmeyer *v.* Nullmeyer, 49 Ill. App. 573.

Iowa.— Coulthard *v.* Coulthard, 91 Iowa 742, 60 N. W. 213; Evans *v.* Evans, 82 Iowa 462, 48 N. W. 809. *Compare* Blair *v.* Blair, 106 Iowa 269, 76 N. W. 700.

Kansas.— Masterman *v.* Masterman, 58 Kan. 748, 51 Pac. 277.

Missouri.— Ashburn *v.* Ashburn, 101 Mo. App. 365, 74 S. W. 394.

New York.— Woodrick *v.* Woodrick, 141 N. Y. 457, 36 N. E. 395 [*affirming* 20 N. Y. Suppl. 468]; Kennedy *v.* Kennedy, 73 N. Y. 369; De Meli *v.* De Meli, 67 How. Pr. 20, 5 N. Y. Civ. Proc. 306.

Oklahoma.— Beach *v.* Beach, 4 Okla. 359, 46 Pac. 514.

Oregon.—Boon *v.* Boon, 12 Oreg. 437, 8 Pac. 450.

Texas.— Loring *v.* Loring, 17 Tex. Civ. App. 95, 42 S. W. 642.

Washington.— Blurock *v.* Blurock, 4 Wash. 495, 30 Pac. 637. See, however, Scoland *v.* Scoland, 4 Wash. 118, 29 Pac. 930.

Belief in truth of charges.— The fact that the husband had reasonable grounds for believing in the truth of the charges is no defense, however, if in fact he did not believe in them. Walker *v.* Walker, 77 L. T. Rep. N. S. 715.

Presumptions as to malice and probable cause.— If a false charge of infidelity is made without probable cause, it is presumed to be malicious. Loring *v.* Loring, 17 Tex. Civ. App. 95, 42 S. W. 642. Where the charge was made in a bill for divorce, and the accused has been exonerated by the verdict or the bill has been dismissed for want of prosecution, the burden rests on complainant to show probable cause and good faith. Wagner *v.* Wagner, 36 Minn. 239, 30 N. W. 766. See also Jones *v.* Jones, 60 Tex. 451.

22. Palmer *v.* Palmer, 45 Mich. 150, 7 N. W. 760, 40 Am. Rep. 461 (charge of incest); Jones *v.* Jones, 62 N. H. 463 (charge of bigamy); Wright *v.* Wright, 6 Tex. 3 (charge of murder); Bray *v.* Bray, 1 Hagg. Eccl. 163, 3 Eng. Eccl. 76 (charge of incest).

Impairment of health.—If the false charges do not result in an actual or threatened impairment of health the person accused is not entitled to a divorce. Kuhl *v.* Kuhl, 124 Cal. 57, 56 Pac. 629; Small *v.* Small, 57 Ind. 568; Burney *v.* Burney, 11 Tex. Civ. App. 174, 32 S. W. 328; McDougall *v.* McDougall, 5 Wash. 802, 32 Pac. 749.

Charges rendering marriage relation insupportable.— The fact that a wife while sick expressed a fear that her husband intended to poison her and consequently left him does not entitle him to a divorce as for cruelty rendering their living together insupportable. Sapp *v.* Sapp, 71 Tex. 348, 9 S. W. 258.

Charges as element of cruelty.— False charges of crime may in connection with other causes amount to cruelty, even where they are insufficient of themselves to constitute

some foundation in fact, as where the circumstances are such that a husband is justified in accusing his wife of an attempt to poison him.[23]

(c) Of Insanity. If one spouse falsely charges the other with being insane it may constitute cruelty,[24] unless the charge is made in good faith upon a belief in its truth.[25]

(d) Of Physical Incapacity. A false and malicious imputation of incapacity for the marital relation, causing mental suffering to the injured party and consequent impairment of health, is cruelty for which a divorce may be granted.[26]

(5) Offensive Language. A systematic and continued use by the husband of vile, profane, and unkind language, in the presence of and toward the wife, causing mental suffering and threatening permanent injury to her health, entitles her to a divorce.[27] However, mere rudeness of language, petulance of manners, austerity of temper, or an occasional sally of temper which does not injure or threaten to injure the health of the complaining party does not constitute legal cruelty.[28]

that offense. Marsh *v.* Marsh, 64 Iowa 667, 21 N. W. 130; Smith *v.* Smith, 40 N. J. Eq. 566, 5 Atl. 109; Nogees *v.* Nogees, 7 Tex. 538, 58 Am. Dec. 78.

23. Disborough *v.* Disborough, (N. J. Ch. 1893) 26 Atl. 852.

24. Andrews *v.* Andrews, 120 Cal. 184, 52 Pac. 298.

25. Reichert *v.* Reichert, 124 Mich. 694, 83 N. W. 1008.

26. Berdolt *v.* Berdolt, 56 Nebr. 792, 77 N. W. 399; Van Arsdalen *v.* Van Arsdalen, 30 N. J. Eq. 359.

27. *California.*— Andrews *v.* Andrews, 120 Cal. 184, 52 Pac. 298; Powelson *v.* Powelson, 22 Cal. 358.

Colorado.— Rosenfeld *v.* Rosenfeld, 21 Colo. 16, 40 Pac. 49.

Georgia.—Gholston *v.* Gholston, 31 Ga. 625.

Iowa.— Berry *v.* Berry, 115 Iowa 543, 88 N. W. 1075.

Louisiana.— Tourné *v.* Tourné, 9 La. 452.

Michigan.—Goodman *v.* Goodman, 26 Mich. 417.

Minnesota.—Marks *v.* Marks, 56 Minn. 264, 57 N. W. 651, 45 Am. St. Rep. 466, 62 Minn. 212, 64 N. W. 561.

Missouri.— Allen *v.* Allen, 31 Mo. 479.

New York.— Fitzpatrick *v.* Fitzpatrick, 21 Misc. 378, 47 N. Y. Suppl. 737.

Oregon.— Ryan *v.* Ryan, 30 Oreg. 226, 47 Pac. 101.

Pennsylvania.— Braun *v.* Braun, 194 Pa. St. 287, 44 Atl. 1096, 75 Am. St. Rep. 699; Dietrick *v.* Dietrick, 14 Phila. 649.

See 17 Cent. Dig. tit. "Divorce," § 68.

"Extreme cruelty" as used in the statutes of some states cannot consist of abusive language alone. Vignos *v.* Vignos, 15 Ill. 186; Hill *v.* Hill, 2 Mass. 150.

Offensive language as element of cruelty.— Offensive language may in connection with actual or threatened violence constitute cruelty, even where it might not of itself be sufficient.

California.— Johnson *v.* Johnson, (1894) 35 Pac. 637.

Illinois.— Sharp *v.* Sharp, 116 Ill. 509, 6 N. E. 15.

Iowa.— Schichtl *v.* Schichtl, 88 Iowa 210, 55 N. W. 309; Beebe *v.* Beebe, 10 Iowa 133.

Louisiana.— Duhon *v.* Duhon, 110 La. 240, 34 So. 428; Moclair *v.* Leahy, 36 La. Ann. 583.

Michigan.— Stark *v.* Stark, 129 Mich. 153, 88 N. W. 391; Thompson *v.* Thompson, 79 Mich. 124, 44 N. W. 424; Friend *v.* Friend, 53 Mich. 543, 19 N. W. 176, 51 Am. Rep. 161.

Mississippi.— Johns *v.* Johns, 57 Miss. 530.

New Hampshire.— Harratt *v.* Harratt, 7 N. H. 196, 26 Am. Dec. 730.

New Jersey.— Thomas *v.* Thomas, 20 N. J. Eq. 97.

New York.—Waltermire *v.* Waltermire, 110 N. Y. 183, 17 N. E. 739; Davies *v.* Davies, 55 Barb. 130, 37 How. Pr. 45; Whispell *v.* Whispell, 4 Barb. 217.

North Dakota.— De Roche *v.* De Roche, (1903) 94 N. W. 767.

Ohio.— Beatty *v.* Beatty, Wright 557.

Rhode Island.— Wilson *v.* Wilson, 16 R. I. 122, 13 Atl. 102.

Tennessee.— Payne *v.* Payne, 4 Humphr. 500, 40 Am. Dec. 660.

Texas.— Taylor *v.* Taylor, 18 Tex. 574.

Virginia.— Kinsey *v.* Kinsey, 90 Va. 16, 17 S. E. 819; Myers *v.* Myers, 83 Va. 806, 6 S. E. 630.

Washington.— Denison *v.* Denison, 4 Wash. 705, 30 Pac. 1100.

Wisconsin.—Hacker *v.* Hacker, 90 Wis. 325, 63 N. W. 278; Wachholz *v.* Wachholz, 75 Wis. 377, 44 N. W. 506; Freeman *v.* Freeman, 31 Wis. 235; Pillar *v.* Pillar, 22 Wis. 658.

See 17 Cent. Dig. tit. "Divorce," § 83.

28. *Connecticut.*— Shaw *v.* Shaw, 17 Conn. 189.

Illinois.— Duberstein *v.* Duberstein, 171 Ill. 133, 49 N. E. 316; Turbitt *v.* Turbitt, 21 Ill. 438; Fritts *v.* Fritts, 36 Ill. App. 31.

Iowa.— Potter *v.* Potter, 75 Iowa 211, 39 N. W. 270.

Kansas.— Masterman *v.* Masterman, 58 Kan. 748, 51 Pac. 277.

Kentucky.— Gains *v.* Gains, (1892) 19 S. W. 929; Finley *v.* Finley, 9 Dana 52, 33 Am. Dec. 528.

Massachusetts.— Freeborn *v.* Freeborn, 168 Mass. 50, 46 N. E. 428.

Michigan.— German *v.* German, 57 Mich. 256, 23 N. W. 802; Johnson *v.* Johnson, 49 Mich. 639, 14 N. W. 670.

(6) UNNATURAL ACTS — (a) MASTURBATION. The practice of masturbation in the voluntary presence of the wife is not cruelty, although her health may be injured by its effect on her feelings.[29]

(b) SODOMY. The commission of sodomy by a husband is extreme cruelty toward the wife.[30]

(v) *CONDUCT IMPOSING HARDSHIP OR PRIVATION* — (A) *Failure to Provide Necessaries.* Extreme neglect of a wife by the husband that inevitably tends to destroy her peace of mind and ultimately to impair her health warrants a decree of divorce,[31] unless the neglect was the result of adverse circumstances.[32]

(B) *Failure to Provide Medical Care.* A husband who negligently or wilfully refuses to provide for a wife such medicines and medical attendance as her condition may warrant and as may be within his means to afford is guilty of cruelty for which the wife is entitled to a divorce.[33] So if a wife wilfully and maliciously permits the husband to suffer for want of proper nursing when he is solely dependent on her care and has not the means to employ a nurse, it is cruelty for which he is entitled to relief.[34]

(C) *Compelling Wife to Labor.* Compelling a wife to perform work not suitable to her health and condition is cruelty entitling her to a divorce.[35]

Nebraska.— Shuster *v.* Shuster, (1902) 92 N. W. 203; Gleason *v.* Gleason, 16 Nebr. 15, 19 N. W. 784.

New Jersey.— Hewitt *v.* Hewitt, (Ch. 1897), 37 Atl. 1011; Coles *v.* Coles, 32 N. J. Eq. 547; Davis *v.* Davis, 19 N. J. Eq. 180.

New York.— De Meli *v.* De Meli, 67 How. Pr. 20, 5 N. Y. Civ. Proc. 306.

Pennsylvania.— Richards *v.* Richards, 1 Grant 389; Dietrick *v.* Dietrick, 14 Phila. 649; Sowers *v.* Sowers, 11 Phila. 213.

Tennessee.— Shell *v.* Shell, 2 Sneed 716; Hagood *v.* Hagood, (Ch. App. 1897) 48 S. W. 122.

Texas.— Scott *v.* Scott, 61 Tex. 119.

29. W. *v.* W., 141 Mass. 495, 6 N. E. 541, 55 Am. Rep. 491.

30. Anonymous, 3 Ohio S. & C. Pl. Dec. 450, 2 Ohio N. P. 342.

31. *California.*— See Bryan *v.* Bryan, (1902) 70 Pac. 304.

Indiana.— Eastes *v.* Eastes, 79 Ind. 363.

Iowa.— Harnett *v.* Harnett, 55 Iowa 45, 7 N. W. 394.

Kentucky.— Irwin *v.* Irwin, 96 Ky. 318, 28 S. W. 664, 30 S. W. 417, 16 Ky. L. Rep. 657; Wilson *v.* Wilson, 38 S. W. 140, 18 Ky. L. Rep. 741.

Louisiana.— Moclair *v.* Leahy, 36 La. Ann. 583.

Michigan.— Cary *v.* Cary, 106 Mich. 646, 64 N. W. 510. See also Whitacre *v.* Whitacre, 64 Mich. 232, 31 N. W. 327.

Ohio.— Jones *v.* Jones, Wright 155.

See 17 Cent. Dig. tit. "Divorce," § 71.

Contra.— Maddox *v.* Maddox, 189 Ill. 152, 59 N. E. 599, 82 Am. St. Rep. 431, 52 L. R. A. 628.

Wantonness.— It is not enough that the husband, being of sufficient ability, refuses to supply the wife with the necessaries of life, but the refusal or neglect must be done grossly, or wantonly and cruelly. Faller *v.* Faller, 10 Nebr. 144, 4 N. W. 1036. *Compare* Myrick *v.* Myrick, 67 Ga. 771; Whitacre *v.* Whitacre, 64 Mich. 232, 31 N. W. 327.

32. *Iowa.*— Rivers *v.* Rivers, 60 Iowa 378, 14 N. W. 774.

Louisiana.— Halls *v.* Cartwright, 18 La. Ann. 414.

Missouri.— Freeman *v.* Freeman, 94 Mo. App. 504, 68 S. W. 389.

Pennsylvania.— Sowers *v.* Sowers, 11 Phila. 213.

Texas.— Loring *v.* Loring, 17 Tex. Civ. App. 95, 42 S. W. 642.

33. *Colorado.*— Sylvis *v.* Sylvis, 11 Colo. 319, 17 Pac. 912.

Indiana.— See Mercer *v.* Mercer, 114 Ind. 558, 17 N. E. 182.

Iowa.— Schichtl *v.* Schichtl, 88 Iowa 210, 55 N. W. 309; Dolittle *v.* Dolittle, 78 Iowa 691, 43 N. W. 616, 6 L. R. A. 187.

Kansas.— Gibbs *v.* Gibbs, 18 Kan. 419.

Louisiana.— Moclair *v.* Leahy, 36 La. Ann. 583.

Texas.— Eastman *v.* Eastman, 75 Tex. 473, 12 S. W. 1107; Miller *v.* Miller, 72 Tex. 250, 12 S. W. 167; Wright *v.* Wright, 6 Tex. 3.

England.— Evans *v.* Evans, 1 Hagg. Const. 35, 4 Eng. Eccl. 310; Dysart *v.* Dysart, 1 Rob. Eccl. 106.

34. Bonney *v.* Bonney, 175 Mass. 7, 55 N. E. 461, 78 Am. St. Rep. 473, holding, however, that the husband is not entitled to a divorce if he had the means to hire proper attention.

35. *Iowa.*— Caruthers *v.* Caruthers, 13 Iowa 266.

Michigan.— De Zwaan *v.* De Zwaan, 91 Mich. 279, 51 N. W. 998. See also Stark *v.* Stark, 129 Mich. 153, 88 N. W. 391.

New York.— Gloster *v.* Gloster, 23 N. Y. App. Div. 336, 48 N. Y. Suppl. 160.

Texas.— Huilker *v.* Huilker, 64 Tex. 1.

Wisconsin.— Pillar *v.* Pillar, 22 Wis. 658.

Customary labor.— If the wife has been bred to farm life, it is not cruel treatment endangering her life to require her to aid in farm labor. Detrick's Appeal, 117 Pa. St. 452, 11 Atl. 882.

Voluntary labor.— If the work, although

(D) *Involving Husband in Difficulties.* A wife's extravagance and dishonesty in money matters involving the husband in great difficulties is no cause for a divorce as constituting cruel and inhuman treatment.[36]

(VI) *Conduct Directly Injuring Health*— (A) *Communication of Disease.* The communication of a venereal disease by a husband to his wife is such cruelty on his part as will entitle her to a divorce,[37] unless he was ignorant of his condition[38] or unless she consented to the intercourse with knowledge of the disease and its nature.[39]

(B) *Sexual Excess.* Sexual intercourse persisted in by the husband against the will of the wife to the injury of her health is cruelty affording her ground for divorce,[40] if he knows or has reason to know the injury and suffering which his demands will inflict upon her.[41]

beyond the wife's strength, was done by her voluntarily, the husband is not to be charged with cruelty. Beyer *v.* Beyer, 50 Wis. 254, 6 N. W. 807, 36 Am. Rep. 848.

36. Weaver *v.* Weaver, 74 N. Y. App. Div. 591, 77 N. Y. Suppl. 568.

37. *California.*— Venzke *v.* Venzke, 94 Cal. 225, 29 Pac. 449.

Connecticut.— Morehouse *v.* Morehouse, 70 Conn. 420, 39 Atl. 516.

Michigan.— Holthoefer *v.* Holthoefer, 47 Mich. 260, 643, 11 N. W. 150; Canfield *v.* Canfield, 34 Mich. 519.

New Jersey.— Cook *v.* Cook, 32 N. J. Eq. 475.

New York.— Anonymous, 17 Abb. N. Cas. 231.

Oregon.— Rehart *v.* Rehart, (1891) 25 Pac. 775.

Pennsylvania.— McMahen *v.* McMahen, 186 Pa. St. 485, 40 Atl. 795, 41 L. R. A. 602, holding that where a wife was innocently contaminated with syphilis by her husband before marriage, and after marriage was kept by him constantly afflicted with it, until after enduring it for five years her life was endangered by longer living with him, it constitutes cruel treatment endangering her life, or indignities to her person rendering her condition intolerable and life burdensome, and is hence ground for divorce.

Rhode Island.— See Wilson *v.* Wilson, 16 R. I. 122, 13 Atl. 102.

Texas.— Hanna *v.* Hanna, 3 Tex. Civ. App. 51, 21 S. W. 720.

England.— Morphett *v.* Morphett, L. R. 1 P. & D. 702, 35 L. J. P. & M. 23, 19 L. T. Rep. N. S. 801, 17 Wkly. Rep. 471; Boardman *v.* Boardman, L. R. 1 P. & D. 233, 14 Wkly. Rep. 1024; Brown *v.* Brown, L. R. 1 P. & D. 46, 11 Jur. N. S. 1027, 35 L. J. P. & M. 13, 13 L. T. Rep. N. S. 645, 14 Wkly. Rep. 149; Collett *v.* Collett, 1 Curt. Eccl. 678; Ciocci *v.* Ciocci, 1 Spinks 121, 26 Eng. L. & Eq. 604.

Although the disease was not communicated to the wife, yet where the husband, being afflicted before marriage, intentionally withheld the fact until after marriage, it constituted cruelty, since the knowledge of the fact when brought home to the wife was calculated to make her miserable to such a degree as to endanger her life or health or create a reasonable apprehension thereof. Leach *v.* Leach, (Me. 1887) 8 Atl. 349.

38. Long *v.* Long, 9 N. C. 189.

Knowledge of disease.— The husband is presumed to be aware of his condition. Boardman *v.* Boardman, L. R. 1 P. & D. 233, 14 Wkly. Rep. 1024; Brown *v.* Brown, L. R. 1 P. & D. 46, 11 Jur. N. S. 1027, 35 L. J. P. & M. 13, 13 L. T. Rep. N. S. 645, 14 Wkly. Rep. 149.

Wilfulness.—The communication of a venereal disease to the wife must have been wilful on the part of the husband to establish it as cruelty. Brown *v.* Brown, L. R. 1 P. & D. 46, 11 Jur. N. S. 1027, 35 L. J. P. & M. 13, 13 L. T. Rep. N. S. 645, 14 Wkly. Rep. 149; Ciocci *v.* Ciocci, 1 Spinks 121, 26 Eng. L. & Eq. 604.

39. Rehart *v.* Rehart, (Oreg. 1891) 25 Pac. 775; N. *v.* N., 9 Jur. N. S. 1203, 9 L. T. Rep. N. S. 265, 3 Swab. & Tr. 234.

Continued cohabitation is excused, however, where the wife is ignorant of the nature of the husband's disease. Wilson *v.* Wilson, 16 R. I. 122, 13 Atl. 102.

40. *Connecticut.*— Mayhew *v.* Mayhew, 61 Conn. 233, 23 Atl. 966, 29 Am. St. Rep. 195.

Illinois.— Youngs *v.* Youngs, 33 Ill. App. 223 [*affirmed* in 130 Ill. 230, 22 N. E. 806, 17 Am. St. Rep. 313, 6 L. R. A. 548].

Michigan.— Walsh *v.* Walsh, 61 Mich. 554, 28 N. W. 718.

Minnesota.— Grant *v.* Grant, 53 Minn. 181, 54 N. W. 1059.

Missouri.— Maget *v.* Maget, 85 Mo. App. 6.

New Hampshire.— Melvin *v.* Melvin, 58 N. H. 569, 42 Am. Rep. 605.

New Jersey.— English *v.* English, 27 N. J. Eq. 579; Moores *v.* Moores, 16 N. J. Eq. 275.

Pennsylvania.— See Oxley *v.* Oxley, 191 Pa. St. 474, 43 Atl. 340.

Tennessee.— Gardner *v.* Gardner, 104 Tenn. 410, 58 S. W. 342, 78 Am. St. Rep. 924.

Washington.— McAllister *v.* McAllister, 28 Wash. 613, 69 Pac. 119.

See 17 Cent. Dig. tit. "Divorce," § 73.

Threatened injury.—The mere fact that the wife had reason to fear that the husband would compel her to occupy the same bed with him regardless of the consequences to her health will not entitle her to a divorce, where she had no reason to fear personal violence of any other character. Shaw *v.* Shaw, 17 Conn. 189.

41. Mayhew *v.* Mayhew, 61 Conn. 233, 23 Atl. 966, 29 Am. St. Rep. 195; Youngs *v.*

(VII) *HABITUAL INTEMPERANCE.* Habitual intemperance in the use of liquors or opiates does not of itself constitute cruelty.[42]

(VIII) *REFUSAL TO COHABIT AND DESERTION.* In the absence of proof that the health of the complaining party is either injured or threatened, the refusal of the other party to cohabit is not legal cruelty,[43] nor does desertion amount to cruelty.[44]

5. DESERTION — a. Statutory Provisions. Desertion or abandonment for a period varying from one to five years is generally prescribed by statute as a ground for divorce, either absolute or limited or both.[45]

b. What Constitutes — (I) *IN GENERAL.* Desertion or abandonment consists in the voluntary separation of one spouse from the other, for the prescribed time, without the latter's consent, without justification, and with the intention of not returning.[46]

Youngs, 33 Ill. App. 223 [*affirmed* in 130 Ill. 230, 22 N. E. 806, 17 Am. St. Rep. 313, 6 L. R. A. 548].

42. *California.*— Haskell *v.* Haskell, 54 Cal. 262.

Georgia.— Ring *v.* Ring, 118 Ga. 183, 44 S. E. 861, 62 L. R. A. 878.

Mississippi.—Waskam *v.* Waskam, 31 Miss. 154.

New York.— Anonymous, 17 Abb. N. Cas. 231.

Pennsylvania.— Holland *v.* Holland, 4 Leg. Gaz. 372.

See 17 Cent. Dig. tit. "Divorce," § 78.

Intemperance as element of cruelty.— Misconduct caused directly or indirectly by habitual drunkenness or existing conjunctively therewith may constitute cruelty.

Alabama.— Hughes *v.* Hughes, 19 Ala. 307.

Iowa.— Wheeler *v.* Wheeler, 53 Iowa 511, 5 N. W. 689, 36 Am. Rep. 240.

Nevada.— Gardner *v.* Gardner, 23 Nev. 207, 45 Pac. 139.

Texas.— Eastman *v.* Eastman, 75 Tex. 473, 12 S. W. 1107; Camp *v.* Camp, 18 Tex. 528.

Virginia.— Kinsey *v.* Kinsey, 90 Va. 16, 17 S. E. 819.

Washington.— Lee *v.* Lee, 3 Wash. 236, 28 Pac. 355.

Wisconsin.— Wachholz *v.* Wachholz, 75 Wis. 377, 44 N. W. 506.

England.— White *v.* White, 6 Jur. N. S. 28, 1 L. T. Rep. N. S. 197, 1 Swab. & Tr. 591.

43. *Maine.*— Stewart *v.* Stewart, 78 Me. 548, 7 Atl. 473, 57 Am. Rep. 822.

Massachusetts.— Cowles *v.* Cowles, 112 Mass. 298.

New Jersey.— Disborough *v.* Disborough, (Ch. 1893) 26 Atl. 852; Burton *v.* Burton, 52 N. J. Eq. 215, 27 Atl. 825; Reid *v.* Reid, 21 N. J. Eq. 331.

Ohio.— McKinney *v.* McKinney, 9 Ohio S. & C. Pl. Dec. 655.

Pennsylvania.— Magill *v.* Magill, 3 Pittsb. 25; Klopfer's Appeal, 1 Mona. 81.

Wisconsin.— Schoessow *v.* Schoessow, 83 Wis. 553, 53 N. W. 856.

England.— D'Aguilar *v.* D'Aguilar, 1 Hagg. Eccl. 773, 3 Eng. Eccl. 329.

44. Smith *v.* Smith, 62 Cal. 466; Ruby *v.* Ruby, 29 Ind. 174; Warren *v.* Warren, 3 Mass. 321; Murnan *v.* Murnan, 128 Mich. 680, 87 N. W. 1039.

45. See statutes of different states.

46. *California.*— Morrison *v.* Morrison, 20 Cal. 431.

Colorado.— Stein *v.* Stein, 5 Colo. 55.

Connecticut.— Bennett *v.* Bennett, 43 Conn. 313.

Illinois.— Elzas *v.* Elzas, 171 Ill. 632, 49 N. E. 717.

Kentucky.— Orr *v.* Orr, 8 Bush 156.

Maryland.— Lynch *v.* Lynch, 33 Md. 328.

Massachusetts.— Magrath *v.* Magrath, 103 Mass. 577, 4 Am. Rep. 579.

Michigan.— Rose *v.* Rose, 50 Mich. 92, 14 N. W. 711; Porritt *v.* Porritt, 18 Mich. 420.

Missouri.— Hall *v.* Hall, 77 Mo. App. 600; Davis *v.* Davis, 60 Mo. App. 545; Droege *v.* Droege, 55 Mo. App. 481.

Nebraska.— Kikel *v.* Kikel, 25 Nebr. 256, 41 N. W. 180.

New Hampshire.— Davis *v.* Davis, 37 N. H. 191.

New Jersey.— Sergent *v.* Sergent, 33 N. J. Eq. 204.

New York.— Williams *v.* Williams, 130 N. Y. 193, 29 N. E. 98, 27 Am. St. Rep. 517, 14 L. R. A. 220.

Ohio.— Millinor *v.* Milliner, Wright 138.

Oregon.— Ogilvie *v.* Ogilvie, 37 Oreg. 171, 61 Pac. 627; Sisemore *v.* Sisemore, 17 Oreg. 542, 21 Pac. 820.

Pennsylvania.— Ferree *v.* Ferree, 19 Pa. Co. Ct. 67; Clark *v.* Clark, 2 Chest. Co. Rep. 38; Bean *v.* Bean, 11 Lanc. Bar 138; Broughton *v.* Broughton, 1 Del. Co. 273.

Texas.— Besch *v.* Besch, 27 Tex. 390.

Virginia.— Latham *v.* Latham, 30 Gratt. 307.

West Virginia.— Martin *v.* Martin, 33 W. Va. 695, 11 S. E. 12; Alkire *v.* Alkire, 33 W. Va. 517, 11 S. E. 11.

See 17 Cent. Dig. tit. "Divorce," §§ 107, 120, 122.

Wilful and obstinate desertion.— Where the offense is described by statute as "wilful and obstinate desertion," it is essential that the party complained of left voluntarily and against the will of complainant, and that she remained away when it was her duty to return. Wood *v.* Wood, 63 N. J. Eq. 688, 53 Atl. 51; Sweeney *v.* Sweeney, 62 N. J. Eq. 357, 50 Atl. 785; Bowlby *v.* Bowlby, 25 N. J. Eq. 406; Cornish *v.* Cornish, 23 N. J. Eq. 208.

(II) *Separation*—(A) *In General.* There must be an actual breaking off of the matrimonial cohabitation to constitute a desertion.[47] There may, however, be an actual cessation of matrimonial cohabitation, notwithstanding that the guilty party occasionally visits the other,[48] unless during those visits the parties cohabit as man and wife.[49] So there may be a cessation of cohabitation and a consequent desertion, in spite of the fact that the husband contributes toward the wife's support,[50] in the absence of statute to the contrary.[51]

(B) *Refusal of Conjugal Rights.* In some states a persistent and continued refusal of marital intercourse by one of the spouses without cause or justification constitutes desertion, although the parties still live beneath the same roof.[52] By the weight of authority, however, the mere withdrawal from the marital bed is not sufficient to constitute the offense; there must be a substantial abandonment of other marital duties also.[53]

(C) *Change of Domicile*—(1) In General. It is the right of the husband, without the consent of the wife, to establish the family domicile, and it is the duty of the wife to follow him.[54] By establishing a new domicile he does not therefore desert the wife,[55] provided that he invites her to come there.[56] Since the wife has no right to determine the family domicile, an expressly avowed permanent change of domicile by her without the consent of her husband and without cause constitutes desertion.[57]

Mere cessation of matrimonial cohabitation is not necessarily desertion.

Alabama.— Gray *v.* Gray, 15 Ala. 779.

Florida.— Crawford *v.* Crawford, 17 Fla. 180.

Iowa.— Atkinson *v.* Atkinson, 67 Iowa 364, 25 N. W. 284.

New Jersey.—Moak *v.* Moak, (Ch. 1901) 48 Atl. 394; Bourquin *v.* Bourquin, 33 N. J. Eq. 7; Cook *v.* Cook, 13 N. J. Eq. 263; Jennings *v.* Jennings, 13 N. J. Eq. 38; Ford *v.* Ford, 6 N. J. Eq. 542.

Pennsylvania.—Graham *v.* Graham, 153 Pa. St. 450, 25 Atl. 766; Hannigan *v.* Hannigan, 14 York Leg. Rec. 18.

Virginia.— Bailey *v.* Bailey, 21 Gratt. 43.

See, however, Elzas *v.* Elzas, 171 Ill. 632, 49 N. E. 717; Fritz *v.* Fritz, 138 Ill. 436, 28 N. E. 1058, 32 Am. St. Rep. 156, 14 L. R. A. 685; Carter *v.* Carter, 62 Ill. 439.

Justification as a defense see *infra*, VIII, C, 3.

47. Rie *v.* Rie, 34 Ark. 37; Powers' Appeal, 120 Pa. St. 320, 14 Atl. 60; Bailey *v.* Bailey, 21 Gratt. (Va.) 43.

48. Rie *v.* Rie, 34 Ark. 37 (where the wife visited the house of her husband to look after her children, and while there engaged in household duties); Clearman *v.* Clearman, 2 N. Y. Suppl. 356, 15 N. Y. Civ. Proc. 313 (where a husband had visited the wife's apartments every day to see their children).

49. See *infra*, VII, C, 5, b, (III), (A).

50. Elzas *v.* Elzas, 171 Ill. 632, 49 N. E. 717; Magrath *v.* Magrath, 103 Mass. 577, 4 Am. Rep. 579; Gates *v.* Gates, (N. J. Err. & App. 1900) 46 Atl. 1100; Bourquin *v.* Bourquin, 33 N. J. Eq. 7; Palmer *v.* Palmer, 22 N. J. Eq. 88; Davis *v.* Davis, 19 N. J. Eq. 180; Johnston *v.* Johnston, Wright (Ohio) 454.

51. F. *v.* F., 1 N. H. 198; Ruckman *v.* Ruckman, 58 How. Pr. (N. Y.) 278; Ahrenfeldt *v.* Ahrenfeldt, Hoffm. (N. Y.) 47.

52. Fink *v.* Fink, 137 Cal. 559, 70 Pac. 628; Whitfield *v.* Whitfield, 89 Ga. 471, 15 S. E. 543; Evans *v.* Evans, 93 Ky. 510, 20 S. W. 605, 14 Ky. L. Rep. 628; Heermance *v.* James, 47 Barb. (N. Y.) 120, 126.

53. *District of Columbia.*—Steele *v.* Steele, 1 MacArthur 505.

Illinois.— Fritz *v.* Fritz, 138 Ill. 436, 28 N. E. 1058, 32 Am. St. Rep. 156, 14 L. R. A. 685.

Minnesota.— Segelbaum *v.* Segelbaum, 39 Minn. 258, 39 N. W. 492.

New Jersey.— Anonymous, 52 N. J. Eq. 349, 28 Atl. 467.

Virginia.—Throckmorton *v.* Throckmorton, 86 Va. 768, 11 S. E. 289.

Wisconsin.— Schoessow *v.* Schoessow, 83 Wis. 553, 53 N. W. 856.

See 17 Cent. Dig. tit. "Divorce," § 128.

Utter desertion.— A refusal of sexual intercourse while marital cohabitation continues does not amount to "utter desertion" within a statute declaring such desertion to be a cause for divorce. Stewart *v.* Stewart, 78 Me. 548, 7 Atl. 473, 57 Am. Rep. 822; Southwick *v.* Southwick, 97 Mass. 327, 93 Am. Dec. 95.

Restitution of conjugal rights will not be decreed because of a total and absolute refusal of matrimonial intercourse. A cessation of cohabitation must be shown. Orme *v.* Orme, 2 Add. Eccl. 382, 2 Eng. Eccl. 354; Forster *v.* Forster, 1 Hagg. Const. 144, 4 Eng. Eccl. 358; Weldon *v.* Weldon, 9 P. D. 52, 53 L. J. P. 9, 32 Wkly. Rep. 231.

54. See, generally, Domicile.

55. Schuman *v.* Schuman, 93 Mo. App. 99.

56. McLean *v.* Janin, 45 La. Ann. 664, 12 So. 747.

57. *California.*— Carey *v.* Carey, 73 Cal. 630, 15 Pac. 313.

Kentucky.— Gains *v.* Gains, (1892) 19 S. W. 929; Watkinson *v.* Watkinson, 12 B. Mon. 210.

(2) Refusal to Adopt Husband's Domicile — (a) General Rule. If the husband establishes a matrimonial domicile[58] and makes a peremptory and unconditional demand upon the wife to live with him there,[59] her refusal to do so, if without justification and persisted in for the statutory time, constitutes desertion.[60]

(b) Exceptions. The application of this rule may be limited by the condition of the wife's health, by the state of civilization in the place where the new domicile is established,[61] and by the hardship incident to the wife's journeying there. It has been held for example that a wife's refusal to follow her husband to a foreign country is not in itself a wilful and malicious desertion, since the circumstances may be such as to justify her refusal.[62]

(d) *Separation Caused by Defendant* — (1) Turning Wife Out of Doors. If a husband turns the wife out of doors she is entitled to a divorce as for desertion upon the expiration of the statutory period.[63]

(2) Misconduct Causing Complainant to Leave — (a) In General. The spouse who by his or her act intentionally brings the cohabitation to an end is guilty of desertion; and if a spouse by misconduct renders the continuance of the marital relation unbearable so that the other leaves the family home, and this

Michigan.— Rathbun *v.* Rathbun, 76 Mich. 462, 43 N. W. 307; Stoffer *v.* Stoffer, 50 Mich. 491, 15 N. W. 564.

Missouri.— Deschodt *v.* Deschodt, 59 Mo. App. 102; Kaster *v.* Kaster, 43 Mo. App. 115.

Oregon.— Sisemore *v.* Sisemore, 17 Oreg. 542, 21 Pac. 820; Cline *v.* Cline, (1887) 16 Pac. 282.

Pennsylvania.— Van Dyke *v.* Van Dyke, 135 Pa. St. 459, 19 Atl. 1061; Clark *v.* Clark, 2 Chest. Co. Rep. 38.

West Virginia.— Alkire *v.* Alkire, 33 W. Va. 517, 11 S. E. 11.

58. Vosburg *v.* Vosburg, 136 Cal. 195, 68 Pac. 694 (holding that a wife is not guilty of desertion, although she refuses to agree with her husband as to the selection of a new home, unless he actually acquires the home and offers it to her, and she without sufficient cause refuses to live there); Phelan *v.* Phelan, 135 Ill. 445, 25 N. E. 751 [*affirming* 35 Ill. App. 511] (holding that it is not the duty of the wife to follow her husband to a place at which it does not appear that he has either a home or a business); Barbour *v.* Barbour, 7 Ky. L. Rep. 827 (holding that, although the wife repeatedly declares that she will not go with her husband to a new home selected by him, her failure to follow him is not desertion if he asserts in leaving his home that his business will only be temporary and that he will soon return).

59. Vosburg *v.* Vosburg, 136 Cal. 195, 68 Pac. 694 (holding that the husband must offer the new home to the wife); Hardenbergh *v.* Hardenbergh, 14 Cal. 654 (holding that the right of the husband to change the domicile must be peremptorily exercised, and that it is not sufficient to leave to the discretion of the wife the question whether she will accompany him); Hughart *v.* Hughart, 5 Ky. L. Rep. 931 (holding that where the demand of the husband is made conditionally, the wife is not guilty of abandonment if she refuses to comply with the condition); Goldstein *v.* Goldstein, (N. J. Ch. 1893) 26 Atl. 862.

A technical demand and refusal, with the necessary absence, is not always sufficient to show desertion. Ralston *v.* Ralston, 13 Phila. (Pa.) 30.

60. *California.*— Hardenbergh *v.* Hardenbergh, 14 Cal. 654.

Illinois.— Kennedy *v.* Kennedy, 87 Ill. 250.

Louisiana.— Gahn *v.* Darby, 36 La. Ann. 70; Muller *v.* Hilton, 13 La. Ann. 1, 71 Am. Dec. 504; Chretien *v.* Chretien, 5 Mart. N. S. 60.

Missouri.— Schuman *v.* Schuman, 93 Mo. App. 99.

New Jersey.— Goldstein *v.* Goldstein, (Ch. 1893) 26 Atl. 862; Hunt *v.* Hunt, 29 N. J. Eq. 96.

Pennsylvania.— Beck *v.* Beck, 163 Pa. St. 649, 30 Atl. 236; Cutler *v.* Cutler, 2 Brewst. 511; Angier *v.* Angier, 7 Phila. 305.

See 17 Cent. Dig. tit. "Divorce," § 129.

61. Haymond *v.* Haymond, 74 Tex. 414, 12 S. W. 90.

62. Bishop *v.* Bishop, 30 Pa. St. 412. See also Haymond *v.* Haymond, 74 Tex. 414, 12 S. W. 90; Hare *v.* Hare, 10 Tex. 355; Gleason *v.* Gleason, 4 Wis. 64.

63. Jones *v.* Jones, 95 Ala. 443, 11 So. 11, 18 L. R. A. 95; Starkey *v.* Starkey, 21 N. J. Eq. 135; Dailey's Appeal, 10 Wkly. Notes Cas. (Pa.) 420, holding that where a husband permitted his wife to be driven from the house of his mother, where they had been residing, and refused to provide another home for her, his conduct constituted wilful and malicious desertion.

Voluntary separation.— If a husband repeatedly tells his wife that she must leave at a certain time, and admits in his answer to her bill for divorce that he would have removed her if she had not gone, the wife is entitled to a divorce, although she left without force or threats. Harding *v.* Harding, 22 Md. 337.

result was intended by the guilty party, the other, upon the lapse of the statutory period, is entitled to a divorce as for desertion.[64]

(b) Character of Misconduct. If the misconduct causing a separation is such as to constitute in itself a ground for divorce,[65] and not otherwise,[66] it is sufficient after the lapse of the statutory period to charge the offending spouse with desertion. For example it has been held that harboring a prostitute in the family home[67] or cruel treatment[68] may thus justify a separation and entitle the innocent spouse to a divorce for desertion. On the other hand non-support[69] and

64. *Alabama.*—Holston *v.* Holston, 23 Ala. 777.

Illinois.— Albee *v.* Albee, 141 Ill. 550, 31 N. E. 153; Johnson *v.* Johnson, 125 Ill. 510, 16 N. E. 891.

Michigan.— Warner *v.* Warner, 54 Mich. 492, 20 N. W. 557.

New Jersey.— Weigand *v.* Weigand, 41 N. J. Eq. 202, 3 Atl. 699 [*affirmed* in 42 N. J. Eq. 699, 11 Atl. 113]; Skean *v.* Skean, 33 N. J. Eq. 148; Palmer *v.* Palmer, 22 N. J. Eq. 88; Marker *v.* Marker, 11 N. J. Eq. 256.

New York.— Waltermire *v.* Waltermire, 110 N. Y. 183, 17 N. E. 739; Barber *v.* Barber, 2 Am. L. J. N. S. 193.

North Carolina.— Setzer *v.* Setzer, 128 N. C. 170, 38 S. E. 731, 83 Am. St. Rep. 666; High *v.* Bailey, 107 N. C. 70, 12 S. E. 45; Wood *v.* Wood, 27 N. C. 674.

Oregon.— Sisemore *v.* Sisemore, 17 Oreg. 542, 21 Pac. 820.

Pennsylvania.— Howe *v.* Howe, 16 Pa. Super. Ct. 193.

Texas.— Camp *v.* Camp, 18 Tex. 528.

Virginia.— Almond *v.* Almond, 4 Rand. 662, 15 Am. Dec. 781.

England.— Sickert *v.* Sickert, [1899] P. 278, 68 L. J. P. 114, 81 L. T. Rep. N. S. 495, 48 Wkly. Rep. 268; Baker *v.* Baker, 32 L. J. P. & M. 145, 9 L. T. Rep. N. S. 117, 3 Swab. & Tr. 213, 11 Wkly. Rep. 502; Koch *v.* Koch, [1899] P. 221, 68 L. J. P. 90, 81 L. T. Rep. N. S. 61; Dickinson *v.* Dickinson, 62 L. T. Rep. N. S. 330.

See 17 Cent. Dig. tit. "Divorce," §§ 123, 130 *et seq.*

In Massachusetts the statute authorizing a divorce for the "utter desertion" of either party has been held not to apply to cases in which the complainant was the deserting party, although the desertion was caused by the misconduct of the other. Padelford *v.* Padelford, 159 Mass. 281, 34 N. E. 336; Lea *v.* Lea, 99 Mass. 493, 96 Am. Dec. 772; Fera *v.* Fera, 98 Mass. 155; Pidge *v.* Pidge, 3 Metc. 257.

Intent.— If the guilty party persists in the misconduct despite the remonstrances of the complainant, it will be assumed that such misconduct was intended to bring about a separation and will constitute desertion. Sickert *v.* Sickert, [1899] P. 278, 68 L. J. P. 114, 81 L. T. Rep. N. S. 495. It is otherwise if the guilty party did not expressly or impliedly intend the consequences of his misconduct. Lynch *v.* Lynch, 33 Md. 328; Renk *v.* Renk, (N. J. Ch. 1897) 38 Atl. 427; Plimley *v.* Plimley, 35 N. J. Eq. 18; Laing *v.* Laing, 21 N. J. Eq. 248.

Justification as a defense see *infra*, VIII, C, 3, d, (IV).

65. See Weigand *v.* Weigand, 41 N. J. Eq. 202, 3 Atl. 699.

66. Barnett *v.* Barnett, 27 Ind. App. 466, 61 N. E. 737; Lynch *v.* Lynch, 33 Md. 328; Weigand *v.* Weigand, 42 N. J. Eq. 699, 11 Atl. 113; Laing *v.* Laing, 21 N. J. Eq. 248; Sowers' Appeal, 89 Pa. St. 173; Rodenbaugh *v.* Rodenbaugh, 17 Pa. Co. Ct. 477; Klopfer's Appeal, 1 Mona. (Pa.) 81. See also Graeff *v.* Graeff, (N. J. Ch. 1892) 25 Atl. 704.

67. Koch *v.* Koch, [1899] P. 221, 68 L. J. P. 90, 81 L. T. Rep. N. S. 61; Dickinson *v.* Dickinson, 62 L. T. Rep. N. S. 330. And see Weigand *v.* Weigand, 41 N. J. Eq. 202, 3 Atl. 699.

Adultery.— It has been held, however, that the mere fact that a husband by frequent acts of adultery justifies his wife in leaving him does not render him guilty of desertion after the lapse of the statutory period. Stiles *v.* Stiles, 52 N. J. Eq. 446, 29 Atl. 162; Kershaw *v.* Kershaw, 5 Pa. Dist. 551. See also *supra*, note 64.

68. McVickar *v.* McVickar, 46 N. J. Eq. 490, 19 Atl. 249, 19 Am. St. Rep. 422; Palmer *v.* Palmer, 22 N. J. Eq. 88; Starkey *v.* Starkey, 21 N. J. Eq. 135; Marker *v.* Marker, 11 N. J. Eq. 256; Waltermire *v.* Waltermire, 110 N. Y. 183, 17 N. E. 739; Camp *v.* Camp, 18 Tex. 528. See also Gleason *v.* Gleason, 4 Wis. 64.

Communication of disease.— A wife, who on learning that she had contracted a venereal disease from her husband, denied him marital rights, which caused him so to mistreat her that she was compelled to leave him, is entitled to a divorce as for desertion, upon the lapse of the statutory time. Daeters *v.* Daeters, (N. J. Ch. 1897) 38 Atl. 950.

Cruelty of wife.— The rule is the same where the wife by cruelty compels the husband to leave the family house. Upon the expiration of the statutory period he is entitled to a divorce as for desertion. Setzer *v.* Setzer, 128 N. C. 170, 38 S. E. 731, 83 Am. St. Rep. 666.

In Maryland cruelty is ground for a qualified divorce only and cannot be allowed, when used as a justification for living apart from the offending party, to be made the ground of a final divorce as for desertion. Lynch *v.* Lynch, 33 Md. 328.

69. Bennett *v.* Bennett, 43 Conn. 313; Frost *v.* Frost, 17 N. H. 251; De Witt *v.* De Witt, (N. J. Ch. 1896) 36 Atl. 20; Cos-

drunkenness[70] have been held insufficient to entitle the innocent spouse to ask for a dissolution of the bonds of matrimony.

(III) *Period of Desertion*—(A) *In General.* Desertion, to constitute ground for divorce, must continue for the full statutory period prior to the commencement of the action.[71] It must be continuous throughout that period[72] and be uninterrupted by reconciliations.[73]

till *v.* Costill, 47 N. J. Eq. 346, 21 Atl. 35; Skean *v.* Skean, 33 N. J. Eq. 148; Sandford *v.* Sandford, 32 N. J. Eq. 420; Lewis *v.* Lewis, 6 N. J. Eq. 22; Ingersoll *v.* Ingersoll, 49 Pa. St. 249, 88 Am. Dec. 500; Broughton *v.* Broughton, 1 Del. Co. (Pa.) 273; Gumhert *v.* Gumbert, 30 Pittsb. Leg. J. N. S. 110. See also Palmer *v.* Palmer, 22 N. J. Eq. 88.

Non-support and cruelty.— If a husband fails to furnish his wife with such necessaries and comforts as are within his means and by cruelty compels her to leave him he is guilty of desertion. Levering *v.* Levering, 16 Md. 213. So where the failure of the husband to provide for the wife and his persistent and long continued cruel treatment of her, caused by his voluntary and habitual intoxication, is such as to render her existence miserable and actually to endanger her life, it amounts to desertion on his part. McVickar *v.* McVickar, 46 N. J. Eq. 490, 19 Atl. 249, 19 Am. St. Rep. 422.

Non-support and drunkenness.— If a husband becomes a habitual drunkard, and although able makes no provision for the support of his wife, and she is compelled to leave him and to live apart from him for the statutory period, she is entitled to a divorce as for desertion. James *v.* James, 58 N. H. 266. See also McVickar *v.* McVickar, 46 N. J. Eq. 490, 19 Atl. 249, 19 Am. St. Rep. 422.

70. Laing *v.* Laing, 21 N. J. Eq. 248, since habitual drunkenness is not in New Jersey a ground of divorce.

Drunkenness and non-support see *supra*, note 69.

71. *Illinois.*— Albee *v.* Albee, 141 Ill. 550, 31 N. E. 153; Embree *v.* Embree, 53 Ill. 394.

Kentucky.— Lee *v.* Lee, 1 Duv. 196; Evans *v.* Evans, 5 B. Mon. 278.

Louisiana.— Harman *v.* McLeland, 16 La. 26.

Maine.— Small *v.* Small, 31 Me. 493; Ricker *v.* Ricker, 29 Me. 281.

Michigan.— Rudd *v.* Rudd, 33 Mich. 101.

Minnesota.— Stocking *v.* Stocking, 76 Minn. 292, 79 N. W. 172, 668; Wagner *v.* Wagner, 39 Minn. 394, 40 N. W. 360.

Mississippi.— Gaillard *v.* Gaillard, 23 Miss. 152.

Missouri.— Ulrey *v.* Ulrey, 80 Mo. App. 48.

New Jersey.— Moak *v.* Moak, (Ch. 1901) 48 Atl. 394; Tracey *v.* Tracey, (Ch. 1899) 43 Atl. 713; Newing *v.* Newing, 45 N. J. Eq. 498, 18 Atl. 166.

Ohio.— Johnston *v.* Johnston, Wright 454.

Pennsylvania.— Middleton *v.* Middleton, 187 Pa. St. 612, 41 Atl. 291; Stymiest *v.* Stymiest, 4 Pa. Dist. 305, 16 Pa. Co. Ct. 236.

Texas.—Hannig *v.* Hannig, (Civ. App. 1893) 24 S. W. 695.

England.— Lapington *v.* Lapington, 14 P. D. 21, 52 J. P. 727, 58 L. J. P. 26, 59 L. T. Rep. N. S. 608, 37 Wkly. Rep. 384; Wood *v.* Wood, 13 P. D. 22, 57 L. J. P. 48; Farmer *v.* Farmer, 9 P. D. 245, 53 L. J. P. 113, 33 Wkly. Rep. 169; Drew *v.* Drew, 64 L. T. Rep. N. S. 840; Cargill *v.* Cargill, 4 Jur. N. S. 764, 27 L. J. P. & M. 69, 1 Swab. & Tr. 235, 6 Wkly. Rep. 870; Cudlipp *v.* Cudlipp, 27 L. J. P. & M. 64, 1 Swab. & Tr. 229.

See 17 Cent. Dig. tit. "Divorce," § 111.

When period ends.— When abandonment is alleged as a ground for divorce in a cross complaint, however, the period thereof terminates with the filing of that pleading and not with the institution of suit. Neddo *v.* Neddo, 56 Kan. 507, 44 Pac. 1.

72. *Illinois.*— Embree *v.* Embree, 53 Ill. 394.

Kentucky.— Fishli *v.* Fishli, 2 Litt. 337.

Michigan.— Rudd *v.* Rudd, 33 Mich. 101.

Minnesota.— Wagner *v.* Wagner, 39 Minn. 394, 40 N. W. 360.

New Hampshire.— Hancock *v.* Hancock, 5 N. H. 239.

New York.— Simon *v.* Simon, 6 N. Y. App. Div. 469, 39 N. Y. Suppl. 573.

England.— Farmer *v.* Farmer, 9 P. D. 245, 53 L. J. P. 113, 33 Wkly. Rep. 169.

73. *Illinois.*— Phelan *v.* Phelan, 135 Ill. 445, 25 N. E. 751 (holding that cohabitation for several days of the period of desertion is a defense); Sommers *v.* Sommers, 16 Ill. App. 77.

Mississippi.— Gaillard *v.* Gaillard, 23 Miss. 152, holding that two periods of desertion interrupted by a reconciliation cannot be added together for the purpose of making up the statutory term.

New Jersey.— Tracey *v.* Tracey, (Ch. 1899) 43 Atl. 713, holding that where a wife who has refused to live with her husband subsequently admits him to his marital rights, the period of her previous refusal is not a part of the required time.

Ohio.— Johnston *v.* Johnston, Wright 454.

Pennsylvania.— Bell *v.* Bell, 11 Wkly. Notes Cas. 156.

West Virginia.— Burk *v.* Burk, 21 W. Va. 445.

Occasional visits see *supra*, VII, C, 5, b, (II), (A).

Negotiations for cohabitation, if engaged in mutually, constitute an interruption of the continuity of the desertion. Rudd *v.* Rudd, 33 Mich. 101. Attempted reconciliation as

(B) *When Period Begins to Run.* While actual separation and intention to desert must both exist to constitute desertion, they need not be identieal in their commencement. If the departure antedates the intention to desert, the period of desertion dates from the time when the intention was formed.[74] If on the other hand the intention to desert antedates the departure, the period commences to run from the time when the departure was taken.[75] If the separation was by consent, which was afterward revoked, the desertion commences from the time of the revocation.[76]

(IV) *CONSENT OF COMPLAINANT*—(A) *In General.* It has been firmly established by the decisions that if either expressly or by implication from the circumstances the complainant consents to the original separation or to its continuance,[77]

ending desertion see *infra*, VII, C, 5, b, (IV), (B), (2).

74. Phelan *v.* Phelan, 12 Fla. 449; Conger *v.* Conger, 13 N. J. Eq. 286; Reed *v.* Reed, Wright (Ohio) 224; Pinkard *v.* Pinkard, 14 Tex. 356, 65 Am. Dec. 129.

75. Trimble *v.* Trimble, 65 Ark. 87, 44 S. W. 1040; Middleton *v.* Middleton, 187 Pa. St. 612, 41 Atl. 291.

76. Albee *v.* Albee, 141 Ill. 550, 31 N. E. 153; Newing *v.* Newing, 45 N. J. Eq. 498, 18 Atl. 166; Hankinson *v.* Hankinson, 33 N. J. Eq. 66; Conger *v.* Conger, 13 N. J. Eq. 286.

Attempted reconciliation as ending desertion see *infra*, VII, C, 5, b, (IV), (B), (2).

77. *Alabama.*—Allen *v.* Allen, 84 Ala. 367, 4 So. 590; Crow *v.* Crow, 23 Ala. 583; Jones *v.* Jones, 13 Ala. 145.

California.— Benkert *v.* Benkert, 32 Cal. 467.

Colorado.— Ault *v.* Ault, 29 Colo. 149, 68 Pac. 231.

District of Columbia.— Smithson *v.* Smithson, 7 Mackey 227; Secor *v.* Secor, 1 MacArthur 630.

Georgia.— Word *v.* Word, 29 Ga. 281.

Indiana.— Barnett *v.* Barnett, 27 Ind. App. 466, 61 N. E. 737.

Kansas.— Taylor *v.* Taylor, 41 Kan. 535, 21 Pac. 632.

Kentucky.— Masterson *v.* Masterson, 46 S. W. 20, 20 Ky. L. Rep. 631.

Massachusetts.— Bradley *v.* Bradley, 160 Mass. 258, 35 N. E. 482; Lea *v.* Lea, 8 Allen 418.

Michigan.— Wright *v.* Wright, 80 Mich. 572, 45 N. W. 365; Rose *v.* Rose, 50 Mich. 92, 14 N. W. 711; Beller *v.* Beller, 50 Mich. 49, 14 N. W. 696; Cox *v.* Cox, 35 Mich. 461.

Minnesota.— Hosmer *v.* Hosmer, 53 Minn. 502, 55 N. W. 630.

Mississippi.— Fulton *v.* Fulton, 36 Miss. 517.

Missouri.—Simpson *v.* Simpson, 31 Mo. 24; Wathen *v.* Wathen, 101 Mo. App. 286, 73 S. W. 736; Schuman *v.* Schuman, 93 Mo. App. 99; Davis *v.* Davis, 60 Mo. App. 545; Droege *v.* Droege, 55 Mo. App. 481; Gilmer *v.* Gilmer, 37 Mo. App. 672; Dwyer *v.* Dwyer, 16 Mo. App. 422.

New Jersey.—Grover *v.* Grover, 63 N. J. Eq. 771, 50 Atl. 1051; Wood *v.* Wood, 63 N. J. Eq. 688, 53 Atl. 51; McGean *v.* McGean, 63 N. J. Eq. 285, 49 Atl. 1083; Sarfaty *v.* Sarfaty, 59 N. J. Eq. 193, 45 Atl. 261; Van Wart *v.* Van Wart, 57 N. J. Eq. 598, 41 Atl. 965; Chipchase *v.* Chipchase, 48 N. J. Eq. 549, 22 Atl. 588, 49 N. J. Eq. 594, 26 Atl. 468; Costill *v.* Costill, 47 N. J. Eq. 346, 21 Atl. 35; Broom *v.* Broom, 47 N. J. Eq. 215, 20 Atl. 377, 49 N. J. Eq. 347, 25 Atl. 963; Herold *v.* Herold, 47 N. J. Eq. 210, 20 Atl. 375, 9 L. R. A. 696; Newing *v.* Newing, 45 N. J. Eq. 498, 18 Atl. 166; Grant *v.* Grant, 36 N. J. Eq. 502; Johnson *v.* Johnson, 35 N. J. Eq. 20; Sergent *v.* Sergent, 33 N. J. Eq. 204; Hankinson *v.* Hankinson, 33 N. J. Eq. 66; Meldowney *v.* Meldowney, 27 N. J. Eq. 328; Stone *v.* Stone, 25 N. J. Eq. 445; Bowlby *v.* Bowlby, 25 N. J. Eq. 406; Cornish *v.* Cornish, 23 N. J. Eq. 208; Goldbeck *v.* Goldbeck, 18 N. J. Eq. 42; Moores *v.* Moores, 16 N. J. Eq. 275; Jennings *v.* Jennings, 13 N. J. Eq. 38; Payne *v.* Payne, (Ch. 1894) 28 Atl. 449; Olcott *v.* Olcott, (Ch. 1893) 26 Atl. 469; McKean *v.* McKean, (Ch. 1886) 5 Atl. 799.

New York.—Adams *v.* Adams, 20 N. Y. Suppl. 765; Dignan *v.* Dignan, 17 Misc. 268, 40 N. Y. Suppl. 320; De Meli *v.* De Meli, 5 N. Y. Civ. Proc. 306, 67 How. Pr. 20.

Ohio.— Van Voorhees *v.* Van Voorhees, Wright 636; Barnes *v.* Barnes, Wright 475; Hesler *v.* Hesler, Wright 210.

Pennsylvania.— Graham *v.* Graham, 153 Pa. St. 450, 25 Atl. 766; Butler *v.* Butler, 1 Pars. Eq. Cas. 329, 4 Pa. L. J. Rep. 284; Smith *v.* Smith, 3 Phila. 489.

Tennessee.— Rutledge *v.* Rutledge, 5 Sneed 554.

Texas.— McGowen *v.* McGowen, 52 Tex. 657.

West Virginia.— Wass *v.* Wass, 41 W. Va. 126, 23 S. E. 537.

England.— Fitzgerald *v.* Fitzgerald, L. R. 1 P. & D. 694, 38 L. J. P. & M. 14, 19 L. T. Rep. N. S. 575, 17 Wkly. Rep. 264; Smith *v.* Smith, 28 L. J. P. & M. 27, 1 Swab. & Tr. 359, 7 Wkly. Rep. 382; Thompson *v.* Thompson, 4 Jur. N. S. 717, 27 L. J. P. & M. 65, 1 Swab. & Tr. 231, 6 Wkly. Rep. 867; Cudlipp *v.* Cudlipp, 27 L. J. P. & M. 64, 1 Swab. & Tr. 229; Ward *v.* Ward, 27 L. J. P. & M. 63, 1 Swab. & Tr. 185, 6 Wkly. Rep. 867.

See 17 Cent. Dig. tit. "Divorce," § 113.

Separation directed by complainant.—Where a wife leaves her husband when directed by him, although his action resulted from a quarrel, he cannot afterward charge her with desertion. Reed *v.* Reed, 62 Ark. 611, 37 S. W. 230; Herr *v.* Herr, 17 Lanc. L. Rev. 209; Thorpe *v.* Thorpe, 30 Pittsb. Leg. J. N. S. 133, 13 York Leg. Rec. 103. Nor is the wife en-

and that consent is not revoked,[78] there is no such desertion as warrants a divorce.

(B) *Attempted Reconciliation* — (1) As Prerequisite to Divorce. An attempt on the part of the complainant to effect a reconciliation is under some circumstances a prerequisite of an action for divorce.[79] Ordinarily if a husband whose wife has left him does not in some way express his desire to her that she return and resume her duties as a wife, her continued absence is not a desertion for which he is entitled to a divorce.[80] It has been held, however, that if the complainant is free from blame, he is under no obligation to take steps to effect a reconciliation;[81] but if the departure complained of was caused by the complainant's misconduct, and he made no effort to detain the wife or to secure her return, the separation will be deemed to have been consented to and will not constitute desertion, although complainant's misconduct would not in itself authorize a

titled to a divorce for desertion, under such circumstances (Howe *v.* Howe, 23 Pa. Co. Ct. 363; Charter *v.* Charter, 65 J. P. 246, 84 L. T. Rep. N. S. 272), unless the husband's conduct was such as to compel her to leave his home (see *supra*, VII, C, 5, b, (II), (D)).

Consent because of misconduct.— If one party, upon discovery of the other's adultery, consents to or directs the other's departure, the departure is not a desertion, although the consent is justified. Ford *v.* Ford, 143 Mass. 577, 10 N. E. 474; Fera *v.* Fera, 98 Mass. 155; Pidge *v.* Pidge, 3 Metc. (Mass.) 257. See, however, Haviland *v.* Haviland, 32 L. J. P. & M. 65, 11 Wkly. Rep. 373, holding that where a wife, on discovering the adultery of her husband, told him to go to the other woman, "and when you are sick of her, return to me," and she made him solemnly promise to return, which he never did, the husband was guilty of desertion. See also *supra*, VII, C, 5, b, (II), (D), (2), notes 64, 67.

Effect of bond for support.— A husband who has given bond to the guardians of the poor for the support of his wife, who has left his house, cannot maintain a libel for divorce against his wife on the ground of desertion. Vanleer *v.* Vanleer, 13 Pa. St. 211.

Unwillingness to cohabit.— A feeling of unwillingness on the wife's part to live with her husband is no bar to her suit if it is the reasonable result of the husband's misconduct. Grover *v.* Grover, 63 N. J. Eq. 771, 774, 50 Atl. 1051 (where it was said that "no wife, in order to be entitled to a divorce, ought to be required to swear that she desires to have a husband, who has ended a career of brutality toward her by deserting her, come back and resume that career"); Smith *v.* Smith, 55 N. J. Eq. 222, 37 Atl. 49.

Separation agreement as defense see *infra*, VIII, D, 2.

78. See *infra*, VII, C, 5, b, (IV), (B), (3).

79. See cases cited *infra*, note 80 *et seq.*

In Louisiana relief on the ground of abandonment can be had only by complying with Rev. Code, art. 145, which requires the abandonment to be shown by evidence of three reiterated summonses from month to month directing the deserting spouse to return, followed by a judgment which shall sentence him to comply with such request, together with notice of such judgment from month to month for three times successively, etc. Merrill *v.* Flint, 28 La. Ann. 194; Perkins *v.* Potts, 8 La. Ann. 14.

80. *Alabama.*— Crow *v.* Crow, 23 Ala. 583; Gray *v.* Gray, 15 Ala. 779.

Arkansas.— Trimble *v.* Trimble, 65 Ark. 87, 44 S. W. 1040.

California.— Carey *v.* Carey, 73 Cal. 630, 15 Pac. 313.

District of Columbia.— Woolard *v.* Woolard, 18 App. Cas. 326; Smithson *v.* Smithson, 7 Mackey 227.

Michigan.—Wright *v.* Wright, 80 Mich. 572, 45 N. W. 365; Beller *v.* Beller, 50 Mich. 49, 14 N. W. 696.

Minnesota.— Stocking *v.* Stocking, 76 Minn. 292, 79 N. W. 172, 668.

New Jersey.— Hall *v.* Hall, (Err. & App. 1903) 55 Atl. 300 [*affirming* (Ch. 1902) 53 Atl. 455]; Proudlove *v.* Proudlove, (Ch. 1900) 46 Atl. 951; Hall *v.* Hall, 59 N. J. Eq. 402, 45 Atl. 690; Wright *v.* Wright, (Ch. 1899) 43 Atl. 447; Gates *v.* Gates, 59 N. J. Eq. 100, 43 Atl. 436; McGurk *v.* McGurk, (Ch. 1904) 28 Atl. 510; Costill *v.* Costill, 47 N. J. Eq. 346, 21 Atl. 35; McVickar *v.* McVickar, 46 N. J. Eq. 490, 19 Atl. 249, 19 Am. St. Rep. 422; Newing *v.* Newing, 45 N. J. Eq. 498, 18 Atl. 166; Rittenhouse *v.* Rittenhouse, 29 N. J. Eq. 274.

Ohio.— Frarell *v.* Frarell, Wright 455; Bigelow *v.* Bigelow, Wright 416.

Pennsylvania.— Middleton *v.* Middleton, 187 Pa. St. 612, 41 Atl. 291; Musgrave *v.* Musgrave, 185 Pa. St. 260, 39 Atl. 961; Heaton *v.* Heaton, 8 Pa. Dist. 658, 23 Pa. Co. Ct. 218; Chambers *v.* Chambers, 20 Pa. Co. Ct. 41.

Rhode Island.—Thorpe *v.* Thorpe, 9 R. I. 57.

Tennessee.— Lanier *v.* Lanier, 5 Heisk. 462.

See 17 Cent. Dig. tit. "Divorce," §§ 114, 154.

Misconduct of wife after separation.— If since the wife's desertion she has so acted as to give the husband just cause to suspect her chastity, he is not bound, as a prerequisite to obtaining a divorce, to attempt to induce her to return. Hall *v.* Hall, (N. J. Ch. 1902) 53 Atl. 455 [*affirmed* in (N. J. Err. & App. 1903) 55 Atl. 300].

81. Hitchcock *v.* Hitchcock, 15 App. Cas. (D. C.) 81; Ford *v.* Ford, 143 Mass. 577, 10 N. E. 474; Schleifer *v.* Schleifer, 19 N. Y. Suppl. 973; Ogilvie *v.* Ogilvie, 37 Oreg. 171,

divorce.[82] If it appear from the circumstances and the disposition of the parties that any attempt to effect a reconciliation would be unavailing, the attempt is not a prerequisite to an action of divorce.[83] A wife is not held to the same accountability as the husband for failure to seek a reconciliation.[84]

(2) As Terminating Desertion. If before the expiration of the statutory period of desertion[85] a spouse otherwise guilty of desertion offers to resume the marriage relationship the continuity of the period of duration is interrupted and there can be no divorce,[86] unless the separation was due to the misconduct of the

61 Pac. 627. *Contra*, Wood *v.* Wood, 63 N. J. Eq. 688, 53 Atl. 51.

82. Gillinwaters *v.* Gillinwaters, 28 Mo. 60; Dwyer *v.* Dwyer, 16 Mo. App. 422; Meldowney *v.* Meldowney, 27 N. J. Eq. 328; Cornish *v.* Cornish, 23 N. J. Eq. 208; McCormick *v.* McCormick, 19 Wis. 172.

83. Trall *v.* Trall, 32 N. J. Eq. 231. See also Hall *v.* Hall, (N. J. Err. & App. 1903) 55 Atl. 300 [*affirming* (N. J. Ch. 1902) 53 Atl. 455].

84. Millowitsch *v.* Millowitsch, 44 Ill. App. 357 (holding that a wife when deserted by her husband need not hunt him up or go to the place to which he has fled); Sargent *v.* Sargent, 36 N. J. Eq. 644.

Revocation of consent to separation.— If, however, the separation was originally by agreement, the wife must plainly signify to her husband that she desires to revoke the agreement before she can complain of his living apart thereunder. Costill *v.* Costill, 47 N. J. Eq. 346, 21 Atl. 35; Hankinson *v.* Hankinson, 33 N. J. Eq. 66.

85. See *infra*, VII, C, 5, b, (IV), (B), (4), (b).

86. *Alabama.*— Allen *v.* Allen, 84 Ala. 367, 4 So. 590; Hanberry *v.* Hanberry, 29 Ala. 719; Crow *v.* Crow, 23 Ala. 583; Jones *v.* Jones, 13 Ala. 145.

Colorado.—Ault *v.* Ault, 29 Colo. 149, 68 Pac. 231.

Illinois.—Albee *v.* Albee, 141 Ill. 550, 31 N. E. 153.

Kansas.— Taylor *v.* Taylor, 41 Kan. 535, 21 Pac. 632, where defendant had written suggesting his return, but his wife wrote him not to do so, and never during all his absence suggested or expressed any wish or desire that he should return.

Kentucky.—Alderson *v.* Alderson, 69 S. W. 700, 24 Ky. L. Rep. 595.

Maine.— Fellows *v.* Fellows, 31 Me. 342.

Massachusetts.— Bradley *v.* Bradley, 160 Mass. 258, 35 N. E. 482.

Minnesota.—Stocking *v.* Stocking, 76 Minn. 292, 79 N. W. 172, 668; Grant *v.* Grant, 64 Minn, 234, 66 N. W. 983; Hosmer *v.* Hosmer, 53 Minn. 502, 55 N. W. 630.

Mississippi.— Fulton *v.* Fulton, 36 Miss. 517; Gaillard *v.* Gaillard, 23 Miss. 152.

Missouri.— McKeehan *v.* McKeehan, 84 Mo. 403.

New Jersey.— Crickler *v.* Crickler, 58 N. J. Eq. 427, 43 Atl. 1064; Loux *v.* Loux, 57 N. J. Eq. 561, 41 Atl. 358; McVickar *v.* McVickar, 46 N. J. Eq. 490, 19 Atl. 249, 19 Am. St. Rep. 422; Schanck *v.* Schanck, 33 N. J. Eq. 363; Hankinson *v.* Hankinson, 33 N. J. Eq. 66; Trall *v.* Trall, 32 N. J. Eq. 231; Taylor *v.* Taylor, 28 N. J. Eq. 207; Bowlby *v.* Bowlby, 25 N. J. Eq. 406; Ferrari *v.* Ferrari, (Ch. 1891) 22 Atl. 261.

New York.— Simon *v.* Simon, 6 N. Y. App. Div. 469, 39 N. Y. Suppl. 573 [*affirmed* in 159 N. Y. 549, 54 N. E. 1094]; Gilbert *v.* Gilbert, 5 Misc. 555, 26 N. Y. Suppl. 30; McGahay *v.* Williams, 12 Johns. 293.

Oregon.— Ogilvie *v.* Ogilvie, 37 Oreg. 171, 61 Pac. 627.

Pennsylvania.— Grove's Appeal, 37 Pa. St. 443; McDermott's Appeal, 8 Watts & S. 251; Peifer *v.* Peifer, 22 Pa. Co. Ct. 593.

Rhode Island.—Gourlay *v.* Gourlay, 16 R. I. 705, 19 Atl. 142.

Texas.— McGowan *v.* McGowan, (Civ. App. 1899) 50 S. W. 399.

England.— Keech *v.* Keech, L. R. 1 P. & D. 641, 38 L. J. P. & M. 7, 19 L. T. Rep. N. S. 462; Wassell *v.* Wassell, 68 L. J. P. 127 81 L. T. Rep. N. S. 496; Dallas *v.* Dallas, 43 L. J. P. & M. 87, 31 L. T. Rep. N. S. 271; Brookes *v.* Brookes, 28 L. J. P. & M. 38, 1 Swab. & Tr. 326, 7 Wkly. Rep. 143.

Locus penitentiæ.— However wilful the desertion may be, and however destitute of reasonable cause, it is no ground for divorce, unless it is continued for two years. At any time during that period the offending party has an undoubted right to put an end to it, and if that is done no cause of divorce has arisen. If at any time during the two years the party guilty of the desertion, in good faith and with an honest intention to resume the marital relations, returns or offers to return to the deserted husband or wife, the continuity of the desertion is broken. Nor can the deserted party prevent this by refusing to receive back and to resume marital relations with the one guilty of desertion. He or she cannot, because the other has taken a position, however wilful or causeless it may have been, hold him or her to it. For the two years the door of repentance and return must be kept open, and if it is closed and barred when an offer to return is made in good faith, not only is the desertion terminated, but the circumstances may be such as to reverse the legal attitude of the parties, and constitute the party originally offended against from that time forth the offender. Albee *v.* Albee, 141 Ill. 550, 31 N. E. 153.

Preventing reconciliation.— Where the conduct of complainant has been such as to prevent a reconciliation and a return to the matrimonial domicile when offered or requested in good faith by the deserter, it is a sufficient justification for the desertion and will preclude a divorce because thereof.

Alabama.— Gray *v.* Gray, 15 Ala. 779.

party offering the reconciliation and that such misconduct on the part of such party still continues.[87]

(3) As Revocation of Consent to Separation. Although the complaining party may have at first consented to the separation or acquiesced in it, the effect of the consent as a defense to his action for divorce may be nullified by an attempted reconciliation.[88]

(4) Sufficiency of Offer of Reconciliation — (a) In General. An offer of reconciliation must be made in good faith and not merely to lay a foundation for a divorce, and must be free from improper qualifications and conditions,[89] and also be couched in terms likely to bring about a reconciliation. A cold and formal invitation to return, especially if it contains unfounded charges, or does not contain an offer to accord the other spouse full marital rights or an expression of

Missouri.— Gillinwaters *v.* Gillinwaters, 28 Mo. 60.

New Jersey.— Driver *v.* Driver, 28 N. J. Eq. 393; Taylor *v.* Taylor, 28 N. J. Eq. 207; Bowlby *v.* Bowlby, 25 N. J. Eq. 406; Goldstein *v.* Goldstein, (Ch. 1893) 26 Atl. 862.

Pennsylvania.— Hardie *v.* Hardie, 162 Pa. St. 227, 29 Atl. 886, 25 L. R. A. 697; Eichert *v.* Eichert, 3 Wkly. Notes Cas. 290.

Texas.— Hannig *v.* Hannig, (Civ. App. 1893) 24 S. W. 695.

Attempted reconciliation after removal of cause for desertion see *infra*, VII, C, 5, b, (IV), (B), (5).

87. Edwards *v.* Edwards, 62 L. J. P. 33, holding that if the husband continues to live in open adultery with another woman his willingness to resume cohabitation with his wife will not relieve him from the charge of desertion.

88. Hankinson *v.* Hankinson, 33 N. J. Eq. 66; Cunningham *v.* Irwin, 7 Serg. & R. (Pa.) 247, 10 Am. Dec. 458; Butler *v.* Butler, 1 Pars. Eq. Cas. (Pa.) 329; McAllister *v.* McAllister, 10 Heisk. (Tenn.) 345.

89. *District of Columbia.*— Woolard *v.* Woolard, 18 App. Cas. 326.

Kansas.— Prather *v.* Prather, 26 Kan. 273.

Kentucky.— Fishli *v.* Fishli, 2 Litt. 337.

Mississippi.— Fulton *v.* Fulton, 36 Miss. 517.

Missouri.— Messenger *v.* Messenger, 56 Mo. 329.

New Jersey.— Abele *v.* Abele, 62 N. J. Eq. 644, 50 Atl. 686; Barrett *v.* Barrett, 37 N. J. Eq. 29; Taylor *v.* Taylor, 28 N. J. Eq. 207; Wright *v.* Wright, (Ch. 1899) 43 Atl. 447; Olcott *v.* Olcott, (N. J. Ch. 1893) 26 Atl. 469; Ferrari *v.* Ferrari, (N. J. Ch. 1891) 22 Atl. 261; McKean *v.* McKean, (N. J. Ch. 1886) 5 Atl. 799.

Ohio.— Friend *v.* Friend, Wright 639.

Pennsylvania.— Middleton *v.* Middleton, 187 Pa. St. 612, 41 Atl. 291; Musgrave *v.* Musgrave, 185 Pa. St. 260, 39 Atl. 961; Angier *v.* Angier, 63 Pa. St. 450; Ball *v.* Ball, 8 Pa. Dist. 678, 23 Pa. Co. Ct. 307; Heaton *v.* Heaton, 8 Pa. Dist. 658, 23 Pa. Co. Ct. 218.

Rhode Island.— Thorpe *v.* Thorpe, 9 R. I. 57.

England.— Martin *v.* Martin, 78 L. T. Rep. N. S. 568.

Expression of offer.—Where a wife who had deserted her husband for fear of the consequences of her own wrong wrote to him to come and see her, and afterward met him in a public place and told him that she wanted to see him, and he excused himself and they never met thereafter, neither the letter nor the conversation amounted to an offer by the wife to resume her marital duties. Ogilvie *v.* Ogilvie, 37 Oreg. 171, 61 Pac. 627.

Good faith must appear by facts showing that the offer was made in the hope that future dissensions would be avoided. The return by a wife to her husband's home is not alone sufficient where she was prosecuting litigation against him upon a groundless charge of adultery and made no offer to abandon the litigation or to retract the charge. Jenkins *v.* Jenkins, 104 Ill. 134. Where a husband professes to be willing to return to cohabitation, the questions that should be submitted to the jury are whether the conduct of the husband was that of a man honestly intending to resume cohabitation with his wife; whether he was not misrepresenting his real intentions in the letters he wrote; and whether the real and only object of those letters was to evade the consequences which might ensue and to deprive the wife of the remedy which she would be entitled to upon the completion of the two years' absence. French-Brewster *v.* French-Brewster, 62 L. T. Rep. N. S. 609. To negative a charge of desertion it is not sufficient that a man should merely write to his wife "Come back," or that he should say to a third person that he is willing to take her back. The court will look to the whole of his conduct, and must be satisfied from it that when he offered to take her back he really intended what he said. Harris *v.* Harris, 15 L. T. Rep. N. S. 448. See Harris *v.* Harris, 31 L. J. P. & M. 6.

Improper conditions.—An offer of reconciliation upon the condition that the wife release all interest in the husband's real property is not sufficient. Day *v.* Day, 84 Iowa 221, 50 N. W. 979. Nor is a condition proper which seeks to bind the wife, in case of her return, not to have any further intercourse with her mother. Williams *v.* Williams, 130 N. Y. 193, 29 N. E. 98, 27 Am. St. Rep. 517, 14 L. R. A. 220. So where a husband and wife have separated by agreement, the refusal of his request to be permitted to live with her at the place where she is living apart from him is not desertion. Eisenberg *v.* Eisenberg, 1 Pa. Co. Ct. 590, 18 Wkly. Notes Cas. (Pa.) 146.

regret for the offerer's own wrong-doing, is not sufficient as an offer of reconciliation and may be disregarded.[90]

(b) Time of Offer. An offer of reconciliation by a guilty spouse after the expiration of the statutory period of desertion does not obliterate the offense and so deprive the innocent spouse of the right to a divorce.[91]

(5) Rejection of Offer of Reconciliation as Desertion. If within the statutory period of desertion[92] an offer of reconciliation is made the rejection of it constitutes desertion;[93] and this is true, although the party thus refusing to resume the marital relation was not originally the offender,[94] provided that the cause of the separation has been removed, as by reformation of the guilty party,[95] but not otherwise.[96]

(6) Failure to Attempt Reconciliation as Desertion. The mere failure of a husband whose wife has left him to attempt to effect a reconciliation does not of itself constitute desertion on his part,[97] unless she left him for just cause.[98]

(v) *Intention, Wilfulness, and Malice.* It is a necessary element of desertion as a ground for divorce that the guilty party shall intend to abandon the other and permanently renounce the obligations of the marriage relation. Accordingly it has been held that the desertion must be wilful;[99] and it has also

90. Woollard *v.* Woollard, 18 App. Cas. (D. C.) 326; Fishli *v.* Fishli, 2 Litt. (Ky.) 337; McKean *v.* McKean, (N. J. Ch. 1886) 5 Atl. 799; Middleton *v.* Middleton, 187 Pa. St. 612, 41 Atl. 291; McClurg's Appeal, 66 Pa. St. 366.

91. McMullin *v.* McMullin, (Cal. 1902) 71 Pac. 108; Benkert *v.* Benkert, 32 Cal. 367; Basing *v.* Basing, 10 Jur. N. S. 806, 33 L. J. P. & M. 150, 10 L. T. Rep. N. S. 756, 3 Swab. & Tr. 516; Cargill *v.* Cargill, 4 Jur. N. S. 764, 27 L. J. P. & M. 69, 1 Swab. & Tr. 235, 6 Wkly. Rep. 870; Cudlipp *v.* Cudlipp, 27 L. J. P. & M. 64, 1 Swab. & Tr. 229.

92. See *supra*, VII, C, 5, b, (IV), (B), (4), (b).

93. Gates *v.* Gates, 59 N. J. Eq. 100, 43 Atl. 436; McGurk *v.* McGurk, (N. J. Ch. 1894) 28 Atl. 510; Whelan *v.* Whelan, 183 Pa. St. 293, 38 Atl. 625; Schwab *v.* Schwab, 19 Phila. (Pa.) 338; McAllister *v.* McAllister, 10 Heisk. (Tenn.) 345.

94. *Alabama.*— Hanberry *v.* Hanberry, 29 Ala. 719.

Illinois.—Albee *v.* Albee, 141 Ill. 550, 31 N. E. 153.

Maine.— Fellows *v.* Fellows, 31 Me. 342.

New Jersey.— Hooper *v.* Hooper, 34 N. J. Eq. 93; Schanck *v.* Schanck, 33 N. J. Eq. 363.

New York.— Gibert *v.* Gibert, 5 Misc. 555, 26 N. Y. Suppl. 30.

Oregon.— Ogilvie *v.* Ogilvie, 37 Oreg. 171, 61 Pac. 627.

95. Slack *v.* Slack, (N. J. Ch. 1892) 23 Atl. 1080.

96. Cooper *v.* Cooper, 33 L. T. Rep. N. S. 264. See also Jerolaman *v.* Jerolaman, (N. J. Ch. 1903) 54 Atl. 166.

97. Fitzgerald *v.* Fitzgerald, L. R. 1 P. & D. 694, 38 L. J. P. & M. 14, 19 L. T. Rep. N. S. 575, 17 Wkly. Rep. 264.

98. Jerolaman *v.* Jerolaman, (N. J. Ch. 1903) 54 Atl. 166.

99. *California.*— Benkert *v.* Benkert, 32 Cal. 467 (holding that the statute designating the offense as "wilful desertion" means that the desertion shall be intentional); Morrison *v.* Morrison, 20 Cal. 431.

Colorado.—Ault *v.* Ault, 29 Colo. 149, 68 Pac. 231.

District of Columbia.—McDonough *v.* McDonough, 20 App. Cas. 46; Bergheimer *v.* Bergheimer, 17 App. Cas. 381.

Florida.— Crawford *v.* Crawford, 17 Fla. 180.

Georgia.— Word *v.* Word, 29 Ga. 281.

Illinois.— Elzas *v.* Elzas, 171 Ill. 632, 49 N. E. 717; Sommers *v.* Sommers, 16 Ill. App. 77.

Iowa.—Atkinson *v.* Atkinson, 67 Iowa 364, 25 N. W. 284.

Kansas.— Franklin *v.* Franklin, 53 Kan. 143, 35 Pac. 1118.

Kentucky.— Williams *v.* Williams, 21 S. W. 529, 14 Ky. L. Rep. 744, holding that a separation occasioned by a desire for temporary relief from household duties does not constitute desertion.

Maryland.— Lynch *v.* Lynch, 33 Md. 328.

Michigan.— Rose *v.* Rose, 50 Mich. 92, 14 N. W. 711; Cox *v.* Cox, 35 Mich. 461; Rudd *v.* Rudd, 33 Mich. 101; Porritt *v.* Porritt, 18 Mich. 420; Cooper *v.* Cooper, 17 Mich. 205, 97 Am. Dec. 182.

Minnesota.— Grant *v.* Grant, 64 Minn. 234, 66 N. W. 983.

Mississippi.— Fulton *v.* Fulton, 36 Miss. 517.

Missouri.— Boos *v.* Boos, 88 Mo. App. 530.

Nebraska.— Swan *v.* Swan, 15 Nebr. 453, 19 N. W. 639.

New Jersey.—Sweeney *v.* Sweeney, 62 N. J. Eq. 357, 50 Atl. 785; Rogers *v.* Rogers, 18 N. J. Eq. 445; Cook *v.* Cook, 13 N. J. Eq. 263; Moak *v.* Moak, (Ch. 1900) 48 Atl. 394, all holding that mere absence is not sufficient, and that the circumstances must show that the absent party intended permanently to separate and dissever the matrimonial relation.

New York.— Williams *v.* Williams, 3 Silv.

been held in some states that the desertion must be malicious.[1] However, if the desertion is wilful and without justification malice is implied.[2]

6. Excessively Vicious Conduct. In some states excessively vicious conduct has been declared by statute to be a ground for divorce *a mensa et thoro*.[3]

7. Gross Misbehavior and Wickedness. Gross misbehavior and wickedness repugnant to and inconsistent with the marriage contract is a statutory ground for divorce in some states.[4]

8. Gross Neglect of Duty — a. Statutory Provisions. Gross neglect of duty by a spouse has been made a ground for divorce in some states.[5]

b. What Constitutes — (I) *In General.* Since the statutes do not define gross neglect of duty, the question is to be left to the sound discretion of the court.[6] It may consist of a single heinous act of neglect.[7] Simple neglect is insufficient, however. There must not only be a default or omission to perform a marital duty, but the act complained of must be attended with circumstances of indignity or aggravation.[8]

(II) *Failure to Support.* A substantial failure of a husband suitably to

Supreme 385, 6 N. Y. Suppl. 645, 17 N. Y. Civ. Proc. 297; Dignan *v.* Dignan, 17 Misc. 268, 40 N. Y. Suppl. 320; Barlow *v.* Barlow, 2 Abb. Pr. N. S. 259; Ruckman *v.* Ruckman, 58 How. Pr. 278; Ahrenfeldt *v.* Ahrenfeldt, 1 Hoffm. Ch. 47.

Ohio.— Friend *v.* Friend, Wright 639; Guembell *v.* Guembell, Wright 226.

Pennsylvania.— Thomas *v.* Thomas, 4 Kulp 328; Trotter *v.* Trotter, 30 Pittsb. Leg. J. N. S. 109.

Rhode Island.—Gourlay *v.* Gourlay, 16 R. I. 705, 19 Atl. 142.

Texas.— Besch *v.* Besch, 27 Tex. 390.

Virginia.— Bailey *v.* Bailey, 21 Gratt. 43.

Wisconsin.— Phillips *v.* Phillips, 22 Wis. 256.

England.— Charter *v.* Charter, 65 J. P. 246, 84 L. T. Rep. N. S. 272.

See 17 Cent. Dig. tit. "Divorce," § 109.

Presumption as to intent.— However, a prolonged abandonment coupled with a withdrawal of support and other aggravating circumstances may conclusively indicate an intention on the part of the husband permanently to separate from the wife. De Armond *v.* De Armond, 66 Ark. 601, 53 S. W. 45; Morrison *v.* Morrison, 20 Cal. 431; Gill *v.* Gill, 93 Md. 652, 49 Atl. 557; Howell *v.* Howell, 63 N. J. Eq. 293, 49 Atl. 586; Osborn *v.* Osborn, 44 N. J. Eq. 257, 9 Atl. 698, 10 Atl. 107, 14 Atl. 217; Williams *v.* Williams, 35 N. J. Eq. 382; Guembell *v.* Guembell, Wright (Ohio) 226; Clark *v.* Clark, Wright (Ohio) 225; Amsden *v.* Amsden, Wright (Ohio) 66; Wynne *v.* Wynne, [1898] P. 18, 67 L. J. P. & M. 5, 46 Wkly. Rep. 560. And when a separation and intent to desert are once shown, the same intent will be presumed to continue until the contrary appears. Gray *v.* Gray, 15 Ala. 779; Prather *v.* Prather, 26 Kan. 273; Bailey *v.* Bailey, 21 Gratt. (Va.) 43.

1. See statutes of the different states.

In Tennessee the desertion must be wilful "or" malicious. McBride *v.* McBride, (Tenn. Sup. 1902) 69 S. W. 781; Majors *v.* Majors, 1 Tenn. Ch. 264.

2. McClurg's Appeal, 66 Pa. St. 366; Bean *v.* Bean, 11 Lanc. Bar (Pa.) 138; McBride *v.* McBride, (Tenn. Sup. 1902) 69 S. W. 781, holding that wilful desertion without reasonable cause for the statutory period is a sufficient ground for divorce, although there is no malice in fact. *Contra,* Rutledge *v.* Rutledge, 5 Sneed (Tenn.) 554; Stewart *v.* Stewart, 2 Swan (Tenn.) 591; Majors *v.* Majors, 1 Tenn. Ch. 264.

3. See statutes of the different states.

Frequent drunkenness of the wife accompanied by abusive and indecent language is insufficient under such a statute. Shutt *v.* Shutt, 71 Md. 193, 17 Atl. 1024, 17 Am. St. Rep. 519.

4. See statutes of the different states.

Consorting with other women.— The fact that a husband has been a daily companion of a woman other than his wife is not a ground of divorce under such a statute. Stevens *v.* Stevens, 8 R. I. 557.

5. See statutes of the different states.

6. Morse *v.* Morse, 5 Ohio S. & C. Pl. Dec. 544, 3 Ohio N. P. 310; Duhme *v.* Duhme, 3 Ohio Dec. (Reprint) 95, 3 Weekly L. Gas. 187.

7. McKinney *v.* McKinney, 9 Ohio S. & C. Pl. Dec. 655; Schwartz *v.* Schwartz, 6 Ohio S. & C. Pl. Dec. 525.

8. Smith *v.* Smith, 22 Kan. 699; *In re* Gross Neglect, 8 Ohio S. & C. Pl. Dec. 701 (holding that mere neglect or partial neglect or even total neglect is not sufficient); Tiberghein *v.* Tiberghein, 8 Ohio Dec. (Reprint) 464, 8 Cinc. L. Bul. 89 (holding that failure to provide for many years, although no proper effort to provide is made, is not gross neglect).

Undue economy and harsh treatment.—The facts that a husband practised undue economy toward his wife; that he was cold, harsh, and unfeeling; that without assaulting her he was at times violent in his demeanor toward her; and that he imputed to her a want of chastity and communicated his suspicions to others have been held not to constitute gross neglect of duty. Duhme *v.* Duhme, 3 Ohio Dec. (Reprint) 95, 3 Wkly. L. Gaz. 187.

provide for his wife's support when he has ability to do so is gross neglect of duty entitling the wife to a divorce.[9]

(III) *ABANDONMENT.* Abandonment or desertion is not sufficient to constitute gross neglect of duty unless accompanied with circumstances of indignity or aggravation.[10]

(IV) *NEGLECT BY WIFE.* A wife as well as a husband may be guilty of gross neglect and thus give cause for divorce.[11]

c. Period of Neglect. No length of time is prescribed during which the neglect must continue to constitute ground for divorce.[12]

9. HABITUAL DRUNKENNESS — a. In General. In the absence of statute drunkenness is not a ground for divorce.[13] In nearly all states, however, habitnal drunkenness or its equivalent is by statute a ground for divorce.[14] In some states habitual drunkenness, to authorize a divorce, must be accompanied with wasting of estate.[15]

b. What Constitutes — (I) *GENERAL RULES.* The persistent habit of becoming intoxicated constitutes the offense of habitual drunkenness.[16] While constant and

9. Schwartz *v.* Schwartz, 6 Ohio S. & C. Pl. Dec. 525, 7 Ohio N. P. 194; Nail *v.* Nail, 2 Ohio Dec. (Reprint) 501, 3 West. L. Month. 328.

The fact that a husband is always in liquor and refuses to contribute to his family's support while able to do so is cause for divorce, although he never becomes intoxicated. Ziegler *v.* Ziegler, 7 Ohio Dec. (Reprint) 139, 1 Cinc. L. Bul. 163. *Compare* Ferree *v.* Ferree, 8 Ohio Dec. (Reprint) 405, 7 Cinc. L. Bul. 302.

Where a husband gambled away his wages, leaving his wife with two small children unprovided for, so that but for the kindness of others she would frequently have been without food, which conduct was continued for a considerable time and was accompanied by insulting language in answer to the wife's complaints, it was gross neglect of duty. Holland *v.* Holland, 8 Ohio Dec. (Reprint) 460, 8 Cinc. L. Bul. 86.

10. Smith *v.* Smith, 22 Kan. 699; Nichols *v.* Nichols, 8 Ohio Dec. (Reprint) 463, 8 Cinc. L. Bul. 88; Dunbar *v.* Dunbar, 4 Ohio Dec. (Reprint) 237, 1 Clev. L. Rep. 148.

11. Leach *v.* Leach, 46 Kan. 724, 27 Pac. 131 (holding that the refusal of a wife for more than five years to cohabit with her husband and to perform many of her household duties entitles him to a divorce); Osterhout *v.* Osterhout, 30 Kan. 746, 2 Pac. 869 (holding that where a wife induced her husband to make over his property to her and then turned him out of the house, and afterward on his return preferred against him a false charge of insanity, she was guilty of gross neglect of duty). *Compare* Dunbar *v.* Dunbar, 4 Ohio Dec. (Reprint) 237, 1 Clev. L. Rep. 148.

12. McKinney *v.* McKinney, 9 Ohio S. & C. Pl. Dec. 655, 7 Ohio N. P. 259 (holding that the neglect must continue for some time but not for any definite time); Schwartz *v.* Schwartz, 6 Ohio S. & C. Pl. Dec. 525, 7 Ohio N. P. 194; Morse *v.* Morse, 5 Ohio S. & C. Pl. Dec. 544, 3 Ohio N. P. 310. *Compare In re* Gross Neglect, 8 Ohio S. & C. Pl. Dec. 701; Nail *v.* Nail, 2 Ohio Dec. (Reprint) 501, 3 West. L. Month. 328.

13. *California.*—Haskell *v.* Haskell, 54 Cal. 262.

Maryland.— Shutt *v.* Shutt, 71 Md. 193, 17 Atl. 1024, 17 Am. St. Rep. 519.

New York.— Anonymous, 17 Abb. N. Cas. 231.

Pennsylvania.— Mason *v.* Mason, 131 Pa. St. 161, 18 Atl. 1021; Bean *v.* Bean, 11 Lanc. Bar 138.

England.— Scott *v.* Scott, 29 L. J. P. & M. 64.

Drunkenness as cruelty see *supra*, VII, C, 4, b, (VII).

14. See statutes of the different states.

15. Shuck *v.* Shuck, 7 Bush (Ky.) 806 (holding that the impairment of one's physical and mental strength by habitual drunkenness is within the statute); McKay *v.* McKay, 18 B. Mon. (Ky.) 8 (holding that where the husband has no property, the word "estate" includes his health, time, and labor); Azbill *v.* Azbill, 14 Ky. L. Rep. 105.

16. *Arkansas.*— Brown *v.* Brown, 38 Ark. 324.

Florida.— McGill *v.* McGill, 19 Fla. 341.

Georgia.— Myrick *v.* Myrick, 67 Ga. 771.

Illinois.— Youngs *v.* Youngs, 130 Ill. 230, 22 N. E. 806, 17 Am. St. Rep. 313, 6 L. R. A. 548; Richards *v.* Richards, 19 Ill. App. 465.

Kansas.— Walton *v.* Walton, 34 Kan. 195, 8 Pac. 110.

Louisiana.— De Lesdernier *v.* De Lesdernier, 45 La. Ann. 1364, 14 So. 191; Williams *v.* Goss, 43 La. Ann. 868, 9 So. 750; Mack *v.* Handy, 39 La. Ann. 491, 2 So. 181; Halls *v.* Cartwright, 18 La. Ann. 414.

Massachusetts.— Blaney *v.* Blaney, 126 Mass. 205.

Michigan.— Magahay *v.* Magahay, 35 Mich. 210.

Missouri.— Golding *v.* Golding, 6 Mo. App. 602.

Oregon.— McBee *v.* McBee, 22 Oreg. 329, 29 Pac. 887, 29 Am. St. Rep. 613.

Pennsylvania.— Bean *v.* Bean, 11 Lanc. Bar 138.

Rhode Island.— Gourlay *v.* Gourlay, 16 R. I. 705, 19 Atl. 142.

See 17 Cent. Dig. tit. "Divorce," § 41.

continuous drunkenness need not be shown,[17] yet occasional indulgence in intoxicating liquors is not sufficient to establish the offense.[18] There must be such a frequent indulgence to excess as to show the existence of a confirmed habit,[19] and an inability to control the appetite.[20]

(II) *Use of Opiates.* As a rule the drunkenness meant by the statute is that produced by the excessive use of alcoholic liquors and not by excessive indulgence in opiates.[21]

c. Period of Indulgence. The statutes usually prescribe the time for which the habit of drunkenness must continue in order to render it a ground for divorce,[22] and require that it shall have continued for that period immediately preceding the bringing of the suit.[23]

d. Antenuptial Habit. If the habit of drunkenness was contracted before the marriage it is not ordinarily ground for divorce.[24]

10. Insanity. Insanity arising after marriage is not ground for divorce,[25] unless, as is the case in some states, it is so provided by statute.[26]

Neglect of business.— Habitual intemperance is "that degree of intemperance from the use of intoxicating drinks which disqualifies the person a great portion of the time from properly attending to business, or which would reasonably inflict a course of great mental anguish upon the innocent party." Cal. Civ. Code, § 106. It is not necessary that the habit shall render the party at all times incapable of attending to business, but it is sufficient if it disqualifies him from attending to his business during the principal portion of the time usually devoted to business. Mahone *v.* Mahone, 19 Cal. 626, 81 Am. Dec. 91. In the absence of statute, however, habitual drunkenness need not be such as to disqualify the party from attending to his business during the principal portion of the time usually devoted to business. Richards *v.* Richards, 19 Ill. App. 465.

17. Fuller *v.* Fuller, 108 Ga. 256, 33 S. E. 865; Marous *v.* Marous, 86 Ill. App. 597; Meathe *v.* Meathe, 83 Mich. 150, 47 N. W. 109; Ishler *v.* Ishler, 81 Mo. App. 567.

Periodical intoxication may authorize a divorce. De Lesdernier *v.* De Lesdernier, 45 La. Ann. 1364, 14 So. 191; Blaney *v.* Blaney, 126 Mass. 205.

18. *Georgia.*— Myrick *v.* Myrick, 67 Ga. 771.

Iowa.— Bizer *v.* Bizer, 110 Iowa 248, 81 N. W. 465.

Louisiana.— Mack *v.* Handy, 39 La. Ann. 491, 2 So. 181.

Michigan.— Meathe *v.* Meathe, 83 Mich. 150, 47 N. W. 109.

Oregon.— McBee *v.* McBee, 22 Oreg. 329, 29 Pac. 887, 29 Am. St. Rep. 613, holding that where defendant drank to excess only when he went from his farm to the town, which did not average more than twice a month, and he was never disqualified from performing his work, it was not "habitual gross drunkenness."

Pennsylvania.— Bean *v.* Bean, 11 Lanc. Bar 138.

Rhode Island.— Gourlay *v.* Gourlay, 16 R. I. 705, 19 Atl. 142, holding that the charge is not sustained by evidence that on several occasions years before the action was brought defendant drank to excess.

19. McGill *v.* McGill, 19 Fla. 341; Halls *v.* Cartwright, 18 La. Ann. 414.

20. Walton *v.* Walton, 34 Kan. 195, 8 Pac. 110; Magahay *v.* Magahay, 35 Mich. 210; Ishler *v.* Ishler, 81 Mo. App. 567, it appearing in the last two cases that the husband became intoxicated as often as the temptation was presented.

21. Youngs *v.* Youngs, 130 Ill. 230, 22 N. E. 806, 17 Am. St. Rep. 313, 6 L. R. A. 548; Dawson *v.* Dawson, 23 Mo. App. 169.

In Massachusetts, however, gross and confirmed drunkenness caused by the voluntary and excessive use of opium or other drugs is a ground for divorce if the use is excessive. Burt *v.* Burt, 168 Mass. 204, 46 N. E. 622.

22. See statutes of the different states.

23. Reynolds *v.* Reynolds, 44 Minn. 132, 46 N. W. 236. See also Burt *v.* Burt, 168 Mass. 204, 46 N. E. 622, holding that gross and confirmed drunkenness caused by the voluntary and excessive use of opium or other drugs must exist at the time the libel for divorce is brought.

24. Lyster *v.* Lyster, 111 Mass. 327; Porritt *v.* Porritt, 16 Mich. 140.

Knowledge of antenuptial habit as a defense see *infra*, VIII, E.

25. *Illinois.*— Lloyd *v.* Lloyd, 66 Ill. 87; Hamaker *v.* Hamaker, 18 Ill. 137, 65 Am. Dec. 705.

Indiana.— Baker *v.* Baker, 82 Ind. 146; Curry *v.* Curry, Wils. 236.

Iowa.— Tiffany *v.* Tiffany, 84 Iowa 122, 50 N. W. 554; Wertz *v.* Wertz, 43 Iowa 534.

Kansas.— Powell *v.* Powell, 18 Kan. 371, 26 Am. Rep. 774.

Kentucky.— Pile *v.* Pile, 94 Ky. 308, 22 S. W. 215, 15 Ky. L. Rep. 88.

26. See statutes of the different states.

Constitutionality of statute.— A statute making incurable chronic mania which has existed for more than ten years a cause for divorce is not contrary to public policy. Hickman *v.* Hickman, 1 Wash. 257, 24 Pac. 445, 22 Am. St. Rep. 148.

11. Mutual Separation. The mutual separation of the parties for a specified period is made a ground of divorce in some states.[27]

12. Non-Support of Wife — a. In General. In the absence of statute the non-support of a wife is not ground for divorce.[28] In many states, however, a divorce, either absolute or limited, is authorized by statute where the husband wilfully refuses or neglects to provide suitable maintenance for the wife,[29] usually for a prescribed time which varies from one to three years.[30]

b. What Constitutes — (I) *Sufficiency of Maintenance.* The sufficiency of the maintenance or support furnished by the husband depends upon the condition and social rank of the parties and is to be determined in each case by the peculiar circumstances thereof.[31]

(II) *Wilfulness and Wantonness.* The statutes sometimes provide that the refusal or neglect, to constitute ground for divorce, must be wilful, wanton, gross, and cruel,[32] in which case simple neglect or refusal to support is not sufficient to justify a decree.[33]

(III) *Ability of Husband.* Non-support of a wife is not a cause for divorce unless the husband has the pecuniary ability to support her.[34] Accordingly if the non-support results from his imprisonment for crime, it is not ground for divorce.[35] By the weight of authority, "ability" or "pecuniary ability" as used in the statute means ability to provide for a wife either from labor or from property rather than from property alone.[36]

27. Boreing *v.* Boreing, 71 S. W. 431, 24 Ky. L. Rep. 1288; Brockle *v.* Brockle, 7 Ky. L. Rep. 747.

Finality of separation.— If the separation has continued for the prescribed time, a divorce must be granted, although the parties did not during that period intend that the separation should be final. Thompson *v.* Thompson, 53 Wis. 153, 10 N. W. 166.

28. Lesher *v.* Lesher, 9 Pa. Dist. 69.

29. See statutes of the different states.

Separation by consent.— A wife is not entitled to a divorce if it appears that she deserted her husband or that they separated and remained apart by mutual consent, and that during the two years the husband was not requested and did not refuse to contribute to the support of the absent members of his family. Barnett *v.* Barnett, 27 Ind. App. 466, 61 N. E. 737.

30. See statutes of the different states. See also Branch *v.* Branch, [Colo. 1902] 71 Pac. 632.

31. Runkle *v.* Runkle, 96 Mich. 493, 56 N. W. 2 (holding that it is not wilful neglect for a husband to refuse to change habits of frugality to habits of liberality); Whitacre *v.* Whitacre, 64 Mich. 232, 31 N. W. 327; Owen *v.* Owen, 48 Mo. App. 208 (holding that there is no non-support where, out of a salary of one hundred dollars per month, the husband paid the house rent of thirty dollars per month and gave his wife eight dollars per week and whatever money she earned by keeping boarders); Farnsworth *v.* Farnsworth, 58 Vt. 555, 5 Atl. 401; Hurlburt *v.* Hurlburt, 14 Vt. 561; Weishaupt *v.* Weishaupt, 27 Wis. 621 (holding that where, for more than a year, the husband failed to furnish the wife provisions and clothing, and gave her in money but thirty dollars, and refused to pay a physician whom she was obliged to call in, it constituted non-support); Keeler *v.* Keeler, 24 Wis. 522. See also Thompson *v.* Thompson, 79 Me. 286, 9 Atl. 888, holding that suitable medicine when needed is a part of a proper support.

32. See statutes of the different states.

33. Holt *v.* Holt, 117 Mass. 202 (so holding, although the husband is able to furnish support); Peabody *v.* Peabody, 104 Mass. 195 (so holding, at least in the absence of any consequent injury to the wife's health or any reasonable apprehension thereof); Caswell *v.* Caswell, 66 Vt. 242, 28 Atl. 988; Jennings *v.* Jennings, 16 Vt. 607; Mandigo *v.* Mandigo, 15 Vt. 786.

Non-support is wanton, gross, and cruel, where the parties had separated as the result of mutual fault, and the husband was of sufficient ability to support the wife and neglected to do so, and refused to visit her upon request and made no answer to her proposals to visit him, and finally when she returned to his house refused to receive her. Lillie *v.* Lillie, 65 Vt. 109, 26 Atl. 525.

34. *California.*— Washburn *v.* Washburn, 9 Cal. 475.

Massachusetts.— Holt *v.* Holt, 117 Mass. 202; Harteau *v.* Harteau, 14 Pick. 181, 25 Am. Dec. 372.

New Hampshire.— James *v.* James, 58 N. H. 266; Davis *v.* Davis, 37 N. H. 191.

Rhode Island.—Hammond *v.* Hammond, 15 R. I. 40, 23 Atl. 143, 2 Am. St. Rep. 867.

Vermont.— Cilley *v.* Cilley, 61 Vt. 548, 18 Atl. 1120; Jewett *v.* Jewett, 61 Vt. 370, 17 Atl. 734; Farnsworth *v.* Farnsworth, 58 Vt. 555, 5 Atl. 401.

35. Hammond *v.* Hammond, 15 R. I. 40, 23 Atl. 143, 2 Am. St. Rep. 867.

36. James *v.* James, 58 N. H. 266. See also Davis *v.* Davis, 37 N. H. 191; State *v.* Witham, 70 Wis. 473, 35 N. W. 934, where it was held that the word "ability" as used

(iv) *Ability of Wife.* It has been held that where the earnings of the wife are sufficient for her own support, and they are applied to that purpose, the failure of the husband to provide the common necessaries of life for the wife is not wilful neglect.[37]

13. Personal Indignities — a. Statutory Provisions. In a few states it is provided by statute that personal indignities rendering the condition of the injured party intolerable and life burdensome is a cause for divorce, either absolute or limited.[38]

b. What Constitutes — (i) *General Rules* — (a) *In General.* The offense of inflicting personal indignities on a spouse is similar to that of cruelty, although it includes conduct which is not within the definition of cruelty as a ground for divorce.[39] It is impossible to lay down a general rule for the determination of what indignities may render the condition of the injured party intolerable.[40] They may consist of rudeness, vulgarity, unmerited reproach, haughtiness, contumely, studied neglect, intentional incivility, manifest disdain, abusive language, malignant ridicule, and every other plain manifestation of settled hate and estrangement;[41] but slight acts of misconduct are not sufficient.[42]

in a statute making the non-support of a wife a penal offense includes the husband's capacity to earn or obtain means for her maintenance. *Contra*, however, see Washburn *v.* Washburn, 9 Cal. 475, holding that the term "ability" has reference to the possession by the husband of the means in property to provide necessaries and not to his capacity of acquiring such means by labor.

In Vermont the legislature has declared "pecuniary ability" to mean "sufficient ability to provide suitable maintenance for a wife, whether derived from the income of property, personal labor, or any other source." Sess. Laws (1886), Act 59. This statute, however, does not refer to the capacity of the husband to acquire means for the wife's support, but to the money received by him as salary or wages, and hence the wife cannot obtain a divorce because the husband will not work and has therefore no means for her support. Cilley *v.* Cilley, 61 Vt. 548, 18 Atl. 1120; Jewett *v.* Jewett, 61 Vt. 370, 17 Atl. 734; Farnsworth *v.* Farnsworth, 58 Vt. 555, 5 Atl. 401.

37. Rycraft *v.* Rycraft, 42 Cal. 444; Washburn *v.* Washburn, 9 Cal. 475, holding that the reason of the rule is that the earnings of both husband and wife go into a common fund, the control of which belongs to the husband, and his consent that they be applied to the wife's support is a performance of his legal obligation. See, however, Keeler *v.* Keeler, 24 Wis. 522.

38. See statutes of the different states.

In Pennsylvania this cause of divorce exists in favor of the wife only. Powers' Appeal, 120 Pa. St. 320, 14 Atl. 60; Miles *v.* Miles, 76 Pa. St. 357; Pennington *v.* Pennington, 10 Phila. (Pa.) 22.

39. Rose *v.* Rose, 9 Ark. 507, holding that the statute gives to the courts a broader jurisdiction than that exercised by the civil and ecclesiastical courts. See also Fitzgerald *v.* Fitzgerald, 22 Pa. Co. Ct. 490.

40. Hooper *v.* Hooper, 19 Mo. 355 (holding that the evident intent of the legislature was to leave each case to be determined according to its own peculiar circumstances); May *v.* May, 62 Pa. St. 206; Richards *v.* Richards, 37 Pa. St. 225.

41. Kurtz *v.* Kurtz, 38 Ark. 119; Rose *v.* Rose, 9 Ark. 507.

Repeated outbursts of temper accompanied by violent acts and conduct showing a malignant hatred of the complainant are sufficient. Motley *v.* Motley, 93 Mo. App. 473, 67 S. W. 741; Heilbron *v.* Heilbron, 158 Pa. St. 297, 27 Atl. 967, 38 Am. St. Rep. 845; Payne *v.* Payne, 4 Humphr. (Tenn.) 500, 40 Am. Dec. 660.

Neglect arising from hatred, consisting of continual absence from home, refusal to speak to the wife or to enter her room when sick, thus causing her to become a physical wreck and rendering her life intolerable, is ground for divorce, as "indignities to her person." Brubaker *v.* Brubaker, 4 Pa. Dist. 185, 16 Pa. Co. Ct. 314.

42. *Arkansas.*— Rose *v.* Rose, 9 Ark. 507, holding that the acts must be of such a nature as to cause extreme and unmerited suffering.

Louisiana.— Scott *v.* Scott, 27 La. Ann. 594.

Missouri.— Van Horn *v.* Van Horn, 82 Mo. App. 79 (holding that mere unkindness to the wife's children by a former husband is not sufficient); Goodman *v.* Goodman, 80 Mo. App. 274 (holding that the wife's refusal to comply with an unreasonable request to compel her brother to leave their home was not an indignity entitling the husband to divorce); Webb *v.* Webb, 44 Mo. App. 229 (holding that mere wranglings and exhibitions of temper due to the lack in both parties of a conciliatory spirit is not sufficient).

Oregon.— Nickerson *v.* Nickerson, 34 Oreg. 1, 48 Pac. 423, 54 Pac. 277, holding that the refusal of a husband to send away his son by a former marriage because he was imprudent and sometimes abusive to the wife is not a personal indignity.

Pennsylvania. — Bloom *v.* Bloom, 8 Pa. Dist. 563, 22 Pa. Co. Ct. 433 (holding that

(B) *Necessity of Violence.* Personal violence or conduct creating a fear of bodily harm is not a necessary element of the offense of inflicting personal indignities on a spouse.[43]

(C) *Necessity of Danger to Life or Health.* Personal indignities, to constitute ground for divorce, need not be of such a character as to endanger life or health.[44]

(D) *Single Act of Indignity.* A single act of indignity is not sufficient to render the wife's condition intolerable or her life burdensome and so entitle her to a divorce.[45]

(E) *Intention.* Ordinarily an act is not an indignity unless it was intended as such.[46]

(II) *Illustrations*—(A) *False Charges.* Charges of infidelity made by a husband against his wife without just cause are personal indignities affording ground for divorce if they result in mental suffering rendering her condition intolerable;[47] and the same is true where the husband, in the presence of his wife, calls their child a bastard, especially where the accusation is coupled with other indignities of a personal nature.[48] If, however, the charge is made in the belief that it is true and not wantonly or in malice, it is not an indignity.[49]

(B) *Habitual Intemperance.* A single act of drunkenness does not constitute an indignity to the person of the complainant,[50] but a continued and excessive use of liquors and opiates rendering the condition of the injured party intolerable justifies a divorce.[51]

(C) *Lewd Conduct.* The lewd and indecent conduct of a husband toward his wife is not alone sufficient to authorize a divorce as for personal indignities rendering life burdensome.[52] She is entitled to a divorce, however, if he is openly and notoriously devoted to disreputable women.[53]

indignities to the person, as a ground for divorce, must consist of a series of insulting and cruel acts, long continued until they become unbearable); Downing *v.* Downing, 8 Kulp 463 (holding that the indignities must consist of such a course of conduct on the part of the husband as is humiliating, degrading, and insulting to the wife, and which has been unprovoked by any fault on her part); Carter *v.* Carter, 1 Kulp 359 (holding that harsh and unkind treatment alone is not sufficient).

43. Haley *v.* Haley, 44 Ark. 429; Rose *v.* Rose, 9 Ark. 507; Hooper *v.* Hooper, 19 Mo. 355; Melvin *v.* Melvin, 130 Pa. St. 6, 18 Atl. 920; Pennington *v.* Pennington, 10 Phila. (Pa.) 22.

44. May *v.* May, 62 Pa. St. 206; Krug *v.* Krug, 22 Pa. Super. Ct. 572; Dickenson *v.* Dickenson, 1 Del. Co. (Pa.) 293. See also McCartin *v.* McCartin, 37 Mo. App. 471.

45. Rose *v.* Rose, 9 Ark. 507; Kempf *v.* Kempf, 34 Mo. 211; Mahn *v.* Mahn, 70 Mo. App. 337; Webb *v.* Webb, 44 Mo. App. 229; May *v.* May, 62 Pa. St. 206; Richards *v.* Richards, 37 Pa. St. 225; Krug *v.* Krug, 22 Pa. Super. Ct. 572; Selly *v.* Selly, 9 Pa. Dist. 752, 24 Pa. Co. Ct. 286; Bloom *v.* Bloom, 8 Pa. Dist. 563, 22 Pa. Co. Ct. 433; Cutler *v.* Cutler, 2 Brewst. (Pa.) 511; Smith *v.* Smith, 19 Phila. (Pa.) 389; Richards *v.* Richards, 6 Luz. Leg. Reg. (Pa.) 83.

A single act of desertion may, however, be an indignity rendering the condition of the other party intolerable. Cannon *v.* Cannon, 17 Mo. App. 390.

46. Goodman *v.* Goodman, 80 Mo. App. 274; Everton *v.* Everton, 50 N. C. 202.

47. Hooper *v.* Hooper, 19 Mo. 355; Crow *v.* Crow, 29 Oreg. 392, 45 Pac. 761. *Contra*, Everton *v.* Everton, 50 N. C. 202. *Compare* Cheatham *v.* Cheatham, 10 Mo. 296.

False charges accompanied by misconduct may authorize a divorce. Coble *v.* Coble, 55 N. C. 392; Melvin *v.* Melvin, 130 Pa. St. 6, 18 Atl. 920.

48. Green *v.* Green, 131 N. C. 533, 42 S. E. 954, 92 Am. St. Rep. 788; Richards *v.* Richards, 6 Luz. Leg. Reg. (Pa.) 83.

49. Goodman *v.* Goodman, 80 Mo. App. 274, as where a wife in good faith accuses her husband of having communicated to her and her child a disease which he never had, but which she believed he had and which belief she declared to him so as to protect herself from further contamination.

50. Kempf *v.* Kempf, 34 Mo. 211.

51. Dawson *v.* Dawson, 23 Mo. App. 169. See also McCann *v.* McCann, 91 Mo. App. 1, holding that where defendant drank to excess at least two or three times a week, and frequented resorts of ill fame, and did other acts of like nature calculated to cause plaintiff humiliation, it is sufficient to authorize a divorce.

Intoxication inducing other misconduct rendering the condition of the wife intolerable and her life burdensome is within the statute. Doan *v.* Doan, 3 Pa. L. J. Rep. 7, 4 Pa. L. J. 332.

52. Cline *v.* Cline, 10 Oreg. 474.

53. Penningroth *v.* Penningroth, 72 Mo. App. 329; Wheeler *v.* Wheeler, 63 Mo. App. 298.

Familiarities and attentions by a husband to his wife's half sister and his refusal to

(D) *Publishing Notice to Withhold Credit.* A notice published by the husband to the effect that credit should not be given his wife on his account is not of itself sufficient as a personal indignity to warrant a divorce to the wife.[54] If, however, a husband acts without just cause and in malice, such a notice may in connection with other circumstances constitute a personal indignity.[55]

(E) *Sexual Excess.* If a husband compels the wife to submit to an over indulgence in sexual intercourse, she is entitled to a divorce as for personal indignities.[56]

14. Public Defamation — a. In General. Public defamation of one party to a marriage by the other is a statutory ground for a limited divorce in some states.[57]

b. What Constitutes. The offense is not complete unless the defamatory language was uttered in the presence of third persons,[58] although the utterance need not be in a public place.[59] If a false charge of misconduct was made to a third person in good faith and without malice it does not constitute public defamation;[60] nor is a charge of adultery made in a pleading in an action for divorce which fails for lack of proof necessarily within the statute.[61] If, however, a charge made in a judicial proceeding was known to be false by the party making it, it is ground for divorce.[62]

15. Religious Belief Inconsistent With Marriage. It is provided by statute in some states that if a spouse shall join a religious sect which professes to believe the relation of husband and wife to be unlawful and shall in consequence refuse to cohabit for a certain period the other may obtain a divorce.[63]

16. Turning Wife Out of Doors. In some states the statute authorizes a limited divorce to the wife if the husband shall turn her out of doors.[64]

17. Vagrancy. In some states vagrancy of the husband is made a ground of divorce in favor of the wife.[65]

18. Violent and Ungovernable Temper. The statutes of some states allow a divorce for the habitual indulgence of a violent and ungovernable temper by either party.[66]

send her away when requested by his wife, together with neglect of the wife's comfort and happiness, do not constitute personal indignities rendering life burdensome. Rickard *v.* Rickard, 9 Oreg. 168.

54. Hooper *v.* Hooper, 19 Mo. 355.

55. Young *v.* Young, (Tenn. Ch. App. 1900) 57 S. W. 438.

56. Krug *v.* Krug, 22 Pa. Super. Ct. 572.

57. See statutes of the different states.

The essential characteristics of the offense are similar to the false and malicious charges which constitute cruelty within the statutes permitting divorces on that ground. See *supra*, VII, C, 4, b, (IV), (C), (4).

58. Bienvenu *v.* Bienvenu, 14 La. Ann. 386.

59. Cass *v.* Cass, 34 La. Ann. 611, where a charge of adultery against a wife by her husband, made in the presence of her servants or of a visitor or to another person in the latter's house, was held public defamation.

60. Ashton *v.* Grucker, 48 La. Ann. 1194, 20 So. 738, where a statement by a wife to a confidential friend, charging the husband with adultery, made without malice and to induce the husband to return to the matrimonial domicile, was held not to be a public defamation, although untrue in fact.

61. Homes *v.* Carrier, 16 La. Ann. 94.

62. Linzay *v.* Linzay, 51 La. Ann. 630, 25 So. 308, holding that a wife's affidavit charging her husband with a crime and resulting in his arrest, if known by the wife to be entirely unfounded, is ground for separation.

63. Fitts *v.* Fitts, 46 N. H. 184 (holding that it is cause for divorce, although both parties joined such sect, where complainant afterward withdrew); Dyer *v.* Dyer, 5 N. H. 271.

64. Groves' Appeal, 37 Pa. St. 443.

Conditions of divorce.— A divorce will not be granted as for turning the wife out of doors unless she was ejected by force or was compelled to leave because of a threat to employ force and a reasonable apprehension that it would be used against her, or unless the husband's conduct was such as to justify the wife's withdrawal from their home (Sowers' Appeal, 89 Pa. St. 173 [*affirming* 11 Phila. 213]; or unless, the wife being away, the husband refuses to receive her upon her demand that she be taken back (Sowers' Appeal, *supra*; McDermott's Appeal, 8 Watts & S. (Pa.) 251).

65. Dwyer *v.* Dwyer, 26 Mo. App. 647, holding, however, that the mere refusal of an able-bodied man to support his wife does not constitute vagrancy.

66. Palmer *v.* Palmer, 26 Fla. 215, 7 So. 864; Crawford *v.* Crawford, 17 Fla. 180; Burns *v.* Burns, 13 Fla. 369, holding, however, that occasional outbursts of passion and frequent and unreasonable complaints, al-

VIII. DEFENSES.

A. Invalidity of Marriage. The remedy of divorce presupposes the existence of a valid marriage. Consequently a divorce may not be granted for causes which nullify the marriage *ab initio* unless the legislature has authorized that course;[67] nor may it be granted for other causes unless there exists a valid and subsisting marriage relation between the parties.[68]

B. Want of Capacity to Commit Offense — 1. DRUNKENNESS. It is no excuse for matrimonial misconduct that it is the result of intoxication voluntarily indulged in,[69] unless the complainant induced or consented to the intoxication.[70]

2. INSANITY. The insanity of a spouse, if it existed at the time of the commission of a matrimonial offense,[71] is, within the rule excusing a matrimonial

though made boisterously, tending only to render the marriage relation unhappy and disagreeable, are insufficient, and that the temper displayed must be habitual, and render life an oppressive and intolerable burden.

67. See *supra*, VII, B, 1.

68. *California.*— Kilburn *v.* Kilburn, 89 Cal. 46, 26 Pac. 636, 23 Am. St. Rep. 447; White *v.* White, 82 Cal. 427, 23 Pac. 276, 7 L. R. A. 799.

Florida.— Ponder *v.* Graham, 4 Fla. 23.

Iowa.— Borton *v.* Borton, 48 Iowa 697.

Massachusetts.— Mangue *v.* Mangue, 1 Mass. 240.

Michigan.—Van Dusan *v.* Van Dusan, 97 Mich. 70, 56 N. W. 234; Rose *v.* Rose, 67 Mich. 619, 35 N. W. 802; Cross *v.* Cross, 55 Mich. 280, 21 N. W. 309.

New Jersey.— Zule *v.* Zule, 1 N. J. Eq. 96.

New York.—Winans *v.* Winans, 124 N. Y. 140, 26 N. E. 293; Harbeck *v.* Harbeck, 102 N. Y. 714, 7 N. E. 408; Collins *v.* Collins, 80 N. Y. 1; Von Prochazka *v.* Von Prochazka, 3 N. Y. Suppl. 301; Blinks *v.* Blinks, 5 Misc. 193, 25 N. Y. Suppl. 768 (holding that a bigamous marriage being void *ab initio*, the second wife cannot maintain an action for a judicial separation); Anonymous, 15 Abb. Pr. N. S. 311; Finn *v.* Finn, 62 How. Pr. 83; Pugsley *v.* Pugsley, 9 Paige 589; Dobbs *v.* Dobbs, 3 Edw. 377.

Wisconsin.— Wheeler *v.* Wheeler, 76 Wis. 631, 45 N. W. 531.

A common-law marriage is a marriage "contracted and solemnized" within the meaning of the statute authorizing divorce. Bowman *v.* Bowman, 24 Ill. App. 165. Sufficiency of evidence of marriage see *infra*, XIII, C, 4.

Fraudulent marriage.— Where one of the parties to an executory agreement to marry is induced by the fraudulent representations of the other to go through a marriage ceremony before a person not authorized to perform it and cohabitation follows, the party guilty of the fraud cannot urge the invalidity of the marriage to defeat an action for divorce by the innocent party. Farley *v.* Farley, 94 Ala. 501, 10 So. 646, 33 Am. St. Rep. 141.

Presumption of validity.— When a prior marriage between one of the spouses and a third person is shown, it does not overcome the presumption of the validity of the later marriage, in the absence of evidence that the former spouse was then living, especially where he had left home long before the second marriage and has not been heard from during the lapse of a long period since that marriage (Wagoner *v.* Wagoner, 128 Mich. 635, 87 N. W. 898); and although it is shown that at the time of the second marriage the former spouse was living, the presumption of the validity of that marriage is not overcome, in the absence of evidence that the former spouse had not been divorced (McKibbin *v.* McKibbin, 139 Cal. 448, 73 Pac. 143). See also *infra*, XIII, A, note 7. See, generally, DEATH, 13 Cyc. 295 *et seq.*; MARRIAGE.

Necessity of marriage to support application for alimony see *infra*, XIX, B, 4, a.

Validity of marriage in general see MARRIAGE.

69. *Kentucky.*— Lockridge *v.* Lockridge, 3 Dana 28, 28 Am. Dec. 52; Harl *v.* Harl, 73 S. W. 756, 24 Ky. L. Rep. 2163.

Maryland.— Bowie *v.* Bowie, 3 Md. Ch. 51.

New Jersey.— McVickar *v.* McVickar, 46 N. J. Eq. 490, 19 Atl. 249, 19 Am. St. Rep. 422.

Texas.— Camp *v.* Camp, 18 Tex. 528.

Washington.— Lee *v.* Lee, 3 Wash. 236, 28 Pac. 355.

70. McVickar *v.* McVickar, 46 N. J. Eq. 490, 19 Atl. 249, 19 Am. St. Rep. 422.

71. Harrigan *v.* Harrigan, 135 Cal. 397, 67 Pac. 506 (where the period of desertion elapsed before defendant became insane); Rathbun *v.* Rathbun, 40 How. Pr. (N. Y.) 328; Stratford *v.* Stratford, 92 N. C. 297, all holding that insanity of defendant at the time the action was commenced is not a defense if he or she was sane when the offense was committed.

Insanity as abating suit see INSANE PERSONS.

Presumption of insanity.— If it appears that defendant was insane prior to the commission of the offense, the invalidity will be presumed to have continued down to that time. Cook *v.* Cook, 53 Barb. (N. Y.) 180. Conversely it may be inferred from a subsequent existence of the disease that defendant was insane at the time of the offense. Cohn *v.* Cohn, 85 Cal. 108, 24 Pac. 659.

offense for want of capacity to commit, a defense to an action for divorce, whether the offense be adultery,[72] cruelty,[73] abandonment or desertion,[74] or non-support.[75]

C. Provocation, Justification, and Excuse[76] — **1. For Adultery — a. Coercion.** Adultery of the wife does not constitute ground for divorce where she was forced to submit to it.[77]

b. Mistake. If a wife commits adultery through mistake, believing the man to be her husband, it is not ground for divorce.[78] So if the husband absents himself for a long period, and the wife in the belief that he is dead remarries and cohabits with another, she is not guilty of adultery so as to authorize a divorce.[79]

72. Wray *v.* Wray, 19 Ala. 522; Broadstreet *v.* Broadstreet, 7 Mass. 474; Hill *v.* Hill, 27 N. J. Eq. 214; Nichols *v.* Nichols, 31 Vt. 328, 73 Am. Dec. 352. *Contra*, Matchin *v.* Matchin, 6 Pa. St. 332, 336, 47 Am. Dec. 466, where it was held that the adultery of a wife is not excused by insanity, since the primary intent of divorce "is undoubtedly to keep the sources of generation pure, and when they have been corrupted, the preventitive remedy is to be applied without regard to the moral responsibility of the subject of it."

Depravity of character and abandoned habits are not in themselves evidence of insanity so as to constitute a defense to a charge of adultery. Hill *v.* Hill, 27 N. J. Eq. 214.

Test of insanity.— If the wife was capable of appreciating the nature of the act and its probable consequences her insanity in other respects is no defense. Yarrow *v.* Yarrow, [1892] P. 92, 61 L. J. P. & Adm. 69, 66 L. T. Rep. N. S. 383.

73. *California.*—Cohn *v.* Cohn, 85 Cal. 108, 24 Pac. 659.

Iowa.— Tiffany *v.* Tiffany, 84 Iowa 122, 50 N. W. 554; Wertz *v.* Wertz, 43 Iowa 534.

Kansas.— Powell *v.* Powell, 18 Kan. 371, 26 Am. Rep. 774.

Pennsylvania.— Hansell *v.* Hansell, 3 Pa. Dist. 724, 15 Pa. Co. Ct. 514.

Texas.— Sapp *v.* Sapp, 71 Tex. 348, 9 S. W. 258.

England.— Hanbury *v.* Hanbury, [1892] P. 222, 61 L. J. P. & Adm. 115; Hayward *v.* Hayward, 1 Swab. & Tr. 81, 6 Wkly. Rep. 638.

General insanity and monomania.— If the insanity is general the sane spouse may obtain protection through an inquisition of lunacy, and consequently the insanity precludes a divorce. Smith *v.* Smith, 33 N. J. Eq. 458; Hall *v.* Hall, 33 L. J. P. & M. 65, 9 L. T. Rep. N. S. 810, 3 Swab. & Tr. 347. If, however, the insanity consists in a monomania for which the subject cannot be confined, the sane spouse is entitled to a divorce for misconduct resulting from the disease (Smith *v.* Smith, *supra*; Scoland *v.* Scoland, 4 Wash. 118, 29 Pac. 930; Hanbury *v.* Hanbury, [1892] P. 222, 61 L. J. P. & Adm. 115; Curtis *v.* Curtis, 27 L. J. P. & M. 73, 1 Swab. & Tr. 192), unless it appears that the mental disorder has been subdued and that there is no danger of a recurrence of the acts of violence (Curtis *v.* Curtis, *supra*).

Test of insanity.— To constitute insanity a defense, it must have been such as to deprive defendant of the use of his reason to the extent that he did not know right from wrong and was incapable of willing the one or the other. Hansell *v.* Hansell, 3 Pa. Dist. 724, 15 Pa. Co. Ct. 514. It must be such as to deprive the party of the power to desist from the misconduct. Duvale *v.* Duvale, (N. J. Ch. 1896) 34 Atl. 888.

74. Baker *v.* Baker, 82 Ind. 146. And see Franklin *v.* Franklin, 53 Kan. 143, 35 Pac. 1118, holding that the shortcomings and erratic acts of a wife who had been insane but had at least partially recovered are to be viewed charitably in determining whether her subsequent abandonment of her husband is a sufficient ground for divorce.

Voluntary separation.— A husband is not entitled to an absolute divorce from his wife on the ground that they voluntarily lived apart for five years (Ky. St. § 2117), where she has become a lunatic and been confined in an asylum for that length of time. Pile *v.* Pile, 94 Ky. 308, 22 S. W. 215, 15 Ky. L. Rep. 88; Ferguson *v.* Ferguson, 8 Ky. L. Rep. 428.

Time of insanity.— Insanity precludes a divorce for desertion unless the full period of desertion had elapsed before defendant became insane. The fact that the desertion commenced while defendant was sane does not defeat the defense where he or she became insane before the cause of action accrued. Blandy *v.* Blandy, 20 App. Cas. (D. C.) 535; Storrs *v.* Storrs, 68 N. H. 118, 34 Atl. 672. *Contra*, Douglass *v.* Douglass, 31 Iowa 421.

75. Deneen *v.* McLeod, 21 Quebec Super. Ct. 54.

76. **Recrimination distinguished.**— Misconduct of complainant constituting a defense on the ground of provocation, justification, or excuse, need not be such as in itself would entitle defendant to a divorce. See cases cited *infra*, note 98. It is thus distinguished from misconduct of complainant constituting the defense of recrimination, which must of itself be sufficient as a ground for divorce. See *infra*, VIII, K, 2, a.

77. Gordon *v.* Gordon, 141 Ill. 160, 30 N. E. 446, 33 Am. St. Rep. 294, 21 L. R. A. 387; People *v.* Chapman, 62 Mich. 280, 28 N. W. 896, 4 Am. St. Rep. 857.

78. Gordon *v.* Gordon, 141 Ill. 160, 30 N. E. 446, 33 Am. St. Rep. 294, 21 L. R. A. 387.

79. Gordon *v.* Gordon, 141 Ill. 160, 30 N. E. 446, 33 Am. St. Rep. 294, 21 L. R. A. 387; Valleau *v.* Valleau, 6 Paige (N. Y.) 207 (holding that the second marriage being void-

e. Prior Divorce. An absolute divorce dissolves the marriage tie, and therefore subsequent intercourse between a former spouse and a third person does not constitute adultery, provided a final decree has been rendered,[80] and that no fraud was practised to obtain it.[81] Since a limited divorce does not sever but merely suspends the marriage relation. It does not relieve subsequent intercourse between one of the spouses and a third person of the character of adultery.[82]

d. Misconduct of Husband. Although the husband may not be guilty of connivance, yet if his conduct conduces to his wife's adultery he cannot have a divorce therefor.[83] The question of what conduct thus conduces to adultery depends largely on the circumstances of the particular case.[84] It must ordinarily amount

able and not void under the statute, cohabitation under the second marriage is not adultery unless the injured party to the first marriage procures a judicial dissolution of the second marriage and the parties thereto continue their cohabitation); Ralston *v.* Ralston, 2 Pa. Dist. 241.

80. Gorden *v.* Gorden, 141 Ill. 160, 30 N. E. 446, 33 Am. St. Rep. 294, 21 L. R. A. 387. See also *infra*, XV, G, 1, d; XXI, A, 1.

Mistake.— The belief of a wife at the time of her second marriage that a divorce from her first husband has been granted her does not relieve her subsequent intercourse with her second husband of the character of adultery. Gorden *v.* Gorden, 141 Ill. 160, 30 N. E. 446, 33 Am. St. Rep. 294, 21 L. R. A. 387.

Reversal of decree.— If after a decree of divorce one of the spouses remarries and subsequently the decree is reversed on appeal his cohabitation under the second marriage before the reversal is not adultery. Bailey *v.* Bailey, 45 Hun (N. Y.) 278.

81. Winston *v.* Winston, 165 N. Y. 553, 59 N. E. 273 [*affirming* 34 N. Y. App. Div. 460, 54 N. Y. Suppl. 298]; McGown *v.* McGown, 19 N. Y. App. Div. 368, 46 N. Y. Suppl. 285 [*affirmed* in 164 N. Y. 558, 58 N. E. 1089], both holding that a spouse who fraudulently procures a judgment of divorce and afterward marries and cohabits with another is guilty of adultery. See also Comstock *v.* Adams, 23 Kan. 513, 33 Am. Rep. 191; Munson *v.* Munson, 60 Hun (N. Y.) 189, 14 N. Y. Suppl. 692; McGiffert *v.* McGiffert, 31 Barb. (N. Y.) 69; Vischer *v.* Vischer, 12 Barb. (N. Y.) 640; Crouch *v.* Crouch, 30 Wis. 667.

82. Vischer *v.* Vischer, 12 Barb. (N. Y.) 640; Green *v.* Green, L. R. 3 P. 121, 43 L. J. P. & M. 6, 29 L. T. Rep. N. S. 251, 21 Wkly. Rep. 824; Bland *v.* Bland, L. R. 1 P. 237, 35 L. J. P. & M. 104, 15 Wkly. Rep. 9; Ritchie *v.* Ritchie, 4 Macq. H. L. 162. See also *infra*, XV, G, 2.

83. *Kentucky.*— Finley *v.* Finley, 2 S. W. 554, 8 Ky. L. Rep. 605.

North Carolina.— Tew *v.* Tew, 80 N. C. 316, 30 Am. Rep. 84.

Ohio.— Mayer *v.* Mayer, 5 Ohio Dec. (Reprint) 444, 5 Am. L. Rec. 674, 2 Cinc. L. Bul. 47.

Tennessee.— Moore *v.* Moore, 102 Tenn. 148, 52 S. W. 778.

England.— Burdon *v.* Burdon, [1901] P. 52, 69 L. J. P. & Adm. 118; Heyes *v.* Heyes, 13 P. D. 11, 51 J. P. 775, 57 L. J. P. & Adm. 22, 57 L. T. Rep. N. S. 815; Hawkins *v.* Hawkins, 10 P. D. 177, 54 L. J. P. & Adm. 94, 34 Wkly. Rep. 47.

Connivance see *infra*, VIII, H.

84. Parry *v.* Parry, [1896] P. 37, 65 L. J. P. & Adm. 35, 73 L. T. Rep. N. S. 759.

Desertion or abandonment by the husband is not in itself sufficient to prevent a divorce for the wife's adultery. Steele *v.* Steele, 104 N. C. 631, 10 S. E. 707. And see Proctor *v.* Proctor, 11 Jur. N. S. 531, 34 L. J. P. & M. 99, 12 L. T. Rep. N. S. 505, 4 Swab. & Tr. 140, 13 Wkly. Rep. 963; Haswell *v.* Haswell, 29 L. J. P. & M. 21, 1 L. T. Rep. N. S. 69, 1 Swab. & Tr. 502, 8 Wkly. Rep. 76. Where, however, a man marries a woman whom he has seduced and after living with her some time wilfully abandons her, knowing her liability to fall, and she commits adultery, his conduct conduces to her infidelity. Mayer *v.* Mayer, 5 Ohio Dec. (Reprint) 444, 5 Am. L. Rec. 674, 2 Cinc. L. Bul. 47; Hawkins *v.* Hawkins, 10 P. D. 177, 54 L. J. P. & Adm. 94, 34 Wkly. Rep. 47.

Neglect of the husband to provide for the support of a wife or in any manner to concern himself about her is "wilful neglect and misconduct" conducing to her adultery. Hawkins *v.* Hawkins, 10 P. D. 177, 54 L. J. P. & Adm. 94, 34 Wkly. Rep. 47; Matter of Simmon's Divorce Bill, 12 Cl. & F. 339, 8 Eng. Reprint 1438; Starbuck *v.* Starbuck, 59 L. J. P. & Adm. 20, 61 L. T. Rep. N. S. 876; Meara *v.* Meara, 35 L. J. P. & M. 33, 14 Wkly. Rep. 349; Coulthart *v.* Coulthart, 28 L. J. P. & M. 21; Heyes *v.* Heyes, 36 Wkly. Rep. 527 [*affirming* 13 P. D. 11, 51 J. P. 775, 57 L. J. P. & Adm. 22, 57 L. T. Rep. N. S. 815]. If, however, the separation is for a reasonable cause, it is not wilful neglect. Davies *v.* Davies, 9 Jur. N. S. 828, 32 L. J. P. & M. 111, 8 L. T. Rep. N. S. 703, 3 Swab. & Tr. 221, 11 Wkly. Rep. 402; Beavan *v.* Beavan, 8 Jur. N. S. 1110, 32 L. J. P. & M. 36, 7 L. T. Rep. N. S. 435, 2 Swab. & Tr. 652, 11 Wkly. Rep. 155; Du Terreaux *v.* Du Terreaux, 28 L. J. P. & M. 95, 1 Swab. & Tr. 555. The existence of a reasonable cause must affirmatively appear. Haswell *v.* Haswell, 29 L. J. P. & M. 21, 1 L. T. Rep. N. S. 69, 1 Swab. & Tr. 502, 8 Wkly. Rep. 76.

Exposure of the wife to temptation and failure to accord her protection conduces to her adultery. Heidrich *v.* Heidrich, 22 Pa. Super. Ct. 72; Barnes *v.* Barnes, L. R. 1 P. 505, 37 L. J. P. & M. 4, 17 L. T. Rep. N. S. 268, 16 Wkly. Rep. 281; Baylis *v.* Baylis,

to a breach of marital duty of the part of the husband,[85] and be such that the wife's adultery was the natural and probable consequence of it.[86]

2. For Cruelty — a. In General. If the cruelty set up as a ground of divorce was provoked by the misconduct of the complainant a divorce will not be granted.[87]

L. R. 1 P. 395, 36 L. J. P. & M. 89, 16 L. T. Rep. N. S. 613, 15 Wkly. Rep. 1092; Jeffreys *v.* Jeffreys, 10 Jur. N. S. 572, 33 L. J. P. & M. 84, 10 L. T. Rep. N. S. 309, 3 Swab. & Tr. 493, 12 Wkly. Rep. 809; Groves *v.* Groves, 28 L. J. P. & M. 108. See also Tew *v.* Tew, 80 N. C. 316, 30 Am. Rep. 84; Foy *v.* Foy, 35 N. C. 90; Moss *v.* Moss, 24 N. C. 55; Whittington *v.* Whittington, 19 N. C. 64. However, mere carelessness is not sufficient. It must appear that the husband perceived the danger and purposely or recklessly forbore to interfere. St. Paul *v.* St. Paul, L. R. 1 P. 739, 21 L. T. Rep. N. S. 108, 17 Wkly. Rep. 1111; Dering *v.* Dering, L. R. 1 P. 531, 37 L. J. P. & M. 52, 19 L. T. Rep. N. S. 48.

85. Cunnington *v.* Cunnington, 28 L. J. P. & M. 101, 1 Swab. & Tr. 475, 8 Wkly. Rep. 3, holding that felony committed by the husband for which he is imprisoned is not misconduct conducing to adultery.

86. Herrick *v.* Herrick, 31 Mich. 298; Moore *v.* Moore, 102 Tenn. 148, 52 S. W. 778; Williamson *v.* Williamson, 7 P. D. 76, 51 L. J. P. & Adm. 54, 46 L. T. Rep. N. S. 920, 30 Wkly. Rep. 616.

Compulsory prostitution.— Where a wife who had been driven by her husband to earn money by prostitution left him and cohabited adulterously with another and subsequently led a respectable life, her adulterous cohabitation was the continuing result of the original misconduct of the husband. Burdon *v.* Burdon, [1901] P. 52, 69 L. J. P. & Adm. 118.

87. *Alabama.*— David *v.* David, 27 Ala. 222.

Arkansas.— Cate *v.* Cate, 53 Ark. 484, 14 S. W. 675; Rose *v.* Rose, 9 Ark. 507.

California.— Waldron *v.* Waldron, 85 Cal. 251, 24 Pac. 649, 858, 9 L. R. A. 487; Johnson *v.* Johnson, 14 Cal. 459; Morris *v.* Morris, 14 Cal. 76, 73 Am. Dec. 615.

Illinois.— Nullmeyer *v.* Nullmeyer, 49 Ill. App. 573; Howard *v.* Howard, 47 Ill. App. 453.

Indiana.—Alexander *v.* Alexander, 140 Ind. 555, 38 N. E. 855.

Iowa.— Prather *v.* Prather, 99 Iowa 393, 68 N. W. 806; Felton *v.* Felton, 94 Iowa 739, 62 N. W. 677; Owen *v.* Owen, 90 Iowa 365, 57 N. W. 887; Evans *v.* Evans, 82 Iowa 462, 48 N. W. 809; Edgerton *v.* Edgerton, 79 Iowa 68, 44 N. W. 218; Gilbertson *v.* Gilbertson, 78 Iowa 755, 41 N. W. 573; McKee *v.* McKee, 77 Iowa 464, 42 N. W. 372; Peavy *v.* Peavy, 76 Iowa 443, 41 N. W. 67; Knight *v.* Knight, 31 Iowa 451.

Kentucky.— Fightmaster *v.* Fightmaster, 60 S. W. 918, 22 Ky. L. Rep. 1512.

Louisiana.—Ashton *v.* Grucker, 48 La. Ann. 1194, 20 So. 738 (holding that a husband's persistent association with another woman, arousing the jealousy of his wife and resulting in quarrels, will bar an action for divorce by him on account of his wife's repeated reproaches); Lalande *v.* Jore, 5 La. Ann. 32 (holding that where the ill treatment consisted of defamatory language by the husband induced by the continued exasperation and violence of the wife she was not entitled to a divorce from bed and board); Rowley *v.* Rowley, 19 La. 557; Cooper *v.* Cooper, 10 La. 249; Fleytas *v.* Pigneguy, 9 La. 419; Durand *v.* Her Husband, 4 Mart. 174.

Maryland.— Childs *v.* Childs, 49 Md. 509. See also Daiger *v.* Daiger, 2 Md. Ch. 335.

Michigan.— Peck *v.* Peck, 66 Mich. 586, 33 S. W. 893; German *v.* German, 57 Mich. 256, 23 N. W. 802; Bishop *v.* Bishop, 17 Mich. 211, holding that grievances provoked in the hope that a cause for divorce might result should not be considered.

Missouri.— Harper *v.* Harper, 29 Mo. 301.

Nebraska.— Walton *v.* Walton, 57 Nebr. 102, 77 N. W. 392.

Nevada.— Reed *v.* Reed, 4 Nev. 395.

New Hampshire.— Poor *v.* Poor, 8 N. H. 307, 29 Am. Dec. 664.

New Jersey.— Coles *v.* Coles, 32 N. J. Eq. 547; Duvall *v.* Duvall, (Ch. 1896) 34 Atl. 888; Lynch *v.* Lynch, (Ch. 1888) 16 Atl. 175.

New York.— Rose *v.* Rose, 52 Hun 154, 4 N. Y. Suppl. 856; Taylor *v.* Taylor, 26 N. Y. Suppl. 246; Crow *v.* Crow, 7 N. Y. Civ. Proc. 423; Devaismes *v.* Devaismes, 3 Code Rep. 124, holding that a wife's improper conduct with other men may justify the husband's cruelty.

North Dakota.— McAllister *v.* McAllister, 7 N. D. 324, 75 N. W. 256.

Oregon.— Mendelson *v.* Mendelson, 37 Oreg. 163, 61 Pac. 645; Taylor *v.* Taylor, 11 Oreg. 303, 8 Pac. 354.

Pennsylvania.— Richards *v.* Richards, 37 Pa. St. 225; Lloyd *v.* Lloyd, 2 Woodw. 481; Doan *v.* Doan, 3 Pa. L. J. Rep. 7, 4 Pa. L. J. 332.

Texas.— Beck *v.* Beck, 63 Tex. 34; Jones *v.* Jones, 60 Tex. 451; Hale *v.* Hale, 47 Tex. 336, 26 Am. Rep. 294; Bohan *v.* Bohan, (Civ. App. 1900) 56 S. W. 959; Cunningham *v.* Cunningham, 22 Tex. Civ. App. 6, 53 S. W. 75; Loring *v.* Loring, 17 Tex. Civ. App. 95, 42 S. W. 642.

Utah.— Hartwell *v.* Hartwell, 25 Utah 41, 69 Pac. 265.

Wisconsin.— Skinner *v.* Skinner, 5 Wis. 449, holding that a wife's frequent association with acknowledged prostitutes and other conduct inconsistent with her matrimonial duties may justify the husband's cruelty.

England.— Hughes *v.* Hughes, L. R. 1 P. 219, 35 L. J. P. & M. 94; Boreham *v.* Boreham, L. R. 1 P. 77, 35 L. J. P. & M. 49, 14 Wkly. Rep. 317; Holden *v.* Holden, 1 Hagg. Const. 453, 4 Eng. Eccl. 452; Waring *v.* War-

b. Excessive Retaliation. Where the cruelty complained of, although provoked by the complainant, is excessive and out of proportion to the provocation, it may still be a cause for divorce.[88] It is not necessary that the complainant should be entirely blameless.[89]

3. For Desertion — a. In General. If the circumstances are such as to justify or excuse one sponse in separating from the other the latter is not entitled to a divorce as for desertion.[90]

b. Separation From Necessity. If the defendant's absence was from necessity the desertion is justified or excused. So absence,[91] because of business,[92]

ing, 2 Phillim. 132; Dysart *v.* Dysart, 1 Rob. Eccl. 106.

See 17 Cent. Dig. tit. "Divorce," § 145 *et seq.*

Indiscreet conduct as justifying false charges of adultery see *supra*, VII, C, 4, b, (IV), (C), (4), (6).

Character of misconduct.— The misconduct of complainant to constitute a defense need not equal that of defendant, although it must be of the same general character and be such as was reasonably calculated to provoke defendant's misconduct. Bohan *v.* Bohan, (Tex. Civ. App. 1900) 56 S. W. 959.

Time of misconduct.— Not only acts of complainant occurring on the same day with those complained of, but also previous acts of complainant may be urged in provocation or justification. Skolfield *v.* Skolfield, 86 Me. 31, 29 Atl. 925; Powers *v.* Powers, 84 N. Y. App. Div. 588, 82 N. Y. Suppl. 1022. See also Bihin *v.* Bihin, 17 Abb. Pr. (N. Y.) 19.

88. *California.*— Eidenmuller *v.* Eidenmuller, 37 Cal. 364; Johnson *v.* Johnson, 14 Cal. 459.

Illinois.— Wessels *v.* Wessels, 28 Ill. App. 253.

Iowa.— Douglass *v.* Douglass, 81 Iowa 258, 47 N. W. 92.

Maryland.— See Daiger *v.* Daiger, 2 Md. Ch. 335.

Missouri.— Owen *v.* Owen, 48 Mo. App. 208.

Montana.— Albert *v.* Albert, 5 Mont. 577, 6 Pac. 23, 51 Am. Rep. 86.

Nebraska.— Boeck *v.* Boeck, 16 Nebr. 196, 20 N. W. 223.

Nevada.— Reed *v.* Reed, 4 Nev. 395.

New Hampshire.— Poor *v.* Poor, 8 N. H. 307, 29 Am. Dec. 664.

Oregon.— Taylor *v.* Taylor, 11 Oreg. 303, 8 Pac. 354.

Pennsylvania.— Richards *v.* Richards, 37 Pa. St. 225.

Tennessee.— McClanahan *v.* McClanahan, 104 Tenn. 217, 56 S. W. 858.

Texas.— Loring *v.* Loring, 17 Tex. Civ. App. 95, 42 S. W. 642.

Wisconsin.— Skinner *v.* Skinner, 5 Wis. 449.

England.— Waring *v.* Waring, 2 Phillim. 132.

See 17 Cent. Dig. tit. "Divorce," § 146 *et seq.*

Illustrations.— Complainant's violent and irascible temper (Eidenmuller *v.* Eidenmuller, 37 Cal. 364; Wessels *v.* Wessels, 28 Ill. App. 253; Boeck *v.* Boeck, 16 Nebr. 196, 20 N. W. 223), meddlesome and aggravating ways (Douglass *v.* Douglass, 81 Iowa 258, 47 N. W. 92; Marsh *v.* Marsh, 64 Iowa 667, 21 N. W. 130), offensive language (Gholston *v.* Gholston, 31 Ga. 625; Berryman *v.* Berryman, 59 Mich. 605, 26 N. W. 789; Albert *v.* Albert, 5 Mont. 577, 6 Pac. 23, 51 Am. Rep. 86; Boeck *v.* Boeck, 16 Nebr. 196, 20 N. W. 223), angry impatience (McClanahan *v.* McClanahan, 104 Tenn. 217, 56 S. W. 858), refusal of marital intercourse (Segelbaum *v.* Segelbaum, 39 Minn. 258, 39 N. W. 492), or preference for another than defendant (Owen *v.* Owen, 48 Mo. App. 208) will not excuse acts of personal violence attended with actual or threatened bodily harm.

Provocation is not a defense, however, where the passions of a husband are so much beyond his control that it is inconsistent with the personal safety of the wife to continue in his society. King *v.* King, 28 Ala. 315.

89. Rose *v.* Rose, 9 Ark. 507; Marsh *v.* Marsh, 64 Iowa 667, 21 N. W. 130.

90. Fink *v.* Fink, 137 Cal. 559, 70 Pac. 628 (holding that if there is just cause for refusing marital intercourse, the refusal is not ground for divorce); Powell *v.* Powell, 29 Vt. 148 (holding that to authorize a divorce the desertion must be without any good reason or without such a reason as the party on probable proof believes to be sufficient).

Consent of abandoned spouse as excusing desertion: In general see *supra*, VII, C, 5, b, (IV). Agreement for separation see *infra*, VIII, D, 2.

91. Lynch *v.* Lynch, 33 Md. 328; Broughton *v.* Broughton, 1 Del. Co. (Pa.) 273; Huxtable *v.* Huxtable, 68 L. J. P. & Adm. 83.

92. Kennedy *v.* Kennedy, 87 Ill. 250; Bruner *v.* Bruner, 70 Md. 105, 16 Atl. 385 (holding that where a separation was caused by the husband's absence to obtain employment, during which time the correspondence with his wife was frequent and affectionate and indicated a hope that they would be reunited, and his failure to support her resulted from his inability, a divorce should not be granted); Embley *v.* Embley, (N. J. Ch. 1897) 37 Atl. 46 (holding that there was no desertion where a husband left town because he had been arrested for debt and attacked by the newspapers, and his parting from his wife was friendly, and he subsequently wrote affectionate letters indicating his desire to continue their marital relations, and was at first unable to comply with her demand for money to enable her to go to

sickness,[93] or imprisonment,[94] is a desertion which is justified or excused and does not constitute a ground for divorce.

e. **Separation Pending Divorce Suit.** Voluntary separation of either party during the pendency of a divorce suit brought by or against such party is not to be included in computing the statutory period of desertion, since such separation is justified.[95]

d. **Misconduct of Complainant** — (I) *General Rule.* Misconduct of one spouse causing the other to leave the family home and remain away may afford justification for the desertion and preclude a divorce on that ground.[96]

(II) *Requisites of Misconduct.* It has been held that a wife is not justified in leaving her husband unless his conduct is such as would in itself constitute a ground for divorce.[97] It would seem to subserve the interests of public policy

him, and when he became able and wrote requesting a reunion she ignored his letters); Huxtable *v.* Huxtable, 68 L. J. P. & Adm. 83; Williams *v.* Williams, 3 Swab. & Tr. 547; *Ex p.* Aldridge, 1 Swab. & Tr. 88, 6 Wkly. Rep. 507.

93. Neely *v.* Neely, 131 Pa. St. 552, 20 Atl. 311.

94. Porritt *v.* Porritt, 18 Mich. 420; Hyland *v.* Hyland, 55 N. J. Eq. 35, 36 Atl. 270; Wolf *v.* Wolf, 38 N. J. Eq. 128. And see Wynne *v.* Wynne, [1898] P. 18, 67 L. J. P. & Adm. 5; Drew *v.* Drew, 13 P. D. 97, 57 L. J. P. & Adm. 64, 58 L. T. Rep. N. S. 923, 36 Wkly. Rep. 927; Astrope *v.* Astrope, 29 L. J. P. & M. 27. *Contra,* Davis *v.* Davis, 102 Ky. 440, 43 S. W. 168, 19 Ky. L. Rep. 1520, 39 L. R. A. 403. However, the mere fact that the husband has been in the house of correction during the greater part of the five years of desertion under successive sentences does not preclude a divorce, where the original desertion took place before the imprisonment and during the intervals of liberty he neither returned to his wife nor contributed to her support. Hews *v.* Hews, 7 Gray (Mass.) 279.

Confinement as a lunatic as justifying desertion see *supra,* VIII, B, 2.

95. *Florida.*— Palmer *v.* Palmer, 36 Fla. 385, 18 So. 720.

Illinois.— Haltenhof *v.* Haltenhof, 44 Ill. App. 135.

Louisiana.— Jolly *v.* Weber, 36 La. Ann. 676.

Michigan.— Porritt *v.* Porritt, 18 Mich. 420.

Minnesota.— Hurning *v.* Hurning, 80 Minn. 373, 83 N. W. 342, holding that the period of lawful separation pending divorce proceedings does not end until judgment is entered in accordance with the conclusions of law as filed by the court.

Missouri.— Doyle *v.* Doyle, 26 Mo. 545; Salorgne *v.* Salorgne, 6 Mo. App. 603.

New Jersey.— Weigel *v.* Weigel, (Err. & App. 1903) 54 Atl. 1125 [*affirming* 63 N. J. Eq. 677, 52 Atl. 1123]; Chipchase *v.* Chipchase, 48 N. J. Eq. 549, 22 Atl. 588, 49 N. J. Eq. 594, 26 Atl. 468; Marsh *v.* Marsh, 14 N. J. Eq. 315, 82 Am. Dec. 251.

See 17 Cent. Dig. tit. "Divorce," § 124.

Qualifications of rule.— If a wife who has deserted her husband without just cause thereafter so wrongfully conducts herself as to justify and induce her husband to sue for a divorce upon the ground of adultery, the pendency of that action, although she be not in fact guilty, will not suspend the effect of her desertion. Wagner *v.* Wagner, 39 Minn. 394, 40 N. W. 360. So the institution of a suit by the husband after the wife's wilful desertion to have their marriage declared void is not sufficient to convert the desertion into justifiable separation from the time of the pendency of the suit. Hitchcock *v.* Hitchcock, 15 App. Cas. (D. C.) 81.

Cohabitation pendente lite as condonation see *infra,* VIII, F, 3, c.

96. Cornish *v.* Cornish, 23 N. J. Eq. 208.

Removal of cause for desertion and offer of reconciliation see *supra,* VII, C, 5, b, (IV), (B), (5).

97. *District of Columbia.*— Hitchcock *v.* Hitchcock, 15 App. Cas. 81.

Illinois.— Carter *v.* Carter, 62 Ill. 439.

Iowa.— Pierce *v.* Pierce, 33 Iowa 238; Douglass *v.* Douglass, 31 Iowa 421.

Kentucky.— Logan *v.* Logan, 2 B. Mon. 142.

Mississippi.— Kenley *v.* Kenley, 2 How. 751.

New Jersey.— Black *v.* Black, 30 N. J. Eq. 215; Boyce *v.* Boyce, 23 N. J. Eq. 337; Moores *v.* Moores, 16 N. J. Eq. 275.

Pennsylvania.— Detrick's Appeal, 117 Pa. St. 452, 11 Atl. 882; Gordon *v.* Gordon, 48 Pa. St. 226; Grove's Appeal, 37 Pa. St. 443, Butler *v.* Butler, 1 Pars. Eq. Cas. 329, 4 Pa. L. J. Rep. 284; Cutler *v.* Cutler, 2 Brewst. 511; Clark *v.* Clark, 2 Chest. Co. Rep. 38; Klopfer's Appeal, 1 Mona. 81.

West Virginia.— Martin *v.* Martin, 33 W. Va. 695, 11 S. E. 12.

Causes not justifying desertion.— The husband is permitted to determine whom he shall entertain in his house, and therefore a wife is not justified in leaving him because he invites members of his family to live with him (Jones *v.* Jones, 55 Mo. App. 523. *Contra,* Powell *v.* Powell, 29 Vt. 148), or because he excludes her son by a former marriage from the house (Fulton *v.* Fulton, 36 Miss. 517). The refusal of the husband to allow the wife to attend a church of which she is a member is not sufficient to justify her in separating from him. Law-

and the sacredness of the marriage tie, however, to permit a spouse to set up in defense of his or her desertion such misconduct on the part of the other as would render it impossible to continue the matrimonial cohabitation with safety, health, and self-respect, although the misconduct is not in itself a sufficient ground for divorce, and some courts so hold.[98]

(III) *Particular Acts of Misconduct* — (A) *Adultery.* If one spouse commits adultery, the other is justified in leaving the matrimonial domicile.[99]

(B) *Cruelty.* Cruel treatment by reason of which the wife is compelled to leave the home of the husband is a justification for the desertion and precludes a divorce on that ground.[1] Gross language, rude or overbearing manners, ill temper *v.* Lawrence, 3 Paige (N. Y.) 267. Nor is desertion justified by want of affection (Hitchcock *v.* Hitchcock, 15 App. Cas. (D. C.) 81; Taylor *v.* Taylor, 80 Iowa 29, 45 N. W. 307, 20 Am. St. Rep. 394; Schuman *v.* Schuman, 93 Mo. App. 99; Alkire *v.* Alkire, 33 W. Va. 517, 11 S. E. 11) or incompatibility of temper (Van Dyke *v.* Van Dyke, 135 Pa. St. 459, 19 Atl. 1061).

98. *Massachusetts.*— Lyster *v.* Lyster, 111 Mass. 327.

Minnesota.— Stocking *v.* Stocking, 76 Minn. 292, 79 N. W. 172, 668, holding that it is a sufficient justification if the party withdrawing from the cohabitation has reasonable grounds for believing, and does honestly believe, that by reason of the actual misconduct of the other it cannot be longer continued with health, safety, or self-respect.

Missouri. — Gillinwaters *v.* Gillinwaters, 28 Mo. 60; Neff *v.* Neff, 20 Mo. App. 182, holding that a wife was justified in leaving the husband because he was subject to fits, where before the marriage he had denied the infirmity, and he refused to allow any one by to protect her.

New York.— See Williams *v.* Williams, 130 N. Y. 193, 29 N. E. 98, 14 L. R. A. 220, 27 Am. St. Rep. 517, holding that desertion by a wife, caused by the husband prohibiting her from seeing or communicating with her mother and his informing her that she could not go with him if she wanted to see or communicate with her mother, does not constitute cause for divorce.

Vermont.— See Powell *v.* Powell, 29 Vt. 148.

England. — Yeatman *v.* Yeatman, L. R. 1 P. 489, 37 L. J. P. & M. 37, 18 L. T. Rep. N. S. 415, 16 Wkly. Rep. 734.

99. Kershaw *v.* Kershaw, 5 Pa. Dist. 551; Larson *v.* Larson, 3 Kulp (Pa.) 215.

The birth of a child seven months after the cohabitation of a husband and wife began affords no ground for a charge of adultery against her, so as to justify his expelling her from his house. Harding *v.* Harding, 22 Md. 337.

1. *Alabama.*— Hardin *v.* Hardin, 17 Ala. 250, 52 Am. Dec. 170.

Illinois.— Schoen *v.* Schoen, 48 Ill. App. 382.

Iowa.— Schichtl *v.* Schichtl, 88 Iowa 210, 55 N. W. 309; Day *v.* Day, 84 Iowa 221, 50 N. W. 979; Doolittle *v.* Doolittle, 78 Iowa 691, 43 N. W. 616, 6 L. R. A. 187.

Kentucky.— Evans *v.* Evans, 93 Ky. 510, 20 S. W. 605, 14 Ky. L. Rep. 628; Watkinson *v.* Watkinson, 12 B. Mon. 210; McCroklin *v.* McCroklin, 2 B. Mon. 370; Butler *v.* Butler, 4 Litt. 201; Fisher *v.* Fisher, 10 Ky. L. Rep. 283.

Louisiana.— Gahn *v.* Darby, 36 La. Ann. 70; Naulet *v.* Dubois, 6 La. Ann. 403.

Massachusetts.— Lea *v.* Lea, 99 Mass. 493, 96 Am. Dec. 772; Pidge *v.* Pidge, 3 Metc. 257.

Minnesota.— Stocking *v.* Stocking, 76 Minn. 292, 79 N. W. 172, 668.

Mississippi.— Kenley *v.* Kenley, 2 How. 751.

Missouri. — Gillinwaters *v.* Gillinwaters, 28 Mo. 60; Neff *v.* Neff, 20 Mo. App. 182; Dwyer *v.* Dwyer, 16 Mo. App. 422.

Nebraska.— Kikel *v.* Kikel, 25 Nehr. 256, 41 N. W. 180.

New Jersey.— Smithkin *v.* Smithkin, 62 N. J. Eq. 161, 49 Atl. 815; Crickler *v.* Crickler, 58 N. J. Eq. 427, 43 Atl. 1064; Meldowney *v.* Meldowney, 27 N. J. Eq. 328; Cornish *v.* Cornish, 23 N. J. Eq. 208; Moores *v.* Moores, 16 N. J. Eq. 275; Marker *v.* Marker, 11 N. J. Eq. 256.

New York.— Simon *v.* Simon, 15 Misc. 515, 37 N. Y. Suppl. 1121 [*affirmed* in 6 N. Y. App. Div. 469, 39 N. Y. Suppl. 573 (*affirmed* in 159 N. Y. 549, 54 N. E. 1094)].

Pennsylvania.— Angier *v.* Angier, 63 Pa. St. 450; Doan *v.* Doan, 3 Pa. L. J. Rep. 7, 4 Pa. L. J. 332.

Vermont.— Powell *v.* Powell, 29 Vt. 148.

Virginia.— Hutchins *v.* Hutchins, 93 Va. 68, 24 S. E. 903.

England.—Mackenzie *v.* Mackenzie, [1895] A. C. 384; Yeatman *v.* Yeatman, L. R. 1 P. 489, 37 L. J. P. & M. 37, 18 L. T. Rep. N. S. 415, 16 Wkly. Rep. 734; Koch *v.* Koch, [1899] P. 221, 68 L. J. P. & Adm. 90; Graves *v.* Graves, 10 Jur. N. S. 546, 33 L. J. P. & M. 66, 10 L. T. Rep. N. S. 273, 3 Swab. & Tr. 350, 12 Wkly. Rep. 1016.

Acts of third persons.— Cruelty on the part of members of the husband's family, without the wife's provocation, justifies her departure. Day *v.* Day, 84 Iowa 221, 50 N. W. 979; Loux *v.* Loux, 57 N. J. Eq. 561, 41 Atl. 358; Hutchins *v.* Hutchins, 93 Va. 68, 24 S. E. 903, holding, however, that mere offensive conduct by members of the husband's family not in itself cruelty is insufficient to justify the wife's desertion. See, however, Harris *v.* Harris, 31 Gratt. (Va.) 13, holding that the wife's desertion is not justified by the fact that the husband failed to con-

per, jealousy, or unkindness,[2] if they do not threaten bodily harm,[3] will not ordinarily justify desertion, although personal violence is not a necessary element of cruelty as a justification.[4]

(c) *Non-Marital Crime.* The fact that the husband is guilty of a crime does not justify the wife in refusing to live with him while he is at large, if the offense is not a breach of his marital vows.[5]

(d) *Non-Support.* Inability of a husband to provide his wife with suitable support is not of itself sufficient to justify her desertion.[6]

(e) *Refusal to Cohabit.* One spouse is not justified in deserting the other because the latter refuses marital intercourse.[7]

(iv) *Justification or Provocation For Misconduct.* If the misconduct alleged in justification of a desertion was justified or provoked by the acts of defendant it is insufficient as a defense.[8]

4. For Non-Support. If a wife withdraws herself from the family home against her husband's consent, she cannot complain that he does not provide for her,[9] unless his conduct is such as to justify her in withdrawing from him.[10] False charges of infidelity made by a wife do not justify the husband in failing to support her.[11]

D. Agreement For Separation — 1. In General. An agreement for separation is not ordinarily a bar to a divorce, either limited or absolute,[12] and this is

trol his servants and maintain over them her authority as his wife.

Sexual indulgence.— Frequent intercourse by the husband does not justify the wife's desertion unless it amounts to cruelty. Moores *v.* Moores, 16 N. J. Eq. 275. A wife's fear of having too many children is no justification for deserting her husband. Leavitt *v.* Leavitt, Wright (Ohio) 719; Du Terreaux *v.* Du Terreaux, 28 L. J. P. & M. 95, 1 Swab. & Tr. 555.

2. *Alabama.*—Bryan *v.* Bryan, 34 Ala. 516; Hanberry *v.* Hanberry, 29 Ala. 719.

Louisiana.— Gahn *v.* Darby, 36 La. Ann. 70.

Mississippi.— Kenley *v.* Kenley, 2 How. 751.

Missouri.— Ashburn *v.* Ashburn, 101 Mo. App. 365, 74 S. W. 394; Grove *v.* Grove, 79 Mo. App. 142.

New Jersey.— Lammertz *v.* Lammertz, 59 N. J. Eq. 649, 45 Atl. 271; Sarfaty *v.* Sarfaty, 59 N. J. Eq. 193, 45 Atl. 261.

Pennsylvania.—Cutler *v.* Cutler, 2 Brewst. 511; Dickenson *v.* Dickenson, 1 Del. Co. 293.

Virginia.— Carr *v.* Carr, 22 Gratt. 168.

West Virginia.— Martin *v.* Martin, 33 W. Va. 695, 11 S. E. 12; Alkire *v.* Alkire, 33 W. Va. 517, 11 S. E. 11.

3. Kenley *v.* Kenley, 2 How. (Miss.) 751.

4. Schoen *v.* Schoen, 48 Ill. App. 382.

False charges of infidelity may justify desertion (Hardin *v.* Hardin, 17 Ala. 250, 52 Am. Dec. 170; Jerolamon *v.* Jerolamon, 10 N. J. L. J. 41; Herr *v.* Herr, 17 Lanc. L. Rev. 209), where the accused's conduct has not been indiscreet (Ashburn *v.* Ashburn, 101 Mo. App. 365, 74 S. W. 394).

5. Foy *v.* Foy, 35 N. C. 90; Williamson *v.* Williamson, 7 P. D. 76, 51 L. J. P. & Adm. 54, 46 L. T. Rep. N. S. 920, 30 Wkly. Rep. 616, *semble*.

6. Freeman *v.* Freeman, 94 Mo. App. 504, 68 S. W. 389; Van Dyke *v.* Van Dyke, 135 Pa. St. 459, 19 Atl. 1061, holding that if the husband contributes to the support of his family according to his ability there is no justification for desertion. *Compare* Belden *v.* Belden, 33 N. J. Eq. 94.

Turning husband out.— Where a wife insists on her husband's leaving her because he will not support the family, his departure is not desertion. Johnson *v.* Johnson, 35 N. J. Eq. 20.

7. Reid *v.* Reid, 21 N. J. Eq. 331; Eshbach *v.* Eshbach, 23 Pa. St. 343. *Contra*, Synge *v.* Synge, [1901] P. 317, 70 L. J. P. & Adm. 97, 85 L. T. Rep. N. S. 83.

8. Evans *v.* Evans, 93 Ky. 510, 20 S. W. 605, 14 Ky. L. Rep. 628 (holding that where the husband defends by alleging that he left his wife because of her ungovernable temper and abuse of him, and the evidence shows that such abuse was because of his adulterous acts, he should be considered the offending party); Richards *v.* Richards, 1 Grant (Pa.) 389 (holding that the husband's violence is no justification for the wife's desertion where it was necessary to prevent the commission of an unlawful act by her).

9. *Alabama.*— Gray *v.* Gray, 15 Ala. 779.

Georgia.— Fuller *v.* Fuller, 108 Ga. 256, 33 S. E. 865.

Indiana.—Barnett *v.* Barnett, 27 Ind. App. 466, 61 N. E. 737.

Pennsylvania.—Roth *v.* Roth, 15 Pa. Super. Ct. 192.

Rhode Island.— Gourlay *v.* Gourlay, 16 R. I. 705, 19 Atl. 142.

10. Page *v.* Page, 51 Mich. 88, 16 N. W. 245.

11. French *v.* French, 14 Gray (Mass.) 186.

12. *Iowa.*— Lewis *v.* Lewis, 75 Iowa 200, 39 N. W. 271.

Maryland.— Kremelberg *v.* Kremelberg, 52 Md. 553; J. G. *v.* H. G., 33 Md. 401, 3 Am. Rep. 183.

so, although the cause of action accrued before the agreement was entered into,[13] in the absence of a covenant, express or implied, not to sue for past offenses.[14]

2. WHERE CAUSE IS DESERTION. An agreement for separation which has not been revoked and under which the spouses are living apart precludes either from obtaining a divorce for desertion,[15] unless the cause of action therefor had fully accrued at the time the agreement was entered into.[16]

E. Antenuptial Knowledge of Cause. Knowledge by the complainant of the cause for divorce at the time the marriage was contracted is a bar to the suit.[17]

New York.—Galusha *v.* Galusha, 116 N. Y. 635, 22 N. E. 1114, 15 Am. St. Rep. 453, 6 L. R. A. 487; Rogers *v.* Rogers, 4 Paige 516, 27 Am. Dec. 84; Anderson *v.* Anderson, 1 Edw. 380.

Pennsylvania.— Bloom *v.* Bloom, 8 Pa. Dist. 563, 22 Pa. Co. Ct. 433; Eby *v.* Eby, 17 Pa. Co. Ct. 269.

England.— Brown *v.* Brown, L. R. 3 P. 202, 43 L. J. P. & M. 47, 31 L. T. Rep. N. S. 272; Morrall *v.* Morrall, 6 P. D. 98, 50 L. J. P. & Adm. 62, 47 L. T. Rep. N. S. 50, 29 Wkly. Rep. 897; Mortimer *v.* Mortimer, 3 Hagg. Const. 310, 4 Eng. Eccl. 543; Durant *v.* Durant, 1 Hagg. Eccl. 733, 3 Eng. Eccl. 310; Westmeath *v.* Westmeath, 2 Hagg. Eccl. Suppl. 1, 4 Eng. Eccl. 238; Hunt *v.* Hunt, 32 L. J. P. & M. 168; Spering *v.* Spering, 32 L. J. P. & M. 116, 9 L. T. Rep. N. S. 24, 3 Swab. & Tr. 211, 11 Wkly. Rep. 810. *Compare* Dowling *v.* Dowling, [1898] P. 228, 68 L. J. P. & Adm. 8, 47 Wkly. Rep. 272.

See 17 Cent. Dig. tit. "Divorce," § 161.

Adultery committed after voluntary separation is ground for divorce.

Massachusetts.—Franklin *v.* Franklin, 154 Mass. 515, 28 N. E. 681, 26 Am. St. Rep. 266, 13 L. R. A. 843.

Missouri.— Stokes *v.* Stokes, 1 Mo. 320.

New York.—Carpenter *v.* Osborn, 102 N. Y. 552, 7 N. E. 823.

North Carolina.— Wood *v.* Wood, 27 N. C. 674.

Pennsylvania.— Gee *v.* Gee, 2 Pa. Dist. 773, 13 Pa. Co. Ct. 382.

13. Potts *v.* Potts, (N. J. Ch. 1899) 42 Atl. 1055; Clark *v.* Fosdick, 118 N. Y. 7, 22 N. E. 1111, 16 Am. St. Rep. 733, 6 L. R. A. 132; Fosdick *v.* Fosdick, 15 R. I. 130, 23 Atl. 140; Moore *v.* Moore, 12 P. D. 193, 51 J. P. 632, 56 L. J. P. & Adm. 104, 57 L. T. Rep. N. S. 568, 36 Wkly. Rep. 110.

In connection with lapse of time a separation agreement may constitute a defense as showing bad faith. Williams *v.* Williams, L. R. 1 P. 178, 35 L. J. P. & M. 585, 14 L. T. Rep. N. S. 770, 14 Wkly. Rep. 1022; Matthews *v.* Matthews, 6 Jur. N. S. 659, 29 L. J. P. & M. 118, 2 L. T. Rep. N. S. 472, 1 Swab. & Tr. 499, 8 Wkly. Rep. 591.

14. Squires *v.* Squires, 53 Vt. 208, 38 Am. Rep. 668; Flower *v.* Flower, 25 L. T. Rep. N. S. 902, 20 Wkly. Rep. 231.

Ignorance of misconduct.— A covenant not to sue is no defense where it was executed by the husband in ignorance of the fact that the wife had committed adultery and on her positive assertion of innocence. Brown *v.* Brown, L. R. 7 Eq. 185, 38 L. J. Ch. 153, 19 L. T. Rep. N. S. 594, 17 Wkly. Rep. 98.

15. *Maryland.*— Brown *v.* Brown, 5 Gill 249 [*affirming* 2 Md. Ch. 316].

Missouri.— Rodgers *v.* Rodgers, 84 Mo. App. 197.

New Jersey.— Power *v.* Power, (Ch. 1903) 55 Atl. 111.

Pennsylvania.— Mondean *v.* Mondean, 30 Pittsb. Leg. J. N. S. 364; Alleman *v.* Alleman, 2 Dauph. Co. Rep. 209.

England.— Parkinson *v.* Parkinson, L. R. 2 P. 25, 39 L. J. P. & M. 14, 21 L. T. Rep. N. S. 732.

Consent to desertion generally see *supra*, VII, C, 5, b, (IV).

Genuineness of consent.—An agreement obtained by the husband without the real concurrence of his wife and without justification does not operate as a defense in an action against him for desertion. Dagg *v.* Dagg, 7 P. D. 17, 51 L. J. P. & Adm. 19, 47 L. T. Rep. N. S. 132, 30 Wkly. Rep. 431.

Construction of agreement.— Where a wife deserted her husband and afterward demanded a settlement of money affairs, and an agreement was thereupon executed reciting her desertion and making disposition for her support, it was not an assent by the husband to the separation, and after the expiration of the required time he was entitled to a divorce. Ogilvie *v.* Ogilvie, 37 Oreg. 171, 61 Pac. 627.

Breach of agreement.— A separation under an agreement is not converted into a desertion merely because one of the parties does not fulfil all the terms of the agreement. Crabb *v.* Crabb, L. R. 1 P. 601, 37 L. J. P. & M. 42, 18 L. T. Rep. N. S. 153, 16 Wkly. Rep. 650.

An agreement which was never acted upon, either as to the spouses living apart or as to the stipulations about money matters contained in it, does not deprive the act of the husband in subsequently leaving the wife against her will of the character of desertion. Cock *v.* Cock, 10 Jur. N. S. 806, 33 L. J. P. & M. 157, 10 L. T. Rep. N. S. 726, 3 Swab. & Tr. 514.

16. Moore *v.* Moore, 12 P. D. 193, 51 J. P. 632, 56 L. J. P. & Adm. 104, 57 L. T. Rep. N. S. 568, 36 Wkly. Rep. 110.

17. Stanley *v.* Stanley, 115 Ga. 990, 42 S. E. 374; Heinzman *v.* Heinzman, 4 Pa. Dist. 225, 15 Pa. Co. Ct. 669.

Habitual intoxication of a husband affords no ground for divorce where at the time of the marriage the wife knew that he was a slave to intoxicants. Tilton *v.* Tilton, 29 S. W. 290, 16 Ky. L. Rep. 538. See also Smith *v.* Smith, (Tenn. Ch. App. 1899) 53 S. W. 1000.

F. Condonation — 1. Definition. Condonation in the law of divorce is the forgiveness of an antecedent matrimonial offense on condition that it shall not be repeated, and that the offender shall thereafter treat the injured party with conjugal kindness.[18] So long as the offender complies with the condition there can be no divorce,[19] but a breach of the condition works a revival of the original offense and allows a divorce therefor.[20]

2. Essential Elements — a. Freedom of Consent. Condonation to be effectual must be the voluntary act of the injured party,[21] and not induced by fraud,[22] force,[23] or fear.[24]

b. Knowledge of Offense. Full knowledge of a matrimonial offense is an

Imprisonment of a husband for felony affords no ground for divorce where to the wife's knowledge he had been convicted before the marriage. Caswell *v.* Caswell, 64 Vt. 557, 24 Atl. 988, 33 Am. St. Rep. 943.

False representations of chastity of a wife afford no ground for divorce where at the time of the marriage the husband knew them to be false. Crehore *v.* Crehore, 97 Mass. 330, 93 Am. Dec. 98. Antenuptial knowledge of the wife's unchastity does not affect his right to a divorce for her subsequent adultery, however. Levy *v.* Levy, 16 Ill. App. 358. Condonation of false representations of chastity see *infra*, note 31.

18. Turnbull *v.* Turnbull, 23 Ark. 615; Odom *v.* Odom, 36 Ga. 286; Sharp *v.* Sharp, 116 Ill. 509, 6 N. E. 15; Wessels *v.* Wessels, 28 Ill. App. 253; Blandford *v.* Blandford, 8 P. D. 19, 52 L. J. P. & Adm. 17, 48 L. T. Rep. N. S. 238, 31 Wkly. Rep. 508; Campbell *v.* Campbell, 3 Jur. N. S. 845, 5 Wkly. Rep. 519; Peacock *v.* Peacock, 27 L. J. P. & M. 71, 1 Swab. & Tr. 183, 6 Wkly. Rep. 866. See also Condonation, 8 Cyc. 560.

Other definitions are: "The remission, by one of the married parties, of an offense which he knows the other has committed against the marriage, on the condition of being continually afterward treated by the other with conjugal kindness,— resulting in the rule that while the condition remains unbroken there can be no divorce, but a breach of it revives the original remedy." Bishop Mar. Div. & Sep. § 269 [*cited* in Farnham *v.* Farnham, 73 Ill. 497, 500; Pain *v.* Pain, 37 Mo. App. 110, 115].

"The conditional forgiveness of a matrimonial offense constituting a cause of divorce. . . . the following requirements are necessary to condonation: (1) A knowledge on the part of the condoner of the facts constituting the cause of divorce; (2) reconciliation and remission of the offense by the injured party; (3) restoration of the offending party to all marital rights." Cal. Civ. Code, §§ 115, 116; Ida. St. § 2032; Mont. Civ. Code, §§ 164–169; N. D. St. §§ 2747, 2748; S. D. St. §§ 3480, 3481.

Connivance distinguished.—"Condonation" and "connivance" are essentially different in their nature, although they may have the same legal consequence. Condonation may be meritorious but connivance necessarily involves criminality. Turton *v.* Turton, 3 Hagg. Eccl. 338, 5 Eng. Eccl. 130. See *infra*, VIII, H, 1.

19. Keats *v.* Keats, 5 Jur. N. S. 176, 28 L. J. P. & M. 57, 1 Swab. & Tr. 334, 7 Wkly. Rep. 377, holding that a condonation is a blotting out of the offense so as to restore the offender to the same position which he or she occupied before the offense was committed.

20. See *infra*, VIII, F, 4.

21. Clark *v.* Clark, 29 Ill. App. 257; Wessels *v.* Wessels, 28 Ill. App. 253; Cooke *v.* Cooke, 9 Jur. N. S. 754, 32 L. J. P. & M. 154, 8 L. T. Rep. N. S. 644, 3 Swab. & Tr. 126, 11 Wkly. Rep. 957.

Legal compulsion.— An offer by a wife to return to her husband is not a condonation where it is made pursuant to an order of court which requires her to do so as a condition of obtaining support for herself and her child pending suit. Betts *v.* Betts, 2 Rob. (N. Y.) 694, 19 Abb. Pr. (N. Y.) 90.

Moral necessity.— The presumption of condonation arising from cohabitation may be rebutted by proof that the cohabitation was compelled by the adverse circumstances of complainant. Reynolds *v.* Reynolds, 4 Abb. Dec. (N. Y.) 35, 3 Keyes (N. Y.) 368, 1 Transcr. App. (N. Y.) 103, 34 How. Pr. (N. Y.) 346; Cox *v.* Cox, 5 N. Y. Suppl. 367; Taylor *v.* Taylor, 5 N. D. 58, 63 N. W. 893.

22. Farnham *v.* Farnham, 73 Ill. 497, holding that an act of condonation induced by false representations is not binding.

23. *Illinois.*— Farnham *v.* Farnham, 73 Ill. 497.

Iowa.— Harnett *v.* Harnett, 55 Iowa 45, 7 N. W. 394, holding that sexual intercourse by force is not condonation.

Massachusetts.— Gardner *v.* Gardner, 2 Gray 434.

Texas.— Nogees *v.* Nogees, 7 Tex. 538, 58 Am. Dec. 78.

England.— Popkin *v.* Popkin, 1 Hagg. Eccl. 765 note *b*, 3 Eng. Eccl. 325; Cooke *v.* Cooke, 9 Jur. N. S. 754, 32 L. J. P & M. 154, 8 L. T. Rep. N. S. 644, 3 Swab. & Tr. 126, 11 Wkly. Rep. 957.

24. Wilson *v.* Wilson, 16 R. I. 122, 13 Atl. 102, where a wife's cohabitation with her husband after the cruelty complained of was excused because she was so much enfeebled by sickness and the sufferings she had undergone that she dreaded to provoke his anger by shutting the door upon him, and because she had reason to fear that if she excluded him he might attempt to gain possession of their children.

essential element of condonation thereof;[25] a mere suspicion is not sufficient.[26] So a sincere belief in the innocence of the guilty party precludes condonation in spite of reports of infidelity or knowledge of incriminatory facts.[27]

c. Restoration to Marital Rights. To constitute condonation there must ordi-

25. *Arkansas.*— Turnbull *v.* Turnbull, 23 Ark. 615.

Georgia.— Odom *v.* Odom, 36 Ga. 286.

Illinois.— Phillips *v.* Phillips, 1 Ill. App. 245.

Indiana.— Polson *v.* Polson, 140 Ind. 310, 39 N. E. 498; Burns *v.* Burns, 60 Ind. 259.

Kentucky.— Beeler *v.* Beeler, 44 S. W. 136, 19 Ky. L. Rep. 1936.

Massachusetts.— Maglathlin *v.* Maglathlin, 138 Mass. 299; Rogers *v.* Rogers, 122 Mass. 423; Clark *v.* Clark, 97 Mass. 331; Anonymous, 6 Mass. 147.

Missouri.— Welch *v.* Welch, 50 Mo. App. 395.

New Hampshire.— Quincy *v.* Quincy, 10 N. H. 272.

New Jersey.— Graham *v.* Graham, 50 N. J. Eq. 701, 25 Atl. 358; Shackelton *v.* Shackelton, 48 N. J. Eq. 364, 21 Atl. 935, 27 Am. St. Rep. 478; Marsh *v.* Marsh, 13 N. J. Eq. 281.

New York.— Harris *v.* Harris, 83 N. Y. App. Div. 123, 82 N. Y. Suppl. 568; Uhlmann *v.* Uhlmann, 17 Abb. N. Cas. 236; Hoffmire *v.* Hoffmire, 7 Paige 60, 32 Am. Dec. 611.

England.— Popkin *v.* Popkin, 1 Hagg. Eccl. 765 note *b*, 3 Eng. Eccl. 325; Durant *v.* Durant, 1 Hagg. Eccl. 733, 3 Eng. Eccl. 310; Ellis *v.* Ellis, 11 Jur. N. S. 610, 34 L. J. P. & M. 100, 13 L. T. Rep. N. S. 211, 4 Swab. & Tr. 154, 13 Wkly. Rep. 364; Peacock *v.* Peacock, 27 L. J. P. & M. 71, 1 Swab. & Tr. 183, 6 Wkly. Rep. 866.

See 17 Cent. Dig. tit. "Divorce," § 170.

Unknown adulteries are not ordinarily condoned by forgiving known adulteries. Bernstein *v.* Bernstein, [1893] P. 292, 63 L. J. P. & Adm. 3, 69 L. T. Rep. N. S. 513, 6 Reports 609 [*approving* Story *v.* Story, 12 P. D. 196, 51 J. P. 680, 57 L. J. P. & Adm. 15, 57 L. T. Rep. N. S. 536, 36 Wkly. Rep. 190]. Where, however, a wife occupied the same sleeping room with her husband after learning of one of his acts of adultery, and after he had admitted his want of fidelity in general terms, without any inquiries by her as to the particulars of time, place, or person, it warrants a finding that she condoned prior acts of adultery of which she had no specific knowledge. Rogers *v.* Rogers, 122 Mass. 423.

26. *Missouri.*— Welch *v.* Welch, 50 Mo. App. 395.

New Hampshire.— Quincy *v.* Quincy, 10 N. H. 272.

New Jersey.—Shackelton *v.* Shackelton, 48 N. J. Eq. 364, 21 Atl. 935, 27 Am. St. Rep. 478; Ellis *v.* Ellis, (Ch. 1887) 9 Atl. 884.

New York.— Harris *v.* Harris, 83 N. Y. App. Div. 123, 82 N. Y. Suppl. 568.

England.— Bramwell *v.* Bramwell, 3 Hagg. Eccl. 618, 5 Eng. Eccl. 232; Ellis *v.* Ellis, 11 Jur. N. S. 610, 34 L. J. P. & M. 100, 13 L. T. Rep. N. S. 211, 4 Swab. & Tr. 154, 13 Wkly. Rep. 364; Pollack *v.* Pollack, 2 Swab. & Tr. 648.

Cohabitation pending an investigation of charges is not condonation. Reading *v.* Reading, (N. J. Ch. 1887) 8 Atl. 809; Gosser *v.* Gosser, 183 Pa. St. 499, 38 Atl. 1014.

Inability to prove misconduct.— Although the innocent spouse entertains a suspicion or a conviction of the other's infidelity and continues the marital cohabitation, yet there is no condonation unless he has the means of proving the offense. Quincy *v.* Quincy, 10 N. H. 272; Merrill *v.* Merrill, 41 N. Y. App. Div. 347, 58 N. Y. Suppl. 503 (holding that some knowledge must exist sufficiently substantial upon which to base a belief, and that usually there must be some means of making legal proof of the commission of the offense, before condonation will be implied); Uhlmann *v.* Uhlmann, 17 Abb. N. Cas. (N. Y.) 236; D'Aguilar *v.* D'Aguilar, 1 Hagg. Eccl. 773, 3 Eng. Eccl. 329. See also Graham *v.* Graham, 50 N. J. Eq. 701, 25 Atl. 358, holding that there was no condonation where all the husband knew of his wife's guilt consisted of floating rumors of her infidelity, and information procured by a detective that his wife had gone to her supposed paramour's boarding house and remained over an hour. So where a wife protests her innocence of adultery, the husband may believe her until the proofs of her misconduct become reasonably certain, and the law will not construe his confidence in her to be a condonation of the offense. Reading *v.* Reading, (N. J. Ch. 1887) 8 Atl. 809; Merrill *v.* Merrill, 41 N. Y. App. Div. 347, 58 N. Y. Suppl. 503. See also Connelly *v.* Connelly, 98 Mo. App. 95, 71 S. W. 1111. However, while a divorce will not be decreed upon the wife's confession of adultery, yet if the husband cohabits with her after the confession he condones the offense. Timmings *v.* Timmings, 3 Hagg. Eccl. 76, 5 Eng. Eccl. 22. But see Hoffmire *v.* Hoffmire, 7 Paige (N. Y.) 60, 32 Am. Dec. 611.

Knowledge may, however, be implied from notice of facts likely to produce inquiry from which knowledge would be acquired. Maglathlin *v.* Maglathlin, 138 Mass. 299.

27. Polson *v.* Polson, 140 Ind. 310, 39 N. E. 498; Anonymous, 6 Mass. 147; Merrill *v.* Merrill, 41 N. Y. App. Div. 347, 58 N. Y. Suppl. 503; Dillon *v.* Dillon, 3 Curt. Eccl. 86, 7 Eng. Eccl. 377; Ellis *v.* Ellis, 11 Jur. N. S. 610, 34 L. J. P. & M. 100, 13 L. T. Rep. N. S. 211, 4 Swab. & Tr. 154, 13 Wkly. Rep. 364.

Non-existence of a belief in the accused's innocence may be negatived by facts establishing the commission of the offense beyond a reasonable doubt. Delliber *v.* Delliber, 9 Conn. 233 (where the wife lodged two or three nights with her husband after his conviction of the criminal offense of adultery);

narily be a continuance or a renewal of marital cohabitation.[28] A mere promise[29] or an unaccepted offer[30] to resume cohabitation is not ordinarily sufficient.

3. COHABITATION AS CONDONATION — a. Continuance of Cohabitation — (I) *IN GENERAL.* If with knowledge that a matrimonial offense has been committed the innocent spouse voluntarily cohabits with the other, it ordinarily operates as a condonation, and the offense cannot be set up as a ground for divorce.[31]

(II) *AS CONDONATION OF ADULTERY.* A continuance of cohabitation after knowledge of the commission of adultery condones the offense and bars a suit for a divorce on that ground.[32] This rule operates against an innocent wife who

Stevens *v.* Stevens, 14 N. J. Eq. 374; Marsh *v.* Marsh, 13 N. J. Eq. 281 (where the information received was from the witnesses offered by complainant in his suit for divorce). See Pain *v.* Pain, 37 Mo. App. 110.

28. Rudd *v.* Rudd, 66 Vt. 91, 28 Atl. 869 (holding that where there is no promise of future kind treatment and no resumption of the marital relation, there is no condonation of cruel treatment); Keats *v.* Keats, 5 Jur. N. S. 176, 28 L. J. P. & M. 57, 1 Swab. & Tr. 334, 7 Wkly. Rep. 377 (holding that a mere verbal forgiveness is insufficient).

Separation agreement as defense see *supra*, VIII, D, 1.

29. Wolff *v.* Wolff, 102 Cal. 433, 36 Pac. 767, 1037; Goeger *v.* Goeger, 59 N. J. Eq. 15, 45 Atl. 349.

30. Betz *v.* Betz, 2 Rob. (N. Y.) 694, 19 Abb. Pr. (N. Y.) 90.

In cases of desertion an offer of reconciliation is not a condonation unless accepted.

Alabama.— Quarles *v.* Quarles, 19 Ala. 362.

California.— Benkert *v.* Benkert, 32 Cal. 467.

Georgia.— Johns *v.* Johns, 29 Ga. 718.

Kansas.— Prather *v.* Prather, 26 Kan. 273.

Kentucky.— Fishli *v.* Fishli, 2 Litt. 337.

Missouri.— Moore *v.* Moore, 41 Mo. App. 176.

New Jersey.— Barrett *v.* Barrett, 37 N. J. Eq. 29.

New York.— Betz *v.* Betz, 2 Rob. 694, 19 Abb. Pr. 90; Dignan *v.* Dignan, 17 Misc. 268, 40 N. Y. Suppl. 320.

Pennsylvania.— Thompson *v.* Thompson, 2 Dall. 128, 1 L. ed. 317; Com. *v.* Sperling, 8 Pa. Co. Ct. 491.

Requests and offers to return made by or to the deserted party see *supra*, VII, C, 5, b, (IV), (B).

31. *Georgia.*—Sasser *v.* Sasser, 69 Ga. 576; Buckholts *v.* Buckholts, 24 Ga. 238.

Illinois.— Nullmeyer *v.* Nullmeyer, 49 Ill. App. 573.

Indiana.— Burns *v.* Burns, 60 Ind. 259.

Iowa.— May *v.* May, 108 Iowa 1, 78 N. W. 703, 75 Am. St. Rep. 202; Douglass *v.* Douglass, 81 Iowa 258, 47 N. W. 92.

Massachusetts.— Gardner *v.* Gardner, 2 Gray 434; Perkins *v.* Perkins, 6 Mass. 69.

Michigan.— Rayner *v.* Rayner, 49 Mich. 600, 14 N. W. 562.

New Jersey.— McGurk *v.* McGurk, (Ch. 1894) 28 Atl. 510.

North Carolina.— O'Connor *v.* O'Connor, 109 N. C. 139, 13 S. E. 887.

Oregon.— Rehart *v.* Rehart, (1891) 25 Pac. 775.

West Virginia.— Burk *v.* Burk, 21 W. Va. 445.

See 17 Cent. Dig. tit. "Divorce," § 172 *et seq.*

Habitual drunkenness may be condoned by continued cohabitation after the reformation of the offender (Moore *v.* Moore, 41 Mo. App. 176), but condonation will not be inferred where the habits of intoxication continue (Sesterhen *v.* Sesterhen, 60 Iowa 301, 14 N. W. 333).

Incurable venereal disease, if made by statute a ground for divorce, cannot be condoned. Ryder *v.* Ryder, 66 Vt. 158, 28 Atl. 1029, 44 Am. St. Rep. 833. Condonation of cruelty consisting in communication of disease see *infra*, note 35.

Antenuptial misrepresentations.— A husband who continues to live with his wife after full knowledge that her representations of chastity before marriage were false cannot urge such representations as ground for divorce. Stanley *v.* Stanley, 115 Ga. 990, 42 S. E. 374.

Express agreement to condone.—Under Cal. Civ. Code, § 118, providing that cohabitation, passive endurance, or conjugal kindness shall not be evidence of condonation "unless accompanied by an express agreement to condone," affectionate letters thanking defendant for gifts received (Smith *v.* Smith, 119 Cal. 183, 48 Pac. 730, 51 Pac. 183) or containing general expressions of regard for defendant (Hunter *v.* Hunter, 132 Cal. 473, 64 Pac. 772; Morton *v.* Morton, 117 Cal. 443, 49 Pac. 557) are not sufficient to establish condonation.

32. *Alabama.*— Farmer *v.* Farmer, 86 Ala. 322, 5 So. 434.

Arkansas.— Reed *v.* Reed, 62 Ark. 611, 37 S. W. 230; Turnbull *v.* Turnbull, 23 Ark. 615.

Connecticut.— Delliber *v.* Delliber, 9 Conn. 233.

Delaware.— Jeans *v.* Jeans, 2 Harr. 38.

Georgia.— Phillips *v.* Phillips, 91 Ga. 551, 17 S. E. 633.

Illinois.— Moorhouse *v.* Moorhouse, 90 Ill. App. 401.

Indiana.— Phillips *v.* Phillips, 4 Blackf. 131.

Kentucky.— Steele *v.* Steele, 96 Ky. 382, 29 S. W. 17, 16 Ky. L. Rep. 517; Tilton *v.* Tilton, 29 S. W. 290, 16 Ky. L. Rep. 538.

Louisiana.— Land *v.* Martin, 46 La. Ann. 1246, 15 So. 657; Halls *v.* Cartwright, 18 La. Ann. 414; Cooper *v.* Cooper, 10 La. 249.

cohabits with a guilty husband with knowledge of the offense,[33] but it is not applied against her with the same strictness as against an innocent husband who cohabits with a guilty wife.[34]

(III) *As Condonation of Cruelty.* A continuance of cohabitation will condone an act of cruelty and bar a divorce therefor, unless it is apparent from the circumstance that the life or health of the innocent party will be endangered by a continuance of the marriage relation.[35] Where, however, the cruelty consists of a series of wrongs no one of which would in itself be ground for divorce, mere cohabitation during the period in which they are committed in the hope of better treatment in the future does not constitute condonation.[36]

Maryland.— Toulson *v.* Toulson, 93 Md. 754, 50 Atl. 401; Bowie *v.* Bowie, 3 Md. Ch. 51.

Massachusetts.— Anonymous, 6 Mass. 147; Perkins *v.* Perkins, 6 Mass. 69; North *v.* North, 5 Mass. 320.

Mississippi.— Armstrong *v.* Armstrong, 32 Miss. 279.

New Hampshire.— Quincy *v.* Quincy, 10 N. H. 272; Hall *v.* Hall, 4 N. H. 462.

New Jersey.— Hann *v.* Hann, 58 N. J. Eq. 211, 42 Atl. 564; Stevens *v.* Stevens, 14 N. J. Eq. 374; Todd *v.* Todd, (Ch. 1897) 37 Atl. 766.

New York.— Pitts *v.* Pitts, 52 N. Y. 593; Doe *v.* Doe, 52 Hun 405, 5 N. Y. Suppl. 514; Karger *v.* Karger, 19 Misc. 236, 44 N. Y. Suppl. 219, 26 N. Y. Civ. Proc. 161.

North Carolina.— Horne *v.* Horne, 72 N. C. 530.

Ohio.— Questel *v.* Questel, Wright 491; Barnes *v.* Barnes, Wright 475; McDwire *v.* McDwire, Wright 354.

Pennsylvania.—Bloom *v.* Bloom, 8 Pa. Dist. 563, 22 Pa. Co. Ct. 433.

Tennessee.— Thomas *v.* Thomas, 2 Coldw. 123.

England.— Hall *v.* Hall, [1891] P. 302, 60 L. J. P. & Adm. 73, 65 L. T. Rep. N. S. 206; Norris *v.* Norris, 30 L. J. P. & M. 111; Palmer *v.* Palmer, 29 L. J. P. & M. 124, 2 L. T. Rep. N. S. 363, 2 Swab. & Tr. 61, 8 Wkly. Rep. 504.

33. Johnson *v.* Johnson, 14 Wend. (N. Y.) 637.

34. *Indiana.*— Polson *v.* Polson, 140 Ind. 310, 39 N. E. 498.

Maryland.— Bowie *v.* Bowie, 3 Md. Ch. 51.

Mississippi.— Armstrong *v.* Armstrong, 32 Miss. 279.

New Jersey.— Stevens *v.* Stevens, 14 N. J. Eq. 374.

New York.— Johnson *v.* Johnson, 1 Edw. 439.

North Carolina.— Horne *v.* Horne, 72 N. C. 530.

Reason for relaxation of rule.— The rule is thus relaxed in favor of an innocent wife because of the greater difficulties accompanying her withdrawal from the matrimonial domicile arising from her greater dependence upon the existence of the conjugal relation for her support and maintenance.

Indiana.— Polson *v.* Polson, 140 Ind. 310, 39 N. E. 498.

Mississippi.— Armstrong *v.* Armstrong, 32 Miss. 279.

New York.— Johnson *v.* Johnson, 1 Edw. 439.

North Carolina.— Horne *v.* Horne, 72 N. C. 530.

England.— Beeby *v.* Beeby, 1 Hagg. Const. 789, 3 Eng. Eccl. 338.

35. *District of Columbia.*— Hitchcock *v.* Hitchcock, 15 App. Cas. 81.

Illinois.— Abbott *v.* Abbott, 192 Ill. 439, 61 N. E. 350; Youngs *v.* Youngs, 130 Ill. 230, 22 N. E. 806, 17 Am. St. Rep. 313, 6 L. R. A. 548; Sharp *v.* Sharp, 116 Ill. 509, 6 N. E. 15.

Indiana.—Sullivan *v.* Sullivan, 34 Ind. 368.

Iowa.— May *v.* May, 108 Iowa 1, 78 N. W. 703, 75 Am. St. Rep. 202.

Maryland.— Bowie *v.* Bowie, 3 Md. Ch. 51.

Massachusetts.— Osborn *v.* Osborn, 174 Mass. 399, 54 N. E. 868; Robbins *v.* Robbins, 100 Mass. 150, 97 Am. Dec. 91; Gardner *v.* Gardner, 2 Gray 434.

Michigan.— Rayner *v.* Rayner, 49 Mich. 600, 14 N. W. 562.

New Jersey.— McGurk *v.* McGurk, (Ch. 1894) 28 Atl. 510.

New York.— Whispell *v.* Whispell, 4 Barb. 217; Burr *v.* Burr, 10 Paige 20.

North Carolina.— O'Connor *v.* O'Connor, 109 N. C. 139, 13 S. E. 887.

Pennsylvania.— Doan *v.* Doan, 3 Pa. L. J. Rep. 7, 4 Pa. L. J. 332.

England.— Suggate *v.* Suggate, 29 L. J. P. & M. 167, 1 Swab. & Tr. 492, 8 Wkly. Rep. 20; Curtis *v.* Curtis, 27 L. J. P. & M. 73, 1 Swab. & Tr. 192.

Cruelty by communicating disease.—Where a wife continues willingly in cohabitation with her husband after his communication to her of a venereal disease, she condones his cruelty and will not be granted a divorce. Auld *v.* Auld, 16 N. Y. Suppl. 803; Rehart *v.* Rehart, (Oreg. 1891) 25 Pac. 775. A wife's cohabitation with her husband is not a condonation, however, although he informed her of the name of the disease, if he deceived her as to its cause and effects. Wilson *v.* Wilson, 16 R. I. 122, 13 Atl. 102.

36. *Alabama.*— Reese *v.* Reese, 23 Ala. 785.

Illinois.— Phillips *v.* Phillips, 1 Ill. App. 245.

Indiana.— Breedlove *v.* Breedlove, 27 Ind. App. 560, 61 N. E. 797.

Louisiana.— Mack *v.* Handy, 39 La. Ann. 491, 2 So. 181; Jacobs *v.* Tobelman, 36 La. Ann. 842; Terrell *v.* Boarman, 34 La. Ann. 301.

Michigan.— Creyts *v.* Creyts, (1903) 94 N. W. 383.

b. Resumption of Interrupted Cohabitation. A voluntary resumption of cohabitation which has been interrupted because of the commission of a marital offense condones the offense the same as the continuance of a cohabitation which has not been interrupted.[37]

c. Cohabitation Pending Suit. Voluntary cohabitation of the parties pending proceedings for a divorce necessarily operates as a condonation of the misconduct complained of.[38]

d. Extent of Cohabitation — (I) *In General.* There need not be a long continued matrimonial intercourse after the discovery of the offense to constitute a condonation; it is ordinarily sufficient, especially as against the husband, if he has once had intercourse with his wife.[39]

(II) *Presumption of Marital Intercourse.* Sexual intercourse is not necessarily implied from the fact that the parties are living in the same house,[40] but if they occupy the same room and bed, and apparently continue their relations as before the discovery of the offense, marital intercourse and a consequent condonation of the offense will be presumed.[41]

4. Revival of Offense — a. In General. The condonation of a matrimonial offense is not absolute but is based upon the repentance of the guilty party and is conditioned upon non-repetition of the offense and his future treatment of the injured party with conjugal kindness; and a violation of the condition in either respect revives the original offense.[42]

Pennsylvania.— Hollister *v.* Hollister, 6 Pa. St. 449; Steele *v.* Steele, 11 Wkly. Notes Cas. 21.

England.— Curtis *v.* Curtis, 27 L. J. P. & M. 73, 1 Swab. & Tr. 192.

Canada.— See Severn *v.* Severn, 3 Grant Ch. (U. C.) 431.

37. Sparks *v.* Sparks, 94 N. C. 527, the offense being adultery.

Cruelty.— The rule applies to cases of cruelty. Clague *v.* Clague, 46 Minn. 461, 49 N. W. 198; Dunn *v.* Dunn, 26 Nebr. 136, 42 N. W. 279.

Desertion also may be thus condoned. Phelan *v.* Phelan, 135 Ill. 445, 25 N. E. 751. However, a return by a wife to the domicile of the husband to nurse him while suffering from a supposed mortal ailment is not condonation. Guthrie *v.* Guthrie, 26 Mo. App. 566.

38. Holbrook *v.* Holbrook, 18 La. Ann. 643; Harper *v.* Harper, 29 Mo. 301; Marsh *v.* Marsh, 13 N. J. Eq. 281; Peterson *v.* Peterson, 6 Wkly. Notes Cas. (Pa.) 449. *Contra,* Harnett *v.* Harnett, 59 Iowa 401, 13 N. W. 408.

The reason of the rule is that the instituting of the proceedings is incontrovertible evidence of knowledge of the misconduct, and cohabitation with knowledge constitutes condonation. See *supra,* VIII, F, 3, a, b.

39. *Alabama.*— Farmer *v.* Farmer, 86 Ala. 322, 5 So. 434.

Arkansas.— Reed *v.* Reed, 62 Ark. 611, 37 S. W. 230.

Connecticut.— Delliber *v.* Delliber, 9 Conn. 233.

Maryland.— Toulson *v.* Toulson, 93 Md. 754, 50 Atl. 401.

Missouri.— Harper *v.* Harper, 29 Mo. 301.

New Jersey.— Marsh *v.* Marsh, 13 N. J. Eq. 281; Todd *v.* Todd, (Ch. 1897) 37 Atl. 766.

New York.— Pitts *v.* Pitts, 53 N. Y. 593; Doe *v.* Doe, 52 Hun 405, 5 N. Y. Suppl. 514; Karger *v.* Karger, 19 Misc. 236, 44 N. Y. Suppl. 219, 26 N. Y. Civ. Proc. 161.

North Carolina.— Sparks *v.* Sparks, 94 N. C. 527.

Oregon.— Eggerth *v.* Eggerth, 15 Oreg. 626, 16 Pac. 650.

England.— Timmings *v.* Timmings, 3 Hagg. Eccl. 76, 5 Eng. Eccl. 22.

See 17 Cent. Dig. tit. "Divorce," § 175.

Sexual intercourse.— A single act of sexual intercourse after commencement of suit is insufficient as a condonation under Cal. Civ. Code, § 116. Bohnert *v.* Bohnert, 95 Cal. 444, 30 Pac. 590. Nor does sexual intercourse necessarily condone antecedent acts of cruelty (Doe *v.* Doe, 52 Hun (N. Y.) 405, 5 N. Y. Suppl. 514; Cox *v.* Cox, 1 Silv. Supreme (N. Y.) 223, 5 N. Y. Suppl. 367) or desertion (Kennedy *v.* Kennedy, 87 Ill. 250; Danforth *v.* Danforth, 88 Me. 120, 33 Atl. 781, 51 Am. St. Rep. 380, 31 L. R. A. 608).

40. Harnett *v.* Harnett, 59 Iowa 401, 13 N. W. 408; Toulson *v.* Toulson, 93 Md. 754, 50 Atl. 401; Hann *v.* Hann, 58 N. J. Eq. 211, 42 Atl. 564. *Contra,* Marsh *v.* Marsh, 13 N. J. Eq. 281.

41. *Indiana.*— Burns *v.* Burns, 60 Ind. 259.

Maryland.— Toulson *v.* Toulson, 93 Md. 754, 50 Atl. 401.

New Jersey.— Todd *v.* Todd, (Ch. 1897) 37 Atl. 766.

New York.— Karger *v.* Karger, 19 Misc. 236, 44 N. Y. Suppl. 219, 26 N. Y. Civ. Proc. 161.

England.— Hall *v.* Hall, [1891] P. 302, 60 L. J. P. & Adm. 73, 65 L. T. Rep. N. S. 206, holding, however, that the presumption is rebuttable.

42. *Georgia.*— Odom *v.* Odom, 36 Ga. 286.

Illinois.— Sharp *v.* Sharp, 116 Ill. 509, 6 N. E. 15; Farnham *v.* Farnham, 73 Ill. 497.

b. Repetition of Offense. If the offense is repeated after condonation the original offense is revived.[43] Thus if a reconciliation takes place after a separation because of cruelty, subsequent cruel conduct of the guilty party revives the former acts and permits a divorce upon the ground of all acts of cruelty, either before or after the reconciliation;[44] and the commission of adultery subsequent to the condonation of a similar offense revives the former act and permits a divorce for either or both of such acts.[45]

Indiana.—Armstrong *v.* Armstrong, 27 Ind. 186.

Louisiana.— Cass *v.* Cass, 34 La. Ann. 611; Bienvenu *v.* Bienvenu, 14 La. Ann. 386; J. F. C. *v.* M. E., 6 Rob. 135.

Maryland.— Fisher *v.* Fisher, 93 Md. 298, 48 Atl. 833.

Massachusetts.— Osborn *v.* Osborn, 174 Mass. 399, 54 N. E. 868; Jefferson *v.* Jefferson, 168 Mass. 456, 47 N. E. 123.

Missouri.— Wagner *v.* Wagner, 6 Mo. App. 573.

New York.— Whispell *v.* Whispell, 4 Barb. 217; Timerson *v.* Timerson, 2 How. Pr. N. S. 526; Johnson *v.* Johnson, 14 Wend. 637; Burr *v.* Burr, 10 Paige 20; Hoffmire *v.* Hoffmire, 3 Edw. 173; Johnson *v.* Johnson, 1 Edw. 439.

North Dakota.— Gardner *v.* Gardner, 9 N. D. 192, 82 N. W. 872.

Oregon.— Atteberry *v.* Atteberry, 8 Oreg. 224.

Pennsylvania.— Gosser *v.* Gosser, 183 Pa. St. 499, 38 Atl. 1014.

Texas.— Wright *v.* Wright, 6 Tex. 3.

Vermont.— Marshall *v.* Marshall, 65 Vt. 238, 26 Atl. 900; Langdon *v.* Langdon, 25 Vt. 678, 60 Am. Dec. 296.

Wisconsin.— Phillips *v.* Phillips, 27 Wis. 252.

England.— Dowling *v.* Dowling, [1898] P. 228, 68 L. J. P. & Adm. 8, 47 Wkly. Rep. 272; Mytton *v.* Mytton, 11 P. D. 141, 50 J. P. 488, 57 L. T. Rep. N. S. 92, 35 Wkly. Rep. 368; Winscom *v.* Winscom, 10 Jur. N. S. 321, 33 L. J. P. & M. 45, 10 L. T. Rep. N. S. 100, 3 Swab. & Tr. 380, 12 Wkly. Rep. 535; Dent *v.* Dent, 34 L. J. P. & M. 118, 13 L. T. Rep. N. S. 252, 4 Swab. & Tr. 105; Palmer *v.* Palmer, 29 L. J. P. & M. 124, 2 L. T. Rep. N. S. 363, 2 Swab. & Tr. 61, 8 Wkly. Rep. 504; Bostock *v.* Bostock, 27 L. J. P. & M. 86, 1 Swab. & Tr. 221, 6 Wkly. Rep. 868; Ridgway *v.* Ridgway, 29 Wkly. Rep. 612; McKeever *v.* McKeever, Ir. R. 11 Eq. 26.

See 17 Cent. Dig. tit. "Divorce," § 185 *et seq.*

Repentance.— Condonation proceeds upon the idea of repentance having sprung up in the mind of the delinquent; it is not operative in a case where subsequent facts show no repentance to have existed. Armstrong *v.* Armstrong, 27 Ind. 186. See also Rudd *v.* Rudd, 66 Vt. 91, 28 Atl. 869.

43. See cases cited *supra*, note 42.

44. *Alabama.*— Turner *v.* Turner, 44 Ala. 437; Harrison *v.* Harrison, 20 Ala. 629, 56 Am. Dec. 227; Hughes *v.* Hughes, 19 Ala. 307.

California.— Andrews *v.* Andrews, 120 Cal. 184, 52 Pac. 298.

Florida.— Williams *v.* Williams, 23 Fla. 324, 2 So. 768.

Georgia.— Ozmore *v.* Ozmore, 41 Ga. 46.

Illinois.— Miles *v.* Miles, 101 Ill. App. 406; Moorhouse *v.* Moorhouse, 90 Ill. App. 401; Rupp *v.* Rupp, 59 Ill. App. 569; Wessels *v.* Wessels, 28 Ill. App. 253.

Indiana.— Rose *v.* Rose, 87 Ind. 481.

Iowa.— Douglass *v.* Douglass, 81 Iowa 258, 47 N. W. 92.

Massachusetts.— Smith *v.* Smith, 167 Mass. 87, 45 N. E. 52; Robbins *v.* Robbins, 100 Mass. 150, 97 Am. Dec. 91.

Michigan.— Tackaberry *v.* Tackaberry, 101 Mich. 102, 59 N. W. 400.

Montana.— Morrison *v.* Morrison, 14 Mont. 8, 35 Pac. 1.

Nebraska.— Heist *v.* Heist, 48 Nebr. 794, 67 N. W. 790.

New Jersey.— Warner *v.* Warner, 31 N. J. Eq. 225.

New York.— Reynolds *v.* Reynolds, 4 Abb. Dec. 35, 3 Keyes 368, 1 Transcr. App. 103, 34 How. Pr. 346; Atherton *v.* Atherton, 82 Hun 179, 31 N. Y. Suppl. 977; Strauss *v.* Strauss, 67 Hun 491, 22 N. Y. Suppl. 567; Davies *v.* Davies, 55 Barb. 130, 37 How. Pr. 45; Calkins *v.* Long, 22 Barb. 97.

North Carolina.— Lassiter *v.* Lassiter, 92 N. C. 129; Gordon *v.* Gordon, 88 N. C. 45, 43 Am. Rep. 729.

North Dakota.— Taylor *v.* Taylor, 5 N. D. 58, 63 N. W. 893.

Oregon.—Eggerth *v.* Eggerth, 15 Oreg. 626, 16 Pac. 650.

Texas.— Nogees *v.* Nogees, 7 Tex. 538, 58 Am. Dec. 78.

Washington.— Denison *v.* Denison, 4 Wash. 705, 30 Pac. 1100.

Wisconsin.— Crichton *v.* Crichton, 73 Wis. 59, 40 N. W. 638.

England.— Wilson *v.* Wilson, 6 Moore P. C. 484.

See, however, Hitchcock *v.* Hitchcock, 15 App. Cas. (D. C.) 81, holding that to ascertain whether a wife sued for desertion was justified in leaving her husband, where it appears that on a prior occasion she had left him because of charges of infidelity he had made against her but had returned, all inquiry for acts of justification must be limited to the period between her return and her second desertion, as by her return to him all the past was condoned.

45. *Illinois.*— Davis *v.* Davis, 19 Ill. 334.

Massachusetts.— Sewall *v.* Sewall, 122 Mass. 156, 23 Am. Rep. 299.

Mississippi.— Armstrong *v.* Armstrong, 32 Miss. 279.

New Jersey.— Seeburger *v.* Seeburger, 57 N. J. Eq. 631, 42 Atl. 728.

c. Commission of Different Offense — (I) *In General.* An offense which has been condoned may be revived not only by a repetition of the same offense,[46] but also by the subsequent commission of other marital offenses.[47] Thus an act of adultery will be revived by subsequent cruel and unkind treatment,[48] and it has been held that cruelty may be revived by subsequent adultery.[49]

(II) *Offense Not Ground of Divorce.* To revive the original offense by subsequent misconduct of a different nature it is not essential that the misconduct shall be such as in itself to justify a divorce,[50] although it must be so pronounced as to raise a reasonable probability that if the marriage relation is continued a new cause for divorce will arise.[51] Thus adultery is revived by subsequent acts of impropriety tending toward but falling short of a repetition of the offense,[52] and an act of cruelty is revived by subsequent acts of cruelty not in themselves sufficient to justify a divorce.[53]

G. Reformation of Defendant. Protestations of repentance and future

New York.— Deisler *v.* Deisler, 59 N. Y. App. Div. 207, 69 N. Y. Suppl. 326; Johnson *v.* Johnson, 4 Paige 460; Smith *v.* Smith, 4 Paige 432, 27 Am. Dec. 75.

North Carolina.— Collier *v.* Collier, 16 N. C. 352.

Pennsylvania.— Bronson *v.* Bronson, 7 Phila. 405.

England.— Blandford *v.* Blandford, 8 P. D. 19, 52 L. J. P. & Adm. 17, 48 L. T. Rep. N. S. 238, 31 Wkly. Rep. 508; Collins *v.* Collins, 9 App. Cas. 205, 32 Wkly. Rep. 500; Dent *v.* Dent, 34 L. J. P. & M. 118, 13 L. T. Rep. N. S. 252, 4 Swab. & Tr. 105; Seller *v.* Seller, 5 Jur. N. S. 686, 28 L. J. P. & M. 99, 1 Swab. & Tr. 482, 8 Wkly. Rep. 5; Wilton *v.* Wilton, 1 L. T. Rep. N. S. 243, 1 Swab. & Tr. 563, 8 Wkly. Rep. 160.

Incestuous adultery is revived by subsesequent adultery not incestuous. Newsome *v.* Newsome, L. R. 2 P. 306, 40 L. J. P. & M. 71, 25 L. T. Rep. N. S. 204, 19 Wkly. Rep. 1039.

46. See *supra*, VIII, F, 4, b.

47. See cases cited *supra*, note 42.

48. *Illinois.*— Davis *v.* Davis, 19 Ill. 334; Moorhouse *v.* Moorhouse, 90 Ill. App. 401.

Maryland.— Fisher *v.* Fisher, 93 Md. 298, 48 Atl. 833.

New York.— Timerson *v.* Timerson, 2 How. Pr. N. S. 526; Johnson *v.* Johnson, 14 Wend. 637 [*reversing* 4 Paige 460 (*reversing* 1 Edw. 439)] *quære.*

Vermont.— Langdon *v.* Langdon, 25 Vt. 678, 60 Am. Dec. 296.

England.— Durant *v.* Durant, 1 Hagg. Eccl. 733, 3 Eng. Eccl. 310; Cooke *v.* Cooke, 9 Jur. N. S. 754, 32 L. J. P. & M. 154, 8 L. T. Rep. N. S. 644, 3 Swab. & Tr. 126, 11 Wkly. Rep. 957; Dent *v.* Dent, 34 L. J. P. & M. 118, 13 L. T. Rep. N. S. 252, 4 Swab. & Tr. 105.

49. Palmer *v.* Palmer, 29 L. J. P. & M. 124, 2 L. T. Rep. N. S. 363, 2 Swab. & Tr. 61, 8 Wkly. Rep. 504.

50. See cases cited *supra*, note 42.

Commission of crime after a condonation of adultery revives the offense, since by that act the guilty party brings disgrace on his family, which constitutes conjugal unkindness. Hoffmire *v.* Hoffmire, 3 Edw. (N. Y.) 173.

51. Marshall *v.* Marshall, 65 Vt. 238, 26 Atl. 900. See also Jefferson *v.* Jefferson, 168 Mass. 456, 47 N. E. 123; Bostock *v.* Bostock, 27 L. J. P. & M. 86, 1 Swab. & Tr. 221, 6 Wkly. Rep. 868.

52. Winscom *v.* Winscom, 10 Jur. N. S. 321, 33 L. J. P. & M. 45, 3 Swab. & Tr. 380, 10 L. T. Rep. N. S. 100, 12 Wkly. Rep. 535; Ridgway *v.* Ridgway, 29 Wkly. Rep. 612. *Contra*, Collins *v.* Collins, 9 App. Cas. 205, 32 Wkly. Rep. 500.

53. *Florida.*— Williams *v.* Williams, 23 Fla. 324, 2 So. 768.

Georgia.— Odom *v.* Odom, 36 Ga. 286.

Illinois.— Sharp *v.* Sharp, 116 Ill. 509, 6 N. E. 15 (where the husband, subsequent to the condonation, continued to use the wife with studied neglect, refusing to speak to her or take his meals with her); Farnham *v.* Farnham, 73 Ill. 497 (holding that condonation is abrogated by verbal abuse); Moorhouse *v.* Moorhouse, 90 Ill. App. 401; Wessels *v.* Wessels, 28 Ill. App. 253.

Iowa.— Sesterhen *v.* Sesterhen, 60 Iowa 301, 14 N. W. 333.

Massachusetts.— Jefferson *v.* Jefferson, 168 Mass. 456, 47 N. E. 123; Smith *v.* Smith, 167 Mass. 87, 45 N. E. 52; Robbins *v.* Robbins, 100 Mass. 150, 97 Am. Dec. 91 (holding an immediate unkindness, as a refusal to speak to the libellant for six weeks, to be sufficient); Gardner *v.* Gardner, 2 Gray 434.

Nebraska.— Heist *v.* Heist, 48 Nebr. 794, 67 N. W. 790.

New York.—Atherton *v.* Atherton, 82 Hun 179, 31 N. Y. Suppl. 977; Davies *v.* Davies, 55 Barb. 130; Calkins *v.* Long, 22 Barb. 97; Whispell *v.* Whispell, 4 Barb. 217; Burr *v.* Burr, 10 Paige 20.

Oregon.— Atteberry *v.* Atteberry, 8 Oreg. 224.

Texas.— Nogees *v.* Nogees, 7 Tex. 538, 58 Am. Dec. 78.

Vermont.— Langdon *v.* Langdon, 25 Vt. 678, 60 Am. Dec. 296.

England.—Mytton *v.* Mytton, 11 P. D. 141, 50 J. P. 488, 57 L. T. Rep. N. S. 92, 35 Wkly. Rep. 368; Bostock *v.* Bostock, 27 L. J. P. & M. 86, 1 Swab. & Tr. 221, 6 Wkly. Rep. 868; Curtis *v.* Curtis, 27 L. J. P. & M. 73, 1 Swab. & Tr. 192; McKeever *v.* McKeever, Ir. R. 11 Eq. 26.

reformation cannot be entertained as a ground for refusing a divorce for gross cruelty.[54]

H. Connivance — 1. Definition and Elements. Connivance in the law of divorce is the complainant's consent, express or implied, to the misconduct alleged as a ground for divorce.[55] A corrupt intent on the part of the complainant that the guilty party should commit the offense is generally considered an essential element of connivance.[56] If the consent was actively given the intent is impliedly corrupt and the defense is complete,[57] but where the connivance is claimed as impliedly the result of certain acts or omissions, they must appear to have proceeded from an evil motive.[58]

2. Effect as Defense — a. In General. Connivance precludes the granting of a divorce to a party guilty thereof upon whatever grounds the suit is brought.[59] It is practically limited in its application, however, to suits upon the ground of adultery.[60]

b. As Defense to Acts Other Than That Connived at. A husband who has connived at one act of adultery by his wife cannot complain of any subsequent

54. O'Neill *v.* O'Neill, 30 N. J. Eq. 119; Kinsey *v.* Kinsey, 1 Yeates (Pa.) 78.

Reformation as removing cause for desertion see *supra*, VII, C, 5, b, (IV), (B), (5).

55. Dennis *v.* Dennis, 68 Conn. 186, 36 Atl. 34, 57 Am. St. Rep. 95, 34 L. R. A. 449; Boulting *v.* Boulting, 10 Jur. N. S. 182, 33 L. J. P. & M. 33, 9 L. T. Rep. N. S. 779, 3 Swab. & Tr. 329, 12 Wkly. Rep. 389.

Other definitions are: "A married party's corrupt consenting to evil conduct in the other whereof afterward he complains." 2 Bishop Mar. Div. & Sep. § 203.

"The corrupt consent of one party to the commission of the acts of the other constituting the cause of divorce. Corrupt consent is manifested by passive permission, with intent to connive at or actively procure the commission of the acts complained of." Cal. Civ. Code, §§ 112, 113; Mont. Civ. Code, §§ 160, 161; N. D. St. § 2745; S. D. St. § 3478.

"Conniving" means not merely refusing to see an act of adultery but also wilfully abstaining from taking any step to prevent adulterous intercourse, which from what passes before the husband's eyes he must reasonably expect will occur. Gipps *v.* Gipps, 11 H. L. Cas. 1, 10 Jur. N. S. 641, 33 L. J. P. & M. 161, 10 L. T. Rep. N. S. 735, 4 New Rep. 303, 12 Wkly. Rep. 937.

Passive consent.— A divorce for adultery will not be denied, however, because the complaining spouse had in general terms given defendant permission to violate his marriage vows. Chapman *v.* Chapman, 129 Ill. 386, 21 N. E. 806.

Collusion distinguished see *infra*, note 70.

Condonation distinguished see *supra*, note 18.

56. Dennis *v.* Dennis, 68 Conn. 186, 36 Atl. 34, 57 Am. St. Rep. 95, 34 L. R. A. 449; Warn *v.* Warn, 59 N. J. Eq. 642, 45 Atl. 916; Turton *v.* Turton, 3 Hagg. Eccl. 338, 350, 5 Eng. Eccl. 130; Phillips *v.* Phillips, 10 Jur. 829, 4 Notes of Cas. 523, 1 Rob. Eccl. 144; Allen *v.* Allen, 30 L. J. P. & M. 2.

57. Bourgeois *v.* Chauvin, 39 La. Ann. 216, 1 So. 679.

58. *Massachusetts.*— Morrison *v.* Morrison, 136 Mass. 310.

Missouri.— Viertel *v.* Viertel, 86 Mo. App. 494.

New Jersey.— Hedden *v.* Hedden, 21 N. J. Eq. 61.

North Carolina.— Moss *v.* Moss, 24 N. C. 55.

Pennsylvania.— Romich *v.* Romich, 3 Pa. Dist. 617, 16 Pa. Co. Ct. 195.

England.— Glennie *v.* Glennie, 8 Jur. N. S. 1158, 32 L. J. P. & M. 17, 11 Wkly. Rep. 28 (holding that it must appear that complainant was cognizant that the misconduct of which he complains would follow from transactions of which he approved and to which he consented); Marris *v.* Marris, 31 L. J. P. & M. 69, 5 L. T. Rep. N. S. 768, 2 Swab. & Tr. 530.

59. Dennis *v.* Dennis, 68 Conn. 186, 36 Atl. 34, 57 Am. St. Rep. 95, 34 L. R. A. 449.

Consent as precluding divorce for desertion see *supra*, VII, C, 5, b, (IV).

60. *Louisiana.*— Bourgeois *v.* Chauvin, 39 La. Ann. 216, 1 So. 679.

Massachusetts.— Morrison *v.* Morrison, 136 Mass. 310; Cairns *v.* Cairns, 109 Mass. 408; Pierce *v.* Pierce, 3 Pick. 299, 15 Am. Dec. 210.

Michigan.— People *v.* Chapman, 62 Mich. 280, 28 N. W. 896, 4 Am. St. Rep. 857.

New Hampshire.— Bailey *v.* Bailey, 67 N. H. 402, 29 Atl. 847.

New Jersey.— Woodward *v.* Woodward, 41 N. J. Eq. 224, 4 Atl. 424; Yorston *v.* Yorston, 32 N. J. Eq. 495; Hedden *v.* Hedden, 21 N. J. Eq. 61.

New York.— Myers *v.* Myers, 41 Barb. 114.

North Carolina.— Moss *v.* Moss, 24 N. C. 55.

Pennsylvania.— Romich *v.* Romich, 3 Pa. Dist. 617, 16 Pa. Co. Ct. 195.

England.—Thomas *v.* Thomas, 3 L. T. Rep. N. S. 180, 2 Swab. & Tr. 113; Palmer *v.* Palmer, 29 L. J. P. & M. 26, 2 L. T. Rep. N. S. 88, 1 Swab. & Tr. 551.

See 17 Cent. Dig. tit. "Divorce," § 162 *et seq.*

act with either the same or another man.[61] Ordinarily, however, he may obtain a divorce for adultery committed prior to that at which he connived.[62]

3. EXPRESS CONNIVANCE. A spouse who for the purpose of procuring a divorce actually procures the commission of adultery by the other, either personally[63] or by an agent,[64] is guilty of connivance and cannot complain of the other's wrong-doing.

4 IMPLIED CONNIVANCE. Connivance may be implied from acts and omissions of the complainant naturally tending to bring about the other party's adultery or otherwise showing the complainant's consent thereto.[65] However, mere negligence, folly, dulness of apprehension, or indifference will not suffice to charge the complainant with connivance.[66] The acts or omissions relied on to constitute the defense must be such as show a willingness that the guilty party should commit the matrimonial offense complained of.[67] The husband's failure to pro-

Reluctance of consent to adultery.— If a wife, although unwilling to consent to her husband's living in adultery, ultimately gives her consent for the sake of obtaining an allowance, she is guilty of connivance. Ross *v.* Ross, L. R. 1 P. 734, 38 L. J. P. & M. 49, 20 L. T. Rep. N. S. 853.

61. Woodward *v.* Woodward, 41 N. J. Eq. 224, 4 Atl. 424; Hedden *v.* Hedden, 21 N. J. Eq. 61; Hodges *v.* Hodges, 3 Hagg. Eccl. 118; Lovering *v.* Lovering, 3 Hagg. Eccl. 85; Timmings *v.* Timmings, 3 Hagg. Eccl. 76, 5 Eng. Eccl. 22; Stone *v.* Stone, 1 Rob. Eccl. 99. *Contra*, Viertel *v.* Viertel, 99 Mo. App. 710, 75 S. W. 187.

An unsuccessful attempt to procure the commission of one act of adultery is a consent to the wife's subsequent adultery. Hedden *v.* Hedden, 21 N. J. Eq. 61; Phillips *v.* Phillips, 10 Jur. 829, 4 Notes of Cas. 523, 1 Rob. Eccl. 144.

62. Morrison *v.* Morrison, 142 Mass. 361, 8 N. E. 59, 56 Am. Rep. 688 (holding, however, that the circumstances may be such that the court will find no injury done to the husband); Millard *v.* Millard, 78 L. T. Rep. N. S. 471.

63. Wilson *v.* Wilson, 154 Mass. 194, 28 N. E. 167, 26 Am. St. Rep. 237, 12 L. R. A. 524; Pierce *v.* Pierce, 3 Pick. (Mass.) 299, 15 Am. Dec. 210; People *v.* Chapman, 62 Mich. 280, 28 N. W. 896, 4 Am. St. Rep. 857; Timmings *v.* Timmings, 3 Hagg. Eccl. 76, 5 Eng. Eccl. 22; Phillips *v.* Phillips, 10 Jur. 829, 4 Notes of Cas. 523, 1 Rob. Eccl. 144; Stone *v.* Stone, 1 Rob. Eccl. 99.

64. Woodward *v.* Woodward, 41 N. J. Eq. 224, 4 Atl. 424; Yocum *v.* Yocum, 3 Pa. Dist. 615; Sugg *v.* Sugg, 31 L. J. P. & M. 41.

Authority of agent.— If the adultery was brought about by an agent's acting in behalf of complainant, although without complainant's knowledge, divorce will not be granted (Dennis *v.* Dennis, 68 Conn. 186, 39 Atl. 34, 57 Am. St. Rep. 95, 34 L. R. A. 449; Picken *v.* Picken, 34 L. J. P. & M. 22), even though complainant did not authorize the agent to bring it about (Gower *v.* Gower, L. R. 2 P. 428, 41 L. J. P. & M. 49, 27 L. T. Rep. N. S. 43, 20 Wkly. Rep. 889).

65. *Connecticut.*— Dennis *v.* Dennis, 68 Conn. 186, 36 Atl. 34, 57 Am. St. Rep. 95, 34 L. R. A. 449.

Louisiana.— Bourgeois *v.* Bourgeois, 39 La. Ann. 216, 1 So. 679, holding that where the conduct of the husband indicates an intent to have his wife transgress or to let her do so undisturbed, it constitutes connivance.

Massachusetts.— Morrison *v.* Morrison, 136 Mass. 310; Cairns *v.* Cairns, 109 Mass. 408.

Michigan.— Herrick *v.* Herrick, 31 Mich. 298.

Missouri.— Viertel *v.* Viertel, 86 Mo. App. 494.

England.— Moorsom *v.* Moorsom, 3 Hagg. Eccl. 87, 5 Eng. Eccl. 28; Glennie *v.* Glennie, 8 Jur. N. S. 1158, 32 L. J. P. & M. 17, 11 Wkly. Rep. 28. *Compare* Allen *v.* Allen, 30 L. J. P. & M. 2.

If a husband knows of his wife's weakness, as where he himself had seduced her prior to their marriage (Cane *v.* Cane, 39 N. J. Eq. 148; Hedden *v.* Hedden, 21 N. J. Eq. 61; Hawkins *v.* Hawkins, 10 P. D. 177, 54 L. J. P. & Adm. 94, 34 Wkly. Rep. 47; Graves *v.* Graves, 3 Curt. Eccl. 235; Dillon *v.* Dillon, 3 Curt. Eccl. 86, 7 Eng. Eccl. 377) and sees her in a position of temptation and does nothing to warn her or withdraw her therefrom, he is deemed to have consented to her misconduct (Cane *v.* Cane, *supra*; Hedden *v.* Hedden, *supra*).

The husband's failure to remonstrate when witnessing acts of undue familiarity between his wife and her paramour, and his making opportunities for them to be together, arranging for someone to watch them, constitute connivance which bars a divorce to the husband. Morrison *v.* Morrison, 136 Mass. 310. And see Cairns *v.* Cairns, 109 Mass. 408; Brown *v.* Brown, 63 N. J. Eq. 348, 50 Atl. 608; Karger *v.* Karger, 19 Misc. (N. Y.) 236, 44 N. Y. Suppl. 219, 26 N. Y. Civ. Proc. 161.

66. Hoar *v.* Hoar, 3 Hagg. Eccl. 137, 5 Eng. Eccl. 51; Moorsom *v.* Moorsom, 3 Hagg. Eccl. 87, 5 Eng. Eccl. 28; Marris *v.* Marris, 31 L. J. P. & M. 69, 5 L. T. Rep. N. S. 768; 2 Swab. & Tr. 530; Allen *v.* Allen, 30 L. J. P. & M. 2.

67. Cochran *v.* Cochran, 35 Iowa 477 (holding that, although a wife knows of adultery on the part of the husband and continues to live with him and by her own acts gives opportunities for intercourse between him and

tect the wife against temptation will not relieve her from the consequences of her adultery unless he actively or passively consents thereto;[68] and if he suspects her of the offense he may take measures to secure proof to be used by him in an action for divorce without being guilty of connivance.[69]

I. Collusion — 1. **Definition.** Collusion in the law of divorce is a corrupt agreement between a husband and wife whereby one of them, for the purpose of enabling the other to obtain a divorce, commits a matrimonial offense, or whereby for the same purpose evidence is fabricated of an offense not actually committed or evidence of a valid defense is suppressed.[70]

2. **Effect as Defense.** Collusion between the parties bars a divorce,[71] although

his paramour, it does not necessarily show that she assents to his offense); Viertel *v.* Viertel, 86 Mo. App. 494; Warn *v.* Warn, 59 N. J. Eq. 642, 45 Atl. 916; Lovering *v.* Lovering, 3 Hagg. Eccl. 85, 5 Eng. Eccl. 27; Allen *v.* Allen, 30 L. J. P. & M. 2.

68. Robbins *v.* Robbins, 140 Mass. 528, 5 N. E. 837, 54 Am. Rep. 488; Warn *v.* Warn, 59 N. J. Eq. 642, 45 Atl. 916; Rix *v.* Rix, 3 Hagg. Eccl. 74, 5 Eng. Eccl. 21.

69. Cochran *v.* Cochran, 35 Iowa 477; Wilson *v.* Wilson, 154 Mass. 194, 28 N. E. 167, 26 Am. St. Rep. 237, 12 L. R. A. 524 (holding a husband innocent, although he in fact wishes the wife to commit adultery in order that he may secure a divorce, where he does not throw opportunities in her way); Robbins *v.* Robbins, 140 Mass. 528, 5 N. E. 837, 54 Am. Rep. 488 (holding that there was no connivance where a husband pretended that he was going away over night but returned and detected the wife in adultery); Torlotting *v.* Torlotting, 82 Mo. App. 192; Phillips *v.* Phillips, 10 Jur. 829, 4 Notes of Cas. 523, 1 Rob. Eccl. 144; Sugg *v.* Sugg, 31 L. J. P. & M. 41. See, however, Karger *v.* Karger, 19 Misc. 236, 44 N. Y. Suppl. 219, 26 N. Y. Civ. Proc. 161.

Passively refraining from interference in the wife's plans for future adultery and the employment of friends to watch her do not bar the husband's right to a divorce. Pettee *v.* Pettee, 77 Hun (N. Y.) 595, 28 N. Y. Suppl. 1067; Reiersen *v.* Reiersen, 32 N. Y. App. Div. 62, 52 N. Y. Suppl. 509.

70. McIntyre *v.* McIntyre, 9 Misc. (N. Y.) 252, 30 N. Y. Suppl. 200; Crewe *v.* Crewe, 3 Hagg. Eccl. 123, 5 Eng. Eccl. 45; Gray *v.* Gray, 31 L. J. P. & M. 83, 6 L. T. Rep. N. S. 336, 2 Swab. & Tr. 554, 10 Wkly. Rep. 863; Bacon *v.* Bacon, 25 Wkly. Rep. 560.

Other definitions are: "A corrupt combining of married parties to procure a sentence or judicial order by some false practice; as, for one of them to appear to or in fact do what otherwise would be ground for divorce, or in any way to deceive the court in a cause, thus seeking its interposition as for a real injury." 2 Bishop Mar. Sep. & Div. § 249.

"An agreement between husband and wife that one of them shall commit, or appear to have committed, or be represented in court as having committed, acts constituting a cause of divorce, for the purpose of enabling the other to obtain a divorce." Cal. Civ. Code, § 114; Ida. Civ. Code, § 2030; Mont. Civ. Code, § 162; N. D. St. § 2746; S. D. St. § 3379.

Connivance is distinguished from collusion in two respects: (1) Connivance is the corrupt consent to a matrimonial offense actually committed, and this is its whole extent. Collusion on the other hand may consist in an agreement not only for the commission of a matrimonial offense, but also for the fabrication of evidence of an offense not committed or the suppression of evidence of a defense. (2) Connivance consists in the corrupt consent of complainant alone, while collusion necessarily involves a corrupt agreement between the spouses to practise fraud on the court. While one spouse may be guilty of conniving at an offense which the other voluntarily commits, yet there can be no collusion in such a case unless the offense is committed not only voluntarily but by actual agreement between the spouses. See Gray *v.* Gray, 31 L. J. P. & M. 83, 6 L. T. Rep. N. S. 336, 2 Swab. & Tr. 554, 10 Wkly. Rep. 863; Gethin *v.* Gethin, 31 L. J. P. & M. 43; Jessop *v.* Jessop, 30 L. J. P. & M. 193, 4 L. T. Rep. N. S. 308, 2 Swab. & Tr. 302, 9 Wkly. Rep. 640; Lloyd *v.* Lloyd, 30 L. J. P. & M. 97, 1 Swab. & Tr. 567. See also *supra*, VIII, H, 1.

Facilitating divorce as consideration for note see Commercial Paper, 7 Cyc. 742.

71. *Illinois.*—Belz *v.* Belz, 33 Ill. App. 105.

Michigan.— Thompson *v.* Thompson, 70 Mich. 62, 37 N. W. 710.

Missouri.— Torlotting *v.* Torlotting, 82 Mo. App. 192; Gentry *v.* Gentry, 67 Mo. App. 550.

New York.— Huntley *v.* Huntley, 73 Hun 261, 26 N. Y. Suppl. 266; Cowan *v.* Cowan, 23 Misc. 754, 53 N. Y. Suppl. 93; McIntyre *v.* McIntyre, 9 Misc. 252, 30 N. Y. Suppl. 200.

Ohio.— Smith *v.* Smith, Wright 643; Wolf *v.* Wolf, Wright 243.

Pennsylvania.— Latshaw *v.* Latshaw, 18 Pa. Super. Ct. 465.

England.— Todd *v.* Todd, L. R. 1 P. 121, 12 Jur. N. S. 237, 35 L. J. P. & M. 34, 13 L. T. Rep. N. S. 759, 14 Wkly. Rep. 350; Hunt *v.* Hunt, 47 L. J. P. & Adm. 22, 39 L. T. Rep. N. S. 45; Bacon *v.* Bacon, 25 Wkly. Rep. 560.

Exceptions.— If the collusive arrangement had no relation to the acts upon which the suit is finally based it is not necessarily a bar (Reed *v.* Reed, 86 Mich. 600, 49 N. W. 587), and a collusive agreement will not bar

otherwise the complainant has a sufficient cause therefor;[72] and if evidence of counter charges is suppressed, a divorce will be denied, although the facts withheld are insufficient to establish the counter charges.[73]

3. WHAT CONSTITUTES — a. Agreement For Divorce. There must be an agreement between the parties to constitute collusion.[74]

b. Commission of Offense by Agreement. Where the husband promises to commit adultery and arranges with witnesses to procure evidence thereof to be used by the wife in her suit for divorce, it constitutes collusion and a divorce will be denied.[75]

c. Collusion in Prosecution of Suit.[76] An agreement between the parties to withhold evidence tending to weaken the complainant's case[77] or to suppress facts constituting a good defense[78] bars a divorce. However, the complainant cannot be deprived of his remedy because of the failure of the guilty party to appear and defend,[79] unless the default is the result of agreement.[80] The withdrawal of an answer is a circumstance demanding the close scrutiny of the court,[81] but an arrangement facilitating the trial and not resulting in imposition on the court is allowable.[82]

a divorce where it is repudiated before the trial and all the facts are disclosed and the issues are stubbornly contested (Loveren *v.* Loveren, 106 Cal. 509, 39 Pac. 801).

72. Thompson *v.* Thompson, 70 Mich. 62, 37 N. W. 710; Todd *v.* Todd, L. R. 1 P. 121, 12 Jur. N. S. 237, 35 L. J. P. & M. 34, 13 L. T. Rep. N. S. 759, 14 Wkly. Rep. 350.

Collusion in prosecution of suit.— Although adultery is proved and petitioner did not connive at it, the petition will be dismissed if it appears that the parties were acting in concert in the prosecution of the suit. Lloyd *v.* Lloyd, 30 L. J. P. & M. 97, 1 Swab. & Tr. 567.

73. Butler *v.* Butler, 15 P. D. 66, 59 L. J. P. & Adm. 25, 62 L. T. Rep. N. S. 344, 38 Wkly. Rep. 390; Hunt *v.* Hunt, 47 L. J. P. & Adm. 22, 39 L. T. Rep. N. S. 45.

74. Todd *v.* Todd, L. R. 1 P. 121, 12 Jur. N. S. 237, 35 L. J. P. & M. 34, 13 L. T. Rep. N. S. 759, 14 Wkly. Rep. 350; Gethin *v.* Gethin, 31 L. J. P. & M. 43.

Offense committed to furnish ground for divorce.— If a husband without the wife's consent commits adultery, desiring that it be made a ground of divorce, the wife is not prevented from availing herself of it. Crewe *v.* Crewe, 3 Hagg. Eccl. 123, 5 Eng. Eccl. 45.

Agreement by agent.— Where a wife sent her son to her husband to inform him that she desired a divorce, and the husband for the avowed purpose of furnishing evidence committed adultery, and the son communnicated the facts to the wife, she was not entitled to a divorce. Cowan *v.* Cowan, 23 Misc. (N. Y.) 754, 53 N. Y. Suppl. 93.

75. Huntley *v.* Huntley, 73 Hun (N. Y.) 261, 26 N. Y. Suppl. 266; Cowan *v.* Cowan, 23 Misc. (N. Y.) 754, 53 N. Y. Suppl. 93; Todd *v.* Todd, L. R. 1 P. 121, 12 Jur. N. S. 237, 35 L. J. P. & M. 34, 13 L. T. Rep. N. S. 759, 14 Wkly. Rep. 350.

Commission of offense without agreement see *supra*, note 74.

76. See also *supra*, note 72.

77. Bacon *v.* Bacon, 25 Wkly. Rep. 560.

78. Jessop *v.* Jessop, 7 Jur. N. S. 609, 30 L. J. P. & M. 193, 4 L. T. Rep. N. S. 308, 2 Swab. & Tr. 302, 9 Wkly. Rep. 640; Hunt *v.* Hunt, 47 L. J. P. & Adm. 22, 39 L. T. Rep. N. S. 45; Butler *v.* Butler, 15 P. D. 66, 59 L. J. P. & Adm. 25, 62 L. T. Rep. N. S. 344, 38 Wkly. Rep. 390.

Suppression of counter charges.— Where both parties are guilty and they agree to present before the court the guilt of only one of them a divorce will be denied. Gray *v.* Gray, 31 L. J. P. & M. 83, 6 L. T. Rep. N. S. 336, 2 Swab. & Tr. 554, 10 Wkly. Rep. 863. See also *supra*, VIII, I, 1.

79. Pohlman *v.* Pohlman, 60 N. J. Eq. 28, 46 Atl. 658; Drayton *v.* Drayton, 54 N. J. Eq. 298, 38 Atl. 25; Harris *v.* Harris, 31 L. J. Inst. 160.

80. Latshaw *v.* Latshaw, 18 Pa. Super. Ct. 465 (where a divorce was denied upon proof that plaintiff told her husband that she proposed to secure a divorce for abuse and non-support, and he told her to go ahead and he would make no defense); Barnes *v.* Barnes, L. R. 1 P. 505, 37 L. J. P. & M. 4, 17 L. T. Rep. N. S. 268, 16 Wkly. Rep. 281 (holding that if defendant does not oppose the petition upon an understanding with complainant that he will pay her money, collusion is shown). See, however, Erwin *v.* Erwin, (Tex. Civ. App. 1897) 40 S. W. 53.

81. Leavitt *v.* Leavitt, 13 Mich. 452. However, an agreement between the parties as to a division of property and a subsequent desire of defendant to withdraw his answer and permit plaintiff to have a decree are not alone sufficient to constitute collusion (Erwin *v.* Erwin, (Tex. Civ. App. 1897) 40 S W. 53), and a compromise whereby opposition to a petition is withdrawn upon suggestion of the trial judge cannot be deemed collusive (McCarthy *v.* McCarthy, 36 Conn. 177).

82. Holcomb *v.* Holcomb, 100 Mich. 421, 50 N. W. 170, holding that a stipulation to strike from the complaint a charge of adultery and agreeing that the cause be tried on a charge of cruelty does not show collusion.

J. Lack of Sincerity. A suit for divorce must be brought in good faith,[83] without undue influence by third persons,[84] and for the sole purpose of redressing matrimonial wrongs.[85]

K. Recrimination — 1. GENERAL RULE. Divorce is a remedy for the innocent as against the guilty, and will not be granted where both parties are at fault.[86] The defense that the complainant has himself been guilty of misconduct constituting ground for divorce is known as recrimination.[87]

2. OFFENSES PLEADABLE IN RECRIMINATION — a. In General. To constitute a defense of recrimination the misconduct of which the complainant is guilty must be such as in itself to afford the defendant ground for divorce,[88] and it must also

83. Merriman *v.* Merriman, 2 Pa. Dist. 282.
Bad faith as shown by separation agreement and lapse of time see *infra*, VIII, D, 1, note 13.

84. Swearingen *v.* Swearingen, 19 Ga. 265.

85. Adams *v.* Adams, 12 Oreg. 176, 6 Pac. 677 (where a divorce was denied because the parties were nearly equally in fault and the object of the suit was to obtain a division of property); Bishop Mar. Sep. & Div. §§ 430–434.

86. *Arkansas.*— Cate *v.* Cate, 53 Ark. 484, 14 S. W. 675.
Illinois.— Howard *v.* Howard, 47 Ill. App. 453.
Indiana.—Armstrong *v.* Armstrong, 27 Ind. 186; McCoy *v.* McCoy, 3 Ind. 555.
Iowa.— Anderberg *v.* Anderberg, (1902) 91 N. W. 1071.
Kansas.— Franklin *v.* Franklin, 53 Kan. 143, 35 Pac. 1118.
Louisiana.— Castanédo *v.* Fortier, 34 La. Ann. 135; Dillon *v.* Dillon, 32 La. Ann. 643; Trowbridge *v.* Carlin, 12 La. Ann. 882; Neulet *v.* Dubois, 6 La. Ann. 403.
Michigan.— Ortman *v.* Ortman, 92 Mich. 172, 52 N. W. 619.
Missouri.— Ryan *v.* Ryan, 9 Mo. 539; Lawlor *v.* Lawlor, 76 Mo. App. 637.
New Jersey.— White *v.* White, 64 N. J. Eq. 84, 53 Atl. 23; Test *v.* Test, 19 N. J. Eq. 342.
New York.— Rose *v.* Rose, 52 Hun 154, 4 N. Y. Suppl. 856; R. F. H. *v.* S. H., 40 Barb. 9.
North Carolina.— Horne *v.* Horne, 72 N. C. 530.
Ohio.— Mattox *v.* Mattox, 2 Ohio 233, 15 Am. Dec. 547.
Oregon.— Boon *v.* Boon, 12 Oreg. 437, 8 Pac. 450.
Tennessee.— Dismukes *v.* Dismukes, 1 Tenn. Ch. 266.
England.— Proctor *v.* Proctor, 2 Hagg. Const. 292; Beeby *v.* Beeby, 1 Hagg. Const. 789, 3 Eng. Eccl. 338.
See 17 Cent. Dig. tit. "Divorce," § 188 *et seq.*
Origin.— The defense was recognized by the Hebrew Law (Deut. XXII, vs. 13–19) and seems to have formed a part of the civil and canon law (Proctor *v.* Proctor, 2 Hagg. Const. 292; Beeby *v.* Beeby, 1 Hagg. Const. 789, 3 Eng. Eccl. 338).
Where divorce statutes make no reference to recrimination the court will assume that the legislature intended to adopt the general principles which had governed the ecclesiastical courts in England in respect thereto, so far as those principles are applicable and reasonable. Morrison *v.* Morrison, 142 Mass. 361, 8 N. E. 59, 56 Am. Rep. 688; Robbins *v.* Robbins, 140 Mass. 528, 5 N. E. 837, 54 Am. Rep. 488.
The equitable maxim, "He who comes into equity must come with clean hands" has been applied in declaring the doctrine of recrimination. Hoff *v.* Hoff, 48 Mich. 281, 12 N. W. 160; Mattox *v.* Mattox, 2 Ohio 233, 15 Am. Dec. 547; Wass *v.* Wass, 41 W. Va. 126, 23 S. E. 537.

87. Conant *v.* Conant, 10 Cal. 249, 70 Am. Dec. 717.
Other definitions are: "The defence that the applicant has himself done what is ground for divorce either from bed and board or from the bond of matrimony." 2 Bishop Mar. & Div. § 340.
"Recrimination is a showing by the defendant of any cause of divorce against the plaintiff, in bar of the plaintiff's cause of divorce." Cal. Civ. Code, § 122; Ida. St. § 2031; Mont. Civ. Code, § 170; N. D. St. § 2750; S. D. Civ. Code (1903), § 80. See Cassidy *v.* Cassidy, 63 Cal. 352.

88. House *v.* House, 131 N. C. 140, 42 S. E. 546.
Actual commission of offense.— Mere belief in complainant's guilt of adultery, although justified by gravely suspicious circumstances, does not constitute a defense (Drayton *v.* Drayton, 54 N. J. Eq. 298, 38 Atl. 25); nor is a mere intention on complainant's part to form an adulterous connection sufficient to defeat his action (Rudd *v.* Rudd, 66 Vt. 91, 28 Atl. 869).
Cruelty as a recriminatory charge must amount to legal cruelty.
Indiana.— Shores *v.* Shores, 23 Ind. 546.
Iowa.— Pierce *v.* Pierce, 33 Iowa 238.
Maryland.— Childs *v.* Childs, 49 Md. 509.
Michigan.— Warner *v.* Warner, 54 Mich. 492, 20 N. W. 557.
Missouri.— Griesedieck *v.* Griesedieck, 56 Mo. App. 94, holding that a sudden act of retaliation by plaintiff, provoked by the misconduct of defendant, will not defeat the action.
Nebraska.— Kikel *v.* Kikel, 25 Nebr. 256, 41 N. W. 180.
New Jersey.—Harvey *v.* Harvey, (Ch. 1887) 7 Atl. 871.
Grounds for limited divorce.— Abandonment and cruelty, being grounds for a limited divorce only, cannot be pleaded in New York in defense of an action for absolute divorce

have been committed by plaintiff knowingly and without connivance, justification, or excuse.[89]

b. Offense the Same as That Complained of. If the complainant has himself been guilty of the same offense as the defendant, there can be no divorce. Thus if the complainant has committed adultery, he cannot obtain a divorce for adultery;[90] if he has been guilty of cruelty, he cannot obtain a divorce for cruelty;[91]

on the ground of adultery. Griffin *v.* Griffin, 23 How. Pr. (N. Y.) 183.

The words "good conduct" in a statute providing that where divorce proceedings are *ex parte*, the court shall require proof of the good conduct of petitioner and be satisfied that he or she is the innocent and injured party, have reference to the conduct of petitioner in his or her marital relations as distinguished from his or her relations to society in general. Reed *v.* Reed, 39 Mo. App. 473.

Misconduct constituting excuse, justification, or provocation see *supra*, VIII, C.

89. Snook *v.* Snook, 67 L. T. Rep. N. S. 389, holding that where a petitioner acted purely in ignorance of the law and had no intention to commit adultery, the discretion conferred upon the court by the Matrimonial Causes Act of 1857 should be exercised in his favor.

Abandonment conducing to adultery.— If the adultery was committed by complainant after a wilful abandonment by defendant, and can in any sense be considered as having been induced by the abandonment, it will not bar a divorce for the abandonment. House *v.* House, 131 N. C. 140, 42 S. E. 546; Setzer *v.* Setzer, 128 N. C. 172, 38 S. E. 730, 83 Am. St. Rep. 666; Steele *v.* Steele, 104 N. C. 631, 10 S. E. 707; Tew *v.* Tew, 80 N. C. 316, 30 Am. Rep. 84; Foy *v.* Foy, 35 N. C. 90; Whittington *v.* Whittington, 19 N. C. 64. See also Leidig *v.* Leidig, 2 Pa. Dist. 529, 13 Pa. Co. Ct. 29.

Mistake of fact.— A wife who contracts a second marriage, if she entertains a *bona fide* belief that her first husband is dead (Whippen *v.* Whippen, 147 Mass. 294, 17 N. E. 644; Hall *v.* Hall, 4 Allen (Mass.) 39) is not thereby barred from obtaining a divorce from the first husband because of his adultery (Smith *v.* Smith, 64 Iowa 682, 21 N. W. 137; Whitworth *v.* Whitworth, [1893] P. 85, 62 L. J. P. & Adm. 71, 68 L. T. Rep. N. S. 467, 1 Reports 509, 41 Wkly. Rep. 592; Freegard *v.* Freegard, 8 P. D. 186, 52 L. J. P. & Adm. 100, 32 Wkly. Rep. 95; Joseph *v.* Joseph, 34 L. J. P. & M. 96, 13 Wkly. Rep. 872; Potter *v.* Potter, 67 L. T. Rep. N. S. 721, 1 Reports 499), provided that she ceased cohabitation with the second husband as soon as it came to her knowledge that the former husband was living (Matthewson *v.* Matthewson, 18 R. I. 456, 28 Atl. 801, 49 Am. St. Rep. 782).

90. *California.*— Brenot *v.* Brenot, 102 Cal. 294, 36 Pac. 672.

Illinois.— Davis *v.* Davis, 19 Ill. 334; Lenning *v.* Lenning, 73 Ill. App. 224; Gordon *v.* Gordon, 41 Ill. App. 137.

Indiana.— Christianberry *v.* Christianberry, 3 Blackf. 203, 25 Am. Dec. 96.

Kansas.— Burke *v.* Burke, 44 Kan. 307, 24 Pac. 466, 21 Am. St. Rep. 283.

Maryland.— Fisher *v.* Fisher, 93 Md. 298, 48 Atl. 833.

Massachusetts.— Clapp *v.* Clapp, 97 Mass. 531.

Michigan.— Hoff *v.* Hoff, 48 Mich. 281, 12 N. W. 160.

Missouri.— Hoffman *v.* Hoffman, 43 Mo. 547; Duncan *v.* Duncan, 12 Mo. 157; Nagel *v.* Nagel, 12 Mo. 53.

New Jersey.— Fuller *v.* Fuller, 41 N. J. Eq. 198, 3 Atl. 409; Derby *v.* Derby, 21 N. J. Eq. 36; Tracey *v.* Tracey, (Ch. 1899) 43 Atl. 713.

New York.— Peck *v.* Peck, 44 Hun 290; Doe *v.* Doe, 23 Hun 19; Leseuer *v.* Leseuer, 31 Barb. 330; Smith *v.* Smith, 4 Paige 432, 27 Am. Dec. 75; Wood *v.* Wood, 2 Paige 108.

North Carolina.—House *v.* House, 131 N. C. 140, 42 S. E. 546; Horne *v.* Horne, 72 N. C. 530.

Ohio.— Mattox *v.* Mattox, 2 Ohio 233, 15 Am. Dec. 547; Dunbar *v.* Dunbar, Wright 286.

Tennessee.— Rayl *v.* Rayl, (Ch. App. 1900) 64 S. W. 309.

Texas.— Haines *v.* Haines, 62 Tex. 216.

Vermont.— Shackett *v.* Shackett, 49 Vt. 195.

Wisconsin.— Smith *v.* Smith, 19 Wis. 522.

England.— McCord *v.* McCord, L. R. 3 P. 237, 44 L. J. P. & M. 38, 33 L. T. Rep. N. S. 264, 23 Wkly. Rep. 684; Morgan *v.* Morgan, L. R. 1 P. 644, 38 L. J. P. & M. 41, 20 L. T. Rep. N. S. 588, 17 Wkly. Rep. 688; Hutchinson *v.* Hutchinson, 12 Jur. N. S. 491, 14 L. T. Rep. N. S. 338; Stoker *v.* Stoker, 14 P. D. 60, 58 L. J. P. & Adm. 40, 60 L. T. Rep. N. S. 400, 37 Wkly. Rep. 576; Clarke *v.* Clarke, 34 L. J. P. & M. 94, 13 Wkly. Rep. 848; Yonell *v.* Yonell, 33 L. T. Rep. N. S. 578, 24 Wkly. Rep. 59; Grosvenor *v.* Grosvenor, 34 Wkly. Rep. 140, in all which cases the courts exercised the discretionary power vested in them by the Matrimonial Causes Act of 1857 (20 & 21 Vict. c. 85, § 31) and refused a decree where both parties were guilty of adultery.

91. *Arkansas.*— Cate *v.* Cate, 53 Ark. 484, 14 S. W. 675.

Georgia.— Gholston *v.* Gholston, 31 Ga. 625.

Illinois.— Duberstein *v.* Duberstein, 171 Ill. 133, 49 N. E. 316; Howard *v.* Howard, 47 Ill. App. 453.

Indiana.—Alexander *v.* Alexander, 140 Ind. 555, 38 N. E. 855.

Louisiana.—Amy *v.* Berard, 49 La. Ann. 897, 22 So. 48.

Michigan.— Morrison *v.* Morrison, 64 Mich. 53, 30 N. W. 903; Stafford *v.* Stafford, 53

and assuming that both parties can be guilty of desertion, the doctrine of recrimination applies and neither is entitled to a divorce.[92]

c. **Offense Different From That Complained of.** By the weight of authority the offense pleaded in recrimination need not be of the same nature as the offense which defendant has committed. Any misconduct on the part of complainant which constitutes ground for divorce bars his suit without reference to the nature of the offense of which he complains,[93] although in some states a contrary rule prevails by statute or otherwise and the two offenses must be of the same character.[94] Accordingly in most jurisdictions adultery may be set up in recrimination to a suit based on defendant's cruelty,[95] defendant's desertion,[96] or defendant's commission of an infamous crime.[97] So cruel conduct, if made a ground of absolute divorce,[98] may be shown in recrimination of a charge of adultery.[99] And

Mich. 522, 19 N. W. 201; Soper *v.* Soper, 29 Mich. 305.

Missouri.— Hoffman *v.* Hoffman, 43 Mo. 547.

Nebraska.— Shuster *v.* Shuster, (1902) 92 N. W. 203.

Oregon.— Beckley *v.* Beckley, 23 Oreg. 226, 31 Pac. 470; Wheeler *v.* Wheeler, 18 Oreg. 261, 24 Pac. 900.

Texas.— Beck *v.* Beck, 63 Tex. 34; Cunningham *v.* Cunningham, 22 Tex. Civ. App. 6, 53 S. W. 75.

92. Warner *v.* Warner, 54 Mich. 492, 20 N. W. 557; Test *v.* Test, 19 N. J. Eq. 342; Wass *v.* Wass, 41 W. Va. 126, 23 S. E. 537.

93. *California.*— Cassidy *v.* Cassidy, 63 Cal. 352.

Indiana.—Alexander *v.* Alexander, 140 Ind. 555, 38 N. E. 855.

Iowa.— Pierce *v.* Pierce, 33 Iowa 238.

Massachusetts.—Watts *v.* Watts, 160 Mass. 464, 36 N. E. 479, 39 Am. St. Rep. 509, 23 L. R. A. 187; Morrison *v.* Morrison, 142 Mass. 361, 8 N. E. 59, 56 Am. Rep. 688; Cumming *v.* Cumming, 135 Mass. 386, 46 Am. Rep. 476; Handy *v.* Handy, 124 Mass. 394.

Missouri.— Morrison *v.* Morrison, 62 Mo. App. 299.

New Hampshire.— Bailey *v.* Bailey, 67 N. H. 402, 29 Atl. 847.

New Jersey.— Test *v.* Test, 19 N. J. Eq. 342; Tracey *v.* Tracey, (Ch. 1899) 43 Atl. 713.

New York.— Deisler *v.* Deisler, 59 N. Y. App. Div. 207, 60 N. Y. Suppl. 326; Crow *v.* Crow, 7 N. Y. Civ. Proc. 423.

Oregon.— Beckley *v.* Beckley, 23 Oreg. 226, 31 Pac. 470; Wheeler *v.* Wheeler, 18 Oreg. 261, 24 Pac. 900.

Pennsylvania.— Hugo *v.* Hugo, 9 Kulp 280, 21 Pa. Co. Ct. 607. See, however, cases cited *infra*, note 96.

Texas.— Trigg *v.* Trigg, (Sup. 1891) 18 S. W. 313.

Vermont.— Rudd *v.* Rudd, 66 Vt. 91, 28 Atl. 869; Tillison *v.* Tillison, 63 Vt. 411, 22 Atl. 531; Shackett *v.* Shackett, 49 Vt. 195.

West Virginia.— Wass *v.* Wass, 41 W. Va. 126, 23 S. E. 537.

Canada.— Pilnik *v.* Numizinski, 16 Quebec Super. Ct. 231.

See 17 Cent. Dig. tit. "Divorce," § 192 *et seq.*

See also *infra*, note 95 *et seq.*

94. Bast *v.* Bast, 82 Ill. 584 (where it is said that drunkenness of complainant does not bar a divorce for adultery); Dillon *v.* Dillon, 32 La. Ann. 643; Thomas *v.* Tailleu, 13 La. Ann. 127; Trowbridge *v.* Carlin, 12 La. Ann. 882; Buerfening *v.* Buerfening, 23 Minn. 563 (holding, under a statute providing that the court may deny a divorce when it is proved that complainant also has been guilty of adultery, that the adultery of plaintiff cannot be pleaded in bar unless the adultery of defendant is the ground of divorce relied on). See also *infra*, note 96 *et seq.*

95. *Alabama.*— Ribet *v.* Ribet, 39 Ala. 348.

Colorado.— Redington *v.* Redington, 2 Colo. App. 8, 29 Pac. 811.

Georgia.— Johns *v.* Johns, 29 Ga. 718.

Illinois.— Decker *v.* Decker, 193 Ill. 285, 61 N. E. 1108, 86 Am. St. Rep. 325, 55 L. R. A. 697.

Missouri.— Ryan *v.* Ryan, 9 Mo. 539.

New York.— Doe *v.* Roe, 23 Hun 19 [*overruling* Henry *v.* Henry, 17 Abb. Pr. 411, 27 How. Pr. 5; Terhune *v.* Terhune, 40 How. Pr. 258] holding that adultery of the wife is "ill conduct" as that term is used in a statute authorizing defendant in an action for a separation for cruelty to show ill conduct of complainant as a defense.

Wisconsin.— Hubbard *v.* Hubbard, 74 Wis. 650, 43 N. W. 655, 6 L. R. A. 58.

96. Whippen *v.* Whippen, 147 Mass. 294, 17 N. E. 644; Earle *v.* Earle, 43 Oreg. 293, 72 Pac. 976; Vellis *v.* Vellis, 4 Pa. Co. Ct. 100; Matthewson *v.* Matthewson, 18 R. I. 456, 28 Atl. 801, 49 Am. St. Rep. 782. *Contra*, Setzer *v.* Setzer, 128 N. C. 170, 38 S. E. 731, 83 Am. St. Rep. 666; Ristine *v.* Ristine, 4 Rawle (Pa.) 460; Mendenhall *v.* Mendenhall, 12 Pa. Super. Ct. 290; Leidig *v.* Leidig, 2 Pa. Dist. 529, 13 Pa. Co. Ct. 29.

97. C. F. C. *v.* M. E., 6 Rob. (La.) 135, holding, under La. Acts (1832), No. 59, § 1, which makes the husband's commission of an infamous crime and flight from justice a ground of divorce, that a wife guilty of adultery cannot claim a divorce for the homicide of her paramour by her husband.

98. See *supra*, note 88.

99. Nagel *v.* Nagel, 12 Mo. 53; Reading *v.* Reading, (N. J. Ch. 1886) 5 Atl. 721; Church *v.* Church, 16 R. I. 667, 19 Atl. 244, 7 L. R. A. 385; Pease *v.* Pease, 72 Wis. 136, 39 N. W. 133. *Contra*, Stiles *v.* Stiles, 167 Ill. 567, 47 N. E. 867; Bast *v.* Bast, 82 Ill. 584, *semble*.

desertion will bar a suit based either upon an act of adultery subsequently committed by defendant[1] or upon defendant's cruelty.[2]

3. CONDONATION OF OFFENSE. Although complainant has committed adultery, yet if the offense has been condoned it is not a bar to a suit brought for the subsequent adultery of defendant.[3]

L. Prematurity of Suit. To authorize a divorce plaintiff must be entitled to that relief, not only at the time of the trial but at the time the suit is instituted. A plaintiff who begins his suit before his cause of action is complete cannot take advantage of matters accruing *pendente lite*,[4] unless they are set up by amendment or supplemental pleading.[5] In some states a suit may not be brought for a

In England, under the ecclesiastical law, when there were no judicial dissolutions of valid marriages, and divorces from bed and board were allowed only for the two causes of adultery and cruelty, cruelty could not be pleaded in bar to a charge of adultery. Dillon *v.* Dillon, 3 Curt. Eccl. 86, 7 Eng. Eccl. 377; Eldred *v.* Eldred, 2 Curt. Eccl. 376, 7 Eng. Eccl. 144; Moorsom *v.* Moorsom, 3 Hagg. Eccl. 87, 5 Eng. Eccl. 28; Harris *v.* Harris, 2 Hagg. Eccl. 376, 4 Eng. Eccl. 160; Chambers *v.* Chambers, 1 Hagg. Const. 439, 4 Eng. Eccl. 445; Forster *v.* Forster, 1 Hagg. Const. 144, 4 Eng. Eccl. 358; Cocksedge *v.* Cocksedge, 1 Rob. Eccl. 90. Under the Matrimonial Causes Act of 1857 (20 & 21 Vict. c. 85, § 31) the court has discretionary power to allow or disallow the recriminatory defense of cruelty in cases where petitioner proves adultery (Pearman *v.* Pearman, 29 L. J. P. & M. 54, 1 Swab. & Tr. 601, 8 Wkly. Rep. 274), and a divorce for adultery will not ordinarily be granted where complainant has been guilty of cruelty (Ratcliff *v.* Ratcliff, 5 Jur. N. E. 714, 1 Swab. & Tr. 467, 7 Wkly. Rep. 726).

1. *California.*— Conant *v.* Conant, 10 Cal. 249, 70 Am. Dec. 717.

Iowa.— Wilson *v.* Wilson, 40 Iowa 230; Dupont *v.* Dupont, 10 Iowa 112, 74 Am. Dec. 378.

Massachusetts.— Walker *v.* Walker, 172 Mass. 82, 51 N. E. 455; Clapp *v.* Clapp, 97 Mass. 531; Hall *v.* Hall, 4 Allen 39, holding that if the adultery was committed prior to the expiration of the statutory period of desertion the desertion is not a bar.

North Carolina.— Tew *v.* Tew, 80 N. C. 316, 30 Am. Rep. 84; Moss *v.* Moss, 24 N. C. 55; Whittington *v.* Whittington, 19 N. C. 64.

Texas.— Johnson *v.* Johnson, (Civ. App. 1893) 23 S. W. 1022.

Vermont.— McCannon *v.* McCannon, 73 Vt. 147, 50 Atl. 799; Pierce *v.* Pierce, 70 Vt. 270, 40 Atl. 728.

England.—Yeatman *v.* Yeatman, L. R. 2 P. 187, 39 L. J. P. & M. 77, 23 L. T. Rep. N. S. 283, 18 Wkly. Rep. 1088.

Contra.—Richardson *v.* Richardson, 4 Port. (Ala.) 467, 30 Am. Dec. 538; Bast *v.* Bast, 82 Ill. 584; Huling *v.* Huling, 38 Ill. App. 144.

2. Coe *v.* Coe, 98 Mo. App. 472, 72 S. W. 707.

3. *Massachusetts.*— Cumming *v.* Cumming, 135 Mass. 386, 46 Am. Rep. 476.

New Hampshire.— Masten *v.* Masten, 15 N. H. 159.

New Jersey.— Jones *v.* Jones, 18 N. J. Eq. 33, 90 Am. Dec. 607.

New York.— Bleck *v.* Bleck, 27 Hun 296; Morrell *v.* Morrell, 1 Barb. 318; Smith *v.* Smith, 4 Paige 432, 27 Am. Dec. 75; Wood *v.* Wood, 2 Paige 108.

England.— Anichini *v.* Anichini, 2 Curt. Eccl. 210, 7 Eng. Eccl. 85; Seller *v.* Seller, 5 Jur. N. S. 686, 28 L. J. P. & M. 99, 1 Swab. & Tr. 482, 8 Wkly. Rep. 5, in both of which cases the rule was enforced as one of ecclesiastical law.

The reason of the rule is that to permit recrimination of a condoned offense would place the forgiven party wholly within the power of the condoner, and authorize the latter freely to violate his matrimonial obligations without fear of punishment. Cumming *v.* Cumming, 135 Mass. 386, 46 Am. Rep. 476. See also Jones *v.* Jones, 18 N. J. Eq. 33, 90 Am. Dec. 607, holding that an act of adultery committed by the husband and forgiven for years should not compel the husband to submit without redress to the faithlessness of his wife.

Discretion of court.— In England under Matrimonial Causes Act (1857) the rule is applied in the discretion of the court, and a divorce may be denied notwithstanding the condonation. McCord *v.* McCord, L. R. 3 P. 237, 44 L. J. P. & M. 38, 33 L. T. Rep. N. S. 264, 23 Wkly. Rep. 684; Morgan *v.* Morgan, L. R. 1 P. 644, 38 L. J. P. & M. 41, 20 L. T. Rep. N. S. 588, 17 Wkly. Rep. 688; Goode *v.* Goode, 7 Jur. N. S. 317, 30 L. J. P. & M. 105, 4 L. T. Rep. N. S. 122, 2 Swab. & Tr. 253, 9 Wkly. Rep. 552; Clarke *v.* Clarke, 34 L. J. P. & M. 94, 13 Wkly. Rep. 848; Pearman *v.* Pearman, 29 L. J. P. & M. 54, 1 Swab. & Tr. 601, 8 Wkly. Rep. 274; Story *v.* Story, 12 P. D. 196, 51 J. P. 680, 57 L. J. P. & Adm. 15, 57 L. T. Rep. N. S. 536, 36 Wkly. Rep. 190.

4. Tourné *v.* Tourné, 9 La. 452, holding that ill treatment occurring after suit brought can afford no ground for judicial separation.

A statutory exception exists in Vermont in cases of desertion. Hemenway *v.* Hemenway, 65 Vt. 623, 27 Atl. 609.

Insufficiency of residence as ground for abatement see *supra*, V, C, 2, d, (III).

5. Steele *v.* Steele, 35 Conn. 48 (holding that one who files a petition for divorce before she has lived in the state the required

divorce except in certain cases until after the lapse of six months from the time when complainant became aware of the ground for divorce.[6]

M. Delay in Bringing Suit — 1. **Statutes of Limitations.** Statutes limiting in general terms the time within which actions may be brought do not ordinarily apply to divorce suits.[7] In many states, however, statutes have been enacted which require divorce suits to be brought, if at all, within a certain time, either after the offense was committed[8] or after the discovery of the offense.[9]

2. **Laches.** Long lapse of time between the occurrence of a matrimonial offense and an application for a divorce will bar the suit,[10] unless a satisfactory

time may be granted a divorce upon the expiration of that time *pendente lite* if the fact is set up by supplemental petition without objection); McCrocklin *v.* McCrocklin, 2 B. Mon. (Ky.) 370 (holding that plaintiff may be granted an absolute divorce for abandonment upon the expiration of the statutory period of abandonment *pendente lite*, if that fact is set up by amendment of the bill).

Amendment of pleadings see *infra*, XII, G.

Supplemental pleadings see *infra*, XII, F.

6. Green *v.* Green, 131 N. C. 533, 42 S. E. 954; Scoggins *v.* Scoggins, 80 N. C. 318, 85 N. C. 347; Gaylord *v.* Gaylord, 56 N. C. 74. See also Broughton *v.* Broughton, 1 Del. Co. (Pa.) 273, holding that a subpœna in an action for divorce on the ground of desertion cannot be issued until six months from the act of desertion.

7. Mosely *v.* Mosely, 67 Ga. 92; Tufts *v.* Tufts, 8 Utah 142, 30 Pac. 309, 16 L. R. A. 482. See, however, Moulton *v.* Moulton, 2 Barb. Ch. (N. Y.) 309, where a divorce suit was held to be barred by the statute limiting the time for bringing suits in equity.

8. See statutes of the different states.

Construction of statute.— Ky. St. § 2120, providing that an action for divorce must be brought within five years next after the doing of the act complained of, does not prohibit the granting of a divorce to parties who have lived apart for more than five years, where the ground of divorce is that they have lived apart for five years next preceding the action. Clark *v.* Clark, 53 S. W. 644, 21 Ky. L. Rep. 955. "Condemnation for felony," which is made a ground of divorce by Ky. St. § 2117, does not refer to conviction merely, but exists as long as the judgment is in force, and hence the cause is not barred because not brought within five years from the conviction. It may be brought at any time during the imprisonment or within five years from the termination thereof. Davis *v.* Davis, 102 Ky. 440, 43 S. W. 168, 19 Ky. L. Rep. 1520, 39 L. R. A. 403.

Disability to sue.— One who has not resided in the state a year cannot sue for a divorce. Hence the statute requiring divorce suits to be brought within a year after the offense is committed does not bar a suit instituted shortly after the expiration of the first year of plaintiff's residence in the state, although the cause of action accrued more than a year before that time. Jacobsen *v.* Jacobsen, 11 Oreg. 454, 5 Pac. 567.

Running of statute.— The limitation of an action for divorce for desertion begins to run from the first solicitation to bring about a reconciliation. Howard *v.* Howard, 134 Cal. 346, 66 Pac. 367.

9. See statutes of the several states.

Construction of statute.— Within "one year after the discovery of the act charged" as used in a divorce statute does not apply to suits based on an act of cruelty but only on an act of adultery. Smedley *v.* Smedley, 30 Ala. 714.

Adultery.— Where the act complained of consists of a continuous adulterous cohabitation, the statute begins to run from the time when plaintiff acquired knowledge thereof, and not from any subsequent act of adultery committed during such cohabitation. Church *v.* Church, 7 N. Y. St. 177; Valleau *v.* Valleau, 6 Paige (N. Y.) 207; Williamson *v.* Williamson, 1 Johns. Ch. (N. Y.) 488; Dutcher *v.* Dutcher, 39 Wis. 651.

10. *Alabama.*—Rawdon *v.* Rawdon, 28 Ala. 565.

District of Columbia.— Secor *v.* Secor, 1 MacArthur 630.

Georgia.— Mosely *v.* Mosely, 67 Ga. 92.

Illinois.— Hitchins *v.* Hitchins, 140 Ill. 326, 29 N. E. 888 [*affirming* 41 Ill. App. 82].

Massachusetts.— Clark *v.* Clark, 97 Mass. 331.

Michigan.— Stuart *v.* Stuart, 47 Mich. 566, 11 N. W. 388, lapse of twelve years.

Missouri.— Stokes *v.* Stokes, 1 Mo. 320.

New Hampshire.— Smith *v.* Smith, 43 N. H. 234; Fellows *v.* Fellows, 8 N. H. 160.

New Jersey.— Barker *v.* Barker, 63 N. J. Eq. 593, 53 Atl. 4, lapse of twenty-five years.

New York.— Williamson *v.* Williamson, 1 Johns. Ch. 488, lapse of twenty years.

Utah.— Tufts *v.* Tufts, 8 Utah 142, 30 Pac. 309, 16 L. R. A. 482.

England.— Short *v.* Short, L. R. 3 P. 193; Newman *v.* Newman, L. R. 2 P. 57, 39 L. J. P. & M. 36, 22 L. T. Rep. N. S. 552, 18 Wkly. Rep. 584, both decided under the Matrimonial Causes Act (20 & 21 Vict. c. 85, § 31), which authorizes the court in its discretion to refuse a petition for a dissolution of the marriage when petitioner shall have been in its opinion guilty of unreasonable delay.

See 17 Cent. Dig. tit. "Divorce," § 235.

Unreasonable lapse of time is defined by Cal. Civ. Code, § 125, to be such delay "as establishes the presumption that there has been connivance, collusion, or condonation of

excuse is shown for the delay; the same rule being applied as in equity cases in general.[11]

IX. PARTIES.[12]

A. Parties Plaintiff — 1. IN GENERAL. The remedy of divorce is personal, and the right to seek it belongs only to one or the other of the spouses.[13]

2. DISABILITIES — a. Coverture. In nearly all the states a married woman may now by statute sue in her own name for a divorce without the intervention of a next friend.[14]

b. Infancy. It has been held that infants of an age permitting them to enter into a valid contract of marriage may maintain an action for divorce.[15]

the offense, or full acquiescence in the same, with intent to continue the marriage relation, notwithstanding the commission of the offense." A delay of fourteen months after a desertion without cause is not unreasonable. Thomson *v.* Thomson, 121 Cal. 11, 53 Pac. 403.

Presumption of condonation from lapse of time see *infra*, XIII, A, note 10.

Laches of wife.— A wife's delay will not be so strictly charged against her where the offense is adultery and she has not cohabited with her husband since she ascertained the fact of its commission. Johnson *v.* Johnson, 50 Mich. 293, 15 N. W. 462 (where the court suggests that delay in complaining of family difficulties should be encouraged rather than punished, in the hope that a better state of things may be established by the voluntary action of the parties); Cummins *v.* Cummins, 15 N. J. Eq. 138; D'Aguilar *v.* D'Aguilar, 1 Hagg. Eccl. 773, 3 Eng. Eccl. 329; Angle *v.* Angle, 1 Rob. Eccl. 634.

Separation agreement as defense in connection with lapse of time see *supra*, VIII, D, 1, note 13.

11. Barker *v.* Barker, 63 N. J. Eq. 593, 53 Atl. 4, holding, however, that complainant's residence abroad does not of itself constitute an excuse for laches.

Lack of knowledge of the offense is a valid excuse for a delay in instituting suit. Clark *v.* Clark, 97 Mass. 331.

Poverty of complainant may excuse his delay. Schonwald *v.* Schonwald, 62 N. C. 215; Nicholson *v.* Nicholson, L. R. 3 P. 53, 29 L. T. Rep. N. S. 108; Wilson *v.* Wilson, L. R. 2 P. 435; Cood *v.* Cood, 1 Curt. Eccl. 755, 6 Eng. Eccl. 452. See, however, Barker *v.* Barker, 63 N. J. Eq. 593, 53 Atl. 4.

Unwillingness to expose a scandal reflecting upon members of the family of petitioner may excuse his delay. Burr *v.* Burr, 10 Paige (N. Y.) 20; Newman *v.* Newman, L. R. 2 P. 57, 39 L. J. P. & M. 36, 22 L. T. Rep. N. S. 552, 18 Wkly. Rep. 584.

12. See, generally, PARTIES.

Death of party: As abating suit see ABATEMENT AND REVIVAL, 1 Cyc. 64, 79 note 92. As affecting allowance of alimony see *infra*, XIX, D, 9, e; F, 1, f.

Residence of parties as affecting jurisdiction see *supra*, V, C.

13. *Georgia.*— Worthy *v.* Worthy, 36 Ga. 45, 91 Am. Dec. 758.

Illinois.— Bradford *v.* Abend, 89 Ill. 78, 31 Am. Rep. 67.

Iowa.— Mohler *v.* Shank, 93 Iowa 273, 61 N. W. 981, 57 Am. St. Rep. 274, 34 L. R. A. 161.

Kansas.— Birdzell *v.* Birdzell, 33 Kan. 433, 6 Pac. 561, 52 Am. Rep. 439.

Louisiana.— D'Auvilliers *v.* D'Auvilliers, 32 La. Ann. 605.

Massachusetts.— Winslow *v.* Winslow, 7 Mass. 96.

New Hampshire.— Kimball *v.* Kimball, 44 N. H. 122, 82 Am. Dec. 194.

Vermont.— Richardson *v.* Richardson, 50 Vt. 119.

14. *Alabama.*— Richardson *v.* Richardson, 4 Port. 467, 30 Am. Dec. 538.

California.— Kashaw *v.* Kashaw, 3 Cal. 312.

Georgia.— Besore *v.* Besore, 49 Ga. 378.

Maine.— Jones *v.* Jones, 18 Me. 308, 36 Am. Dec. 723.

New Jersey.— Amos *v.* Amos, 4 N. J. Eq. 171.

New York.— Shore *v.* Shore, 2 Sandf. 715; Tippel *v.* Tippel, 4 How. Pr. 346, 3 Code Rep. 40; Forrest *v.* Forrest, 3 Code Rep. 254; Newman *v.* Newman, 3 Code Rep. 183; Anonymous, 3 Code Rep. 18; Coit *v.* Coit, 2 Code Rep. 94.

Pennsylvania.— Everett *v.* Everett, 8 Kulp 112, 5 Pa. Dist. 160, 16 Pa. Co. Ct. 599.

Tennessee.— Hawkins *v.* Hawkins, 4 Sneed 105.

Texas.— Wright *v.* Wright, 3 Tex. 168.

See 17 Cent. Dig. tit. "Divorce," § 239.

At common law a suit for divorce could not be brought by a wife in her own name, but it was required to be done by a next friend (Hawkins *v.* Hawkins, 4 Sneed (Tenn.) 105); and in New York, under a statute permitting a suit for an absolute divorce to be brought by the wife in her own name but making no such provision where the suit was for a separation, it was held that in the latter case the suit must be brought by the wife's next friend (Smith *v.* Smith, 4 Paige (N. Y.) 92; Wood *v.* Wood, 8 Wend. (N. Y.) 357).

See, generally, HUSBAND AND WIFE.

15. Besore *v.* Besore, 49 Ga. 378; Jones *v.* Jones, 18 Me. 308, 36 Am. Dec. 723.

See, generally, INFANTS.

Suit by guardian.— It has been held, however, that in the absence of statute a party's infancy precludes his prosecution of the suit

c. Insanity.[16] A divorce suit cannot be prosecuted in behalf of an insane plaintiff by his legal representative,[17] unless that course is authorized by statute, as is the case in some jurisdictions.[18]

d. Prodigality. A person under guardianship as a spendthrift may nevertheless petition for a divorce in his own name.[19]

B. Parties Defendant — 1. Disabilities[20] **— a. Coverture.** As a rule a wife may now by statute defend an action brought against her for divorce without the intervention of a next friend.[21]

b. Infancy. In the absence of statute to the contrary, an infant defendant in a divorce suit must appear by a guardian *ad litem*.[22]

c. Insanity.[23] If defendant was insane when he committed the offense[24] he may be sued for divorce, although he has become insane, an appearance being made in his behalf by his next friend or legal representative.[25]

2. Third Persons — a. In General. If plaintiff seeks, in addition to a divorce, other relief involving an adjudication of property rights as against defendant and other persons claiming an adverse interest in the subject-matter, such persons

without the intervention of a guardian *ad litem*. Wood *v.* Wood, 2 Paige (N. Y.) 108. In the ecclesiastical courts guardians *ad litem* were appointed to represent infant parties in divorce suits. Barham *v.* Barham, 1 Hagg. Const. 5; Brown *v.* Brown, 2 Rob. Eccl. 302. See, generally, Guardian and Ward.

16. Insanity as ground for abatement see Insane Persons.

17. Worthy *v.* Worthy, 36 Ga. 45, 91 Am. Dec. 758; Iago *v.* Iago, 168 Ill. 339, 48 N. E. 30, 61 Am. St. Rep. 120, 39 L. R. A. 115; Bradford *v.* Abend, 89 Ill. 78, 31 Am. Rep. 67 (where a decree of divorce was set aside when it appeared that plaintiff at the time the suit was commenced was in close confinement as a lunatic); Mohler *v.* Shank, 93 Iowa 273, 61 N. W. 981, 57 Am. St. Rep. 274, 34 L. R. A. 161; Birdzell *v.* Birdzell, 33 Kan. 433, 6 Pac. 561, 52 Am. Rep. 539. See, generally, Insane Persons.

Waiver of objections.— A husband defendant cannot, after decree, object that his wife, being insane, should have sued for alimony by her committee and not her next friend. Mims *v.* Mims, 33 Ala. 98.

18. Cowan *v.* Cowan, 139 Mass. 377, 1 N. E. 152; Garnett *v.* Garnett, 114 Mass. 379, 19 Am. Rep. 369; Little *v.* Little, 13 Gray (Mass.) 264; Mansfield *v.* Mansfield, 13 Mass. 412; Broadstreet *v.* Broadstreet, 7 Mass. 474; Thayer *v.* Thayer, 9 R. I. 377; Fry *v.* Fry, 15 P. D. 50, 59 L. J. P. & Adm. 43, 62 L. T. Rep. N. S. 501, 38 Wkly. Rep. 615; Baker *v.* Baker, 5 P. D. 142, 49 L. J. P. & Adm. 49, 42 L. T. Rep. N. S. 332, 28 Wkly. Rep. 630 [*affirmed* in 6 P. D. 12, 49 L. J. P. & Adm. 83]; Woodgate *v.* Taylor, 30 L. J. P. & M. 197, 5 L. T. Rep. N. S. 119, 2 Swab. & Tr. 512.

Petition for guardian.— The court may entertain a petition by a third person for the appointment of a guardian *ad litem* to conduct a divorce action for an insane libellant. Denny *v.* Denny, 8 Allen (Mass.) 311.

19. Winslow *v.* Winslow, 7 Mass. 96 (holding that a libel for divorce cannot be sued by the guardian of the spendthrift); Richardson *v.* Richardson, 50 Vt. 119. See, generally, Spendthrifts.

20. Disability arising from conviction of crime see Convicts.

21. See statutes of the different states.

Next friend.— A former statute in New York required a married woman, when she could not be joined with her husband, to prosecute or defend by her next friend; and under this statute an action for an absolute divorce could not proceed after service of summons until a next friend had been appointed to defend the suit in her behalf. Meldora *v.* Meldora, 4 Sandf. (N. Y.) 721.

Curator ad hoc.— Where, in an action for a separation from bed and board instituted by the husband, a curator *ad hoc* was appointed to represent the wife, who was an absentee, but the case was tried without any issue joined or judgment by default regularly taken, judgment cannot be rendered for plaintiff. Schnaufer *v.* Schnaufer, 4 La. Ann. 355.

See, generally, Husband and Wife.

22. Wood *v.* Wood, 2 Paige (N. Y.) 108. See, generally, Infants.

23. Insanity as ground for abatement see Insane Persons.

24. See *supra*, VIII, B, 2.

25. Mansfield *v.* Mansfield, 13 Mass. 412; Broadstreet *v.* Broadstreet, 7 Mass. 474; Rathbun *v.* Rathbun, 40 How. Pr. (N. Y.) 328; Stratford *v.* Stratford, 92 N. C. 297; Mordaunt *v.* Moncreiff, L. R. 2 H. L. Sc. 374, 43 L. J. P. & M. 49, 30 L. T. Rep. N. S. 649, 23 Wkly. Rep. 12 [*reversing* L. R. 2 P. 382, 41 L. J. P. & M. 42, 26 L. T. Rep. N. S. 812, 20 Wkly. Rep. 553]. See, generally, Insane Persons.

Discretion of court.— The fact that a divorce *nisi* was obtained while the parties were sane does not make it a matter of course that an absolute divorce should be granted; and a statement of facts agreed upon by the guardians does not free the court from its duty to dispose of the case as public policy and the interests of the parties require. Garnett *v.* Garnett, 114 Mass. 379, 19 Am. Rep. 369.

may be made parties defendant.[26] In England, in a suit for divorce because of adultery, the alleged adulterer must be made a party unless otherwise directed by the court.[27]

b. Intervention — (i) *In General.* Ordinarily a third person cannot intervene in a suit for divorce for the purpose of opposing the granting of a decree.[28]

(ii) *By Particeps Criminis.* The person charged as *particeps criminis* with defendant in an act of adultery upon which the suit is based cannot intervene to protect his character,[29] unless he is permitted to do so by statute.[30]

(iii) *By State.* In some jurisdictions statutes have been enacted which provide that if no defense is interposed in a divorce suit, the state shall by some officer of court intervene and defend.[31]

X. PROCESS.

A. In General. A divorce cannot be granted as against defendant unless the court has acquired jurisdiction of his person. Unless therefore he has been duly

26. Kashaw *v.* Kashaw, 3 Cal. 312; Wetmore *v.* Wetmore, 5 Oreg. 469 (holding that a grantee of the husband is a proper party in view of a statute entitling a party in whose favor a divorce is granted to an individual one-third part of the land owned by the other); Gibson *v.* Gibson, 46 Wis. 449, 1 N. W. 147; Damon *v.* Damon, 28 Wis. 510 (holding that one who took a conveyance of the husband's property without consideration to defeat a recovery of alimony may be joined as a defendant). See, however, Cummings *v.* Cummings, (Cal. 1887) 14 Pac. 562; Greiner *v.* Greiner, 58 Cal. 115 (both holding that purchasers of community property are not proper parties defendant in an action for divorce, since the title to such property is vested in the husband, and that if it is transferred in fraud of the wife's interest, her remedy is by an action to vacate the transfer after dissolution of the marriage); Varney *v.* Varney, 54 Wis. 422, 11 N. W. 694 (holding that a purchaser of the husband's property is not a proper party defendant unless it be clearly shown that the conveyance was made with intent to prejudice the rights of plaintiff, or that they will be actually prejudiced by the conveyance).

The parents of the spouses are not necessary parties to a suit by the wife for a divorce and a settlement of her rights under a marriage contract to which the parents are parties. D'Auvilliers *v.* D'Auvilliers, 32 La. Ann. 605.

27. Lowe *v.* Lowe, [1899] P. 204, 68 L. J. P. & Adm. 60, 80 L. T. Rep. N. S. 575, 47 Wkly. Rep. 553; Harrop *v.* Harrop, [1899] P. 61, 68 L. J. P. & Adm. 58, 80 L. T. Rep. N. S. 171; Nicolas *v.* Nicolas, 68 L. J. P. & Adm. 66, 80 L. T. Rep. N. S. 422. See also *infra*, IX, B, 2, b, (II).

28. Quigley *v.* Quigley, 45 Hun (N. Y.) 23 (where it was said that a child who may in effect be pronounced illegitimate by a decree of divorce is in the unfortunate position of being unable to intervene in the action); E. B. *v.* E. C. B., 8 Abb. Pr. (N. Y.) 44 (holding that a parent of a married infant is not a proper party to an action of divorce against the infant and has no right either on the ground of relationship or of interest in the litigation to intervene); Stearns *v.* Stearns, 10 Vt. 540 (holding that creditors cannot appear in a divorce suit and resist the petition on their suggestion that it was collusive and intended to defeat their rights). See also Clay *v.* Clay, 21 Hun (N. Y.) 609; Burke *v.* Burke, 5 Misc. (N. Y.) 319, 26 N. Y. Suppl. 57.

The ecclesiastical courts, however, permitted intervention by one whose interests would be affected by a dissolution of the marriage. Ray *v.* Sherwood, 1 Curt. Eccl. 173; Wood *v.* Medley, 1 Hagg. Eccl. 645.

29. Quigley *v.* Quigley, 45 Hun (N. Y.) 23; Clay *v.* Clay, 21 Hun (N. Y.) 609; Burke *v.* Burke, 5 Misc. (N. Y.) 319, 26 N. Y. Suppl. 57.

Participation in trial.— Although the co-respondent may not intervene, yet the court may permit her by counsel to take testimony in her defense, to cross-examine witnesses, to be sworn herself, and to produce other witnesses in her behalf. Clay *v.* Clay, 21 Hun (N. Y.) 609.

30. Rixa *v.* Rixa, 35 Misc. (N. Y.) 227, 71 N. Y. Suppl. 815, holding that the person with whom the answer alleges plaintiff committed adultery also may intervene. See also *supra*, IX, B, 2, a.

31. Creamer *v.* Creamer, 36 Ga. 618; Scott *v.* Scott, 17 Ind. 309. See *supra*, IV, B, 2.

A prosecuting attorney who has been discharged by the court from further service in a divorce suit which he had defended on the ground of collusion between the parties has no authority to move for a new trial or to tender a bill of exceptions. State *v.* Friedley, 151 Ind. 404, 51 N. E. 473.

In England the king's proctor in his official capacity intervenes at any time before the decree absolute on the ground of collusion only (Dering *v.* Dering, L. R. 1 P. 531, 37 L. J. P. & M. 52, 19 L. T. Rep. N. S. 48; Hudson *v.* Hudson, 1 P. D. 65, 45 L. J. P. & Adm. 39, 24 Wkly. Rep. 282; Lautour *v.* Lautour, 10 H. L. Cas. 685, 10 Jur. N. S.

notified of the institution of the suit by service of process, either personal or constructive, the court cannot render a decree.[32] In many of the states there are statutes or rules of court specially regulating the sufficiency of process and the service thereof in divorce suits. In the absence of these the regulations relating to process in civil actions in general will govern in proceedings for divorce.[33] Statutes regulating service of process in divorce cases should be strictly construed,[34] and a non-compliance therewith defeats the court's jurisdiction over defendant.[35]

B. General Requisites — 1. Signature. The citation must be signed by a proper officer else it is fatally defective.[36]

2. Statement of Ground of Divorce. In some states the process must indicate the ground upon which the divorce is prayed.[37]

3. Service of Petition. In some states not only a summons but also the petition for divorce must be served on defendant.[38]

C. Personal Service — 1. In General. Actual notice to defendant in a divorce suit is favored,[39] and is required where he is domiciled within the jurisdiction of the court and might have been personally served by the exercise of due diligence.[40]

2. Manner of Service. Unless defendant is a non-resident, the process must ordinarily be served upon him personally.[41] In some states, however, process may be served by leaving a copy at defendant's residence in his absence,[42] by mailing him a copy,[43] or by citing him through a curator *ad hoc*.[44] The reading

325, 33 L. J. P. & M. 89, 10 L. T. Rep. N. S. 198, 12 Wkly. Rep. 611), or at any other time as one of the public (Masters *v.* Masters, 34 L. J. P. & M. 7).

32. *Connecticut.*— *In re* Hotchkish, 1 Root 355.

Georgia.— Parish *v.* Parish, 32 Ga. 653.

Illinois.— Townsand *v.* Townsand, 21 Ill. 540.

Louisiana.— Champon *v.* Champon, 40 La. Ann. 28, 3 So. 397; Jurgielewiez *v.* Jurgielewiez, 24 La. Ann. 77.

Ohio.— Ferrel *v.* Ferrel, 1 Ohio Dec. (Reprint) 135, 2 West. L. J. 427.

See, generally, Process.

33. Sears *v.* Sears, 9 N. Y. Civ. Proc. 432. See also *infra*, X, D, 1, note 53.

34. Morey *v.* Morey, 27 Minn. 265, 6 N. W. 783. See also *infra*, X, D, 1. See, however, Jones *v.* Jones, 60 Tex. 451.

35. Philbrick *v.* Philbrick, 27 Vt. 786; Moffat *v.* Moffat, 10 Vt. 432; Parker *v.* Parker, N. Chipm. (Vt.) 27.

36. Philbrick *v.* Philbrick, 27 Vt. 786, holding a citation fatally defective if signed only by a justice of the peace.

37. Rudolph *v.* Rudolph, 12 N. Y. Suppl. 81, 19 N. Y. Civ. Proc. 424, holding, however, that where a statute requires the process to be indorsed with a statement of the purpose of the action, as "action to annul a marriage," "action for a divorce," "action for a separation," an indorsement of "action for a divorce" on a summons in an action for a separation is a mere irregularity of which defendant cannot avail himself unless he has actually been prejudiced. See also Pentz *v.* Pentz, 6 Pa. Dist. 708.

Indorsement of copy.— A failure to indorse the copy of a summons left with defendant, where the original was properly indorsed, does not invalidate an order of arrest in the action or preclude an application for alimony but merely prevents the entry of judgment by default. Sears *v.* Sears, 9 N. Y. Civ. Proc. 432.

Variance between the writ and the complaint is not ordinarily a fatal objection. Pentz *v.* Pentz, 6 Pa. Dist. 708.

38. Stone *v.* Stone, 25 N. J. Eq. 445.

39. Spinney *v.* Spinney, 87 Me. 484, 32 Atl. 1019; Smith *v.* Smith, 9 Mass. 422; Randall *v.* Randall, 7 Mass. 502; Banks *v.* Banks, 189 Pa. St. 196, 42 Atl. 111; Bland *v.* Bland, L. R. 3 P. 233, 44 L. J. P. & M. 14, 32 L. T. Rep. N. S. 404, 23 Wkly. Rep. 419; Milne *v.* Milne, 34 L. J. P. & M. 143, 4 Swab. & Tr. 183.

40. Harter *v.* Harter, 5 Ohio 318; Love *v.* Love, 10 Phila. (Pa.) 453.

41. See *infra*, X, D, 2.

Service on his attorney is not sufficient. Newberry *v.* Newberry, 9 Kulp (Pa.) 379, 22 Pa. Co. Ct. 361.

42. Beard *v.* Beard, 21 Ind. 321.

Unless authorized by statute, however, the leaving of an attested copy of the bill at the last known place of abode of the libellee is insufficient, where he was not then in the house and has not been in the county since that time. Labotiere *v.* Labotiere, 8 Mass. 383; Randall *v.* Randall, 7 Mass. 502.

43. Smith *v.* Smith, 4 Greene (Iowa) 266, holding, however, that the statute should be strictly observed, and that the courts should carefully guard against any abuse of its provisions.

44. Lachaud *v.* Lachaud, 10 La. Ann. 156, holding that in a proceeding for absolute divorce based on a decree of separation from bed and board obtained six years before and on the continued abandonment, the absent

of a subpœna to answer a bill of divorce is not a sufficient service;[45] nor is it sufficient merely to put defendant in the unknown possession of a summons.[46]

3. PLACE OF SERVICE. Personal service of process without the state is ineffectual,[47] unless authorized by statute.[48] However, process may be personally served beyond the county where the court sits.[49]

4. WHO MAY MAKE SERVICE. The officer or person by whom process in divorce suits may be served is usually prescribed by statute or rule of court,[50] and process otherwise served is ineffectual.[51]

D. Constructive Service — 1. IN GENERAL. Actual notice to a non-resident defendant in a divorce suit is not a prerequisite to the exercise of jurisdiction,[52] and in nearly all the states statutes exist which permit of a constructive service of process by publication where defendant is without the state.[53] Where the

spouse may be cited through a curator *ad hoc*. Where, however, a marriage is solemnized in a foreign country and the husband subsequently abandons the wife and comes to Louisiana, he cannot prosecute a suit against her there for a divorce by causing a curator *ad hoc* to be appointed to represent her, through whom she is cited. Champon *v.* Champon, 40 La. Ann. 28, 3 So. 397.

There are only two cases in which a curator may be appointed to represent absent wives in suits for divorce; one where defendant is charged with commission of an infamous crime and being a fugitive from justice, and the other where a separation is claimed on the ground of abandonment. Muller *v.* Hilton, 13 La. Ann. 1, 71 Am. Dec. 504; Prindle *v.* Williams, 9 La. Ann. 34.

45. Welch *v.* Welch, 16 Ark. 527; Smith *v.* Smith, 9 Mass. 422, where the statute requires service to be made by serving the party with an attested copy of the libel and a summons to appear.

46. Bulkley *v.* Bulkley, 6 Abb. Pr. (N. Y.) 307, where plaintiff delivered to defendant, at the time of her departure upon a sea voyage, a sealed box which he informed her contained a present for a third person and a note for herself, but which in fact contained the summons.

47. Keen *v.* Keen, 2 Wkly. Notes Cas. (Pa.) 492; Ormsby *v.* Ormsby, 30 Pittsb. Leg. J. N. S. 272; Conrad *v.* Conrad, 1 Lack. Jur. (Pa.) 34; Weatherbee *v.* Weatherbee, 20 Wis. 499. *Contra*, Holland *v.* Holland, 29 Cinc. L. Bul. 98. See also *infra*, XXI, C, 4, b, (I), note 71.

Service "wherever found."— A statute authorizing personal service of process on defendant "wherever found," and also providing for publication of summons in case defendant cannot be found in the county, does not give the courts jurisdiction of a non-resident defendant by personal service on him without the state. Burton *v.* Burton, 45 Hun (N. Y.) 68; Ralston's Appeal, 93 Pa. St. 133; Payne *v.* Payne, 18 Pa. Co. Ct. 34. *Contra*, Snyder *v.* Snyder, 1 Wkly. Notes Cas. (Pa.) 187, 10 Phila. (Pa.) 306.

48. McFarlane *v.* Cornelius, 43 Oreg. 513, 73 Pac. 325, 74 Pac. 468 (holding that under the statute it is proper for an order for publication to require the summons and complaint to be mailed to defendant at a temporary foreign residence); Jones *v.* Jones, 60 Tex. 451 (holding that the object of the statute authorizing personal service of process on a non-resident defendant being to provide an easier and less expensive method of service than by publication, its provisions are to be liberally construed); Stephens *v.* Stephens, 62 Tex. 337 (holding, however, that the statute must be substantially complied with). See also Baldwin *v.* Baldwin, 1 Pa. Co. Ct. 178, 17 Wkly. Notes Cas. (Pa.) 222.

If authorized at all, personal service on a non-resident defendant outside of the state can be made only when the publication of the summons has been ordered. McBlain *v.* McBlain, 77 Cal. 507, 20 Pac. 61.

49. Ewing *v.* Ewing, 24 Ind. 468; Brown *v.* Brown, 10 Nebr. 349, 6 N. W. 397; Austin *v.* Austin, 4 C. Pl. (Pa.) 67.

No special authorization from the court is necessary to warrant the service of a subpœna by the sheriff of another county than that in which the divorce proceedings have been instituted. Fillman's Appeal, 99 Pa. St. 286 [*reversing* 10 Wkly. Notes Cas. 222].

50. Leavitt *v.* Leavitt, 135 Mass. 191 (holding that a constable or private person has no authority to serve such process unless by special order of the court); Brown *v.* Brown, 15 Mass. 389; Timney *v.* Timney, 21 Pa. Super. Ct. 538 (holding that a rule of the common pleas providing that in divorce cases "the subpœna, copy of the libel and notice, and prayer and answer shall be served by the sheriff upon the respondent, if he is within the county," is a reasonable and proper rule, and one which the court has power to make, under Pa. Act March 13, 1815 (6 Smith Laws 286), although there is nothing in the act which requires service by the sheriff); Moffat *v.* Moffat, 10 Vt. 432 (holding that no person is authorized to serve process from the supreme court unless particularly named therein).

51. Spafford *v.* Spafford, 16 Vt. 511 (holding that if a person not authorized serves process, defendant may disregard it); Parker *v.* Parker, N. Chipm. (Vt.) 27 (where a petition for divorce served by a person not particularly named in the process was dismissed).

52. Residence of defendant as affecting jurisdiction: Domestic divorce see *supra*, V, C, 3. Foreign divorce see *infra*, XXI, C, 3.

53. Lewis *v.* Lewis, 15 Kan. 181; Hare *v.* Hare, 10 Tex. 355, both cases holding that a

requirements of these statutes are strictly complied with and not otherwise,[54] the decree is as binding on the parties as in cases where the service of process is personal.[55]

2. Who May Be Served. Constructive service of process is available only in case defendant resides without the state,[56] is absent therefrom,[57] or cannot be found therein.[58]

3. Proceedings For Service — a. Affidavit of Non-Residence or Absence. The fact of the non-residence or absence of defendant is usually required to be shown by affidavit.[59] This requirement is jurisdictional, and if the affidavit does not comply with the statute in regard to its contents, service of process thereunder does not confer jurisdiction.[60]

b. Order For Publication — (1) *In General.* In most states an order directing the publication of a notice of the suit is made a prerequisite of constructive

general statute authorizing constructive service of process where defendant is a non-resident extends to suits for divorce. See also Plummer *v.* Plummer, 37 Miss. 185, holding that a statute requiring one month's publication of notice in chancery cases impliedly repeals a prior statute requiring three months' notice in divorce cases.

54. *Colorado.*— Israel *v.* Arthur, 7 Colo. 5, 1 Pac. 438.

Michigan.— Bentley *v.* Hosmer, 110 Mich. 626, 68 N. W. 650, 69 N. W. 660.

Pennsylvania.— Sciple *v.* Sciple, 21 Pa. Co. Ct. 559.

Texas.— See Stephens *v.* Stephens, 62 Tex. 337.

United States.—Cheely *v.* Clayton, 110 U. S. 701, 4 S. Ct. 328, 28 L. ed. 298, holding that if the statutory requisites as to service by publication are not complied with, the divorce is void for want of jurisdiction of the person of defendant.

Personal service on non-resident see *supra*, X, C, 3.

55. McFarland *v.* McFarland, 40 Ind. 458; Tolen *v.* Tolen, 2 Blackf. (Ind.) 407, 21 Am. Dec. 742; Ditson *v.* Ditson, 4 R. I. 87.

56. *Alabama.*— Harrison *v.* Harrison, 19 Ala. 499.

Indiana.— Beard *v.* Beard, 21 Ind. 321.

Maine.— Spinney *v.* Spinney, 87 Me. 484, 32 Atl. 1019, holding that where the libellee has a known residence within the state and is only temporarily absent from it an actual service of the summons must be obtained.

Nebraska.—Atkins *v.* Atkins, 9 Nebr. 191, 2 N. W. 466.

North Carolina.—King *v.* King, 84 N. C. 32.

57. Godfrey *v.* Godfrey, 27 Ga. 466; Smith *v.* Smith, 6 Mass. 36; Anonymous, 5 Mass. 197; Choate *v.* Choate, 3 Mass. 391; Homston *v.* Homston, 3 Mass. 159.

Absence on a voyage with an expectation of returning is not such an absence from the state as will authorize proceedings upon the libel without personal notice. Mace *v.* Mace, 7 Mass. 212.

58. Israel *v.* Arthur, 7 Colo. 5, 1 Pac. 438; Morrison *v.* Morrison, 64 Mich. 53, 30 N. W. 903; Von Rhade *v.* Von Rhade, 2 Thomps. & C. (N. Y.) 491; Green *v.* Green, 13 Pa. Co. Ct. 671. See also Briggs *v.* Briggs, 2 C. Pl. (Pa.) 64, holding that where the respondent resides out of the state the proper mode of service of the subpœna is by the customary two returns of "*non est inventus*" and publication.

59. Godfrey *v.* Godfrey, 27 Ga. 466; Atkins *v.* Atkins, 9 Nebr. 191, 2 N. W. 466; King *v.* King, 84 N. C. 32.

Affidavit by plaintiff alone.— An order of publication will not be granted on the affidavit of plaintiff alone, without other proof of defendant's non-residence. Hall *v.* Hall, 10 N. Y. Suppl. 223.

Venue.— An affidavit attached to the petition need not state the venue where it is sufficiently laid in the petition. Burnes *v.* Burnes, 61 Mo. App. 612.

60. Godfrey *v.* Godfrey, 27 Ga. 466 (holding that it is insufficient to show merely that defendant could not be found in two counties); Atkins *v.* Atkins, 9 Nebr. 191, 2 N. W. 466 (holding that an affidavit which fails to set out for what the action is brought is fatally defective).

Illustrations of sufficiency.— An affidavit that affiant has made diligent search and inquiry for the residence and whereabouts of defendant and is unable to find him is sufficient. Morrison *v.* Morrison, 64 Mich. 53, 30 N. W. 903. Although the affidavit does not show what efforts have been made to find defendant, it is sufficient to sustain the granting of the order if no motion is made to set it aside. Von Rhade *v.* Von Rhade, 2 Thomps. & C. (N. Y.) 491. The affidavit is not faulty as failing to negative the existence of defendant's residence in the state where the complaint does so. McFarlane *v.* Cornelius, 43 Oreg. 513, 73 Pac. 325, 74 Pac. 468. Where the master reports that respondent resides abroad and has expressly refused to attend the hearing or authorize any one to appear for him, the affidavit for publication of notice of final rule for divorce need not state that an effort has been made to serve respondent personally with notice. Baldwin *v.* Baldwin, 1 Pa. Co. Ct. 178, 17 Wkly. Notes Cas. (Pa.) 222. It is not necessary to describe defendant's property in the affidavit in order to authorize publication of summons and give the court jurisdiction to make a decree concerning such property. Goore *v.* Goore, 24 Wash. 139, 63 Pac. 1092.

service of process and a substantial non-compliance with the requirements of the statute renders the notice ineffectual.[61]

(11) *SERVICE OF ORDER.* In some states the order of publication must be personally served on defendant.[62]

c. Issuance of Summons. A summons need not be issued where service is made by publication,[63] in the absence of statute to the contrary.[64]

d. Publication of Notice. The statutes contain various provisions as to the publication of the notice of suit, and unless they are complied with the court acquires no jurisdiction over defendant.[65]

e. Service of Published Notice. The notice as published is usually required to be mailed to defendant at his last known place of residence or at some place specified in the order of publication,[66] unless it appears that the residence or whereabouts of defendant is unknown.[67] If this requirement is not observed the court acqnires no jurisdiction of defendant.

61. McBlain *v.* McBlain, 77 Cal. 507, 20 Pac. 61; Shrader *v.* Shrader, 36 Fla. 502, 18 So. 672; Freeman *v.* Freeman, 1 Mich. 480; Burnes *v.* Burnes, 61 Mo. App. 612, holding, however, that an order of publication is not vitiated because of a phrase to the effect that the last insertion in the newspaper therein designated was "to be at least" thirty days before the first day of a certain term of court, since such phrase is mere surplusage.

Entry of order.— Where the entry of the order in the rule docket is not required to contain an abstract of the facts, an entry which purports to state the grounds is not conclusive that upon such and no other the order was granted. Finch *v.* Frymire, (Tenn. Ch. App. 1896) 36 S. W. 883.

For form of order of publication see Knowlton *v.* Knowlton, 155 Ill. 158, 39 N. E. 595.

62. Bentley *v.* Hosmer, 110 Mich. 626, 68 N. W. 650, 69 N. W. 660, holding that the court has no jurisdiction where defendant was a non-resident, when the cause of action arose and has not been personally served with the order.

63. Green *v.* Green, 7 Ind. 113; Larimer *v.* Knoyle, 43 Kan. 338, 23 Pac. 487.

64. Israel *v.* Arthur, 7 Colo. 5, 1 Pac. 438, holding that a statute requiring "usual exertion on the part of the sheriff to serve summons," notwithstanding publication is not complied with where a return of "*non est inventus*" is made before the return-day of the writ.

Service of summons on non-resident defendant see *supra*, X, C, 3.

65. Ferguson *v.* Ferguson, 9 Pa. Dist. 250, holding that publication in a legal journal is not a compliance with a statute requiring the notice to be published in a newspaper.

Publication of the summons alone will suffice where it contains a notice that if defendant fails to answer within the time limited plaintiff will apply for the relief demanded by the complaint. Anonymous, 3 How. Pr. (N. Y.) 293.

Time of publication.— An order requiring publication of a notice for two weeks successively before the term of court to which it is made returnable is complied with by a publication once in each of two successive weeks, although the first publication is made less than two weeks before the first day of the term (Knowlton *v.* Knowlton, 155 Ill. 158, 39 N. E. 595), but if the last day of publication is on the return-day of the notice it is not sufficient (Powell *v.* Powell, 3 Del. Co. (Pa.) 206). Under a statute providing that upon an alias subpœna being returned *non est inventus* the sheriff shall cause notice to be published "for four weeks successively prior to the first day of the then next term," all that is required is that respondent shall have at least four weeks' constructive notice before the term at which he is bound to appear, and it is not forbidden that he have more. Banks *v.* Banks, 189 Pa. St. 196, 42 Atl. 111.

66. *Illinois.*— Werner *v.* Werner, 30 Ill. App. 159.

Kansas.— Ensign *v.* Ensign, 45 Kan. 612, 26 Pac. 7; Lewis *v.* Lewis, 15 Kan. 181.

Massachusetts.— Labotiere *v.* Labotiere, 8 Mass. 383.

New Jersey.— Britton *v.* Britton, 45 N. J. Eq. 88, 15 Atl. 266; Doughty *v.* Doughty, 27 N. J. Eq. 315; Rogers *v.* Rogers, 18 N. J. Eq. 445.

New York.— Stanton *v.* Crosby, 9 Hun 370.

Ohio.— Carr *v.* Carr, 7 Ohio Dec. (Reprint) 136, 1 Cinc. L. Bul. 151.

Pennsylvania.— Green *v.* Green, 13 Pa. Co. Ct. 671; Gilbert's Appeal, 15 Wkly. Notes Cas. 466 [*affirming* 16 Phila. 83].

See 17 Cent. Dig. tit. "Divorce," § 259.

Although unnecessary under the statute, personal service of notice on a non-resident defendant, supplemental to the constructive notice by publication, does not invalidate the service by publication. Burnes *v.* Burnes, 61 Mo. App. 612.

67. Ensign *v.* Ensign, 45 Kan. 612, 26 Pac. 7 (where it was held that an affidavit stating that the residence of defendant is unknown and cannot be ascertained by any means within plaintiff's control forms no part of the service by publication and may be made and filed at any time before judgment is granted); Larimer *v.* Knoyle, 43 Kan. 338, 23 Pac. 487 (holding that the affidavit of unknown residence need not be filed within three days after the date of the first publication); Hemphill *v.* Hemphill, 38 Kan. 220, 16 Pac. 457.

E. Correction of Defects — 1. Amendment. A process defective in its inception may be amended to cure the defect where the power to allow amendments in civil cases is generally conferred on the courts by statute.[68]

2. Issuance of New Process. If a citation is fatally defective, the case will not be continued to allow plaintiff to issue and serve a proper summons.[69]

F. Proof of Service. To justify the entry of a decree of divorce in case of default, there must first be proof of due service of process.[70]

G. Waiver of Process — 1. By Appearance — a. By Plaintiff. By instituting the suit plaintiff appears for all purposes therein.[71]

b. By Defendant. A general appearance by defendant dispenses with the necessity of process, and if process is in fact issued the appearance waives defects therein and in the service thereof.[72] In some states the appearance of defendant under an original bill does not give jurisdiction of his person under a supplemental bill.[73]

2. By Acknowledgment of Service. An acknowledgment by defendant of due service of process is not sufficient to dispense with a compliance with the statutory provisions relating thereto.[74]

68. Sears *v.* Sears, 9 N. Y. Civ. Proc. 432; Long *v.* Long, 1 Pa. Co. Ct. 572.

Amendment of affidavit of service see *infra*, note 70.

69. Philbrick *v.* Philbrick, 27 Vt. 786.

70. Shrader *v.* Shrader, 36 Fla. 502, 18 So. 672; Stone *v.* Stone, 25 N. J. Eq. 445; Shetzler *v.* Shetzler, 2 Edw. (N. Y.) 584.

Acceptance of service.— Acceptance of service by defendant is ordinarily sufficient evidence that he has had notice of the suit (Keeler *v.* Keeler, 24 Wis. 522), if accompanied by proof of the identity of the person accepting the service (Bittinger *v.* Bittinger, 4 Pa. Dist. 441). Acceptance of service as dispensing with due service of process see *infra*, X, G, 2.

Identity of defendant.—Without proof that the person on whom process was served was in fact the defendant named therein, a divorce will not be granted. Delling *v.* Delling, 34 Misc. (N. Y.) 122, 69 N. Y. Suppl. 479; Pessolano *v.* Pessolano, 34 Misc. (N. Y.) 16, 69 N. Y. Suppl. 449; Fawcett *v.* Fawcett, 29 Misc. (N. Y.) 673, 61 N. Y. Suppl. 108 (where it was held that where the brother of plaintiff serves the summons, he should in case of default be examined as to his knowledge that the person served was defendant); Fackner *v.* Fackner, 9 Pa. Dist. 739.

An amended affidavit of service of summons by publication may be received by court after judgment has been rendered and before the roll is made up. Newman's Estate, 75 Cal. 213, 16 Pac. 887, 7 Am. St. Rep. 146.

71. Young *v.* Young, 8 Ohio Dec. (Reprint) 575, 9 Cinc. L. Bul. 24, holding that a defendant filing a cross petition need not issue summons thereon to plaintiff.

72. *Alabama.*— Harrison *v.* Harrison, 20 Ala. 629, 56 Am. Dec. 227.

Georgia.— Standridge *v.* Standridge, 31 Ga. 223.

Illinois.— Middleton *v.* Middleton, 18 Ill. App. 472.

Kentucky.— Maguire *v.* Maguire, 7 Dana 181.

Louisiana.—Castell *v.* Castell, 28 La. Ann. 91.

New Hampshire.— White *v.* White, 60 N. H. 210.

New York.— Rich *v.* Rich, 88 Hun 566, 34 N. Y. Suppl. 854.

South Dakota.— Pollock *v.* Pollock, 9 S. D. 48, 68 N. W. 176.

See 17 Cent. Dig. tit. "Divorce," §§ 224, 267.

See, however, Philbrick *v.* Philbrick, 27 Vt. 786, holding that if a citation is signed only by a justice of the peace, the irregularity is not waived by the libellee's attending the taking of the testimony.

Appearance by attorney.— Where defendant's counsel files a warrant of attorney and enters a general appearance for defendant, service of process on defendant is dispensed with. Renz *v.* Renz, 22 Wkly. Notes Cas. (Pa.) 226. However, an invalid service on an attorney for defendant is not validated by the attorney's general appearance. Newberry *v.* Newberry, 9 Kulp (Pa.) 379, 22 Pa. Co. Ct. 361. And the court cannot appoint an attorney for a defendant who is *sui juris* against his consent. Chandler *v.* Chandler, 13 Ind. 492.

Failure to enter the appearance of a nonresident defendant which was actually made at the required time may be cured by an entry thereof *nunc pro tunc*. Brink *v.* Brink, 8 Kulp (Pa.) 367.

73. Rigney *v.* Rigney, 127 N. Y. 408, 28 N. E. 405, 24 Am. St. Rep. 462, so holding under a statute providing that where a supplemental bill is filed there must be a service of a new subpœna or a voluntary appearance thereafter by defendant before jurisdiction of his person can be acquired.

74. Ferrel *v.* Ferrel, 1 Ohio Dec. (Reprint) 135, 2 West. L. J. 427 (holding that a compliance with the statute requiring personal service or advertisement cannot be thus dispensed with); Bittinger *v.* Bittinger, 4 Pa. Dist. 441; Weatherbee *v.* Weatherbee, 20 Wis. 499 (holding that where there has been no order by publication, a written admission of service signed by defendant in another state, with an agreement "to waive any other serv-

XI. INTERLOCUTORY PROCEEDINGS AND REMEDIES.[75]

A. Discovery and Inspection. Plaintiff is not entitled to a discovery as to the commission of the adultery complained of,[76] nor to an order compelling defendant to furnish a list of his witnesses.[77] Where the physical incapacity of a party to a divorce suit is in issue, however, he or she may be compelled to submit to a physical examination by a physician or surgeon.[78]

B. Injunction.[79] An injunction may issue in a divorce suit in a proper case to preserve the rights of the parties pending the litigation and enable the court to do justice.[80]

C. Ne Exeat.[81] The court may issue a writ of ne exeat against a defendant in a divorce suit in a proper case.[82]

ice," is not sufficient to give the court jurisdiction).

Acceptance by attorney.— No reason being shown for failing to serve defendant personally, and no warrant of attorney being filed, acceptance of service by an attorney for defendant does not confer jurisdiction. Freeby *v.* Freeby, 9 Kulp (Pa.) 373. See also De Niceville *v.* De Niceville, 37 L. J. P. & M. 43.

Acceptance as proof of service see *supra*, note 70.

75. **Pleas in abatement** see ABATEMENT AND REVIVAL.

76. Barr *v.* Barr, 31 Ind. 240 (holding that a statute requiring a defendant to answer the petition under oath if required to do so by petitioner does not authorize the filing of interrogatories with an answer to a cross petition); Black *v.* Black, 26 N. J. Eq. 431. See, generally, DISCOVERY.

77. Mullison *v.* Mullison, 13 Wkly. Notes Cas. (Pa.) 314.

78. *Alabama.*— Anonymous, 89 Ala. 291, 7 So. 100, 18 Am. St. Rep. 116, 7 L. R. A. 425; Anonymous, 35 Ala. 226.

Michigan.—*Compare* Page *v.* Page, 51 Mich. 88, 16 N. W. 245.

New Jersey.— Shafts *v.* Shafts, 28 N. J. Eq. 34, where, however, the order was denied because the evidence as to defendant's impotence was conflicting and defendant was sixty-three years of age.

New York.— Newell *v.* Newell, 9 Paige 25; Devenbagh *v.* Devenbagh, 5 Paige 554, 28 Am. Dec. 443 note, holding, however, that where defendant has already submitted to an examination by competent surgeons whose testimony can readily be obtained she will be excused from further examination.

Pennsylvania.— See A. C. *v.* B. C., 11 Wkly. Notes Cas. 479.

Vermont.— Le Barron *v.* Le Barron, 35 Vt. 365.

England.— H. *v.* P., L. R. 3 P. 126; Pollard *v.* Wyburn, 1 Hagg. Eccl. 725, 3 Eng. Eccl. 308.

79. See, generally, INJUNCTIONS.

80. Schooler *v.* Schooler, 77 Ga. 601 (holding that under a constitution providing that the superior courts shall have exclusive jurisdiction in divorce cases and also in equity cases the superior court may in a divorce case exercise all its powers, whether legal or equitable, necessary to maintain and carry out its jurisdiction); Kirby *v.* Kirby, 1 Paige (N. Y.) 261.

The husband's interference with the wife's separate estate may be enjoined. Lyon *v.* Lyon, 102 Ga. 453, 31 S. E. 34, 66 Am. St. Rep. 189, 42 L. R. A. 194; Robinson *v.* Robinson, 123 N. C. 136, 31 S. E. 371.

The husband's residence in the wife's dwelling-house, she being the complainant, will not be enjoined until the truth of her charges is determined. Chapman *v.* Chapman, 25 N. J. Eq. 394.

The husband's restraint upon the wife's personal liberty during the pendency of the action may be enjoined. *In re* Gill, 20 Wis. 686.

Bringing another suit.— Where both parties are domiciled within a state, an injunction may issue to restrain one of them from instituting divorce proceedings in another state. Forrest *v.* Forrest, 2 Edm. Sel. Cas. (N. Y.) 180.

Injunction against disposal of property to defeat alimony see *infra*, XIX, A, 7, b.

81. See, generally, NE EXEAT.

82. Bushnell *v.* Bushnell, 7 How. Pr. (N. Y.) 389; Kirby *v.* Kirby, 1 Paige (N. Y.) 261.

Time of application.— A ne exeat will be denied where the petition for divorce has not been filed. Bylandt *v.* Bylandt, 6 N. J. Eq. 28.

Supporting affidavit.— The writ may issue upon the affidavit of the complaining wife alone. Bayly *v.* Bayly, 2 Md. Ch. 326.

Good faith.— Where it appears that the suit has not been instituted in good faith but merely to collect money from the husband the writ will not issue. Kirrigan *v.* Kirrigan, 15 N. J. Eq. 146.

Discharge of writ.— The writ will be discharged where defendant husband's answer disputes plaintiff's right to alimony, and the allegation in plaintiff's affidavit that defendant intends to leave the state is positively denied. Bayly *v.* Bayly, 2 Md. Ch. 326.

Bond to remain in state.— Under the provision of the code of practice that actions shall be brought in the name of the real party in interest, an action to enforce the penalty of a bond conditioned that a husband, sued

XII. PLEADINGS.[83]

A. Complaint — 1. In General. The pleading of the party who institutes a suit for divorce is variously termed a bill, complaint, libel, and petition, according to the practice prevailing in the particular jurisdiction.

2. Election as to Ground of Divorce. If several acts, each constituting a separate ground for divorce, constitute collectively an additional ground for divorce, the injured party may proceed upon the latter alone.[84]

3. Joinder of Causes of Action. Two or more distinct matrimonial offenses may be charged in the same complaint where they are causes for the same kind of divorce.[85] Otherwise not,[86] unless the court has discretion to grant either an absolute or a limited divorce according to the facts proved.[87] A cause of action for an absolute divorce cannot be joined with one to annul a tripartite separation agreement;[88] but it is not a misjoinder to petition for a divorce and incidental relief.[89]

4. Allegation of Jurisdictional Facts — a. In General. The complaint should show on its face that the case is within the jurisdiction of the court. Accord-

for divorce, should not leave the state without leave of court, was properly brought for the use and benefit of the wife; and a complaint alleging that after the bond was given the husband left the state and has not since returned, and that the wife recovered judgment against him in a certain sum, sufficiently shows, as against a demurrer, that he left after the judgment was rendered. Marselis *v.* People, (Colo. App. 1903) 71 Pac. 429.

83. See, generally, Pleading.

84. McCann *v.* McCann, 91 Mo. App. 1, holding that where a person has been guilty of several acts of misconduct which would warrant a divorce on the ground of adultery or habitual drunkenness, and they have been brought to the knowledge of the innocent party, they need not be set out as ground for divorce in the statutory words; for, if the acts are numerous and of a sort to render the condition of the injured spouse intolerable, they may be charged as indignities.

85. *Alabama.*— Morris *v.* Morris, 20 Ala. 168; Quarles *v.* Quarles, 19 Ala. 363.

Indiana.— Fritz *v.* Fritz, 23 Ind. 388.

Louisiana.— Mack *v.* Handy, 39 La. Ann. 491, 2 So. 181.

Massachusetts.— Young *v.* Young, 4 Mass. 430.

Michigan.—McDonald *v.* McDonald, 1 Mich. N. P. 191.

Minnesota.— Grant *v.* Grant, 53 Minn. 181, 54 N. W. 1059.

Missouri.— Stokes *v.* Stokes, 1 Mo. 320.

North Carolina.— Griffith *v.* Griffith, 89 N. C. 113.

Pennsylvania.— Braun *v.* Braun, 194 Pa. St. 287, 44 Atl. 1096, 75 Am. St. Rep. 699.

See 17 Cent. Dig. tit. "Divorce," § 10.

86. Decamp *v.* Decamp, 2 N. J. Eq. 294; Zorn *v.* Zorn, 38 Hun (N. Y.) 67; Henry *v.* Henry, 17 Abb. Pr. (N. Y.) 411; Hoffman *v.* Hoffman, 35 How. Pr. (N. Y.) 384; McIntosh *v.* McIntosh, 12 How. Pr. (N. Y.) 289; Rose *v.* Rose, 11 Paige (N. Y.) 166; Smith *v.* Smith, 4 Paige (N. Y.) 91; Johnson *v.* Johnson, 6 Johns. Ch. (N. Y.) 163, all holding that a charge of cruelty, being a cause for limited divorce only, cannot be joined with a charge of adultery, which is a cause for absolute divorce. See, however, Doe *v.* Roe, 23 Hun (N. Y.) 19.

Multifariousness.— Where, however, a bill is filed for a divorce on the ground of adultery, containing a prayer for relief adapted to the charge of adultery only, it is not rendered multifarious by the insertion of charges of cruel treatment. Beach *v.* Beach, 11 Paige (N. Y.) 161.

87. Fera *v.* Fera, 98 Mass. 155; Young *v.* Young, 4 Mass. 430; Grant *v.* Grant, 53 Minn. 181, 54 N. W. 1059; Wagner *v.* Wagner, 36 Minn. 239, 30 N. W. 766.

88. Galusha *v.* Galusha, 138 N. Y. 272, 33 N. E. 1062, holding that the causes of action are not of the same class and do not affect the same parties.

89. Kashaw *v.* Kashaw, 3 Cal. 312 (where partition of community property was also asked); Hodecker *v.* Hodecker, 20 Misc. (N. Y.) 641, 46 N. Y. Suppl. 1073 (where a complaint in an action for limited divorce alleging cruelty and desertion by the husband and fraud in securing a release of dower rights, and also praying for provision for support and a temporary injunction against alienation of property, was held not to state more than one cause of action); Faulk *v.* Faulk, 23 Tex. 653; Damon *v.* Damon, 28 Wis. 510 (in both of which cases the sequestration of defendant's property for the benefit of plaintiff and her children was also asked).

Waiver of objection.— Under Nebr. Code Civ. Proc. § 96, providing that by failure to take exceptions to a misjoinder of causes of action it shall be deemed waived, property rights not growing out of the marriage relation should be adjudicated in an action for divorce, although not properly joined, where no objection was made. Reed *v.* Reed, 65 Nebr. 849, 91 N. W. 857.

ingly all facts whose existence is essential to the exercise of jurisdiction over the subject-matter of the suit should be alleged.[90]

b. Of Marriage. The fact of marriage should be averred in direct and explicit terms.[91]

c. Of Residence — (I) *Necessity.* Where a residence by complainant within the state is required for a certain period of time immediately preceding the commencement of proceedings for a divorce, or at the time the offense was committed or the complaint was filed, the fact of such residence is jurisdictional and should be alleged.[92] If residence in the state is alleged, it is not usually necessary to allege residence in the county where the suit is brought,[93] unless so required by statute.[94]

(II) *Sufficiency.* Residence as a jurisdictional fact should appear by direct and unequivocal averment, although no particular form is requisite.[95]

90. Edwards *v.* Edwards, 30 Ala. 394; White *v.* White, 45 N. H. 121; Jarvis *v.* Jarvis, 3 Edw. (N. Y.) 462.

91. Brinckle *v.* Brinckle, 10 Phila. (Pa.) 1, holding that an actual marriage and not a mere agreement to marry should be averred.

Lawful marriage.— A bill is not demurrable for a failure to state that the parties were "lawfully" married. Huston *v.* Huston, 63 Me. 184.

The place of marriage need not be alleged (Farley *v.* Farley, 94 Ala. 501, 10 So. 646, 33 Am. St. Rep. 141), unless the libel shows facts which render the place of marriage a jurisdictional fact (Greenlaw *v.* Greenlaw, 12 N. H. 200).

Common-law marriage.— The facts relied on to constitute a common-law marriage should be alleged in sufficient detail to permit of a determination of the question whether a marriage actually existed. Andrews *v.* Andrews, 75 Tex. 609, 12 S. W. 1124. If such facts negative the existence of a valid marriage the complaint will be dismissed. Van Dusan *v.* Van Dusan, 97 Mich. 70, 56 N. W. 234; Rose *v.* Rose, 67 Mich. 619, 35 N. W. 802; Clancy *v.* Clancy, 66 Mich. 202, 33 N. W. 889. Although the bill shows that a prior marriage existed at the time of the ceremony, yet if it alleges that after the impediment was removed the parties recognized the ceremony as binding and thereafter lived together as husband and wife, it is sufficient. Flanagan *v.* Flanagan, 116 Mich. 185, 74 N. W. 460.

92. *Alabama.*— Crossman *v.* Crossman, 33 Ala. 486.

California.— Bennett *v.* Bennett, 28 Cal. 599.

Florida.— Gredler *v.* Gredler, 36 Fla. 372, 18 So. 762; Phelan *v.* Phelan, 12 Fla. 449.

Indiana.— Powell *v.* Powell, 53 Ind. 513.

Kentucky.— Moore *v.* Moore, 10 Ky. L. Rep. 1062.

Minnesota.— Thelen *v.* Thelen, 75 Minn. 433, 78 N. W. 108.

Missouri.— Cheatham *v.* Cheatham, 10 Mo. 296; Johnson *v.* Johnson, 95 Mo. App. 329, 68 S. W. 971; Collins *v.* Collins, 53 Mo. App. 470; Cole *v.* Cole, 3 Mo. App. 571.

New Hampshire.— Hopkins *v.* Hopkins, 35 N. H. 474; Batchelder *v.* Batchelder, 14 N. H. 380; Kimball *v.* Kimball, 13 N. H. 222; Greenlaw *v.* Greenlaw, 12 N. H. 200; Smith *v.* Smith, 12 N. H. 80; White *v.* White, 5 N. H. 476.

Oklahoma.— Irwin *v.* Irwin, 3 Okla. 186, 41 Pac. 369.

Pennsylvania.— Richardson *v.* Richardson, 8 Pa. Dist. 242; Johnson *v.* Johnson, 3 Pa. Dist. 166; Gould *v.* Gould, 14 Pa. Co. Ct. 185; Powell *v.* Powell, 3 Del. Co. 206.

Texas.— Haymond *v.* Haymond, 74 Tex. 414, 12 S. W. 90.

Washington.— Luce *v.* Luce, 15 Wash. 608, 47 Pac. 21.

See 17 Cent. Dig. tit. "Divorce," § 287.

93. Johnson *v.* Johnson, 30 Colo. 402, 70 Pac. 692; Young *v.* Young, 18 Minn. 90; Gant *v.* Gant, 49 Mo. App. 3.

94. Richardson *v.* Richardson, 8 Pa. Dist. 242; Johnson *v.* Johnson, 3 Pa. Dist. 166; Powell *v.* Powell, 3 Del. Co. (Pa.) 206.

Mode of objection.— A libel which does not fully set forth, as required by rule of court, the time and circumstances of libellant's acquiring a residence in the county, but which complies with the act of assembly, must be taken advantage of by demurrer or on a rule for a bill of particulars and not by motion to quash. Shellenberger *v.* Shellenherger, 6 Pa. Co. Ct. 287.

Waiver of objection.— Failure of the petition to allege plaintiff's residence in the county cannot be taken advantage of for the first time on the trial. Lewis *v.* Lewis, 9 Ind. 105.

95. Batchelder *v.* Batchelder, 14 N. H. 330, holding that a general description of a party as being of a certain town and county within the state, without specifying residence, is insufficient. Where, however, the parties are described as residents of the state and the marriage is alleged to have taken place there, no further allegation of residence is necessary. Greenlaw *v.* Greenlaw, 12 N. H. 200.

Actual bona fide residence.— An allegation that plaintiff resides in the state and has resided therein for five years prior to the commencement of the suit is equivalent to an allegation that she is an "actual *bona fide* inhabitant of the state." Needles *v.* Needles, (Tex. Civ. App. 1900) 54 S. W. 1070.

Residence at time of offense.— Where a statute requires the injured party to be a resident of the state at the time of the com-

5. Allegation of Particular Offenses — a. In General. The nature and circumstances of the offense relied on as a ground for divorce should be specifically alleged, and the time and place where it was committed should be set forth with reasonable certainty.[96] However, a defect consisting of a failure to specify the

mission of the offense and at the time of exhibiting the complaint, a complaint alleging that plaintiff had been an inhabitant of the state from September, 1872, and charging defendant with adultery at divers times between 1870 and 1873, is sufficient. Von Rhade *v.* Von Rhade, 2 Thomps. & C. (N. Y.) 491.

Residence next before suing.—An averment of residence in the state for "one whole year last past" is equivalent to the statutory phrase "one whole year next before the filing of the petition." Hinrichs *v.* Hinrichs, 84 Mo. App. 27. See also Burns *v.* Burns, 13 Fla. 369. But an allegation that plaintiff "has for more than one year prior to the filing of this petition been a resident" of the state is insufficient. Collins *v.* Collins, 53 Mo. App. 470. So an allegation that plaintiff has resided in the state for more than a year continuously before the filing of the petition is insufficient. Johnson *v.* Johnson, 95 Mo. App. 329, 68 S. W. 971. See also Haymond *v.* Haymond, 74 Tex. 414, 12 S. W. 90.

Specifying county but omitting state.— An allegation that plaintiff is a resident of Campbell county, omitting the words "in Kentucky," is presumed to mean the county of that name in that state. Strode *v.* Strode, 3 Bush (Ky.) 227, 96 Am. Dec. 211.

Usual residence.— An averment that plaintiff "now resides and for some time has resided" in a certain county is equivalent to the expression "usually resides," etc. Lochnane *v.* Lochnane, 78 Ky. 467.

96. *Arkansas.*— Rie *v.* Rie, 34 Ark. 37.

Florida.— Crawford *v.* Crawford, 17 Fla. 180; Phelan *v.* Phelan, 12 Fla. 449.

Iowa.— Freerking *v.* Freerking, 19 Iowa 34.

Michigan.— Van Driele *v.* Van Driele, 58 Mich. 273, 25 N. W. 188.

New York.— Walton *v.* Walton, 32 Barb. 203, 20 How. Pr. 347; Anonymous, 11 Abb. Pr. 231.

North Carolina.— Martin *v.* Martin, 130 N. C. 27, 40 S. E. 822; Everton *v.* Everton, 50 N. C. 202.

Pennsylvania.— Sites *v.* Sites, 9 Pa. Dist. 192, 23 Pa. Co. Ct. 439, holding that the libel should lay the grounds of complaint in the language of the statute and then specify particularly the constituent facts.

Rhode Island.— Brown *v.* Brown, 2 R. I. 381.

Tennessee.— Horne *v.* Horne, 1 Tenn. Ch. 259.

Texas.— Wright *v.* Wright, 6 Tex. 3; Byrne *v.* Byrne, 3 Tex. 336; Wright *v.* Wright, 3 Tex. 168.

Washington.— Stanley *v.* Stanley, 24 Wash. 460, 64 Pac. 732.

See 17 Cent. Dig. tit. "Divorce," §§ 293, 295.

A bill is sufficient on demurrer if enough appear on its face to require answer and explanation by defendant. Van Driele *v.* Van Driele, 58 Mich. 273, 25 N. W. 188.

Language of statute.— It is sufficient to charge the respondent's fault in the language of the statute. Mumford *v.* Mumford, 13 R. I. 19.

In Pennsylvania it has been held that a libel is not defective for want of particularity as to time and place, since defendant may demand specifications affording him the necessary information. Realf *v.* Realf, 77 Pa. St. 31 (adultery); Hancock's Appeal, 64 Pa. St. 470 (adultery); Breinig *v.* Breinig, 26 Pa. St. 161 (cruelty). Later rules of court, however, require the same precision in a libel that would be necessary in a bill in equity; but where time and place are specified with as much certainty as the party can reasonably be expected to furnish without setting out his evidence in detail, he should not be deprived of his opportunity to make out his case. Gillardon *v.* Gillardon, 15 Wkly. Notes Cas. 528 (adultery); Spengler *v.* Spengler, 15 Wkly. Notes Cas. 437 (cruelty). Bill of particulars see *infra*, XII, K.

Allegation of time and place of: Adultery see *infra*, XII, A, 5, b, (I), (B). Cruelty see *infra*, XII, A, 5, b, (II), (B). Desertion or abandonment see *infra*, XII, A, 5, b, (III).

Conviction of crime.— An allegation that defendant "was convicted of the crime of rape upon a little girl, daughter of plaintiff," sufficiently charges conviction of an infamous crime. Polson *v.* Polson, 140 Ind. 310, 39 N. E. 498.

Fraud and duress.— A general charge that the marriage was procured by fraud and coercion, without setting forth facts substantiating the charge, is insufficient. Ferris *v.* Ferris, 8 Conn. 166; Shriver *v.* Shriver, 14 Phila. (Pa.) 170.

Habitual intemperance.— A complaint alleging intemperance in the language of the statute is sufficient without alleging the different acts of intoxication. Forney *v.* Forney, 80 Cal. 528, 22 Pac. 294. So an allegation that "defendant, for more than five years last past, disregarding his duties as a husband toward the plaintiff, has been guilty of habitual intemperance" is sufficient to support a decree for plaintiff in the absence of a demurrer for uncertainty. Reading *v.* Reading, 96 Cal. 4, 30 Pac. 803.

Impotency to constitute a cause for divorce must be incurable and have existed at the time of marriage (see *supra*, VII, A, 2, a; VII, B, 3, b), and hence these facts should both be specifically alleged in the complaint. Ferris *v.* Ferris, 8 Conn. 166 (holding that an allegation that defendant was laboring under a "corporal imbecility" was insufficient); Peipho *v.* Peipho, 88 Ill. 438; Roe *v.* Roe, 29

acts constituting the ground for divorce with sufficient certainty is cured by an answer raising no objection thereto.[97]

b. Illustrations[98] — (I) *Allegation of Adultery* — (A) *In General.* Adultery must be specifically and positively alleged, and with such reasonable certainty as to time, place, and person that defendant may know the charge which he is called upon to meet.[99]

(B) *Time and Place.* The time and place of the offense should be alleged with sufficient particularity to enable defendant to prepare his defense.[1]

Pittsb. Leg. J. (Pa.) 319; A. C. *v.* B. C., 10 Wkly. Notes Cas. (Pa.) 569. See, however, Kempf *v.* Kempf, 34 Mo. 211 (where a petition alleging that defendant was at the time of the marriage and still is impotent, specifying the particular character of the impotence, was held sufficient, although it did not allege that the defect was incurable, this fact being implied in the use of the term "impotence"). Furthermore the physical condition causing impotency should be described. Ferris *v.* Ferris, *supra* (holding that this requirement is not met by a general allegation that defendant has made no attempt to consummate the marriage); Peipho *v.* Peipho, *supra*.

Neglect.— When gross neglect is relied on as a cause for divorce, the complaint should state specifically and with reasonable certainty the facts and circumstances constituting the offense. Devoe *v.* Devoe, 51 Cal. 543; Callen *v.* Callen, 44 Kan. 370, 24 Pac. 360; Brown *v.* Brown, 22 Mich. 242; Burner *v.* Burner, 7 Ohio Dec. (Reprint) 140, 1 Cinc. L. Bul. 164. And where the offense consists of the husband's neglect to provide for his wife, if of sufficient ability, the fact of his ability to provide must be alleged. Ward *v.* Ward, 20 Wis. 252.

Violent and ungovernable temper.— Where a divorce is sought on the ground of violent and ungovernable temper, the complaint must allege facts from which the court can determine whether such temper exists. Johnson *v.* Johnson, 23 Fla. 413, 2 So. 834; Phelan *v.* Phelan, 12 Fla. 449. *Compare* Donald *v.* Donald, 21 Fla. 571 (where the facts were sufficiently alleged); Burns *v.* Burns, 13 Fla. 369. It must also be alleged that such temper was indulged in toward complainant. Phelan *v.* Phelan, *supra*.

97. *Alabama.*— Holston *v.* Holston, 23 Ala. 777.

California.— Conant *v.* Conant, 10 Cal. 249, 70 Am. Dec. 717.

Indiana.— Short *v.* Kerns, 95 Ind. 431.

Nebraska.— Dakin *v.* Dakin, (1901) 95 N. W. 781, holding that a petition is sufficient if the allegations are set forth with sufficient fulness to allow of the introduction of evidence in its support, where no objection is made thereto.

Pennsylvania.— Breinig *v.* Breinig, 26 Pa. St. 161; Schulte's Appeal, 34 Leg. Int. 448.

If, however, the bill is so defective as to fail in setting out a legal cause for divorce, no amount of evidence nor the verdict of a jury will warrant a decree on it. Johnson *v.* Johnson, 4 Wis. 135. See also Wright *v.* Wright, 3 Tex. 168.

98. Allegation of: Conviction of crime see *supra*, note 96. Fraud and duress see *supra*, note 96. Habitual intemperance see *supra*, note 96. Impotency see *supra*, note 96. Neglect see *supra*, note 96. Violent and ungovernable temper see *supra*, note 96.

99. Farr *v.* Farr, 34 Miss. 597, 69 Am. Dec. 406; Marsh *v.* Marsh, 16 N. J. Eq. 391, 84 Am. Dec. 164; Wood *v.* Wood, 2 Paige (N. Y.) 108; Kane *v.* Kane, 3 Edw. (N. Y.) 389; Mansfield *v.* Mansfield, Wright (Ohio) 284.

General allegation.— It is not sufficient to charge the offense by a general accusation or insinuation amounting to mere suspicion. Denison *v.* Denison, 4 Wash. 705, 30 Pac. 1100. A general charge may be sufficient, however, when founded on the pregnancy of defendant without access of plaintiff (Carty *v.* Carty, 13 Ky. L. Rep. 880; Mitchell *v.* Mitchell, 61 N. Y. 398) or on the existence of a venereal disease contracted since the marriage (Mitchell *v.* Mitchell, *supra*; Clark *v.* Clark, 7 Rob. (N. Y.) 276).

An allegation on information that defendant has been guilty of adultery is not sufficient. Trotter *v.* Trotter, 30 Pittsb. Leg. J. N. S. 109.

Living in adultery.— An averment that defendant was living "in open and notorious adultery" with a person named is sufficiently definite, since the evidence required to prove the offense is even greater than if a single act were alleged. Marble *v.* Marble, 36 Mich. 386. *Compare* Stokes *v.* Stokes, 1 Mo. 320, 322, where it was held insufficient to allege that defendant "is now residing . . . with the aforesaid Ann Smith, whom he has, . . . imposed on the people of this State as his lawful wife." In North Carolina the wife's petition for a divorce for the husband's adultery must allege in terms that after separating from his wife he has lived in adultery. Morris *v.* Morris, 75 N. C. 168.

1. *California.*— Conant *v.* Conant, 10 Cal. 249, 70 Am. Dec. 717.

Connecticut.— Trubee *v.* Trubee, 41 Conn. 36.

Delaware.— Addicks *v.* Addicks, 1 Marv. 338, 41 Atl. 78.

Illinois.— Hawes *v.* Hawes, 33 Ill. 286.

Indiana.— Christianberry *v.* Christianberry, 3 Blackf. 202, 25 Am. Dec. 96.

Kentucky.—Carty *v.* Carty, 13 Ky. L. Rep. 880.

Louisiana.— Compton *v.* Compton, 9 La. Ann. 499.

Michigan.— Randall *v.* Randall, 31 Mich. 194; Shoemaker *v.* Shoemaker, 20 Mich. 222.

(c) *Name of Particeps Criminis.* The name of the person with whom the acts complained of were committed should be alleged, if known to complainant,[2]

Minnesota.— Frecman *v.* Freeman, 39 Minn. 370, 40 N. W. 167.

Mississippi.— Farr *v.* Farr, 34 Miss. 597, 69 Am. Dec. 406.

Missouri.— Stokes *v.* Stokes, 1 Mo. 320.

New Jersey.— Scheffling *v.* Scheffling, 44 N. J. Eq. 438, 15 Atl. 577; Black *v.* Black, 26 N. J. Eq. 431; Noel *v.* Noel, 24 N. J. Eq. 137; Goodwin *v.* Goodwin, 23 N. J. Eq. 210; Miller *v.* Miller, 20 N. J. Eq. 216; Mills *v.* Mills, 18 N. J. Eq. 444; Marsh *v.* Marsh, 16 N. J. Eq. 391, 84 Am. Dec. 164; Clutch *v.* Clutch, 1 N. J. Eq. 474; Stone *v.* Stone, (Ch. 1888) 13 Atl. 245.

New York.— Mitchell *v.* Mitchell, 61 N. Y. 398; Woog *v.* Woog, 58 N. Y. App. Div. 620, 69 N. Y. Suppl. 555; Cardwell *v.* Cardwell, 12 Hun 92; Pramagiori *v.* Pramagiori, 7 Rob. 302; Heyde *v.* Heyde, 4 Sandf. 692; Gridley *v.* Gridley, 7 N. Y. Civ. Proc. 215; Strong *v.* Strong, 1 Abb. Pr. N. S. 233; Anonymous, 17 Abb. Pr. 48; Ingersoll *v.* Ingersoll, 1 Code Rep. 102, 2 Edm. Sel. Cas. 49; Wood *v.* Wood, 2 Paige 108; Codd *v.* Codd, 2 Johns. Ch. 224; Kane *v.* Kane, 3 Edw. 389.

Ohio.— Smith *v.* Smith, Wright 643.

Tennessee.— Evans *v.* Evans, (Ch. App. 1900) 57 S. W. 367; Dismukes *v.* Dismukes, 1 Tenn. Ch. 266.

Vermont.— Sanders *v.* Sanders, 25 Vt. 713.

Virginia.— Miller *v.* Miller, 92 Va. 196, 23 S. E. 232.

Washington.—Denison *v.* Denison, 4 Wash. 705, 30 Pac. 1100.

In Pennsylvania the matter is governed by rule of court. See *supra*, note 96.

Time.— It is sufficient to allege the month and year without the exact day. Scheffling *v.* Scheffling, 44 N. J. Eq. 438, 15 Atl. 577. Especially is this true where the place and the name of the co-respondent are set forth. Addicks *v.* Addicks, 1 Marv. (Del.) 338, 41 Atl. 78 (where a libel was held sufficient, although the year was the only allegation in respect to time); Black *v.* Black, 26 N. J. Eq. 431; Noel *v.* Noel, 24 N. J. Eq. 137; Goodwin *v.* Goodwin, 23 N. J. Eq. 210; Woog *v.* Woog, 58 N. Y. App. Div. 620, 69 N. Y. Suppl. 555 (where a complaint was held sufficient, although the times were given only as between January and April, 1900, it being alleged that the precise dates were unknown).

Place.— The charge should be stated with such particularity of the place of commission as to enable defendant to meet it on the trial. Conant *v.* Conant, 10 Cal. 249, 70 Am. Dec. 717; Trubee *v.* Trubee, 41 Conn. 36; Freeman *v.* Freeman, 39 Minn. 370, 40 N. W. 167 (holding that it is insufficient to allege merely the name of the paramour unless either time or place is definitely set forth); Mills *v.* Mills, 18 N. J. Eq. 444; Marsh *v.* Marsh, 16 N. J. Eq. 391, 84 Am. Dec. 164; Wood *v.* Wood, 2 Paige (N. Y.) 108; Codd *v.* Codd, 2 Johns. Ch. (N. Y.) 224; Kane *v.* Kane, 3 Edw. (N. Y.) 389; Horne *v.* Horne, 1 Tenn. Ch. 259. The place should be named, as a specified house or the like. Cardwell *v.* Cardwell, 12 Hun (N. Y.) 92 (holding insufficient an allegation of the commission of adultery at various houses of prostitution in a certain city); Heyde *v.* Heyde, 4 Sandf. (N. Y.) 692, 693 (holding insufficient a charge that "defendant, since the marriage, viz., in the month of November, 1851, committed adultery with a female in the city of New York, whose name is unknown to the plaintiff, and the particular circumstances whereof are unknown to the plaintiff, but which she expects to be able to prove at the trial of this cause"); Gridley *v.* Gridley, 7 N. Y. Civ. Proc. 215; Miller *v.* Miller, 92 Va. 196, 23 S. E. 232; Denison *v.* Denison, 4 Wash. 705, 30 Pac. 1100. If the house is not known, reference should be made to the particular nature of the proof by which the allegation as to the place of adultery is to be supported (Pramagiori *v.* Pramagiori, 7 Rob. (N. Y.) 302), and there should be an averment that the place is unknown and that complainant was unable to obtain information after having attempted so to do (Mitchell *v.* Mitchell, 61 N. Y. 398; Woog *v.* Woog, 58 N. Y. App. Div. 620, 69 N. Y. Suppl. 555). It is sufficient to allege that adultery was committed in the county in 1860 with a named person (Hawes *v.* Hawes, 33 Ill. 286); that the offense was committed on a certain day at a house named, giving city, street, and number (Stone *v.* Stone, (N. J. Ch. 1888) 13 Atl. 245); that adultery was committed with a certain person in a certain city, and with other persons in houses of ill fame in specified cities (Noel *v.* Noel, 24 N. J. Eq. 137); that respondent, "in August and September, 1871, visited the house of . . . a place of ill fame in Virgin alley, Pittsburg, for the purpose of fornication with divers persons unknown to the libellant" (Realf *v.* Realf, 77 Pa. St. 31). See also Evans *v.* Evans, (Tenn. Ch. App. 1900) 57 S. W. 367, holding an allegation of adultery with a named person in a certain city sufficient to justify the admission of evidence, although the street and number of the house were not alleged.

2. *Alabama.*— Farley *v.* Farley, 94 Ala. 501, 10 So. 646, 33 Am. St. Rep. 141; Holston *v.* Holston, 23 Ala. 777.

Kentucky.— Carty *v.* Carty, 13 Ky. L. Rep. 880.

Massachusetts.— Choate *v.* Choate, 3 Mass. 391; Church *v.* Church, 3 Mass. 157.

Michigan.— Shoemaker *v.* Shoemaker, 20 Mich. 222.

Mississippi.— *Compare* Farr *v.* Farr, 34 Miss. 597, 69 Am. Dec. 406, holding that the name of the person, even if known, need not be set forth unless reasonable certainty cannot otherwise be attained.

New Jersey.— Miller *v.* Miller, 20 N. J. Eq. 216; Mills *v.* Mills, 18 N. J. Eq. 444.

and if unknown that fact should be stated[3] and the time, place, and circumstances be alleged with sufficient certainty to identify the offense,[4] where that can be done.[5]

(II) *Allegation of Cruelty*—(A) *In General.* The particular facts relied on as constituting cruelty should be set forth in detail; it is not sufficient to allege cruelty in general terms, as in the language of the statute.[6] However,

New York.— Heyde *v.* Heyde, 4 Sandf. 692.

Ohio.— Richards *v.* Richards, Wright 302; Mansfield *v.* Mansfield, Wright 284; Bird *v.* Bird, Wright 98.

3. Wood *v.* Wood, 2 Paige (N. Y.) 108. See also cases cited *supra*, note 2.

4. Miller *v.* Miller, 20 N. J. Eq. 216 (holding that a divorce can never be granted upon general charges in the bill of adultery with "divers persons whose names are unknown"); Mills *v.* Mills, 18 N. J. Eq. 444; Heyde *v.* Heyde, 4 Sandf. (N. Y.) 692; Kane *v.* Kane, 3 Edw. (N. Y.) 389; Trotter *v.* Trotter, 30 Pittsb. Leg. J. N. S. 109, 13 York Leg. Rec. 119. And see Shoemaker *v.* Shoemaker, 20 Mich. 222.

5. Mitchell *v.* Mitchell, 61 N. Y. 398.

6. *Alabama.*— Smedley *v.* Smedley, 30 Ala. 714; Reese *v.* Reese, 23 Ala. 785; Hughes *v.* Hughes, 19 Ala. 307; Hill *v.* Hill, 10 Ala. 527, holding that an averment that defendant was violent and disorderly in her conduct, until at length her life was one continued practice of extreme cruelty upon plaintiff, states a conclusion merely.

Arizona.— Lount *v.* Lount, 1 Ariz. 422, 25 Pac. 798.

California.— Smith *v.* Smith, 124 Cal. 651, 57 Pac. 573; De Haley *v.* Haley, 74 Cal. 489, 16 Pac. 248, 5 Am. St. Rep. 460.

Colorado.— Sylvis *v.* Sylvis, 11 Colo. 319, 17 Pac. 912.

Illinois.— Youngs *v.* Youngs, 130 Ill. 230, 22 N. E. 806, 17 Am. St. Rep. 313, 6 L. R. A. 548; Campbell *v.* Campbell, 27 Ill. App. 309.

Indiana.— Brown *v.* Brown, 138 Ind. 257, 37 N. E. 142; Spitzmesser *v.* Spitzmesser, 26 Ind. App. 532, 60 N. E. 315.

Iowa.— Freerking *v.* Freerking, 19 Iowa 34.

Kansas.— Callen *v.* Callen, 44 Kan. 370, 24 Pac. 360; Prather *v.* Prather, 26 Kan. 273, both cases holding that defendant is entitled to notice, not only of the general charge made against him, but of the main facts relied on to sustain the charge.

Michigan.— Dashback *v.* Dashback, 62 Mich. 322, 28 N. W. 812.

Missouri— Bowers *v.* Bowers, 19 Mo. 351.

New Hampshire.— Smith *v.* Smith, 43 N. H. 234; K. *v.* K., 43 N. H. 164, 165 (holding that the material facts upon which libellant relies must be substantially set forth); Fellows *v.* Fellows, 8 N. H. 160.

New York.— Mackintosh *v.* Mackintosh, 44 N. Y. App. Div. 118, 60 N. Y. Suppl. 679; Walton *v.* Walton, 32 Barb. 203, 20 How. Pr 347; Anonymous, 11 Abb. Pr. 231.

North Carolina.— Martin *v.* Martin, 130 N. C. 27, 40 S. E. 822; White *v.* White, 84 N. C. 340; Joyner *v.* Joyner, 59 N. C. 322, 82 Am. Dec. 421; Erwin *v.* Erwin, 57 N. C. 82; Harrison *v.* Harrison, 29 N. C. 484.

Ohio.— Conn *v.* Conn, Wright 563.

Oklahoma.— Irwin *v.* Irwin, 2 Okla. 180, 37 Pac. 548.

Tennessee.— Horne *v.* Horne, 1 Tenn. Ch. 259.

Texas.— Nogees *v.* Nogees, 7 Tex. 538, 58 Am. Dec. 78.

Virginia.— Trimble *v.* Trimble, 97 Va. 217, 33 S. E. 531.

Washington.— Branscheid *v.* Branscheid, 27 Wash. 368, 67 Pac. 812.

See 17 Cent. Dig. tit. "Divorce," § 300.

Cruel and barbarous treatment.— Under a statute authorizing a divorce because of the wife's "cruel and barbarous treatment" rendering the condition of the husband intolerable or his life burdensome, it is not sufficient to allege specific acts of personal indignities or gross insult offered by a wife to her husband. Pennington *v.* Pennington, 10 Phila. (Pa.) 22; Schlicter *v.* Schlicter, 10 Phila. (Pa.) 11; Bean *v.* Bean, 11 Lanc. Bar (Pa.) 138; Holland *v.* Holland, 4 Leg. Gaz. (Pa.) 372.

False charges.— An allegation in the wife's petition that her husband had filed a "false and malicious" affidavit in a divorce suit charging her with unchastity does not show cruelty where no averment is made that the suit has terminated in her favor (De Haley *v.* Haley, 74 Cal. 489, 16 Pac. 248, 5 Am. St. Rep. 460) and where the alleged cruelty consists of insults perpetrated by the wife in charging her husband with adultery, the complaint must allege the falsity of the charge (Huckabay *v.* Huckabay, 35 Tex. 620).

Language of statute.— It is good pleading to allege cruelty generally in the language of the statute and then specifically describe the particular acts complained of. Reese *v.* Reese, 23 Ala. 785; Sites *v.* Sites, 9 Pa. Dist. 192, 23 Pa. Co. Ct. 439; Edwards *v.* Edwards, 9 Phila. (Pa.) 617. In Rhode Island a petition for divorce is sufficiently specific, if it states the grounds of divorce in the language of the statute, except where petitioner relies on a charge of gross misbehavior and wickedness in violation of the marriage contract, in which case the acts relied on to make out the charge must be specified. Brown *v.* Brown, 2 R. I. 381. In Delaware the bill must describe the offense in the terms of the statute. Wagner *v.* Wagner, 3 Pennew. 303, 51 Atl. 603.

every act complained of need not be specifically described; it is enough if sufficient facts are alleged to establish legal cruelty as a ground for divorce.[7]

(B) *Time and Place.* The acts of cruelty should be alleged with reasonable certainty as to time and place.[8] However, the exact day and place of the occurrence of each particular act need not be alleged;[9] and where the conduct complained of is continued and not confined to any particular time or locality, a specific allegation of time and place is impracticable and should not be required.[10]

(C) *Physical or Mental Effect.* Since, to constitute ground for divorce, cruelty must result either in bodily harm or injury to the health or a reasonable fear of one or the other,[11] either one or the other of these effects of the misconduct on the complainant must be alleged.[12] In some states the misconduct, to

7. Reese *v.* Reese, 23 Ala. 785 (holding that one or two specifications are sufficient and that the evidence may make out others under the general charge); Sylvis *v.* Sylvis, 11 Colo. 319, 17 Pac. 912 (where the complaint alleged that defendant falsely accused plaintiff of illegal acts "too vile to be set forth," and evidence in support of the charge was held admissible); Campbell *v.* Campbell, 27 Ill. App. 309; K. *v.* K., 43 N. H. 164, 165.

For forms of complaints see the following cases:

Alabama.— Smedley *v.* Smedley, 30 Ala. 714; Hughes *v.* Hughes, 19 Ala. 307.

California.— Johnson *v.* Johnson, (1894) 35 Pac. 637.

Colorado.— Sylvis *v.* Sylvis, 11 Colo. 319, 17 Pac. 912.

Indiana.— Brown *v.* Brown, 138 Ind. 257, 37 N. E. 142; Spitzmesser *v.* Spitzmesser, 26 Ind. App. 532, 60 N. E. 315.

Maine.— Holyoke *v.* Holyoke, 78 Me. 404, 6 Atl. 827; Huston *v.* Huston, 63 Me. 184.

Missouri.—Tripp *v.* Tripp, 78 Mo. App. 413.

New York.— Itzkowitz *v.* Itzkowitz, 33 N. Y. App. Div. 244, 53 N. Y. Suppl. 356.

North Carolina.— Griffith *v.* Griffith, 89 N. C. 113.

Oklahoma.— Irwin *v.* Irwin, 2 Okla. 180, 37 Pac. 548.

Virginia.— Trimble *v.* Trimble, 97 Va. 217, 33 S. E. 531.

8. *Florida.*— Johnson *v.* Johnson, 23 Fla. 413, 2 So. 834; Crawford *v.* Crawford, 17 Fla. 180.

Iowa.— Freerking *v.* Freerking, 19 Iowa 34.

New Hampshire.— Smith *v.* Smith, 43 N. H. 234; Fellows *v.* Fellows, 8 N. H. 160.

New York.— Mackintosh *v.* Mackintosh, 44 N. Y. App. Div. 118, 60 N. Y. Suppl. 679; Walton *v.* Walton, 32 Barb. 203, 20 How. Pr. 347; Anonymous, 11 Abb. Pr. 231.

North Carolina.— Martin *v.* Martin, 130 N. C. 27, 40 S. E. 822; Ladd *v.* Ladd, 121 N. C. 118, 28 S. E. 190.

Tennessee.— Horne *v.* Horne, 1 Tenn. Ch. 259.

Texas.— Nogees *v.* Nogees, 7 Tex. 538, 58 Am. Dec. 78; Byrne *v.* Byrne, 3 Tex. 336; Wright *v.* Wright, 3 Tex. 168.

In Pennsylvania the matter is governed by rule of court. See *supra*, XII, A, 5, a, note 96.

Discretion of court.— It has been held, under a statute conferring on the court discretionary power to grant a divorce, that a pleading is not demurrable because of an omission of an allegation of the date and place where the cruelty was committed. Holyoke *v.* Holyoke, 78 Me. 404, 6 Atl. 827; Huston *v.* Huston, 63 Me. 18.

9. Reese *v.* Reese, 23 Ala. 785; Johnson *v.* Johnson, (Cal. 1894) 35 Pac. 637 (holding that a complaint alleging extreme cruelty in that defendant, "about three years ago," struck plaintiff without cause, and since that time has continually, whenever they have been together, used vile language to her, is sufficient); Itzkowitz *v.* Itzkowitz, 33 N. Y. App. Div. 244, 53 N. Y. Suppl. 356; Irwin *v.* Irwin, 2 Okla. 180, 37 Pac. 548 (where an allegation that "on or about February, 1892, and on divers other occasions prior and subsequent thereto," defendant was guilty of cruelty was held sufficient).

10. Smedley *v.* Smedley, 30 Ala. 714, where a wife's bill alleging that the husband, "soon after their marriage, commenced treating her, and did treat her, with cruelty and inhumanity; that on various occasions he had inflicted blows on her in anger, and with much violence, thereby endangering her health and life," was held sufficient.

11. See *supra*, VII, C, 4, b.

12. Smith *v.* Smith, 124 Cal. 651, 57 Pac. 573 (holding that a complaint which does not allege either grievous bodily injury or grievous mental suffering is defective); Freerking *v.* Freerking, 19 Iowa 34 (where a complaint which did not allege that plaintiff was injured or her health impaired was held insufficient); Jones *v.* Jones, 62 N. H. 463 (where the court required plaintiff to amend so as to set forth the mental or physical effect of the misconduct); Klein *v.* Klein, 34 N. Y. Super. Ct. 48.

It is sufficient to allege that the acts complained of caused grievous mental suffering without alleging an injurious effect on plaintiff's health (Barnes *v.* Barnes, 95 Cal. 171, 30 Pac. 298, 16 L. R. A. 660, the decision being based on a statute), or that the conduct complained of impaired or seriously threatened to impair libellant's health (Holyoke *v.* Holyoke, 78 Me. 404, 6 Atl. 827).

justify a divorce, must have further evil effects, in which case these must be alleged.[13]

(III) *Allegation of Desertion or Abandonment.* The complaint should aver the existence of the facts essential to constitute desertion or abandonment, as those offenses are defined in the particular state,[14] and accordingly it must appear that the absence has continued for the time prescribed by statute.[15]

6. Negativing Defenses — a. Provocation and Justification. In many states, usually because of statutes, the complaint must allege facts negativing misconduct on the part of complainant provoking or justifying the acts complained of.[16] However, the readiness of the complainant in a petition based on desertion to

13. Dunkel *v.* Dunkel, 11 Pa. Co. Ct. 297; Frazer *v.* Frazer, 32 Pittsb. Leg. J. (Pa.) 222 (both cases holding, under a statute authorizing a divorce for cruelty where the husband offers such indignities to the wife as to render her condition intolerable and force her to withdraw from his house and family, that a libel is insufficient which fails to allege that the wife was so forced to withdraw); Horne *v.* Horne, 1 Tenn. Ch. 259 (holding that an allegation that the husband's "treatment has been cruel in the extreme," without averring that it is such as "renders it unsafe or improper to cohabit with him and be under his dominion and control," as is required by statute to constitute cruelty, is insufficient).

14. Cass *v.* Cass, 31 N. J. Eq. 626; Todd *v.* Todd, 9 N. J. L. J. 342, both cases holding that a bill which alleges merely that a wife deserted her husband on a certain date and afterward persistently remained absent is insufficient for failure to show continuous, wilful, and obstinate desertion.

Voluntary absence.— It must appear that defendant's absence was voluntary. Hare *v.* Hare, 10 Tex. 355.

Wilfulness and malice.— If the statute provides that the desertion or absence must be "wilful and malicious," sufficient facts must be alleged to show that such was the character of the offense. Angier *v.* Angier, 63 Pa. St. 450; Crone *v.* Crone, 3 Pa. Dist. 375, 14 Pa. Co. Ct. 456; Stewart *v.* Stewart, 2 Swan (Tenn.) 591.

Misconduct compelling plaintiff to leave.— Where a divorce is sought by a wife for desertion arising from her departure from the home of her husband because of his extreme cruelty, the facts constituting the cruelty should be specifically alleged. Morris *v.* Morris, 20 Ala. 168; Smithkin *v.* Smithkin, 62 N. J. Eq. 161, 49 Atl. 815; Bainbridge *v.* Bainbridge, 15 Wkly. Notes Cas. (Pa.) 529.

Allegations of want of justification see *infra*, XII, A, 6, a.

For forms of complaints see the following cases:

Alabama.— Gray *v.* Gray, 15 Ala. 779.

California.— Vosburg *v.* Vosburg, 136 Cal. 195, 68 Pac. 694; Sheridan *v.* Sheridan, 134 Cal. 88, 66 Pac. 73.

Colorado.— Calvert *v.* Calvert, 15 Colo. 390, 24 Pac. 1043.

Missouri.— Van Horn *v.* Van Horn, 82 Mo. App. 79.

Texas.— Morey *v.* Morey, 82 Tex. 308, 17 S. W. 838.

15. Phelan *v.* Phelan, 12 Fla. 449; Powell *v.* Powell, 58 Mich. 299, 25 N. W. 199; Hancock *v.* Hancock, 5 N. H. 239.

Beginning and end of period.— The complaint should allege the date when the desertion actually began (McCormick *v.* McCormick, 19 Wis. 172. See Phelan *v.* Phelan, 12 Fla. 449), and that it continued up to the commencement of the suit (Kimball *v.* Kimball, 13 N. H. 222; Morey *v.* Morey, 82 Tex. 308, 17 S. W. 838).

16. Owsley *v.* Owsley, 78 Ky. 257, 1 Ky. L. Rep. 124; Epling *v.* Epling, 1 Bush (Ky.) 74; Hulsbeck *v.* Hulsbeck, 11 Ky. L. Rep. 368; Caskey *v.* Caskey, 4 Ky. L. Rep. 811 (all holding, under a statute authorizing a divorce for certain causes "to the party not in fault," that plaintiff must allege that he was not in fault); O'Connor *v.* O'Connor, 109 N. C. 139, 13 S. E. 887. See *infra*, XII, B, 5, b.

Cruelty.— Allegations charging specific assaults have been held insufficient in the absence of a statement of facts explaining how they came to be made and under what circumstances they were inflicted. White *v.* White, 84 N. C. 340; Joyner *v.* Joyner, 59 N. C. 322, 82 Am. Dec. 421; Erwin *v.* Erwin, 57 N. C. 82. However, the petition of the husband is sufficient, although it does not allege that he was without fault, where it avers that the peace and happiness of the family were destroyed in consequence of the violent temper and misconduct of the wife. Kenemer *v.* Kenemer, 26 Ind. 330.

Desertion.— Where the statute describes the offense as absence "without reasonable cause" a failure to allege that fact is a fatal defect.

Iowa.— Pinkney *v.* Pinkney, 4 Greene 324.

Missouri— Hoffman *v.* Hoffman, 43 Mo. 547; Freeland *v.* Freeland, 19 Mo. 354, where, under a statute permitting a divorce "when either party has absented himself or herself, without a reasonable cause, for the space of two years," a complaint was held defective which did not allege that the absence had continued without reasonable cause, although it was so alleged as to defendant's departure.

Pennsylvania.— Angier *v.* Angier, 63 Pa. St. 450; Crone *v.* Crone, 3 Pa. Dist. 375, 14 Pa. Co. Ct. 456.

Tennessee — Stewart *v.* Stewart, 2 Swan 591.

receive back and cohabit with her husband at all times during the period of absence need not be averred.[17]

b. Condonation and Connivance. The complaint need not allege that plaintiff has not condoned or connived at the misconduct complained of. Condonation and connivance are matters of defense to be set forth by defendant,[18] unless they affirmatively appear from the complaint.[19]

c. Laches and Limitations. Sufficient facts should be set forth in the complaint to show that the suit is brought within the time prescribed by statute,[20] or to explain an apparently inexcusable delay in applying for the divorce.[21]

7. Prayer For Relief. The complaint must contain a prayer for relief else a divorce will be denied.[22] If the prayer specifically seeks an absolute divorce, a limited divorce will not be granted, and *vice versa*,[23] unless the court is authorized to grant either an absolute or a limited divorce according to the facts alleged and proved.[24]

B. Answer — 1. In General. As a rule a defendant who contests the divorce is required to file a formal answer,[25] which should be a clear assignment of the causes why a divorce should not be granted.[26]

2. Time For Answering. The time for filing an answer is usually prescribed by statute.[27]

Texas.— See Hare *v.* Hare, 10 Tex. 355, holding that it is not sufficient to state that libellee unnecessarily and without sufficient cause abandoned libellant, but the circumstances attending the desertion must be particularly stated to show that it was without sufficient cause and was the offensive desertion contemplated by the statute.

17. Gray *v.* Gray, 15 Ala. 779.

18. Young *v.* Young, 18 Minn. 90; Van Benthuysen *v.* Van Benthuysen, 2 N. Y. Suppl. 238, 15 N. Y. Civ. Proc. 234 (holding that a complaint or cross bill is not demurrable for failure to allege that the adultery was without connivance); Steele *v.* Steele, 104 N. C. 631, 10 S. E. 707; Edwards *v.* Edwards, 61 N. C. 534; Earp *v.* Earp, 54 N. C. 239. See *infra*, XII, B, 5, c, d.

19. Diedrich *v.* Diedrich, (Nebr. 1903) 94 N. W. 536, holding, however, that a demurrer to a wife's petition for divorce because of cruelty will not be sustained on the ground that it shows condonation, unless condonation plainly and unequivocally appears from its allegations.

20. Strong *v.* Strong, 4 Rob. (N. Y.) 621, 1 Abb. Pr. N. S. (N. Y.) 233; Zorkowski *v.* Zorkowski, 3 Rob. (N. Y.) 613. See, however, *infra*, XII, B, 5, f.

21. Smith *v.* Smith, 43 N. H. 234; Fellows *v.* Fellows, 8 N. H. 160.

22. Grissom *v.* Grissom, 8 Wkly. Notes Cas. (Pa.) 484.

Prayer for separation.— A prayer for alimony has been held to be in effect a prayer for a decree of separation, where it is a relief incident to separation only. Freeman *v.* Freeman, 13 S. W. 246, 11 Ky. L. Rep. 822.

23. Todd *v.* Todd, 9 N. J. L. J. 342; Whittington *v.* Whittington, 19 N. C. 64; Clayton *v.* Clayton, 1 Ashm. (Pa.) 52; Pillow *v.* Pillow, 5 Yerg. (Tenn.) 420.

Decree of nullity.—Where a complaint only asks for a divorce *a mensa et thoro*, a decree declaring the marriage contract void cannot be granted. Walton *v.* Walton, 32 Barb. (N. Y.) 203, 20 How. Pr. (N. Y.) 347; Anonymous, 11 Abb. Pr. (N. Y.) 231.

24. Hackney *v.* Hackney, 9 Humphr. (Tenn.) 450, where, under the statute, a prayer for a divorce from bed and board was held sufficient to sustain a decree for divorce *a vinculo matrimonii*.

25. See Orrok *v.* Orrok, 1 Mass. 341. And see the statutes of the various states.

A contrary practice prevails in some states, however, and anything that tends to show that libellant is not entitled to a divorce for the causes alleged is admissible without formal answer. Brown *v.* Brown, 37 N. H. 536, 75 Am. Dec. 154; Burton *v.* Burton, 58 Vt. 414, 5 Atl. 281; Shackett *v.* Shackett, 49 Vt. 195; Blain *v.* Blain, 45 Vt. 538. See also *infra*, notes 33–35.

Answer to cross bill.— In Louisiana plaintiff may disprove the allegations of a cross bill, although he has not formally denied them. Suberville *v.* Adams, 46 La. Ann. 119, 14 So. 518.

Waiver of objection.— An objection that there is no formal denial of a charge of adultery is waived on the trial by treating the allegation as denied and offering evidence to prove it. Morehouse *v.* Morehouse, 70 Conn. 420, 39 Atl. 516.

26. Hopper *v.* Hopper, 11 Paige (N. Y.) 46; Keller *v.* Keller, 2 Woodw. (Pa.) 483.

For form of answer see Sylvis *v.* Sylvis, 11 Colo. 319, 17 Pac. 912; Warner *v.* Warner, 54 Mich. 492, 20 N. W. 557; Paden *v.* Paden, 28 Nebr. 275, 44 N. W. 228; Anonymous, 15 Abb. Pr. N. S. (N. Y.) 311.

27. See Fagebank *v.* Fagebank, 9 Minn. 72.

Filing nunc pro tunc.— An application for leave to file an answer *nunc pro tunc* will be granted before a decree is made, where it appears that justice will be thereby promoted. Paulding *v.* Paulding, 1 Wkly. Notes Cas. (Pa.) 159. *Contra*, Shay *v.* Shay, 9 Phila. (Pa.) 521.

Entry of default before expiration of time for answering see *infra*, XV, C, 1.

3. Joinder of Defenses — a. Matters in Abatement and in Bar. Under the codes, matter of abatement and matter in bar may be set up as separate defenses in the same answer.[28]

b. Denials and Affirmative Defenses. In some states defendant may specifically or generally deny the alleged misconduct and insist in the same answer upon an independent, affirmative defense.[29]

4. Simple Defenses. The form, sufficiency, and effect of denials in an answer in divorce are commonly governed by the general rules of pleading as they exist in the different states.[30]

5. Affirmative Defenses — a. Invalidity of Marriage. If the complaint shows a marriage apparently valid, defendant cannot prove its invalidity without pleading it in defense.[31]

b. Justification. In the absence of statute, misconduct of plaintiff affording justification for the acts complained of must be alleged in the answer in order to be proved in defense.[32]

c. Condonation. By the weight of authority, condonation of the offense complained of as a cause for divorce must be alleged in the answer or it will not be available as a defense.[33]

d. Connivance. The defense of connivance, like condonation, must be specially pleaded else it cannot be proved.[34]

e. Recrimination. If defendant wishes to show that plaintiff has forfeited the right to relief by misconduct, he must set up that defense in his answer.[35]

28. Dutcher *v.* Dutcher, 39 Wis. 651, holding, however, that neither the distinction between the two kinds of defense nor the legal effect of judgments upon them respectively is affected by the codes.

29. Hopper *v.* Hopper, 11 Paige (N. Y.) 46; Smith *v.* Smith, 4 Paige (N. Y.) 432, 27 Am. Dec. 75; Wood *v.* Wood, 2 Paige (N. Y.) 108. *Contra,* Eggerth *v.* Eggerth, 15 Oreg. 626, 16 Pac. 650.

30. Smith *v.* Smith, 19 Nebr. 706, 28 N. W. 296, holding that where a petition alleged that defendant had unlawfully gone through the ceremony of marriage with S and had since cohabited with S in a state of adultery, a denial in the answer that the marriage was unlawful and that defendant "has cohabited with said [S] in a state of adultery" is not a denial of the cohabitation.

A general denial is a good plea to a complaint based on adultery. Oades *v.* Oades, 6 Nebr. 304.

Surplusage.—Where there is a sufficient denial of each alleged cause of divorce the court may disregard immaterial matter. Moore *v.* Moore, 7 Phila. (Pa.) 308.

31. Vincent *v.* Vincent, 16 Daly (N. Y.) 534, 17 N. Y. Suppl. 497, holding that the defense that defendant had another wife living at the time of his alleged marriage to plaintiff must be pleaded to be available.

32. Moores *v.* Moores, 16 N. J. Eq. 275, holding that an answer alleging that the wife was compelled to leave her husband "because of his cruel conduct toward her," without specifying particular acts of cruelty or any facts from which cruelty could be inferred, is too vague to entitle respondent to introduce evidence in support of the charge. See, however, *supra,* XII, A, 6, a.

33. *Delaware.*— Jeans *v.* Jeans, 2 Harr. 38.

Indiana.— Lewis *v.* Lewis, 9 Ind. 105; Breedlove *v.* Breedlove, 27 Ind. App. 560, 61 N. E. 797.

Massachusetts. — Pastoret *v.* Pastoret, 6 Mass. 276.

New Jersey.— Fuller *v.* Fuller, 41 N. J. Eq. 198, 3 Atl. 409.

New York.— Merrill *v.* Merrill, 41 N. Y. App. Div. 347, 58 N. Y. Suppl. 503; Roe *v.* Roe, 14 Hun 612; Hopper *v.* Hopper, 11 Paige 46.

See also *supra,* XII, A, 6, b.

Contra.—Hunter *v.* Hunter, 132 Cal. 473, 64 Pac. 772 (*semble*); Backus *v.* Backus, 3 Me. 136; Owen *v.* Owen, 48 Mo. App. 208; Moore *v.* Moore, 41 Mo. App. 176; Hill *v.* Hill, 24 Oreg. 416, 33 Pac. 809.

Discretion of court.— While the defense of condonation if not specially pleaded may not be taken advantage of as a matter of right, yet the court may, if there is reason to believe that such a defense exists, direct an inquiry to ascertain the fact, and refuse a divorce if it exists. Karger *v.* Karger, 19 Misc. (N. Y.) 236, 44 N. Y. Suppl. 219, 26 N. Y. Civ. Proc. 161; Smith *v.* Smith, 4 Paige (N. Y.) 432.

34. Smith *v.* Smith, 4 Paige (N. Y.) 432. See also *supra,* XII, A, 6, b.

Discretion of court.— While the defense of connivance cannot be taken advantage of unless specially pleaded, yet the court may, if there is reason to believe that such a defense exists, direct an inquiry to ascertain the fact, and refuse a divorce if it exists. Karger *v.* Karger, 19 Misc. (N. Y.) 236, 44 N. Y. Suppl. 219, 26 N. Y. Civ. Proc. 161; Smith *v.* Smith, 4 Paige (N. Y.) 432.

35. *Illinois.*—Elzas *v.* Elzas, 83 Ill. App. 519.

Massachusetts. — Pastoret *v.* Pastoret, 6 Mass. 276.

f. Limitation of Actions. If it does not appear on the face of the complaint that the action is barred by the statute of limitations, that defense must be specially pleaded.[36]

C. Reply. The need of interposing a reply in an action for divorce is governed by the rules applicable in ordinary actions.[37]

D. Demurrer — 1. In General. Objection may be taken by way of demurrer to a complaint in a divorce suit as in any other case.[38]

2. Joinder With Plea. A plea and a demurrer cannot be put in at the same time.[39]

3. Grounds. The various grounds of demurrer are generally defined by statute.[40] It has been held that a complaint which is defective for lack of certainty is not demurrable.[41]

E. Cross Complaint or Counter-Claim[42] — 1. Right to Interpose. It was the practice of the ecclesiastical courts, where plaintiff himself had been guilty of misconduct constituting ground for divorce, to permit defendant to plead that misconduct, and if he himself was free from blame to obtain a divorce as if he were plaintiff.[43] This practice now prevails in both England and America either by force of statute[44] or by judicial determination adopting the ecclesiastical

Missouri.— Yallaly *v.* Yallaly, 39 Mo. 490.

New Jersey.— Reid *v.* Reid, 21 N. J. Eq. 331; Jones *v.* Jones, 18 N. J. Eq. 33, 90 Am. Dec. 607.

New York.— Roe *v.* Roe, 14 Hun 612; Strong *v.* Strong, 1 Abb. Pr. N. S. 233.

The court may in its discretion, however, allow proof in recrimination although it has not been pleaded. Tillison *v.* Tillison, 63 Vt. 411, 22 Atl. 531.

Sufficiency of pleading.— The misconduct of plaintiff must be set out in the answer with the same particularity as to time, place, and circumstance as is required in a complaint for divorce on the same ground. Holston *v.* Holston, 23 Ala. 777; Garrett *v.* Garrett, 12 Ind. 407; Reid *v.* Reid, 21 N. J. Eq. 331; Jones *v.* Jones, 18 N. J. Eq. 33, 90 Am. Dec. 607; Strong *v.* Strong, 3 Rob. (N. Y.) 719, 1 Abb. Pr. N. S. (N. Y.) 233; Morrell *v.* Morrell, 1 Barb. (N. Y.) 318; Tim *v.* Tim, 47 How. Pr. (N. Y.) 253; Wood *v.* Wood, 2 Paige (N. Y.) 108. It is sufficient to allege that plaintiff, in February and March, 1867, in the cities of New York and Brooklyn, committed adultery and thereby contracted a venereal disease which he communicated to defendant some time about the month of March, 1867. Clark *v.* Clark, 7 Rob. (N. Y.) 276. And an answer setting up the adultery of plaintiff as a defense need not allege either that the parties were inhabitants of the state at the commission of the offense or that defendant then or at the commencement of the action was an actual inhabitant of the state. Leseuer *v.* Leseuer, 31 Barb. (N. Y.) 330.

36. Dutcher *v.* Dutcher, 39 Wis. 651. See, however, *supra*, XII, A, 6, c.

37. Sylvis *v.* Sylvis, 11 Colo. 319, 17 Pac. 912 (holding that where plaintiff alleges that he left defendant because of her misconduct, an allegation in the answer that plaintiff deserted defendant without just cause is not new matter requiring a reply); Leslie *v.* Leslie, 11 Abb. Pr. N. S. (N. Y.) 311 (holding that where a reply is interposed to an original answer, an amended answer reiterating the charges and adding no new matter need not be replied to).

38. Hill *v.* Hill, 10 Ala. 527; Gimmy *v.* Gimmy, 22 Cal. 633; Potts *v.* Potts, (N. J. Ch. 1899) 42 Atl. 1055; Stone *v.* Stone, (N. J. Ch. 1888) 13 Atl. 245 (so holding, although the statute makes no provision for defense except by answer); Walton *v.* Walton, 32 Barb. (N. Y.) 203, 20 How. Pr. (N. Y.) 347; Anonymous, 11 Abb. Pr. (N. Y.) 231.

39. Ewing *v.* Ewing, 2 Phila. (Pa.) 371.

40. See statutes of the different states.

Sufficiency of complaint see *supra*, XII, A.

41. Barnett *v.* Barnett, 64 S. W. 844, 23 Ky. L. Rep. 1117; Huston *v.* Huston, 63 Me. 184, holding that where the allegations in a libel are sufficient to give the court jurisdiction to grant a divorce under its discretionary power, the libellee cannot avail himself of merely circumstantial omissions to defeat the libel by demurrer. *Contra*, Anonymous, 11 Abb. Pr. (N. Y.) 231; Wright *v.* Wright, 3 Tex. 168, both cases holding that a complaint which does not specify the nature and circumstances of the misconduct complained of and set forth the time and place with reasonable certainty is bad on demurrer.

42. Necessity of issuing summons on cross petition see *supra*, X, G, 1, a.

43. Best *v.* Best, 1 Add. Eccl. 411, 2 Eng. Eccl. 158; Clowes *v.* Jones, 3 Curt. Eccl. 185; Dysart *v.* Dysart, 1 Rob. Eccl. 106.

44. Blakely *v.* Blakely, 89 Cal. 324, 26 Pac. 1072; Mott *v.* Mott, 82 Cal. 413, 22 Pac. 1140; Wadsworth *v.* Wadsworth, 81 Cal. 182, 22 Pac. 648, 15 Am. St. Rep. 38; De Haley *v.* Haley, 74 Cal. 489, 16 Pac. 248, 5 Am. St. Rep. 460; Bovo *v.* Bovo, 63 Cal. 77; Owen *v.* Owen, 54 Ga. 526; Bleck *v.* Bleck, 27 Hun (N. Y.) 296; McNamara *v.* McNamara, 2 Hilt. (N. Y.) 547, 9 Abb. Pr. (N. Y.) 18; Taylor *v.* Taylor, 25 Misc. (N. Y.) 566, 55 N. Y. Suppl. 1050, 28 N. Y. Civ. Proc. 323; Van Benthuysen *v.* Van Ben-

rule,[45] and defendant is permitted to seek and secure affirmative relief either by a pleading variously termed a cross complaint, cross bill, and cross petition,[46] or by the answer itself.[47]

2. Time of Filing. A cross complaint should be filed after the complaint has been answered.[48]

3. What May Be Included. Any misconduct which is a cause for either an absolute or a limited divorce may be set up as a counter-claim or alleged in a cross complaint as a ground for affirmative relief,[49] although it occurred after the institution of the suit.[50] So defendant may maintain a cross complaint for alimony and maintenance and the custody of the children, although she does not ask for a divorce.[51] A counter-claim to annul the marriage may not be interposed in an action for divorce, however;[52] nor may a cross bill to decide the title

thuysen, 2 N. Y. Suppl. 238, 15 N. Y. Civ. Proc. 234; Spahn *v.* Spahn, 12 Abb. N. Cas. (N. Y.) 169; Anonymous, 17 Abb. Pr. (N. Y.) 48; Finn *v.* Finn, 62 How. Pr. (N. Y.) 83; Tim *v.* Tim, 47 How. Pr. (N. Y.) 253.

In England, under the Matrimonial Causes Act of 1866 (29 Vict. c. 32), § 2, the court may in any suit instituted for dissolution of marriage, if the respondent opposes the relief sought on the ground, in case of suit by the husband, of his adultery, cruelty, or desertion, or, in case of suit by a wife, on the ground of her adultery or cruelty, give respondent the same relief as if he or she were petitioner. See Borham *v.* Borham, L. R. 2 P. 193, 40 L. J. P. & M. 6, 23 L. T. Rep. N. S. 600, 19 Wkly. Rep. 215; Schira *v.* Schira, L. R. 1 P. 466; Drysdale *v.* Drysdale, L. R. 1 P. 365, 36 L. J. P. & M. 39, 15 L. T. Rep. N. S. 512; Osborne *v.* Osborne, 10 Jur. N. S. 80, 33 L. J. P. & M. 38, 9 L. T. Rep. N. S. 456, 3 Swab. & Tr. 327; Burroughs *v.* Burroughs, 8 Jur. N. S. 624, 31 L. J. P. & M. 124, 5 L. T. Rep. N. S. 771, 2 Swab. & Tr. 544; Stoker *v.* Stoker, 14 P. D. 60, 58 L. J. P. & Adm. 40, 60 L. T. Rep. N. S. 400, 37 Wkly. Rep. 576; Otway *v.* Otway, 13 P. D. 12.

45. Wuest *v.* Wuest, 17 Nev. 217, 30 Pac. 886, holding that, the law being silent as to the right of defendant to affirmative relief, the rule of the ecclesiastical courts admitting of such relief must prevail as a part of the common law.

46. *Colorado.*— Gilpin *v.* Gilpin, 12 Colo. 504, 21 Pac. 612.

Illinois.— Chestnut *v.* Chestnut, 88 Ill. 548; Birkby *v.* Birkby, 15 Ill. 120.

Indiana.—Stafford *v.* Stafford, 9 Ind. 162; McCafferty *v.* McCafferty, 8 Blackf. 218.

Kentucky.— Lee *v.* Lee, 1 Duv. 196.

Michigan.— Hoff *v.* Hoff, 48 Mich. 281, 12 N. W. 160.

Mississippi.— Dewees *v.* Dewees, 55 Miss. 315.

Missouri.— Hoffman *v.* Hoffman, 43 Mo. 547.

Nebraska.— Greene *v.* Greene, 49 Nebr. 546, 68 N. W. 947, 59 Am. St. Rep. 560, 34 L. R. A. 110; Wilde *v.* Wilde, 37 Nebr. 891, 56 N. W. 724; Atkins *v.* Atkins, 13 Nebr. 271, 13 N. W. 285.

New Jersey.— Harrison *v.* Harrison, 46 N. J. Eq. 75, 19 Atl. 126; Osborn *v.* Osborn, 44 N. J. Eq. 257, 9 Atl. 698, 10 Atl. 107, 14 Atl. 217.

Oregon.— Dodd *v.* Dodd, 14 Oreg. 338, 13 Pac. 509.

West Virginia.— Martin *v.* Martin, 33 W. Va. 695, 11 S. E. 12.

See 17 Cent. Dig. tit. "Divorce," §§ 11, 323.

Right of non-resident defendant to file cross bill see *supra*, V, C, 3, b.

47. Berdolt *v.* Berdolt, 56 Nebr. 792, 77 N. W. 399; Dodd *v.* Dodd, 14 Oreg. 338, 13 Pac. 509; Shafer *v.* Shafer, 10 Nebr. 468, 6 N. W. 768.

48. Allen *v.* Allen, 30 Fed. Cas. No. 18,223, 1 Hempst. 58.

Even after the trial has commenced and plaintiff's evidence is partly taken, a cross complaint may be filed where notice has been duly given. Van Voorhis *v.* Van Voorhis, 94 Mich. 60, 53 N. W. 964. A cross bill to decide the title to land may not be interposed after decree, however. Abbott *v.* Abbott, 189 Ill. 488, 59 N. E. 958, 82 Am. St. Rep. 470.

49. Wilson *v.* Wilson, 40 Iowa 230; Harrison *v.* Harrison, 46 N. J. Eq. 75, 19 Atl. 126; Spahn *v.* Spahn, 12 Abb. N. Cas. (N. Y.) 169; Smith *v.* Smith, 4 Paige (N. Y.) 432, 27 Am. Dec. 75; Martin *v.* Martin, 33 W. Va. 695, 11 S. E. 12.

Adultery may be set up as a counter-claim in an action for a limited divorce on the ground of cruelty and an affirmative judgment be demanded thereon. De Meli *v.* De Meli, 120 N. Y. 485, 24 N. E. 996, 17 Am. St. Rep. 652; Van Benthuysen *v.* Van Benthuysen, 2 N. Y. Suppl. 238, 15 N. Y. Civ. Proc. 234. The rule was otherwise in New York before the enactment of Laws (1881), c. 703, amending Code Civ. Proc. § 1770. Henry *v.* Henry, 3 Rob. 614; McNamara *v.* McNamara, 2 Hilt. 547, 9 Abb. Pr. 18; Griffin *v.* Griffin, 23 How. Pr. 183.

50. Wilson *v.* Wilson, 40 Iowa 230; Smith *v.* Smith, 4 Paige (N. Y.) 432, 27 Am. Dec. 75; Martin *v.* Martin, 33 W. Va. 695, 11 S. E. 12, holding that where the statutory period of desertion on the part of plaintiff elapses *pendente lite*, a cross bill may then be maintained by defendant.

51. Gilpin *v.* Gilpin, 12 Colo. 504, 21 Pac. 612.

52. Taylor *v.* Taylor, 25 Misc. (N. Y.) 566, 55 N. Y. Suppl. 1052, 28 N. Y. Civ.

to land be interposed by defendant after a decree has been rendered in the divorce suit.[53]

4. Sufficiency of Allegations. The misconduct relied on for affirmative relief must be alleged specifically and with as much certainty as to time, place, and circumstance as in the case of a complaint.[54]

5. Prayer For Relief. A cross complaint or counter-claim should conclude with a prayer for relief, which should conform as near as may be to the requirements of a prayer for relief in an original complaint.[55]

F. Supplemental Pleadings — 1. In General. It is within the discretion of the court to permit either party to file a supplemental pleading. This power is usually conferred by statute,[56] although it would seem to exist without express statutory provision.[57] In passing on the application the court should consider all the facts and circumstances and grant or refuse it as may be proper.[58]

2. Supplemental Complaint — a. Necessity For Filing. Facts arising since the commencement of the suit and upon which the divorce sought is partly based cannot be brought before the court unless alleged in a supplemental bill.[59]

b. What May Be Alleged — (1) *Facts Occurring Pendente Lite.* Facts occurring after the filing of the original complaint may under certain conditions be alleged in a supplemental complaint.[60] However, plaintiff will not be permitted to set up in a supplemental bill subsequently occurring facts upon which a decree might be had without reference to the original bill.[61]

Proc. 323. *Compare* Finn *v.* Finn, 62 How. Pr. (N. Y.) 83.

53. Abbott *v.* Abbott, 189 Ill. 488, 59 N. E. 958, 82 Am. St. Rep. 470.

54. Coulthurst *v.* Coulthurst, 58 Cal. 239 (holding that it cannot be aided by the averments of any other pleading in the action); Stover *v.* Stover, 6 Ida. 493, 56 Pac. 263; Moores *v.* Moores, 16 N. J. Eq. 275; Burr *v.* Burr, 2 Edw. (N. Y.) 448.

55. Tackaberry *v.* Tackaberry, 101 Mich. 102, 59 N. W. 400, holding, however, that a divorce may be granted on a cross bill, although not expressly praying such relief, where it denies plaintiff's averments of cruelty, counter charges cruelty and drunkenness, and is supported by evidence that defendant's misconduct, if any, was inspired by plaintiff's conduct.

56. See statutes of the different states.

57. Spears *v.* New York, 72 N. Y. 442.

58. Campbell *v.* Campbell, 7 N. Y. St. 441.

Conditions of leave to file.— Before granting the application the court should be satisfied of the good faith of the applicant; that the matter sought to be set up is material and probably true; that it has come to the applicant's knowledge since the original pleading was filed; and that the applicant has not been guilty of negligence. Burdell *v.* Burdell, 2 Barb. (N. Y.) 473, 3 How. Pr. (N. Y.) 216; Strong *v.* Strong, 3 Rob. (N. Y.) 669, 28 How. Pr. (N. Y.) 432; Burr *v.* Burr, 2 Edw. (N. Y.) 448.

59. Klemme *v.* Klemme, 37 Ill. App. 54.

60. Cornwall *v.* Cornwall, 30 Hun (N. Y.) 573; Scoland *v.* Scoland, 4 Wash. 118, 29 Pac. 930, in both of which cases acts of cruelty committed after the commencement of the action were permitted to be alleged in a supplemental bill.

61. *Alabama.*— Hill *v.* Hill, 10 Ala. 527.

Illinois.— Embree *v.* Embree, 53 Ill. 394, holding that a bill prematurely filed for divorce on the ground of desertion is not aided by a supplemental bill alleging two years' desertion, where the two years includes any portion of the time which has elapsed after the filing of the original bill.

Louisiana.— Freudenstein *v.* Freudenstein, 110 La. 424, 34 So. 589, holding that relief cannot be granted on a supplemental bill alone or as the main demand.

Maryland.— Schwab *v.* Schwab, 96 Md. 592, 54 Atl. 653, 9 Am. St. Rep. 598, holding that in a suit for divorce for adultery a supplemental bill setting up as a ground for relief acts of adultery occurring subsequent to the institution of the suit and with persons not specified in the original bill is improperly allowed.

New Jersey.— Lutz *v.* Lutz, 52 N. J. Eq. 241, 28 Atl. 315, holding, however, that where condonation of an act of adultery is interposed as a defense, a supplemental petition may be filed charging defendant with acts of adultery subsequent to the alleged condonation and after the commencement of the action.

New York.— Campbell *v.* Campbell, 69 N. Y. App. Div. 435, 74 N. Y. Suppl. 979; Faas *v.* Faas, 57 N. Y. App. Div. 611, 68 N. Y. Suppl. 509 (where the rule was applied, although defendant having set up a counter-claim, plaintiff would not be able to discontinue, except by leave of the court for good cause shown, and begin again his suit); Robertson *v.* Robertson, 9 Daly 44; Neiberg *v.* Neiberg, 8 Misc. 97, 28 N. Y. Suppl. 1005, 31 Abb. N. Cas. 257; Halsted *v.* Halsted, 5 Misc. 416, 26 N. Y. Suppl. 758 [*affirmed* in 7 Misc. 23, 27 N. Y. Suppl. 408]; Milner *v.* Milner, 2 Edw. 114.

Waiver of objection.— If a supplemental

(II) *Facts Inconsistent With Original Complaint.* The supplemental bill being merely an addition to the original bill the two must be consistent.[62]

3. Supplemental Answer. Misconduct of plaintiff may be set up by defendant in recrimination by means of a supplemental answer, where it occurred after the original answer was filed[63] or was not discovered before that event.[64] So condonation of the offense complained of, occurring after the commencement of the suit, may be pleaded in a supplemental answer.[65]

G. Amendments — 1. In General. Amendments to pleadings in divorce suits are permissible to the same extent and under like restrictions as in other suits.[66] Ordinarily they are not allowable as a matter of right, but rest in the

bill is received without objection, it will be treated as part of the case, and facts occurring subsequent to the filing of the original bill but prior to the supplemental bill will be considered as supporting plaintiff's case. Feigley *v.* Feigley, 7 Md. 537, 61 Am. Dec. 375.

62. Gleason *v.* Gleason, 54 Cal. 135, where it was held that, in an action to obtain a divorce and for a division of the common property, a supplemental complaint to enforce an alleged trust arising out of an express contract between the parties while married would not be permitted. However, a supplemental petition relating exclusively to property rights and permanent alimony may be permitted if the issue is made more specific than in the original petition. Johnson *v.* Johnson, 22 Colo. 20, 43 Pac. 130, 55 Am. St. Rep. 112; Peck *v.* Peck, 66 Mich. 586, 33 N. W. 893.

Change of action.— A supplemental complaint alleging adultery and praying an absolute divorce cannot be filed in an action for a limited divorce on the ground of cruelty. Schwab *v.* Schwab, 93 Md. 382, 49 Atl. 331, 52 L. R. A. 414; Hoffman *v.* Hoffman, 35 How. Pr. (N. Y.) 384. *Compare* Irwin *v.* Irwin, 105 Ky. 632, 49 S. W. 432, 20 Ky. L. Rep. 1761, where plaintiff was permitted to file a supplemental petition for an absolute divorce on the ground of separation for five years in an action for a divorce from bed and board on the ground of cruelty and settled aversion.

63. Armstrong *v.* Armstrong, 27 Ind. 186; Fuller *v.* Fuller, 41 N. J. Eq. 198, 3 Atl. 409; Blanc *v.* Blanc, 67 Hun (N. Y.) 384, 22 N. Y. Suppl. 264, 23 N. Y. Civ. Proc. 101. *Contra*, Burdell *v.* Burdell, 2 Barb. (N. Y.) 473, 3 How. Pr. (N. Y.) 216, holding that where facts have occurred since the filing of the answer which constitute a defense, the proper way for defendant to avail himself of them is to obtain an order that the cause stand over until he can put them in issue by a cross bill, which must be brought to a hearing with the original suit.

64. Strong *v.* Strong, 3 Rob. (N. Y.) 669.

65. Warner *v.* Warner, 31 N. J. Eq. 225; Smith *v.* Smith, 4 Paige (N. Y.) 432, 27 Am. Dec. 75.

66. *California.*— Sharon *v.* Sharon, 77 Cal. 102, 19 Pac. 230.

Indiana.— Olleman *v.* Olleman, 143 Ind. 172, 42 N. E. 470; Armstrong *v.* Armstrong, 27 Ind. 186.

Iowa.— Inskeep *v.* Inskeep, 5 Iowa 204.

Kentucky.— Fishli *v.* Fishli, 2 Litt. 337; Barth *v.* Barth, 42 S. W. 1116, 19 Ky. L. Rep. 905.

Maine.—Anderson *v.* Anderson, 4 Me. 100, 16 Am. Dec. 237.

Massachusetts.— Tourtelot *v.* Tourtelot, 4 Mass. 506.

Michigan.— Clutton *v.* Clutton, 108 Mich. 267, 66 N. W. 52, 31 L. R. A. 160; Schafberg *v.* Schafberg, 52 Mich. 429, 18 N. W. 202; Green *v.* Green, 26 Mich. 437; Briggs *v.* Briggs, 20 Mich. 34.

New Hampshire.— Whipp *v.* Whipp, 54 N. H. 580; Adams *v.* Adams, 20 N. H. 299, 51 Am. Dec. 219.

New Jersey.— Miller *v.* Miller, 40 N. J. Eq. 475, 2 Atl. 449.

New York.— Brinkley *v.* Brinkley, 56 N. Y. 192; Robertson *v.* Robertson, 9 Daly 44; Strong *v.* Strong, 3 Rob. 669, 28 How. Pr. 432; Campbell *v.* Campbell, 7 N. Y. St. 441; Rose *v.* Rose, 11 Paige 166; Codd *v.* Codd, 2 Johns. Ch. 224; Mix *v.* Mix, 1 Johns. Ch. 204.

North Carolina.— Holloman *v.* Holloman, 127 N. C. 15, 37 S. E. 68; O'Connor *v.* O'Connor, 109 N. C. 139, 13 S. E. 887.

Pennsylvania.— Melvin *v.* Melvin, 130 Pa. St. 6, 18 Atl. 920; Grove's Appeal, 37 Pa. St. 443; Greenogle *v.* Greenogle, 8 Pa. Dist. 516, 22 Pa. Co. Ct. 97; Dasey *v.* Dasey, 13 Pa. Co. Ct. 612; Leidig *v.* Leidig, 2 Pa. Dist. 529, 13 Pa. Co. Ct. 29; A. *v.* A., 2 Pa. Dist. 393, 12 Pa. Co. Ct. 608; Shellenberger *v.* Shellenberger, 6 Pa. Co. Ct. 287; Tiedemann *v.* Tiedemann, 5 Pa. Co. Ct. 77; Perkins *v.* Perkins, 16 Wkly. Notes Cas. 48; Clayburgh *v.* Clayburgh, 15 Wkly. Notes Cas. 365; Hancock *v.* Hancock, 13 Wkly. Notes Cas. 29; Matthews *v.* Matthews, 6 Wkly. Notes Cas. 147; Cumpston *v.* Cumpston, 4 Wkly. Notes Cas. 184; Toone *v.* Toone, 10 Phila. 174.

England.— Borham *v.* Borham, L. R. 2 P. 193, 40 L. J. P. & M. 6, 23 L. T. Rep. N. S. 600, 19 Wkly. Rep. 215; Mycock *v.* Mycock, L. R. 2 P. 98, 39 L. J. P. & M. 56, 23 L. T. Rep. N. S. 238, 18 Wkly. Rep. 1144; Parkinson *v.* Parkinson, L. R. 2 P. 27, 39 L. J. P. & M. 21; Hudson *v.* Hudson, 9 Jur. N. S. 1302, 33 L. J. P. & M. 5, 12 Wkly. Rep. 216; Windham *v.* Windham, 9 Jur. N. S. 82, 32 L. J. P. & M. 89; Charter *v.* Charter, 58 L. J. P. & Adm. 44, 60 L. T. Rep. N. S. 872; Austin *v.* Austin, 41 L. J. P. & M. 8, 25 L. T. Rep. N. S. 856, 20 Wkly. Rep. 128; Henslow *v.* Henslow, 40 L. J. P. & M. 31, 24 L. T. Rep.

sound discretion of the court;[67] and the court has the power not only to pass upon an application voluntarily made but also of its own motion to compel a defendant to interpose a valid defense if he has one.[68]

2. Application to Amend — a. Time of Making. An amendment may be allowed in a proper case at any time before final decree so as to present the entire controversy and enable the court to do exact justice and finally and fully determine the rights of the parties.[69]

b. To Whom Made. The application to amend must be made to the court.[70]

3. When Allowed — a. In General. Amendments are properly allowed for the purpose of making the essential allegations of the pleading more definite and certain,[71] or to insert an essential allegation which has been omitted[72] or to include allegations of misconduct committed subsequent to the commencement of the suit.[73]

b. Changing or Enlarging Cause of Action. Plaintiff cannot amend so as to change the action to one of nullity,[74] or so as to change an action for separation

N. S. 846, 19 Wkly. Rep. 786; Bartlett *v.* Bartlett, 34 L. J. P. & M. 64; Green *v.* Green, 33 L. J. P. & M. 83; Griffith *v.* Griffith, 33 L. J. P. & M. 81, 10 L. T. Rep. N. S. 308, 3 Swab. & Tr. 355; Bunyard *v.* Bunyard, 32 L. J. P. & M. 176, 11 Wkly. Rep. 990; Forman *v.* Forman, 32 L. J. P. & M. 80, 11 Wkly. Rep. 401; Jago *v.* Jago, 32 L. J. P. & M. 48, 11 Wkly. Rep. 192; Ambler *v.* Ambler, 32 L. J. P. & M. 6, 7 L. T. Rep. N. S. 339, 11 Wkly. Rep. 111; Walker *v.* Walker, 30 L. J. P. & M. 214; Bannister *v.* Bannister, 29 L. J. P. & M. 53; Symonds *v.* Symonds, 23 L. T. Rep. N. S. 568, 19 Wkly. Rep. 166.

See 17 Cent. Dig. tit. "Divorce," § 328 *et seq.*

67. Carter *v.* Carter, 152 Ill. 434, 28 N. E. 948, 38 N. E. 669; Musselman *v.* Musselman, 44 Ind. 104; Harrington *v.* Harrington, 107 Mass. 329; Melvin *v.* Melvin, 130 Pa. St. 6, 18 Atl. 920; Toone *v.* Toone, 10 Phila. (Pa.) 174; Clayburgh *v.* Clayburgh, 15 Wkly. Notes Cas. (Pa.) 365.

By statute in New York, however, either party is permitted as of course to serve an amended pleading within a specified time after the service of the original, in which event the right to amend is absolute. Cooper *v.* Jones, 4 Sandf. 699. And see Campbell *v.* Campbell, 7 N. Y. St. 441.

Fraud and injustice.— An application to amend will be denied where fraud appears or where its allowance would result in injustice to the adverse party. Miller *v.* Miller, 40 N. J. Eq. 475, 2 Atl. 449; Campbell *v.* Campbell, 7 N. Y. St. 441.

68. Strong *v.* Strong, 3 Rob. (N. Y.) 669, 28 How. Pr. (N. Y.) 432.

69. *Illinois.*—Carter *v.* Carter, 152 Ill. 434, 28 N. E. 948, 38 N. E. 669, holding that whether complainant may be allowed to amend the bill on the trial is in the discretion of the court.

Indiana.— Olleman *v.* Olleman, 143 Ind. 172, 42 N. E. 470, where it was held no error to permit an amendment setting up justification pending the trial.

New Jersey.— Miller *v.* Miller, 40 N. J. Eq. 475, 2 Atl. 449.

North Carolina.— O'Connor *v.* O'Connor, 109 N. C. 139, 13 S. E. 887.

Pennsylvania.— Melvin *v.* Melvin, 130 Pa. St. 6, 18 Atl. 920 (where plaintiff was allowed to amend a bill of particulars on the trial); Dasey *v.* Dasey, 13 Pa. Co. Ct. 612 (where an amendment was permitted after the appointment of an examiner); Cumpston *v.* Cumpston, 4 Wkly. Notes Cas. 184; Toone *v.* Toone, 10 Phila. 174.

Washington.— Lee *v.* Lee, 3 Wash. 236, 28 Pac. 355.

The court on appeal will not allow an allegation of cruelty to be added by way of amendment to a charge of offering indignities to libellant's person. Powers' Appeal, 120 Pa. St. 320, 14 Atl. 60.

70. Leidig *v.* Leidig, 13 Pa. Co. Ct. 29, holding that, although the proceeding is at issue and has been referred to a master, the respondent cannot amend his answer before the master.

71. *California.*— Sharon *v.* Sharon, 77 Cal. 102, 19 Pac. 230.

Minnesota.— Freeman *v.* Freeman, 39 Minn. 370, 40 N. W. 167.

New York.— Codd *v.* Codd, 2 Johns. Ch. 224.

Ohio.— Richards *v.* Richards, Wright 302; Bird *v.* Bird, Wright 98.

Pennsylvania.— Greenogle *v.* Greenogle, 8 Pa. Dist. 516, 22 Pa. Co. Ct. 97.

England.— Bunyard *v.* Bunyard, 32 L. J. P. & M. 176, 11 Wkly. Rep. 990; Windham *v.* Windham, 9 Jur. N. S. 82, 32 L. J. P. & M. 89.

72. Mix *v.* Mix, 1 Johns. Ch. (N. Y.) 204, where the residence of the parties at the time the adultery was committed was not stated, and plaintiff was allowed to amend.

73. Adams *v.* Adams, 20 N. H. 299, 51 Am. Dec. 219; Borham *v.* Borham, L. R. 2 P. 193, 40 L. J. P. & M. 6, 23 L. T. Rep. N. S. 600, 19 Wkly. Rep. 215; Walker *v.* Walker, 30 L. J. P. & M. 214.

The answer may be amended so as to allege adultery of plaintiff discovered after the issues were joined, if defendant appears to have reasonable prospect of establishing it. Strong *v.* Strong, 3 Rob. (N. Y.) 669, 28 How. Pr. (N. Y.) 432.

74. Schafberg *v.* Schafberg, 52 Mich. 429, 18 N. W. 202. *Contra,* Barth *v.* Barth, 102

to one for absolute divorce.[75] However, a bill for an absolute divorce alleging adultery may be amended by adding a charge of extreme cruelty and a prayer for a limited divorce;[76] and in the absence of statute to the contrary,[77] an amendment will be allowed to include other grounds of divorce than those specified in the complaint,[78] provided that plaintiff was not aware of them when the original complaint was drawn.[79]

c. Matters of Form. Defects in form may be cured by amendment, as where the respondent neglects to demand an issue in her answer as required by a court rule,[80] or the verification is omitted[81] or does not contain the necessary recital of absence of collusion.[82]

d. Conforming Allegations to Proof. An amendment may be allowed so as to make the allegation conform to the proof,[83] except where the evidence has been erroneously admitted against the objection of the adverse party.[84]

H. Signature. In some states plaintiff is required by statute to sign the complaint personally.[85]

Ky. 56, 42 S. W. 1116, 19 Ky. L. Rep. 905, 80 Am. St. Rep. 335, where plaintiff was permitted to amend his complaint by alleging that at the time of his marriage with defendant she had a living husband from whom she had not been divorced, and asking to have the marriage declared void.

75. Robertson *v.* Robertson, 9 Daly (N. Y.) 44. See, however, Tiedemann *v.* Tiedemann, 5 Pa. Co. Ct. 77, holding that a libel may be amended by changing a prayer for a limited divorce to one for absolute divorce, where the grounds for relief are the same.

76. Anderson *v.* Anderson, 4 Me. 100, 16 Am. Dec. 237.

77. Ring *v.* Ring, 112 Ga. 854, 38 S. E. 330, holding, under a statute prohibiting an amendment adding a new and distinct cause of action, that a petition on the ground of habitual drunkenness cannot be amended by adding an allegation of cruelty as a new ground for divorce.

78. Tourtelot *v.* Tourtelot, 4 Mass. 506; Powers' Appeal, 120 Pa. St. 320, 14 Atl. 60; Dasey *v.* Dasey, 13 Pa. Co. Ct. 612; Hancock *v.* Hancock, 13 Wkly. Notes Cas. (Pa.) 29 (the last three cases holding that an allegation of cruelty may be added by amendment to a charge of offering indignities to libellant's person); A. *v.* A., 2 Pa. Dist. 393, 12 Pa. Co. Ct. 608; Clayburgh *v.* Clayburgh, 15 Wkly. Notes Cas. (Pa.) 365 (the two cases holding that a libel for cruelty may be amended by adding a charge of adultery); Perkins *v.* Perkins, 16 Wkly. Notes Cas. (Pa.) 48; Toone *v.* Toone, 10 Phila. (Pa.) 174; Cartlidge *v.* Cartlidge, 8 Jur. N. S. 493, 31 L. J. P. & M. 135. *Contra*, Matthews *v.* Matthews, 6 Wkly. Notes Cas. (Pa.) 147, holding that a libel for adultery cannot be amended by alleging desertion.

79. Israel *v.* Israel, 54 N. Y. App. Div. 408, 66 N. Y. Suppl. 777; Bannister *v.* Bannister, 29 L. J. P. & M. 53, both cases holding that if acts of adultery sought to be included by amendment were known to applicant when the original pleading was made the application should be denied.

Cruelty is necessarily within the knowledge of the injured party at the time the pleading is made, and amendments adding new charges of cruelty should not be allowed except under special circumstances. Austin *v.* Austin, 41 L. J. P. & M. 8, 25 L. T. Rep. N. S. 856, 20 Wkly. Rep. 128. See, however, Parkinson *v.* Parkinson, L. R. 2 P. 25, 39 L. J. P. & M. 14, 21 L. T. Rep. N. S. 732; Rowley *v.* Rowley, 29 L. J. P. & M. 15, 1 Swab. & Tr. 487, 7 Wkly. Rep. 653, in both of which cases cruelty was set up by amendment.

80. Magill's Appeal, 59 Pa. St. 430.

81. Daly *v.* Hosmer, 102 Mich. 392, 60 N. W. 758; Harrison *v.* Harrison, 94 Mich. 559, 54 N. W. 275, 34 Am. St. Rep. 364.

82. Clutton *v.* Clutton, 108 Mich. 267, 66 N. W. 52, 31 L. R. A. 160; Daly *v.* Hosmer, 102 Mich. 392, 60 N. W. 758; Harrison *v.* Harrison, 94 Mich. 559, 54 N. W. 275, 34 Am. St. Rep. 364; Moore *v.* Moore, 130 N. C. 333, 41 S. E. 943.

83. Carter *v.* Carter, 152 Ill. 434, 28 N. E. 948, 38 N. E. 669; Adams *v.* Adams, 20 N. H. 299, 51 Am. Dec. 219; O'Connor *v.* O'Connor, 109 N. C. 139, 13 S. E. 887; Jackson *v.* Jackson, 105 N. C. 433, 11 S. E. 173.

Where proof of the date of the offense differs from that alleged, an amendment is properly allowed changing the date in the pleading to conform with the proof. Grove's Appeal, 37 Pa. St. 443; Bunyard *v.* Bunyard, 32 L. J. P. & M. 176, 11 Wkly. Rep. 990.

84. Green *v.* Green, 26 Mich. 437.

85. Willard *v.* Willard, 4 Mass. 506; Wanamaker *v.* Wanamaker, 10 Phila. (Pa.) 466 (holding that a failure so to do is fatal to the decree, if there is no appearance by defendant or actual service upon him); Capwell *v.* Capwell, 21 R. I. 101, 41 Atl. 1005 (holding that a statute requiring a petition to be signed by petitioner if of legal age to consent to marriage means fourteen years for males and twelve years for females); Philbrick *v.* Philbrick, 27 Vt. 786.

Signature by attorney.— In Massachusetts the libel cannot be signed by libellant's attorney, although he be specially empowered by libellant to sign it. Gould *v.* Gould, 1 Metc. 382. In New Hampshire, if the libel is signed by attorney, the signature must be

I. Verification.[86] The pleadings in a divorce suit are usually required to be verified under oath.[87] Verification of a petition for divorce is not a jurisdictional requisite, however, and proceedings founded upon an unverified or a defectively verified petition are not void.[88]

J. Affidavit Accompanying Complaint.[89] In some states the complaint is required by statute to be accompanied by an affidavit showing among other things good faith, absence of collusion, and residency of plaintiff in the state for the prescribed time.[90]

K. Bill of Particulars. A bill of particulars may be ordered in the discretion of the court where the acts complained of in the complaint or cross complaint are alleged in general terms.[91] It should be required for example if there is

written in libellant's presence and by his direction. Daniels *v.* Daniels, 56 N. H. 219.

Signature by next friend.— Where a wife suing for divorce signs the libel her next friend need not sign it. Grissom *v.* Grissom, 8 Wkly. Notes Cas. (Pa.) 484.

Waiver of objection.— Failure of libellant to sign the libel is not cured by respondent's appearance. Philbrick *v.* Philbrick, 27 Vt. 786.

86. See also *infra*, XII, J.

87. Green *v.* Green, 26 Mich. 437; Briggs *v.* Briggs, 20 Mich. 34; Foy *v.* Foy, 35 N. C. 90, all holding that if the petition must be verified under a statute, the facts alleged in an amendment thereto must be sworn to or they will not be regarded.

Where the charge is adultery, however, the weight of authority is in favor of relieving defendant from the necessity of verifying the answer. Anthony *v.* Anthony, 11 N. J. Eq. 70; Bray *v.* Bray, 6 N. J. Eq. 27; Miller *v.* Miller, 1 N. J. Eq. 386; Anable *v.* Anable, 24 How. Pr. (N. Y.) 92; Sweet *v.* Sweet, 15 How. Pr. (N. Y.) 169. *Contra*, Olney *v.* Olney, 7 Abb. Pr. (N. Y.) 350.

Verification on information and belief is sufficient under a statute requiring a complaint in a divorce suit to be under oath. Burdick *v.* Burdick, 7 Wash. 533, 35 Pac. 415.

88. Musselman *v.* Musselman, 44 Ind. 106; Darrow *v.* Darrow, 43 Iowa 411; McCraney *v.* McCraney, 5 Iowa 232, 68 Am. Dec. 702.

89. See also *supra*, XII, I.

90. Brown *v.* Brown, 138 Ind. 257, 37 N. E. 142; Eastes *v.* Eastes, 79 Ind. 363; Stewart *v.* Stewart, 28 Ind. App. 378, 62 N. E. 1023; Moore *v.* Moore, 130 N. C. 333, 41 S. E. 943; Nichols *v.* Nichols, 128 N. C. 108, 38 S. E. 296 (holding that it is necessary, in order that the court may take jurisdiction, that all the requisites mentioned in the affidavit shall be set out and sworn to by plaintiff); Ladd *v.* Ladd, 121 N. C. 118, 28 S. E. 190; Dickinson *v.* Dickinson, 7 N. C. 327, 9 Am. Dec. 608.

An amended complaint setting up a new ground for divorce should be accompanied by the affidavit. Holloman *v.* Holloman, 127 N. C. 15, 37 S. E. 68.

A substantial compliance with the statute is sufficient. Eastes *v.* Eastes, 79 Ind. 363; Stewart *v.* Stewart, 28 Ind. App. 378, 62 N. E. 1023 (holding that if the petition, itself sworn to by petitioner before the clerk, contains the matters required to be stated in the affidavit, it is a sufficient compliance with the statute); Moore *v.* Moore, 130 N. C. 333, 41 S. E. 943.

Oath.— A provision that the affidavit shall be sworn to before a certain officer is directory merely, and it is sufficient if sworn to before another officer qualified to administer oaths. Brown *v.* Brown, 138 Ind. 257, 37 N. E. 142; Eastes *v.* Eastes, 79 Ind. 363; Garret *v.* Garrett, 4 Wkly. Notes Cas. (Pa.) 240, *semble*. *Contra*, Grissom *v.* Grissom, 8 Wkly. Notes Cas. (Pa.) 484; Reeves *v.* Reeves, 12 Phila. (Pa.) 188.

Absence of collusion.— The want of an averment of absence of collusion is fatal and necessitates a dismissal of the petition. Ayres *v.* Gartner, 90 Mich. 380, 51 N. W. 461; Hopkins *v.* Hopkins, 132 N. C. 22, 43 S. E. 508; Rayl *v.* Rayl, (Tenn. Ch. App. 1900) 64 S. W. 309; De Armond *v.* De Armond, 92 Tenn. 40, 20 S. W. 422.

Waiver of objection.— If the affidavit is defective, the failure of the adverse party to object thereto until a hearing of the cause is a waiver of the objection. Holcombe *v.* Holcombe, 100 Mich. 421, 59 N. W. 170; Hackney *v.* Hackney, 9 Humphr. (Tenn.) 450.

91. *Delaware.*— Addicks *v.* Addicks, 1 Marv. 338, 41 Atl. 78, holding that it is immaterial, where a libel is deemed insufficient by the court, whether it is remedied by a bill of particulars or by amendment.

Massachusetts.— Harrington *v.* Harrington, 107 Mass. 329.

New York.— Cardwell *v.* Cardwell, 12 Hun 92.

Pennsylvania.— Garrat *v.* Garrat, 4 Yeates 244; Shisler *v.* Shisler, 19 Wkly. Notes Cas. 130; Bartol *v.* Bartol, 18 Wkly. Notes Cas. 8; Lord *v.* Lord, 16 Wkly. Notes Cas. 496; Edwards *v.* Edwards, 3 Pittsb. 333; Butler *v.* Butler, 8 Pittsb. Leg. J. 390.

Rhode Island.— Mumford *v.* Mumford, 13 R. I. 19.

If the allegation of marriage is general, defendant may ask a bill of particulars in order to prepare for trial. Brinckle *v.* Brinckle, 10 Phila. (Pa.) 144. See also Bullock *v.* Bullock, 85 Hun (N. Y.) 373, 32 N. Y. Suppl. 1009.

Bill as matter of right.— Neither party is entitled as a matter of course to a bill of

uncertainty as to the time and place of the commission of an act of adultery, and the name of the *particeps criminis* is not given.[92]

L. Impertinent Allegations. Nothing will be considered impertinent in a pleading which can in any event be material to the pleader, either as a cause of action or ground of defense or in relation to matters incidentally involved in the suit.[93]

M. Issues, Proof, and Variance — 1. CONFINEMENT TO ISSUES. Generally speaking the parties to a divorce suit, as in other cases, are confined to the issues made by the pleadings.[94]

particulars. Mitchell *v.* Mitchell, 61 N. Y. 398; De Carrillo *v.* Carrillo, 53 Hun (N. Y.) 359, 6 N. Y. Suppl. 305, 17 N. Y. Civ. Proc. 220.

Affidavit for bill.— Where the complaint is indefinite as to the time and place of the misconduct and the charges are denied by verified answer, a motion for a bill of particulars will be granted on the affidavit of defendant's attorney. Kirkland *v.* Kirkland, 39 Misc. (N. Y.) 423, 80 N. Y. Suppl. 21. Under some circumstances, however, the affidavit must be made by defendant personally. De Carrillo *v.* Carrillo, 53 Hun (N. Y.) 359, 6 N. Y. Suppl. 305, 17 N. Y. Civ. Proc. 220.

92. Adams *v.* Adams, 16 Pick. (Mass.) 254; Kirkland *v.* Kirkland, 39 Misc. (N. Y.) 423, 80 N. Y. Suppl. 21; Hunter *v.* Hunter, 38 Misc. (N. Y.) 672, 78 N. Y. Suppl. 243; Hartopp *v.* Hartopp, 71 L. J. P. & Adm. 78, 87 L. T. Rep. N. S. 188, holding that under an order to give further and better particulars of the dates and places when and where alleged acts of adultery extending over ten months were committed, petitioner must give the best particulars which he can extract from the witnesses upon whom he relies to prove his case, and that it is not a sufficient compliance with such an order to allege generally that respondent and co-respondent were constantly meeting, and were in respondent's bedroom together, and that they were frequently out riding and driving alone together, from which the court will be asked to infer that they committed adultery.

Particulars as to time.—However, the court is not warranted in requiring complainant to specify the precise time, if the place is definitely alleged and the name of the co-respondent is given. Krauss *v.* Krauss, 73 N. Y. App. Div. 509, 77 N. Y. Suppl. 203; Ketcham *v.* Ketcham, 32 N. Y. App. Div. 26, 52 N. Y. Suppl. 961 (holding that where a particular act of adultery is definitely alleged, and other acts "at various other times, at certain other places to defendant unknown," a motion for a bill of particulars as to the latter allegation should not be granted in such form as to exclude evidence of general confession or general course of conduct); Carpenter *v.* Carpenter, 17 N. Y. Suppl. 195 (holding that under an allegation that defendant was living "in adulterous intercourse" with a woman, plaintiff should not be required to furnish a bill of particulars); De Carrillo *v.* Carrillo, 53 Hun (N. Y.) 359, 6 N. Y. Suppl. 305, 17 N. Y. Civ. Proc. 220; Oviatt *v.* Oviatt, 14 Misc. (N. Y.) 127, 35 N. Y. Suppl. 654.

93. Anonymous, 15 Abb. Pr. N. S. (N. Y.) 311; Hopper *v.* Hopper, 11 Paige (N. Y.) 46, holding that nothing is impertinent in an answer which can in any event be material to defendant either as an absolute defense to the suit or in relation to the question of costs or amount of alimony to be decreed to complainant if she succeeds.

In a suit based on adultery, any collateral fact may be alleged the admission of which by defendant would be material either in establishing the general allegations of the bill or in determining the nature of the relief to which plaintiff may be entitled. Casey *v.* Casey, 2 Barb. (N. Y.) 59. However, charges of cruelty in the petition have been stricken out as impertinent. Pullen *v.* Pullen, (N. J. Ch. 1885) 1 Atl. 896; Monroy *v.* Monroy, 1 Edw. (N. Y.) 382.

In an action for separation based on cruelty the bill should not contain charges of adultery. Snover *v.* Snover, 10 N. J. Eq. 261; Klein *v.* Klein, 34 N. Y. Super. Ct. 48, holding that allegations of scandalous, indecent, and licentious acts committed with women other than plaintiff, unaccompanied with averments that such acts either led plaintiff to apprehend personal injury to herself or gave her pain or affected her body, mind, health, or feelings, are immaterial and irrelevant in a complaint for divorce from bed and board. However, it is not impertinent to allege acts of violence and misconduct on the part of defendant toward complainant's children and other members of his family. Perry *v.* Perry, 1 Barb. Ch. (N. Y.) 516.

94. Morrell *v.* Morrell, 3 Barb. (N. Y.) 236; Müller *v.* Müller, 6 Pa. Dist. 176, 18 Pa. Co. Ct. 400, holding that irrelevant and scandalous testimony not within the pleadings should be excluded, although exhibiting abundant grounds for divorce.

Legitimacy of child.— N. Y. Gen. Rules Prac. No. 75, requiring a husband who attempts to question the legitimacy of any of his wife's children to distinctly allege in his complaint that they are or that he believes them to be illegitimate, prevents the testing of the legitimacy of a child born before the marriage unless the question is presented by the complaint, notwithstanding that Code Civ. Proc. § 1760, permits the determination, as one of the issues in the case, of the legitimacy of a child born after the offense charged. Tully *v.* Tully, 28 Misc. (N. Y.) 54, 59 N. Y. Suppl. 818.

2. Necessity of Proof of Allegations. The complainant in a divorce case must ordinarily prove the essential allegations of his complaint.[95]

3. Variance — a. In General. It is a general rule in divorce as in all other cases that the allegations contained in the pleadings and the proof on the trial should correspond.[96]

b. As to Adultery. The essential allegations of the complaint as to the time and place of the commission of the adultery complained of and as to the person with whom it was committed should ordinarily be proved as laid.[97]

c. As to Cruelty. Where cruelty is alleged as a ground for divorce, the particular acts relied on in the complaint to establish it must be substantially proved as alleged.[98]

95. Bennett *v.* Bennett, 28 Cal. 599 (holding that plaintiff must prove residence within the state for the statutory period); Turner *v.* Turner, 3 Me. 398; Arborgast *v.* Arborgast, 8 How. Pr. (N. Y.) 297.

The marriage of the parties must be proved (Schmidt *v.* Schmidt, 29 N. J. Eq. 496; Belyew *v.* Belyew, (Tex. Civ. App. 1895) 32 S. W. 40) if denied in the answer (Fox *v.* Fox, 25 Cal. 587; Hill *v.* Hill, 2 Mass. 150).

Where defendant files a cross petition for divorce, that relief may be granted him solely on evidence introduced by plaintiff, however. Glasscock *v.* Glasscock, 94 Ind. 163.

96. *Colorado.*— Cairnes *v.* Cairnes, 29 Colo. 260, 68 Pac. 233, 93 Am. St. Rep. 55; Rosenfeld *v.* Rosenfeld, 21 Colo. 16, 40 Pac. 49.

Connecticut.— Trubee *v.* Trubee, 41 Conn. 36, holding that where a petition alleges misconduct of defendant destroying petitioner's happiness and defeating the purposes of the marriage adultery cannot be proved.

New Jersey.— Zule *v.* Zule, 1 N. J. Eq. 96, holding that where a bill alleges cruelty as a ground of divorce and it appears that defendant had a former wife living at the time of his marriage with plaintiff, her request for a judgment of nullity must be refused.

New York.— Anonymous, 17 Abb. Pr. 48.

North Carolina.— Foy *v.* Foy, 35 N. C. 90, holding that since a complaint in a divorce case must be sworn to, it is more emphatically required in such cases than in others that the allegations and proof should correspond.

Pennsylvania.— Kershaw *v.* Kershaw, 5 Pa. Dist. 551.

See 17 Cent Dig. tit. "Divorce," § 351.

An allegation of the marriage of the parties authorizes the admission of proof of a common-law marriage, however. Cuneo *v.* De Cuneo, 24 Tex. Civ. App. 436, 59 S. W. 284.

97. Prince *v.* Prince, 25 N. J. Eq. 310; Scheffling *v.* Scheffling, 44 N. J. Eq. 438, 15 Atl. 577; Miller *v.* Miller, 20 N. J. Eq. 216, the last two cases holding that the offense must be shown to have been committed so near the time alleged that the variance shall not operate to the prejudice of defendant. See, however, XIII, B, 6, a, (II), (B), note 27.

Adultery after filing of bill.— The acts of adultery must be proved to have occurred before the filing of a bill for divorce or it will not be granted. Ferrier *v.* Ferrier, 4 Edw. (N. Y.) 296.

Where a single act of adultery is relied on and the particular time is specified in the complaint, the proof should be confined to the precise time of the offense as so specified. Bennett *v.* Bennett, 24 Mich. 482; Farnsworth *v.* Farnsworth, 8 Ohio S. & C. Pl. Dec. 171.

Place.— It has been held that if the place is particularly specified, proof of adultery at another place is insufficient. Adams *v.* Adams, 20 N. H. 299, 51 Am. Dec. 219; Prince *v.* Prince, 25 N. J. Eq. 310. *Contra*, Washburn *v.* Washburn, 8 Mass. 131.

Particeps criminis.— If adultery is alleged with a particular person, proof of adultery with any other person is not sufficient. Washburn *v.* Washburn, 5 N. H. 195; Prince *v.* Prince, 25 N. J. Eq. 310; Miller *v.* Miller, 20 N. J. Eq. 216; Mills *v.* Mills, 18 N. J. Eq. 444; Germond *v.* Germond, 6 Johns. Ch. (N. Y.) 347, 10 Am. Dec. 335. If, however, it is alleged to have been committed with persons unknown to complainant, proof of adultery with any persons identified in the evidence may be permitted (Adams *v.* Adams, 20 N. H. 299, 51 Am. Dec. 219), provided that they were not known to complainant (Miller *v.* Miller, *supra*; Mills *v.* Mills, *supra*).

98. David *v.* David, 27 Ala. 222; Cole *v.* Cole, 23 Iowa 433; Westphal *v.* Westphal, 81 Minn. 242, 83 N. W. 988; Segelbaum *v.* Segelbaum, 39 Minn. 258, 39 N. W. 492, all holding that where particular acts of violence are charged, they must be substantially proved, although non-essential circumstances need not be proved precisely as set forth.

Proof of different acts.— The proof should be limited to the particular acts of cruelty relied upon as constituting a ground for divorce (Winterburg *v.* Winterburg, 52 Kan. 406, 34 Pac. 971; Ford *v.* Ford, 104 Mass. 198; Chadwick *v.* Chadwick, 52 N. J. Eq. 539, 28 Atl. 1051; McQueen *v.* McQueen, 82 N. C. 471; Thorp *v.* Thorp, Wright 763; Sites *v.* Sites, 9 Pa. Dist. 192, 23 Pa. Co. Ct. 439), although the court may take into account other acts of cruelty explanatory of the relations of the parties and tending to corroborate the specific acts alleged. See *infra*, XIII, B, 6, b, (II).

XIII. EVIDENCE.[99]

A. Burden of Proof and Presumptions. The general rules of law concerning the burden of proof and presumptions are applicable in suits for divorce.[1] Plaintiff bears the burden of establishing the allegations of the complaint.[2] Thus if he asserts it as a ground for divorce he must prove adultery,[3] fraud in concealing antenuptial pregnancy,[4] desertion,[5] habitual drunkenness,[6] or the existence of a prior marriage between defendant and a third person.[7] Defendant on

99. See, generally, DEPOSITIONS; EVIDENCE; WITNESSES.

1. See, generally, EVIDENCE.

2. Garcin *v.* Garcin, 62 N. J. Eq. 189, 50 Atl. 71; Weigel *v.* Weigel, 60 N. J. Eq. 322, 47 Atl. 183 (both cases holding that plaintiff must prove the existence of the misconduct complained of); Linden *v.* Linden, 36 Barb. (N. Y.) 61, 63 (where the court said: "Nothing is to be taken in favor of the applicant by presumption or intendment, as to the facts, even in the case of a default in answering, or at the hearing").

3. Williams *v.* Williams, 67 Tex. 198, 2 S. W. 823; Bradish *v.* Bliss, 35 Vt. 326; N. *v.* N., 9 Jur. N. S. 1203, 9 L. T. Rep. N. S. 265, 3 Swab. & Tr. 234.

Evidence in equipoise.—Where the facts relied on to establish adultery may as well import innocence as guilt, they must be held to import innocence. Carter *v.* Carter, 62 Ill. 439; Pollock *v.* Pollock, 71 N. Y. 137; Poillon *v.* Poillon, 78 N. Y. App. Div. 127, 79 N. Y. Suppl. 545; Steffens *v.* Steffens, 16 Daly (N. Y.) 363, 11 N. Y. Suppl. 424; Conway *v.* Conway, 37 Misc. (N. Y.) 414, 75 N. Y. Suppl. 760; Pfeiffer *v.* Pfeiffer, 9 N. Y. Suppl. 28; Donnelly *v.* Donnelly, 63 How. Pr. (N. Y.) 481. See *infra*, note 42.

Presumption of continuance of illicit relation.— Persons who have been cohabiting illicitly are presumed to continue their criminal intercourse so long as they live under the same roof (Smith *v.* Smith, 4 Paige (N. Y.) 432, 27 Am. Dec. 75), but the existence of an adulterous relation between a wife and a man other than her husband prior to the marriage raises no presumption of its continuance subsequent to the marriage (Razor *v.* Razor, 42 Ill. App. 504). See *infra*, XIII, C, 4, note 68.

4. McCulloch *v.* McCulloch, 69 Tex. 682, 7 S. W. 593, 5 Am. St. Rep. 96.

Presumption of fatherhood.—Where a wife gives birth to a fully developed child three and a half months after marriage, the presumption is that the husband is the father. McCullough *v.* McCullough, 69 Tex. 682, 7 S. W. 593, 5 Am. St. Rep. 96. This presumption is rebuttable however. Harrell *v.* Harrell, (Tex. Civ. App. 1897) 42 S. W. 1040. See also *infra*, XIII, C, 6, a, (II), (C).

5. Rogers *v.* Rogers, 18 N. J. Eq. 445 (holding that the circumstances and manner of the desertion must be shown, so that the court may determine whether defendant intended to abandon plaintiff and when such abandonment commenced); Hannigan *v.* Hannigan, 14 York Leg. Rec. 18; Smith *v.* Smith, 28 L. J. P. & M. 27, 7 Wkly. Rep. 382, 1 Swab. & Tr. 359.

Wilfulness and obstinacy.— If the wife's desertion under the statute must be wilful and obstinate, the burden is on the husband to show both wilfulness and obstinacy. Wood *v.* Wood, 63 N. J. Eq. 688, 53 Atl. 51; Loux *v.* Loux, 57 N. J. Eq. 561, 41 Atl. 358; Tracey *v.* Tracey, (N. J. Ch. 1899) 43 Atl. 713; Payne *v.* Payne, (N. J. Ch. 1894) 28 Atl. 449; Ogilvie *v.* Ogilvie, 37 Oreg. 171, 61 Pac. 627.

Consent of complainant.— A husband must prove by the weight of evidence that his wife separated herself from him by her own wilful act against his wishes. Wood *v.* Wood, 63 N. J. Eq. 688, 53 Atl. 51; Grant *v.* Grant, 36 N. J. Eq. 502; Sergent *v.* Sergent, 33 N. J. Eq. 204; Taylor *v.* Taylor, 28 N. J. Eq. 207; Stone *v.* Stone, 25 N. J. Eq. Eq. 445; Bowlby *v.* Bowlby, 25 N. J. Eq. 406; Jennings *v.* Jennings, 13 N. J. Eq. 38.

Misconduct of defendant.— Where it is alleged that complainant was compelled to separate from her husband because of his gross cruelty and that such misconduct constitutes desertion, the burden of proof is on her to show that fact. Seeley *v.* Seeley, 64 N. J. Eq. 1, 53 Atl. 387; Herold *v.* Herold, 47 N. J. Eq. 210, 20 Atl. 375, 9 L. R. A. 696; Starkey *v.* Starkey, 21 N. J. Eq. 135; Frush *v.* Frush, (N. J. Ch. 1890) 20 Atl. 261.

6. McCraw *v.* McCraw, 171 Mass. 146, 50 N. E. 526.

Presumption of continuance.— When gross and confirmed habits of intoxication are shown before separation of the spouses, they are presumed to continue, in the absence of evidence to the contrary. McCraw *v.* McCraw, 171 Mass. 146, 50 N. E. 526.

7. Harris *v.* Harris, 8 Ill. App. 57; Stymiest *v.* Stymiest, 16 Pa. Co. Ct. 236, both cases holding that when a prior marriage between one of the spouses and a third person is shown, it does not overcome the presumption of the validity of the later marriage, in the absence of evidence that the former spouse was then alive. And although it be shown that at the time of the second marriage the former spouse was living, the presumption of the validity of that marriage is not overcome, in the absence of evidence that the former spouses had not been divorced. Harris *v.* Harris, *supra*. See also *supra*, VIII, A, note 68. See, generally, DEATH, 13 Cyc. 295 *et seq.*; MARRIAGE.

the other hand bears the burden of establishing affirmative defenses set up in the answer. Thus the burden is ordinarily on him to show justification for his apparent misconduct;[8] and if connivance[9] or condonation[10] is set up as a defense, defendant must prove it.

B. Admissibility — 1. Admissions and Confessions. An admission or confession of guilt by defendant, while not alone sufficient to warrant a decree,[11] is admissible in connection with other evidence,[12] unless a statute forbids.[13]

2. Character and Reputation. Unless directly put in issue evidence is not

8. Morrison *v.* Morrison, 20 Cal. 431; Orr *v.* Orr, 8 Bush (Ky.) 156; Mendenhall *v.* Mendenhall, 12 Pa. Super. Ct. 290; Klopfer's Appeal, 1 Mona. (Pa.) 81, all holding that the burden is not on a plaintiff who seeks a divorce for desertion to show that no cause for the desertion existed. *Contra,* Besch *v.* Besch, 27 Tex. 390.

Exceptions.— However, where the alleged desertion consists of defendant's misconduct compelling plaintiff to separate from him, the burden is on plaintiff to show that her separation was compelled by the misconduct (see *supra,* note 5), and a husband who seeks a divorce because his wife refused to remove with him from one state to another must show that her refusal was unreasonable and that his conduct was such that it would be safe for her to live with him (Gleason *v.* Gleason, 4 Wis. 64).

9. Farace *v.* Farace, 1 N. Y. Civ. Proc. 419, 61 How. Pr. (N. Y.) 61.

In some states plaintiff is required to show absence of connivance where default is made by defendant. Ivison *v.* Ivison, 29 Misc. (N. Y.) 240, 61 N. Y. Suppl. 118; Hanks *v.* Hanks, 3 Edw. (N. Y.) 469. See also Simmons *v.* Simmons, 47 Mich. 253, 645, 10 N. W. 360; Emmons *v.* Emmons, Walk. (Mich.) 532. However, N. Y. Code Civ. Proc. § 1757, requiring plaintiff to prove the material allegations of the complaint in case defendant makes default, and rule 73 of the supreme court, providing that when the action is based on adultery, "unless it is averred in the complaint that the adultery charged was committed without the consent, connivance, privity, or procurement of the plaintiff, and that plaintiff has not voluntarily cohabited with defendant since the discovery thereof, judgment shall not be rendered for the relief demanded until plaintiff proves such facts by affidavit," do not require plaintiff, where defendant contests the action, to furnish proof of such facts when not alleged in the complaint. Lowenthal *v.* Lowenthal, 157 N. Y. 236, 51 N. E. 995; McCarthy *v.* McCarthy, 143 N. Y. 235, 38 N. E. 288.

10. Graham *v.* Graham, 50 N. J. Eq. 701, 25 Atl. 358; Merrill *v.* Merrill, 41 N. Y. App. Div. 347, 58 N. Y. Suppl. 503.

Presumption from cohabitation.—Condonation of an offense is presumed from a continuance of marital cohabitation subsequent to its commission with full knowledge of it (Burns *v.* Burns, 60 Ind. 259. See *supra,* VIII, F, 3, a), and accordingly the burden may be shifted to plaintiff to show that the circumstances were such that the cohabitation did not constitute condonation (Stevens *v.* Stevens, 14 N. J. Eq. 374; Kane *v.* Kane, 3 Edw. (N. Y.) 389). Plaintiff's knowledge of defendant's guilt will not be presumed but must be proved by defendant. Odom *v.* Odom, 36 Ga. 286. The presumption of condonation arising from cohabitation may be rebutted by the accompanying circumstances (Whispell *v.* Whispell, 4 Barb. (N. Y.) 217), and will not be enforced against the wife to the same extent as against the husband (Phillips *v.* Phillips, 1 Ill. App. 245; Denison *v.* Denison, 4 Wash. 705, 30 Pac. 1100. See *supra,* VIII, F, 2, 3).

Presumption from lapse of time.— Condonation of cruelty may be presumed from lapse of time. Hitchins *v.* Hitchins, 140 Ill. 326, 29 N. E. 888 [*affirming* 41 Ill. App. 82]; Smith *v.* Smith, 43 N. H. 234; Fellows *v.* Fellows, 8 N. H. 160. Lapse of time as laches see *supra,* VIII, M, 2.

11. See *infra,* XIII, C, 3.

12. Morehouse *v.* Morehouse, 70 Conn. 420, 39 Atl. 516; Johns *v.* Johns, 29 Ga. 718.

Admission by letter.— Where divorce is resisted because of petitioner's adultery, a letter written by him confessing the commission thereof, although not signed or delivered to any person, is admissible. Lenning *v.* Lenning, 176 Ill. 180, 52 N. E. 46.

Involuntary confessions.— A confession is not admissible unless it is the voluntary act of the party making it. Perkins *v.* Perkins, 59 N. J. Eq. 515, 46 Atl. 173 (where the husband procured by threats his wife's signature to a confession of adultery); Summerbell *v.* Summerbell, 37 N. J. Eq. 603; Derby *v.* Derby, 21 N. J. Eq. 36; Callender *v.* Callender, 53 How. Pr. (N. Y.) 364.

13. King *v.* King, 28 Ala. 315; Evans *v.* Evans, 41 Cal. 103; Burke *v.* Burke, 44 Kan. 307, 24 Pac. 466, 21 Am. St. Rep. 283, all holding that a statute declaring that no divorce can be granted on the confession of either of the parties does not preclude the admissibility of such a confession but merely prevents a divorce where no other evidence is produced. See, however, Toole *v.* Toole, 112 N. C. 152, 16 S. E. 912, 34 Am. St. Rep. 479; Steele *v.* Steele, 104 N. C. 631, 10 S. E. 707; Perkins *v.* Perkins, 88 N. C. 41; Bascom *v.* Bascom, Wright (Ohio) 632; Brainard *v.* Brainard, Wright (Ohio) 354; Endick *v.* Endick, 61 Tex. 559; Stafford *v.* Stafford, 41 Tex. 111; Hanna *v.* Hanna, 3 Tex. Civ. App. 51, 21 S. W. 720; Hampton *v.* Hampton, 87 Va. 148, 12 S. E. 340; Cralle *v.* Cralle, 79 Va. 182, all holding that confessions are not

admissible to show the general character[14] or the general reputation[15] of either party to a divorce suit. Where adultery is charged, however, evidence of reputation is by the weight of authority admissible to prove the good character of defendant,[16] although it is not admissible as substantive proof of adultery.[17]

3. INDECENCY. The mere indecency of disclosures is not sufficient for the exclusion of evidence which is relevant and material and necessary for the purposes of the suit.[18]

4. OPINIONS. The opinions or conclusions of witnesses as to the facts in issue are not generally admissible in divorce cases.[19]

admissible under a statute providing that a decree of divorce shall be rendered upon full and satisfactory evidence "independent of the confession or admission of either party."

14. Humphrey *v.* Humphrey, 7 Conn. 116; Berdell *v.* Berdell, 80 Ill. 604; Sullivan *v.* Sullivan, 92 Me. 84, 42 Atl. 230, all holding that unless the general character of a party is directly put in issue, evidence of his general character is inadmissible, whether offered to rebut positive or presumptive testimony. However, the alleged grounds for divorce may be of such a nature as to bear directly upon his character, such for instance as a charge of cruelty consisting of a forced, vulgar, and excessive exercise of marital rights, in which case he may take the initiative and prove good character. Bu Bose *v.* Du Bose, 75 Ga. 753. See also cases cited *infra*, note 16.

15. Evans *v.* Evans, 93 Ky. 510, 20 S. W. 605, 14 Ky. L. Rep. 628; Dwyer *v.* Dwyer, 2 Mo. App. 17, both cases holding that the general reputation of either party for good or bad temper cannot be shown.

General reputation for morality in the neighborhood cannot be proved, where no attack has been made on the general character of the party. Breedlove *v.* Breedlove, 27 Ind. App. 560, 61 N. E. 797.

General reputation as to particular vices which are directly in issue is admissible. Graft *v.* Graft, 76 Ind. 136 (holding that where alleged cruelty consists of the husband's false accusation against his wife's chastity, she may show her good character); O'Bryan *v.* O'Bryan, 13 Mo. 16, 53 Am. Dec. 128; Miller *v.* Miller, 14 Mo. App. 418. But reputation for general good character is not admissible to rebut an attack upon the character in a particular respect. Berdell *v.* Berdell, 80 Ill. 604. And where the issue is whether the libellee has since the marriage contracted a habit of intoxication, evidence of her reputation for sobriety before marriage is not admissible. Sullivan *v.* Sullivan, 92 Me. 84, 42 Atl. 230.

16. Hilker *v.* Hilker, 153 Ind. 425, 55 N. E. 81 (holding that where evidence of particular acts of indiscretion by a wife is introduced, she may give evidence of her general reputation and character for chastity in the neighborhood where she resides); O'Bryan *v.* O'Bryan, 13 Mo. 16, 53 Am. Dec. 128 (where the rule is maintained on the ground that a charge of adultery brings in issue defendant's good character and reputation and on the further ground that such a charge is in its nature criminal and that such evidence should be admitted as in criminal cases); Warner *v.* Warner, 69 N. H. 137, 44 Atl. 908; Harper *v.* Harper, Wright (Ohio) 283 (holding that plaintiff's general reputation for chastity may be inquired into, but not as to specific acts). *Contra*, Humphrey *v.* Humphrey, 7 Conn. 116; Yallaly *v.* Yallaly, 39 Mo. 490.

Reputation of co-respondent.—It is not error to exclude evidence of the good reputation for chastity of the alleged *particeps criminis*, where her general reputation has not been put in issue and she is neither a party to nor a witness in the case. Cowan *v.* Cowan, 16 Colo. 335, 26 Pac. 934.

17. *Connecticut.*—Humphrey *v.* Humphrey, 7 Conn. 116.

Illinois.— Carter *v.* Carter, 62 Ill. 439; Thomas *v.* Thomas, 51 Ill. 162.

Kentucky.— Evans *v.* Evans, 93 Ky. 510, 20 S. W. 605, 14 Ky. L. Rep. 628.

Michigan.— Marble *v.* Marble, 36 Mich. 386, holding that such evidence is subsidiary, subordinate, and incidental to the substantive proof, and serves merely to explain the conduct of the parties toward each other.

New Hampshire.— Washburn *v.* Washburn, 5 N. H. 195.

New Jersey.— Miller *v.* Miller, 20 N. J. Eq. 216.

New York.— Budd *v.* Budd, 55 N. Y. App. Div. 113, 67 N. Y. Suppl. 43.

See 17 Cent. Dig. tit. "Divorce," § 372.

18. Abernathy *v.* Abernathy, 8 Fla. 243 (holding, however, that the courts should require the examination of witnesses to be conducted in a spirit of delicacy, avoiding vulgar and obscene language); Melvin *v.* Melvin, 58 N. H. 569, 42 Am. Rep. 605.

19. Leaning *v.* Leaning, 25 N. J. Eq. 241; Richards *v.* Richards, 37 Pa. St. 225; Sheffield *v.* Sheffield, 3 Tex. 79. *Compare* Cameron *v.* State, 14 Ala. 546, 48 Am. Dec. 111; Myers *v.* Myers, 83 Va. 806, 6 S. E. 630.

Adultery.— The rule is the same in actions based on adultery. Soper *v.* Soper, 29 Mich. 305; Trevino *v.* Trevino, 54 Tex. 261. If, however, the conclusion of the witness is warranted by the facts as testified to by him, it may be admitted. Leary *v.* Leary, 18 Ga. 696 (where a witness was allowed to testify to his opinion in respect to solicitude manifested by a wife at the sick-bed of a man not her husband); Carter *v.* Carter, 152 Ill. 434, 28 N. E. 948, 38 N. E. 669; Bizer *v.* Bizer, 110 Iowa 248, 81 N. W. 465.

5. Evidence of Residence. The residence of plaintiff should be proved in the same manner as other essential facts.[20]

6. Evidence of Particular Offenses — a. Adultery — (i) *In General.* Adultery may be established not only by direct evidence of the commission of the offense,[21] but also by indirect or circumstantial evidence.[22] Whatsoever the character of the evidence offered, its admissibility is ordinarily governed by the rules of evidence applied in civil cases generally.[23]

(ii) *Circumstantial Evidence* — (a) *In General.* Indirect or circumstantial evidence is admissible to prove adultery.[24] The facts and circumstances, to be admissible in evidence, must be relevant and material, and such as may produce a reasonable inference that the offense has been committed.[25]

(b) *Disposition and Opportunity.* An adulterous disposition and an opportunity to commit the offense are in combination important factors in proving adultery by circumstantial evidence.[26] These facts may be proved by either direct or circumstantial evidence; and any circumstance is therefore admissible that tends to show a disposition on the part of the accused to commit adultery[27]

In ecclesiastical practice in divorce cases the rule was otherwise. Atkinson *v.* Atkinson, 2 Add. Eccl. 484, 2 Eng. Eccl. 387; Elwes *v.* Elwes, 1 Hagg. Const. 269, 4 Eng. Eccl. 401; Crewe *v.* Crewe, 3 Hagg. Eccl. 123, 128, 5 Eng. Eccl. 45, where Lord Stowell said: "The court, though it cannot rely on the opinion of the witnesses, has a right to know their impression and belief, whether the crime was committed or not; and it is material that the examiner should understand that it is necessary the witnesses should be required to give this information."

20. Sewall *v.* Sewall, 122 Mass. 156, 23 Am. Rep. 299 (where a voting list of a town, without evidence that a person's name was placed thereon at his request, and a tax-list with a memorandum of "paid" against his name, were held to be inadmissible in his favor to show that his domicile was in that town); Townsend *v.* Townsend, 2 R. I. 150 (holding that *ex parte* affidavits are inadmissible).

21. Goldie *v.* Goldie, 39 Misc. (N. Y.) 389, 79 N. Y. Suppl. 357.

22. See *infra*, XIII, C, 6, a, (II).

23. See, generally, Evidence; Witnesses.

Admissibility of evidence of: Admissions see *supra*, XIII, B, 1. Character and reputation see *supra*, XIII, B, 2. Opinions see *supra*, XIII, B, 4.

Indecency as ground of exclusion see *supra*, XIII, B, 3.

24. Richardson *v.* Richardson, 4 Port. (Ala.) 467, 30 Am. Dec. 538; Thayer *v.* Thayer, 101 Mass. 111, 100 Am. Dec. 110; Marble *v.* Marble, 36 Mich. 386; Chase *v.* Chase, 19 N. Y. Suppl. 268.

Interest in alleged paramour's welfare.— Evidence of defendant's unusual interest in the welfare of the alleged paramour is admissible. Leary *v.* Leary, 18 Ga. 696; Toole *v.* Toole, 112 N. C. 152, 16 S. E. 912, 34 Am. St. Rep. 439, holding that evidence that a wife requested to be allowed to pay the costs of a criminal prosecution against her alleged paramour is competent as showing her interest in and association with him.

Alienation of affections.— Evidence tending to show an alienation of the affections of the husband or wife is admissible in connection with other evidence as affording an inference of adultery. Richardson *v.* Richardson, 4 Port. (Ala.) 467, 30 Am. Dec. 538; Mulock *v.* Mulock, 1 Edw. (N. Y.) 14; Saunders *v.* Saunders, 10 Jur. 143.

Non-support.— Evidence that a husband had contributed nothing to the support of his wife is admissible as tending to show his unfaithfulness to his marriage vows. Carpenter *v.* Carpenter, 9 N. Y. Suppl. 583.

25. Kilburn *v.* Kilburn, 89 Cal. 46, 26 Pac. 636, 23 Am. St. Rep. 447; Franey *v.* Franey, 28 N. Y. App. Div. 50, 50 N. Y. Suppl. 918 (holding that evidence that an accused wife was indiscreet in her language and under the influence of intoxicants at her home in the presence of the husband's friends, who had assembled at his request, is inadmissible); Lyon *v.* Lyon, 62 Barb. (N. Y.) 138; Beadleston *v.* Beadleston, 2 N. Y. Suppl. 809 (holding that evidence that a person with whom no adultery was attempted to be shown was discovered on one occasion in defendant's room while she was sick, using improper language and conducting himself in an improper manner, is not admissible).

26. McClung *v.* McClung, 40 Mich. 493, holding that it may be presumed that licentious persons of opposite sexes, consorting together and holding loose views of the marriage relation, commit such offenses as they have opportunity to commit.

27. Woodrick *v.* Woodrick, 141 N. Y. 457, 36 N. E. 395 (holding that salacious verses in the wife's handwriting are admissible against her); Carpenter *v.* Carpenter, 9 N. Y. Suppl. 583; Toole *v.* Toole, 109 N. C. 615, 14 S. E. 57.

Antenuptial incontinence.— Where the act is charged to have been committed with the same person with whom there was illicit connection prior to the marriage, the anterior connection may be shown to throw light on defendant's subsequent conduct. Bickley *v.* Bickley, 136 Ala. 548, 34 So. 946;

and an opportunity created by the parties themselves or otherwise for the commission of the offense.[28]

b. Cruelty — (i) *In General.* Subject to the ordinary rules of evidence,[29] cruelty may be proved by either direct[30] or circumstantial[31] evidence. And subject to the same limitations defendant may in turn adduce any evidence that tends to rebut the charges made.[32]

(ii) *Collateral Conduct.* While a divorce cannot be granted for particular acts of cruelty which are not pleaded,[33] yet evidence of acts not alleged may be admitted in explanation, corroboration, or aggravation of those specifically charged,[34] and the collateral acts may be shown for this purpose, although they

Mott *v.* Mott, 3 N. Y. App. Div. 432, 38 N. Y. Suppl. 261. And see Brooks *v.* Brooks, 145 Mass. 574, 14 N. E. 777, 1 Am. St. Rep. 485; Paul *v.* Paul, 11 N. Y. St. 71. *Contra*, Hedden *v.* Hedden, 21 N. J. Eq. 61.

Disposition of alleged paramour.—Evidence of the adulterous intent of the alleged paramour is not admissible in the absence of evidence connecting defendant with the same intent. Pond *v.* Pond, 132 Mass. 219 (where evidence that the alleged paramour went to a hotel with defendant and asked for connecting rooms was excluded, in the absence of evidence that they went to the hotel to commit adultery and that such request was made in defendant's presence); B. *v.* B., 10 Pa. Co. Ct. 558.

Acts of improper familiarity between defendant and the persons named as co-respondents may be shown. Brooks *v.* Brooks, 145 Mass. 574, 14 N. E. 777, 1 Am. St. Rep. 485; Thayer *v.* Thayer, 101 Mass. 111, 100 Am. Dec. 110; Mott *v.* Mott, 3 N. Y. App. Div. 532, 38 N. Y. Suppl. 261; Goldie *v.* Goldie, 39 Misc. (N. Y.) 389, 75 N. Y. Suppl. 357; Smith *v.* Smith, 13 N. Y. Suppl. 817; Caton *v.* Caton, 13 Jur. 431; Alexander *v.* Alexander, 6 Jur. N. S. 56, 2 Swab. & Tr. 95, 8 Wkly. Rep. 452.

Misconduct with another than alleged paramour.— Acts of indiscretion or of adultery committed with one not named as co-respondent are not admissible to prove the adultery charged in the complaint. Stevens *v.* Stevens, 54 Hun (N. Y.) 490, 8 N. Y. Suppl. 47; Goldie *v.* Goldie, 39 Misc. (N. Y.) 389, 75 N. Y. Suppl. 357; Davis *v.* Davis, 4 Misc. (N. Y.) 454, 24 N. Y. Suppl. 1151 [*affirmed* in 150 N. Y. 571, 44 N. E. 1123]; Beadleston *v.* Beadleston, 2 N. Y. Suppl. 809. And see McDermott *v.* State, 13 Ohio St. 332, 334, 82 Am. Dec. 444 (where it is said: "It by no means follows, that a desire to have sexual intercourse with one person, tends, legitimately, to prove a willingness to have like intercourse with another and different person. Indeed, the reverse is much the most probable"); Realf *v.* Realf, 77 Pa. St. 31. See, however, Derby *v.* Derby, 21 N. J. Eq. 36, 60 (where evidence of the husband's solicitation of a woman not named in the petition was admitted for the purpose of showing his disposition to be faithless to his marriage vows); Carpenter *v.* Carpenter, 9 N. Y. Suppl. 583 (where evidence of defendant's visits to other houses of ill fame than those in which the adultery was charged to have been committed, and of his lewd conduct on those occasions, was admitted as bearing on the probability of the evidence in support of the specific charges).

Pleading and proof.— Evidence of adulterous intercourse between the parties prior to the time set forth in the pleadings (Smith *v.* Smith, 13 N. Y. Suppl. 817; Lockyer *v.* Lockyer, 1 Edm. Sel. Cas. (N. Y.) 107) or subsequent thereto (Thayer *v.* Thayer, 101 Mass. 111, 100 Am. Dec. 110; Smith *v.* Smith, *supra*; Wales *v.* Wales, [1900] P. 63, 69 L. J. P. & Adm. 34. *Contra*, Foval *v.* Foval, 39 Ill. App. 644) is competent. It has been held, however, that evidence of improper intimacy with other men and at other times and places than those named in the bill of particulars is inadmissible. Realf *v.* Realf, 77 Pa. St. 31. See also XII, M, 3, b.

28. Mayer *v.* Mayer, 21 N. J. Eq. 246; Berckmans *v.* Berckmans, 16 N. J. Eq. 122; Freeman *v.* Freeman, 31 Wis. 235.

29. See, generally, Evidence; Witnesses. Evidence of character see *supra*, XIII, B, 2. Indecency as ground of exclusion see *supra*, XIII, B, 3.

30. See *infra*, XIII, B, 6, b. (ii).

31. Goodrich *v.* Goodrich, 44 Ala. 670; Berdell *v.* Berdell, 80 Ill. 604; Lockwood *v.* Lockwood, 2 Curt, Eccl. 281, 7 Eng. Eccl. 114; Dysart *v.* Dysart, 1 Rob. Eccl. 106; Jackson *v.* Jackson, 8 Grant Ch. (U. C.) 499, all holding that evidence that bruises and marks of violence were found on the body of complainant after she claimed to have received blows from her husband is competent in confirmation of her testimony. See, however, Edmond's Appeal, 57 Pa. St. 232.

32. Carter *v.* Carter, 152 Ill. 434, 28 N. E. 948, 38 N. E. 669 [*affirming* 37 Ill. App. 219], holding that where a wife charges that during a certain time she was in continued ill health as the result of cruelty, evidence that during that time she used to rise at six, go rowing with a male companion, and spend the day picknicking with him, is admissible to disprove the charge, although no improper relation between her and her companion is alleged.

Apprehension of danger.—Where the basis of the suit is misconduct of defendant because of which plaintiff apprehends bodily harm, any evidence is admissible that tends to show that such apprehension does not actually exist. Johns *v.* Johns, 29 Ga. 718; Griffin *v.* Griffin, 8 B. Mon. (Ky.) 120; Cook *v.* Cook, 11 N. J. Eq. 195.

33. See *supra*, XII, M, 3, c.

34. *Alabama.*— Folmar *v.* Folmar, 69 Ala. 84; David *v.* David, 27 Ala. 222; Moyler *v.* Moyler, 11 Ala. 620.

occurred after suit brought,[35] and although they do not in themselves amount to legal cruelty.[36] The admission of such evidence, however, rests largely in the discretion of the court.[37]

c. Desertion. The acts and declarations of the parties in connection with the alleged desertion and occurring at about the date thereof are admissible as constituting a part of the *res gestæ* for the purpose of explaining the relations existing between the parties and enabling the court to determine whether the alleged misconduct constitutes desertion.[38]

d. Habitual Drunkenness. In an action for divorce on the ground of habitual drunkenness, evidence of facts collateral to those charged in the complaint is admissible in support of the charge.[39] Thus a confirmed habit of drunkenness existing prior to the period alleged in the complaint[40] or at any time subsequent

Illinois.— Coursey *v.* Coursey, 60 Ill. 186, holding that evidence of defendant's drunkenness may be received in connection with that of violence or threats, since it tends to explain the character of the threats.

Indiana.— Breedlove *v.* Breedlove, 27 Ind. App. 560, 61 N. E. 797.

Maine.— Thompson *v.* Thompson, 79 Me. 286, 9 Atl. 888.

Minnesota.— Westphal *v.* Westphal, 81 Minn. 242, 83 N. W. 988; Segelbaum *v.* Segelbaum, 39 Minn. 258, 39 N. W. 492.

Pennsylvania.— Barnsdall *v.* Barnsdall, 171 Pa. St. 625, 33 Atl. 343, holding that the whole conduct of defendant during the period of the alleged ill treatment should be considered, and evidence descriptive of it is admissible.

Washington.— Lee *v.* Lee, 3 Wash. 236, 28 Pac. 355, holding that while no new and separate items of complaint not pleaded nor sufficient in themselves as grounds for divorce can be proved, minor circumstances and general conduct disclosing the *animus* of defendant in the commission of the acts charged may be shown.

England.— Squires *v.* Squires, 10 Jur. N. S. 756, 33 L. J. P. & M. 172, 3 Swab. & Tr. 541, 12 Wkly. Rep. 1028; Jewell *v.* Jewell, 6 L. T. Rep. N. S. 369, 2 Swab. & Tr. 573, 10 Wkly. Rep. 672, both holding that evidence of violent demeanor and language not pleaded but leading up to and making probable the acts charged may be admitted.

See 17 Cent. Dig. tit. "Divorce," § 379 *et seq.*

Communication of disease.— Where cruelty is alleged to consist of the communication of a venereal disease to the wife on two occasions shortly after the marriage, evidence that the husband had communicated the disease to her on another occasion not mentioned in the bill is admissible to show the extent of the cruel treatment. Hanna *v.* Hanna, 3 Tex. Civ. App. 51, 21 S. W. 720. And see Cook *v.* Cook, 32 N. J. Eq. 475, where evidence of defendant's association with abandoned women after his marriage and before he communicated a venereal disease to plaintiff was held admissible as showing that he exposed himself to the liability to contract the disease and with the knowledge of his condition recklessly communicated it to plaintiff.

Failure to provide for wife and children may be evidence of cruelty. Rupp *v.* Rupp, 59 Ill. App. 569; Eastes *v.* Eastes, 79 Ind. 363; Mack *v.* Handy, 39 La. Ann. 491, 2 So. 181; Morrison *v.* Morrison, 14 Mont. 8, 35 Pac. 1.

Condoned misconduct.—Evidence of cruelty which has been condoned is admissible to show the character of subsequent acts of cruelty alleged as a ground for a limited divorce. Doe *v.* Doe, 52 Hun (N. Y.) 405, 5 N. Y. Suppl. 514.

35. Gardner *v.* Gardner, 23 Nev. 207, 45 Pac. 139; Doughaday *v.* Crowell, 11 N. J. Eq. 201. *Contra*, Rayner *v.* Rayner, 49 Mich. 600, 14 N. W. 562.

36. Farnham *v.* Farnham, 73 Ill. 497; Day *v.* Day, 56 N. H. 316; Fowler *v.* Fowler, 11 N. Y. Suppl. 419, 19 N. Y. Civ. Proc. 282, holding that a statement made by defendant to plaintiff on the second night of their marriage that he did not love her and had made a mistake in marrying her was properly admitted as a fact in itself contributing to constitute plaintiff's cause of action.

37. Smith *v.* Smith, 167 Mass. 87, 45 N. E. 52; Ford *v.* Ford, 104 Mass. 198; Scoland *v.* Scoland, 4 Wash. 118, 29 Pac. 930, holding that whether proof of acts of cruelty subsequently to the commencement of the suit should be permitted is a question resting largely in the court's discretion.

38. Walter *v.* Walter, 117 Ind. 247, 20 N. E. 148 (holding that the conduct of the husband toward the wife previous to their separation may be proved); Fulton *v.* Fulton, 36 Miss. 517; Graves *v.* Graves, 10 Jur. N. S. 546, 33 L. J. P. & M. 66, 10 L. T. Rep. N. S. 273, 3 Swab. & Tr. 350, 12 Wkly. Rep. 1016.

Religious belief.— In an action for divorce on the ground of abandonment, the fact that defendant belonged to a religious sect whose doctrines prohibited cohabitation with an unbelieving spouse and which had caused the separation of other spouses is irrelevant. Haymond *v.* Haymond, 74 Tex. 414, 12 S. W. 90.

39. Morrison *v.* Morrison, 14 Mont. 8, 35 Pac. 1.

40. Reynolds *v.* Reynolds, 44 Minn. 132, 46 N. W. 236; McBee *v.* McBee, 22 Oreg. 329, 29 Pac. 887, 29 Am. St. Rep. 613; Gourlay *v.* Gourlay, 16 R. I. 705, 19 Atl. 142.

to the commencement of the suit and prior to its trial[41] may be shown, not as independent ground for divorce but as bearing upon the issue of defendant's habits at the time charged.

C. Weight and Sufficiency — 1. Preponderance of Evidence. A complainant must establish the grounds for divorce by a clear preponderance of evidence;[42] the criminal law rule that guilt must be proved beyond a reasonable doubt being inapplicable where a spouse is charged with matrimonial misconduct.[43] The same rule applies generally to affirmative defenses. They must be established by a preponderance of the evidence.[44]

2. Number and Character of Witnesses[45] — a. In General. In most jurisdictions marital misconduct as a ground for divorce may be proved by a single witness in the absence of a statutory provision to the contrary effect,[46] provided

41. Allen *v.* Allen, 73 Conn. 54, 46 Atl. 242, 84 Am. St. Rep. 135, 49 L. R. A. 142 (holding that evidence of the intemperate habits of defendant up to the time of trial is properly admitted in the discretion of the court, since the condition authorizing divorce must exist at the time of its granting); Mack *v.* Handy, 39 La. Ann. 491, 2 So. 181.

42. *Illinois.*— Lenning *v.* Lenning, 176 Ill. 180, 52 N. E. 46; Stiles *v.* Stiles, 167 Ill. 576, 47 N. E. 867; Chestnut *v.* Chestnut, 88 Ill. 548; McDeed *v.* McDeed, 67 Ill. 545; Carter *v.* Carter, 62 Ill. 439; Pittman *v.* Pittman, 72 Ill. App. 500.

Iowa.— Slater *v.* Slater, 73 Iowa 764, 35 N. W. 439.

Michigan.— German *v.* German, 57 Mich. 256, 23 N. W. 802; Richards *v.* Richards, 48 Mich. 530, 12 N. W. 688.

New Jersey.— Post *v.* Post, (Ch. 1902) 52 Atl. 1102; Patterson *v.* Patterson, (Ch. 1890) 20 Atl. 347; Derby *v.* Derby, 21 N. J. Eq. 36; Fischer *v.* Fischer, 18 N. J. Eq. 300; Berckmans *v.* Berckmans, 17 N. J. Eq. 453.

New York.— Moller *v.* Moller, 115 N. Y. 466, 22 N. E. 169; Allen *v.* Allen, 101 N. Y. 658, 5 N. E. 341; Conger *v.* Conger, 82 N. Y. 603; Pollock *v.* Pollock, 71 N. Y. 137; Poillon *v.* Poillon, 78 N. Y. App. Div. 127, 79 N. Y. Suppl. 545; Smith *v.* Smith, 89 Hun 610, 35 N. Y. Suppl. 556; Linden *v.* Linden, 36 Barb. 61; Conway *v.* Conway, 37 Misc. 414, 75 N. Y. Suppl. 760.

Ohio.— Farnsworth *v.* Farnsworth, 8 Ohio S. & C. Pl. Dec. 171.

Oregon.— Smith *v.* Smith, 5 Oreg. 186.

Pennsylvania.— Edmond's Appeal, 57 Pa. St. 232.

Texas.—Williams *v.* Williams, 67 Tex. 198, 2 S. W. 823; Moore *v.* Moore, 22 Tex. 237.

Vermont.— Lindley *v.* Lindley, 68 Vt. 421, 35 Atl. 349.

Virginia.— Hampton *v.* Hampton, 87 Va. 148, 12 S. E. 340.

Wisconsin.— Poertner *v.* Poertner, 66 Wis. 644, 29 N. W. 386.

See 17 Cent. Dig. tit. "Divorce," § 392.

Equally balanced testimony, as where the statements of the complainant are either denied or explained by defendant, is not sufficient. Jenkins *v.* Jenkins, 86 Ill. 340; German *v.* German, 57 Mich. 256, 23 N. W. 802; Fischer *v.* Fischer, 18 N. J. Eq. 300. See also *supra,* note 3.

Satisfactory evidence.— The circumstances relied on to establish the offense must be sufficient to satisfy the mind that it has actually taken place. Moller *v.* Moller, 115 N. Y. 466, 22 N. E. 169; Allen *v.* Allen, 101 N. Y. 658, 5 N. E. 341; Pollock *v.* Pollock, 71 N. Y. 137; Edmond's Appeal, 57 Pa. St. 232; Moore *v.* Moore, 22 Tex. 237; Caton *v.* Caton, 13 Jur. 431. The court is never required to adjudge defendant guilty of adultery merely because a witness swears to it or swears to facts from which it must be inferred. To justify such an adjudication, the court must be satisfied that the witnesses are honest, that they are not mistaken, and that their testimony is true. Fuller *v.* Fuller, 41 N. J. Eq. 460, 5 Atl. 725.

Positive and negative testimony.— The negative testimony of witnesses that they had never seen defendant drunk will not outweigh affirmative statements of other witnesses showing that he is an habitual drunkard. Smith *v.* Smith, 11 Ky. L. Rep. 859.

Preponderance of evidence of residence see *infra,* XIII, C, 5.

43. Lenning *v.* Lenning, 176 Ill. 180, 52 N. E. 46; Stiles *v.* Stiles, 167 Ill. 576, 47 N. E. 867; Chestnut *v.* Chestnut, 88 Ill. 548; Carter *v.* Carter, 62 Ill. 439; Pittman *v.* Pittman, 72 Ill. App. 500; Smith *v.* Smith, 5 Oreg. 186; Poertner *v.* Poertner, 66 Wis. 644, 29 N. W. 386.

Adultery is not required to be proved beyond a reasonable doubt. Allen *v.* Allen, 101 N. Y. 658, 5 N. E. 341; Farnsworth *v.* Farnsworth, 8 Ohio S. & C. Pl. Dec. 171; Lindley *v.* Lindley, 68 Vt. 421, 35 Atl. 349; Poertner *v.* Poertner, 66 Wis. 644, 29 N. W. 386. *Compare* Berckmans *v.* Berckmans, 17 N. J. Eq. 453; Pollock *v.* Pollock, 71 N. Y. 137; Edmond's Appeal, 57 Pa. St. 232.

44. Carter *v.* Carter, 62 Ill. 439; Deane *v.* Deane, 12 Jur. 63.

45. **To prove residence** *see infra,* XIII, C, 5.

46. Moyler *v.* Moyler, 11 Ala. 620; Bray *v.* Bray, 6 N. J. Eq. 628.

On the contrary, it has been held that a divorce cannot be granted on default upon the testimony of only one witness examined in open court and the deposition of one other witness. Suesemilch *v.* Suesemilch, 43 Ill. App. 573. See also Kline *v.* Kline, 104 Ill. App. 274. And in Kentucky by statute two

that the witness is of good character and his testimony is credible[47] and uncontradicted.[48]

b. Children of Parties. The children of the parties are not necessarily excluded as witnesses in a divorce case,[49] but their evidence should be carefully considered and be supported by corroborating circumstances.[50]

c. Parties — (I) *In General.* The common-law rule prohibiting one spouse from testifying against the other has generally been changed by statutes so far as divorce cases are concerned.[51] If, however, the evidence consists in the testimony of the parties alone, and this is in conflict, a divorce will not be granted.[52]

(II) *Corroboration* — (A) *Necessity.* Ordinarily the uncorroborated testimony of the party charging the offense is insufficient to establish the fact of its commission, whether it consist of adultery,[53] cruel and inhuman treatment,[54]

witnesses or one witness and strong corroborating circumstances are necessary to sustain the charge of adultery or lewdness. Barnett *v.* Barnett, 64 S. W. 844, 23 Ky. L. Rep. 1117; Blanton *v.* Blanton, 59 S. W. 518, 22 Ky. L. Rep. 1017; Taylor *v.* Taylor, 7 Ky. L. Rep. 666.

A sworn answer denying the allegations of the bill does not make it necessary to prove them by two witnesses (Derby *v.* Derby, 21 N. J. Eq. 36) where the statute does not require a sworn answer (Hughes *v.* Hughes, 19 Ala. 307) or where the bill waives an answer under oath (Van Inwagen *v.* Van Inwagen, 86 Mich. 333, 49 N. W. 154). However, if the answer is responsive to the allegations of the bill, defendant is entitled to the benefit of it, as in other cases in equity. Latham *v.* Latham, 30 Gratt. (Va.) 307.

47. Hughes *v.* Hughes, 44 Ala. 698 (holding the testimony of a single witness insufficient where he was not of good general character); Brown *v.* Brown, (N. J. Ch. 1901) 50 Atl. 608 (holding that while the testimony of a single witness may be sufficient proof of adultery, although denied by defendant upon oath, yet such effect must depend upon the probability of the story, the character of the witness, and the consistency of his evidence); Fanning *v.* Fanning, 2 Misc. (N. Y.) 90, 20 N. Y. Suppl. 849 (holding the testimony of a single witness insufficient where he was biased).

48. Poillon *v.* Poillon, 78 N. Y. App. Div. 127, 79 N. Y. Suppl. 545; Fanning *v.* Fanning, 2 Misc. (N. Y.) 90, 20 N. Y. Suppl. 849, both holding the testimony of a single witness insufficient where he is contradicted in one or more material points.

49. Draper *v.* Draper, 68 Ill. 17, where a child of nine years was permitted to testify in behalf of her mother, the complainant, it appearing that she understood the nature and effect of an oath. See, generally, WITNESSES.

50. Crowner *v.* Crowner, 44 Mich. 180, 6 N. W. 198, 28 Am. Rep. 245; Kneale *v.* Kneale, 28 Mich. 344, holding that a divorce should not be granted where the only evidence establishing the offense is that of the children of the parties, who are called upon to testify to the adulterous conduct of their mother, witnessed by them at an age when they were probably unable to understand the significance of the facts sworn to.

51. See, generally, WITNESSES.

52. Rie *v.* Rie, 34 Ark. 37; Daeters *v.* Daeters, (N. J. Ch. 1897) 38 Atl. 950; Sowers *v.* Sowers, 11 Phila. (Pa.) 213; Johnson *v.* Johnson, 35 Leg. Int. (Pa.) 70; Koch *v.* Koch, 1 Leg. Rec. (Pa.) 67. See also Duberstein *v.* Duberstein, 171 Ill. 133, 49 N. E. 316; Ortmann *v.* Ortmann, 92 Mich. 172, 52 N. W. 619.

Want of consent to the desertion alleged may be shown by complainant's own testimony. Northway *v.* Northway, 116 Mich. 19, 74 N. W. 211.

53. *Arkansas.*— Kurtz *v.* Kurtz, 38 Ark. 119.

Georgia.— Woolfolk *v.* Woolfolk, 53 Ga. 661.

Illinois.— Jenkins *v.* Jenkins, 86 Ill. 340.

Iowa.— Potter *v.* Potter, 75 Iowa 211, 39 N. W. 270.

Kentucky.— See Barnett *v.* Barnett, 64 S. W. 844, 23 Ky. L. Rep. 1117.

Minnesota.— True *v.* True, 6 Minn. 458.

New Jersey.— Cummins *v.* Cummins, 15 N. J. Eq. 138.

54. *Alabama.*— Jordan *v.* Jordan, 17 Ala. 466.

Arkansas.— Brown *v.* Brown, 38 Ark. 324; Rie *v.* Rie, 34 Ark. 37.

California.— Hatton *v.* Hatton, 136 Cal. 353, 68 Pac. 1016; Kuhl *v.* Kuhl, 124 Cal. 57, 56 Pac. 629; Andrews *v.* Andrews, 120 Cal. 184, 52 Pac. 298; Reid *v.* Reid, 112 Cal. 274, 44 Pac. 564; Venzke *v.* Venzke, 94 Cal. 225, 29 Pac. 499; Cooper *v.* Cooper, 88 Cal. 45, 25 Pac. 1062; Haley *v.* Haley, (1887) 14 Pac. 92; Haley *v.* Haley, 67 Cal. 24, 7 Pac. 3.

Illinois.— Duberstein *v.* Duberstein, 171 Ill. 133, 49 N. E. 316.

Maryland.— Goodhues *v.* Goodhues, 90 Md. 292, 44 Atl. 990.

Massachusetts.— Robbins *v.* Robbins, 100 Mass. 150, 97 Am. Dec. 91.

Michigan.— Ortman *v.* Ortman, 92 Mich. 172, 52 N. W. 619.

Missouri.— Maget *v.* Maget, 85 Mo. App. 6.

Nebraska.— Paden *v.* Paden, 28 Nebr. 275, 44 N. W. 228; Faller *v.* Faller, 10 Nebr. 144, 4 N. W. 1036.

New Jersey.— Garcin *v.* Garcin, 62 N. J. Eq. 189, 50 Atl. 71; Weigel *v.* Weigel, 60 N. J. Eq. 322, 47 Atl. 183. See Wood *v.* Wood, 63 N. J. Eq. 688, 53 Atl. 51.

Ohio.— Henry *v.* Henry, 11 Ohio Dec. (Reprint) 781, 29 Cinc. L. Bul. 156; Hansel *v.* Hansel, Wright 212.

desertion,[55] or any other ground for divorce.[56] This rule is not deemed inflexible, however.[57]

(B) *Sufficiency.* Complainant is not required to be corroborated as to each act testified to in support of the complaint; if a portion of those acts are corroborated by the testimony of third persons it is sufficient.[58] The corroborative testimony must, however, relate to some material fact testified to by the complainant;[59] it is not sufficient to produce a witness who testifies generally in

Tennessee.— Evans *v.* Evans, (Ch. App. 1900) 57 S. W. 367.

England.— N. *v.* N., 9 Jur. N. S. 1203, 9 L. T. Rep. N. S. 265, 3 Swab. & Tr. 234, holding that a wife's evidence of unnatural connection had or attempted to be had with her by the husband is not sufficient to establish the charge.

Contra.— Baker *v.* Baker, 195 Pa. St. 407, 46 Atl. 96; Flattery *v.* Flattery, 88 Pa. St. 27. See, however, Matheas *v.* Matheas, 1 Lack. Jur. 4; Stevenson *v.* Stevenson, 7 Phila. 386; Winter *v.* Winter, 7 Phila. 369; Dickenson *v.* Dickenson, 1 Del. Co. (Pa.) 293.

55. Hagle *v.* Hagle, 74 Cal. 608, 16 Pac. 518; Kimball *v.* Kimball, 13 N. H. 222; Seeley *v.* Seeley, 64 N. J. Eq. 1, 53 Atl. 387; Grover *v.* Grover, 63 N. J. Eq. 771, 50 Atl. 1051; Hires *v.* Hires, 61 N. J. Eq. 491, 48 Atl. 598; Costill *v.* Costill, 47 N. J. Eq. 346, 21 Atl. 35; Herold *v.* Herold, 47 N. J. Eq. 210, 20 Atl. 375, 9 L. R. A. 696; McShane *v.* McShane, 45 N. J. Eq. 341, 19 Atl. 465; Sandford *v.* Sandford, 32 N. J. Eq. 420; Pullen *v.* Pullen, 29 N. J. Eq. 541; Belton *v.* Belton, 26 N. J. Eq. 449; Tate *v.* Tate, 26 N. J. Eq. 55; Woodworth *v.* Woodworth, 21 N. J. Eq. 251; Moak *v.* Moak, (N. J. Ch. 1901) 48 Atl. 394; De Witt *v.* De Witt, (N. J. Ch. 1896) 36 Atl. 20; Wood *v.* Wood, 63 N. J. Ch. 688, 53 Atl. 51; Edmiston *v.* Edmiston, 8 Pa. Dist. 679; Parfrey *v.* Parfrey, 2 C. Pl. (Pa.) 257.

Justification for desertion may be established by defendant's uncorroborated testimony. White *v.* White, 86 Cal. 219, 24 Pac. 996.

56. Pyle *v.* Pyle, 10 Phila. (Pa.) 58, holding that duress is not proved by the unsupported testimony of libellant.

Impotency is not sufficiently proved by statements of the libellant alone. Fulmer *v.* Fulmer, 13 Phila. (Pa.) 166. *Contra,* Christman *v.* Christman, 7 Pa. Co. Ct. 595.

57. Robbins *v.* Robbins, 100 Mass. 150, 151, 97 Am. Dec. 91; Maget *v.* Maget, 85 Mo. App. 6; Baker *v.* Baker, 195 Pa. St. 407, 46 Atl. 96; Flattery *v.* Flattery, 88 Pa. St. 27; Krug *v.* Krug, 22 Pa. Super. Ct. 572; Christman *v.* Christman, 7 Pa. Co. Ct. 595. And see Rosecrance *v.* Rosecrance, 127 Mich. 322, 86 N. W. 800, holding that Comp. L. § 8652, enacting that no divorce shall be granted solely on the declarations of the parties, refers to confessions and not to the testimony of a party as a witness.

Uncontradicted testimony.— The uncorroborated testimony of the wife as to the misconduct of the husband may justify a divorce, where defendant neglects to take the stand and deny or explain the charges. Sylvis *v.* Sylvis, 11 Colo. 319, 17 Pac. 912; Baker *v.* Baker, 195 Pa. St. 407, 46 Atl. 96.

58. Andrews *v.* Andrews, 120 Cal. 184, 52 Pac. 298; Wolff *v.* Wolff, 102 Cal. 433, 36 Pac. 767, 1037; Venzke *v.* Venzke, 94 Cal. 225, 29 Pac. 499 (holding that where alleged cruelty consists of a charge of infidelity, the use of obscene and scurrilous language, and the communication of a loathsome disease, the wife's testimony is sufficiently corroborated by a letter from the husband charging her with committing adultery, by the testimony of a witness that the husband, when informed of his wife's charges, did not deny them, and by the testimony of a physician that he had treated the husband for the disease named); Cooper *v.* Cooper, 88 Cal. 45, 25 Pac. 1062; Matthai *v.* Matthai, 49 Cal. 90; Schipper *v.* Schipper, 57 Ill. App. 170; Lewis *v.* Lewis, 75 Iowa 200, 39 N. W. 271; Westphal *v.* Westphal, 81 Minn. 242, 83 N. W. 988 (holding that a wife's evidence as to specific acts of cruelty may be sufficiently corroborated by testimony of other witnesses to other acts of cruelty, especially where none of the charges are denied by the husband).

59. Hagle *v.* Hagle, 74 Cal. 608, 16 Pac. 518; Haley *v.* Haley, 67 Cal. 24, 7 Pac. 3 (holding that the wife's testimony as to her husband's cruelty in charging her with adultery was not sufficiently corroborated by an attorney's statements of communications which were made to him without cruel intent); Potter *v.* Potter, 75 Iowa 211, 39 N. W. 270 (holding that corroboration must be as to matters constituting the cause of action, and that evidence of plaintiff's daughter, who did not witness the alleged violence, as to the effect of it on plaintiff's health is insufficient); Lyon *v.* Lyon, 62 Barb. (N. Y.) 138. See, however, Kimball *v.* Kimball, 13 N. H. 222 (impliedly holding that if no other persons have knowledge of the facts, libellant may be corroborated by evidence that she sustains a good general character); Baker *v.* Baker, 195 Pa. St. 407, 46 Atl. 96 (where it was held that uncontradicted testimony of the wife as to cruelty was sufficiently corroborated by the fact that she left her husband ostensibly because of such cruelty); McAllister *v.* McAllister, 28 Wash. 613, 69 Pac. 119 (where evidence that the wife, although fairly robust before marriage, left her husband broken in health, and rapidly recovered her strength after the separation, was held sufficiently corroborative of her testimony of

corroboration of the matters alleged.[60] The testimony of plaintiff may be corroborated by that of defendant, in the absence of collusion,[61] or by the testimony of the children of the parties.[62]

3. Admissions and Confessions. Admissions or confessions of guilt are not ordinarily sufficient to establish marital misconduct as a ground for divorce,[63] unless they are corroborated by independent evidence of guilt,[64] or unless it

cruel treatment consisting of excessive marital intercourse during pregnancy).

60. Murray *v.* Murray, 66 Tex. 207, 18 S. W. 506.

61. Smith *v.* Smith, 119 Cal. 183, 48 Pac. 730, 51 Pac. 183. See, however, Scarborough *v.* Scarborough, 54 Ark. 20, 14 S. W. 1098, where it was held that the admissions of the husband cannot be taken as corroborative evidence of the truth of his wife's statements.

62. Roelke *v.* Roelke, 103 Wis. 204, 78 N. W. 923, holding that testimony of a son that he saw marks on his mother's throat immediately after she left home sufficiently corroborates her testimony that her husband choked her just before leaving home. And see Crichton *v.* Crichton, 73 Wis. 59, 40 N. W. 638. See, however, Robinson *v.* Robinson, 65 Mo. App. 216, holding that where the only corroborative testimony was that of the two children of the parties, aged respectively ten and thirteen years, who displayed bias and sympathy for plaintiff, their mother, from whom they had been separated for several months, the court was justified in denying a divorce.

63. *Georgia.*— Buckholts *v.* Buckholts, 24 Ga. 238.

Indiana.— McCulloch *v.* McCulloch, 2 Blackf. 60.

Iowa.— Lyster *v.* Lyster, 1 Iowa 130.

Kentucky.— Rodgers *v.* Rodgers, 13 Ky. L. Rep. 203.

Texas.— Mathews *v.* Mathews, 41 Tex. 331.

Confessions may aid other proof but the decree must not rest alone, nor perhaps essentially, on them, for there is great danger of confessions extorted or made designedly to furnish means to effect a divorce. They are therefore to be received with jealousy and to be weighed with caution, and to be supported by facts and circumstances tending to demonstrate the charge to the satisfaction of the court. Armstrong *v.* Armstrong, 32 Miss. 279; Lindsay *v.* Lindsay, 42 N. J. Eq. 150, 7 Atl. 666; Madge *v.* Madge, 42 Hun (N. Y.) 524; Lyon *v.* Lyon, 62 Barb. (N. Y.) 138; Fowler *v.* Fowler, 29 Misc. (N. Y.) 670, 61 N. Y. Suppl. 109; Montgomery *v.* Montgomery, 3 Barb. Ch. (N. Y.) 132; Betts *v.* Betts, 1 Johns. Ch. (N. Y.) 197.

Separation agreement.— The adoption and confirmation of a prior separation agreement between the parties by a subsequent decree of separation does not invalidate the decree as being founded on the admissions of the parties. Marshall *v.* Baynes, 88 Va. 1040, 14 S. E. 978.

64. *Alabama.*— Richardson *v.* Richardson, 4 Port. 467, 30 Am. Dec. 538.

Arkansas.—Scarborough *v.* Scarborough, 54 Ark. 20, 14 S. W. 1098; Kurtz *v.* Kurtz, 38 Ark. 119; Rie *v.* Rie, 34 Ark. 37; Welch *v.* Welch, 16 Ark. 527.

California.— Baker *v.* Baker, 13 Cal. 87.

Georgia.— Woolfolk *v.* Woolfolk, 53 Ga. 661; Johns *v.* Johns, 29 Ga. 718.

Louisiana.— Mack *v.* Handy, 39 La. Ann. 491, 2 So. 181; Weigel's Succession, 18 La. Ann. 49; Harman *v.* McLeland, 16 La. 26.

Massachusetts.— Baxter *v.* Baxter, 1 Mass. 346.

Michigan.— Robinson *v.* Robinson, 16 Mich. 79; Sawyer *v.* Sawyer, Walk. 48.

Minnesota.— Clark *v.* Clark, 86 Minn. 249, 90 N. W. 390; True *v.* True, 6 Minn. 458.

Mississippi.— Armstrong *v.* Armstrong, 32 Miss. 279.

Missouri.— Twyman *v.* Twyman, 27 Mo. 383.

New Hampshire.—White *v.* White, 45 N. H. 121; Washburn *v.* Washburn, 5 N. H. 195.

New Jersey.— Kloman *v.* Kloman, 62 N. J. Eq. 153, 49 Atl. 810; Perkins *v.* Perkins, 59 N. J. Eq. 515, 46 Atl. 173; Summerbell *v.* Summerbell, 37 N. J. Eq. 603; Miller *v.* Miller, 20 N. J. Eq. 216; Jones *v.* Jones, 17 N. J. Eq. 351; Miller *v.* Miller, 2 N. J. Eq. 139, 32 Am. Dec. 417; Clutch *v.* Clutch, 1 N. J. Eq. 474.

New York.— Lyon *v.* Lyon, 62 Barb. 138; Fowler *v.* Fowler, 29 Misc. 670, 61 N. Y. Suppl. 109; Doe *v.* Roe, 1 Johns. Cas. 25; Betts *v.* Betts, 1 Johns. Ch. 197.

North Carolina.— Toole *v.* Toole, 112 N. C. 152, 16 S. E. 912, 34 Am. St. Rep. 479; Hansley *v.* Hansley, 32 N. C. 506.

Pennsylvania.— Matchin *v.* Matchin, 6 Pa. St. 332, 47 Am. Dec. 466; Ritchey *v.* Ritchey, 6 Pa. Dist. 406; Wood *v.* Wood, 2 Brewst. 447; Edwards *v.* Edwards, 3 Pittsb. 333.

Texas.— Sheffield *v.* Sheffield, 3 Tex. 79.

Vermont.— Gould *v.* Gould, 2 Aik. 180.

See 17 Cent. Dig. tit. "Divorce," § 399 *et seq.*

The reason of the rule is that to grant a divorce on confession of a party would open the door to collusion and place the continuance of the marriage relation at the will of the parties. Holland *v.* Holland, 2 Mass. 154.

Sufficiency of corroboration.— The nature of the admission or confession and the circumstances under which it was made will determine the sufficiency of the corroborative evidence. Bergen *v.* Bergen, 22 Ill. 187; Jones *v.* Jones, 17 N. J. Eq. 351; Clutch *v.* Clutch, 1 N. J. Eq. 474; Stewart *v.* Stewart, 51 N. Y. App. Div. 629, 65 N. Y. Suppl. 927, where an oral admission of adultery was held sufficiently corroborated by several letters of

affirmatively appears either from the circumstances under which they were made or from extraneous evidence that they are not collusive.[65] If either of these conditions is complied with, and the admissions or confessions were freely and intelligently made,[66] a decree of divorce may be founded thereon.[67]

4. Proof of Marriage. Marriage may be proved by cohabitation and general reputation,[68] unless the result would be to prove defendant guilty of bigamy, in which case a ceremonial marriage must be proved.[69]

5. Proof of Residence. A preponderance of the evidence is both necessary and sufficient to establish the residence of plaintiff within the state for the time prescribed by statute.[70] While residence may be proved by circumstantial evidence, the court will not act upon proof of circumstances not in themselves conclusive, if direct and indisputable evidence is available.[71] The testimony of complainant is not sufficient to establish residence,[72] unless it is uncontra-

defendant hinting at like admissions, defendant's only explanation of them being that they were written under the influence of despondency. The rule does not require that each item of the confession be corroborated. Clark *v.* Clark, 86 Minn. 249, 90 N. W. 390, holding that it is sufficient if the corroborating evidence tends in some degree to support the allegations relied on. The evidence must, however, relate to some portion of the confession which is material to the issue. Lyon *v.* Lyon, 62 Barb. (N. Y.) 138, holding that where witnesses testify in regard to separate acts of adultery, but neither swears to any fact that tends to show that adultery was committed at the time stated by defendant in his confession, the corroboration is insufficient. The confession of a wife is not corroborated by the unsupported testimony of her husband. Perkins *v.* Perkins, 59 N. J. Eq. 515, 46 Atl. 173.

65. Tewksbury *v.* Tewksbury, 5 Miss. 109; Jones *v.* Jones, 17 N. J. Eq. 351; Madge *v.* Madge, 42 Hun (N. Y.) 524; Sigel *v.* Sigel, 20 N. Y. Suppl. 377; Owen *v.* Owen, 4 Hagg. Eccl. 261; Tucker *v.* Tucker, 11 Jur. 893, 5 Notes of Cas. 458; Fullerton *v.* Fullerton, 11 Scotch Sess. Cas. (3d series) 720.

Absence of collusion.— The rule forbidding divorce on the uncorroborated confessions of a party is founded in the fear of collusion, and when they are made under circumstances precluding suspicion of collusion, the reason for the rule fails, and a decree may be granted thereon without other evidence.

California.— Baker *v.* Baker, 13 Cal. 87.

Kansas.— Burke *v.* Burke, 44 Kan. 307, 24 Pac. 466, 21 Am. St. Rep. 283.

Maine.— Vance *v.* Vance, 8 Me. 132.

Massachusetts.— Billings *v.* Billings, 11 Pick. 461.

New York.— Stewart *v.* Stewart, 51 N. Y. App. Div. 629, 65 N. Y. Suppl. 927; Lyon *v.* Lyon, 62 Barb. 138.

England.— Williams *v.* Williams, L. R. 1 P. 29, 35 L. J. P. & M. 8, 13 L. T. Rep. N. S. 610.

66. Garcin *v.* Garcin, 62 N. J. Eq. 189, 50 Atl. 71; Summerbell *v.* Summerbell, 37 N. J. Eq. 603; Derby *v.* Derby, 21 N. J. Eq. 36, where it was held that a confession was not entitled to any weight as evidence when it was shown not to have been fairly obtained, nor made with a full understanding of its effect.

67. See cases cited *supra*, notes 64–66.

68. *Illinois.*— Harman *v.* Harman, 16 Ill. 85.

Indiana.— Trimble *v.* Trimble, 2 Ind. 76.

Texas.— Cuneo *v.* De Cuneo, 24 Tex. Civ. App. 436, 59 S. W. 284.

Vermont.— Mitchell *v.* Mitchell, 11 Vt. 134.

West Virginia.— Hitchcox *v.* Hitchcox, 2 W. Va. 435.

See 17 Cent. Dig. tit. "Divorce," § 396.

Invalidity of marriage as a defense see *supra*, VIII, A.

Change of meretricious relation.— If there is no evidence of a present agreement between the parties to take each other for husband and wife, and there is a doubt as to whether there was any actual change of a previously existing meretricious relation, a finding that there was no marriage is proper. Harbeck *v.* Harbeck, 2 N. Y. St. 451. See also *supra*, XIII, A, note 3.

69. Case *v.* Case, 17 Cal. 598.

70. Whittaker *v.* Whittaker, 151 Ill. 266, 37 N. E. 1017 (holding that a definite and positive statement of complainant as to her residence, corroborated by a witness with whom she boarded, will be given greater weight than conflicting testimony of witnesses for defendant who are uncertain as to the times and places where they saw complainant); Sweeney *v.* Sweeney, 62 N. J. Eq. 357, 50 Atl. 785 (holding that if the evidence leaves it in doubt as to whether petitioner intended to make the state her permanent residence, the court will not take jurisdiction).

71. Hendricks *v.* Hendricks, 72 Ala. 132.

72. Hunter *v.* Hunter, 64 N. J. Eq. 277, 53 Atl. 221 (holding that in an action on the ground of desertion, commenced promptly on the expiration of an alleged residence in the state for the necessary two years, the presumption that the residence has not been maintained *animo manendi* cannot be removed by petitioner's own testimony as to her motives); Grover *v.* Grover, 63 N. J. Eq. 771, 796, 50 Atl. 1051; Tracy *v.* Tracy, 60 N. J. Eq. 25, 46 Atl. 657. See also Van Alstine *v.* Van Alstine, 23 Wash. 310, 63 Pac. 243, holding that the statement of plaintiff in an affidavit filed on motion for suit money

dicted[73] or corroborated.[74] In some states the statute requires proof of residence to be made by two witnesses who are resident freeholders and householders of the state.[75]

6. Proof of Particular Offenses — a. Adultery — (i) *In General.* The proof of adultery as a ground for divorce must be clear and positive.[76] It must be sufficiently definite to identify the time and place of the offense, and the circumstances under which it was committed.[77] The evidence sufficient to prove adultery may be direct, as where the parties are seen *in flagrante delicto*, or it may be indirect or circumstantial,[78] or it may consist in part of both.[79] In either event the court will carefully weigh the evidence, taking into consideration its inherent probability, the credibility of the witnesses, and the character of the evidence offered by the accused in denial or explanation; and if so considered the evidence of guilt is inconclusive a divorce will be denied.[80] However, the mere fact that the

that she is a resident of the state does not control facts showing the contrary as detailed in her testimony in the trial.

73. Pollock *v.* Pollock, 9 S. D. 48, 68 N. W. 176, holding that plaintiff's uncontroverted testimony that he had come into the state for the purpose of becoming a resident and had resided there the required length of time justifies a finding that he was a resident.

74. Whittaker *v.* Whittaker, 151 Ill. 266, 37 N. E. 1017; McShane *v.* McShane, 45 N. J. Eq. 341, 19 Atl. 465.

75. Becker *v.* Becker, 160 Ind. 407, 66 N. E. 1010; Driver *v.* Driver, 158 Ind. 88, 54 N. E. 389; Brown *v.* Brown, 138 Ind. 257, 37 N. E. 142 (all holding that evidence that the witnesses were resident freeholders and householders of the state is a prerequisite to the court's jurisdiction); Cummins *v.* Cummins, 30 Ind. App. 671, 66 N. E. 915 (holding that proof by two witnesses, only one of whom possesses the required qualifications, is insufficient).

Proof of residence of witnesses.— The proof of the residence of the witnesses need be only such as to satisfy the court. Powell *v.* Powell, 53 Ind. 513; Maxwell *v.* Maxwell, 53 Ind. 363.

An admission by defendant's counsel of plaintiff's residence within the state is insufficient. Prettyman *v.* Prettyman, 125 Ind. 149, 25 N. E. 179.

76. Gibson *v.* Gibson, 18 App. Cas. (D. C.) 72; Berckmans *v.* Berckmans, 17 N. J. Eq. 453; Reid *v.* Reid, 17 N. J. Eq. 101; Moller *v.* Moller, 115 N. Y. 466, 22 N. E. 169; Schulze *v.* Schulze, 83 N. Y. App. Div. 375, 82 N. Y. Suppl. 266; Burch *v.* Burch, 80 N. Y. App. Div. 55, 80 N. Y. Suppl. 182; Donnelly *v.* Donnelly, 63 How. Pr. (N. Y.) 481; Trust *v.* Trust, 11 How. Pr. (N. Y.) 523; Poertner *v.* Poertner, 66 Wis. 644, 29 N. W. 386. See, however, *supra*, XIII, C, 1.

77. Stiles *v.* Stiles, 62 Ill. App. 408 [*reversed* on other grounds in 167 Ill. 576, 47 N. E. 867]; Herrick *v.* Herrick, 31 Mich. 298.

Testimony that adultery was committed without evidence as to the facts upon which the conclusion is based is insufficient. Herrick *v.* Herrick, 31 Mich. 298; Garr *v.* Garr, 8 Kulp (Pa.) 460.

Time of commission.— Where the proof fails to show whether the adultery was committed before or after marriage the divorce should not be granted. Pessolano *v.* Pessolano, 34 Misc. (N. Y.) 16, 69 N. Y. Suppl. 449; Patterson *v.* Patterson, 89 Tenn. 151, 14 S. W. 485.

78. See *infra*, XIII, C, 6, a, (II).

79. Jeter *v.* Jeter, 36 Ala. 391; Graham *v.* Graham, 50 N. J. Eq. 701, 25 Atl. 358; Culver *v.* Culver, 38 N. J. Eq. 163; Adams *v.* Adams, 17 N. J. Eq. 324; Reading *v.* Reading, (N. J. Ch. 1887) 8 Atl. 809; Moller *v.* Moller, 115 N. Y. 466, 22 N. E. 169; Dunlap *v.* Dunlap, Wright (Ohio) 559; Burchet *v.* Burchet, Wright (Ohio) 161.

80. *Alabama.*— Farmer *v.* Farmer, 86 Ala. 322, 5 So. 434.

Iowa.— Haggard *v.* Haggard, 62 Iowa 82, 17 N. W. 178, where the only evidence of adultery consisted of boastful admissions of defendant and the testimony of a hostile witness, which was explicitly denied by defendant and the alleged paramour.

Louisiana.— Land *v.* Martin, 46 La. Ann. 1246, 15 So. 657.

Michigan.— Van Voorhis *v.* Van Voorhis, 94 Mich. 60, 53 N. W. 964, where plaintiff's witnesses were paid detectives or otherwise interested in the event, and the register at the hotel where it was alleged the parties stayed as man and wife showed unmistakable signs of erasures and rewriting, and the charge was denied.

New Jersey.— Pullen *v.* Pullen, 46 N. J. Eq. 318, 20 Atl. 393 (holding that a charge of adultery with a housekeeper was not sustained in the face of a denial by both, and of evidence that at the time alleged defendant was away from home and that the housekeeper's reputation for chastity was good); Scheffling *v.* Scheffling, 44 N. J. Eq. 438, 15 Atl. 577 (holding that the uncorroborated and improbable evidence of a single witness is not sufficient to establish a charge of adultery against the explicit denials of defendant and his alleged paramour); Fuller *v.* Fuller, 41 N. J. Eq. 460, 5 Atl. 725 (holding that circumstances ordinarily sufficient to prove the charge are insufficient where they are given by witnesses of questionable character and defendant and her alleged paramour positively deny that they were together at the times and in the places alleged); Fuller *v.* Fuller, 33 N. J. Eq. 583; Mayer *v.* Mayer, 21

evidence is conflicting or that guilt is explicitly denied does not preclude a divorce for adultery.[81]

(II) *Circumstantial Evidence* — (A) *General Rules.* The charge of adultery may be sufficiently proved by evidence of circumstances leading to an inference of guilt.[82] It is impossible fully to indicate the circumstances which will lead to such a conclusion, because they may be infinitely diversified by the situation and character of the parties, and by many other incidental matters which may be apparently slight and delicate in themselves but which may have most important bearings in the particular case.[83] While the circumstances need not be such that

N. J. Eq. 246; Larrison *v.* Larrison, 20 N. J. Eq. 100 (where the only witness for petitioner was untrustworthy and the charge was denied by defendant and her alleged paramour); Bray *v.* Bray, 6 N. J. Eq. 506 (holding that a wife's denial is strengthened by the fact that her husband wishes to be rid of her); Knowlden *v.* Knowlden, (Ch. 1902) 52 Atl. 377 (where defendant's denial, supported by an alibi proved by her paramour, was held sufficient to overcome the positive testimony of two witnesses); Main *v.* Main, (Ch. 1892) 24 Atl. 1024 (where a denial corroborated by testimony of defendant's niece that she occupied the same room with defendant was held to overcome the evidence of a witness who testified that he saw defendant come from the room of the paramour at four A. M., but who showed ignorance as to the location of the rooms and indicated in other ways that his testimony was unreliable).

New York.— Smith *v.* Smith, 89 Hun 610, 35 N. Y. Suppl. 556; Welke *v.* Welke, 63 Hun 625, 17 N. Y. Suppl. 298; Auld *v.* Auld, 16 N. Y. Suppl. 803.

Virginia.— Hampton *v.* Hampton, 87 Va. 148, 12 S. E. 340, where no specific act of adultery was charged, and complainant's witnesses testified only to acts of doubtful propriety between defendant and complainant's brother, which were positively denied by the brother, and a confession made by defendant had been secured by unfair means.

81. Dunham *v.* Dunham, 162 Ill. 589, 44 N. E. 841, 35 L. R. A. 70 (holding that where persons have created opportunities for the commission of adultery and have conducted themselves in a manner inconsistent with their innocence, courts are justified in drawing the inference that such opportunities were improved, notwithstanding their denials of guilt); Culver *v.* Culver, 38 N. J. Eq. 163; Moller *v.* Moller, 115 N. Y. 466, 22 N. E. 169.

Notwithstanding an unequivocal denial of all the essential facts by both defendant and his paramour, the circumstances may be so strong as to convict him of the offense even in the absence of direct proof. Bizer *v.* Bizer, 110 Iowa 248, 81 N. W. 465; Kastendiek *v.* Kastendiek, (N. J. Ch. 1896) 35 Atl. 744 (holding that defendant's uncorroborated denial does not overcome proof showing a disposition to perpetrate the offense, a planning by him for that object, and an opportunity afforded him to accomplish his purpose); Marsh *v.* Marsh, 28 N. J. Eq. 196; McGrail *v.* McGrail, (N. J. Ch. 1894) 28 Atl. 511; Dunn *v.* Dunn, (N. J. Ch. 1891) 21 Atl. 466; Musick *v.* Musick, 88 Va. 12, 13 S. E. 302 (holding that where defendant had seduced plaintiff before marriage and deserted her immediately after and consorted with lewd women, with whom he was frequently found in compromising situations, adultery is established, although both he and the alleged *particeps criminis* deny it).

82. *Alabama.*— Powell *v.* Powell, 80 Ala. 595, 1 So. 549; Jeter *v.* Jeter, 36 Ala. 391; Mosser *v.* Mosser, 29 Ala. 313; Richardson *v.* Richardson, 4 Port. 467, 30 Am. Dec. 538.

California.— Evans *v.* Evans, 41 Cal. 103.

Illinois.— Stiles *v.* Stiles, 167 Ill. 576, 47 N. E. 867; Chestnut *v.* Chestnut, 88 Ill. 548; Bast *v.* Bast, 82 Ill. 584; Blake *v.* Blake, 70 Ill. 618; Levy *v.* Levy, 16 Ill. App. 358.

Iowa.— Carlisle *v.* Carlisle, 99 Iowa 247, 68 N. W. 681; Names *v.* Names, 67 Iowa 383, 25 N. W. 671; Inskeep *v.* Inskeep, 5 Iowa 204.

Kansas.— Burke *v.* Burke, 44 Kan. 307, 24 Pac. 466, 21 Am. St. Rep. 283.

Louisiana.—Siebert *v.* Klapper, 49 La. Ann. 241, 21 So. 259; Mehle *v.* Lapeyrollerie, 16 La. Ann. 4.

Maryland.— Kremelberg *v.* Kremelberg, 52 Md. 553.

Michigan.— Bishop *v.* Bishop, 17 Mich. 211.

New Jersey.— Ewing *v.* Ewing, (Ch. 1886) 4 Atl. 651; Clare *v.* Clare, 19 N. J. Eq. 37 (holding that the rule that adultery must be clearly proved does not mean that it must be directly sworn to, but that the proof must be entitled to and command belief); Berckmans *v.* Berckmans, 16 N. J. Eq. 122; Day *v.* Day, 4 N. J. Eq. 444.

New York.— Allen *v.* Allen, 101 N. Y. 658, 5 N. E. 341; Ferguson *v.* Ferguson, 3 Sandf. 307; Chase *v.* Chase, 19 N. Y. Suppl. 268; Smith *v.* Smith, 13 N. Y. Suppl. 817; Mulock *v.* Mulock, 1 Edw. 14.

Ohio.— Bryant *v.* Bryant, Wright 156.

Pennsylvania.— Matchin *v.* Matchin, 6 Pa. St. 332, 47 Am. Dec. 466.

Utah.— Griffin *v.* Griffin, 18 Utah 98, 55 Pac. 84.

England.— Loveden *v.* Loveden, 2 Hagg. Const. 1, 4 Eng. Eccl. 461; Chambers *v.* Chambers, 1 Hagg. Const. 439, 4 Eng. Eccl. 445; Harris *v.* Harris, 2 Hagg. Eccl. 376, 4 Eng. Eccl. 160.

See 17 Cent. Dig. tit. "Divorce," § 419.

83. Loveden *v.* Loveden, 2 Hagg. Const. 1, 4 Eng. Eccl. 461; Williams *v.* Williams, 1 Hagg. Const. 299, 4 Eng. Eccl. 415.

Artificial and technical rules afford but little aid in determining questions of this kind, for after all the question of guilt or in-

an inference of guilt is the only possible conclusion that can be drawn therefrom,[84] yet the facts must be such as to lead a just and reasonable man to the conclusion of guilt.[85] They are not sufficient if they merely justify a suspicion of guilt,[86] in the absence of other incriminating circumstances,[87] such for instance as the accused's failure to adduce available evidence in denial or explanation of evidence tending to show adultery.[88] So where the circumstances adduced in support of the charge are capable of two interpretations, one of which is consistent with innocence, a divorce should not be granted.[89]

(B) *Disposition and Opportunity* — (1) IN GENERAL. If an adulterous disposition on the part of defendant and the alleged paramour is shown, and it

nocence depends upon the facts and circumstances of each particular case. Kremelberg *v.* Kremelberg, 52 Md. 553. And see Dunham *v.* Dunham, 6 L. Rep. (Mass.) 139.

84. Chestnut *v.* Chestnut, 88 Ill. 548; Allen *v.* Allen, 101 N. Y. 658, 5 N. E. 341 [*overruling* Pollock *v.* Pollock, 71 N. Y. 137]. *Contra,* Burke *v.* Burke, 44 Kan. 307, 24 Pac. 466, 21 Am. St. Rep. 283; Herberger *v.* Herberger, 16 Oreg. 327, 14 Pac. 70.

85. *Alabama.*— Powell *v.* Powell, 80 Ala. 595, 1 So. 549; Richardson *v.* Richardson, 4 Port. 467, 30 Am. Dec. 538.

Illinois.— Stiles *v.* Stiles, 167 Ill. 576, 47 N. E. 807.

Iowa.— Names *v.* Names, 67 Iowa 383, 25 N. W. 671; Inskeep *v.* Inskeep, 5 Iowa 204.

Maryland.— Kremelberg *v.* Kremelberg, 52 Md. 553.

New Jersey.— Berckmans *v.* Berckmans, 16 N. J. Eq. 122; Day *v.* Day, 4 N. J. Eq. 444; Ewing *v.* Ewing, (Ch. 1886) 4 Atl. 651.

New York.— Moller *v.* Moller, 115 N. Y. 466, 22 N. E. 169; Ferguson *v.* Ferguson, 3 Sandf. 307.

Pennsylvania.— Matchin *v.* Matchin, 6 Pa. St. 332, 47 Am. Dec. 466.

England.— Loveden *v.* Loveden, 2 Hagg. Const. 1, 2, 4 Eng. Eccl. 461.

86. *Alabama.*— Powell *v.* Powell, 80 Ala. 595, 1 So. 549, meetings and walks in public places.

Illinois.— Thomas *v.* Thomas, 51 Ill. 162, unexplained absences from home.

Iowa.— Carlisle *v.* Carlisle, 99 Iowa 247, 68 N. W. 681; Rivers *v.* Rivers, 60 Iowa 378, 14 N. W. 774, holding that an interview of defendant with a woman of bad character, if reasonably explained, is not sufficient.

Louisiana.— Cooper *v.* Cooper, 10 La. 249.

Michigan.— Soper *v.* Soper, 29 Mich. 305.

New Jersey.— Flavell *v.* Flavell, 20 N. J. Eq. 211, holding that where defendant when intoxicated had met a woman, and afterward when partly intoxicated and half asleep had called out her name, it was insufficient.

New York.— Conger *v.* Conger, 82 N. Y. 603 (frequent interviews); Pettus *v.* Pettus, 37 Misc. 315, 75 N. Y. Suppl. 462 (apparent undue affection for another).

Ohio.— Johnston *v.* Johnston, Wright 454.

Texas.— Burney *v.* Burney, 11 Tex. Civ. App. 174, 32 S. W. 328.

West Virginia.— Martin *v.* Martin, 33 W. Va. 695, 11 S. E. 12, apparent undue affection for another.

See 17 Cent. Dig. tit. "Divorce," § 424.

87. Flavell *v.* Flavell, 20 N. J. Eq. 211; Leyland *v.* Leyland, (N. J. Ch. 1888) 16 Atl. 177; Conger v. Conger, 82 N. Y. 603; Schreiber *v.* Schreiber, 3 Misc. (N. Y.) 411, 23 N. Y. Suppl. 299.

88. Young *v.* Young, 15 S. W. 780, 12 Ky. L. Rep. 886 (holding that the refusal of defendant's physician, on the ground of professional privilege, to answer whether defendant had a venereal disease, while raising no inference of guilt, is strongly significant in determining the weight of evidence); McGrail *v.* McGrail, 48 N. J. Eq. 532, 22 Atl. 582 (holding that an insufficient, contradictory, or restricted explanation of incriminating circumstances reacts against defendant, and combined with testimony may suffice to establish his guilt); Stickle *v.* Stickle, 48 N. J. Eq. 336, 22 Atl. 60 (holding that defendant's failure to deny the authenticity of incriminating statements in letters to her from her alleged paramour constituted an admission of the adultery necessarily to be inferred from them); Bibby *v.* Bibby, 33 N. J. Eq. 56 (holding that the failure to produce the alleged paramour as a witness when within reach of process is corroborative of testimony showing guilt); Harris *v.* Harris, 83 N. Y. App. Div. 123, 82 N. Y. Suppl. 568. See, generally, EVIDENCE. See also CRIMINAL LAW, 12 Cyc. 379 *et seq.*

89. *Alabama.*— Powell *v.* Powell, 80 Ala. 595, 1 So. 549; Jeter *v.* Jeter, 36 Ala. 391; Mosser *v.* Mosser, 29 Ala. 313.

Illinois.— Chestnut *v.* Chestnut, 88 Ill. 548; Carter *v.* Carter, 62 Ill. 439.

Iowa.— Carlisle *v.* Carlisle, 99 Iowa 247, 68 N. W. 681; Names *v.* Names, 67 Iowa 383, 25 N. W. 671; Inskeep *v.* Inskeep, 5 Iowa 204.

Kansas.— Burke *v.* Burke, 44 Kan. 307, 24 Pac. 466, 21 Am. St. Rep. 283.

Kentucky.— Rodgers *v.* Rodgers, 13 Ky. L. Rep. 203.

New Jersey.— Mayer *v.* Mayer, 21 N. J. Eq. 246; Berckmans *v.* Berckmans, 16 N. J. Eq. 122; O'Brien *v.* O'Brien, (Ch. 1894) 30 Atl. 875.

New York.— Pollock *v.* Pollock, 71 N. Y. 137; Poillon *v.* Poillon, 78 N. Y. App. Div. 127, 79 N. Y. Suppl. 545; Smith *v.* Smith, 89 Hun 610, 35 N. Y. Suppl. 556; Ferguson *v.* Ferguson, 3 Sandf. 307; Anonymous, 17 Abb. Pr. 48.

Oregon.— Herberger *v.* Herberger, 16 Oreg. 327, 14 Pac. 70.

See 17 Cent. Dig. tit. "Divorce," § 420.

appears that there was an opportunity for them to commit the offense, these facts are sufficient to establish adultery.[90] An adulterous disposition is not necessarily shown by the existence of a state of undue familiarity between the parties accused,[91] and in the absence of evidence of an adulterous inclination proof of opportunity alone does not establish adultery.[92] To have this effect the oppor-

90. *Illinois.*— Blake *v.* Blake, 70 Ill. 618.
Iowa.— Inskeep *v.* Inskeep, 5 Iowa 204.
Michigan.— McClung *v.* McClung, 40 Mich. 493.
New Jersey.— Black *v.* Black, 30 N. J. Eq. 228; Berckmans *v.* Berckmans, 16 N. J. Eq. 122.
New York.— Van Epps *v.* Van Epps, 6 Barb. 320; Smith *v.* Smith, 13 N. Y. Suppl. 817.
Wisconsin.— Freeman *v.* Freeman, 31 Wis. 235.
England.— Bramwell *v.* Bramwell, 3 Hagg. Eccl. 618, 5 Eng. Eccl. 232; Harris *v.* Harris, 2 Hagg. Eccl. 376, 4 Eng. Eccl. 160; Westmeath *v.* Westmeath, 2 Hagg. Eccl. Suppl. 1, 4 Eng. Eccl. 238.
Secrecy and concealment.— Stolen interviews, clandestine arrangements to bring about an available opportunity, and secret correspondence between the parties showing their criminal desire, in connection with other circumstances proving that an opportunity was actually afforded, may conclusively establish their guilt. Carter *v.* Carter, 152 Ill. 434, 28 N. E. 948, 38 N. E. 669; Daily *v.* Daily, 64 Ill. 329; Graham *v.* Graham, 50 N. J. Eq. 701, 25 Atl. 358; Stickle *v.* Stickle, 48 N. J. Eq. 336, 22 Atl. 60; Stackhouse *v.* Stackhouse, (N. J. Ch. 1897) 36 Atl. 884; Allen *v.* Allen, 101 N. Y. 658, 5 N. E. 341; Auld *v.* Auld, 16 N. Y. Suppl. 803; Lockwood *v.* Lockwood, 2 Curt. Eccl. 281, 7 Eng. Eccl. 114; Loveden *v.* Loveden, 2 Hagg. Const. 1, 4 Eng. Eccl. 461; Elwes *v.* Elwes, 1 Hagg. Const. 269, 4 Eng. Eccl. 401; Bramwell *v.* Bramwell, 3 Hagg. Eccl. 618, 5 Eng. Eccl. 232; Morse *v.* Morse, 2 Hagg. Eccl. 608, 4 Eng. Eccl. 220.
Frequent association with prostitutes at houses of prostitution or other places under circumstances irreconcilable with an innocent intent are conclusive as to defendant's adulterous disposition, and, when the evidence shows an opportunity available for the commission of the offense, will be sufficient to sustain the charge. Cooke *v.* Cooke, 71 Ill. App. 663; Abel *v.* Abel, 89 Iowa 300, 56 N. W. 442 (where evidence that defendant visited houses of prostitution, and in his wife's absence permitted two prostitutes to stay at his house all night was deemed sufficient to show adultery); Emerson *v.* Emerson, 16 N. Y. Suppl. 793.

91. Osborn *v.* Osborn, 44 N. J. Eq. 257, 9 Atl. 698, 10 Atl. 107, 14 Atl. 217; Conger *v.* Conger, 82 N. Y. 603; Pollock *v.* Pollock, 71 N. Y. 137 (holding that proof that a young woman was almost daily at apartments occupied by a man as his residence and place of business, and sometimes in the evening; that she occasionally did his housework in the absence of the person employed therefor; that they went to places of amusement together; that she was believed by the neighbors to be his wife, and was twice addressed as such, but without herself knowing it, was insufficient to show adultery); Pettus *v.* Pettus, 37 Misc. (N. Y.) 315, 75 N. Y. Suppl. 462. However, the acts of familiarity may have occurred under such circumstances and at such times and places as to lead inevitably to the conclusion that the offense was committed. Carter *v.* Carter, 152 Ill. 434, 28 N. E. 948, 38 N. E. 669 (where evidence that a married woman was seen at three A. M. standing in her night-dress at the door of her room at a hotel, talking with a man whose vest was unbuttoned, apparently just leaving her, and in whose company she had been previously seen, and with whom she had been corresponding after a three weeks' acquaintance, was held sufficient to establish adultery); Blake *v.* Blake, 70 Ill. 618; Names *v.* Names, 67 Iowa 383, 25 N. W. 671; Hurtzig *v.* Hurtzig, 44 N. J. Eq. 329, 15 Atl. 537 [*affirmed* in 45 N. J. Eq. 869, 19 Atl. 622] (where adultery was established by evidence that a wife allowed undue familiarities to be taken by a man not her husband; that she had long and private interviews with him by day and by night, from which she came with her hair in disorder; and that she expressed great admiration for him and hatred for her husband).
Familiarity with relatives.—Adulterous intercourse will not readily be inferred from improper conduct with a near relative. Peavey *v.* Peavey, 76 Iowa 443, 41 N. W. 67; Kenrick *v.* Kenrick, 4 Hagg. Eccl. 114.

92. *Illinois.*— Blake *v.* Blake, 70 Ill. 618.
Kansas.— Burke *v.* Burke, 44 Kan. 307, 24 Pac. 466, 21 Am. St. Rep. 283.
New Jersey.— Osborn *v.* Osborn, 44 N. J. Eq. 257, 9 Atl. 698, 10 Atl. 107, 14 Atl. 217; Mayer *v.* Mayer, 21 N. J. Eq. 246; Larrison *v.* Larrison, 20 N. J. Eq. 100; Stiefel *v.* Stiefel, (Ch. 1896) 35 Atl. 287.
New York.— Isaacs *v.* Isaacs, 29 Misc. 557, 51 N. Y. Suppl. 956.
Oregon.— Herberger *v.* Herberger, 16 Oreg. 327, 14 Pac. 70.
Virginia.— Throckmorton *v.* Throckmorton, 86 Va. 768, 11 S. E. 289.
Professional calls.— A charge of adultery is not sustained against a wife upon evidence that she had placed herself in the hands of an irregular physician for treatment for some female difficulty, and that on several days a physical examination was made by him in a room with the door bolted (Stuart *v.* Stuart, 47 Mich. 566, 11 N. W. 388); nor is evidence of frequent private interviews with a clergyman sufficient to establish adultery (Freeman *v.* Freeman, 31 Wis. 235).

tunity must occur under incriminating circumstances, as where the parties hold themselves out to be husband and wife.[93]

(2) Occupancy of Same Room or Bed. Adultery may be established by the fact that the parties occupied the same room at night[94] or the same bed,[95] in the absence of an explanation of the incriminating circumstance.[96]

(3) Visiting House of Ill Fame. A visit at a house of ill fame, in the absence of an explanation consistent with innocence,[97] raises a presumption of adultery;[98] and the circumstances attending the visit may be such as to afford

93. Morrison *v.* Morrison, 95 Ala. 309, 10 So. 648; Graham *v.* Graham, 50 N. J. Eq. 701, 25 Atl. 358; Smith *v.* Smith, 13 N. Y. Suppl. 817. See also White *v.* White, 64 N. J. Eq. 84, 53 Atl. 23.

94. Foval *v.* Foval, 39 Ill. App. 644; Names *v.* Names, 67 Iowa 383, 25 N. W. 671; Van Epps *v.* Van Epps, 6 Barb. (N. Y.) 320; Holcomb *v.* Holcomb, 3 N. Y. St. 762; Langstaff *v.* Langstaff, Wright (Ohio) 148.

Connecting rooms.— Where the parties occupied connecting rooms with the door between unbolted, it is a circumstance which with other facts showing a disposition to commit adultery may lead to a conclusion of guilt. Warren *v.* Warren, 8 Misc. (N. Y.) 189, 29 N. Y. Suppl. 313; Jayne *v.* Jayne, 5 Misc. (N. Y.) 307, 25 N. Y. Suppl. 810; Auld *v.* Auld, 16 N. Y. Suppl. 803. See, however, Aitchison *v.* Aitchison, 99 Iowa 93, 68 N. W. 573, where adultery was denied by the parties, and the only evidence supporting it was that they met by appointment in a hotel, occupied adjoining rooms, were seen together in one of the rooms seated on the bed, but not in a compromising position, and that defendant paid the hotel bills of both.

95. *Illinois.*— Rawson *v.* Rawson, 37 Ill. App. 491, holding that occupancy of the same sleeping-car berth for a considerable portion of a night warrants an inference of adultery.

Maryland.— Shufeldt *v.* Shufeldt, 86 Md. 519, 39 Atl. 416.

Michigan.— Fischer *v.* Fischer, 131 Mich. 441, 91 N. W. 633.

New Jersey.— Dunn *v.* Dunn, (Ch. 1891) 21 Atl. 466; Leyland *v.* Leyland, (Ch. 1888) 16 Atl. 177.

New York.— Schreiber *v.* Schreiber, 3 Misc. 411, 23 N. Y. Suppl. 299.

However, a man will not be supposed to have committed adultery with another woman while his wife and child are on the same bed with him. Scott *v.* Scott, Wright (Ohio) 469; Rickard *v.* Rickard, 9 Oreg. 168.

96. Mosser *v.* Mosser, 29 Ala. 313 (where the fact of a servant's remaining in the room with defendant at night was satisfactorily explained by evidence that she was the only servant about the house and that her services were required for the purpose of adjusting poultices on an eruption for which he was undergoing treatment); Peavey *v.* Peavey, 76 Iowa 443, 41 N. W. 67.

97. Ciocci *v.* Ciocci, 1 Spinks 121, where the visit was made from a motive of philanthropy.

Ignorance and fraud.— The visit may be explained by evidence showing that it was made through ignorance or mistake as to the character of the house, or because of the fraudulent inducement of plaintiff's agents. Cane *v.* Cane, 39 N. J. Eq. 148; Yocum *v.* Yocum, 3 Pa. Dist. 615; Latham *v.* Latham, 30 Gratt. (Va.) 307.

98. *Alabama.*— Richardson *v.* Richardson, 4 Port. 467, 30 Am. Dec. 538.

California.— Evans *v.* Evans, 41 Cal. 103.

New Jersey.— Stackhouse *v.* Stackhouse, (Ch. 1897) 36 Atl. 884.

Virginia.— Latham *v.* Latham, 30 Gratt. 307.

England.— Loveden *v.* Loveden, 2 Hagg. Const. 1, 4 Eng. Eccl. 461.

In Kentucky and New York it has been held that it is not sufficient evidence of adultery to prove that the person merely visited a house of ill fame. Locke *v.* Locke, (Ky. 1892) 18 S. W. 233; Platt *v.* Platt, 5 Daly (N. Y.) 295; Anonymous, 17 Abb. Pr. (N. Y.) 48; Betts *v.* Betts, 1 Johns. Ch. (N. Y.) 197. However, in Van Name *v.* Van Name, 49 Hun (N. Y.) 264, 2 N. Y. Suppl. 77, the earlier cases were disregarded and the rule stated in the text was followed.

The bad character of the house must clearly appear. Zorkowski *v.* Zorkowski, 27 How. Pr. (N. Y.) 37.

Visit by wife.— The inference of guilt is stronger where a married woman enters a house of ill fame with knowledge of its character, with a man not her husband. Cane *v.* Cane, 39 N. J. Eq. 148; Stackhouse *v.* Stackhouse, (N. J. Ch. 1897) 36 Atl. 884; Matchin *v.* Matchin, 6 Pa. St. 332, 47 Am. Dec. 466; Best *v.* Best, 5 Add. Eccl. 411, 2 Eng. Eccl. 158; Wood *v.* Wood, 4 Hagg. Eccl. 138 note *b*; Eliot *v.* Eliot [*cited* in Williams *v.* Williams, 1 Hagg. Const. 299, 302, 4 Eng. Eccl. 415]. See also Griffin *v.* Griffin, (Tex. Civ. App. 1902) 67 S. W. 514. However, the fact that defendant and her house were of ill repute is not sufficient to entitle complainant to a divorce. Miller *v.* Miller, 20 N. J. Eq. 216.

Boarding with woman of bad repute.— Where a husband without apparent cause, other than the trivial troubles incident to the married lives of most people, leaves his family and boards with a woman of bad repute, the court will presume that he is living in adultery, although specific acts are not proven. Leedale *v.* Leedale, 8 Ohio S. & C. Pl. Dec. 334.

Association with prostitutes see *supra*, note 90.

conclusive evidence of guilt, as where defendant was wantonly familiar with an inmate of the house and was shut up in a room with her.[99]

(c) *Pregnancy Without Access by Husband.* Where a married woman is pregnant with or gives birth to a child under circumstances negativing the possibility of her husband's being the father of it, her adultery is proved.[1]

(d) *Subsequent Bigamous Marriage.* Proof of a subsequent bigamous marriage of defendant is not sufficient to establish adultery, without proof of cohabitation also.[2]

(e) *Venereal Disease.* It is *prima facie* evidence of adultery that a husband long after marriage is infected with a venereal disease.[3]

(iii) *Character of Witnesses* — (a) *Particeps Criminis.* While the testimony of the alleged paramour may be considered in determining the fact of adultery,[4] it is liable to grave suspicion and should be acted upon with extreme caution;[5] and ordinarily unless it is corroborated it is not sufficient to establish guilt.[6]

99. Cooke *v.* Cooke, 152 Ill. 286, 38 N. E. 1027; Marous *v.* Marous, 86 Ill. App. 597; Mott *v.* Mott, 3 N. Y. App. Div. 532, 38 N. Y. Suppl. 261; Van Epps *v.* Van Epps, 6 Barb. (N. Y.) 320; Loveden *v.* Loveden, 2 Hagg. Const. 1, 4 Eng. Eccl. 461; Kenrick *v.* Kenrick, 4 Hagg. Eccl. 114.

Length of visit.— Adultery is conclusively established under such circumstances, whether defendant remains all night (Evans *v.* Evans, 41 Cal. 103; Cooke *v.* Cooke, 152 Ill. 286, 38 N. E. 1027; Noel *v.* Noel, 24 N. J. Eq. 137) or only for a quarter of an hour or less (Astley *v.* Astley, 1 Hagg. Eccl. 714, 3 Eng. Eccl. 303).

1. Richardson *v.* Richardson, 1 Hagg. Eccl. 6, 3 Eng. Eccl. 13; Caton *v.* Caton, 13 Jur. 431.

The husband is presumed to be the father of the child if he had access to his wife within the required period. Cross *v.* Cross, 3 Paige (N. Y.) 139, 23 Am. Dec. 778. See also *supra*, XIII, A, note 4.

2. Clapp *v.* Clapp, 97 Mass. 531; Reemie *v.* Reemie, 4 Mass. 586; Masten *v.* Masten, 15 N. H. 159; Wilson *v.* Wilson, Wright (Ohio) 128; Horne *v.* Horne, 27 L. J. P. & M. 50, 2 Swab. & Tr. 48. *Compare* Ellis *v.* Ellis, 11 Mass. 92.

3. Johnson *v.* Johnson, 14 Wend. (N. Y.) 637.

Antenuptial disease.— Affliction with a disease within so short a time after marriage that it might have been contracted prior thereto is not sufficient to establish adultery as against his sworn denial. Mount *v.* Mount, 15 N. J. Eq. 162, 82 Am. Dec. 276 (where proof that the husband was so afflicted within six months after marriage was held insufficient); Popkin *v.* Popkin, 1 Hagg. Eccl. 765 note *b*, 3 Eng. Eccl. 325.

Evidence of existence of disease.— In the absence of evidence that the husband is afflicted, evidence that a wife has the disease is not sufficient to charge him with adultery, although no evidence is introduced to prove her guilty of the same offense. Holthoefer *v.* Holthoefer, 47 Mich. 260, 643, 11 N. W. 150; Homburger *v.* Homburger, 46 How. Pr. (N. Y.) 346. Possession by the accused of mixtures commonly used as remedies for such a disease (Mack *v.* Handy, 39 La. Ann. 491, 2 So. 181) or stains upon his linen which might have resulted from his infection (James *v.* James, 29 Nebr. 533, 45 N. W. 777; Ferguson *v.* Ferguson, 1 Barb. Ch. (N. Y.) 604) are not in themselves sufficient to establish guilt, although worthy of consideration in connection with other facts. See also *infra*, note 12.

4. Moulton *v.* Moulton, 13 Me. 110; Mayer *v.* Mayer, 21 N. J. Eq. 246; Moller *v.* Moller, 115 N. Y. 466, 22 N. E. 169; Van Epps *v.* Van Epps, 6 Barb. (N. Y.) 320; Turney *v.* Turney, 4 Edw. (N. Y.) 566; Banta *v.* Banta, 3 Edw. (N. Y.) 295; Thompson *v.* Thompson, 10 Rich. Eq. (S. C.) 416, all holding that if such evidence is all that is obtainable, it should be considered at its true worth in connection with the other circumstances of the case.

5. *Illinois.*— Wahle *v.* Wahle, 71 Ill. 510.

Indiana.— Lewis *v.* Lewis, 9 Ind. 105.

Michigan.— Herrick *v.* Herrick, 31 Mich. 298.

New York.— Beadleston *v.* Beadleston, 50 Hun 603, 2 N. Y. Suppl. 809; Van Epps *v.* Van Epps, 6 Barb. 320; Anonymous, 5 Rob. 611; Glaser *v.* Glaser, 36 Misc. 231, 73 N. Y. Suppl. 284; Delling *v.* Delling, 34 Misc. 122, 69 N. Y. Suppl. 479; Fawcett *v.* Fawcett, 29 Misc. 673, 61 N. Y. Suppl. 108.

Pennsylvania.— Heckel *v.* Heckel, 8 Pa. Dist. 27.

Texas.— Simons *v.* Simons, 13 Tex. 468, holding that the testimony of the *particeps criminis* is of the weakest and most unsatisfactory nature if admissible at all.

England.—Ginger *v.* Ginger, L. R. 1 P. & D. 37; Ciocci *v.* Ciocci, 1 Spinks 121, 26 Eng. L. & Eq. 416.

6. *Arkansas.*— Payne *v.* Payne, 42 Ark. 235.

Illinois.— Wahle *v.* Wahle, 71 Ill. 510.

Indiana.— Lewis *v.* Lewis, 9 Ind. 105.

Kentucky.— Evans *v.* Evans, 93 Ky. 510, 20 S. W. 605, 14 Ky. L. Rep. 628.

Michigan.— Herrick *v.* Herrick, 31 Mich. 298; Bishop *v.* Bishop, 17 Mich. 211; Emmons *v.* Emmons, Walk. 532.

New Jersey.— Hedden *v.* Hedden, 21 N. J.

(B) *Prostitutes and Procurers.* While the testimony of prostitutes may be considered on the question of adultery,[7] their testimony should be corroborated.[8] Procurers are classed with prostitutes, and their evidence is to be received with the same caution and should be corroborated to the same extent.[9]

(C) *Detectives.* Although the testimony of a person employed to watch and detect a husband or wife suspected of adultery is competent and ought not to be absolutely rejected, it should be received with great caution, and scrupulously and minutely scrutinized,[10] and ordinarily it should be corroborated either by the

Eq. 61; Geoger *v.* Geoger, (Ch. 1900) 45 Atl. 349.

New York.— Beadleston *v.* Beadleston, 50 Hun 603, 2 N. Y. Suppl. 809; Anonymous, 5 Rob. 611; Glaser *v.* Glaser, 36 Misc. 231, 73 N. Y. Suppl. 284; Delling *v.* Delling, 34 Misc. 122, 69 N. Y. Suppl. 479; Fawcett *v.* Fawcett, 29 Misc. 673, 61 N. Y. Suppl. 108; Van Cort *v.* Van Cort, 4 Edw. 621; Banta *v.* Banta, 3 Edw. 295.

Oregon.— Cline *v.* Cline, (1887) 16 Pac. 282.

Pennsylvania.— Heckel *v.* Heckel, 8 Pa. Dist. 27.

Texas.— Simons *v.* Simons, 13 Tex. 468.

England.— Simmons *v.* Simmons, 11 Jur. 830, 5 Notes of Cas. 324, 1 Rob. Eccl. 566.

See 17 Cent. Dig. tit. "Divorce," § 415.

Extent of rule.—The requirement as to corroboration seems rather a precaution on the part of the court than a rule of law. It is founded mainly upon the inability of the party charged with adultery to contradict the testimony of the alleged paramour, because of the common-law incompetency of husband or wife to testify in actions for divorce. Where by statute either spouse may become a witness, the force of the reason requiring corroboration is materially weakened, and the sufficiency of the alleged paramour's testimony must depend mainly upon the degree of credibility the judge or jury sees fit to attach to it. Steffens *v.* Steffens, 16 Daly (N. Y.) 363, 11 N. Y. Suppl. 424.

Qualifications of rule.— The rule requiring corroboration of a *particeps criminis* does not apply where he denies the alleged criminality (Pollock *v.* Pollock, 71 N. Y. 137); and, if defendant declines to testify in his own behalf, the jury may find for plaintiff on the uncorroborated testimony of the *particeps criminis* (Crary *v.* Crary, 18 N. Y. Suppl. 753).

Sufficiency of corroboration.—The facts and circumstances relied on as corroborative of the paramour's testimony must be material and tend to prove that the adultery was in fact committed. Geoger *v.* Geoger, (N. J. Ch. 1900) 45 Atl. 349; Steffens *v.* Steffens, 16 Daly (N. Y.) 363, 11 N. Y. Suppl. 424.

7. Paul *v.* Paul, 37 N. J. Eq. 23; Anonymous, 17 Abb. Pr. (N. Y.) 48.

8. *Maryland.*—Wagoner *v.* Wagoner, (1887) 10 Atl. 221.

New Jersey.— See Clare *v.* Clare, 19 N. J. Eq. 37.

New York.— Winston *v.* Winston, 165 N. Y. 553, 59 N. E. 273; McCarthy *v.* McCarthy, 143 N. Y. 235, 38 N. E. 288; Moller *v.* Moller, 115 N. Y. 466, 22 N. E. 169; Mott *v.* Mott, 3 N. Y. App. Div. 532, 38 N. Y. Suppl. 261; Anonymous, 17 Abb. Pr. 48; Turney *v.* Turney, 4 Edw. 566.

Tennessee.— Hickerson *v.* Hickerson, (Ch. App. 1899) 52 S. W. 1019.

England.— Sopwith *v.* Sopwith, 4 Swab. & Tr. 243.

See 17 Cent. Dig. tit. "Divorce," § 416.

This is not a rule of evidence absolutely controlling the determination of the issue, but one for the guidance of the judicial conscience. Winston *v.* Winston, 165 N. Y. 553, 59 N. E. 273.

Sufficiency of corroboration.— Where the testimony of prostitutes is corroborated by proof of facts and circumstances harmonizing therewith and giving such weight and strength to the testimony as to induce belief in its truth, a judgment of divorce is proper. Mayer *v.* Mayer, 21 N. J. Eq. 246; Moller *v.* Moller, 115 N. Y. 466, 22 N. E. 169; Van Epps *v.* Van Epps, 6 Barb. (N. Y.) 320. Such corroboration as justifies a belief that the incriminating testimony is true will suffice. Winston *v.* Winston, 165 N. Y. 553, 59 N. E. 273. This is especially so where defendant fails to take the stand in his own behalf. McCarthy *v.* McCarthy, 143 N. Y. 235, 38 N. E. 288.

9. Blake *v.* Blake, 70 Ill. 618; Whitenack *v.* Whitenack, 36 N. J. Eq. 474, holding that, although a divorce should not be granted on uncorroborated testimony of a procurer, yet where other testimony shows that defendant and her paramour were frequently together in lonely places and at complainant's home in his absence, and they denied these meetings, adultery is proved.

10. *Connecticut.*— See Dennis *v.* Dennis, 68 Conn. 186, 36 Atl. 34, 57 Am. St. Rep. 95, 34 L. R. A. 449.

Illinois.— Blake *v.* Blake, 70 Ill. 618.

Michigan.— See Van Voorhis *v.* Van Voorhis, 94 Mich. 60, 53 N. W. 964.

New Jersey.—See Pullen *v.* Pullen, 46 N. J. Eq. 318, 20 Atl. 393; Hurtzig *v.* Hurtzig, 44 N. J. Eq. 329, 15 Atl. 537; Cane *v.* Cane, 39 N. J. Eq. 148.

New York.—Winston *v.* Winston, 165 N. Y. 553, 59 N. E. 273; Moller *v.* Moller, 115 N. Y. 466, 22 N. E. 169; Anonymous, 17 Abb. Pr. 48. And see Helmes *v.* Helmes, 24 Misc. 125, 52 N. Y. Suppl. 734.

Oregon.— Cline *v.* Cline, (1887) 16 Pac. 282.

Tennessee.— Hickerson *v.* Hickerson, (Ch. App. 1899) 52 S. W. 1019.

Virginia.— Engleman *v.* Engleman, 97 Va.

facts and circumstances in evidence or by the direct testimony of other witnesses or by both.[11]

b. Cruelty. Cruelty as a ground for divorce must be established by clear and satisfactory evidence.[12] Mere general statements to the effect that defendant has ill treated plaintiff or that they cannot live together will not suffice.[13] In weighing the evidence the court may consider the failure of defendant to explain incriminating circumstances proved against him.[14]

c. Desertion. To establish desertion the evidence must be clear and convincing.[15] There must be proof of the facts and circumstances under which it occurred; it is not sufficient to state generally that the complainant was aban-

487, 34 S. E. 50; Throckmorton *v.* Throckmorton, 86 Va. 768, 11 S. E. 289.

England.— See Gower *v.* Gower, L. R. 2 P. 428, 41 L. J. P. & M. 49, 27 L. T. Rep. N. S. 43, 20 Wkly. Rep. 889; Picken *v.* Picken, 34 L. J. P. & M. 22.

Reason for rule.— When a man sets up as a hired discoverer of supposed delinquencies, and the amount of his pay depends upon the extent of his employment, and the extent of his employment depends upon the discoveries he is able to make, then the man becomes a most dangerous instrument. Blake *v.* Blake, 70 Ill. 618, 622.

11. Moller *v.* Moller, 115 N. Y. 466, 22 N. E. 169.

12. De Meli *v.* De Meli, 5 N. Y. Civ. Proc. 306, 67 How. Pr. (N. Y.) 20. See, however, *supra*, XIII, C, 1.

Mental suffering.—To justify a decree upon the ground of cruelty causing mental suffering, proof of the existence and the cause of such suffering must be plain, and its serious effect upon present health, as well as its menace of real danger to life, must be shown with an unusual degree of certainty. Ogden *v.* Ogden, 17 App. Cas. (D. C.) 104; Densmore *v.* Densmore, 6 Mackey (D. C.) 544.

Communication of disease.— The testimony of a physician that the husband at the time of the separation had gonorrhea, accompanied by the admission that the medical books instance rare cases where that disease has been contracted from intercourse with chaste women, is not sufficient to entitle the wife to a divorce on the ground that the husband has contracted "a loathsome disease," as against defendant's denial, supported by the testimony of many medical experts that without microscopic examination it cannot be determined whether the disease is gonorrhea or urethritis, which is a disease frequently contracted from intercourse with chaste women in bad health. Boughner *v.* Boughner, 41 S. W. 26, 19 Ky. L. Rep. 504. See also Glenn *v.* Glenn, 87 Mo. App. 377. The fact that the wife was infected and that she had not been unchaste before marriage or unfaithful afterward, there being no proof that the husband had ever suffered from the disease, does not establish cruelty on the part of the husband as communicating a disease to the wife. Morphett *v.* Morphett, L. R. I P. 702, 38 L. J. P. & M. 23, 19 L. T. Rep. N. S. 801, 17 Wkly. Rep. 471. See also *supra*, note 3.

A husband suing for a divorce for cruelty must present a plainer case of violence or mental suffering injuriously affecting his health than the wife. Duberstein *v.* Duberstein, 171 Ill. 133, 49 N. E. 316; Aurand *v.* Aurand, 157 Ill. 321, 41 N. E. 859; Spitzmesser *v.* Spitzmesser, 26 Ind. App. 532, 60 N. E. 315.

Leading questions.— Where testimony in a divorce suit on the ground of cruelty is largely drawn out by leading questions, and goes but little beyond the points suggested by the questions, it is entitled to little credence. Richards *v.* Richards, 48 Mich. 530, 12 N. W. 688.

Physical ability of defendant to exert a great amount of violence, as where he was afflicted with locomotor ataxia, is a circumstance which may be considered in determining the effect of his alleged cruelty. McCahill *v.* McCahill, 71 Hun (N. Y.) 224, 25 N. Y. Suppl. 221.

Personal indignities as ground for divorce must also be proved clearly and satisfactorily. Edmond's Appeal, 57 Pa. St. 232.

13. Ogden *v.* Hebert, 49 La. Ann. 1714, 22 So. 919; Hill *v.* Hill, 24 Oreg. 416, 33 Pac. 809 (holding that plaintiff's testimony that defendant has falsely charged her with unchastity is not sufficient to warrant a decree, unless she also states the times, places, and circumstances of the alleged charges, and the persons to whom they were made); Edmond's Appeal, 57 Pa. St. 232 (holding the same rule applicable where a divorce is sought because of personal indignities).

14. Adkins *v.* Adkins, 63 Mo. App. 351; Brown *v.* Brown, L. R. 1 P. 46, 11 Jur. N. S. 1027, 13 L. T. Rep. N. S. 645, 14 Wkly. Rep. 149, where it was held that a husband's state of health must be within his own knowledge, and that if he is charged with having communicated to his wife a loathsome disease, and does not come forward to assert his ignorance, the court will hold the charge established.

15. Franklin *v.* Franklin, 53 Kan. 143, 35 Pac. 1118; Hosmer *v.* Hosmer, 53 Minn. 502, 55 N. W. 630. See, however, *supra*, XIII, C, 1.

Each case rests upon its own circumstances. The courts have not laid down any particular rules for determining whether a separation does or does not, as matter of proof, amount to desertion. Bailey *v.* Bailey, 21 Gratt. (Va.) 43.

doned by the other party.[16] The fact of desertion may be proved by a variety of circumstances leading with more or less probability to that conclusion.[17]

d. Habitual Drunkenness. General testimony that defendant is an habitual drunkard is insufficient to establish the offense; facts must be given in detail so that the court may judge whether or not they constitute habitual drunkenness.[18]

7. Proof of Affirmative Defenses. Collusion is not required to be proved as fully as other defenses. The court may refuse a divorce if no more than a grave suspicion of collusion exists.[19] Connivance[20] or condonation,[21] however, must be proved by clear and satisfactory evidence; and no less evidence is required to establish a recriminatory charge made in an answer than is required to establish a like charge in a complaint.[22]

16. *Alabama.*— Allen *v.* Allen, 84 Ala. 367, 4 So. 590.

Georgia.—Woolfolk *v.* Woolfolk, 53 Ga. 661.

Illinois.— Carter *v.* Carter, 62 Ill. 439.

Kentucky.— Gray *v.* Gray, 56 S. W. 652, 22 Ky. L. Rep. 17.

Massachusetts.— Bodwell *v.* Bodwell, 113 Mass. 314.

Michigan.— Rudd *v.* Rudd, 33 Mich. 101.

New Hampshire.— Kimball *v.* Kimball, 13 N. H. 222.

New Jersey.— Tate *v.* Tate, 26 N. J. Eq. 55; Stone *v.* Stone, 25 N. J. Eq. 445; Leaning *v.* Leaning, 25 N. J. Eq. 241; Test *v.* Test, 19 N. J. Eq. 342.

New York.— Turney *v.* Turney, 4 Edw. 566.

Pennsylvania.— Pote *v.* Pote, 8 Pa. Dist. 660, 23 Pa. Co. Ct. 327; Eisenberg *v.* Eisenberg, 18 Wkly. Notes Cas. 146; Jayne *v.* Jayne, 4 Kulp 74; Williams *v.* Williams, 1 Woodw. 308.

Tennessee.— Majors *v.* Majors, 1 Tenn. Ch. 264.

See 17 Cent. Dig. tit. "Divorce," § 446 *et seq.*

17. *Massachusetts.*— Gregory *v.* Pieree, 4 Mete. 478, holding that desertion by a husband is sufficiently shown where he leaves the wife with a declared intention never to return, or marries or lives in adultery with another woman, or is unnecessarily absent a long time without making provision for the family, etc.

New York.— Williams *v.* Williams, 3 Silv. Supreme 385, 6 N. Y. Suppl. 645, 17 N. Y. Civ. Proc. 297, holding that desertion is shown by the fact that defendant left the state and took up his residence in another, where he procured a divorce.

Ohio.— Guembell *v.* Guembell, Wright 226.

Texas.— Besch *v.* Beseh, 27 Tex. 390.

Wisconsin.—Phillips *v.* Phillips, 22 Wis. 256.

England.— Lawrence *v.* Lawrenee, 8 Jur. N. S. 972, 31 L. J. P. & M. 145, 6 L. T. Rep. N. S. 550, 2 Swab. & Tr. 575.

Unexplained absence of a husband without tidings from him is not sufficient to establish an intent to desert and to continue his desertion, in the absence of proof that he remained alive and free and able to return if he had desired to do so. Sweeney *v.* Sweeney, 62 N. J. Eq. 357, 50 Atl. 785. See, however, Besch *v.* Besch, 27 Tex. 390. See, generally, Death.

Declarations of a wife upon leaving her husband that she would no longer live with him are suffieient to show that her absenee was wilful, and if unexplained it must be taken to have been unjustifiable. Packard *v.* Packard, 90 Iowa 765, 58 N. W. 903; Willson *v.* Willson, 12 Ky. L. Rep. 987; Hall *v.* Hall, 4 Allen (Mass.) 39. Declarations by a husband of his intention not to live with his wife are not neeessarily conclusive that he and not the wife was the deserter however. Gray *v.* Gray, 15 Ala. 779.

18. Batchelder *v.* Batchelder, 14 N. H. 380.

19. *District of Columbia.*— Jones *v.* Jones, 20 App. Cas. 38.

Michigan.— Holton *v.* Holton, 116 Mich. 669, 75 N. W. 97.

New York.—E. B. *v.* E. C. B., 28 Barb. 299.

Ohio.— Wolf *v.* Wolf, Wright 243.

England.— Williams *v.* Williams, 1 Hagg. Const. 299, 4 Eng. Eccl. 415.

Voluntary appearance.— Where defendant not only accepted service of summons but without notice appeared and consented to the taking of depositions, and failed to ask a single question of the witness, the case smacks too strongly of collusion to authorize the court to reverse a judgment dismissing the petition. Calloway *v.* Calloway, 8 Ky. L. Rep. 537; Ferguson *v.* Ferguson, 8 Ky. L. Rep. 428. But see English *v.* English, 19 Pa. Super. Ct. 586, where it was held that it cannot be declared as an unvarying rule that an appearance of respondent, in the absence of due legal serviee of the subpœna, is conclusive evidence of collusion.

20. Welch *v.* Welch, 50 Mo. App. 395; Cook *v.* Cook, (N. J. Ch. 1893) 27 Atl. 818; Turton *v.* Turton, 3 Hagg. Eecl. 338, 5 Eng. Eecl. 130; Croft *v.* Croft, 3 Hagg. Eecl. 310, 5 Eng. Eccl. 120.

Connivance by husband.—Less weighty evidence will be required to prove a husband's connivance than the wife's. Angle *v.* Angle, 12 Jur. 525.

Circumstantial evidence.—It may, however, be proved by express language or by inference from facts and conduet. Moorsom *v.* Moorsom, 3 Hagg. Eccl. 87, 5 Eng. Eccl. 28; Rogers *v.* Rogers, 3 Hagg. Eccl. 57, 5 Eng. Eecl. 13; Boulting *v.* Boulting, 10 Jur. N. S. 182, 33 L. J. P. & M. 33, 9 L. T. Rep. N. S. 779, 3 Swab. & Tr. 329, 12 Wkly. Rep. 389.

21. Depass *v.* Winter, 23 La. Ann. 422; McConnell *v.* McConnell, 37 Nebr. 57, 55 N. W. 292.

22. Pollock *v.* Pollock, 71 N. Y. 137; Denison *v.* Denison, 4 Wash. 705, 30 Pac. 1100.

XIV. TRIAL.[23]

A. Place of Hearing. It is frequently provided by statute that the hearing of a divorce suit shall be held in open court.[24]

B. Time of Trial. In some states the time of trial is regulated by statute.[25]

C. Continuances.[26] An order of continuance may be granted in a divorce suit as in other civil cases.[27]

D. Dismissal or Discontinuance[28] — 1. VOLUNTARY DISMISSAL. Ordinarily the complainant may at any time prior to a decree, unless a cross bill has been filed, dismiss the bill as a matter of course.[29]

23. See, generally, TRIAL.

24. Hobart *v.* Hobart, 45 Iowa 501; Cross *v.* Cross, 55 Mich. 280, 21 N. W. 309; Hamilton *v.* Hamilton, 37 Mich. 603.

In England, under the Matrimonial Causes Act of 1857 (20 & 21 Vict. c. 85), § 22, the court may hear a suit in private, if brought for nullity of marriage or judicial separation, but cannot hear a petition for dissolution of marriage except in open court. A. *v.* A., L. R. 3 P. 230, 44 L. J. P. & M. 15, 31 L. T. Rep. N. S. 801, 23 Wkly. Rep. 386; C. *v.* C., L. R. 1 P. 640, 20 L. T. Rep. N. S. 280. See also Barnett *v.* Barnett, 29 L. J. P. & M. 28.

The object of the rule is not merely to prevent secret proceedings, but rather to secure trials before the courts themselves and not elsewhere or at any other times than the law prescribes for the sessions of courts. Hobart *v.* Hobart, 45 Iowa 501.

25. Daly *v.* Hosmer, 102 Mich. 392, 60 N. W. 758, holding, under a statute providing that no testimony shall be taken until four months after the filing of the bill, that where an answer in the nature of a cross bill is filed the time begins to run from the filing of the original and not the cross bill.

26. See, generally, CONTINUANCES IN CIVIL CASES.

27. Barnes *v.* Barnes, 95 Cal. 171, 30 Pac. 298, 16 L. R. A. 660, holding that an application for continuance is addressed to the sound discretion of the court, and will not be granted where the circumstances cast suspicion on the good faith of the application and induce a belief that it was intended solely for delay. So, although the court should be liberal in granting continuances in divorce cases, because the public as well as the parties are interested in the result, defendant cannot complain if his application is denied, where he has attempted to subordinate the business of the court to his own business engagements and convenience.

Grounds.— A continuance may be granted because of the absence of a material witness (Scripture *v.* Scripture, 70 Hun (N. Y.) 432, 24 N. Y. Suppl. 301. And see Hughes *v.* Hughes, 44 Ala. 698); or for the purpose either of remedying a defective service (Chase *v.* Chase, 61 N. H. 123), if the defect is not fatal (Philbrick *v.* Philbrick, 27 Vt. 786), or of permitting an amendment to a pleading (Burdell *v.* Burdell, 2 Barb. (N. Y.) 473, 3 How. Pr. (N. Y.) 216), or of enabling a defendant who becomes insane pending the action to regain his reason (Stratford *v.* Stratford, 92 N. C. 297). However, the hearing will not be postponed to produce an insane plaintiff in court, where his physician's affidavit avers that he could not be presented in court without suffering injury. Thayer *v.* Thayer, 9 R. I. 377.

28. See, generally, DISMISSAL AND NONSUIT; EQUITY.

29. *Idaho.*— Stover *v.* Stover, 7 Ida. 185, 61 Pac. 462.

Illinois.— Clark *v.* Clark, 29 Ill. App. 257.

Kansas.— Ashmead *v.* Ashmead, 23 Kan. 262.

New York.— *In re* Butler, 101 N. Y. 307, 4 N. E. 518.

Pennsylvania.— Koecker *v.* Koecker, 7 Phila. 364, holding that a libellant may suffer a nonsuit on the trial as in other cases. See Schlichter *v.* Schlichter, 10 Phila. 11.

Public interest.— However, the right to a discontinuance is not to be strictly regarded in actions for divorce, since the rights of the parties to the record are not alone to be considered, but the public is also to be regarded as a party. Winans *v.* Winans, 124 N. Y. 140, 26 N. E. 293 (where the marriage of the parties was in issue); Winston *v.* Winston, 21 N. Y. App. Div. 371, 47 N. Y. Suppl. 399 (where defendant had obtained a divorce from plaintiff in another state and remarried a third person). But it has been held that the public has no interest in an action for divorce where the legality of the marriage is not questioned. Moore *v.* Moore, 22 N. Y. Suppl. 451. And see Burton *v.* Burton, 58 Vt. 414, 5 Atl. 281.

Grounds for refusing leave to dismiss.— Leave to discontinue will not be granted where defendant will thereby suffer a disadvantage (Murphy *v.* Murphy, 8 Phila. (Pa.) 357), as where a charge of adultery is made by defendant in recrimination and denied by plaintiff (Campbell *v.* Campbell, 12 Hun (N. Y.) 636); nor will leave be granted where the status or the custody of the children of the marriage will thereby remain undetermined (Winans *v.* Winans, 124 N. Y. 140, 26 N. E. 293; Winston *v.* Winston, 21 N. Y. App. Div. 371, 47 N. Y. Suppl. 399). To justify a refusal of the application, however, there must be some facts or reasons upon which the court's dis-

2. Involuntary Dismissal. The court may of its own volition or upon the application of defendant dismiss the complaint in a divorce suit as in other civil cases for various causes.[30]

3. Operation and Effect. Ordinarily a dismissal of the bill carries the whole case out of court,[31] unless defendant has interposed a cross complaint or counterclaim.[32] However, the court retains jurisdiction to determine the rights of the parties with reference to alimony and attorney's fees.[33]

E. Necessity of Taking Proofs — 1. Where Facts Are Admitted. Neither an express admission of matrimonial misconduct in defendant's answer, nor an implied admission by a failure to deny it, is sufficient to authorize a decree of divorce without proper proof of the fact.[34] Proof of marriage or residence

cretion can be based. The fact that adultery is charged is not a sufficient cause for denying the application. Moore *v.* Moore, 22 N. Y. Suppl. 451.

Conditions of leave to discontinue.— Leave to discontinue is usually granted on condition that the costs and temporary alimony if any be paid by plaintiff. Leslie *v.* Leslie, 3 Daly (N. Y.) 194 [*affirmed* in 10 Abb. Pr. N. S. 64]; Milner *v.* Milner, 2 Edw. (N. Y.) 114. And see Clutton *v.* Clutton, 106 Mich. 690, 64 N. W. 774; Campbell *v.* Campbell, 54 How. Pr. (N. Y.) 115; Dixon *v.* Dixon, L. R. 2 P. 253, 40 L. J. P. & M. 38, 25 L. T. Rep. N. S. 135, 19 Wkly. Rep. 787; Cooper *v.* Cooper, 33 L. J. P. & M. 71, 10 L. T. Rep. N. S. 275, 3 Swab. & Tr. 392.

Discontinuance as consideration for note see Commercial Paper, 7 Cyc. 717, note 61.

30. Sommers *v.* Sommers, 16 Ill. App. 77 (want of jurisdiction); Taber *v.* Taber, 60 N. Y. Super. Ct. 65, 16 N. Y. Suppl. 613, 21 N. Y. Civ. Proc. 340 (want of prosecution); Weichel *v.* Weichel, 7 Kulp (Pa.) 442, 15 Pa. Co. Ct. 606 (failure to comply with court rules in respect to the proceeding where defendant has defaulted).

On failure of proof.— The court may order a dismissal for failure of plaintiff to prove jurisdictional facts (Edwards *v.* Edwards, 30 Ala. 394, where a bill was dismissed without prejudice to plaintiff on failure to prove the statutory residence) or to sustain by sufficient evidence the misconduct alleged as a ground for divorce.

Iowa.— Edgerton *v.* Edgerton, 79 Iowa 68, 44 N. W. 218.

Louisiana.— Weaver *v.* Weaver, 110 La. 265, 34 So. 438.

Massachusetts.— Bodwell *v.* Bodwell, 113 Mass. 314.

Michigan.— Powell *v.* Powell, 58 Mich. 299, 25 N. W. 199.

New York.— Burke *v.* Burke, 75 Hun 412, 27 N. Y. Suppl. 67.

Texas.— Moore *v.* Moore, 22 Tex. 237.

See 17 Cent. Dig. tit. "Divorce," § 490.

Erroneous dismissal.— Failure to serve the summons ten days before the first day of the term at which the suit was brought, as required by Ind. Div. Act, § 13, is not ground for a dismissal, but is only a cause for continuance. Bratton *v.* Bratton, 79 Ind. 588. Although the manner and substance of examination and cross-examination might lead to a suspicion of collusion, it is error to refuse to hear further testimony and to dismiss the suit without conclusive proof of collusion. Blinn *v.* Blinn, 113 Iowa 83, 84 N. W. 957. Defendant is not entitled to a compulsory *non prosequi* for plaintiff's failure to furnish a bill of particulars, where plaintiff has previously obtained a rule for counsel fees which are unpaid. Jones *v.* Jones, 23 Wkly Notes Cas. (Pa.) 370.

Dismissal without prejudice.— If the proof does not sustain the specific allegation of adultery contained in the bill, it may be dismissed with privilege of filing a new bill containing further specific allegations. Miller *v.* Miller, 20 N. J. Eq. 216. The discretionary power to order a dismissal without prejudice exists even after testimony has been received and the case is taken under advisement. Ashmead *v.* Ashmead, 23 Kan. 262; Burton *v.* Burton, 58 Vt. 414, 5 Atl. 281. See also Moore *v.* Moore, 22 Tex. 237.

31. Stoner *v.* Stoner, 9 Ind. 505.

Effect as res judicata see *infra*, XV, F.

32. Dewees *v.* Dewees, 55 Miss. 315; Campbell *v.* Campbell, 12 Hun (N. Y.) 636, both cases holding that the court may order a retention of the cause for a final decree on the cross bill. So defendant is entitled to introduce evidence in support of his cross complaint, although plaintiff does not appear (Ficke *v.* Ficke, 62 Mo. 335) or fails to make out his case (Owen *v.* Owen, 54 Ga. 526). See also *supra*, V, C, 3, b.

33. Thornberry *v.* Thornberry, 2 J. J. Marsh. (Ky.) 322, holding that where a divorce and alimony are sought, and there is no ground for divorce, the bill should be retained so far as the claim for alimony is concerned.

Attorney's fees.— Where, pending a suit by a wife for divorce, she and her husband are reconciled and a dismissal is entered in vacation, the court retains jurisdiction until the entry of judgment at the next term, for the purpose of requiring the husband to compensate the wife's attorneys. Courtney *v.* Courtney, 4 Ind. App. 221, 30 N. E. 914. But see Sims *v.* Davis, 48 Nebr. 720, 67 N. W. 765, holding that upon an order of dismissal being filed, the attorney for plaintiff has no standing to move to set aside the order so that his application for an allowance of an attorney's fee may be passed upon.

34. *Alabama.*— Richardson *v.* Richardson, 4 Port. 467, 30 Am. Dec. 538, holding that

which is alleged and admitted either expressly or impliedly need not be required, however.[35]

2. On Default or Bill Confessed. A divorce will not be granted upon default of defendant to appear or upon a bill taken for confessed, unless complainant's charges of misconduct are sustained by sufficient proof;[36] and the court will usually require proof of jurisdictional facts[37] and of service of process on defendant.[38]

3. On Failure to Prosecute Recriminatory Charges. It has been held that the failure of a defendant who has interposed a counter charge of adultery by way of recrimination to appear and prosecute the charge does not entitle plaintiff to a divorce without denying the misconduct.[39]

F. Trial by Court — 1. In General. In the absence of statute to the contrary, a suit for divorce may be tried by the court without a jury.[40]

2. Findings — a. Of Fact. Findings of fact by the court in divorce suits should include a determination of all the material issues made by the pleadings

this rule applies in cases of divorce either *a vinculo* or *a mensa et thoro*.

Indiana.— Scott *v.* Scott, 17 Ind. 309.

Louisiana.— Anderson *v.* Anderson, 48 La. Ann. 642, 19 So. 567; Harman *v.* McLeland, 16 La. 26.

Minnesota.— Young *v.* Young, 17 Minn. 181.

New York.— Palmer *v.* Palmer, 1 Paige 276.

Oregon.— Hill *v.* Hill, 24 Oreg. 416, 33 Pac. 809.

Pennsylvania.— Daniel *v.* Daniel, 1 Pearson 242.

Virginia.— Latham *v.* Latham, 30 Gratt. 307.

See 17 Cent. Dig. tit. "Divorce," § 475.

Cross complaint.— Nor can a defendant be granted a divorce upon the uncontroverted allegations of his cross bill. Nichols *v.* Nichols, 39 Mo. App. 291.

35. Fox *v.* Fox, 25 Cal. 587; Harman *v.* Harman, 16 Ill. 85; Hill *v.* Hill, 2 Mass. 150; Simons *v.* Simons, 13 Tex. 468. *Contra*, Schmidt *v.* Schmidt, 29 N. J. Eq. 496; Belyew *v.* Belyew, (Tex. Civ. App. 1895) 32 S. W. 40. See Smith *v.* Smith, 10 N. D. 219, 86 N. W. 721, holding that the court is not concluded by an admission in defendant's answer that plaintiff's residence in the state was *bona fide* when the action was commenced.

36. *Arkansas.*— Welch *v.* Welch, 16 Ark. 527.

Illinois.— Wheeler *v.* Wheeler, 18 Ill. 39; Shillinger *v.* Shillinger, 14 Ill. 147; Kline *v.* Kline, 104 Ill. App. 274.

Indiana.— Scott *v.* Scott, 17 Ind. 309.

Kansas.— Meyer *v.* Meyer, 60 Kan. 859, 57 Pac. 550.

Michigan.— Robinson *v.* Robinson, 16 Mich. 79.

Minnesota.— Young *v.* Young, 17 Minn. 181; True *v.* True, 6 Minn. 453.

New York.— Robinson *v.* Robinson, 1 Barb. 27; Ivison *v.* Ivison, 29 Misc. 240, 61 N. Y. Suppl. 118; Hanks *v.* Hanks, 3 Edw. 469; Shetzler *v.* Shetzler, 2 Edw. 584; Graves *v.* Graves, 2 Paige 62; Palmer *v.* Palmer, 1 Paige 276; Barry *v.* Barry, Hopk. 118; Moore *v.* Moore, 14 N. Y. Wkly. Dig. 255, holding that the testimony is to be closely scrutinized in case of default.

Ohio.— Smith *v.* Smith, Wright 643; Mansfield *v.* Mansfield, Wright 284.

Pennsylvania.— Kilborn *v.* Field, 78 Pa. St. 194.

See 17 Cent. Dig. tit. "Divorce," § 476.

In New York, Gen. Rules Pr. No. 72, provides that where the action is based on adultery, unless it be averred in the complaint that the offense was committed without plaintiff's privity, consent, or connivance; that five years have not elapsed since the discovery of the offense; and that plaintiff has not voluntarily cohabited with defendant since such discovery; and also where, at the time of the offense, defendant was living in adulterous intercourse, that five years have not elapsed since the commencement of the intercourse was discovered; and the complaint be verified under oath, judgment shall not be rendered for the relief demanded until plaintiff's affidavit be produced stating the above facts. This rule was made for cases of default only. McCarthy *v.* McCarthy, 143 N. Y. 235, 38 N. E. 288; Merrill *v.* Merrill, 41 N. Y. App. Div. 347, 58 N. Y. Suppl. 503; Evans *v.* Evans, 27 Misc. 10, 57 N. Y. Suppl. 274. A statement in the complaint that "five years have not elapsed since he [plaintiff] discovered the fact that such adultery had been committed by the defendant without his consent, connivance or procurement," is not a sufficient denial of such consent. Myers *v.* Myers, 41 Barb. 114. A *dictum* in Merrill *v.* Merrill, *supra*, is to the effect that plaintiff must negative condonation and prove the fact should defendant make default; but in Evans *v.* Evans, *supra*, the court declares that where a verified complaint contains the prescribed allegations, oral proof of them is unnecessary.

37. Williams *v.* Williams, 3 Me. 135, where proof of marriage was required.

38. See *supra*, X, F.

39. Akers *v.* Akers, 8 Pa. Dist. 419, 22 Pa. Co. Ct. 550.

40. See cases cited *infra*, notes XIV, G, 1.

and litigated in the trial,[41] and should ordinarily be restricted to these.[42] They should not be mere conclusions of law,[43] but findings upon the ultimate facts in issue are sufficient without findings upon the facts probative thereof.[44]

b. Of Law. The findings of law should conclude with a finding in favor of one of the parties and against the other.[45]

G. Trial by Jury — 1. Right to Jury. A suit for divorce may be tried by the court without a jury,[46] unless the right of trial by jury is conferred by constitutional grant or legislative enactment.[47]

41. O'Brien *v.* O'Brien, 124 Cal. 422, 57 Pac. 225 (holding that a failure to find the jurisdictional fact of residence or the facts constituting the grounds for divorce is fatal); Cassidy *v.* Cassidy, 63 Cal. 352; Dunn *v.* Dunn, 62 Cal. 176; Miller *v.* Miller, 43 Iowa 325 (holding that a finding that defendant's conduct was "such as to manifest a disregard of the marriage vow and obligations to his wife" is not sufficient to sustain an allegation of inhuman treatment endangering life).

Findings on cross complaint.— Where the parties each complain of the desertion of the other, a finding that defendant deserted plaintiff is a sufficient finding as to the desertion set up by defendant. De Tolna *v.* De Tolna, 135 Cal. 575, 67 Pac. 1045. And where both parties allege cruelty, a finding of fact for plaintiff is sufficient basis for a conclusion of law that plaintiff is entitled to a decree. Smith *v.* Smith, (Cal. 1897) 48 Pac. 730.

42. Bryan *v.* Bryan, (Cal. 1902) 70 Pac. 304; De Tolna *v.* De Tolna, 135 Cal. 575, 67 Pac. 1045; Devoe *v.* Devoe, 51 Cal. 543; Fox *v.* Fox, 25 Cal. 587.

Condonation.— Where evidence shows condonation of the acts for which a divorce is sought, however, it is the duty of the court to find to that effect, although condonation is not pleaded. Hunter *v.* Hunter, 132 Cal. 473, 64 Pac. 772.

43. Fink *v.* Fink, 137 Cal. 559, 70 Pac. 628.

44. Howard *v.* Howard, 134 Cal. 346, 66 Pac. 367 (holding that where the court finds that defendant deserted plaintiff it is not necessary to find further that plaintiff sought a reconciliation and defendant refused it); Kepfler *v.* Kepfler, 134 Cal. 205, 66 Pac. 208 (holding that a finding which negatives every charge of cruelty alleged in the complaint must be treated as negativing also a charge of desertion by driving plaintiff from home by cruelty); Terrill *v.* Terrill, 109 Cal. 413, 42 Pac. 137 (holding that where findings are made on issues raised by specific denials of plaintiff's allegations of desertion and failure to support, a separate finding is unnecessary on an allegation in the answer of defendant's willingness and offer to support); Trumpy *v.* Trumpy, 43 Conn. 270 (holding that a general finding that defendant has not been guilty of intolerable cruelty sufficiently negatives specific allegations of cruelty); Schmid *v.* Schmid, 60 Ill. App. 174, 175 (holding that a recital that "the court, having heard the evidence, . . . found the allegations of the bill to be true," is a sufficient finding); Pollock *v.* Pollock, 71 N. Y. 137 (holding that a decision stating that the court found plaintiff guilty of the adultery "as charged in the answer" and directing the complaint to be dismissed is a sufficient compliance with a statute requiring the decision to separately state the facts found and the conclusions of law). See, however, Fink *v.* Fink, 137 Cal. 559, 70 Pac. 628; Bowers *v.* Bowers, 19 Mo. 351, holding that a finding that defendant was guilty of acts and abuse which were indignities, without stating their nature, is insufficient.

45. Gullett *v.* Gullett, 25 Ind. 517, holding that a finding that a divorce ought to be granted, "not upon the application of either party, but upon the whole case," is insufficient, since a divorce can be granted only upon the application of the injured party. It has been held, however, that a decree of divorce in a suit where both parties appear is not objectionable because it does not find plaintiff to be the injured and innocent party. Schmidt *v.* Schmidt, 26 Mo. 235.

46. *Arkansas.*— Simpson *v.* Simpson, 25 Ark. 487.

Indiana.— Leffel *v.* Leffel, 35 Ind. 76, holding that where a jury trial is ordered and the jury fail to agree and are discharged, the court may find upon the issues and decide the cause on the evidence which was given before the jury.

Iowa.— Hobart *v.* Hobart, 51 Iowa 512, 1 N. W. 780; Sherwood *v.* Sherwood, 44 Iowa 192.

Kansas.— Carpenter *v.* Carpenter, 30 Kan. 712, 2 Pac. 122, 46 Am. Rep. 108.

Kentucky.— Newcomb *v.* Newcomb, 13 Bush 544, 26 Am. Rep. 222.

Maine.— Slade *v.* Slade, 58 Me. 157.

Pennsylvania.— Carre *v.* Carre, 2 Yeates 207.

Washington.—Madison *v.* Madison, 1 Wash. Terr. 60.

In the ecclesiastical courts the judges determined both the facts and the law without a jury. 3 Blackstone Comm. 101.

47. Schafberg *v.* Schafberg, 52 Mich. 429, 18 N. W. 202, holding that the statute requiring the issues to be tried by a jury is not mandatory, but merely secures to either party the right to a jury unless it is waived.

In New York the issue of adultery must be tried before a jury unless such trial is waived. Batzel *v.* Batzel, 42 N. Y. Super. Ct. 561, 54 How. Pr. 139. The right to such a trial is constitutional and cannot be reduced to a discretionary right by a general rule of practice. Lowenthal *v.* Lowenthal, 92 Hun 385, 36 N. Y. Suppl. 1053 [*affirmed* in 157 N. Y. 236, 51 N. E. 995];

2. Application For Jury. The application for a jury must be seasonably made.[48]

3. Number of Jurors. The number of men required to constitute a jury is usually governed by statutes relating to jury trials generally.[49]

4. Submission of Issues. In nearly all the states the practice exists, either by statutory provision or by adaptation of equity rules, of authorizing the submission of questions of fact in divorce cases to a jury to aid the court in the determination of the issues.[50] The questions which will be thus framed and submitted[51]

Whitney *v.* Whitney, 76 Hun 585, 28 N. Y. Suppl. 214; Conderman *v.* Conderman, 44 Hun 181; Morrell *v.* Morrell, 3 Barb. 236; Deitz *v.* Deitz, 4 Thomps. & C. 565, 48 How. Pr. 114; Forrest *v.* Forrest, 6 Duer 102, 3 Abb. Pr. 144; Fries *v.* Fries, 34 Misc. 478, 70 N. Y. Suppl. 295; Sigel *v.* Sigel, 19 N. Y. Suppl. 906, 28 Abb. N. Cas. 308; McCrea *v.* McCrea, 58 How. Pr. 220; Whale *v.* Whale, 1 Code Rep. 115.

In North Carolina the material facts charged in a petition for divorce and alimony must be submitted to a jury on whose verdict and not otherwise the court shall make its decree. Miles *v.* Miles, 55 N. C. 21.

In England it is usual for the court to try the issues more fit to itself than a jury (Ricketts *v.* Ricketts, 35 L. J. P. & M. 92, 13 L. T. Rep. N. S. 761); and the court may submit issues of fact to a jury, although the parties object (Ratcliff *v.* Ratcliff, 27 L. J. P. & M. 60, 1 Swab. & Tr. 217, 6 Wkly. Rep. 866; C *v.* C, 32 L. J. P. & M. 12).

A constitutional provision securing generally the right of trial by jury applies to such right only as it existed at common law and has no reference to suits for divorce. Cassidy *v.* Sullivan, 64 Cal. 266, 28 Pac. 234; Mead *v.* Mead, 1 Mo. App. 247.

Framing issues for jury see *infra*, XIV, G, 4.

48. Allison *v.* Allison, 46 Pa. St. 321; Schaeffer *v.* Schaeffer, 3 Kulp (Pa.) 14; Newbold's Appeal, 2 Wkly. Notes Cas. (Pa.) 472; Mann *v.* Mann, 2 Wkly. Notes Cas. (Pa.) 50; Mattson *v.* Mattson, 1 Wkly. Notes Cas. (Pa.) 414; Uhrich *v.* Uhrich, 3 Del. Co. (Pa.) 281; Lynch *v.* Lynch, 7 Luz. Leg. Reg. (Pa.) 69; Richards *v.* Richards, 5 Luz. Leg. Reg. (Pa.) 237; Finnegan *v.* Finnegan, 2 Leg. Gaz. (Pa.) 372; Myers *v.* Myers, 5 L. T. N. S. (Pa.) 58, all holding that an application not made until after the report of a referee is filed is too late.

A demand for an issue is in time, if made at the second meeting before a commissioner appointed to take evidence (Derringer *v.* Derringer, 8 Phila. (Pa.) 269; Richards *v.* Richards, 5 Luz. Leg. Reg. (Pa.) 237; Beaumont *v.* Beaumont, 1 Chest. Co. Rep. (Pa.) 304), or if made before the examiner has taken testimony (Murphey *v.* Murphey, 9 Kulp (Pa.) 556; Karmoski *v.* Karmoski, 9 Kulp (Pa.) 355).

49. Branch *v.* Branch, 30 Colo. 499, 71 Pac. 632 (holding that a statute providing that the jury shall consist of six persons, unless the parties agree to a smaller number not less than three, applies in divorce suits, the statute concerning divorce having no provision as to juries); Hall *v.* Hall, 131 N. C. 185, 42 S. E. 562 (holding that consent to a verdict by eleven jurors is valid, the verdict being for defendant, although, under N. C. Code, § 1288, providing that no judgment in a divorce shall be given in favor of plaintiff till the facts have been found by a jury, it would not be valid if the verdict were for plaintiff).

50. Hobart *v.* Hobart, 51 Iowa 512, 1 N. W. 780; Sherwood *v.* Sherwood, 44 Iowa 192, Morrison *v.* Morrison, 14 Mont. 8, 35 Pac. 1; Beck *v.* Beck, 163 Pa. St. 649, 30 Atl. 236; McIlhenny *v.* McIlhenny, 16 Phila. (Pa.) 83; Winpenny *v.* Winpenny, 16 Phila. (Pa.) 24; Butler *v.* Butler, 8 Pittsb. Leg. J. (Pa.) 390; Stuard *v.* Stuard, 1 Pa. Co. Ct. 504. See also Miles *v.* Miles, 55 N. C. 21.

51. Dunn *v.* Dunn, 11 Mich. 284; Morrell *v.* Morrell, 3 Barb. (N. Y.) 236; Walukas *v.* Walukas, 9 Kulp (Pa.) 332; Cain *v.* Cain, 6 Pa. Co. Ct. 366; Uhrich *v.* Uhrich, 3 Del. Co. (Pa.) 281, all holding that only such matters as are alleged on one side and denied on the other should be submitted.

Certainty.— In framing the issues care should be taken to specify with certainty the charges of misconduct on the part of defendant so as to enable him to meet them on the trial. Whitney *v.* Whitney, 76 Hun (N. Y.) 585, 28 N. Y. Suppl. 214; De Carrillo *v.* Carrillo, 53 Hun (N. Y.) 359, 6 N. Y. Suppl. 305; Strong *v.* Strong, 3 Rob. (N. Y.) 719, 4 Rob. (N. Y.) 621, 1 Abb. Pr. N. S. (N. Y.) 233, holding also, however, that issues as to adultery made in the pleadings and inserted without objection in the issues as framed for trial will not be expunged on motion merely for indefiniteness as to time and place.

Partial submission.— Each controverted allegation in the pleadings need not be submitted. Trigg *v.* Trigg, (Tex. 1891) 18 S. W. 313. Where a part of the alleged adulteries are denied, the court, on application of either party, must direct a settlement of the issues raised by the denial, and may take evidence of the adulteries not denied. Galusha *v.* Galusha, 43 Hun (N. Y.) 181. Where issues are once duly stated and settled, the parties waive the right to have, preliminarily to the trial, any more questions specifically stated and settled. Whitney *v.* Whitney, 76 Hun (N. Y.) 585, 28 N. Y. Suppl. 214.

If condonation or a recriminatory charge is set up in the answer, the issues may include the facts and circumstances relied on to sustain either defense, and they may be submitted to the same jury for determination. Morrell *v.* Morrell, 1 Barb. (N. Y.) 318;

and the mode of submission[52] are commonly governed by the general rules of practice.[53]

5. Province of Court and of Jury. It is for the jury to determine the issues of fact as submitted to it, and for the court to determine whether the facts if found are sufficient to justify a divorce.[54]

6. Instructions. The court may instruct the jury in respect to issues submitted to them in divorce suits as in other civil cases, and the same general rules are applicable thereto.[55]

7. Verdict — a. In General. Where issues are framed and submitted to the jury, the verdict should state specifically and with certainty the facts found to be true,[56] and should be responsive to the issues.[57]

Smith *v.* Smith, 4 Paige (N. Y.) 432, 27 Am. Dec. 75. See, however, Morrell *v.* Morrell, 3 Barb. (N. Y.) 236.

52. Waldron *v.* Waldron, 55 Pa. St. 231 (holding that the form of the issues framed is properly directed by the court); Richmond *v.* Richmond, 10 Yerg. (Tenn.) 343 (holding that it is no objection that the issues are drawn on a paper distinct from the petition and answer).

53. See, generally, Equity.

54. *Georgia.*— Gholston *v.* Gholston, 31 Ga. 625.

Illinois.— Lenning *v.* Lenning, 176 Ill. 180, 52 N. E. 46 [*affirming* 73 Ill. App. 224] (holding that the question whether two or more acts of physical violence constitute cruelty is for the jury); Henderson *v.* Henderson, 88 Ill. 248 (holding that it is error to leave it to the jury to determine as a matter of law upon the evidence, whether complainant is entitled to a divorce).

Massachusetts.— French *v.* French, 14 Gray 186, holding that a ruling that certain evidence constitutes no defense is not error, it not being necessary to submit the evidence to the jury for them to determine that question.

North Carolina.— Harrison *v.* Harrison, 29 N. C. 484.

Pennsylvania.— Gordon *v.* Gordon, 48 Pa. St. 226; Breinig *v.* Breinig, 26 Pa. St. 161, holding that it is for the jury to determine whether words and acts proved imply a threat.

Texas.—Byrne *v.* Byrne, 3 Tex. 336; Wright *v.* Wright, 3 Tex. 168.

England.— Peacock *v.* Peacock, 27 L. J. P. & M. 71, 1 Swab. & Tr. 183, 6 Wkly. Rep. 866, holding that condonation is a question for the jury.

See 17 Cent. Dig. tit. "Divorce," § 493.

55. Lowenthal *v.* Lowenthal, 92 Hun (N. Y.) 385, 36 N. Y. Suppl. 1053 [*affirmed* in 157 N. Y. 236, 51 N. E. 995], holding that whers a charge that the question for the jury was whether the alleged offense as submitted had been proved by a fair preponderance of evidence, it was not error to refuse an instruction that a divorce should not be granted without evidence which after careful scrutiny is satisfactory and can command the confidence of a cautious judge or jury. *Compare* Lenning *v.* Lenning, 176 Ill. 180, 52 N. E. 46; Fries *v.* Fries, 34 Misc. (N. Y.) 478, 70 N. Y. Suppl. 295.

Conformity to issues.— The instructions must be responsive to the issues. Fuller *v.* Fuller, 108 Ga. 256, 33 S. E. 865 (holding that, although a libel charging respondent with conduct such as would authorize a divorce may be defeated by showing that libellant was guilty of "like conduct," the court should not submit to the jury the question whether improper conduct of libellant "justified" respondent in being guilty of conduct of the same kind, since the question of justification is not involved); Smith *v.* Smith, 72 N. C. 139 (where a general instruction that "it is for the jury to say whether the petitioner's complaints are well founded" was held erroneous).

Conformity to evidence.— The instructions must be in accordance with the evidence presented. Von Glahn *v.* Von Glahn, 46 Ill. 134 (holding that where cruelty is alleged, and the evidence tends to show that complainant had been guilty of like conduct or of conduct which provoked the acts charged, it is error to instruct the jury that "if they find that the defendant had been guilty of extreme and repeated cruelty, they should find for complainant," since, in the absence of any explanatory clause, it ignores the issue as to complainant's misconduct); Schoen *v.* Schoen, 48 Ill. App. 382 (holding that where no evidence is presented that plaintiff is afflicted with hysteria or that her condition is such as to incapacitate her from telling the truth, it is error to charge the jury to consider, in determining her credibility, the fact that she is afflicted with hysteria or other illness); Bohan *v.* Bohan, (Tex. Civ. App. 1900) 56 S. W. 959 (holding that where the evidence raises an issue of recrimination, it is error to refuse a charge that if the parties are equally at fault the verdict should be for defendant).

56. Wood *v.* Wood, 27 N. C. 674.

Construction of verdict.— A verdict finding the allegations of the bill to be true except the allegation that plaintiff has been a dutiful wife is substantially a verdict for plaintiff and *prima facie* entitles her to a decree. Thatcher *v.* Thatcher, 17 Ill. 66.

57. Burns *v.* Lewis, 86 Ga. 591, 13 S. E. 123 (holding, however, that a final verdict in favor of a total divorce is sufficient to dissolve the marriage, although silent as to the rights and disabilities of the parties, in spite of a constitutional provision devolving the regulation of the rights of the parties upon the jury); Forrest *v.* Forrest, 6 Duer (N. Y.) 102, 3 Abb. Pr. (N. Y.) 144 (holding, how-

b. Conclusiveness. The verdict of a jury in divorce suits is not conclusive on the court but may be disregarded or set aside by it at discretion,[58] unless the right to a jury trial is made absolute by constitution or by statute, in which event it cannot be set aside[59] except for sufficient cause as in common-law cases.[60]

H. Reference — 1. Power to Refer. In those states where divorce suits are controlled by chancery practice, a reference to a master may be had as in other suits in equity,[61] and in many states references in divorce suits are authorized by statutes, either as included within provisions relating generally to practice in civil cases[62] or by provisions expressly applicable thereto.[63] The consent of the parties is sometimes made a prerequisite of a reference, however.[64]

ever, that a finding on the question of alimony which is material to the issues properly submitted does not vitiate the verdict as to the questions properly submitted).

58. *Indiana.*—Morse *v.* Morse, 25 Ind. 156; Lewis *v.* Lewis, 9 Ind. 105, holding that the verdict is not conclusive, and that the court may look into the case and disregard so much of the findings as is plainly without the issues.

Montana.— Beck *v.* Beck, 6 Mont. 318, 12 Pac. 694, holding that the chancellor may give judgment for defendant, although the verdict is for plaintiff.

New York.— Lowenthal *v.* Lowenthal, 92 Hun 385, 36 N. Y. Suppl. 1053 [*affirmed* in 157 N. Y. 236, 51 N. E. 995], holding that where the jury finds affirmatively as to adultery, the court may disregard and set aside an answer stating by mistake that there was connivance on the part of plaintiff.

Texas.— Haygood *v.* Haygood, 25 Tex. 576; Moore *v.* Moore, 22 Tex. 237; Paulson *v.* Paulson, (Civ. App. 1893) 21 S. W. 778, holding that the rule of inviolability that attaches to a verdict in civil actions generally where there is some evidence to support it does not apply in actions for divorce; and that the judge must be satisfied, not only of the sufficiency of the causes alleged, but of the truth and sufficiency of the evidence by which they are established, independently of the verdict.

England.— Narracott *v.* Narracott, 10 Jur. N. S. 640, 33 L. J. P. & M. 132, 10 L. T. Rep. N. S. 389, 3 Swab. & Tr. 408, 12 Wkly. Rep. 1064.

See 17 Cent. Dig. tit. "Divorce," § 497.

59. *Georgia.*—Montfort *v.* Montfort, 88 Ga. 641, 15 S. E. 688; Burns *v.* Lewis, 86 Ga. 591, 13 S. E. 123.

Illinois.— Lenning *v.* Lenning, 73 Ill. App. 224; Razor *v.* Razor, 42 Ill. App. 504 [*affirmed* in 149 Ill. 621, 36 N. E. 963].

New York.— Lowenthal *v.* Lowenthal, 157 N. Y. 236, 51 N. E. 995; Ferguson *v.* Ferguson, 3 Sandf. 307; Fries *v.* Fries, 34 Misc. 478, 70 N. Y. Suppl. 295; Carpenter *v.* Carpenter, 9 N. Y. Suppl. 583.

Tennessee.— Richmond *v.* Richmond, 10 Yerg. 343.

Wisconsin.— Poertner *v.* Poertner, 66 Wis. 644, 29 N. W. 386.

60. *New York.*— Donnelly *v.* Donnelly, 50 N. Y. App. Div. 453, 64 N. Y. Suppl. 83; Ferguson *v.* Ferguson, 1 Barb. Ch. 604.

North Carolina.— Wood *v.* Wood, 27 N. C. 674.

Pennsylvania.— Kolb's Case, 4 Watts 154.

Tennessee.— Richmond *v.* Richmond, 10 Yerg. 343.

England.— Jago *v.* Jago, 8 Jur. N. S. 1081, 32 L. J. P. & M. 10, 7 L. T. Rep. N. S. 645, 3 Swab. & Tr. 103, 11 Wkly. Rep. 86; Bacon *v.* Bacon, 2 Swab. & Tr. 53.

New trial see *infra*, XVI.

61. Stone *v.* Stone, 28 N. J. Eq. 409; Anonymous, 10 N. J. L. J. 112; Graves *v.* Graves, 2 Paige (N. Y.) 62; Clopton *v.* Clopton, 11 N. D. 212, 91 N. W. 46, holding that the authority to require a referee to report the evidence either with or without findings is inherent in a court of chancery.

In Iowa and Missouri this rule does not prevail. Hobart *v.* Hobart, 45 Iowa 501 (holding that since the statute provides that actions for divorce shall be heard in "open court," such actions cannot even by consent of the parties be sent to a referee for hearing); Mangels *v.* Mangels, 6 Mo. App. 481.

Connivance, condonation, and recrimination. — Where it appears that a petitioner for divorce on the ground of desertion and adultery has himself been guilty of adultery and bigamy, as disclosed by his answer and affidavit filed in another suit before the chancellor, the case will be referred to a master to inquire into petitioner's right to a decree; the statute providing that, if it shall appear to the court that both parties have been guilty of adultery, no divorce shall be granted. Knott *v.* Knott, (N. J. Ch. 1903) 54 Atl. 559. So in a suit for divorce for adultery, if there is reason to believe plaintiff has forgiven the adultery, with knowledge of all the facts, or that the offense was committed by his or her connivance, the court may *ex officio* direct an inquiry to ascertain the fact. Smith *v.* Smith, 4 Paige (N. Y.) 432, 27 Am. Dec. 75.

62. Janvrin *v.* Janvrin, 57 N. H. 146; Moore *v.* Moore, 56 N. H. 512.

63. Ives *v.* Ives, 80 Hun (N. Y.) 136, 29 N. Y. Suppl. 1053; Bliss *v.* Bliss, 11 N. Y. Civ. Proc. 94; Batzel *v.* Batzel, 54 How. Pr. (N. Y.) 139; Cordier *v.* Cordier, 26 How. Pr. (N. Y.) 187; Anonymous, 5 How. Pr. (N. Y.) 306; People *v.* McGinnis, 1 Park. Cr. (N. Y.) 387. And see Baker *v.* Baker, 10 Cal. 527; Gibson *v.* Gibson, 24 Nebr. 394, 39 N. W. 450.

64. Dietz *v.* Dietz, 2 Hun (N. Y.) 339, 4 Thomps. & C. (N. Y.) 565; Sullivan *v.* Sullivan, 41 N. Y. Super. Ct. 519, 52 How. Pr.

2. Qualifications of Referee. To prevent collusion, statutes in some states prohibit a reference as of course in divorce cases to a person nominated by either party or agreed upon by the parties.[65] A person is not disqualified because he acted as referee in a prior action between the same parties.[66]

3. Powers and Duties of Referee — a. In General. In the absence of a statute to a contrary effect, the duty of a referee is confined to the mere taking of evidence and reporting the same to the court, with no power to find as to the truth of the facts and to suggest a decree; it is for the court itself to determine after an examination of the evidence whether a decree should be granted.[67] The duties of a master must be performed by him in person and cannot be delegated.[68]

b. Conduct of Examination. To guard against collusion, the referee should examine the witnesses himself,[69] and in so doing he may put leading questions.[70]

4. Report of Referee — a. Form and Contents. The report of the referee should embrace findings on all the issues,[71] including findings on affirmative

(N. Y.) 453; Diddell *v.* Diddell, 3 Abb. Pr. (N. Y.) 167; Batzel *v.* Batzel, 54 How. Pr. (N. Y.) 139; Waterman *v.* Waterman, 37 How. Pr. (N. Y.) 36; Cordier *v.* Cordier, 26 How. Pr. (N. Y.) 187; Anonymous, 3 Code Rep. (N. Y.) 139; Candy *v.* Candy, 9 Phila. (Pa.) 516. And see McCrea *v.* McCrea, 58 How. Pr. (N. Y.) 220.

65. Pratt *v.* Pratt, 2 N. Y. App. Div. 534, 38 N. Y. Suppl. 26; Ives *v.* Ives, 80 Hun (N. Y.) 136, 29 N. Y. Suppl. 1053 [*modifying* 7 Misc. 328, 28 N. Y. Suppl. 170]. However, judgment on the report of a referee appointed as of course on the consent of the parties will not necessarily be refused. Young *v.* Young, 38 Misc. (N. Y.) 109, 77 N. Y. Suppl. 94. In Ives *v.* Ives, *supra*, the court struck out the name of the referee upon whom the parties had agreed and appointed a new one; but in Pratt *v.* Pratt, *supra*, it was held that where a referee on which the parties have agreed is nominated as of course the proceeding is void and cannot be amended by the appointment of a new referee.

66. Clark *v.* Clark, 7 Rob. (N. Y.) 62.

67. Baker *v.* Baker, 10 Cal. 527; Middleton *v.* Middleton, 187 Pa. St. 612, 41 Atl. 291. *Compare* Gibson *v.* Gibson, 24 Nebr. 394, 39 N. W. 450.

In New York, under the practice in courts of equity before the adoption of the code, the master to whom a reference was made to take proof of defendant's adultery in case of default did not decide the question but merely reported the proof with his opinion thereon for the decision of the court. Renwick *v.* Renwick, 10 Paige 420; Dodge *v.* Dodge, 7 Paige 589. See also Perry *v.* Perry, 2 Barb. Ch. 285, holding that where a bill for separation is taken as confessed, the reference is only to satisfy the conscience of the court that there is no collusion, and not to protect defendant's rights. And in a later case arising under the code it was held that the court ought not to refer a suit for divorce to a referee to hear and determine the issues and thus divest itself of its obligation as the guardian of the rights of married women. Simmons *v.* Simmons, 3 Rob. 642. Under the old code of civil procedure, however, the practice was to refer issues arising in divorce suits to referees to hear and determine, in which case he might decide the issues and determine whether a divorce should be granted (Harding *v.* Harding, 43 N. Y. Super. Ct. 27, 53 How. Pr. 238; Sullivan *v.* Sullivan, 41 N. Y. Super. Ct. 519, 52 How. Pr. 453; Lincoln *v.* Lincoln, 6 Rob. 525; Merrill *v.* Merrill, 11 Abb. Pr. N. S. 74; Price *v.* Price, 9 Abb. Pr. N. S. 291; Waterman *v.* Waterman, 37 How. Pr. 36; Harper *v.* Harper, 5 N. Y. Wkly. Dig. 460), and this practice still prevails in that state (McCleary *v.* McCleary, 30 Hun 154; Schroeter *v.* Schroeter, 23 Hun 230; Anonymous, 3 Abb. N. Cas. 161; Meyer *v.* Meyer, 7 N. Y. Wkly. Dig. 535), without regard to the exact wording of the order of reference. McCleary *v.* McCleary, *supra*, where an order directing "that this action be and the same is hereby referred to . . . to hear the same, and all the issues therein and to report to this court," was held to authorize the referee to hear and determine, although the court suggested that where issues are sent to a referee for trial it is better that the order should direct him "to hear and decide," or "to hear and determine." *Compare* Sullivan *v.* Sullivan, *supra*. An order of reference stating that "this action and the issues therein are referred" authorizes the referee to report upon the question of plaintiff's adultery, although no reply to the amended answer alleging adultery has been served by plaintiff. Breakey *v.* Breakey, 4 N. Y. St. 368.

68. Stone *v.* Stone, 28 N. J. Eq. 409; Cook *v.* Cook, 13 N. J. Eq. 263, holding that where the cause is referred to one master it is irregular to examine a witness before another master.

69. Emmons *v.* Emmons, Walk. (Mich.) 532; Dodge *v.* Dodge, 7 Paige (N. Y.) 589.

70. Seeley *v.* Seeley, 64 N. J. Eq. 1, 53 Atl. 387, but holding that the counsel for complainant cannot examine by questions of a leading character, and that evidence thus elicited should be accorded little weight.

71. Myers *v.* Myers, 41 Barb. (N. Y.) 114; Arborgast *v.* Arborgast, 8 How. Pr. (N. Y.) 297; Pugsley *v.* Pugsley, 9 Paige (N. Y.) 589; Dodge *v.* Dodge, 7 Paige (N. Y.) 589.

Adultery.— Where but one charge of adultery is alleged, and that with a person named, the report of the master that defendant had

defenses.[72] The usual practice is for the referee to annex to his report the evidence and original depositions taken by him.[73]

b. Conclusiveness. Unless otherwise provided by statute, the court is not bound by the findings and opinion contained in a referee's report, but may disregard the report and grant or refuse a decree on the merits.[74] Where, however, a divorce suit is referred to a referee to hear and determine, his decision and findings are the basis of the judgment to be entered, and no provision can be inserted not covered thereby,[75] and the court has no power to direct a judgment contrary thereto,[76] unless the evidence is insufficient to sustain the report, in which case the court may set it aside.[77]

committed adultery with a person whose name was unknown is insufficient. Bokel *v.* Bokel, 3 Edw. (N. Y.) 376.

Desertion.— The report should state the facts and circumstances under which an alleged desertion took place, and the reasons which caused or provoked it, if they can be ascertained (Belton *v.* Belton, 26 N. J. Eq. 449; Leaning *v.* Leaning, 25 N. J. Eq. 241), and where it fails to do so the bill will be dismissed (Shepherd *v.* Shepherd, 1 N. J. L. J. 243). A report finding that the husband had wilfully, maliciously, and without reasonable cause deserted his wife, without a recital of the facts on which such finding was based, will be referred back to him for further findings. Lesher *v.* Lesher, 9 Pa. Dist. 69.

Former marriage.— A finding that plaintiff had a former husband living at the time of her marriage with defendant does not entitle defendant to a divorce, where the referee fails to report evidence of the fact or to specifically find that there was a valid marriage between plaintiff and the former husband and that it was in force when plaintiff married defendant. Linden *v.* Linden, 36 Barb. (N. Y.) 61.

Impotency.— A finding that defendant is impotent implies and includes every essential element constituting impotency, within the meaning of the law of divorce. Payne *v.* Payne, 46 Minn. 467, 49 N. W. 230, 24 Am. St. Rep. 240.

Opinion of referee.— The referee should report his opinion on the facts together with the testimony taken before him. Emmons *v.* Emmons, Walk. (Mich.) 532.

72. Myers *v.* Myers, 41 Barb. (N. Y.) 114, holding that there should be a finding as to connivance.

Condonation.— There should be a finding as to whether plaintiff has condoned the offense. Pugsley *v.* Pugsley, 9 Paige (N. Y.) 589. Where, however, cohabitation after knowledge of adultery is not set up as a defense, a finding based on proof of such fact can have no legal effect on a decision of the cause, and may be rejected as surplusage. Lewis *v.* Lewis, 9 Ind. 105.

Recrimination.— There should be a finding as to the adultery of plaintiff where it is alleged in recrimination and evidence is introduced in support of it. Griffin *v.* Griffin, 70 Hun (N. Y.) 73, 23 N. Y. Suppl. 1070; Paul *v.* Paul, 11 N. Y. St. 71; Church *v.* Church, 7 N. Y. St. 177 (holding that a conclusion of law that plaintiff is entitled to judgment is a negative finding on the issue of plaintiff's adultery); Price *v.* Price, 9 Abb. Pr. N. S. (N. Y.) 291.

73. Fairbanks *v.* Fairbanks, 2 Edw. (N. Y.) 208.

74. Benkert *v.* Benkert, 32 Cal. 467; Baker *v.* Baker, 10 Cal. 527 (both cases holding that the court should disregard the findings of fact filed by a commissioner, and determine the cause on the evidence reported by him); Janvrin *v.* Janvrin, 58 N. H. 144; Rand *v.* Rand, 56 N. H. 421; Ward *v.* Ward, 21 N. Y. Suppl. 795, 29 Abb. N. Cas. (N. Y.) 256 (holding that under an order directing the referee "to determine whether any, and if so what, alimony counsel fee ought to be awarded" to plaintiff, and "to report the facts found and his opinion thereon," the referee could only take evidence and report it to the court, with his opinion thereon, for the purpose of aiding the conscience of the court); Gade *v.* Gade, 14 Abb. N. Cas. (N. Y.) 510.

75. Sabater *v.* Sabater, 7 N. Y. App. Div. 70, 39 N. Y. Suppl. 958; Schroeter *v.* Schroeter, 23 Hun (N. Y.) 230; Bliss *v.* Bliss, 11 N. Y. Civ. Proc. 94.

76. Goldner *v.* Goldner, 49 N. Y. App. Div. 395, 63 N. Y. Suppl. 431; Gorham *v.* Gorham, 40 N. Y. App. Div. 564, 58 N. Y. Suppl. 50; Ryerson *v.* Ryerson, 55 Hun (N. Y.) 191, 7 N. Y. Suppl. 726; Ross *v.* Ross, 31 Hun (N. Y.) 140; Goodrich *v.* Goodrich, 21 N. Y. Wkly. Dig. 264, holding that if the proceedings are regular and free from fraud or collusion, and the evidence is sufficient to uphold the finding, it is the duty of the court to enter judgment on the report. See Uhlmann *v.* Uhlmann, 17 Abb. N. Cas. (N. Y.) 237.

77. Goldner *v.* Goldner, 49 N. Y. App. Div. 395, 63 N. Y. Suppl. 431; Gorham *v.* Gorham, 40 N. Y. App. Div. 564, 58 N. Y. Suppl. 50; Matthews *v.* Matthews, 53 Hun (N. Y.) 244, 6 N. Y. Suppl. 589; McCleary *v.* McCleary, 30 Hun (N. Y.) 154; Harding *v.* Harding, 43 N. Y. Super. Ct. 27; Goldie *v.* Goldie, 39 Misc. (N. Y.) 389, 79 N. Y. Suppl. 357; Blott *v.* Rider, 47 How. Pr. (N. Y.) 90. *Contra*, Schroeter *v.* Schroeter, 23 Hun (N. Y.) 230; Anonymous, 3 Abb. N. Cas. (N. Y.) 161; Rice *v.* Rice, 22 N. Y. Wkly. Dig. 258. See also Ryerson *v.* Ryerson, 55 Hun (N. Y.) 191, 7 N. Y. Suppl. 726, holding that the application for judgment on the report must be either granted or denied, and that the court cannot set aside the report.

c. Remission For Further Proofs. Where the reference is merely for the purpose of taking evidence, the court may, if the report does not sufficiently state the facts and circumstances of the offense, send the case back to the referee for further proofs;[78] but it is otherwise if the reference is not only to take evidence but to report the same to the court with findings.[79]

d. Confirmation. Where the reference is to hear and determine, the report is required to be certified to the court for confirmation, and judgment is to be entered by the court in conformity therewith.[80] If there is reason to suspect collusion or fraud,[81] or if the evidence reported does not support the findings of the referee satisfactorily to the conscience of the court, confirmation of the report is properly refused.[82] The court will not refuse to confirm because of errors committed by the referee in the reception and exclusion of evidence.[83]

XV. JUDGMENT OR DECREE.[84]

A. Nature of Relief Granted — 1. Divorce — a. In General. The final determination of a suit for divorce finds its expression in the judgment or decree declaring, if favorable to the complainant, either an absolute dissolution or a partial suspension of the marriage relation according to the grounds upon which the divorce is sought and the statutes under which the proceedings are instituted;[85] and if favorable to defendant either dismissing the complaint[86] or in case the allegations of a counter-claim or cross complaint have been sustained granting him an absolute or a limited divorce as if he were complainant.[87]

b. Absolute and Limited Divorce. A divorce may be either absolute or limited.[88] An absolute divorce or a divorce *a vinculo matrimonii* dissolves the marriage, releases the mutual rights and obligations of the parties, and creates a new status, carrying with it new duties and obligations imposed by statute or by the terms of the decree.[89] A limited divorce or a divorce *a mensa et thoro* does

78. Stone *v.* Stone, 28 N. J. Eq. 409; Price *v.* Price, 9 Abb. Pr. N. S. (N. Y.) 291; Dodge *v.* Dodge, 7 Paige (N. Y.) 589 (where the case was sent back to the master to take proofs as to the condonation of defendant's guilt, the report leaving this question in doubt); Hart *v.* Hart, 2 Edw. (N. Y.) 207; Edmiston *v.* Edmiston, 8 Pa. Dist. 383, 22 Pa. Co. Ct. 545.

79. Matthews *v.* Matthews, 53 Hun (N. Y.) 244, 6 N. Y. Suppl. 589.

80. Goldie *v.* Goldie, 39 Misc. (N. Y.) 389, 79 N. Y. Suppl. 357.

Order refusing confirmation should be to the effect that the report be set aside, the order of reference vacated, and a new trial of the issues had, with costs to defendant to abide the event. An order absolutely dismissing the complaint upon the merits is error. Harding *v.* Harding, 53 How. Pr. (N. Y.) 238. It is error to set aside the report and direct a trial at the circuit, in the absence of an application to remove the referee or vacate the order of reference, since where the parties have consented to a reference the court cannot disregard the order of reference without a reason sufficient in law. Ryerson *v.* Ryerson, 55 Hun (N. Y.) 191, 7 N. Y. Suppl. 723.

81. Goldner *v.* Goldner, 49 N. Y. App. Div. 395, 63 N. Y. Suppl. 431; Ryerson *v.* Ryerson, 55 Hun (N. Y.) 191, 7 N. Y. Suppl. 726; Matthews *v.* Matthews, 53 Hun (N. Y.) 244, 6 N. Y. Suppl. 589; Ross *v.* Ross, 31 Hun (N. Y.) 140; Harding *v.* Harding, 43 N. Y. Super. Ct. 27, 53 How. Pr. (N. Y.) 238; Sullivan *v.* Sullivan, 41 N. Y. Super. Ct. 519; Blott *v.* Rider, 47 How. Pr. (N. Y.) 90; Rice *v.* Rice, 22 N. Y. Wkly. Dig. 258.

82. Gorham *v.* Gorham, 40 N. Y. App. Div. 564, 58 N. Y. Suppl. 50; Matthews *v.* Matthews, 53 Hun (N. Y.) 244, 6 N. Y. Suppl. 589; Harding *v.* Harding, 43 N. Y. Super. Ct. 27, 53 How. Pr. (N. Y.) 238. And see cases cited *supra*, note 77.

Review of findings.— Under the New York practice the special term cannot on an application for judgment review the findings of fact or rulings on questions of law by the referee, but such review can be had only on appeal to the general term. Smith *v.* Smith, 7 Misc. 305, 28 N. Y. Suppl. 136, 23 N. Y. Civ. Proc. 386.

83. Goldie *v.* Goldie, 39 Misc. (N. Y.) 389, 79 N. Y. Suppl. 357. *Compare* Reynolds *v.* Reynolds, 33 N. Y. App. Div. 625, 53 N. Y. Suppl. 135; Moore *v.* Moore, 14 N. Y. Wkly. Dig. 255.

84. See, generally, EQUITY; JUDGMENTS.

85. See *infra*, XV, G, 1, 2.

86. **Dismissal for failure of proof** see *supra*, XIV, D, 2.

87. **Cross complaint and counter-claim** see *supra*, XII, E.

88. See *supra*, III, B; *infra*, XV, G, 1, 2.

89. Forrest *v.* Forrest, 3 Bosw. (N. Y.) 661.

Form of decree.— An order for the entry of a decree of divorce is not such a final decree as to dissolve the marriage. Cook's Estate, 77 Cal. 220, 17 Pac. 923, 19 Pac. 431, 11 Am. St. Rep. 267, 1 L. R. A. 567; Clark

not dissolve the marriage, but by it the parties are permitted to live apart upon prescribed terms within the provisions of the statute under which it is rendered.[90] In some jurisdictions either kind of divorce may be granted in the discretion of the court.[91] If a divorce is decreed without declaration as to kind or class, it will be construed as for an absolute divorce.[92] In some states an absolute divorce may not be granted for certain causes until a limited divorce has been granted for the same cause and a prescribed time has elapsed therefrom without reconciliation of the parties.[93]

c. Conditional Divorce. In some jurisdictions it is the practice in certain cases to grant a conditional divorce by the rendition of a decree *nisi* to become absolute upon the happening of a prescribed contingency.[94] Such a decree is similar in nature and effect to a divorce from bed and board, since it does not

v. Cassidy, 64 Ga. 662; State *v.* Eaton, 85 Wis. 587, 55 N. W. 890, 39 Am. St. Rep. 867.

90. McNamara *v.* McNamara, 2 Hilt. (N. Y.) 547, 9 Abb. Pr. (N. Y.) 18. And see Israel *v.* Israel, 38 Misc. (N. Y.) 335, 77 N. Y. Suppl. 912.

Form of decree.— Where a divorce *a mensa et thoro* is decreed for cruel and inhuman treatment of the wife by the husband, the separation will be made perpetual, with a proviso that the parties may at any time apply to the court for leave to be discharged from the decree. Barrere *v.* Barrere, 4 Johns. Ch. (N. Y.) 187 [*approved* in Pool *v.* Pool, 2 Edw. (N. Y.) 192].

91. *Arkansas.*— Crews *v.* Crews, 68 Ark. 158, 56 S. W. 778.

California.— Conant *v.* Conant, 10 Cal. 249, 70 Am. Dec. 717.

Delaware.— Coverdill *v.* Coverdill, 3 Harr. 13.

Georgia.— Buckholts *v.* Buckholts, 24 Ga. 238.

Kentucky.— Zumbiel *v.* Zumbiel, 69 S. W. 708, 24 Ky. L. Rep. 590; Steele *v.* Steele, 13 Ky. L. Rep. 45.

Louisiana.— Ellerbusch *v.* Kogel, 108 La. 51, 32 So. 191; Ledoux *v.* Ledoux, 10 La. Ann. 663; Leake *v.* Linton, 6 La. Ann. 262.

Maryland.— Levering *v.* Levering, 16 Md. 213.

Michigan.— Morey *v.* Morey, 117 Mich. 440, 75 N. W. 934; Sullivan *v.* Sullivan, 112 Mich. 674, 71 N. W. 487; Burlage *v.* Burlage, 65 Mich. 624, 32 N. W. 866.

Minnesota.— Salzbrun *v.* Salzbrun, 81 Minn. 287, 83 N. W. 1088; Wagner *v.* Wagner, 36 Minn. 239, 30 N. W. 766.

North Carolina.— Collier *v.* Collier, 16 N. C. 352.

Pennsylvania.— Klingenberger *v.* Klingenberger, 6 Serg. & R. 187.

See 17 Cent. Dig. tit. "Divorce," § 516 *et seq.*

Exercise of discretion.— This discretionary power should not be capriciously exercised, but should be governed by the evidence. Howlett *v.* Howlett, 70 S. W. 404, 24 Ky. L. Rep. 974 (holding that where the husband, without a mitigating circumstance, abused and cruelly beat his wife, indicated that he had a vicious temper, and showed that she would probably suffer great bodily injury by remaining with him, the wife was entitled to an absolute divorce); Locke *v.* Locke, 14 Ky. L. Rep. 143.

See also *supra*, IV, C, 2; VII, A, 2, b.

92. Miller *v.* Miller, 33 Cal. 353; Bennett *v.* Bennett, 3 Fed. Cas. No. 1,318, Deady 299, holding that the presumption is that a decree for divorce is permanent and not temporary, which presumption can be overcome only by record evidence. See Hardy *v.* Kirtland, 34 Ind. 365.

93. Nicholas *v.* Maddox, 52 La. Ann. 1493, 27 So. 966; Harman *v.* McLeland, 16 La. 26.

Reconciliation.— The fact that no reconciliation has taken place must be proved (Ellerbusch *v.* Kogel, 108 La. 51, 32 So. 191; Van Hoven *v.* Weller, 38 La. Ann. 903), and if a willingness to become reconciled be shown an absolute decree will not be granted (Mazerat *v.* Godefroy, 48 La. Ann. 824, 19 So. 756). A reconciliation nullifies the limited decree. Liddell's Succession, 22 La. Ann. 9.

The right to an absolute decree belongs only to the party in whose favor the decree of separation was granted. Johnson *v.* Johnson, 32 La. Ann. 1139. Where each party asks a divorce, a decree of separation awarding to the wife the custody of a child with costs against the community is presumed to have been rendered in favor of the wife. Eskholm *v.* Rau, 34 La. Ann. 546.

The proceedings to procure an absolute decree must be commenced and prosecuted in the ordinary way (Jurgielewiez *v.* Jurgielewiez, 24 La. Ann. 77; Gernon *v.* Hickey, 18 La. Ann. 454), and in such proceedings defendant may plead the nullity of the decree of separation (Daspit *v.* Ehringer, 32 La. Ann. 1174).

94. Oliver *v.* Oliver, 5 Ala. 75 (where a husband had made a settlement upon his wife and her children by a former marriage, and the court refused a decree of divorce in her favor until she should make a reconveyance of such separate estate); McAllister *v.* McAllister, 10 Heisk. (Tenn.) 345 (where, under circumstances showing an aggravated neglect of a wife by her husband, a divorce *a mensa et thoro* was granted temporarily, with power in the chancellor to grant a divorce *a vinculo* if a reconciliation should not be made within a reasonable time).

dissolve the marriage or entirely relieve the parties from their marital obligations.[95] The practice in relation to making the decree absolute so as finally to dissolve the marriage is usually governed by statute.[96]

2. INCIDENTAL RELIEF. Upon granting a divorce the court will determine the incidental rights of the parties, such as those relating to alimony and allowances,[97] the property rights of the parties,[98] the status,[99] custody, and support[1] of their children, the right of the wife to resume her maiden name,[2] the right of the parties to remarry,[3] and questions of costs and fees.[4] The decree should state

In Massachusetts a decree *nisi* is authorized by statute. Pratt *v.* Pratt, 157 Mass. 503, 32 N. E. 747, 21 L. R. A. 97; Peaslee *v.* Peaslee, 147 Mass. 171, 17 N. E. 506; Brigham *v.* Brigham, 147 Mass. 159, 16 N. E. 780; Cowan *v.* Cowan, 139 Mass. 377, 1 N. E. 152 (where a divorce *nisi* was decreed in behalf of an insane plaintiff, although it appeared that her insanity was likely to be permanent); Wales *v.* Wales, 119 Mass. 89; Sparhawk *v.* Sparhawk, 116 Mass. 315; Whiting *v.* Whiting, 114 Mass. 494; Garnett *v.* Garnett, 114 Mass. 347; Edgerly *v.* Edgerly, 112 Mass. 53; Graves *v.* Graves, 108 Mass. 314; Bigelow *v.* Bigelow, 108 Mass. 38.

Condition as to costs.— A proviso in a decree of divorce that "this decree is, however, suspended until the costs are paid (except so far as to issue execution for costs), and then to be in full force and effect," is a nullity, and the decree operates as a dissolution of the marriage from the time it is rendered. Mickle *v.* State, (Ala. 1896) 21 So. 66.

Limited divorce as condition precedent to absolute divorce see *supra*, XV, A, 1, b.

95. Wales *v.* Wales, 119 Mass. 89; Garnett *v.* Garnett, 114 Mass. 347, 19 Am. Rep. 369; Edgerly *v.* Edgerly, 112 Mass. 53; Graves *v.* Graves, 108 Mass. 314; Noble *v.* Noble, L. R. 1 P. 691, 38 L. J. P. & M. 52, 20 L. T. Rep. N. S. 1016; Norman *v.* Villars, 2 Ex. D. 359, 46 L. J. Exch. 57, 36 L. T. Rep. N. S. 788, 25 Wkly. Rep. 780, holding that the status of a married woman is not affected by pronouncing a decree *nisi*, and that she continues subject to all the disabilities of coverture until the decree is made absolute.

96. Owens *v.* Sims, 3 Coldw. (Tenn.) 544, holding, however, that a general provision that a decree shall become absolute if defendant does not come forward and make a defense within six months after service of a copy of the decree does not apply to suits for divorce.

Time of making decree absolute.— It is provided by statute in England that no decree *nisi* shall be made absolute until after the expiration of a certain time from the pronouncing thereof. See Lewis *v.* Lewis, [1892] P. 212, 61 L. J. P. & Adm. 95, 67 L. T. Rep. N. S. 358; Fitzgerald *v.* Fitzgerald, L. R. 3 P. 136, 43 L. J. P. & M. 13, 31 L. T. Rep. N. S. 270, 22 Wkly. Rep. 267; Wickham *v.* Wickham, 6 P. D. 11, 43 L. T. Rep. N. S. 445; Noble *v.* Noble, L. R. 1 P. 691, 38 L. J. P. & M. 52, 20 L. T. Rep. N. S. 1016; Norman *v.* Villars, 2 Ex. D. 359, 46 L. J. Exch. 579, 36 L. T. Rep. N. S. 788, 25 Wkly. Rep. 780; Skeats *v.* Skeats, 35 L. J. P. & M. 47; Gipps *v.* Gipps, 32 L. J. P. & M. 179, 11 Wkly. Rep. 1063; Stoate *v.* Stoate, 32 L. J. P. & M. 120; Stone *v.* Stone, 32 L. J. P. & M. 117, 9 L. T. Rep. N. S. 24, 3 Swab. & Tr. 212, 11 Wkly. Rep. 809; Rippingall *v.* Rippingall, 49 L. J. P. & Adm. 70, 48 L. T. Rep. N. S. 126; Shelton *v.* Shelton, 38 L. J. P. & M. 34, 20 L. T. Rep. N. S. 232, 17 Wkly. Rep. 401; Southern *v.* Southern, 62 L. T. Rep. N. S. 668; Robertson *v.* Robertson, 44 L. T. Rep. N. S. 253.

Notice and hearing.— An application for a decree absolute is a new proceeding, requiring notice and hearing. Sparhawk *v.* Sparhawk, 116 Mass. 315; Garnett *v.* Garnett, 114 Mass. 379, 19 Am. Rep. 369 (also holding that the court is not relieved of its duty to dispose of the case as public policy and the interests of the parties require); Graves *v.* Graves, 108 Mass. 314. *Compare* Peaslee *v.* Peaslee, 147 Mass. 171, 17 N. E. 506, where it was in effect held that a failure to serve a notice of the application did not divest the court of its jurisdiction and invalidate the absolute decree.

Publication of decree.— A compliance with the statute relating to the publication of the entry of the decree *nisi* is a prerequisite to an absolute decree. Darrow *v.* Darrow, 159 Mass. 262, 34 N. E. 270, 21 L. R. A. 100.

Remarriage before decree absolute.— Where a libellant marries under a mistaken belief that her attorney entered a decree absolute, she will be permitted to enter such a decree. Darrow *v.* Darrow, 159 Mass. 262, 34 N. E. 270, 21 L. R. A. 100; Pratt *v.* Pratt, 157 Mass. 503, 32 N. E. 747, 21 L. R. A. 97. *Compare* Cook *v.* Cook, 144 Mass. 163, 10 N. E. 749; Moors *v.* Moors, 121 Mass. 232.

97. See *infra*, XIX.

98. Munroe *v.* Munroe, 20 Oreg. 579, 26 Pac. 838, where plaintiff was granted a decree dissolving the marriage, and also for a sum of money advanced before the marriage at defendant's request upon her fraudulent representations. See, generally, *infra*, XIX, E.

Joinder of causes of action see *supra*, XII, A, 3.

99. Cross *v.* Cross, 3 Paige (N. Y.) 139, 23 Am. Dec. 778, holding, under a statute, that where suit is based on the wife's adultery, the court may determine the legitimacy of children begotten and born after the offense charged.

1. See *infra*, XX.
2. See *infra*, XV, G, 1, c.
3. See *infra*, XV, G, 1, d.
4. See *infra*, XVIII; XIX, C.

in detail the incidental relief thus afforded,[5] especially where rights with respect to real property are involved.

B. Requisites — **1. In General.** In the absence of statute a decree of divorce need not be in writing or signed by the judge.[6] It need not recite that notice was given to defendant;[7] nor is it void upon its face because it does not recite the jurisdictional fact of plaintiff's residence.[8] The names of the parties should be accurately stated.[9]

2. Conformity to Pleadings and Findings. The decree must be based upon and be in accordance with the facts alleged in the pleadings,[10] and should be supported by the findings of fact.[11]

3. Entry.[12] A decree of divorce may be entered *nunc pro tunc*.[13] A person not a party to the suit may cause the entry to be made,[14] and defendant therein is not entitled to notice of the entry.[15]

C. Judgment by Default or Pro Confesso — **1. Requisites and Validity.** To justify the rendition of a decree of divorce as upon default, defendant must have been served with process,[16] the time for answering must have expired,[17] proof must be taken of the existence of the ground of divorce as alleged,[18] and in some states there are statutory regulations as to the time of entering the final decree.[19]

5. Gleason *v.* Emerson, 51 N. H. 405; Barker *v.* Cobb, 36 N. H. 344 (holding that the decree of divorce does not *ipso facto* cut off the husband's rights in his wife's estate, but that to accomplish this object the decree must state the effect proposed); Bamford *v.* Bamford, 4 Oreg. 30 (holding that a party in whose favor a decree is granted obtains no title to real property unless it is mentioned and described in the decree); Young *v.* Young, (Tex. Civ. App. 1893) 23 S. W. 83 (holding that if real property is disposed of by the judgment, the lots should be described therein, or the deeds should be clearly identified); Porter *v.* Porter, 27 Gratt. (Va.) 599.

6. Cook's Estate, 77 Cal. 220, 17 Pac. 923, 19 Pac. 431, 11 Am. St. Rep. 267, 1 L. R. A. 567. See, however, Cook *v.* Cook, 144 Mass. 163, 10 N. E. 749.

7. Marshall *v.* Marshall, 88 Mo. App. 325.

8. Peyton *v.* Peyton, 28 Wash. 278, 68 Pac. 757; McNeil *v.* McNeil, 78 Fed. 834. *Compare* Salzbrun *v.* Salzbrun, 81 Minn. 287, 83 N. W. 1088, holding that a judgment for an absolute divorce is void if the complaint and findings do not disclose the fact of plaintiff's residence.

9. Howton *v.* Gilpin, 69 S. W. 766, 24 Ky. L. Rep. 630, holding, however, that a judgment divorcing a husband, who was correctly named, from his wife, whose christian name was incorrectly given, is not invalid.

10. Haltenhof *v.* Haltenhof, 25 Ill. App. 236; Palmer *v.* Palmer, 1 Paige (N. Y.) 276; Weber *v.* Weber, 16 Oreg. 163, 17 Pac. 866; Bender *v.* Bender, 14 Oreg. 353, 12 Pac. 713; Wass *v.* Wass, 41 W. Va. 126, 23 S. E. 537.

11. Karren *v.* Karren, 25 Utah 87, 69 Pac. 465, 95 Am. St. Rep. 815, 60 L. R. A. 294.

Absence of findings.— Judgment is not rendered void in any case by the mere absence of findings; and in case of default findings are not necessary, and form no part of the judgment-roll. Cook's Estate, 77 Cal. 220, 17 Pac. 923, 19 Pac. 431, 11 Am. St. Rep. 267, 1 L. R. A. 567.

12. Order for entry as constituting decree of divorce see *supra*, XV, A, 1, b, note 89.

13. Cook's Estate, 77 Cal. 220, 17 Pac. 923, 19 Pac. 431, 11 Am. St. Rep. 267, 1 L. R. A. 567; Moster *v.* Moster, 53 Mo. 326; Rush *v.* Rush, 97 Tenn. 279, 37 S. W. 13. See, however, Cook *v.* Cook, 144 Mass. 163, 10 N. E. 749.

14. Cook's Estate, 77 Cal. 220, 17 Pac. 923, 19 Pac. 431, 11 Am. St. Rep. 267, 1 L. R. A. 567, holding that it is the duty of the court to have the judgment entered, no matter by whom its attention may be called to the matter.

15. Cook's Estate, 77 Cal. 220, 17 Pac. 923, 19 Pac. 431, 11 Am. St. Rep. 267, 1 L. R. A. 567.

16. See *infra*, XV, C, 2, e.

17. Walker *v.* Walker, 42 Ala. 489; Mottschall *v.* Mottschall, 31 Colo. 260, 72 Pac. 1053.

Jurisdiction of the person of a defendant having been acquired, it is not lost by the premature entry of his default and a reference of the action for the purpose of taking the proofs. Von Rhade *v.* Von Rhade, 2 Thomps. & C. (N. Y.) 491.

18. See *supra*, XIV, E, 2.

19. Meyer *v.* Meyer, 60 Kan. 859, 57 Pac. 550 (holding, however, that a statute prohibiting a trial at the same term as that in which the action was commenced does not forbid the taking of a default judgment at that term); Gibson *v.* Gibson, 40 Misc. (N. Y.) 103, 81 N. Y. Suppl. 343; Rothstein *v.* Rothstein, 40 Misc. (N. Y.) 101, 81 N. Y. Suppl. 342 (the last two cases construing a statute providing that no final judgment in an uncontested action for divorce shall be entered until after three months from the filing of an interlocutory judgment).

2. Opening or Setting Aside Default — a. Power of Court. Since a judgment by default is not favored in divorce suits, the courts are specially inclined to interpose by opening or setting aside such a judgment and giving defendant a day in court so that the merits of his defense may be passed upon,[20] under such terms and conditions as to the payment of costs and alimony as to the court may seem proper.[21] The opening of defaults in actions for divorce is generally provided for by statute, either by express provision or by implication from the terms of a statute authorizing the opening of defaults in civil suits generally.[22] Unless regulated by statute the rule in chancery must apply, and it rests in the sound discretion of the court to relieve defendant of the consequences of his default.[23]

b. Existence of Defense. It has been said that the rule that a default will not be opened to permit a defense to be interposed which is not meritorious is not vigorously applied in divorce suits;[24] yet it is generally required that it should be made to appear by affidavit or otherwise, as directed by statute or rules of practice, that if the default be opened there is likelihood of a different result being reached.[25]

c. Laches and Limitations. The time prescribed by statute within which an application may be made for opening a default should be observed,[26] and apart from this any unreasonable delay in making the application will unless explained preclude the granting of the relief.[27]

20. Hamilton *v.* Hamilton, 29 N. Y. App. Div. 331, 51 N. Y. Suppl. 365.

21. Cottrell *v.* Cottrell, 83 Cal. 457, 23 Pac. 531; Weidner *v.* Weidner, 85 Hun (N. Y.) 432, 32 N. Y. Suppl. 894.

22. *Illinois.*— Lawrence *v.* Lawrence, 73 Ill. 577, holding that a provision allowing a final decree entered against a defendant without notice except by publication to be opened within three years applies to a decree of divorce.

Indiana.— Day *v.* Nottingham, 160 Ind. 408, 66 N. E. 998, construing a statute which provides that parties against whom a judgment of divorce shall be rendered without other notice than publication may within two years after judgment have the same opened and be allowed to defend as well on the granting of the divorce as in relation to the allowance of alimony and the disposition of property. See, however, McJunken *v.* McJunken, 3 Ind. 30.

Iowa.— *Compare* Whitcomb *v.* Whitcomb, 46 Iowa 437; Gilruth *v.* Gilruth, 20 Iowa 225, both cases construing a general provision as not applying to divorce suits.

Kansas.— Hemphill *v.* Hemphill, 38 Kan. 220, 16 Pac. 457; Lewis *v.* Lewis, 15 Kan. 181.

Kentucky.— Meyar *v.* Meyar, 3 Metc. 298.

Missouri.— Smith *v.* Smith, 20 Mo. 166; Burnes *v.* Burnes, 61 Mo. App. 612, holding that a statute providing for setting aside an interlocutory judgment by default at any time before final judgment is not applicable after the entry of final judgment.

Nebraska.— O'Connell *v.* O'Connell, 10 Nebr. 390, 6 N. W. 467.

New York.— Brown *v.* Brown, 58 N. Y. 609, holding that a provision fixing a time wherein a defendant, "except in an action for divorce," may be allowed to come in and defend where service of summons was by publication, does not deprive the courts of power to open a default in a divorce case where a summons was so served.

Ohio.— Van Derveer *v.* Van Derveer, 11 Chio Dec. (Reprint) 828, 30 Cinc. L. Bul. 96, holding that a provision for opening a default where the judgment was rendered without other service than by publication applies to judgments of divorce.

Washington.— *Compare* Metler *v.* Metler, 32 Wash. 494, 73 Pac. 535, holding, that where plaintiff is regularly awarded a divorce after service by publication, the court has no jurisdiction to set the decree aside and allow defendant to defend, under a statute providing that if a summons is not personally served, defendant or his representatives, on application and sufficient cause shown, may, except in an action for divorce, be allowed to defend within a year after judgment.

See 17 Cent. Dig. tit. "Divorce," § 522.

23. Bowman *v.* Bowman, 64 Ill. 75.

24. Hamilton *v.* Hamilton, 51 N. Y. Suppl. 365.

25. Carr *v.* Carr, 92 Ky. 552, 18 S. W. 453, 13 Ky. L. Rep. 756, 36 Am. St. Rep. 614; Blank *v.* Blank, 107 N. Y. 91, 13 N. E. 615; Maguire *v.* Maguire, 75 N. Y. App. Div. 534, 78 N. Y. Suppl. 312 (holding that where personal service is admitted and adultery charged is not denied by defendant except by stating that she has "a good and valid defense," and no affidavit of merits or proposed answer is presented, the default should not be opened); Everett *v.* Morrison, 21 N. Y. Suppl. 328.

In California, however, the motion to set set aside a default need not be supported by an affidavit of merits. Cottrell *v.* Cottrell, 83 Cal. 457, 23 Pac. 531; McBlane *v.* McBlane, 77 Cal. 507, 20 Pac. 61.

26. Lawrence *v.* Lawrence, 73 Ill. 577; Hemphill *v.* Hemphill, 38 Kan. 220, 16 Pac. 457; Amory *v.* Amory, 6 Rob. (N. Y.) 514, 33 How. Pr. (N. Y.) 490.

27. Hurley *v.* Hurley, 117 Iowa 621, 91 N. W. 895 (holding that, where a decree was granted and came to the knowledge of defendant in 1892, a failure to apply for re-

d. Effect of Remarriage or Death. If plaintiff has remarried since the rendition of a decree of divorce upon default, the courts will be reluctant to open it;[28] and the same is true where plaintiff has died since the decree was rendered.[29]

e. Grounds. A default decree may be set aside where defendant's failure to answer or to attend the trial was due to sickness,[30] to the fault of her attorneys,[31] to a miscarriage of the mails,[32] to the calling of the case for trial out of its order on the docket,[33] or to fraud.[34] So if there has been no service of process or an invalid service, it is ground for opening the default.[35]

D. Setting Aside Judgment — 1. Power of Court. By the weight of authority a court of justice invested with power on due proceedings to set aside or modify its own judgment for fraud or irregularity may for good cause shown set aside or modify its own decree of divorce,[36] and it has been held that this

lief until 1899 precludes relief); Long *v.* Long, 59 Mich. 296, 26 N. W. 520 (holding that an order *pro confesso* not objected to for more than two years, although known to defendant's counsel, and no excuse for the delay being shown, will not be set aside). See Whittaker *v.* Whittaker, 151 Ill. 266, 37 N. E. 1017.

28. Whittaker *v.* Whittaker, 151 Ill. 266, 37 N. E. 1017; Day *v.* Nottingham, 180 Ind. 408, 66 N. E. 998; Von Rhade *v.* Von Rhade, 2 Thomps. & C. (N. Y.) 491, where the judgment was allowed to stand for the protection of the person whom plaintiff had married until it was proved by defendant that plaintiff was not entitled to the divorce.

Qualifications of rule. — If immediate notice is given plaintiff's counsel that a motion will be made to open the default, plaintiff's remarriage before the lapse of a reasonable length of time within which to make the motion will not affect defendant's right to open and defend. Scripture *v.* Scripture, 70 Hun (N. Y.) 432, 24 N. Y. Suppl. 301. So where service is by publication only, the right to set aside the default has been declared by statute in some states to exist for a certain period, within which an application may be made notwithstanding plaintiff's remarriage. Lawrence *v.* Lawrence, 73 Ill. 577.

29. Day *v.* Nottingham, 160 Ind. 408, 66 N. E. 998, holding that the court will be extremely cautious in setting aside a divorce obtained on service by publication, where complainant is dead, although fraud in obtaining the divorce is alleged, and that the application to set it aside must be timely made and must present a strong case of fraud.

30. Henderson *v.* Henderson, 83 N. Y. App. Div. 449, 82 N. Y. Suppl. 444.

31. Simpkins *v.* Simpkins, 14 Mont. 386, 36 Pac. 759, 43 Am. St. Rep. 641; Nichells *v.* Nichells, 5 N. D. 125, 64 N. W. 73, 57 Am. St. Rep. 540, 33 L. R. A. 515.

32. Walrad *v.* Walrad, 55 Ill. App. 668.

33. Bostwick *v.* Bostwick, 73 Tex. 182, 11 S. W. 178.

34. Helmes *v.* Helmes, 24 Misc. (N. Y.) 125, 52 N. Y. Suppl. 734.

Collusion. — Where a defendant refrained from defending under a collusive agreement, she will not be permitted to open the default, if her only reason for so doing appears to be the obtaining of the money which was to have been paid under such agreement. Hubbard *v.* Hubbard, 19 Colo. 13, 34 Pac. 170. *Compare* Simons *v.* Simons, 47 Mich. 253, 645, 10 N. W. 360; Singer *v.* Singer, 41 Barb. (N. Y.) 139.

35. Townsand *v.* Townsand, 21 Ill. 540. See, generally, *supra*, X.

Affidavit of publication. — A decree granted on default after a defective service by publication may be set aside. Patterson *v.* Patterson, 57 Kan. 275, 46 Pac. 304; Smith *v.* Smith, 3 Oreg. 363. So if the statements in the affidavit are false, the default may be set aside. Elmgren *v.* Elmgren, 25 R. I. 177, 55 Atl. 322. Where, however, defendant does not ask leave to answer, the only question is whether the affidavit was sufficient to call for judicial action (Peterson *v.* Peterson, 15 S. D. 462, 90 N. W. 136); and if notice has been given defendant substantially in compliance with the statute, the default will not be opened merely because the affidavit is defective or false in part (Day *v.* Nottingham, 160 Ind. 408, 66 N. E. 998). See also *supra*, X, D, 3, a.

Proof of service. — The general rule that a return of process made by a public officer cannot be contradicted does not always apply; and where service is shown to have been defective, the court may, to prevent irreparable injury, open defendant's default and permit him to answer on the merits. Brown *v.* Brown, 59 Ill. 315. See Provost *v.* Provost, 18 N. Y. Suppl. 896. See also *supra*, X, F.

36. Danforth *v.* Danforth, 105 Ill. 603; Comstock *v.* Adams, 23 Kan. 513, 33 Am. Rep. 191; Edson *v.* Edson, 108 Mass. 590, 11 Am. Rep. 393; Brown *v.* Brown, 53 Wis. 29, 9 N. W. 790; R— *v.* R—, 20 Wis. 331. And see cases cited *infra*, note 37 *et seq.*

At subsequent term. — This power is limited in some states to setting aside a judgment at the same term at which it was rendered. Ficener *v.* Ficener, 3 S. W. 597, 8 Ky. L. Rep. 867; Carley *v.* Carley, 7 Gray (Mass.) 545; Greene *v.* Greene, 2 Gray (Mass.) 361, 61 Am. Dec. 454; Parrish *v.* Parrish, 9 Ohio St. 534, 75 Am. Dec. 482.

The ecclesiastical rule was that a judgment against the validity of a marriage was never

power of the court cannot be defeated or taken away by any agreement or stipulation between the parties.[37]

2. GROUNDS FOR RELIEF — a. In General. A judgment of divorce may be set aside upon various grounds.[38]

b. Fraud — (I) *GENERAL RULES.* Fraud or imposition is a sufficient ground for setting aside a divorce.[39] The fraud authorizing the setting aside of the

final but was forever open to revision and reversal. Meadows *v.* Kingston, Ambl. 756; Bowzer *v.* Ricketts, 1 Hagg. Const. 213; Morris *v.* Webber, 2 Leon. 169; Poynter Mar. & Div. 157. *Contra,* Prudham *v.* Phillips, Ambl. 763; Meddowcroft *v.* Huguenin, 3 Curt. Eccl. 403, 4 Knapp 386, 4 Moore P. C. 386, 7 Eng. Eccl. 438, 13 Eng. Reprint 352; Norton *v.* Seton, 3 Phillim. 147, 1 Eng. Eccl. 384.

Bill or writ of review.— In some states a bill or writ of review or petition in the nature thereof will not lie to revise a decree in a divorce suit. Keller *v.* Keller, 139 Ind. 38, 38 N. E. 337; Earle *v.* Earle, 91 Ind. 27 (except for fraud on the jurisdiction of the court); Lucas *v.* Lucas, 3 Gray (Mass.) 136; Richardson *v.* Stowe, 102 Mo. 33, 14 S. W. 810; Salisbury *v.* Salisbury, 92 Mo. 683, 4 S. W. 717; Scales *v.* Scales, 65 Mo. App. 292; Smith *v.* Smith, 48 Mo. App. 612; Hansford *v.* Hansford, 34 Mo. App. 262; Nave *v.* Nave, 28 Mo. App. 505; Childs *v.* Childs, 11 Mo. App. 395; Bascom *v.* Bascom, 7 Ohio, Pt. II, 125. However, an action to set aside a judgment is not a proceeding to review it and so forbidden. Willman *v.* Willman, 57 Ind. 500. See *infra,* XV, D, 5, a.

37. Comstock *v.* Adams, 23 Kan. 513, 33 Am. Rep. 191, holding that where a divorce is wrongfully obtained a subsequent agreement between the parties that it shall not be disturbed is against public policy and void.

38. Morris *v.* Morris, 60 Mo. App. 86, holding, however, that a divorce cannot be set aside because facts derogatory to plaintiff's right to relief are developed in a subsequent trial between third persons. In Kellow *v.* Kellow, 1 Lehigh Val. L. Rep. (Pa.) 202, however, it was held that where it afterward appears that at the time an *ex parte* decree for divorce was granted libellant was living in open adultery, the decree will be set aside. See Smith *v.* Smith, 4 Paige (N. Y.) 432, 27 Am. Dec. 75.

Matters arising subsequent to decree.— If, after a decree of divorce is entered, defendant is judicially declared insane, the decree should be vacated to permit the guardian to show that the misconduct complained of was the result of the insanity. Cohn *v.* Cohn, 85 Cal. 108, 24 Pac. 659. However, a decree should not be set aside because by a change in the law petitioner has since become a competent witness to testify to his own innocence. Holbrook *v.* Holbrook, 114 Mass. 568.

Mistake does not ordinarily afford ground for setting aside a divorce. Orth *v.* Orth, 69 Mich. 158, 37 N. W. 67, holding that a decree will not be modified or set aside because of defendant's misconception of the effect thereby produced upon property rights. A divorce inadvertently granted under a statute which had been repealed is of no effect, however, and should be set aside. Wales *v.* Wales, 119 Mass. 89; Edson *v.* Edson, 108 Mass. 590, 11 Am. Rep. 393; Merrill *v.* Merrill, 11 Abb. Pr. N. S. (N. Y.) 74. Where subsequent to the decree it appears that defendant inadvertently omitted to deny the adultery charged, the court may permit the decree and proofs to be opened for the purpose of supplying the omission. Osborn *v.* Osborn, 44 N. J. Eq. 257, 9 Atl. 698, 10 Atl. 107, 14 Atl. 217.

39. *Florida.*— Shrader *v.* Shrader, 36 Fla. 502, 18 So. 672; Rawlins *v.* Rawlins, 18 Fla. 345.

Illinois.— Dunham *v.* Dunham, 162 Ill. 589, 44 N. E. 841, 35 L. R. A. 70; Caswell *v.* Caswell, 120 Ill. 377, 11 N. E. 342, 57 Ill. App. 475; Danforth *v.* Danforth, 105 Ill. 603; Maher *v.* Title Guarantee, etc., Co., 95 Ill. App. 365; Scanlan *v.* Scanlan, 41 Ill. App. 449.

Indiana.— Keller *v.* Keller, 139 Ind. 38, 38 N. E. 337; Brown *v.* Grove, 116 Ind. 84, 18 N. E. 387, 9 Am. St. Rep. 823; Nicholson *v.* Nicholson, 113 Ind. 131, 15 N. E. 223; Earle *v.* Earle, 91 Ind. 27 [*overruling* McQuigg *v.* McQuigg, 13 Ind. 294].

Iowa.— Lawrence *v.* Nelson, 113 Iowa 277, 85 N. W. 84, 57 L. R. A. 583; Klaes *v.* Klaes, 103 Iowa 689, 72 N. W. 777; Rush *v.* Rush, 48 Iowa 701; Rouse *v.* Rouse, 47 Iowa 422; Rush *v.* Rush, 46 Iowa 648, 26 Am. Rep. 179; Whitcomb *v.* Whitcomb, 46 Iowa 437; Whetstone *v.* Whetstone, 31 Iowa 276.

Louisiana.— Bryant *v.* Austin, 36 La. Ann. 808.

Maine.— Lord *v.* Lord, 66 Me. 265; Holmes *v.* Holmes, 63 Me. 420; Harding *v.* Alen, 9 Me. 140, 23 Am. Dec. 549.

Maryland. — Gechter *v.* Gechter, 51 Md. 187.

Massachusetts.—Holbrook *v.* Holbrook, 114 Mass. 568; Edson *v.* Edson, 108 Mass. 590, 11 Am. Rep. 393; Carley *v.* Carley, 7 Gray 545; Greene *v.* Greene, 2 Gray 361, 61 Am. Dec. 454.

Minnesota.— Colby *v.* Colby, 59 Minn. 432, 61 N. W. 460, 50 Am. St. Rep. 120; Young *v.* Young, 17 Minn. 181; True *v.* True, 6 Minn. 458.

Missouri.— Mansfield *v.* Mansfield, 26 Mo. 163, decided prior to the enactment of Rev. St. (1899) § 2932, providing that no petition for review of any judgment of divorce shall be allowed.

Montana.— Simpkins *v.* Simpkins, 14 Mont. 386, 36 Pac. 759, 43 Am. St. Rep. 641.

Nebraska.— Hard *v.* Hard, 51 Nebr. 412, 70 N. W. 1122; Smithson *v.* Smithson, 37 Nebr. 535, 56 N. W. 300, 40 Am. St. Rep.

decree may be such as deprives defendant of notice of the pendency of the proceedings,[40] or such as to induce the court to exercise its jurisdiction when in fact it had no right to do so,[41] or it may consist of perjured testimony given in support of the complaint.[42] The burden of proving fraud is upon the party seeking the relief,[43] and it must be clearly established.[44] It is discretionary with the court whether the evidence shall be given by affidavit or by oral testimony.[45]

(II) *COLLUSION.* By the weight of authority a divorce procured through

504; Wisdom *v.* Wisdom, 24 Nebr. 551, 39 N. W. 594, 8 Am. St. Rep. 215.

New Hampshire.— Folsom *v.* Folsom, 55 N. H. 78; Adams *v.* Adams, 51 N. H. 388, 12 Am. Rep. 134.

New Jersey.— Magowan *v.* Magowan, 57 N. J. Eq. 195, 39 Atl. 364.

New York.— Kinnier *v.* Kinnier, 45 N. Y. 535, 6 Am. Rep. 132; Kerr *v.* Kerr, 41 N. Y. 272; Singer *v.* Singer, 41 Barb. 139; McIntyre *v.* McIntyre, 9 Misc. 252, 30 N. Y. Suppl. 200; Merrill *v.* Merrill, 11 Abb. Pr. N. S. 74; Bulkley *v.* Bulkley, 6 Abb. Pr. 307; Denton *v.* Denton, 41 How. Pr. 221; Borden *v.* Fitch, 15 Johns. 121, 8 Am. Dec. 225.

North Dakota.— Nichells *v.* Nichells, 5 N. D. 125, 64 N. W. 73, 57 Am. St. Rep. 540, 33 L. R. A. 515; Yorke *v.* Yorke, 3 N. D. 343, 55 N. W. 1095.

Ohio.— Kredel *v.* Kredel, 11 Ohio Dec. (Reprint) 421, 26 Cinc. L. Bul. 367; Rine *v.* Hodgson, 9 Ohio Dec. (Reprint) 275, 12 Cinc. L. Bul. 33.

Pennsylvania.— Boyd's Appeal, 38 Pa. St. 241; Allen *v.* Maclellan, 12 Pa. St. 328, 51 Am. Dec. 608; Nickerson *v.* Nickerson, 13 Wkly. Notes Cas. 210; Peterson *v.* Peterson, 6 Wkly. Notes Cas. 449; Wanamaker *v.* Wanamaker, 10 Phila. 466; Smith *v.* Smith, 3 Phila. 489; Wilt *v.* Wilt, 2 Dauph. Co. Rep. 100; Fitch *v.* Fitch, 1 C. Pl. 46.

Rhode Island.— State *v.* Watson, 20 R. I. 354, 39 Atl. 193, 78 Am. St. Rep. 871.

Washington.— Peyton *v.* Peyton, 28 Wash. 278, 68 Pac. 757.

Wisconsin.— Moyer *v.* Koontz, 103 Wis. 22, 79 N. W. 50, 74 Am. St. Rep. 837; Everett *v.* Everett, 60 Wis. 200, 18 N. W. 637; Hopkins *v.* Hopkins, 39 Wis. 167; Crouch *v.* Crouch, 30 Wis. 667; Johnson *v.* Coleman, 23 Wis. 452, 99 Am. Dec. 193.

United States.— Daniels *v.* Benedict, 50 Fed. 347.

See 17 Cent. Dig. tit. "Divorce," § 536.

Public policy.— Judgments for divorce so procured are not as a rule set aside out of any regard to the parties concerned, but rather from motives of public policy. Singer *v.* Singer, 41 Barb. (N. Y.) 139.

Nature of fraud.— It must appear that the alleged fraud consists of intrinsic acts not examined and determined in the original divorce proceedings. Moor *v.* Moor, (Tex. Civ. App. 1901) 63 S. W. 347; Daniels *v.* Benedict, 50 Fed. 347.

40. *Indiana.*— Brown *v.* Grove, 116 Ind. 84, 18 N. E. 387, 9 Am. St. Rep. 823.

Louisiana.— Bryant *v.* Austin, 36 La. Ann. 808.

Minnesota.— Young *v.* Young, 17 Minn. 181.

Nebraska.— Smithson *v.* Smithson, 37 Nebr. 535, 56 N. W. 300, 40 Am. St. Rep. 504.

North Dakota.— Yorke *v.* Yorke, 3 N. D. 343, 55 N. W. 1095.

Texas.— See Richards *v.* Minster, 29 Tex. Civ. App. 85, 70 S. W. 98.

Fraudulent service of process.— A judgment of divorce should be set aside upon the ground that the service of the summons was fraudulent where it appeared that a husband accompanied his wife to a steamer on which she was embarking for California, and there, at the last moment before the sailing of the vessel, delivered to her a sealed box which he informed her contained a present for a third person in California and a note for herself, but which in reality contained a summons in an action for divorce against her. Bulkley *v.* Bulkley, 6 Abb. Pr. (N. Y.) 307.

41. Caswell *v.* Caswell, 120 Ill. 377, 11 N. E. 342; Rush *v.* Rush, 48 Iowa 701.

42. Whitcomb *v.* Whitcomb, 46 Iowa 437; Hard *v.* Hard, 51 Nebr. 412, 70 N. W. 1122. In Illinois, however, the fraud for which a decree may be impeached must be in respect to the jurisdiction of the court over the person of defendant and the like, and a defendant cannot ignore a summons, suffer a default, and afterward file an original bill to impeach the decree because it was based on false testimony. Kingman *v.* Kingman, 61 Ill. App. 134.

43. Hopkins *v.* Hopkins, 39 Wis. 167.

44. *Illinois.*— Caswell *v.* Caswell, 24 Ill. App. 548 [*affirmed* in 120 Ill. 377, 11 N. E. 342].

Maine.— Lord *v.* Lord, 66 Me. 265.

Maryland.— Gechter *v.* Gechter, 51 Md. 187, holding that where the petition alleges fraud, but is supported only by affidavits taken without notice to the other party, and is denied by an answer under oath, the decree should not be vacated.

Massachusetts.—Holbrook *v.* Holbrook, 114 Mass. 568.

Minnesota.— Bomsta *v.* Johnson, 38 Minn. 230, 36 N. W. 341.

New Hampshire.— Adams *v.* Adams, 51 N. H. 388, 12 Am. Rep. 134.

New York.— Redding *v.* Redding, 15 N. Y. Suppl. 600.

Pennsylvania.— Perry *v.* Perry, 15 Phila. 242.

Texas.— Moor *v.* Moor, (Civ. App. 1901) 63 S. W. 347.

Wisconsin.— Hopkins *v.* Hopkins, 36 Wis. 167.

See 17 Cent. Dig. tit. "Divorce," § 543.

45. Arne *v.* Holland, 85 Minn. 401, 89 N. W. 3.

collusion between the parties is binding on both and may be impeached by neither.[46]

c. Jurisdictional Defects — (i) *In General.* If the court rendering a judgment had no jurisdiction to do so, the judgment should be set aside whether or not the decree was procured by fraud.[47] The presumption is, however, that judgments of superior courts of general jurisdiction were regularly rendered, and this presumption obtains even when the record does not disclose that the court acquired jurisdiction.[48]

(ii) *Defective Service of Process.* Defendant is entitled to notice of proceedings for divorce against him, and without service of notice, either personal or constructive, in the manner prescribed by statute, the court acquires no jurisdiction of his person, and its judgment against him is void and will be set aside.[49]

d. Reconciliation or Consent of Parties. A decree of divorce may upon proper application to the court be set aside if the parties become reconciled.[50]

46. *Massachusetts.*— Brigham *v.* Dillaway, 176 Mass. 223, 57 N. E. 328.

Michigan.— Simons *v.* Simons, 47 Mich. 253, 645, 10 N. W. 360.

Minnesota.— *In re* Ellis, 55 Minn. 401, 56 N. W. 1056, 43 Am. St. Rep. 514, 23 L. R. A. 287.

New York.— Kinnier *v.* Kinnier, 53 Barb. 454, 35 How. Pr. 66 [*affirmed* in 45 N. Y. 535, 6 Am. Rep. 132].

Pennsylvania.— Miltimore *v.* Miltimore, 40 Pa. St. 151.

Utah.— Karren *v.* Karren, 25 Utah 87, 69 Pac. 465, 95 Am. St. Rep. 815, 60 L. R. A. 468.

Public policy.— On the ground of public policy, however, it would seem the better rule to set aside a collusive judgment, if the application be seasonably made in good faith and not from any expected personal advantage. Mulkey *v.* Mulkey, 100 Cal. 91, 34 Pac. 621; Danforth *v.* Danforth, 105 Ill. 603; Singer *v.* Singer, 41 Barb. (N. Y.) 139. However, collusion between the attorneys of the parties of which plaintiff had no knowledge is not sufficient to justify setting aside a judgment, especially if it appear that plaintiff was entitled to the divorce. Harft *v.* Harft, 16 N. Y. Wkly. Dig. 461.

47. *Illinois.*— Brown *v.* Brown, 59 Ill. 315.

Indiana.— Willman *v.* Willman, 57 Ind. 500.

Iowa.— Rush *v.* Rush, 48 Iowa 701.

Maine.— Holmes *v.* Holmes, 63 Me. 420.

Massachusetts.—Edson *v.* Edson, 108 Mass. 590, 11 Am. Rep. 393.

Minnesota.— State *v.* Armington, 25 Minn. 29; True *v.* True, 6 Minn. 458.

New Jersey.— Potts *v.* Potts, (Ch. 1900) 45 Atl. 701.

New York.— Wortman *v.* Wortman, 17 Abb. Pr. 66; Dunn *v.* Dunn, 4 Paige 425.

Pennsylvania.— Allen *v.* Maclellan, 12 Pa. St. 328, 51 Am. Dec. 608; Gambe *v.* Gambe, 22 Pa. Co. Ct. 23.

Wisconsin.— Crouch *v.* Crouch, 30 Wis. 667; Weatherbee *v.* Weatherbee, 20 Wis. 499.

Fraud see *supra*, XV, D, 2, b.

48. Wells *v.* Wells, 10 N. Y. St. 248; Finch *v.* Frymire, (Tenn. Ch. App. 1896) 36 S. W. 883.

49. *Alabama.*— Golden *v.* Golden, 102 Ala. 353, 14 So. 638.

California.— McBlain *v.* McBlain, 77 Cal. 507, 20 Pac. 61.

Colorado.— Morton *v.* Morton, 16 Colo. 358, 27 Pac. 718, where the affidavit made by an attorney, upon which an order for service by publication was granted, was held defective because it stated no reason why plaintiff did not make the affidavit personally.

Indiana.— Willman *v.* Willman, 57 Ind. 500.

Missouri.— Burge *v.* Burge, 94 Mo. App. 15, 67 S. W. 703.

New York.—Robertson *v.* Robertson, 9 Daly 44; Jewitt *v.* Jewitt, 2 N. Y. Suppl. 250, where it appeared that plaintiff knew of the presence of defendant in a certain city, and in an affidavit to procure an order for the publication of a summons did not state that plaintiff could not with reasonable diligence ascertain where defendant would probably receive mail matter.

Ohio.— Wellington *v.* Wellington, 8 Ohio Dec. (Reprint) 282, 7 Cinc. L. Bul. 20 (where a judgment was set aside because obtained without service of process in fact, but on a false return procured by fraud practised on the sheriff); Hare *v.* Hare, 3 Ohio Dec. (Reprint) 284.

Wisconsin.— Weatherbee *v.* Weatherbee, 20 Wis. 499.

See 17 Cent. Dig. tit. "Divorce," § 535.

See, generally, *supra*, X.

Return of service.—Where the original summons is lost from the files, and the record recites personal service "according to the statute in such case made and provided," and the proof in a proceeding to set aside a decree shows that the summons was in fact served by delivering a copy at the usual place of abode of defendant to a person of the family above the age of ten years, and also that defendant knew that the suit was pending, the return upon the summons cannot be impeached. Scanlon *v.* Scanlon, 41 Ill. App. 449.

50. Clayton *v.* Clayton, 59 N. J. Eq. 310, 44 Atl. 840, holding that a divorce on the ground of adultery may be set aside upon the

So also where the parties thereto consent to its vacation a decree may upon their application be vacated and set aside.[51]

3. Objections and Defenses — a. Marriage of Party Obtaining Divorce. The marriage of the prevailing party in a divorce suit does not preclude relief to the other party by vacating the decree in a proper case,[52] although there is a well justified reluctance to annul such decrees, and it should be done only after the most careful consideration.[53]

b. Death of Party Obtaining Divorce. The weight of authority favors the power of the court to vacate a decree of divorce, even after the complainant's death, where it was obtained by fraud and imposition on the part of the complainant,[54] or without due service of process.[55]

c. Acceptance of Benefits of Decree. Where defendant has himself acted in reliance on the validity of the decree with full knowledge of its effect, he cannot, after a lapse of time, and especially after the death of the complainant, have it set aside because it was obtained by fraud or without due notice.[56]

application of the wife, where the husband after decree seeks her society and asks and obtains marital rights.

Limited divorce.— In some states an order of revocation of a decree of separation may be granted upon a reconciliation of the parties; but a decree of separation is not revoked by a subsequent reconciliation and cohabitation without an order for such purpose. Jones *v.* Jones, (N. J. Ch. 1894) 29 Atl. 502; Hobby *v.* Hobby, 5 N. Y. App. Div. 496, 39 N. Y. Suppl. 36; Jones *v.* Jones, 90 Hun (N. Y.) 414, 35 N. Y. Suppl. 877.

51. Colvin *v.* Colvin, 2 Paige (N. Y.) 385, 22 Am. Dec. 644 (holding that a decree of divorce may be set aside on petition of both parties); Breinig *v.* Breinig, 26 Pa. St. 161 (so holding, although neither party is entitled to the relief as a matter of right).

52. *Colorado.*— Medina *v.* Medina, 22 Colo. 146, 43 Pac. 1001.

Illinois.— Caswell *v.* Caswell, 120 Ill. 377, 11 N. E. 342 [*affirming* 24 Ill. App. 548]; Maher *v.* Title Guarantee, etc., Co., 95 Ill. App. 365.

Iowa.— Whitcomb *v.* Whitcomb, 46 Iowa 437.

Kansas.— Comstock *v.* Adams, 23 Kan. 513, 33 Am. Rep. 191.

Maine.— Holmes *v.* Holmes, 63 Me. 420.

Minnesota.— Olmstead *v.* Olmstead, 41 Minn. 297, 43 N. W. 67; Bomsta *v.* Johnson, 38 Minn. 230, 36 N. W. 341.

New York.— Wortman *v.* Wortman, 17 Abb. Pr. 66.

North Dakota.— Nichells *v.* Nichells, 5 N. D. 125, 64 N. W. 73, 57 Am. St. Rep. 540, 33 L. R. A. 515.

Pennsylvania.— Allen *v.* Maclellan, 12 Pa. St. 328, 51 Am. Dec. 608.

Texas.— Stephens *v.* Stephens, 62 Tex. 337.

Wisconsin.— Crouch *v.* Crouch, 30 Wis. 667.

See 17 Cent. Dig. tit. "Divorce," § 538 *et seq.*

53. Webster *v.* Webster, 54 Iowa 153, 6 N. W. 170; Wortman *v.* Wortman, 17 Abb. Pr. (N. Y.) 66.

54. *Florida.*— Rawlins *v.* Rawlins, 18 Fla. 345.

Indiana.— Brown *v.* Grove, 116 Ind. 84, 18 N. E. 387, 9 Am. St. Rep. 823.

Minnesota.— Bomsta *v.* Johnson, 38 Minn. 230, 36 N. W. 341.

New York.— Watson *v.* Watson, 47 How. Pr. 240.

Pennsylvania.— Fidelity Ins. Co.'s Appeal, 93 Pa. St. 242; Boyd's Appeal, 38 Pa. St. 241.

Wisconsin.— Johnson *v.* Coleman, 23 Wis. 452, 99 Am. Dec. 193.

Contra.— Zoellner *v.* Zoellner, 46 Mich. 511, 9 N. W. 831, holding that the death of complainant extinguishes the suit and the whole ground of action, and that therefore a defendant who has taken no appeal cannot attack the decree for the purpose of reopening the cause and permitting a defense. See also Hurley *v.* Hurley, 117 Iowa 621, 91 N. W. 895; *In re* Brigham, 176 Mass. 223, 57 N. E. 328.

Death as abating suit see Abatement and Revival, 1 Cyc. 64.

55. Carr *v.* Carr, 92 Ky. 552, 18 S. W. 453, 13 Ky. L. Rep. 756, 36 Am. St. Rep. 614, holding, however, that where defendant had no defense, and the result would not be changed if the decree were set aside, defendant's application therefor will be refused after plaintiff's death, although defendant was not duly served.

56. *Arizona.*—De Hereu *v.* De Hereu, (1899) 56 Pac. 871.

Colorado.— Arthur *v.* Israel, 15 Colo. 147, 25 Pac. 81, 22 Am. St. Rep. 381, 10 L. R. A. 693.

Indiana.— Stephens *v.* Stephens, 51 Ind. 542.

Iowa.— Mohler *v.* Shank, 93 Iowa 273, 61 N. W. 981, 57 Am. St. Rep. 274, 34 L. R. A. 161; Ellis *v.* White, 61 Iowa 644, 17 N. W. 28.

Kentucky.— Bourne *v.* Simpson, 9 B. Mon. 454.

Massachusetts.— Loud *v.* Loud, 129 Mass. 14.

Minnesota.— Marion *v.* Foster, 61 Minn. 154, 63 N. W. 484, 52 Am. St. Rep. 586; *In re* Ellis, 55 Minn. 401, 56 N. W. 1056, 43 Am. St. Rep. 514, 23 L. R. A. 287.

d. Bad Faith. A party seeking to vacate or annul a decree of divorce must be actuated by good motives and not by expectation of personal advantage.[57]

e. Lapse of Time — (i) *Laches.* If the party asking to set aside a decree of divorce has been guilty of laches that relief will be denied him.[58] Thus to vacate a decree of divorce obtained by fraud the injured party must act promptly after a discovery of the fraud,[59] unless the facts are such as to excuse the delay.[60]

(ii) *Statutes of Limitations.* The period within which an action will lie to set aside a judgment for fraud is usually prescribed by statute, and unless otherwise provided a general limitation applies to decrees of divorce.[61]

Missouri.— Richeson *v.* Simmons, 47 Mo. 20.

Pennsylvania.— Richardson's Estate, 132 Pa. St. 292, 19 Atl. 82.

Estoppel.— The length of time which has elapsed since a decree of divorce was rendered and the manner in which the parties have treated each other may operate as an estoppel and preclude either from interfering with the affairs of the other. Richeson *v.* Simmons, 47 Mo. 20. Thus if, after the decree of divorce, the wife brings replevin against her former husband in her name and recovers judgment, the assertion of her right as a *feme sole* estops her from controverting the validity of the divorce. Baily *v.* Baily, 44 Pa. St. 274, 84 Am. Dec. 439.

57. Zoellner *v.* Zoellner, 46 Mich. 511, 9 N. W. 831; Singer *v.* Singer, 41 Barb. (N. Y.) 139.

Presumption from delay.—The presumption arising from a long acquiescence by defendant in a fraudulent decree of divorce is that its injurious effects were not seriously regarded by her, and that her action in afterward attempting to set it aside is actuated by a desire to secure some personal advantage in addition to a restoration of marital rights. Nicholson *v.* Nicholson, 113 Ind. 131, 15 N. E. 223; Nichols *v.* Nichols, 25 N. J. Eq. 60; Singer *v.* Singer, 41 Barb. (N. Y.) 139.

58. Hubbard *v.* Hubbard, 19 Colo. 13, 34 Pac. 170, holding that after a decree has been acquiesced in for a long time, reasons which would in the first instance have caused the decree to be withheld may not be sufficient to warrant setting it aside. See, however, Bulkley *v.* Bulkley, 6 Abb. Pr. (N. Y.) 307, holding that since the court acquires no jurisdiction where service of summons is fraudulent, laches of defendant in moving to set aside a decree obtained in such a case is not available as a defense.

Excuse.— Fraud of plaintiff inducing defendant to desist from inquiry as to the rendition of the decree will prevent the running of the statute and excuse defendant's laches. Caswell *v.* Caswell, 120 Ill. 377, 11 N. E. 342; Brown *v.* Grove, 116 Ind. 84, 18 N. E. 387, 9 Am. St. Rep. 823.

59. *Illinois.*— Caswell *v.* Caswell, 120 Ill. 377, 11 N. E. 342 [*affirming* 24 Ill. App. 548]; Sloan *v.* Sloan, 102 Ill. 581; Burge *v.* Burge, 88 Ill. 164; Davis *v.* Davis, 30 Ill. 180; Maher *v.* Title Guarantee, etc., Co., 95 Ill. App. 365.

Indiana.— Nicholson *v.* Nicholson, 113 Ind. 131, 15 N. E. 223; Earle *v.* Earle, 91 Ind. 27.

Iowa.— Hurley *v.* Hurley, 117 Iowa 621, 91 N. W. 895.

Massachusetts.— *In re* Brigham, 176 Mass. 223, 57 N. E. 328; Holbrook *v.* Holbrook, 114 Mass. 568.

Michigan.— Zoellner *v.* Zoellner, 46 Mich. 511, 9 N. W. 831.

New Jersey.— Clayton *v.* Clayton, 59 N. J. Eq. 310, 44 Atl. 840; Nichols *v.* Nichols, 25 N. J. Eq. 60.

New York.— Singer *v.* Singer, 41 Barb. 139.

Oregon.— Sedlak *v.* Sedlak, 14 Oreg. 540, 13 Pac. 452.

Pennsylvania.— Potts *v.* Potts, 10 Wkly. Notes Cas. 102; Firmin *v.* Firmin, 16 Phila. 75; Perry *v.* Perry, 15 Phila. 242.

Texas.— Johnston *v.* Sharpe, (Civ. App. 1896) 34 S. W. 1006.

Washington.— Peyton *v.* Peyton, 28 Wash. 278, 68 Pac. 757.

Wisconsin.— Jones *v.* Jones, 78 Wis. 446, 47 N. W. 728.

United States.— McNeil *v.* McNeil, 78 Fed. 834.

See 17 Cent. Dig. tit. "Divorce," § 541.

See, however, Fritz *v.* Fritz, 9 Ohio S. & C. Pl. Dec. 275, holding that a delay of two years in bringing an action to set aside a decree of divorce obtained by fraud upon the jurisdiction of the court, although unexplained, is not such laches as will create estoppel.

60. Colby *v.* Colby, 64 Minn. 549, 67 N. W. 663; Clayton *v.* Clayton, 59 N. J. Eq. 310, 44 Atl. 840; Everett *v.* Everett, 60 Wis. 200, 18 N. W. 637, all holding that poverty will excuse a delay of eighteen months after knowledge of the fraud. The poverty of defendant and her desire to wait until her son had reached his majority is not a sufficient excuse for a delay of nearly fifteen years, however. Earle *v.* Earle, 91 Ind. 27.

Reliance on promise of support.— A delay of four years caused by the reliance which defendant had placed upon her husband's promise to support her will prevent relief. Nicholson *v.* Nicholson, 113 Ind. 131, 15 N. E. 223.

61. *California.*— Prewett *v.* Dyer, 107 Cal. 154, 40 Pac. 105.

Illinois.— Caswell *v.* Caswell, 120 Ill. 377, 11 N. E. 342; Sloan *v.* Sloan, 102 Ill. 581.

Indiana.— Woolley *v.* Woolley, 12 Ind. 663.

Kansas.— Larimer *v.* Knoyle, 43 Kan. 338, 23 Pac. 487.

Louisiana.— Bourlon *v.* Waggaman, 28 La. Ann. 481.

4. PERSONS ENTITLED TO RELIEF — a. In General. Strangers to the divorce suit are not entitled to have an invalid decree of divorce set aside.[62] That right usually exists only in favor of the injured spouse.[63]

b. Prevailing Party. The party in whose favor a divorce has been granted cannot ordinarily have it set aside,[64] unless the divorce suit was instituted without the knowledge or consent of the applicant.[65]

5. PROCEDURE — a. Remedy. A decree of divorce may be set aside either by motion[66] or by an original suit in equity in the nature of a bill of review,[67] according to the circumstances of the case and the practice of the court in which the relief is sought.

b. Parties Defendant. If the prevailing party has remarried since the decree was granted, the second spouse may be made a party defendant in a proceeding to set aside the decree.[68] If he has died since the decree his legal representatives and all others interested in the distribution of his estate,[69] including all children born prior to the decree,[70] should be made parties.

Nebraska.— See Humphrey *v.* Humphrey, (1902) 91 N. W. 856.

New York.—Amory *v.* Amory, 3 Abb. Pr. N. S. 16.

Wisconsin.— Jones *v.* Jones, 78 Wis. 446, 47 N. W. 728.

62. Ruger *v.* Heckel, 85 N. Y. 483 (holding that the second husband of a divorced woman cannot open the judgment because of fraud and collusion, so as to enable him to procure an annulment of his marriage with her); Quigley *v.* Quigley, 45 Hun (N. Y.) 23 (holding that the co-respondent cannot institute proceedings to open the decree for the purpose of affording him an opportunity to deny the charge of adultery); E. B. *v.* E. C. B., 8 Abb. Pr. (N. Y.) 44 (holding that the mother of a married infant against whom a judgment was rendered will not be permitted to open the judgment on the ground that she has an interest in the litigation).

Infant children of the divorced parties cannot maintain proceedings to set aside the decree. Baugh *v.* Baugh, 37 Mich. 59, 26 Am. Rep. 495. *Contra*, Rawlins *v.* Rawlins, 18 Fla. 345, holding that a child born after the decree was granted is a proper party plaintiff in such an action.

63. Lawrence *v.* Nelson, 113 Iowa 277, 85 N. W. 84, 57 L. R. A. 583, holding that the former wife of a deceased pensioner who, if his widow, is under the laws of the United States entitled to a pension from the time of his death, has a sufficient property interest to entitle her to sue to annul a fraudulent divorce decree obtained by him in his lifetime.

64. Ferry *v.* Ferry, 9 Wash. 239, 37 Pac. 431.

Right to have decree set aside for collusion see *supra*, XV, D, 2, b, (II).

65. Brown *v.* Grove, 116 Ind. 84, 18 N. E. 387, 9 Am. St. Rep. 823, holding that where a husband procured a petition for a divorce to be filed in the name of his wife and answered the complaint, the wife having no knowledge of the proceeding for more than twenty years, the decree will be annulled.

Insane plaintiff.— Since a divorce suit can be brought only with the consent of the injured party, and an insane person can give no such consent, proceedings instituted in his name by a third person are invalid and of no effect. Bradford *v.* Bradford, 89 Ill. 78, 31 Am. Rep. 67.

66. *California.*— Mulkey *v.* Mulkey, 100 Cal. 91, 34 Pac. 621.

Dakota.— Beach *v.* Beach, 6 Dak. 371, 43 N. W. 701, where the judgment was void for insufficient service of process and it was held that an action was not necessary to set it aside.

New York.— Bulkley *v.* Bulkley, 6 Abb. Pr. 307.

North Dakota.—Nichells *v.* Nichells, 5 N. D. 125, 64 N. W. 73, 57 Am. St. Rep. 540, 33 L. R. A. 515; Yorke *v.* Yorke, 3 N. D. 343, 55 N. W. 1095.

Wisconsin.— Weatherbee *v.* Weatherbee, 20 Wis. 499, holding that a judgment for divorce, rendered without jurisdiction of the person of defendant, may be set aside on motion at a subsequent term.

67. Shrader *v.* Shrader, 36 Fla. 502, 18 So. 672; Rawlins *v.* Rawlins, 18 Fla. 345; Earle *v.* Earle, 91 Ind. 27; Blank *v.* Blank, 107 N. Y. 91, 13 N. E. 615; Monroe *v.* Monroe, 21 N. Y. Suppl. 655; Bamford *v.* Bamford, 4 Oreg. 30. See *supra*, note 36.

The decree cannot be set aside for fraud on motion after the death of plaintiff, upon service of notice on the administrator; but an action in the nature of a bill of review bringing before the court all persons interested in the estate left by the decedent is the only mode in which the relief can be obtained. Watson *v.* Watson, 1 Hun (N. Y.) 267, 3 Thomps. & C. (N. Y.) 667, 47 How. Pr. (N. Y.) 240; Groh *v.* Groh, 35 Misc. (N. Y.) 354, 71 N. Y. Suppl. 985.

68. Carlisle *v.* Carlisle, 96 Mich. 128, 55 N. W. 673.

69. Bomsta *v.* Johnson, 38 Minn. 230, 36 N. W. 341; Watson *v.* Watson, 1 Hun (N. Y.) 267, 47 How. Pr. (N. Y.) 240; Groh *v.* Groh, 35 Misc. (N. Y.) 354, 71 N. Y. Suppl. 985; Rine *v.* Hodgson, 9 Ohio Dec. (Reprint) 275, 12 Cinc. L. Bul. 33; Johnson *v.* Coleman, 23 Wis. 452, 99 Am. Dec. 193.

70. Rawlins *v.* Rawlins, 18 Fla. 349. See, however, Lawrence *v.* Nelson, 113 Iowa 277, 85 N. W. 84, 57 L. R. A. 583, holding that

c. Pleadings. The petitioner should show in his petition that he is the injured party and free from guilt,[71] and that he has a meritorious defense to the action for divorce.[72] He should also specifically allege the facts and circumstances constituting the fraud or irregularities complained of, and clearly show that the action was brought within the time prescribed by statute.[73]

d. Notice and Hearing. A decree should not be vacated without giving the complainant therein an opportunity to be heard,[74] and if he has remarried the second spouse also is entitled to notice.[75]

e. Decree — (i) *Form.* Where the proceedings for divorce were fraudulent from their inception, the decree setting aside the judgment of divorce should simply nullify it and not permit defendant to defend as though the judgment had never been entered;[76] but where the fraud occurred subsequent to the commencement of the divorce proceedings, the decree should set aside the judgment of divorce and grant defendant a reasonable time to plead.[77] A decree granting a divorce and settling the property rights of the parties cannot be set aside in part only.[78]

(ii) *Operation and Effect.* The vacation of a decree of divorce renders it void *ab initio* and restores the parties to their previous marital status, with all its incidental rights and duties.[79] On collateral attack the presumption is in favor of the validity of a decree setting aside a judgment of divorce.[80]

E. Collateral Attack — **1. Grounds of Attack.** A decree of divorce granted by a court having no jurisdiction over the subject-matter or over the person against whom it was granted is absolutely void and may be collaterally attacked

adult heirs of a deceased United States pensioner are not necessary parties to annul a fraudulent divorce obtained by him in his lifetime, since they are beyond the age that entitles them to a pension.

71. Bamford *v.* Bamford, 4 Oreg. 30.

72. Webster *v.* Webster, 54 Iowa 153, 6 N. W. 170; Thelin *v.* Thelin, 8 Ill. App. 421; Everett *v.* Morrison, 21 N. Y. Suppl. 328.

73. Earle *v.* Earle, 91 Ind. 27; Webster *v.* Webster, 54 Iowa 153, 6 N. W. 170; Barteau *v.* Barteau, 45 Minn. 132, 47 N. W. 645; Bomsta *v.* Johnson, 38 Minn. 230, 36 N. W. 341; Liem *v.* Liem, 5 Kulp (Pa.) 178.

For forms of petitions see the following cases:

Florida.— Shrader *v.* Shrader, 36 Fla. 502, 18 So. 672; Rawlins *v.* Rawlins, 18 Fla. 345.

Indiana.— Willman *v.* Willman, 57 Ind. 500.

Iowa.— Rush *v.* Rush, 46 Iowa 648, 26 Am. Rep. 179.

Maine.— Spinney *v.* Spinney, 87 Me. 484, 32 Atl. 1019; Lord *v.* Lord, 66 Me. 265.

Minnesota.— Colby *v.* Colby, 59 Minn. 432, 61 N. W. 460, 50 Am. St. Rep. 420.

Nebraska.— Cochran *v.* Cochran, 42 Nebr. 612, 60 N. W. 942.

74. Morris *v.* Morris, 60 Mo. App. 86.

Service on attorney.— If the proceeding is by motion notice to plaintiff's attorney is sufficient. Beach *v.* Beach, 6 Dak. 371, 43 N. W. 701; Yorke *v.* Yorke, 3 N. D. 343, 55 N. W. 1095. A person who claims rights under a decree of divorce cannot be heard to say that her attorney of record therein was unauthorized, and therefore that service on him of a motion to vacate the decree for fraud was not binding. Gebhard *v.* Gebhard, 25 Misc. (N. Y.) 1, 54 N. Y. Suppl. 406.

75. Carlisle *v.* Carlisle, 96 Mich. 128, 55 N. W. 673.

76. Colby *v.* Colby, 64 Minn. 549, 67 N. W. 663; Crocker *v.* Crocker, Sheld. (N. Y.) 257.

77. Yorke *v.* Yorke, 3 N. D. 343, 55 N. W. 1095.

78. McCraney *v.* McCraney, 5 Iowa 232, 68 Am. Dec. 702, holding that a decree avoiding a sentence of divorce so far as it affects the wife's portion in her husband's estate, and otherwise leaving it in force, is of no effect.

79. *Kansas.*— Comstock *v.* Adams, 23 Kan. 513, 33 Am. Rep. 191.

New Jersey.— Voorhees *v.* Voorhees, 46 N. J. Eq. 411, 19 Atl. 172, 19 Am. St. Rep. 404.

New York.— Gebhard *v.* Gebhard, 25 Misc. 1, 54 N. Y. Suppl. 406.

Pennsylvania.— Boyd's Appeal, 38 Pa. St. 246, holding that where a divorce is set aside after the death of the husband, the wife is restored to all her marital rights in his estate.

Rhode Island.— State *v.* Watson, 20 R. I. 354, 39 Atl. 193, 78 Am. St. Rep. 871, holding that a husband who continues living with his second wife after a decree of divorce procured by him against his first wife has been set aside is guilty of adultery.

80. Comstock *v.* Adams, 23 Kan. 513, 33 Am. Rep. 191 (holding that where it is shown that a court of a sister state possesses general jurisdiction, including power to grant divorces, and such a court grants a divorce and then sets it aside, it is presumed that the court had power so to do); Allen *v.* Maclellan, 12 Pa. St. 328, 51 Am. Dec. 608 (so holding, although there was nothing in the record to show that proof of fraud in procuring the divorce was made, and although it was ad-

at any time and on any occasion where it is set up as a valid judgment.[81] Where, however, the court had jurisdiction of the parties and the subject-matter, its decree cannot be collaterally attacked because of mere error or irregularity.[82] Nor can a decree of divorce be collaterally attacked because it was obtained by fraud and ought not to have been rendered.[83]

mitted that when service of the notice of the intended application to vacate was made at the reputed residence of libellant, she was out of the state).

81. *Colorado.*— Israel *v.* Arthur, 7 Colo. 5, 1 Pac. 438 (where the record showed affirmatively that the statute requiring service by publication was not complied with); Clayton *v.* Clayton, 4 Colo. 410.

Georgia.— Parish *v.* Parish, 32 Ga. 653.

Indiana.— Cavanaugh *v.* Smith, 84 Ind. 380.

Iowa.— Mohler *v.* Shank, 93 Iowa 273, 61 N. W. 981, 57 Am. St. Rep. 274, 34 L. R. A. 161.

Utah.— *In re* Christiansen, 17 Utah 412, 53 Pac. 1003, 70 Am. St. Rep. 794, 41 L. R. A. 504, holding that a judgment pronounced by a tribunal having no authority to determine the matter in issue is necessarily and incurably void, and may be shown to be so in any collateral or other proceeding in which it is drawn in question.

See 17 Cent. Dig. tit. "Divorce," § 549.

Pleading.— Where a husband brings a claim against a tenant of his wife for a portion of her rents allotted to him by a decree of divorce, the tenant, if he means to take advantage of the nullity of the decree, must make his averment thereof in such form as that the husband can take issue. He cannot set the nullity up on argument under an averment that he has a mortgage of the rents and "reserves to himself the right to impeach the decree if occasion should offer and require him to do so." Cheever *v.* Wilson, 9 Wall. (U. S.) 108, 19 L. ed. 604. So where a decree of divorce is attacked in a pleading in another action because of fraud in regard to service of process and otherwise, the pleader must allege that he did not have actual notice of the divorce proceedings in time to appear and defend, and that he did not learn of the fraud until within less than two years next preceding the filing of the pleading. Larimer *v.* Knoyle, 43 Kan. 338, 23 Pac. 487.

82. *California.*— Newman's Estate, 75 Cal. 213, 16 Pac. 887, 7 Am. St. Rep. 146, holding that a judgment by default rendered before the time allowed defendant to answer has expired is simply erroneous and not void, and can be attacked only upon motion or by appeal and by the party aggrieved.

Indiana.— Cavanaugh *v.* Smith, 84 Ind. 380.

New York.— Delafield *v.* Brady, 108 N. Y. 524, 15 N. E. 428; Hunt *v.* Hunt, 72 N. Y. 217, 28 Am. Rep. 129 (holding that a judgment rendered by a court having power to deal with the general subject of the action, and having jurisdiction of the parties, although against the facts or without facts to sustain it, is not void as rendered without jurisdiction, and cannot be questioned collaterally); Wottrich *v.* Freeman, 71 N. Y. 601.

Pennsylvania.— Hake *v.* Fink, 9 Watts 336.

Tennessee.— Rush *v.* Moore, (Ch. App. 1897) 48 S. W. 90.

Vermont.— Burton *v.* Burton, 58 Vt. 414, 5 Atl. 281.

Defective service of process rendering a decree of divorce not void but merely voidable cannot be taken advantage of in a collateral attack on the decree. *In re* James, 99 Cal. 374, 33 Pac. 1122, 37 Am. St. Rep. 60 (so holding where the published order for defendant to appear was in every way formal, and the only defect in the process was the failure of the clerk, on entering the original order in the records, to sign his name to it); Pettiford *v.* Zoellner, 45 Mich. 358, 8 N. W. 57 (so holding where the affidavit of publication was irregular because based on information and belief); Donnelly *v.* West, 66 How. Pr. (N. Y.) 428; Miltimore *v.* Miltimore, 40 Pa. St. 151.

Misnomer of defendant, if no harm results therefrom, does not vitiate the decree so as to render it subject to collateral attack. Harrison *v.* Harrison, 19 Ala. 499; Howton *v.* Gilpin, 69 S. W. 766, 24 Ky. L. Rep. 630.

Defects in pleadings.— So where a decree of divorce is rendered on a complaint which does not state facts sufficient to justify the relief demanded and awarded, it cannot on that ground be collaterally attacked. *In re* James, 99 Cal. 374, 33 Pac. 1122, 37 Am. St. Rep. 60; Ayers *v.* Harshman, 66 Ind. 291. See McFarlane *v.* Cornelius, 43 Oreg. 513, 73 Pac. 325, 74 Pac. 468. Nor is a decree void as for fraud because the bill omitted to state a fact which would have been a bar to the relief sought. Harrison *v.* Harrison, 19 Ala. 499. The fact that the petition was not verified by plaintiff but was sworn to by her attorney is not a jurisdictional defect, and cannot be urged in a collateral proceeding instituted nearly thirty years later to enforce the dower rights of plaintiff. Ellis *v.* White, 61 Iowa 644, 17 N. W. 28.

83. *Alabama.*— Harrison *v.* Harrison, 19 Ala. 499.

Indiana.— Nicholson *v.* Nicholson, 113 Ind. 131, 15 N. E. 223.

Kansas.— See Larimer *v.* Knoyle, 43 Kan. 338, 23 Pac. 487, holding that the fact that the petition for divorce, the affidavit for service by publication, and the affidavit filed in lieu of sending a copy of the petition and publication notice to defendant were false, does not render the judgment of divorce absolutely void.

Maine.— Davis *v.* Davis, 61 Me. 395.

Minnesota.— *In re* Ellis, 55 Minn. 401, 56 N. W. 1056, 43 Am. St. Rep. 514, 23 L. R.

2. Conclusiveness of Record. Recitals in the record of a divorce suit are conclusive in a collateral attack on the decree.[84]

3. Presumption in Favor of Decree. On collateral attack of a decree of divorce, it is presumed in favor of the decree, in the absence of a showing to the contrary, that the court had jurisdiction over the parties and that facts existed authorizing the court to exercise its jurisdiction over the subject-matter.[85]

4. Estoppel to Attack Decree. A party to a void decree of divorce who has acted thereunder and accepted its benefits cannot in a collateral proceeding

A. 287, holding that the validity of a judgment of divoree eannot be impeached in a eollateral proceeding beeause plaintiff was induced to bring the suit by ill treatment and threats that unless she did so the ill treatment would be continued.

Missouri.— De Graw *v.* De Graw, 7 Mo. App. 121.

Washington.— Peyton *v.* Peyton, 28 Wash. 278, 68 Pac. 757.

Contra.— Whetstone *v.* Whetstone, 31 Iowa 276 (holding that a deeree of divoree set up as a bar in another aetion for divoree between the same parties may be attaeked); Plummer *v.* Plummer, 37 Miss. 185 (holding that a decree obtained by fraud may always be collaterally attacked); Daniels *v.* Benedict, 50 Fed. 347.

84. Harrison *v.* Harrison, 20 Ala. 629, 56 Am. Dec. 227 (holding that jurisdictional facts stated in the bill must be deemed to be true in a suit on the deeree); Newman's Estate, 75 Cal. 213, 16 Pac. 887, 7 Am. St. Rep. 146 (holding that an affidavit of service of summons by publication against a nonresident defendant and recitals thereof in the judgment are conclusive on collateral attack); Amy *v.* Amy, 12 Utah 278, 42 Pac. 1121 (holding that the reeital in the decree that "defendant was duly served with process by publieation" is eonelusive upon the court's jurisdiction of defendant's person, although the affidavit of publication fails to allege that the summons was published as provided by statute).

What constitutes record.— The affidavit on the application for an order of publieation and the order therefor are not a part of the judgment-roll and eannot be considered on the question of due serviee (Newman's Estate, 75 Cal. 213, 16 Pac. 887, 7 Am. St. Rep. 146), and their absenee from the reeord eannot be appealed to in a collateral attack to impeach a judgment reciting service of process by publieation (Amy *v.* Amy, 12 Utah 278, 42 Pac. 1121).

Construction of record.—A recital that due serviee by publieation was made does not preclude a eollateral attack on the judgment where the record otherwise affirmatively shows that the statute was not complied with. Israel *v.* Arthur, 7 Colo. 5, 1 Pac. 438; Northeut *v.* Lemery, 8 Oreg. 316. However, a certifieate by the elerk in the minutes that eertain papers are all that were filed in the eause is not ineompatible with the existence of an order for publieation not in the files. Amy *v.* Amy, 12 Utah 278, 42 Pac. 1121.

85. *Alabama.*— Thompson *v.* Thompson, 91 Ala. 591, 8 So. 419, 11 L. R. A. 443; Wilson *v.* Holt, 83 Ala. 528, 3 So. 321, 3 Am. St. Rep. 768, both eases holding that the presumption is in favor of the validity of a deeree whieh has existed unassailed for more than thirty years.

California.— See Buelna *v.* Ryan, 139 Cal. 630, 73 Pac. 466.

Indiana.— Cavanaugh *v.* Smith, 84 Ind. 380.

Kansas.— Larimer *v.* Knoyle, 43 Kan. 338, 23 Pac. 487, holding that after judgment of divoree, where it appears in another action and in another eourt that the affidavit of plaintiff's ignoranee of defendant's whereabouts, made to dispense with sending the published notiee of suit to him, was sworn to, in the county where the divorce proeeedings were pending, before "S. Fee, J. P.," it will be presumed that "S. Fee, J. P.," was a man by the name of S. Fee, who was a justiee of the peaee of sueh county.

Kentucky.— Asbury *v.* Powers, 65 S. W. 605, 23 Ky. L. Rep. 1622, after lapse of twenty years, death of husband, and remarriage.

Missouri.— Werz *v.* Werz, 11 Mo. App. 26.

Utah.— Amy *v.* Amy, 12 Utah 278, 42 Pac. 1121, holding that where judgment of divorce reeited that defendant was duly served with process by publieation, the presumption of the eourt's jurisdiction of defendant's person is not overcome by the fact of defendant's non-residenee, neither the property rights of the parties nor the rights of their ehildren being determined thereby; and particularly where defendant reeeived notiee of the proceedings and both parties regarded the divorce as valid and again married.

See 17 Cent. Dig. tit. "Divorce," § 200.

However, if a statute purporting to confer jurisdiction is void, no intendment of law or presumption of faet ean be made in favor of the jurisdiction. *In re* Christiansen, 17 Utah 412, 53 Pac. 1003, 70 Am. St. Rep. 794, 41 L. R. A. 504. And if summons is required to be served on a non-resident defendant by publication for four weeks, jurisdiction over the person of defendant will not be presumed, where it appears by the indorsement of filing on the complaint that four weeks could not have intervened between the time of sueh filing and the rendition of the decree, although the deeree eontains a recital that "defendant had been served by publication as required by law." Northeut *v.* Lemery, 8 Oreg. 316.

attack its validity;[86] and a party who has been guilty of fraud[87] or collusion[88] and thereby procured a decree of divorce cannot attack the decree on that ground.

F. Res Judicata — 1. Judgment as Bar — a. To Subsequent Suit. A decree dismissing a complaint for divorce on the merits is a bar to a subsequent suit upon the same cause of action.[89] Acts occurring subsequent to the dismissal, however, may be set up as grounds for a new action.[90]

86. Mohler *v.* Shank, 93 Iowa 273, 61 N. W. 981, 57 Am. St. Rep. 274, 34 L. R. A. 161; Ellis *v.* White, 61 Iowa 644, 17 N. W. 28; State *v.* King, 109 La. 161, 33 So. 121; Weigel's Succession, 18 La. Ann. 49; Marvin *v.* Foster, 61 Minn. 154, 63 N. W. 484, 52 Am. St. Rep. 586; Agnew's Appeal, 3 Walk. (Pa.) 320.

Remarriage as precluding attack.—The fact that defendant in a void decree of divorce subsequently marries another man does not estop her from asserting marital rights in her lawful husband's estate. *In re* Christiansen, 17 Utah 412, 53 Pac. 1003, 70 Am. St. Rep. 794, 41 L. R. A. 504.

87. Dow *v.* Blake, 148 Ill. 76, 89, 35 N. E. 761, 39 Am. St. Rep. 156 [*citing* Greene *v.* Greene, 2 Gray (Mass.) 361, 61 Am. Dec. 454; Simons *v.* Simons, 47 Mich. 253, 645, 10 N. W. 360; Adams *v.* Adams, 51 N. H. 388, 12 Am. Rep. 134; Ruger *v.* Heckel, 85 N. Y. 483; Coddington *v.* Coddington, 10 Abb. Pr. (N. Y.) 450; Miltimore *v.* Miltimore, 40 Pa. St. 151; Allen *v.* Maclellan, 12 Pa. St. 328, 51 Am. Dec. 608; Prudham *v.* Phillips, Amb. 763].

88. Dow *v.* Blake, 148 Ill. 76, 35 N. E. 761, 39 Am. St. Rep. 156; Nichols *v.* Nichols, 25 N. J. Eq. 60; Moor *v.* Moor, (Tex. Civ. App. 1901) 63 S. W. 347; Karren *v.* Karren, 25 Utah 87, 69 Pac. 465, 95 Am. St. Rep. 815, 60 L. R. A. 468. See, however, Daniels *v.* Benedict, 50 Fed. 347, where it was held that, although a wife was in fault in consenting to a collusive decree of divorce against her, yet where the parties were not *in pari delicto*, she was not thereby estopped from attacking the decree.

89. *Illinois.*— Haltenholf *v.* Haltenhof, 44 Ill. App. 135, holding that if a bill alleges desertion, which must by statute continue for a certain period, and a decree of dismissal is rendered, a subsequent bill for the same cause will not lie until the lapse of the statutory period after the dismissal.

Iowa.— Vinsant *v.* Vinsant, 49 Iowa 639.

Massachusetts.— Bradley *v.* Bradley, 160 Mass. 258, 35 N. E. 482; Thurston *v.* Thurston, 99 Mass. 39; Fera *v.* Fera, 98 Mass. 155.

Minnesota.—Peterson *v.* Peterson, 68 Minn. 71, 70 N. W. 865.

New Hampshire.— Brown *v.* Brown, 37 N. H. 536, 75 Am. Dec. 154.

Oregon.— Farquar *v.* Farquar, 20 Oreg. 69, 25 Pac. 146, 23 Am. St. Rep. 93.

Pennsylvania.— Kershaw *v.* Kershaw, 5 Pa. Dist. 551; Schotte *v.* Schotte, 8 Wkly. Notes Cas. 236.

Vermont.— Tillison *v.* Tillison, 63 Vt. 411, 22 Atl. 531.

Virginia.— Miller *v.* Miller, 92 Va. 196, 23 S. E. 232.

See 17 Cent. Dig. tit. "Divorce," § 554 *et seq.*

Different acts of same nature.—Where adultery was alleged to have been committed during a certain period, and the bill is dismissed as unsustained by the evidence, a subsequent bill for similar misconduct during the same period is barred (Glaude *v.* Peat, 43 La. Ann. 161, 8 So. 884; Vance *v.* Vance, 17 Me. 203; Wagoner *v.* Wagoner, 76 Md. 311, 25 Atl. 338; Edgerly *v.* Edgerly, 112 Mass. 53; Viertel *v.* Viertel, 99 Mo. App. 710, 75 S. W. 187), unless plaintiff was ignorant of the act at the time of bringing the first suit (Morrison *v.* Morrison, 142 Mass. 361, 8 N. E. 59, 56 Am. Rep. 688; Viertel *v.* Viertel, *supra*). So a libel is barred if it alleges the same acts of cruelty as a former libel, although there is evidence of other acts of cruelty, previous to the former libel, than those testified to at the first trial. Fera *v.* Fera, 98 Mass. 155.

Different grounds of divorce.— The dismissal of a bill alleging certain acts as constituting a specific ground of divorce does not bar a subsequent suit alleging the same acts as constituting an entirely different ground. Vinsant *v.* Vinsant, 49 Iowa 639 (where it was held that a judgment for defendant in an action based on adultery is not a bar to a subsequent action based on conviction of assault with intent to commit rape, although the cause of action is founded on the same criminal act); Rand *v.* Rand, 58 N. H. 536 (holding that the refusal of a divorce for extreme cruelty is no bar to a subsequent suit on the ground of abandonment consisting of the same acts of cruelty compelling the separation of the parties). See, however, Bartlett *v.* Bartlett, 113 Mass. 312, 18 Am. Rep. 493, holding that the dismissal of a libel for desertion bars a subsequent libel for adultery known to libellant before the filing of the first libel, where he shows no reason for not having then assigned it as a ground of divorce.

Different relief.— A judgment on the merits against defendant in an action for absolute divorce is a bar to a subsequent action by plaintiff for a limited divorce upon the same grounds, where under the practice plaintiff might have obtained in the first action the relief prayed for in the second. Wagner *v.* Wagner, 36 Minn. 239, 30 N. W. 766.

90. *California.*— Wagner *v.* Wagner, 104 Cal. 293, 37 Pac. 935 (holding that where the ground alleged was the husband's wilful neglect to provide necessaries, which must

b. To Subsequent Defense. A judgment dismissing a complaint for divorce on the merits precludes plaintiff from setting up the same grounds of misconduct as a defense in a suit for divorce afterward brought against him.[91]

2. Judgment as Merging Causes of Action. A decree granting a limited divorce does not bar a subsequent action by plaintiff on different grounds for an absolute divorce.[92] Nor does a judgment sustaining a defense based on the misconduct of plaintiff preclude defendant from afterward asserting the same misconduct as a ground for divorce.[93]

3. Judgment as Establishing Facts Adjudicated. A decree in a divorce suit is conclusive upon the parties as to all the facts actually determined.[94]

4. Requisites of Judgment — a. Jurisdiction. A judgment on the merits is not a bar to a subsequent suit if the court had no jurisdiction to determine the merits of the controversy.[95]

b. Adjudication of Merits. A judgment dismissing a suit for divorce does

by statute continue for a year, the dismissal of the bill does not bar a subsequent action based on the continued neglect of the husband to support his wife for a year after the dismissal); Haley *v.* Haley, (1887) 14 Pac. 92 (holding that the dismissal of the wife's bill and the husband's cross bill containing charges of adultery against the wife, because neither was sustained by the evidence, does not bar a subsequent bill by the wife on the ground that such charges, being false, constituted cruel treatment).

Missouri.— Torlotting *v.* Torlotting, 97 Mo. App. 183, 70 S. W. 941, holding that a decree denying a divorce as for adultery does not bar a suit for cruelty subsequently occurring.

New York.— Cordier *v.* Cordier, 26 How. Pr. 187, holding that plaintiff in an action based on adultery may, after judgment for defendant, bring a second action for subsequent acts of adultery with the person with whom defendant is charged with adultery in the first action.

Oregon.— Farquar *v.* Farquar, 20 Oreg. 69, 25 Pac. 146, 23 Am. St. Rep. 93.

Wisconsin.— Varney *v.* Varney, 58 Wis. 19, 16 N. W. 36, holding that after dismissal of a complaint for divorce, plaintiff may maintain a second action for non-support occurring after the first trial.

91. Tillison *v.* Tillison, 63 Vt. 411, 22 Atl. 531, holding that a plaintiff alleging cruelty as a ground for divorce cannot set up the same cruelty as a defense in a subsequent action against her for divorce on the ground of her adultery.

92. Edgerly *v.* Edgerly, 112 Mass. 53; Evans *v.* Evans, 43 Minn. 31, 44 N. W. 524, 7 L. R. A. 448; Hulse *v.* Hulse, L. R. 2 P. 259, 40 L. J. P. & M. 51, 24 L. T. Rep. N. S. 847, 19 Wkly. Rep. 880; Ritchie *v.* Ritchie, 4 Macq. 162; Geils *v.* Geils, 1 Macq. 255; Mason *v.* Mason, 8 P. D. 21, 52 L. J. P. & Adm. 27, 48 L. T. Rep. N. S. 290, 31 Wkly. Rep. 361.

93. Lea *v.* Lea, 99 Mass. 493, 96 Am. Dec. 772, holding that the dismissal of a husband's libel for divorce for desertion, as a defense to which the wife has set up his cruelty causing her withdrawal, does not bar her libel for desertion consisting of such cruelty. See Evans *v.* Evans, (Tenn. Ch. App. 1900) 57 S. W. 367.

94. *Alabama.*— Harrison *v.* Harrison, 19 Ala. 499.

Illinois.— Prescott *v.* Fisher, 22 Ill. 390 (holding that the recitals in a decree for divorce are conclusive as against the party who sought it); Smith *v.* Smith, 101 Ill. App. 187.

Indiana.— Walker *v.* Walker, 150 Ind. 317, 50 N. E. 68.

Massachusetts.— Lyster *v.* Lyster, 111 Mass. 327; Lewis *v.* Lewis, 106 Mass. 309.

Michigan.— Simons *v.* Simons, 47 Mich. 253, 645, 10 N. W. 360.

Minnesota.—Peterson *v.* Peterson, 68 Minn. 71, 70 N. W. 865.

Nebraska.— Oades *v.* Oades, 6 Nebr. 304.

New Jersey.— Magowan *v.* Magowan, 57 N. J. Eq. 195, 39 Atl. 364.

New York.— Kamp *v.* Kamp, 46 How. Pr. 143.

Pennsylvania.— Curtis *v.* Curtis, 200 Pa. St. 255, 49 Atl. 769.

Rhode Island.— Gill *v.* Read, 5 R. I. 343, 73 Am. Dec. 73.

Texas.— Schultze *v.* Schultze, (Tex. Civ. App. 1901) 66 S. W. 56.

Utah.— Amy *v.* Amy, 12 Utah 278, 42 Pac. 1121.

Vermont.— Blain *v.* Blain, 45 Vt. 538.

Wisconsin.— Amory *v.* Amory, 26 Wis. 152; Kalisch *v.* Kalisch, 9 Wis. 529.

See 17 Cent. Dig. tit. "Divorce," § 559.

In Oregon the statute authorizes the court on motion to set aside or modify so much of a decree for divorce as may provide for the support and education of minor children or the maintenance of either party, and hence the original decree is not final and conclusive as to those matters. Henderson *v.* Henderson, 37 Oreg. 141, 60 Pac. 597, 61 Pac. 136, 82 Am. St. Rep. 741, 48 L. R. A. 766.

Special findings are not conclusive as to facts which are not essential to the general verdict and the decree entered thereon. Burlen *v.* Shannon, 99 Mass. 200, 96 Am. Dec. 733.

95. Masterman *v.* Masterman, 58 Kan. 748, 51 Pac. 277, holding that where the court adjudged that plaintiff was a non-resident,

not bar a subsequent suit therefor unless it was rendered after a trial of the issues and upon the merits.[96]

5. Persons Concluded. A decree of divorce is conclusive of the matters determined only when it is set up against a party to the divorce suit. Strangers are not estopped by it.[97]

6. Proof of Judgment. An exemplified copy of the decree should be produced for the purpose of proving a divorce, if it is obtainable.[98] However the granting of a divorce may be presumed from circumstances in some cases.[99]

G. Operation and Effect — 1. Of Absolute Divorce[1] — a. As to Transactions Between Husband and Wife — (i) *In General.* After an absolute divorce the husband and wife may contract with each other, she being then *sui juris*,[2] and she may sue upon valid contracts made with him during coverture,[3] but she can-

and at the same time found that he had no cause of action on the merits, the judgment was not a bar to a subsequent action for the same cause in the state of his residence.

96. Rivers *v.* Rivers, 65 Iowa 568, 22 N. W. 679 (where it was held that a decree dismissing a complaint alleging adultery and conviction of felony because of the pendency of an appeal from the conviction is not a bar to an action for divorce on the ground of such conviction, brought after its affirmance); Brown *v.* Brown, 37 N. H. 536, 75 Am. Dec. 154 (holding that if the dismissal is for a defect in the pleadings or for want of prosecution it is no bar).

Dismissal without prejudice.— A decree dismissing a libel for divorce without prejudice is not a bar to another action for the same cause. Cornelius *v.* Cornelius, 31 Ala. 479; Kershaw *v.* Kershaw, 5 Pa. Dist. 551; Burton *v.* Burton, 58 Vt. 414, 5 Atl. 281. In Massachusetts if a decree dismissing a libel for divorce is not intended to be a bar to a new libel for the same cause it must set forth that the dismissal is without prejudice. Thurston *v.* Thurston, 99 Mass. 39. And see Bradley *v.* Bradley, 160 Mass. 258, 35 N. E. 482.

97. Coney *v.* Harney, 53 N. J. L. 53, 20 Atl. 736; Rice *v.* Rice, (N. J. Ch. 1892) 23 Atl. 946; Gouraud *v.* Gouraud, 3 Redf. Surr. (N. Y.) 262.

98. Wiseman *v.* Wiseman, 89 Ind. 479 (holding that an oral statement of a husband or wife that they have been divorced is not sufficient evidence thereof); Teter *v.* Teter, 88 Ind. 494 (holding that a transcript of the record in the divorce suit is not sufficient).

Sufficiency of copy.— An exemplified copy will not be sufficient proof unless it recites all the jurisdictional facts. Com. *v.* Blood, 97 Mass. 538; Lawrence's Case, 18 Abb. Pr. (N. Y.) 347, holding that if the decree does not show on its face the required jurisdictional facts, enough of the record should be produced to show that the court had jurisdiction.

Destruction of records.— Where the records of a certain court for a particular year were destroyed by fire, parol evidence of memoranda made by the judge on his calendar directing the entry of a decree in a case pending in such year in said court between the parties in question is admissible as tending to show the entry of such decree. *In re* Edwards, 58 Iowa 431, 10 N. W. 793.

99. Blanchard *v.* Lambert, 43 Iowa 228, 22 Am. Rep. 245; Harvey *v.* Carroll, 72 Tex. 63, 10 S. W. 334; Harvey *v.* Carroll, 5 Tex. Civ. App. 324, 23 S. W. 713, all holding that a protracted separation with a subsequent marriage by both parties may create a presumption of divorce. See also *supra*, VIII, A, note 68; XIII, A, note 7. See, however, Wiseman *v.* Wiseman, 89 Ind. 479 (holding that evidence that the husband cohabited with another woman in a remote place for a long period and had children by her, and that during all that time she was recognized as his wife, has no tendency to prove a dissolution of the original marriage); Barnes *v.* Barnes, 90 Iowa 282, 57 N. W. 851 (holding that where the records of the counties in which a man and his wife have lived show no divorce, there is no presumption of divorce in favor of the woman because she marries another, although the first husband also marries another, with whom, however, it is not shown that he lived); Gilman *v.* Sheets, 78 Iowa 499, 43 N. W. 299 (holding that a divorce will not be presumed where there is no evidence of conduct inconsistent with the continuance of the marriage relation on the part of the wife, although the husband has deserted her and married again); Ellis *v.* Ellis, 58 Iowa 720, 13 N. W. 65 (holding that where a wife had no knowledge that her husband, living apart from her, had married again or was cohabiting with another woman, until after his death, and there is no evidence that she did not at all times regard the marriage as existing, no presumption can be indulged that he had procured a divorce).

1. Effect of divorce: As defense to prosecution for adultery see Adultery, 1 Cyc. 954. As defense to prosecution for bigamy see Bigamy, 5 Cyc. 692 note 17, 700 note 81. On presumption as to legitimacy of children see Bastards, 5 Cyc. 627. On right to prosecute for adultery see Adultery, 1 Cyc. 955 note 20.

2. McBride *v.* Greenwood, 11 Ga. 379.

3. Weatherford *v.* McCrocklin, 34 S. W. 24, 17 Ky. L. Rep. 1297; Carlton *v.* Carlton, 72 Me. 115, 39 Am. Rep. 307, holding that a divorced wife may sue her former husband for personal services performed for him during their marriage.

Suit on note.— After divorce the wife may

not sue for injury from a personal tort committed by him against her before divoree.[4]

(II) *Separation Agreements.* An agreement between the parties for the separate support of the wife is not terminated by a decree for absolute divorce which is silent on the matter.[5]

b. As to Property Rights of Parties[6]—(I) *Wife's Interest in Husband's Property.* Inchoate rights of the wife in the husband's property are usually cut off by a decree of absolute divorce.[7]

(II) *Husband's Interest in Wife's Property.* The rights of a husband in his wife's property exist only during the marriage, and consequently an absolute divoree obtained by the wife divests him of all his interest therein.[8] Choses in action belonging to the wife and not reduced to possession by the husband before the commeneement of the suit will revest in her discharged of all his claims in the same manner as if the marriage had been dissolved by his death.[9]

(III) *Estates by Entirety and in Community.* Where property belongs to the community or is held as an estate by the entirety, the spouses become tenants in common on the granting of an absolute divorce.[10]

sue the husband on a promissory note given by him to her during coverture (Webster *v.* Webster, 58 Me. 139, 4 Am. Rep. 253), but not until it matures (Flattery *v.* Flattery, 91 Pa. St. 474).

Implied contract.— A divorced wife cannot maintain an action at law against her divorced husband upon an implied contract arising during coverture. Pittman *v.* Pittman, 4 Oreg. 298.

4. Bandfield *v.* Bandfield, 117 Mich. 80, 75 N. W. 287, 72 Am. St. Rep. 550, 40 L. R. A. 757, holding that a statute authorizing a married woman to sue in relation to her sole property, the same as if she were unmarried, does not warrant such an action.

5. Carey *v.* Mackey, 82 Me. 516, 20 Atl. 84, 17 Am. St. Rep. 500, 9 L. R. A. 113; Kremelberg *v.* Kremelberg, 52 Md. 553 (holding that where a husband covenants with his wife's father to pay a certain sum annually for her support, a subsequent absolute divorce obtained by the husband does not relieve him from liability thereunder); Galusha *v.* Galusha, 116 N. Y. 635, 22 N. E. 1114, 15 Am. St. Rep. 453, 6 L. R. A. 487; Carpenter *v.* Osborne, 102 N. Y. 552, 7 N. E. 823; Clark *v.* Fosdick, 13 Daly (N. Y.) 500; Blaker *v.* Cooper, 7 Serg. & R. (Pa.) 500; McGrath *v.* Pennsylvania Co., 8 Phila. (Pa.) 113.

6. **Division of property by decree** see *infra*, XIX, E.

Effect of divorce on: Curtesy see CURTESY, 12 Cyc. 1018. Dower see DOWER. Homestead see HOMESTEADS. Right to share in decedent's estate see DESCENT AND DISTRIBUTION, 14 Cyc. 1. See also *infra*, XXI, A, B.

Jurisdiction to determine property rights of non-residents see *infra*, XIX, A, 6, a, (III), (A).

7. Kent *v.* McCann, 52 Ill. App. 305, holding that ordinarily the wife loses by the divorce her rights in the husband's personal property.

Alimony see *infra*, XIX, E.

Dower see DOWER.

8. *Connecticut.*— Starr *v.* Pease, 8 Conn. 541.

Illinois.— Howey *v.* Goings, 13 Ill. 95, 54 Am. Dec. 427.

Indiana.— Doe *v.* Brown, 5 Blackf. 309.

Kentucky.— Hays *v.* Sanderson, 7 Bush 489; Adams *v.* Adams, 4 Ky. L. Rep. 897.

Maryland.— Wright *v.* Wright, 2 Md. 429, 56 Am. Dec. 723.

Massachusetts.— Moran *v.* Somes, 154 Mass. 200, 28 N. E. 152; Dunham *v.* Dunham, 128 Mass. 34; Babcock *v.* Smith, 22 Pick. 61.

Michigan.—Johnson *v.* Johnson, Walk. 309.

Mississippi.— Clark *v.* Slaughter, 38 Miss. 64.

Missouri.— Hickman *v.* Link, 97 Mo. 482, 7 S. W. 12; Wood *v.* Simmons, 20 Mo. 363; Highley *v.* Allen, 3 Mo. App. 521.

New Hampshire.—Barker *v.* Cobb, 36 N. H. 344.

New York.— Renwick *v.* Renwick, 10 Paige 420.

Pennsylvania.— Schoch's Appeal, 33 Pa. St. 351; Hake *v.* Fink, 9 Watts 336; Matter of Kintzinger, 2 Ashm. 455.

Texas.— McKinney *v.* Noble, 38 Tex. 195; Byrne *v.* Byrne, 3 Tex. 336.

Vermont.— Burt *v.* Hurlburt, 16 Vt. 292.

Virginia.— Porter *v.* Porter, 27 Gratt. 599.

See 17 Cent. Dig. tit. "Divorce," § 823.

See also CURTESY, 12 Cyc. 1018.

Sale by husband before divorce.— A sale by the husband of the wife's personal property, which is otherwise legal, is not affected by a subsequent divorce obtained by the wife. Cunningham *v.* Mitchell, 30 Ind. 362. Accordingly the divorce will not enable her to recover against the purchaser of the property. Warner *v.* Warner, 33 Miss. 547.

9. Hunt *v.* Thompson, 61 Mo. 148; Renwick *v.* Renwick, 10 Paige (N. Y.) 420; Arrington *v.* Arrington, 102 N. C. 491, 9 S. E. 200. See also Chase *v.* Chase, 6 Gray (Mass.) 157, where it is intimated that a right of action for slander of a wife during coverture may be enforced by her in her own name after divorce.

10. *Alabama.*— Donegan *v.* Donegan, 103 Ala. 488, 15 So. 823, 49 Am. St. Rep. 53.

California.— Kirschner *v.* Dietrich, 110

c. As to Resuming Maiden Name. A woman who has obtained a divorce may, even without statutory authority, resume her maiden name.[11]

d. As to Remarriage — (I) *In General.* Either party to an absolute divorce is at liberty to contract a new marriage,[12] and unless authorized by statute the decree of divorce should not impose restraints upon this right.[13] In many states, however, statutes have been enacted prohibiting the remarriage of the guilty party either absolutely or for a certain period subsequent to the divorce,[14] except, in some jurisdictions, by leave of court granted upon a showing of good behavior since the dissolution of the marriage.[15] Where defendant in a divorce suit is a non-resident, however, the jurisdiction of the court is limited to the dissolution of the marriage, and his remarriage cannot be prohibited.[16]

(II) *Operation of Statutory Prohibition.* A statute prohibiting the remarriage of a divorced person in the lifetime of the former spouse does not operate where the divorce was obtained in another state;[17] nor does it operate against a remarriage in another state,[18] even though the parties go there to evade the law of their domicile.[19]

2. Of Limited Divorce. A limited divorce, although it does not dissolve the marriage, substitutes for the common-law obligations arising from the marriage

Cal. 502, 42 Pac. 1064; Biggi *v.* Biggi, 98 Cal. 35, 32 Pac. 803, 35 Am. St. Rep. 141.

Illinois.— Harrer *v.* Wallner, 80 Ill. 197.

Indiana.— Lash *v.* Lash, 58 Ind. 526.

New York.— Stelz *v.* Shreck, 128 N. Y. 263, 28 N. E. 510, 26 Am. St. Rep. 475, 13 L. R. A. 325; Beach *v.* Hollister, 3 Hun 519, 5 Thomps. & C. 568.

Tennessee.— Hopson *v.* Fowlkes, 92 Tenn. 697, 23 S. W. 55, 36 Am. St. Rep. 120, 23 L. R. A. 805; Ames *v.* Norman, 4 Sneed 683, 70 Am. Dec. 269.

Texas.— Williamson *v.* Gore, (Civ. App. 1903) 73 S. W. 563 [*citing* Murrell *v.* Wright, 78 Tex. 519, 15 S. W. 156; Pilcher *v.* Kirk, 60 Tex. 162; Karnes *v.* Butler, (Civ. App. 1901) 62 S. W. 963], holding also that either may recover the entire interest as against a trespasser.

See 17 Cent. Dig. tit. "Divorce," § 824.

Contra.— Lewis' Appeal, 85 Mich. 340, 48 N. W. 580, 24 Am. St. Rep. 94 [*overruling* Dowling *v.* Salliotte, 83 Mich. 131, 47 N. W. 225], holding that under a joint deed to both husband and wife they become tenants by entirety, and the estate thus created, with the attendant right of survivorship, is not affected by a decree of divorce.

See also Homesteads.

11. Rich *v.* Mayer, 7 N. Y. Suppl. 69; Till *v.* Wright, 21 Pittsb. Leg. J. (Pa.) 190.

12. State *v.* Weatherby, 43 Me. 258, 69 Am. Dec. 59; Powell *v.* Powell, 27 Miss. 783. See also Breach of Promise to Marry, 5 Cyc. 1012 note 18.

Effect of remarriage as precluding: Appeal from decree of divorce see *infra*, XVII, A, 2. Collateral attack on decree of divorce see *supra*, XV, E, 4, note 86. Opening of default see *supra*, XV, C, 2, d. Prosecution for adultery see Adultery, 1 Cyc. 955 note 20. Setting aside of decree of divorce see *supra*, XV, D, 3, a.

Remarriage before decree absolute see *supra*, XV, A, 1, c, note 96.

13. Barber *v.* Barber, 16 Cal. 378; Owens *v.* Claytor, 56 Md. 129.

14. *Georgia.*—Clark *v.* Cassidy, 64 Ga. 662.

Kentucky.— Cox *v.* Combs, 8 B. Mon. 231.

New York.— Cropsey *v.* Ogden, 11 N. Y. 228; Smith *v.* Woodworth, 44 Barb. 198; People *v.* Hovey, 5 Barb. 117; Green's Case, 8 Abb. N. Cas. 450; Moore *v.* Moore, 8 Abb. N. Cas. 171.

Vermont.— State *v.* Richardson, 72 Vt. 49, 47 Atl. 103.

Washington.— Willey *v.* Willey, 22 Wash. 115, 60 Pac. 145, 79 Am. St. Rep. 923; *In re* Smith, 4 Wash. 702, 30 Pac. 1059, 17 L. R. A. 573.

See 17 Cent. Dig. tit. "Divorce," § 818.

Operation of statute.— Where the remedy of divorce exists, but the statute is amended by conferring upon the court a discretionary power to decree that the guilty party shall not remarry during the lifetime of the other party, the amendment is applicable to actions pending at the time it went into effect. Elliott *v.* Elliott, 38 Md. 357. See also Bigamy, 5 Cyc. 692 note 17.

Validity of marriage of divorced person in violation of statute see Marriage.

15. Clark *v.* Cassidy, 62 Ga. 407; Thompson *v.* Thompson, 114 Mass. 566; *In re* Child, 109 Mass. 406; Peck *v.* Peck, 8 Abb. N. Cas. 400, 60 How. Pr. (N. Y.) 206.

16. Garner *v.* Garner, 56 Md. 127, holding that such a prohibition is not necessarily a part of the decree dissolving the marriage, but is in the nature of a decree *in personam*, and is in so far invalid. See also *supra*, V, C, 3, c.

17. Fuller *v.* Fuller, 40 Ala. 301; Phillips *v.* Madrid, 83 Me. 205, 22 Atl. 114, 23 Am. St. Rep. 770, 12 L. R. A. 862; Bullock *v.* Bullock, 122 Mass. 3; Clark *v.* Clark, 8 Cush. (Mass.) 385.

18. Thorp *v.* Thorp, 90 N. Y. 602, 43 Am. Rep. 189; Dickson *v.* Dickson, 1 Yerg. (Tenn.) 110, 24 Am. Dec. 444. See, generally, Marriage.

19. *Alabama.*—Wilson *v.* Holt, 83 Ala. 528, 3 So. 321; Reed *v.* Hudson, 13 Ala. 570.

the terms of the judgment, which is thereafter the measure of the rights and duties of the parties.[20] The property rights of the parties usually remain unchanged,[21] except where under authority of statute the decree expressly provides for the disposition of the property of the parties,[22] although it has been held that the wife's capacity to contract and to sue and be sued after a limited divorce is the same as though she had never been married.[23]

3. TIME OF TAKING EFFECT. The decree takes effect from the date of its rendition and not of its entry.[24]

XVI. NEW TRIAL.[25]

A. In General. The rules of practice and procedure governing new trials, as well as the rules of practice and procedure relating to rehearings in civil cases generally are alike applicable to new trials and rehearing in divorce suits,[26] unless by statutory enactment a different practice exists.[27] In some states the court may in its discretion grant a new trial of less than all of several issues.[28] The right of

Massachusetts.— Putnam *v.* Putnam, 8 Pick. 433.

New York.— Moore *v.* Hegeman, 92 N. Y. 521, 44 Am. Rep. 408 [*affirming* 27 Hun 68]; Van Voorhis *v.* Brintnall, 86 N. Y. 18, 40 Am. Rep. 505 [*reversing* 23 Hun 260]; Roberts *v.* Ogdensburg, etc., R. Co., 34 Hun 324; Stack's Estate, 10 N. Y. St. 690, 6 Dem. Surr. 280; Kerrison *v.* Kerrison, 60 How. Pr. 51, 8 Abb. N. Cas. 444; Marshall *v.* Marshall, 4 Thomps. & C. 449, 48 How. Pr. 57; Webb's Estate, 1 Tuck. Surr. 372.

Pennsylvania.— Van Storch *v.* Griffin, 71 Pa. St. 240.

United States.— Ponsford *v.* Johnson, 19 Fed. Cas. No. 11,266, 2 Blatchf. 51.

See 17 Cent. Dig. tit. "Divorce," §§ 819, 844.

Contra.— Williams *v.* Oates, 27 N. C. 535; Irby *v.* Wilson, 21 N. C. 568; Pennegar *v.* State, 87 Tenn. 244, 10 S. W. 305, 10 Am. St. Rep. 648, 2 L. R. A. 703.

20. People *v.* Cullen, 153 N. Y. 629, 47 N. E. 894, 44 L. R. A. 420. See also *supra*, XV, A, 1, b, c.

21. *Alabama.*— Ellison *v.* Mobile, 53 Ala. 558.

Louisiana.— Gee *v.* Thompson, 11 La. Ann. 657.

Maryland.— Hokamp *v.* Hagaman, 36 Md. 511.

Massachusetts.— Ames *v.* Chew, 5 Metc. 320; Dean *v.* Richmond, 5 Pick. 461.

New Jersey.— American Legion *v.* Smith, 45 N. J. Eq. 466, 17 Atl. 770.

North Carolina.— Castlebury *v.* Maynard, 95 N. C. 281.

Tennessee.— Jarnigan *v.* Jarnigan, 80 Tenn. 292.

See 17 Cent. Dig. tit. "Divorce," § 809.

See also CURTESY, 12 Cyc. 1019; DOWER; HOMESTEAD.

22. Delafield *v.* Brady, 108 N. Y. 524, 15 N. E. 428; Erkenbrach *v.* Erkenbrach, 96 N. Y. 456; Davis *v.* Davis, 75 N. Y. 221; Kamp *v.* Kamp, 59 N. Y. 212; Griffin *v.* Griffin, 47 N. Y. 134; Holmes *v.* Holmes, 4 Barb. (N. Y.) 295; Meehan *v.* Meehan, 2 Barb. (N. Y.) 377; Renwick *v.* Renwick, 10 Paige (N. Y.) 425; Van Duzer *v.* Van Duzer, 6 Paige (N. Y.) 366, 31 Am. Dec. 257; Haviland *v.* Bloom, 6 Johns. Ch. (N. Y.) 178; Taylor *v.* Taylor, 112 N. C. 134, 16 S. E. 1019; Taylor *v.* Taylor, 93 N. C. 418, 53 Am. Rep. 460; Marshall *v.* Baynes, 88 Va. 1040, 14 S. E. 978; Gallagher *v.* Gallagher, 101 Wis. 202, 77 N. W. 145.

23. Pierce *v.* Burnham, 4 Metc. (Mass.) 303; Dean *v.* Richmond, 5 Pick. (Mass.) 461; 2 Kent Comm. 157. See also Barber *v.* Barber, 21 How. (U. S.) 582, 16 L. ed. 226. In New Jersey, however, under Gen. St. p. 2012, § 14, enlarging the legal rights of married women, but saving the common-law inability of the husband and wife to sue each other, a married woman living apart from her husband under a decree of divorce *a mensa et thoro* cannot maintain an action at law against him. Drum *v.* Drum, (Sup. 1903) 55 Atl. 86.

Acknowledgment of deed of wife after limited divorce see ACKNOWLEDGMENTS, 1 Cyc. 598 note 83.

24. *In re* Cook, 83 Cal. 415, 23 Pac. 392; Cook's Estate, 77 Cal. 220, 17 Pac. 923, 19 Pac. 431, 11 Am. St. Rep. 267, 1 L. R. A. 567; Newman's Estate, 75 Cal. 213, 16 Pac. 887, 7 Am. St. Rep. 146; Alt *v.* Banholzer, 39 Minn. 511, 40 N. E. 830, 12 Am. St. Rep. 681; Van Cleaf *v.* Burns, 118 N. Y. 549, 23 N. E. 881, 16 Am. St. Rep. 782.

25. See, generally, NEW TRIAL.

26. Meyar *v.* Meyar, 3 Metc. (Ky.) 298.

27. Amory *v.* Amory, 33 How. Pr. (N. Y.) 490, citing a statute providing that in an action for divorce the court may, if the offense charged is denied, award a new or further trial of the issues as often as justice shall seem to require.

28. Lake *v.* Bender, 18 Nev. 361, 4 Pac. 711, 7 Pac. 74 (holding that in an action for divorce and for division of property, the court may grant a new trial of the issues relating to the property alone); Hall *v.* Hall, 131 N. C. 185, 42 S. E. 562 (holding that a new trial may be granted on the issues of adultery by plaintiff without granting it on issues of desertion by defendant).

the wife to obtain a new trial is waived where she accepts alimony paid in compliance with the judgment.[29]

B. Grounds. A new trial or a rehearing will not be granted in a divorce suit except upon a sufficient ground,[30] such for example as the insufficiency of the evidence to support the decree,[31] or the discovery of new evidence.[32]

XVII. APPEAL.[33]

A. Right of Review — 1. In General. A right of review by appeal or writ of error does not exist in suits for a divorce,[34] unless as is the case in most jurisdictions the right is conferred by constitution or statute.[35]

29. Storke *v.* Storke, 132 Cal. 349, 64 Pac. 578. See also *infra*, XVII, A, 2.

30. Mumford *v.* Mumford, 13 R. I. 19.

Fraud.— A new trial will not be granted on the ground of fraud, unless the fraud is clearly proven. Folsom *v.* Folsom, 55 N. H. 78. And see Spitzmesser *v.* Spitzmesser, 26 Ind. App. 532, 60 N. E. 315, holding that a decree should not be set aside and a new trial ordered on the ground that defendant was misled and did not appear at the trial, where it was not claimed that there was any fraud or that plaintiff was connected with her being misled.

Surprise.— A new trial will not be granted because of a refusal to order libellant to produce more definite specifications as to the times and places of alleged acts of cruelty, especially where the court suggested that defendant should have a reasonable postponement to meet any unexpected evidence, of which he did not avail himself. Gardner *v.* Gardner, 2 Gray (Mass.) 434.

31. Ferguson *v.* Ferguson, 1 Barb. Ch. (N. Y.) 604, holding that it is the power and duty of a court of chancery to grant a new trial where there is reason to believe that defendant has been unjustly found guilty of the offense charged. *Compare* Hills *v.* Hills, 76 Me. 486.

Conflicting evidence.— A new trial should not be granted merely because the evidence is contradictory. Matthai *v.* Matthai, 49 Cal. 90; Donnelly *v.* Donnelly, 50 N. Y. App. Div. 453, 64 N. Y. Suppl. 83.

Weight of evidence.— A new trial should not be granted on the ground that the verdict is against the weight of evidence unless the court is satisfied with reasonable certainty that there has been error. Scott *v.* Scott, 9 Jur. N. S. 1251, 33 L. J. P. & M. 1, 9 L. T. Rep. N. S. 454, 3 Swab. & Tr. 320, 12 Wkly. Rep. 126; Miller *v.* Miller, 31 L. J. P. & M. 73, 2 Swab. & Tr. 427, 5 L. T. Rep. N. S. 850; Gethin *v.* Gethin, 31 L. J. P. & M. 57, 5 L. T. Rep. N. S. 721, 2 Swab. & Tr. 560.

32. Howarth *v.* Howarth, 9 P. D. 218, 51 L. T. Rep. N. S. 872, holding that the courts will grant new trials because of newly discovered evidence more frequently and for less cause in divorce cases than in other actions.

Materiality of evidence.— A new trial will not be granted where the newly discovered evidence relates to causes for divorce which are not alleged in the petition (Cass *v.* Cass, 34 La. Ann. 611; Pinkard *v.* Pinkard, 14 Tex. 356, 65 Am. Dec. 129), nor where the evidence is immaterial to the offense charged (Harnett *v.* Harnett, 59 Iowa 401, 13 N. W. 408, holding that where a wife has obtained a divorce on the ground of inhuman treatment, newly discovered evidence that the wife's relatives had unduly interested themselves in the case will not entitle the husband to a new trial).

Time of discovery.— The evidence must be shown to have been unknown to the applicant at the time of the trial and incapable of production at the trial by the exercise of reasonable diligence. Chapman *v.* Chapman, 129 Ill. 386, 21 N. E. 806, where defendant's application for a new trial on the ground of newly discovered evidence as to the residence of complainant was denied, since it appeared that the only reason for not producing it at the trial was that defendant did not believe that complainant would testify as to her residence as alleged in her complaint.

33. See, generally, APPEAL AND ERROR.

Appeal as to: Alimony see *infra*, XIX, G. Custody of children see *infra*, XX, I.

34. Simpson *v.* Simpson, 25 Ark. 487; Sharon *v.* Sharon, 67 Cal. 185, 7 Pac. 456, 635, per McKee, J. See also APPEAL AND ERROR, 2 Cyc. 513 note 43.

35. *California.*— Harron *v.* Harron, 128 Cal. 303, 60 Pac. 932; Sharon *v.* Sharon, 67 Cal. 185, 7 Pac. 456, 635, holding that an action for divorce is a case in equity, within Const. art. 6, § 4, giving the supreme court appellate jurisdiction in such cases.

Delaware.— Jeans *v.* Jeans, 3 Harr. 136.

Illinois.— Bowman *v.* Bowman, 64 Ill. 75; Wren *v.* Moss, 7 Ill. 72; Waite *v.* Waite, 18 Ill. App. 334; Hunter *v.* Hunter, 7 Ill. App. 253.

Indiana.— Ritter *v.* Ritter, 5 Blackf. 81; Curry *v.* Curry, Wils. 236.

Kansas.— Ulrich *v.* Ulrich, 8 Kan. 402; Worth *v.* Worth, 4 Kan. 223.

Michigan.— Shaw *v.* Shaw, 9 Mich. 164.

Mississippi.— Fulton *v.* Fulton, 36 Miss. 517, holding that under Rev. Code, pp. 555, 556, §§ 103, 108, providing that appeal will lie from any final decree rendered in a court of chancery, an appeal will lie from a decree of divorce.

Missouri.— McCann *v.* McCann, 91 Mo. App. 1.

Nebraska.— Brotherton *v.* Brotherton, 12 Nebr. 72, 75, 10 N. W. 543, 544, holding that an appeal will lie from a decree of the district court granting a divorce, under Code

2. Waiver of Right. If the party aggrieved by a decree of divorce remarries[36] or accepts benefits therennder,[37] the right to have the decree reviewed on appeal or writ of error is thereby waived.

B. Decisions Reviewable. Constitutional or statutory provisions making appellate jurisdiction dependent upon the pecuniary amount or value in controversy do not apply to divorce suits.[38] An appeal may be taken from an order, made after final decree of divorce, requiring defendant to pay an attorney's fee to plaintiff to enable her to contest a motion for a new trial.[39]

C. Parties. The party aggrieved or his legal representative may ordinarily appeal from a decree in a divorce suit as in other civil cases.[40]

D. Taking and Perfecting Appeal — 1. Time of Taking. Special statutory provisions sometimes require an appeal in divorce cases to be taken within a shorter period of time than in other cases.[41]

Civ. Proc. § 675, giving the right of appeal "in actions in equity."

New York.— Conger *v.* Conger, 77 N. Y. 432.

Pennsylvania.— Rosenberry *v.* Rosenberry, 180 Pa. St. 221, 36 Atl. 706; Robbarts *v.* Robbarts, 9 Serg. & R. 191.

Tennessee.— Parmenter *v.* Parmenter, 3 Head 225; Pillow *v.* Pillow, 5 Yerg. 420; Pearson *v.* Pearson, Peck 27.

Washington.— Tierney *v.* Tierney, 1 Wash. Terr. 568.

West Virginia.— Hitchcox *v.* Hitchcox, 2 W. Va. 435.

See 17 Cent. Dig. tit. "Divorce," § 562 *et seq.*

In Kentucky the court of appeals has no power to review or reverse a judgment granting a divorce. Whitney *v.* Whitney, 7 Bush 520; Bourne *v.* Simpson, 9 B. Mon. 454; Pence *v.* Pence, 6 B. Mon. 496; Maguire *v.* Maguire, 7 Dana 181; Dejarnet *v.* Dejarnet, 5 Dana 499; Thornberry *v.* Thornberry, 4 Litt. 251; Turner *v.* Turner, 62 S. W. 1022, 23 Ky. L. Rep. 370; Springer *v.* Springer, 54 S. W. 710, 21 Ky. L. Rep. 1292; Brown *v.* Brown, 16 Ky. L. Rep. 317; Morrison *v.* Morrison, 10 Ky. L. Rep. 683; Myers *v.* Myers, 2 Ky. L. Rep. 226. However, the action of the chancellor in adjudging costs and in determining the amount of alimony and maintenance is reviewable. Alderson *v.* Alderson, 69 S. W. 700, 24 Ky. L. Rep. 595; Fisher *v.* Fisher, 10 Ky. L. Rep. 283; Caskey *v.* Caskey, 4 Ky. L. Rep. 726. Appeal as to alimony see *infra*, XIX, G, 1.

In Ohio it is provided (Bates St. § 5706) that no appeal shall be allowed in a divorce case, except from an order dismissing the petition without a final hearing, or a final order or judgment granting or refusing alimony, or an order restraining a husband from disposing of his property pending divorce proceedings. See Petersine *v.* Thomas, 28 Ohio St. 596; Taylor *v.* Taylor, 25 Ohio St. 71; Cox *v.* Cox, 19 Ohio St. 502, 2 Am. Rep. 415; Reed *v.* Reed, 17 Ohio St. 563; Price *v.* Price, 10 Ohio St. 316; Tappan *v.* Tappan, 6 Ohio St. 64; Laughery *v.* Laughery, 15 Ohio 404. Accordingly the action of the court of common pleas in dismissing a petition for divorce on the ground that defendant is an insane person is subject to review upon appeal or error. Clowry *v.* Clowry, 16 Ohio Cir. Ct. 302, 8 Ohio Cir. Dec. 652.

Bill or writ of review see *supra*, XV, D, 1, note 36; XV, D, 5, a.

Construction of statute conferring jurisdiction see *supra*, V, B, 2.

36. Stephens *v.* Stephens, 51 Ind. 542; Garner *v.* Garner, 38 Ind. 139.

Remarriage pending appeal.— If a plaintiff remarries pending an appeal from a decree granting a divorce he is not entitled to be heard on appeal or to have the case remanded for a new trial on reversal of the decree. Branch *v.* Branch, 30 Colo. 499, 71 Pac. 632.

37. Williams *v.* Williams, 6 N. D. 269, 69 N. W. 47, holding that the right of a wife to a review is waived where she accepts alimony under the decree.

Waiver of right to new trial see *supra*, XVI, A.

38. Bryant *v.* Austin, 36 La. Ann. 808; Rowley *v.* Rowley, 19 La. 557. See also Conant *v.* Conant, 10 Cal. 249, 70 Am. Dec. 717, holding that a constitutional provision giving the supreme court appellate jurisdiction where the matter in dispute exceeds two hundred dollars means that when the subject of litigation is capable of pecuniary computation the matter in dispute must exceed two hundred dollars in value, and does not prevent an appeal in suits for divorce. See also generally Appeal and Error, 2 Cyc. 542 *et seq.*, 546, 584.

39. Harron *v.* Harron, 128 Cal. 303, 60 Pac. 932.

40. Laughery *v.* Laughery, 15 Ohio 404, holding that a third person who has been made a defendant may appeal from so much of the decision as affects his interests. See Appeal and Error, 2 Cyc. 626 *et seq.*

The next friend of a person who was insane when the suit was commenced and has so continued cannot sue out a writ of error to reverse a decree of divorce. Iago *v.* Iago, 66 Ill. App. 462.

Right of attorney to appeal *see* Appeal and Error, 2 Cyc. 639, note 5.

Death of party pending appeal see Abatement and Revival, 1 Cyc. 79 note 92; Appeal and Error, 2 Cyc. 769 note 42, 775 note 68, 776 note 69.

41. Wilhite *v.* Wilhite, 41 Kan. 154, 21 Pac. 173; Hemphill *v.* Hemphill, 38 Kan.

2. NOTICE AND BOND. Notice should be given and bonds or recognizances should be executed to perfect appeals in divorce cases in the same manner and to the same extent as in other cases, unless otherwise provided by statute.[42]

E. Supersedeas. An appeal from a decree of divorce ordinarily suspends the operation of the decree upon the rights of the appellant, although no supersedeas bond is executed.[43] However, the lower court retains jurisdiction to the extent of considering an application for the payment of alimony and the expenses of the wife pending a determination of the appeal.[44]

F. Sufficiency of Record — 1. JURISDICTIONAL FACTS. The record must affirmatively show that the trial court had jurisdiction over the parties and over the subject-matter of the controversy.[45]

2. EVIDENCE. The appellate court will not attempt to review the evidence in a divorce suit without a full transcript of the testimony.[46] It is not necessary to preserve in the record of a divorce suit the proofs heard by the court on a decree *pro confesso*. It is enough that the court finds the allegations of the bill to be true, where the contrary is not shown.[47]

G. Assignments of Error. As in other cases the assignment of errors must definitely point out the errors complained of.[48]

H. Questions Not Raised Below. In divorce suits, as in other cases, it is the rule that questions not raised in the trial court will not be noticed on appeal.[49]

220, 16 Pac. 457; Haverty *v.* Haverty, 35 Kan. 438, 11 Pac. 364; Judge *v.* Judge, 38 Mo. 159; Allen *v.* Allen, 64 Mo. App. 417; Smith *v.* Smith, 48 Mo. App. 612; Scott *v.* Scott, 44 Mo. App. 600 (the last four cases holding that a statute providing that no action for divorce shall be reviewed by appeal or writ of error unless the appeal is granted during the term at which the judgment was rendered or unless the writ is issued within a certain period after the rendition of the judgment is mandatory); Martin *v.* Martin, 112 Wis. 314, 87 N. W. 232, 88 N. W. 215. See, generally, APPEAL AND ERROR, 2 Cyc. 789 *et seq.*

The time begins to run on the overruling of a motion for a new trial, although the judgment has been formally entered prior to that time. Scott *v.* Scott, 44 Mo. App. 600 [*distinguishing* State *v.* Smith, 104 Mo. 419, 16 S. W. 415; Ham *v.* St. Louis Public Schools, 34 Mo. 181].

42. See APPEAL AND ERROR, 2 Cyc. 818 *et seq.*, 862 *et seq.*

Constructive service of notice.— Where defendant was constructively served with process and he did not appear, and his residence is unknown, he may be constructively served with notice of appeal. McClellan *v.* McClellan, 2 Iowa 312.

In Pennsylvania the divorce act of 1815 makes special provision for the execution of a recognizance, without which an appeal from the common pleas in a divorce case will not be sustained. Brom *v.* Brom, 2 Whart. 94.

43. Rosenfeld *v.* Stix, 67 Mo. App. 582. See APPEAL AND ERROR, 2 Cyc. 888 note 78, 908 *et seq.*

44. *Alabama.*— *Ex p.* King, 27 Ala. 387.

Illinois.— Jenkins *v.* Jenkins, 91 Ill. 167.

Louisiana.— State *v.* Judge Seventh Dist. Ct., 22 La. Ann. 264.

Maryland.— Rohrback *v.* Rohrback, 75 Md. 317, 23 Atl. 610.

Missouri.— Rosenfeld *v.* Rosenfeld, 63 Mo. App. 411. See, however, Lewis *v.* Lewis, 20 Mo. App. 546.

New York.— Robertson *v.* Robertson, 1 Edw. 360.

England.— Jones *v.* Jones, L. R. 2 P. 336, 20 Wkly. Rep. 320.

See 17 Cent. Dig. tit. "Divorce," § 568.

Contra.— State *v.* Phillips, 32 Fla. 403, 13 So. 920; Cralle *v.* Cralle, 81 Va. 773.

45. Cochnower *v.* Cochnower, 27 Ind. 253; Worth *v.* Worth, 4 Kan. 223; Salzbrun *v.* Salzbrun, 81 Minn. 287, 83 N. W. 1088 [*following* Thelen *v.* Thelen, 75 Minn. 433, 78 N. W. 108] (holding that a judgment for an absolute divorce, upon a complaint and findings of fact that do not disclose a previous residence of one year in the state by plaintiff, is void); Thomas *v.* Thomas, 64 Mo. 353; Smith *v.* Smith, 48 Mo. App. 612. See APPEAL AND ERROR, 2 Cyc. 1025. See, however, Wetz *v.* Wetz, 27 Tex. Civ. App. 597, 66 S. W. 869.

46. Ross *v.* Ross, 83 Mo. App. 330.

47. Bowman *v.* Bowman, 64 Ill. 75; Hawes *v.* Hawes, 33 Ill. 286; Davis *v.* Davis, 30 Ill. 180; Wheeler *v.* Wheeler, 18 Ill. 39; Shillinger *v.* Shillinger, 14 Ill. 147. See, generally, APPEAL AND ERROR, 2 Cyc. 1038 *et seq.*

48. McFarland *v.* McFarland, 40 Ind. 458, holding that an assignment that the court "granted a divorce when it ought not to have been done" is too general. See APPEAL AND ERROR, 2 Cyc. 987.

49. Morehouse *v.* Morehouse, 70 Conn. 420, 39 Atl. 516 (holding that the objection that the record does not show a formal denial of the charge of adultery cannot be first raised on appeal from a judgment for plaintiff); Tackaberry *v.* Tackaberry, 101 Mich. 102, 59 N. W. 400; Briggs *v.* Briggs, 20 Mich. 24 (both holding that an objection, made in the first instance in the appellate court, to an amendment to a bill for divorce, that the

I. Review — 1. **General Scope.** The appellate court may ordinarily consider and determine all questions which are properly presented for decision.[50]

2. **Parties Entitled to Allege Error.** Ordinarily the appellee cannot complain of errors if he has not taken a cross appeal.[51]

3. **Presumption of Correctness.** As in other cases the presumption is in favor of the correctness of a decree in a divorce suit.[52]

4. **Grounds of Decision Below.** The appellate court may affirm the judgment on grounds other than those assigned by the lower court.[53]

5. **Discretion of Lower Court.**[54] If the court below has a discretionary power to refuse a divorce, its judgment will not be reversed unless it is clearly shown that its power has been improperly exercised;[55] and the same rule applies to incidental matters within the discretion of the lower court.[56]

6. **Questions of Fact — a. In General.** Appellate courts, in the consideration

bill as amended was not sworn to, will be disregarded if the facts which are to be introduced by the amendment negative collusion); Oliver *v.* Oliver, 20 Mo. 261 (holding that in the absence of exceptions, a judgment dismissing a bill for divorce will be affirmed); Wetz *v.* Wetz, 27 Tex. Civ. App. 597, 66 S. W. 869 (holding that where the motion for new trial failed to call to the attention of the court the question of the residence of plaintiff for the purpose of conferring jurisdiction, it will not be considered on appeal). See Appeal and Error, 2 Cyc. 660 *et seq.* See, however, Kirsch *v.* Kirsch, 83 Cal. 633, 23 Pac. 1083, holding that an objection that an amended cross complaint contains no prayer for affirmative relief may be raised for the first time on appeal.

Alimony.— Where there is no motion for a new trial, and no objection or exception taken, the court cannot consider an erroneous ruling of the trial court in giving alimony after the bill for divorce was dismissed. Stafford *v.* Stafford, 9 Ind. 162; Castell *v.* Castell, 28 La. Ann. 91.

Objections raised on motion for new trial.— Where it was urged on a motion for new trial that plaintiff had failed to show that the witnesses called by her to prove her residence were freeholders, as required by statute, it is sufficient for the purpose of raising that question on appeal. Driver *v.* Driver, 153 Ind. 88, 54 N. E. 389.

50. See, generally, Appeal and Error, 3 Cyc. 220.

Allowance of counsel fees will be reviewed on appeal from a decree of divorce. Jeter *v.* Jeter, 36 Ala. 391.

Community property.— The court may correct an error in withholding from a wife the proper portion of the community estate. Brown *v.* Brown, 60 Cal. 579.

Injunction.— An interlocutory order enjoining interference by defendant in the affairs and property of plaintiff will not be reviewed. McGill *v.* McGill, 19 Fla. 341.

Temporary alimony.— Where an order for temporary alimony is made pending an appeal from a decree granting or refusing a divorce, it cannot be reviewed on such appeal. Edwards *v.* Edwards, 80 Ala. 97. See Williams *v.* Williams, 6 S. D. 284, 61 N. W. 38.

51. Goodman *v.* Goodman, 26 Mich. 417, holding that on an appeal by defendant, the amount of alimony allowed to plaintiff will not be increased, in the absence of any new showing on the subject. See Appeal and Error, 3 Cyc. 236.

52. Curl *v.* Curl, 130 Cal. 638, 63 Pac. 65 (holding that on an appeal from a judgment for plaintiff, taken without bill of exceptions and without findings, the supreme court must presume that the evidence supported the complaint); Bergen *v.* Bergen, 22 Ill. 187 (holding that the presumption is that the court granting a divorce, if it received admissions as evidence, properly scrutinized the evidence, so as to be satisfied that the admissions were made in sincerity and without fraud); Haygood *v.* Haygood, 25 Tex. 576 (holding that where the verdict is in favor of plaintiff but the judgment is in favor of defendant, it will be presumed, in the absence of any statement of facts, that the judge correctly disregarded the verdict).

53. Hare *v.* Hare, 10 Tex. 355, holding that where a demurrer to a petition showing as special cause of exception that the court had no jurisdiction was erroneously sustained, the supreme court might affirm the judgment on the ground that the petition was defective for want of certainty. See Appeal and Error, 3 Cyc. 221.

Different grounds of divorce.— Where two or more grounds of divorce are alleged in a complaint, and a decree is granted upon evidence sufficient to support one of them, it should not be reversed because the evidence does not support the other. Terrill *v.* Terrill, 109 Cal. 413, 42 Pac. 137; Johnson *v.* Johnson, 22 Colo. 20, 43 Pac. 130, 55 Am. St. Rep. 112; Mead *v.* Mead, 1 Mo. App. 247.

54. See, generally, Appeal and Error, 3 Cyc. 325.

55. Ruby *v.* Ruby, 29 Ind. 174; Hale *v.* Hale, 73 S. W. 784, 24 Ky. L. Rep. 2203; Harl *v.* Harl, 73 S. W. 756, 24 Ky. L. Rep. 2163. However, the exercise of the lower court's discretion is subject to revision by the appellate court upon both the law and the facts. Jernigan *v.* Jernigan, 37 Tex. 420.

56. Anonymous, 35 Ala. 226 (order for physical examination); Moore *v.* Moore, 138 N. Y. 679, 34 N. E. 373 (order granting complainant leave to dismiss); Moncrief *v.*

of questions of fact in divorce cases, are subject to much the same restraint as in other civil cases;[57] but they are usually clothed with the power to review such questions in determining whether the facts as proved are sufficient to establish legal grounds for divorce.[58] Divorce suits are treated in many jurisdictions as suits in equity,[59] and appellate courts will as in other equity cases[60] review questions of fact and determine from the whole case whether or not the divorce was properly granted or refused;[61] subject, however, to a different rule existing in some states confining the jurisdiction of appellate courts to a review of errors of law in suits in equity and actions at law indiscriminately.[62]

b. Sufficiency of Evidence — (i) *Conflicting Evidence.* A decree granting or refusing a divorce on evidence which is conflicting will not be disturbed.[63]

Moncrief, 15 Abb. Pr. (N. Y.) 187; Smith *v.* Smith, 15 Pa. Super. Ct. 366 (the last two cases involving a determination of the costs to be awarded on dismissal); Welch *v.* Welch, 33 Wis. 534 (order affecting custody of children).

57. Blair *v.* Blair, 122 Cal. 57, 54 Pac. 369 (holding that where the cruelty is largely mental, it is for the trial court to weigh the evidence in order that the ultimate fact may be properly determined); Andrews *v.* Andrews, 120 Cal. 184, 52 Pac. 298 (holding that whether the misconduct complained of caused grievous bodily injury or grievous mental suffering is largely a question of fact to be determined upon the trial); Fleming *v.* Fleming, 95 Cal. 430, 30 Pac. 566, 29 Am. St. Rep. 124 (holding that whether grievous mental suffering was caused by certain acts of defendant is a question of fact for the trial court, and that its finding thereon is conclusive on the appellate court); Shuster *v.* Shuster, (Nebr. 1902) 92 N. W. 203 (holding that whether the improper language of the husband was provoked by the acts of the wife, unless the language was disproportionate to the occasion, is a question for the trial court); Cross *v.* Cross, 108 N. Y. 628, 15 N. E. 333 (holding that where the testimony shows a previous separation and a settled determination of the parties to live apart, the question whether the result sprang from an abandonment of the wife by the husband or of the husband by the wife is purely one of fact for the trial court, and the result will not be reviewed on appeal); Pollock *v.* Pollock, 9 S. D. 48, 68 N. W. 176 (holding that whether there were threats of harm justifying the leaving of the family home is a question of fact for the trial court, and that its decision thereon will not be disturbed unless there is a clear preponderance of evidence against it). See Appeal and Error, 3 Cyc. 345.

58. Sherwood *v.* Sherwood, 44 Iowa 192; Forrest *v.* Forrest, 25 N. Y. 501.

59. See *supra*, IV, F; V, A, 3, 4.

60. See Appeal and Error, 3 Cyc. 368.

61. Rhodes *v.* Rhodes, 95 Mo. App. 327, 68 S. W. 1066; Schuman *v.* Schuman, 93 Mo. App. 99; McCann *v.* McCann, 91 Mo. App. 1; Endsley *v.* Endsley, 89 Mo. App. 596; Jennings *v.* Jennings, 85 Mo. App. 290; Strahorn *v.* Strahorn, 82 Mo. App. 580; Grove *v.* Grove, 79 Mo. App. 142; Lawlor *v.* Lawlor, 76 Mo. App. 637; Schierstein *v.* Schierstein, 68 Mo. App. 205; Griesedieck *v.* Griesedieck, 56 Mo. App. 94; Nichols *v.* Nichols, 39 Mo. App. 291; Green *v.* Green, 22 Mo. App. 494; Miller *v.* Miller, 14 Mo. App. 418; Forrest *v.* Forrest, 25 N. Y. 501; Taylor *v.* Taylor, 5 N. D. 58, 63 N. W. 893; Middleton *v.* Middleton, 187 Pa. St. 612, 41 Atl. 291; Van Dyke *v.* Van Dyke, 135 Pa. St. 459, 19 Atl. 1061; Smith *v.* Smith, 15 Pa. Super. Ct. 366; Hull *v.* Hull, 14 Pa. Super. Ct. 520.

62. Thompson *v.* Thompson, 79 Me. 286, 9 Atl. 888; Darrow *v.* Darrow, 159 Mass. 262, 34 N. E. 270, 21 L. R. A. 100; Maglathlin *v.* Maglathlin, 138 Mass. 299; Sparhawk *v.* Sparhawk, 120 Mass. 390; Robbins *v.* Robbins, 100 Mass. 150, 97 Am. Dec. 91, all holding that the decision of a single justice on a question of fact in divorce proceedings will not be reviewed in the supreme court.

63. *Alabama.*— Edwards *v.* Edwards, 80 Ala. 97.

California.— Blair *v.* Blair, 122 Cal. 57, 54 Pac. 369; Fuller *v.* Fuller, 17 Cal. 605.

Colorado.— Johnson *v.* Johnson, 22 Colo. 20, 43 Pac. 130, 55 Am. St. Rep. 112.

Illinois.— Griffeth *v.* Griffeth, 162 Ill. 368, 44 N. E. 820; Carter *v.* Carter, 152 Ill. 434, 28 N. E. 948, 38 N. E. 669 [*affirming* 37 Ill. App. 219]; Ayres *v.* Ayres, 142 Ill. 374, 30 N. E. 672; Johnson *v.* Johnson, 24 Ill. App. 80 [*affirmed* in 125 Ill. 510, 16 N. E. 891]; Wilcox *v.* Wilcox, 16 Ill. App. 580.

Iowa.— Cole *v.* Cole, 23 Iowa 433.

Kansas.— Gibbs *v.* Gibbs, 18 Kan. 419; Ulrich *v.* Ulrich, 8 Kan. 402.

Kentucky.— Foreman *v.* Foreman, 13 Ky. L. Rep. 142; Simpson *v.* Simpson, 10 Ky. L. Rep. 116.

Louisiana.— Arcenaux *v.* Arcenaux, 106 La. 792, 31 So. 155.

Massachusetts.—Morrison *v.* Morrison, 136 Mass. 310.

Michigan.— Rosecrance *v.* Rosecrance, 127 Mich. 322, 86 N. W. 800; Creech *v.* Creech, 126 Mich. 267, 85 N. W. 726; Corrie *v.* Corrie, 46 Mich. 235, 9 N. W. 263.

Mississippi.— Coffee *v.* Coffee, (1898) 24 So. 262.

Missouri.— Stevenson *v.* Stevenson, 29 Mo. 95; Endsley *v.* Endsley, 89 Mo. App. 596; Maget *v.* Maget, 85 Mo. App. 6; Lawlor *v.* Lawlor, 76 Mo. App. 637; Schierstein *v.* Schierstein, 68 Mo. App. 205; Adkins *v.* Adkins, 63 Mo. App. 351; Griesedieck *v.* Griesedieck, 56 Mo. App. 94; Nichols *v.* Nichols, 39 Mo. App. 291.

This is especially true where the decree refuses a divorce.[64] If, however, the decree is against the clear preponderance of evidence, it may be reversed on appeal.[65]

(II) *Evidence of Jurisdictional Facts.* The findings of the trial court as to the sufficiency of the evidence to establish the essential jurisdictional facts, such as the residence of the parties and the like, are not reviewable on appeal.[66]

7. Harmless Error. A decree of divorce will not be reversed unless prejudicial error is shown.[67]

Nebraska.— Shuster *v.* Shuster, (1902) 92 N. W. 203; Walton *v.* Walton, 57 Nebr. 102, 77 N. W. 392; Berdolt *v.* Berdolt, 56 Nebr. 792, 77 N. W. 399; Cummins *v.* Cummins, 47 Nebr. 872, 66 N. W. 858; Nygren *v.* Nygren, 42 Nebr. 408, 60 N. W. 885; McConnell *v.* McConnell, 37 Nebr. 57, 55 N. W. 292; Segear *v.* Segear, 23 Nebr. 306, 36 N. W. 536; Powers *v.* Powers, 20 Nebr. 529, 31 N. W. 1; Callahan *v.* Callahan, 7 Nebr. 38.

New York.— Forrest *v.* Forrest, 25 N. Y. 501; Bueki *v.* Bueki, 85 Hun 619, 32 N. Y. Suppl. 1028; Bolen *v.* Bolen, 1 Silv. Supreme 580, 6 N. Y. Suppl. 164; Murray *v.* Murray, 16 N. Y. Suppl. 363; O'Keefe *v.* O'Keefe, 11 N. Y. Suppl. 628; Lutz *v.* Lutz, 9 N. Y. Suppl. 858.

Oregon.—Dobbins *v.* Dobbins, 31 Oreg. 584, 44 Pac. 692.

Pennsylvania.— McMillin *v.* McMillin, 183 Pa. St. 91, 38 Atl. 512; Best *v.* Best, 161 Pa. St. 515, 29 Atl. 1026; Cattison *v.* Cattison, 22 Pa. St. 275; English *v.* English, 19 Pa. Super. Ct. 586.

South Dakota.— Polloek *v.* Polloek, 9 S. D. 48, 68 N. W. 176.

Texas.— Seago *v.* Seago, (Civ. App. 1901) 64 S. W. 941; Barrett *v.* Barrett, (Civ. App. 1901) 61 S. W. 951.

Wisconsin.— Olson *v.* Olson, 99 Wis. 107, 74 N. W. 543; Stone *v.* Stone, 94 Wis. 28, 68 N. W. 390; Krause *v.* Krause, 23 Wis. 354.

See 17 Cent. Dig. tit. "Divorce," § 572.

In New York the court of appeals is bound by a decision of the general term (now appellate division) upon conflicting evidence, to the effect that the affirmative finding of the jury upon the issue of adultery is supported by the evidence. Lowenthal *v.* Lowenthal, 157 N. Y. 236, 51 N. E. 995.

64. *Alabama.*— Edwards *v.* Edwards, 80 Ala. 97.

Illinois.—Hitchins *v.* Hitchins, 41 Ill. App. 82 [*affirmed* in 140 Ill. 326, 29 N. E. 888], holding that a decree dismissing a bill will not be interfered with where the acts on which it is based occurred in another state and no reason is shown for resort not having been made to the courts of such state.

Kansas.— Ulrich *v.* Ulrich, 8 Kan. 402.

Kentucky.— Simpson *v.* Simpson, 10 Ky. L. Rep. 116; Reynolds *v.* Reynolds, 7 Ky. L. Rep. 443.

Missouri.— Ashburn *v.* Ashburn, 101 Mo. App. 365, 74 S. W. 394; Coe *v.* Coe, 98 Mo. App. 472, 72 S. W. 707.

Nebraska.—Cummins *v.* Cummins, 47 Nebr. 872, 66 N. W. 858, holding that where the testimony is weak and open to suspicion, a decree denying a divorce will not be set aside, although the evidence is such that it would sustain a divorce, and although defendant failed to appear.

New York.— Steffens *v.* Steffens, 16 Daly 363, 11 N. Y. Suppl. 424, 19 N. Y. Civ. Proc. 267.

65. *Colorado.*— Gilpin *v.* Gilpin, 12 Colo. 504, 21 Pac. 612.

Illinois.— Hartman *v.* Hartman, 38 Ill. App. 407. See also Abbott *v.* Abbott, 192 Ill. 439, 61 N. E. 350.

Kentucky.— Foreman *v.* Foreman, 13 Ky. L. Rep. 142.

New Jersey.— See Mayer *v.* Mayer, (Ch. 1901) 49 Atl. 1078.

New York.— Franey *v.* Franey, 28 N. Y. App. Div. 50, 50 N. Y. Suppl. 918.

South Dakota.— Pollock *v.* Pollock, 9 S. D. 48, 68 N. W. 176.

Wisconsin.— Stone *v.* Stone, 94 Wis. 28, 68 N. W. 390; Crichton *v.* Crichton, 73 Wis. 59, 40 N. W. 638.

66. Conn *v.* Conn, 2 Kan. App. 419, 42 Pac. 1006; McConnell *v.* McConnell, 37 Nebr. 57, 55 N. W. 292; McConahey *v.* McConahey, 21 Nebr. 463, 32 N. W. 300; De Meli *v.* De Meli, 120 N. Y. 485, 24 N. E. 996, 17 Am. St. Rep. 652; Moore *v.* Moore, 130 N. C. 333, 41 S. E. 943.

67. *Alabama.*— Jordan *v.* Jordan, 17 Ala. 466, holding that where there is ample proof to sustain a decree of divorce, it will be affirmed notwithstanding error in admitting declarations of defendant.

California.— Blakely *v.* Blakely, 89 Cal. 324, 26 Pac. 1072; White *v.* White, 82 Cal. 427, 23 Pac. 276, 7 L. R. A. 799, holding that a decree for plaintiff will not be reversed for want of a finding as to recrimination, where the evidence on that plea is insufficient to sustain it.

Connecticut.— Morehouse *v.* Morehouse, 70 Conn. 420, 39 Atl. 516, holding that where a decree for plaintiff is granted on the ground of defendant's cruelty, the admission of immaterial evidence as to interviews, after plaintiff had left defendant, between plaintiff and a person whom defendant charged on the trial with having had improper relations with plaintiff, is without prejudice to defendant.

District of Columbia.— Fitzhugh *v.* Fitzhugh, 15 App. Cas. 121, where a general allegation that defendant was guilty of adultery with a person with whom it had already been alleged defendant had committed the offense at a certain time and place was held harmless.

Illinois.—Lenning *v.* Lenning, 176 Ill. 180, 52 N. E. 46.

J. Determination and Disposition of Cause.[68] An appellate court which has acquired jurisdiction of an appeal in a divorce suit may dispose of the cause by affirming, reversing, or modifying the decree appealed from.[69] Ordinarily on reversal the case will be remanded to the court below for a new trial[70] or for a determination of incidental matters,[71] although in some states the appellate court is authorized to render such a decree as according to the facts appearing in the record ought to have been rendered in the court below.[72] The reversal of a decree vacates the decree and all proceedings necessarily dependent upon it.[73]

K. Costs.[74] The successful party in an appeal in a divorce suit, even though it be the husband, is generally entitled to costs.[75] If, however, it appears that

Indiana.— Turner *v.* Turner, 26 Ind. App. 677, 60 N. E. 718.

Kentucky.— Evans *v.* Evans, 5 B. Mon. 278; Dejarnet *v.* Dejarnet, 5 Dana 499; Boggess *v.* Boggess, 4 Dana 307; Ross *v.* Ross, 11 Ky. L. Rep. 306; Barrett *v.* Barrett, 11 Ky. L. Rep. 287; Simpson *v.* Simpson, 10 Ky. L. Rep. 116; Reynolds *v.* Reynolds, 7 Ky. L. Rep. 443, all cases holding that where a wife is granted a divorce on her cross petition, the appellate court will not reverse the judgment for error in dismissing the husband's petition, as he is as effectually divorced as if the judgment had been in accordance with his prayer.

Massachusetts.—Fuller *v.* Fuller, 177 Mass. 184, 58 N. E. 588, 83 Am. St. Rep. 273, holding, however, that in an action against a wife for divorce for desertion, it is prejudicial to her to permit the husband to state that he requested her to return home, where it was disputed whether she intended not to return and it appeared that she had not returned.

New York.— Lowenthal *v.* Lowenthal, 157 N. Y. 236, 51 N. E. 995 [*affirming* 92 Hun 385, 36 N. Y. Suppl. 1053]; Forrest *v.* Forrest, 25 N. Y. 501; Galusha *v.* Galusha, 43 Hun 181 [*modified* in regard to another point in 116 N. Y. 635, 22 N. E. 1114, 15 Am. St. Rep. 453, 6 L. R. A. 487].

Texas.— See Young *v.* Young, (Civ. App. 1893) 23 S. W. 83.

Washington.— Lee *v.* Lee, 3 Wash. 236, 28 Pac. 355.

See, generally, APPEAL AND ERROR, 3 Cyc. 383.

68. See, generally, APPEAL AND ERROR, 3 Cyc. 403 *et seq.*

69. Pollock *v.* Pollock, 9 S. D. 48, 68 N. W. 176, holding that the judgment may be modified by the supreme court without a reversal, where all the facts necessary to enable it to do so are contained in the record on appeal. See, however, Bryan *v.* Bryan, (Cal. 1902) 70 Pac. 304, holding that on appeal from an order denying a new trial the supreme court has no power to modify a provision of the decree for the support of a minor child until its majority.

70. Hobart *v.* Hobart, 45 Iowa 501.

71. Gibson *v.* Gibson, 18 App. Cas. (D. C.) 72; Davis *v.* Davis, 86 Ky. 32, 4 S. W. 822, 9 Ky. L. Rep. 914, in both of which cases the cause was remanded for the purpose of making proper provision for alimony.

Counsel fees.— The cause may be remanded for the determination of the question of counsel fees. Gibson *v.* Gibson, 18 App. Cas. (D. C.) 72; Shy *v.* Shy, 7 Heisk. (Tenn.) 125.

Maintenance.— The cause may be remanded to determine the question of maintenance and support of the wife and child. McAllister *v.* McAllister, 28 Wash. 613, 69 Pac. 119.

72. Jernigan *v.* Jernigan, 37 Tex. 420; Rice *v.* Rice, 31 Tex. 174; Erwin *v.* Erwin, (Tex. Civ. App. 1897) 40 S. W. 53. See also Pollock *v.* Pollock, 9 S. D. 48, 68 N. W. 176. *Contra*, Hobart *v.* Hobart, 45 Iowa 501, holding that the fact that an action for divorce is triable *de novo* in the supreme court, and that all the evidence is before it in an action which has been tried before a referee, does not obviate the necessity for a reversal and retrial in the manner provided by statute.

Stipulation for judgment.— A judgment for absolute divorce may be rendered against appellant on a stipulation, where the question has been tried and the general term and the court of appeals have both decided that he is guilty. Conger *v.* Conger, 77 N. Y. 432.

73. Alexander *v.* Alexander, 140 Ind. 560, 40 N. E. 55. But where an order is made for the payment of counsel fees in preparation of a case on appeal, a reversal of the decree of divorce does not necessarily reverse such order. Jenkins *v.* Jenkins, 91 Ill. 167. And it has been held that a reversal of a decree of divorce does not necessarily reverse a decree for alimony, although both are a part of one entry at the trial. Mangels *v.* Mangels, 6 Mo. App. 481. But where the appellate court reverses a decree of divorce and remands the cause for further proceedings, an order for the payment of alimony *pendente lite* is terminated, and it is not revived by the subsequent reversal of a decree in defendant's favor. McGrail *v.* McGrail, 51 N. J. Eq. 537, 26 Atl. 705.

Effect on collateral proceeding.— The reversal of a decree of divorce does not affect a decree for a sale of real property in which plaintiff has a life-estate, granted in a proceeding in which both husband and wife are parties. Krone *v.* Linville, 31 Md. 138.

74. Costs: In lower court see *infra*, XVIII. On appeal generally see COSTS, 11 Cyc. 204 *et seq.*

75. Cornelius *v.* Cornelius, 31 Ala. 479 (holding that where a decree dismissing a wife's bill without prejudice but decreeing to her the custody of her child is modified on

both the husband and the wife were at fault, the costs of the appeal may be divided between them.[76]

XVIII. COSTS AND FEES.[77]

A. When and How Awarded — 1. Discretion of Court. Costs in a divorce suit are not awarded as a matter of right for or against either party, but are usually within the discretion of the court.[78] Where both parties are at fault the court may equally divide the costs,[79] require each party to pay his own costs,[80] or allow no costs to either party.[81]

2. In Behalf of and Against Whom Awarded — a. For or Against the Wife. A wife is usually a favored party in respect to the allowance of costs, and she is frequently relieved from their payment, although she is the unsuccessful plaintiff or a defeated defendant.[82] If it appears, however, that the wife is the party in fault and is the owner of a separate estate, costs will not be awarded in her favor against the husband.[83]

b. For or Against the Husband. If the husband is the defeated party, the

error at the instance of the husband so far as to dismiss the bill generally, the costs of the appeal should be adjudged against the wife and the costs of the court below against the husband); Mosser *v.* Mosser, 29 Ala. 313 (where a decree granting a divorce to the wife was reversed on error, and the costs of the appellate court were imposed on her next friend); Stuart *v.* Trover, 5 Ky. L. Rep. 851 (where a husband succeeded in reducing the amount allowed by the lower court to the wife as alimony, and a judgment was entered against the divorced wife for the costs of the appeal).

76. David *v.* David, 27 Ala. 222.

77. Costs on appeal see *supra*, XVII, K. Payment of costs as condition to: Granting divorce see *supra*, XV, A, 1, c, note 94; *infra*, note 92. Leave to discontinue see *supra*, XIV, D, 1, note 29. Opening default see *supra*, XV, C, 2, a.

78. *California.*— White *v.* White, (1893) 33 Pac. 399.

Maine.— Buckingham *v.* Buckingham, 61 Me. 232.

Michigan.— Lapham *v.* Lapham, 40 Mich. 527; Cox *v.* Cox, 35 Mich. 461; Soper *v.* Soper, 29 Mich. 305.

Montana.— Black *v.* Black, 5 Mont. 15, 2 Pac. 317.

Nebraska.— Eckhard *v.* Eckhard, 29 Nebr. 457, 45 N. W. 466.

New York.— Billings *v.* Billings, 73 N. Y. App. Div. 69, 76 N. Y. Suppl. 628; Lonsdale *v.* Lonsdale, 41 N. Y. App. Div. 224, 58 N. Y. Suppl. 532; Beadleston *v.* Beadleston, 50 Hun 603, 2 N. Y. Suppl. 809.

Tennessee.— Payne *v.* Payne, 96 Tenn. 59, 33 S. W. 613.

Wisconsin.— Sumner *v.* Sumner, 54 Wis. 642, 12 N. W. 21.

79. David *v.* David, 27 Ala. 222.

80. Cox *v.* Cox, 35 Mich. 461.

81. Beadleston *v.* Beadleston, 50 Hun (N. Y.) 603, 2 N. Y. Suppl. 809.

82. *Alabama.*— Mosser *v.* Mosser, 29 Ala. 313; David *v.* David, 27 Ala. 222; Richardson *v.* Richardson, 4 Port. 467, 30 Am. Dec. 538.

Florida.— Phelan *v.* Phelan, 12 Fla. 449.

Illinois.— Thatcher *v.* Thatcher, 17 Ill. 66; Reavis *v.* Reavis, 2 Ill. 242.

Kentucky.— Turner *v.* Turner, 62 S. W. 1022, 23 Ky. L. Rep. 370; Callender *v.* Callender, 15 Ky. L. Rep. 63; Locke *v.* Locke, 14 Ky. L. Rep. 143.

Michigan.— Reichert *v.* Reichert, 124 Mich. 694, 83 N. W. 1008.

Missouri.— Grove *v.* Grove, 79 Mo. App. 142.

Nebraska.— Eckhard *v.* Eckhard, 29 Nebr. 457, 45 N. W. 466.

Oregon.— Bender *v.* Bender, 14 Oreg. 353, 12 Pac. 713.

England.— Robertson *v.* Robertson, 6 P. D. 119, 51 L. J. P. & Adm. 5, 45 L. T. Rep. N. S. 237, 29 Wkly. Rep. 880; Cooke *v.* Cooke, 34 L. J. P. & M. 15, 3 Swab. & Tr. 603; Chaldecott *v.* Chaldecott, 29 L. T. Rep. N. S. 699.

See 17 Cent. Dig. tit. "Divorce," § 576.

83. Dugan *v.* Dugan, 1 Duv. (Ky.) 289; Callender *v.* Callender, 15 Ky. L. Rep. 63; Locke *v.* Locke, 14 Ky. L. Rep. 143; Gordon *v.* Gordon, 6 Ky. L. Rep. 439; De Rose *v.* De Rose, Hopk. (N. Y.) 100; Shoop's Appeal, 34 Pa. St. 233; Brinckle *v.* Brinckle, 6 Wkly. Notes Cas. (Pa.) 123.

In Tennessee costs in a suit brought by a wife against her husband, in which the original bill was dismissed and judgment rendered on defendant's cross bill, may be taxed against the wife. Brasfield *v.* Brasfield, 96 Tenn. 580, 36 S. W. 384. See Hall *v.* Hall, (Ch. App. 1897) 42 S. W. 273.

In England the husband is not required to pay the costs in a divorce suit when his wife has sufficient means to pay them (Milne *v.* Milne, L. R. 2 P. 202, 40 L. J. P. & M. 13, 23 L. T. Rep. N. S. 877, 19 Wkly. Rep. 423; Miller *v.* Miller, L. R. 2 P. 13, 39 L. J. P. & Adm. 4, 21 L. T. Rep. N. S. 471, 18 Wkly. Rep. 152; Heal *v.* Heal, L. R. 1 P. 300, 36 L. J. P. & M. 62; Belcher *v.* Belcher, 1 Curt. Eccl. 444, 6 Eng. Eccl. 372; Carstairs *v.* Carstairs, 3 Swab. & Tr. 538); nor when her suit is vexatious (Flower *v.* Flower, L. R. 3 P. 132, 42 L. J. P. & M. 45, 29 L. T. Rep. N. S. 253, 21 Wkly. Rep. 776; Jones *v.* Jones, 41 L. J. P. & M. 43).

The burden is on the husband to show that

costs of the suit will be awarded against him almost as a matter of course.[84] Although the husband is decreed a divorce for his wife's misconduct, the circumstances of the case may be such as to justify an award of costs against him.[85]

c. **Against Third Parties.** Costs may in certain circumstances be taxed against parties to the suit other than the husband or wife,[86] such for instance as a co-respondent[87] or a next friend suing in behalf of the wife.[88]

B. Amount and Items. The items taxable as costs are generally governed by statutes; and statutes permitting generally the award of costs in divorce suits are construed as authorizing an award of taxable costs only, as controlled by statutes applicable to other civil cases.[89] Whether or not an allowance for counsel

the wife was in fault and that she had ample estate to pay costs. McMakin *v.* Wickliffe, 16 Ky. L. Rep. 240.

Where a bill against the wife is taken as confessed but is dismissed on the ground that the complainant fails to establish by legal evidence the facts charged therein, defendant is not entitled to a decree for costs. Perry *v.* Perry, 2 Barb. Ch. (N. Y.) 285.

84. Stevens *v.* Stevens, 1 Metc. (Mass.) 279; Moore *v.* Moore, 22 N. Y. Suppl. 451; Thorndike *v.* Thorndike, Wash. Terr. 175, all holding a wife entitled to costs upon voluntary discontinuance by the husband.

Bill taken as confessed.— If a defendant husband suffers the bill to be taken as confessed and a divorce is granted, costs follow as a matter of course. Graves *v.* Graves, 2 Paige (N. Y.) 62.

85. Alderson *v.* Alderson, 69 S. W. 700, 24 Ky. L. Rep. 595; Eckhard *v.* Eckhard, 29 Nebr. 457, 45 N. W. 466; Sumner *v.* Sumner, 54 Wis. 642, 12 N. W. 21; Phillips *v.* Phillips, 27 Wis. 252, where the court awarded costs against the husband, who was the successful party, because it appeared that he had not been altogether blameless.

86. Black *v.* Black, 5 Mont. 15, 2 Pac. 317 (holding that if a third person who has been made a party to the suit to recover alimony alleged to be in his hands officiously assists the husband to defend the divorce suit he may be taxed with costs); Simmons *v.* Simmons, 32 Hun (N. Y.) 551 (holding that one who obtrusively petitions the court to set aside a decree of divorce to which he is not a party may be taxed with costs).

87. Billings *v.* Billings, 73 N. Y. App. Div. 69, 76 N. Y. Suppl. 628, holding that a co-respondent who appears and defends is liable for costs if he fails to establish his defense.

In England the court may order the co-respondent to pay the whole or any part of the costs where his misconduct is established. See Whitmore *v.* Whitmore, L. R. 1 P. 25, 35 L. J. P. & M. 32; Codrington *v.* Codrington, 11 Jur. N. S. 287, 34 L. J. P. & M. 60, 4 Swab. & Tr. 63, 13 Wkly. Rep. 527; Winscom *v.* Winscom, 10 Jur. N. S. 321, 33 L. J. P. & M. 45, 10 L. T. Rep. N. S. 100, 3 Swab. & Tr. 380, 12 Wkly. Rep. 535; Robinson *v.* Robinson, 78 L. T. Rep. N. S. 391.

88. Hughes *v.* Hughes, 44 Ala. 698; Gray *v.* Gray, 15 Ala. 779. *Compare* Brinckle *v.* Brinckle, 6 Wkly. Notes Cas. (Pa.) 205.

89. Lonsdale *v.* Lonsdale, 41 N. Y. App. Div. 224, 58 N. Y. Suppl. 532.

The expenses and disbursements of the wife in prosecuting or defending the suit, if within the terms of the statute, are properly taxable as costs against the husband. Paule *v.* Paule, 5 Pa. Dist. 62, 17 Pa. Co. Ct. 147; Vanriper *v.* Vanriper, 3 Lanc. Bar (Pa.) 155 (where a husband seeking a divorce from his wife was required to pay the costs of depositions of physicians taken at his wife's instance, even though he succeeded); Ormsby *v.* Ormsby, 1 Phila. (Pa.) 578; Melizet *v.* Melizet, 1 Pars. Eq. Cas. (Pa.) 78; Gardner *v.* Gardner, 1 Am. L. Reg. (Pa.) 122. And see Kendall *v.* Kendall, 1 Barb. Ch. (N. Y.) 610; Germond *v.* Germond, 1 Paige (N. Y.) 83. In New York the court may make such an allowance to plaintiff in an action for a separation wherein a counter-claim is interposed charging her with adultery as will repay her as far as possible for the additional expense necessitated by preparing to meet such charges. De Meli *v.* De Meli, 67 How. Pr. 20; Green *v.* Green, 40 How. Pr. 465.

Expenses of taking testimony may be allowed to the wife, including master's fees and stenographer's charges. Paule *v.* Paule, 5 Pa. Dist. 62, 17 Pa. Co. Ct. 147; Howe *v.* Howe, 23 Pa. Co. Ct. 363. And see Mahan *v.* Mahan, 10 N. J. L. J. 142. But where a wife, after permitting a bill to be taken against her *pro confesso*, attends upon a reference before a master to take proof and cross-examine complainant's witnesses, the expense of such cross-examination must be paid by her. Perry *v.* Perry, 2 Barb. Ch. (N. Y.) 285. So a defendant wife is not entitled to an allowance for sums paid counsel on the execution of a commission to take depositions on interrogatories. Main *v.* Main, 50 N. J. Eq. 712, 25 Atl. 372.

The wife's traveling expenses in coming from a distant state to be present at the trial for the purpose of identification may be allowed as costs. Main *v.* Main, 50 N. J. Eq. 712, 25 Atl. 372.

Where there is neither an answer, a demurrer, nor a reply, plaintiff is not entitled to costs after notice of trial. Cohen *v.* Cohen, 72 Hun (N. Y.) 393, 25 N. Y. Suppl. 387.

Docket fees, or other special fees which go to the attorneys, are not taxable as costs against the losing party in Missouri. Waters *v.* Waters, 49 Mo. 385.

fees and expenses of the suit already incurred can be taxed as costs and included in the final judgment depends upon the statute. In many states it can be done,[90] while in others such an allowance can be made only *pendente lite* for the purpose of enabling the wife to prosecute the suit to a conclusion.[91]

C. Payment and Collection — **1. In General.** The taxable costs are not payable before the termination of the suit.[92]

2. Enforcement of Payment. The taxable costs may be collected by execution against the property, but ordinarily no attachment against the person will be awarded, or proceedings in contempt for non-payment be allowed.[93]

D. Liability For Counsel Fees — **1. Liability of Husband.** In England a member of the legal profession who in good faith and upon probable cause prosecutes a wife's suit for divorce or defends the husband's suit against her may recover at law from the husband reasonable compensation for his services and expenses, whether he is successful or not.[94] In America the authorities on this question are irreconcilable.[95] The weight of authority and the better reasoning

90. *Illinois.*— Dinet *v.* Pfirshing, 86 Ill. 83; Armstrong *v.* Armstrong, 35 Ill. 109; Duberstein *v.* Duberstein, 66 Ill. App. 579 [*reversed* on another point in 171 Ill. 133, 49 N. E. 316].

Indiana.— McCabe *v.* Britton, 79 Ind. 224 (construing a statute authorizing the court on decreeing a divorce "to require the husband to pay all reasonable expenses of the wife," as including an allowance for her attorney's fees); Hart *v.* Hart, 11 Ind. 384 (holding that an allowance to defend can be made only on a decree directly for or against the divorce and not on a discontinuance).

Kentucky.— Burgess *v.* Burgess, 1 Duv. 287; Meyar *v.* Meyar, 3 Metc. 298; Williams *v.* Monroe, 18 B. Mon. 514.

Maryland.— Chappell *v.* Chappell, 82 Md. 647, 33 Atl. 650; Ricketts *v.* Ricketts, 4 Gill 105.

Washington.— Thorndike *v.* Thorndike, Wash. Terr. 175. *Compare* Prouty *v.* Prouty, 4 Wash. 174, 29 Pac. 1049.

Wisconsin.— Sumner *v.* Sumner, 54 Wis. 642, 12 N. W. 21.

See 17 Cent. Dig. tit. "Divorce," § 579.

91. Lacey *v.* Lacey, 108 Cal. 45, 40 Pac. 1056; Loveren *v.* Loveren, 100 Cal. 493, 35 Pac. 87; Mudd *v.* Mudd, 98 Cal. 320, 33 Pac. 114; Waters *v.* Waters, 49 Mo. 385; Mercer *v.* Mercer, 73 Hun (N. Y.) 192, 25 N. Y. Suppl. 867; Straus *v.* Straus, 67 Hun (N. Y.) 491, 22 N. Y. Suppl. 567; Ward *v.* Ward, 22 N. Y. Suppl. 903, 23 N. Y. Civ. Proc. 61; Moore *v.* Moore, 22 N. Y. Suppl. 451; Williams *v.* Williams, 6 N. Y. Suppl. 645, 25 N. Y. St. 183; Percival *v.* Percival, 14 N. Y. St. 255. See *infra*, XIX, C.

92. State *v.* Bates, 5 Ohio Cir. Ct. 18, 3 Ohio Cir. Dec. 10 (holding that a rule of court requiring petitioner to pay the costs before entry of a decree in her favor is unauthorized and void); Miller *v.* Miller, 1 Wkly. Notes Cas. (Pa.) 415.

93. Branth *v.* Branth, 59 Hun (N. Y.) 623, 13 N. Y. Suppl. 360, 20 N. Y. Civ. Proc. 33; Weill *v.* Weill, 10 N. Y. Suppl. 627, 18 N. Y. Civ. Proc. 241; Blane *v.* Blane, 7 Pa. Dist. 317, 20 Pa. Co. Ct. 543; Maher *v.* Maher, 21 Pa. Co. Ct. 562 [*distinguishing* Grove's Appeal, 68 Pa. St. 143; Wallen *v.* Wallen, 11 Pa. Co. Ct. 41; Calhoun *v.* Calhoun, 6 Pa. Co. Ct. 177; Mann *v.* Mann, 7 Wkly. Notes Cas. (Pa.) 507, upon the ground that such cases referred to the power of the court to enforce an interlocutory order and not a final decree].

The Pennsylvania statute authorizing courts to enforce their decrees in divorce cases by attachment against the person of defendant is limited in its application to decrees in divorces *a mensa et thoro* (Uhrich *v.* Uhrich, 4 Pa. Co. Ct. 133); nor will an attachment issue against a defendant for the payment of costs without an explicit allegation that he is of sufficient ability to pay them (Fletcher *v.* Fletcher, 7 Pa. Dist. 476, 20 Pa. Co. Ct. 647).

Contempt.— It has been held, however, that upon the husband's refusal without sufficient cause to obey the order of the court and pay the costs, he may be proceeded against by attachment for contempt (Ballard *v.* Carperton, 2 Metc. (Ky.) 412); also that an attachment for contempt may be issued after the return of an execution unsatisfied. Pritchered *v.* Pritchered, 4 Abb. N. Cas. (N. Y.) 298.

Order for payment.— Where, after suit had been begun for a separation, the parties made an agreement whereby the wife was to return to her husband and he was to pay the costs, and after her return he served a verified answer and refused to pay them, the court upon her application could compel defendant to pay costs as fixed by the court. Smith *v.* Smith, 35 Hun (N. Y.) 378 [*affirmed* in 99 N. Y. 639]. *Compare* Chase *v.* Chase, 29 Hun (N. Y.) 527, 65 How. Pr. (N. Y.) 306.

94. Rice *v.* Shepherd, 12 C. B. N. S. 332, 6 L. T. Rep. N. S. 432, 104 E. C. L. 332; Ottaway *v.* Hamilton, 3 C. P. D. 393, 47 L. J. C. P. 725, 38 L. T. Rep. N. S. 925, 26 Wkly. Rep. 783; Brown *v.* Ackroyd, 5 E. & B. 819, 2 Jur. N. S. 283, 25 L. J. Q. B. 193, 4 Wkly. Rep. 229, 85 E. C. L. 819; Stocken *v.* Patrick, 29 L. T. Rep. N. S. 507.

95. Naumer *v.* Gray, 28 N. Y. App. Div. 529, 51 N. Y. Suppl. 222.

are against the liability of the husband, as upon implied contract, to pay for services rendered the wife in prosecuting[96] or defending[97] a suit for an absolute divorce; but where the action is for a separation the services rendered in her behalf are necessaries for which the husband should be held liable.[98] In any event it must be shown that the wife had a reasonable cause for instituting the suit.[99]

2. LIABILITY OF WIFE. At common law a wife's contract to pay an attorney a certain sum to prosecute or defend a suit for divorce is void because of her coverture.[1] The statutes of the several states have now for the most part relieved the wife of her common-law disabilities,[2] however, and under these statutes a contract made by a wife for the payment of an attorney for services in respect to the prosecution or defense of a suit for divorce may be enforced against her.[3]

96. *Alabama.*— Pearson *v.* Darrington, 32 Ala. 227.

Arkansas.— Kincheloe *v.* Merriman, 54 Ark. 557, 16 S. W. 578, 26 Am. St. Rep. 19.

Connecticut.— Shelton *v.* Pendleton, 18 Conn. 417.

Illinois.— Dow *v.* Eyster, 79 Ill. 254.

Iowa.— Sherwin *v.* Maben, 78 Iowa 467, 43 N. W. 292, *semble.* See *infra,* note 97.

Kentucky.— Williams *v.* Monroe, 18 B. Mon. 514.

Missouri.— Isbell *v.* Weiss, 60 Mo. App. 54.

Nebraska.— Yeiser *v.* Lowe, 50 Nebr. 310, 69 N. W. 847.

New Hampshire.— Morrison *v.* Holt, 42 N. H. 478, 80 Am. Dec. 120.

New York.— Phillips *v.* Simmons, 11 Abb. Pr. 287, 20 How. Pr. 342.

Ohio.— Dorsey *v.* Goodenow, Wright 120.

Tennessee.— Thompson *v.* Thompson, 3 Head 527.

Wisconsin.— Clarke *v.* Burke, 65 Wis. 359, 27 N. W. 22, 56 Am. St. Rep. 631.

See also ATTORNEY AND CLIENT, 4 Cyc. 994. See 17 Cent. Dig. tit. "Divorce," § 582.

Contra.— Glenn *v.* Hill, 50 Ga. 94; Spayberry *v.* Merk, 30 Ga. 81, 71 Am. Dec. 637; McCurley *v.* Stockbridge, 62 Md. 422, 50 Am. Rep. 229; Bord *v.* Stubbs, 22 Tex. Civ. App. 242, 54 S. W. 633; Peck *v.* Marling, 22 W. Va. 708.

97. *Connecticut.*—Cooke *v.* Newell, 40 Conn. 596.

Indiana.— McCullough *v.* Robinson, 2 Ind. 630.

Massachusetts.—Coffin *v.* Dunham, 8 Cush. 404, 54 Am. Dec. 769.

New Hampshire.— Ray *v.* Adden, 50 N. H. 82, 9 Am. Rep. 175; Morrison *v.* Holt, 42 N. H. 478, 80 Am. Dec. 120.

New Jersey.— Westcott *v.* Hinckley, 56 N. J. L. 343, 29 Atl. 154.

Ohio.— Sherer *v.* Price, 3 Ohio Cir. Ct. 107, 2 Ohio Cir. Dec. 61.

Vermont.— Wing *v.* Hurlburt, 15 Vt. 607, 40 Am. Dec. 695.

See 17 Cent. Dig. tit. "Divorce," § 582.

Contra.— Gossett *v.* Patten, 23 Kan. 340.

In Iowa the decisions, or at least the *dicta,* are in conflict. From the latest case (Sherwin *v.* Maben, 78 Iowa 467, 43 N. W. 292) it would seem that the husband is not liable for services rendered the wife in a divorce suit brought by her, but is liable for services rendered the wife in a suit brought by him against her. See Clyde *v.* Peavy, 74 Iowa 47, 36 N. W. 883; Preston *v.* Johnson, 65 Iowa 285, 21 N. W. 606; Porter *v.* Briggs, 38 Iowa 166, 18 Am. Rep. 27; Johnson *v.* Williams, 3 Greene 97, 54 Am. Dec. 491.

98. Wood *v.* Wood, 30 Misc. (N. Y.) 50, 62 N. Y. Suppl. 854. This distinction between an action for an absolute divorce and an action for a divorce *a mensa et thoro* has been frequently recognized. Morrison *v.* Holt, 42 N. H. 478, 80 Am. Dec. 120. An examination of the cases cited in support of the doctrine that the husband is not liable for such services will show that they are nearly all actions for absolute divorce, and proceed on the ground that the purpose of the action was a dissolution of the marital relationship. Naumer *v.* Gray, 28 N. Y. App. Div. 529, 51 N. Y. Suppl. 222.

99. Sherwin *v.* Maben, 78 Iowa 467, 43 N. W. 292; Preston *v.* Johnson, 65 Iowa 285, 21 N. W. 606; McCurley *v.* Stockbridge, 62 Md. 422, 50 Am. Rep. 229; Naumer *v.* Gray, 28 N. Y. App. Div. 529, 51 N. Y. Suppl. 222; Bord *v.* Stubbs, 22 Tex. Civ. App. 242, 54 S. W. 663, holding that in an action to recover for legal services rendered the wife in divorce proceedings, plaintiff need not show that such proceedings were necessary for the legal protection of the wife, but may recover if he shows that there was probable cause for divorce.

1. Putnam *v.* Tennyson, 50 Ind. 456; Cook *v.* Walton, 38 Ind. 228; Musick *v.* Dodson, 76 Mo. 624, 43 Am. Rep. 780; Wilson *v.* Burr, 25 Wend. (N. Y.) 386.

2. See HUSBAND AND WIFE.

3. Wolcott *v.* Patterson, 100 Mich. 227, 58 N. W. 1006, 43 Am. St. Rep. 456, 24 L. R. A. 629; Lamy *v.* Catron, 5 N. M. 373, 23 Pac. 773 (holding that where a wife has a separate estate of her own, she may charge such estate with necessary solicitor's fees to enable her to prosecute or defend a divorce suit); Peck *v.* Marling, 22 W. Va. 708 (holding that under a statute authorizing a married woman, when living apart from her husband, "to carry on any trade or business," she is liable in assumpsit for an attorney's services rendered in obtaining a divorce, when based on abandonment by the husband, but not when based on his cruelty, as in that case the husband could be sued). See, however,

E. Security For Costs. Whether a divorce suit may be prosecuted without security for costs being given depends upon the statute in the state where the suit is brought.[4]

XIX. ALIMONY AND ALLOWANCES.

A. In General — 1. DEFINITION. Alimony in a general sense means the allowance required by law to be made to a wife out of her husband's estate for her support, either during a matrimonial suit or at its termination, where the fact of marriage is established and she proves herself entitled to a separate maintenance.[5]

Whipple *v.* Giles, 55 N. H. 139, holding that a statute authorizing a married woman to contract and sue and be sued in respect to her separate estate as if she were unmarried does not authorize her to make a contract with an attorney for services in prosecuting a libel for divorce.

4. Moon *v.* Moon, 43 N. J. Eq. 403, 3 Atl. 350 (holding that a court of chancery may revoke an order allowing a husband to prosecute a suit for divorce *in forma pauperis*); Pomeroy *v.* Pomeroy, 1 Johns. Ch. (N. Y.) 606 (holding that on a bill for divorce on the ground of adultery, defendant is not entitled to security for costs, although the bill contains also a charge of cruelty, since the statute applies only to actions for divorce from bed and board); McElhinney *v.* McElhinney, 13 Wkly. Notes Cas. (Pa.) 194 (holding that when libellant and her next friend are not residents, and neither has property in the state, and respondent will resist the libel, libellant must give security for costs); Calhoun *v.* Calhoun, 18 Wkly. Notes Cas. (Pa.) 428 (holding that a respondent cannot in general be compelled to secure costs of a master and prothonotary in taking his testimony in defense of the charge, where libellant has secured such costs for the taking of testimony in her behalf); Hawkins *v.* Hawkins, 4 Sneed (Tenn.) 105 (holding that Tenn. Acts (1835-1836), c. 26, § 3, authorizing a wife to exhibit a bill for divorce in her own proper person, repeals Acts (1831), c. 20, prohibiting the issuance of process on the application of a woman for divorce without bond and good security for costs).

An order restraining defendant from disposing of his property may be granted without the giving of an undertaking. *In re* Mitchell, 1 Kan. 643.

5. *Alabama.*— Smith *v.* Short, 40 Ala. 385.

Arkansas.— Brown *v.* Brown, 38 Ark. 324; Bowman *v.* Worthington, 24 Ark. 522, defining alimony as an allowance which a husband, by order of the court, pays to his wife, being separate from him, for her maintenance.

California.— *Ex p.* Spencer, 83 Cal. 460, 23 Pac. 395, 17 Am. St. Rep. 266 (holding that since alimony proceeds only from the husband to the wife because of the obligation of support which arises from the relation of husband and wife, after the termination of that relation by an absolute divorce there can strictly speaking be no alimony; it is simply a permanent allowance to the wife as compensation for the wrong done to her by her husband); Robinson *v.* Robinson, 79 Cal. 511, 21 Pac. 1095.

Connecticut.— Lyon *v.* Lyon, 21 Conn. 185, defining alimony as a certain part of the husband's estate allowed and assigned to the wife upon their divorce.

Georgia.— Code (1895), § 2456 (defining alimony as "an allowance out of the husband's estate, made for the support of the wife when living separate from him. It is either temporary or permanent"); Odom *v.* Odom, 36 Ga. 286.

Illinois.— Adams *v.* Storey, 135 Ill. 448, 26 N. E. 582, 25 Am. St. Rep. 392, 11 L. R. A. 790 (defining alimony as that allowance which is made to a woman, on a decree of divorce, for her support out of the estate of her husband); Lennahan *v.* O'Keefe, 107 Ill. 620; Stillman *v.* Stillman, 99 Ill. 196, 39 Am. Rep. 21; Newman *v.* Newman, 69 Ill. 167; Wheeler *v.* Wheeler, 18 Ill. 39, 40 (defining alimony as "that maintenance or support which the husband, on separation, is bound to provide for the wife").

Indiana.— Kinney *v.* Kinney, 1 Blackf. 481, defining alimony as a term used to denote the portion allotted to a divorced wife out of her husband's property.

Iowa.— Martin *v.* Martin, 65 Iowa 255, 21 N. W. 595; O'Hagan *v.* O'Hagan, 4 Iowa 509; Jolly *v.* Jolly, 1 Iowa 9; Russell *v.* Russell, 4 Greene 26, 61 Am. Dec. 112.

Kentucky.—Wooldridge *v.* Lucas, 7 B. Mon. 49; Maguire *v.* Maguire, 7 Dana 181.

Maine.— Chase *v.* Chase, 55 Me. 21.

Maryland.— Keerl *v.* Keerl, 34 Md. 21; Wallingsford *v.* Wallingsford, 6 Harr. & J. 485 (where alimony is defined as being, not a part of the husband's estate to be assigned to her in fee simple, subject to her control and to be sold at her pleasure, but a provision for her support, to continue during their joint lives or so long as they live separate); Jamison *v.* Jamison, 4 Md. Ch. 289.

Massachusetts.— Graves *v.* Graves, 108 Mass. 314; Burrows *v.* Burrows, 107 Mass. 428 (holding that alimony includes all allowances, whether annual or gross, made to a wife upon a decree of divorce); Holbrook *v.* Comstock, 16 Gray 109 (holding that alimony is not considered to be the separate property of the wife, but it is that portion of the husband's estate which is allowed for her present subsistence and livelihood); Pub. St. (1882) p. 1287.

Missouri.— Crews *v.* Mooney, 74 Mo. 26 [*citing* 2 Bishop Mar. & Div. § 427];

2. Classification. Alimony is either temporary or permanent. Temporary alimony is that which is payable during the pendency of the suit, and is technically called alimony *pendente lite*. Permanent alimony is that which is payable after the termination of the suit during the joint lives of the parties.[6]

3. Origin and Existence. The doctrine of alimony is based upon the common-law obligation of the husband to support his wife, which is not removed by a divorce obtained by her for his misconduct.[7] The right of alimony, both temporary and permanent, was recognized in ecclesiastical law,[8] and is commonly recognized by modern statutes.[9] Even in the absence of statutory enactment, however, the courts will, if the legislature has given them jurisdiction in divorce cases, assume jurisdiction and administer the relief in conformity with the principles of ecclesiastical or common law.[10]

Waters *v.* Waters, 49 Mo. 385 (defining alimony in its limited sense as an allowance made to the wife out of the husband's estate for her maintenance, either during a matrimonial suit or at its termination, when she has proved herself entitled to a separate maintenance); Dawson *v.* Dawson, 37 Mo. App. 207.

Nebraska.— Greene *v.* Greene, 49 Nebr. 546, 68 N. W. 947, 59 Am. St. Rep. 560, 34 L. R. A. 110, where alimony is defined to be such sum as is ordered by the court to be paid to the wife by the husband for her support, during the time she lives separate from him, or to be paid by her late husband for her maintenance after divorce.

New Hampshire.— Scheafe *v.* Scheafe, 24 N. H. 564; Parsons *v.* Parsons, 9 N. H. 309, 32 Am. Dec. 362, 365.

New Jersey.— Calame *v.* Calame, 25 N. J. Eq. 548.

New York.— Romaine *v.* Chauncey, 129 N. Y. 566, 29 N. E. 826, 26 Am. St. Rep. 544, 14 L. R. A. 712; Burr *v.* Burr, 7 Hill 207.

North Carolina.—Taylor *v.* Taylor, 93 N. C. 418, 53 Am. Rep. 460; Miller *v.* Miller, 75 N. C. 70; Rogers *v.* Vines, 28 N. C. 293.

Ohio.— Pretzinger *v.* Pretzinger, 45 Ohio St. 452, 15 N. E. 471; Cox *v.* Cox, 19 Ohio St. 502, 2 Am. Rep. 415; Piatt *v.* Piatt, 9 Ohio 37.

Pennsylvania.— Clark *v.* Clark, 6 Watts & S. 85.

Tennessee.— White *v.* Bates, 89 Tenn. 570, 15 S. W. 651.

Vermont.— Stearns *v.* Stearns, 66 Vt. 187, 28 Atl. 875, 44 Am. St. Rep. 836; Andrew *v.* Andrew, 62 Vt. 495, 500, 20 Atl. 817.

Virginia.— Francis *v.* Francis, 31 Gratt. 283; Bailey *v.* Bailey, 21 Gratt. 43.

Wisconsin.—Campbell *v.* Campbell, 37 Wis. 216, holding that alimony is not in itself an "estate," in the technical sense of that word; nor is it a charge upon the husband's estate, if he has one; but it is a mere personal charge upon or duty of the husband.

Support of children.— An order to pay for the support of children is not an award of alimony. Rush *v.* Flood, 105 Ill. App. 182.

6. Bowman *v.* Worthington, 24 Ark. 522; Bouvier L. Dict. 131. See Ga. Code (1895), § 2456.

Alimony pendente lite has been held to include suit money, or allowances made to the wife for the payment of counsel fees and expenses of the litigation (Waters *v.* Waters, 49 Mo. 385), but for the purposes of this article such allowances will be treated under a separate heading. See *infra*, XIX, C.

7. York *v.* York, 34 Iowa 530; Philadelphia *v.* Thiele, 10 Phila. (Pa.) 205; Harris *v.* Harris, 31 Gratt. (Va.) 13; Thomas *v.* Thomas, 41 Wis. 229.

8. Shelford Mar. & Div. 586.

Temporary and permanent alimony.— Temporary alimony was awarded to the wife whether she was plaintiff or defendant (Wilson *v.* Wilson, 2 Hagg. Const. 203), for the purpose, as under the present law, of enabling her to prosecute or defend the suit, and for her support and maintenance pending the proceedings; and permanent alimony was granted where the wife had shown herself entitled to a separate maintenance (Ayliffe Parergon Jur. Can. Ang. 58; Godolphin Abr. Eccl. Laws 508; Shelford Mar. & Div. 292).

Absolute and limited divorce.— Divorces *a vinculo* were not decreed in ecclesiastical courts. Hence alimony was granted by them only as an incident to a divorce *a mensa et thoro*. Lawson *v.* Shotwell, 27 Miss. 630; Rees *v.* Waters, 9 Watts (Pa.) 90; Cooke *v.* Cooke, 2 Phillim. 40, 1 Eng. Eccl. 178.

Nullity of marriage.— Neither kind of alimony was granted unless there was a subsisting marriage; so where a nullity was decreed for causes which render the marriage void *ab initio*, no alimony was awarded. Smyth *v.* Smyth, 2 Add. Eccl. 254; Bird *v.* Bird, 1 Lee Eccl. 209, 5 Eng. Eccl. 366; 3 Blackstone Comm. 94; Godolphin Abr. Eccl. Laws 508, 509.

9. Campbell *v.* Campbell, 37 Wis. 206, holding that statutes relating to alimony proceed upon the natural duty of the husband to support his wife, after as well as before the divorce, and must be liberally construed to enforce such duty. See Andrew *v.* Andrew, 62 Vt. 495, 20 Atl. 817.

10. *Florida.*— Chaires *v.* Chaires, 10 Fla. 308.

Georgia.— McGee *v.* McGee, 10 Ga. 477.

Michigan.— Goldsmith *v.* Goldsmith, 6 Mich. 285; Story *v.* Story, Walk. 421.

New Jersey.— Amos *v.* Amos, 4 N. J. Eq. 171.

New York.— Higgins *v.* Sharp, 164 N. Y. 4, 58 N. E. 9; Di Lorenzo *v.* Di Lorenzo, 78

4. **Relief to Husband.** Alimony being based upon the common-law obligation of a husband to support his wife, its very nature is opposed to affording that relief to a husband.[11] In some jurisdictions, however, statutes have been enacted providing for the maintenance of the husband and the children of the marriage out of the wife's separate estate under certain conditions,[12] or requiring a division of community property, or a restoration to the husband of property acquired by the wife from him prior or subsequent to the marriage.[13]

5. **Independent Suit For Alimony.** While the cases are in conflict, yet by the weight of authority, alimony may be allowed only as an incident to a suit for divorce, and not where it is the only relief sought,[14] in the absence of statutes

N. Y. App. Div. 577, 79 N. Y. Suppl. 566; North *v.* North, 1 Barb. Ch. 241, 43 Am. Dec. 778.

Texas.— Andrews *v.* Andrews, Dall. 375.

Vermont.— Le Barron *v.* Le Barron, 35 Vt. 365.

See 17 Cent. Dig. tit. "Divorce," § 587.

Contra.— Kelley *v.* Kelley, 161 Mass. 111, 36 N. E. 837, 42 Am. St. Rep. 389, 25 L. R. A. 806; Baldwin *v.* Baldwin, 6 Gray (Mass.) 341; Shannon *v.* Shannon, 2 Gray (Mass.) 285; Coffin *v.* Dunham, 8 Cush. (Mass.) 404, 54 Am. Dec. 769; Davol *v.* Davol, 13 Mass. 264; West *v.* West, 2 Mass. 223, 227; Orrok *v.* Orrok, 1 Mass. 341; Wilson *v.* Wilson, 19 N. C. 377; Sanford *v.* Sanford, 2 R. I. 64.

11. *Alabama.*— Goodrich *v.* Goodrich, 44 Ala. 670; Oliver *v.* Oliver, 5 Ala. 75.

Colorado.— Meldrum *v.* Meldrum, 15 Colo. 478, 24 Pac. 1083, 11 L. R. A. 65.

Illinois.— Ross *v.* Ross, 78 Ill. 402; Groth *v.* Groth, 69 Ill. App. 68.

Indiana.— Stultz *v.* Stultz, 107 Ind. 400, 8 N. E. 238.

Kansas.— Somers *v.* Somers, 39 Kan. 132, 17 Pac. 841.

Nebraska.— Green *v.* Green, 49 Nebr. 546, 68 N. W. 947, 59 Am. St. Rep. 560, 34 L. R. A. 110.

Utah.— Hoagland *v.* Hoagland, 19 Utah 103, 57 Pac. 20.

12. Barnes *v.* Barnes, 59 Iowa 456, 13 N. W. 441; Small *v.* Small, 42 Iowa 111; Garnett *v.* Garnett, 114 Mass. 347 (holding that the statute applies only to an absolute divorce, and not to a divorce *nisi*); Midwinter *v.* Midwinter, [1893] P. 93, 62 L. J. P. & Adm. 77, 68 L. T. Rep. N. S. 262, 1 Reports 512, 41 Wkly. Rep. 560; Milne *v.* Milne, L. R. 2 P. 295; March *v.* March, L. R. 1 P. 437. See also statutes of the several states.

13. See *infra*, XIX, E.

14. *Arkansas.*— Bowman *v.* Worthington, 24 Ark. 522.

Florida.— Chaires *v.* Chaires, 10 Fla. 308.

Georgia.— Goss *v.* Goss, 29 Ga. 109; McGee *v.* McGee, 10 Ga. 477.

Illinois.— Trotter *v.* Trotter, 77 Ill. 510; Ross *v.* Ross, 69 Ill. 569; Petrie *v.* People, 40 Ill. 334.

Indiana.— Chapman *v.* Chapman, 13 Ind. 396; Fischli *v.* Fischli, 1 Blackf. 360, 12 Am. Dec. 251, holding that if sufficient alimony is not granted by the court decreeing a divorce, no other court can supply the deficiency.

Louisiana.— Carroll *v.* Carroll, 42 La. Ann. 1071, 8 So. 400; Holbrook *v.* Holbrook, 32 La. Ann. 13; Moore *v.* Moore, 18 La. Ann. 613; Heyob *v.* Heyob, 18 La. Ann. 41.

Massachusetts.— Adams *v.* Adams, 100 Mass. 365, 1 Am. Rep. 111; Shannon *v.* Shannon, 2 Gray 285.

Michigan.— Perkins *v.* Perkins, 16 Mich. 162; Peltier *v.* Peltier, Harr. 19.

Missouri.— Doyle *v.* Doyle, 26 Mo. 545; De Graw *v.* De Graw, 7 Mo. App. 121.

New Hampshire.— Parsons *v.* Parsons, 9 N. H. 309, 32 Am. Dec. 362.

New Jersey.— Anshutz *v.* Anshutz, 16 N. J. Eq. 162; Yule *v.* Lule, 10 N. J. Eq. 138.

New York.—Ramsden *v.* Ramsden, 91 N. Y. 281; Atwater *v.* Atwater, 53 Barb. 621, 36 How. Pr. 431; Pomeroy *v.* Wells, 8 Paige 406.

Oregon.— Bamford *v.* Bamford, 4 Oreg. 30.

Pennsylvania.—Rees *v.* Waters, 9 Watts 90.

Texas.— Trevino *v.* Trevino, 63 Tex. 650; Simons *v.* Simons, 23 Tex. 344.

Vermont.— Prosser *v.* Warner, 47 Vt. 667, 19 Am. Rep. 132; Harrington *v.* Harrington, 10 Vt. 505.

West Virginia.— Stewart *v.* Stewart, 27 W. Va. 167.

Wisconsin.— Clarke *v.* Burke, 65 Wis. 359, 27 N. W. 22, 56 Am. Rep. 631.

England.— Ball *v.* Montgomery, 4 Bro. Ch. 339, 2 Ves. Jr. 191, 2 Rev. Rep. 197, 29 Eng. Reprint 924.

See 17 Cent. Dig. tit. "Divorce," § 585.

On the contrary there are a number of authorities fully recognizing the jurisdiction of courts of equity to allow alimony independent of a suit for divorce or separation.

Alabama.— Murray *v.* Murray, 84 Ala. 363, 4 So. 239; Hinds *v.* Hinds, 80 Ala. 225; Wray *v.* Wray, 33 Ala. 187; Mims *v.* Mims, 33 Ala. 98; Glover *v.* Glover, 16 Ala. 440.

California.— Hagle *v.* Hagle, 68 Cal. 588, 9 Pac. 842; Galland *v.* Galland, 38 Cal. 265.

Colorado.— Daniels *v.* Daniels, 9 Colo. 133, 10 Pac. 657.

Iowa.— Platner *v.* Platner, 66 Iowa 378, 23 N. W. 764; Farber *v.* Farber, 64 Iowa 362, 20 N. W. 472; Finn *v.* Finn, 62 Iowa 482, 17 N. W. 739; Whitcomb *v.* Whitcomb, 46 Iowa 437; Graves *v.* Graves, 36 Iowa 310, 14 Am. Rep. 525.

Kentucky.— Hulett *v.* Hulett, 80 Ky. 364; Lockridge *v.* Lockridge, 3 Dana 28, 28 Am. Dec. 52; Butler *v.* Butler, 4 Litt. 201.

Maryland.— Helms *v.* Franciscus, 2 Bland 544, 20 Am. Dec. 402; Jamison *v.* Jamison, 4 Md. Ch. 289.

conferring upon courts authority to decree separate maintenance of the wife under certain conditions.[15]

6. Prerequisites — a. Jurisdiction — (I) *In General.* It may be stated as a general rule, subject to exceptions prescribed either by statute or the practice in particular states, that orders for alimony should be made by the court in which the action is pending or by which a decree of divorce is rendered;[16] and under a statute conferring upon the court authority to order temporary alimony a judge sitting in chambers in vacation cannot grant such an order.[17]

(II) *Upon Appeal.* The authorities differ as to the power of an appellate court to grant an order directing the payment of temporary alimony and suit money upon an appeal in a divorce action. In some jurisdictions such power is denied,[18] but the weight of authority is in favor of an exercise of the power.[19]

(III) *Of Person and Property of Defendant* — (A) *In General.* The obligation of a husband to support his wife is personal, and therefore a decree of alimony against a non-resident defendant is *in personam* and void,[20] unless he has

Mississippi.— McFarland *v.* McFarland, 64 Miss. 449, 1 So. 508; Verner *v.* Verner, 62 Miss. 260; Garland *v.* Garland, 50 Miss. 694 [*overruling dictum* in Lawson *v.* Shotwell, 27 Miss. 630].

North Carolina.— Spiller *v.* Spiller, 2 N. C. 482; Anonymous, 2 N. C. 347.

Ohio.— Woods *v.* Waddle, 44 Ohio St. 449, 8 N. E. 297.

South Carolina.— Briggs *v.* Briggs, 24 S. C. 377; Prather *v.* Prather, 4 Desauss. 33; Jelineau *v.* Jelineau, 2 Desauss. 45; Prince *v.* Prince, 1 Rich. Eq. 282; Mattison *v.* Mattison, 1 Strobh. Eq. 387, 47 Am. Dec. 541; Rhame *v.* Rhame, 1 McCord Eq. 197, 16 Am. Dec. 597.

Virginia.— Almond *v.* Almond, 4 Rand. 662, 15 Am. Dec. 781; Purcell *v.* Purcell, 4 Hen. & M. 507.

Alimony upon legislative divorce see *supra*, III, A, 4.

15. See Husband and Wife.

16. *Arkansas.*— Bowman *v.* Worthington, 24 Ark. 522.

California.— *Ex p.* Winter, 70 Cal. 291, 11 Pac. 630; Bennett *v.* Southard, 35 Cal. 688, holding that such an order cannot be made by a judge of the court in which the action is pending, while holding a district court in a county adjoining that in which the action was brought.

Maine.— Jones *v.* Jones, 18 Me. 308, 36 Am. Dec. 723.

Missouri.— Mahn *v.* Mahn, 63 Mo. App. 375, holding that when a husband and wife sue each other for a divorce in different courts, the court which first acquires jurisdiction has alone the power to award alimony.

New York.— Leslie *v.* Leslie, 10 Abb. Pr. N. S. 64.

Washington.— State *v.* Neal, 19 Wash. 642, 54 Pac. 31.

See 17 Cent. Dig. tit. "Divorce," § 587.

17. Goss *v.* Goss, 29 Ga. 109; Prosser *v.* Prosser, 64 Iowa 378, 20 N. W. 480. See, however, *In re* Gill, 20 Wis. 686, holding that under a statute providing that the court or a judge may require the husband to pay alimony and suit money to the wife, the county judge, having by statute powers of a circuit judge at chambers, may, in a divorce case pending in the circuit court, order payment to the wife of suit money.

18. Reilly *v.* Reilly, 60 Cal. 624; Hunter *v.* Hunter, 100 Ill. 477; Kesler *v.* Kesler, 39 Ind. 153; State *v.* St. Louis Ct. App., 88 Mo. 135.

19. *Florida.*— Prine *v.* Prine, 36 Fla. 676, 18 So. 781, 34 L. R. A. 87.

Iowa.— Day *v.* Day, 84 Iowa 221, 50 N. W. 979; Vanduzer *v.* Vanduzer, 70 Iowa 614, 31 N. W. 956.

Michigan.— Van Voorhis *v.* Van Voorhis, 90 Mich. 276, 51 N. W. 281; Zeigenfuss *v.* Zeigenfuss, 21 Mich. 414; Chaffee *v.* Chaffee, 14 Mich. 463; Goldsmith *v.* Goldsmith, 6 Mich. 285.

Minnesota.— Wagner *v.* Wagner, 36 Minn. 239, 30 N. W. 766.

Mississippi.— Hall *v.* Hall, 77 Miss. 741, 27 So. 636.

Nevada.— Lake *v.* Lake, 17 Nev. 230, 30 Pac. 878.

New Jersey.— Dishorough *v.* Dishorough, 51 N. J. Eq. 306, 28 Atl. 3.

Wisconsin.— Weishaupt *v.* Weishaupt, 27 Wis. 621; Krause *v.* Krause, 23 Wis. 354.

See 17 Cent. Dig. tit. "Divorce," § 588.

20. *California.*— De la Montanya *v.* De la Montanya, 112 Cal. 101, 44 Pac. 345, 53 Am. St. Rep. 165, 32 L. R. A. 82.

Georgia.— Fleming *v.* West, 98 Ga. 778, 27 S. E. 157.

Illinois.—Dunham *v.* Dunham, 57 Ill. App. 475 [*affirmed* in 162 Ill. 589, 44 N. E. 841, 35 L. R. A. 70].

Indiana.— Sowders *v.* Edmunds, 76 Ind. 123; Middleworth *v.* McDowell, 49 Ind. 386; Lytle *v.* Lytle, 48 Ind. 200; Beard *v.* Beard, 21 Ind. 321.

Iowa.—Van Orsdal *v.* Van Orsdal, 67 Iowa 35, 24 N. W. 579.

Kansas.— Rodgers *v.* Rodgers, 56 Kan. 483, 43 Pac. 779.

Kentucky.— Hawkins *v.* Ragsdale, 80 Ky. 353, 44 Am. Rep. 483.

Maine.— Harding *v.* Alden, 9 Me. 140, 23 Am. Dec. 549.

Massachusetts.— Legg *v.* Legg, 8 Mass. 99.

Missouri.— Hamill *v.* Talbott, 81 Mo. App. 210; Anderson *v.* Anderson, 55 Mo. App. 268. See also Ellison *v.* Martin, 53 Mo. 575.

appeared, either in person or by attorney,[21] or has been personally served with process within the territorial jurisdiction of the court.[22] It has been held, however, that property within the jurisdiction of the court may be subjected to a decree granting alimony against a non-resident defendant who has been constructively served with process in a divorce suit.[23]

(B) *Notice of Application.* The statutes and practice in the several states determine the necessity and sufficiency of the notice of application for alimony.[24]

b. Allegations in Pleadings — (I) *As to Cause of Action or Defense.* A *prima facie* case or defense, sufficiently and definitely alleged, must appear in the wife's pleadings to authorize the court to grant her means from the husband's estate for her maintenance pending the suit and for the payment of her expenses.[25]

Nebraska.— Dillon *v.* Starin, 44 Nebr. 881, 63 N. W. 12; Johnson *v.* Johnson, 31 Nebr. 385, 47 N. W. 1115.

New York.—Rigney *v.* Rigney, 127 N. Y. 408, 28 N. E. 405, 24 Am. St. Rep. 462. See, however, Scragg *v.* Scragg, 18 N. Y. Suppl. 487.

Ohio.— Cox *v.* Cox, 19 Ohio St. 502, 2 Am. Rep. 415; Massey *v.* Stimmel, 15 Ohio Cir. Ct. 439, 8 Ohio Cir. Dec. 237.

Vermont.— Smith *v.* Smith, 74 Vt. 20, 51 Atl. 1060, 93 Am. St. Rep. 882; Prosser *v.* Warner, 47 Vt. 667, 19 Am. Rep. 132.

United States.— Barrett *v.* Failing, 111 U. S. 523, 4 S. Ct. 598, 28 L. ed. 505; Barber *v.* Barber, 21 How. 582, 16 L. ed. 226; Hekking *v.* Pfaff, 91 Fed. 60, 33 C. C. A. 328, 43 L. R. A. 618; Gratton *v.* Weber, 47 Fed. 852; Bunnell *v.* Bunnell, 25 Fed. 214, construing Howell St. Mich. § 6245, authorizing state courts to award alimony and sequestrate the property of defendant within the jurisdiction and appropriate it to the payment of alimony, and holding that the statute does not apply where defendant is called into court by constructive notice.

See 17 Cent. Dig. tit. "Divorce," § 591 *et seq.*

21. Beard *v.* Beard, 21 Ind. 321; Johnson *v.* Johnson, 31 Nebr. 385, 47 N. W. 1115 (holding that where defendant has answered in an action to subject property within the state to the payment of alimony, a judgment may be rendered, although the divorce itself is obtained *ex parte*); Gray *v.* Gray, 143 N. Y. 354, 38 N. E. 301. See, however, Simmons *v.* Simmons, 62 N. C. 63, holding that defendant's presence in court when the petition was filed, and his personal objection to an order granting alimony in the absence of a personal service of a petition in the action for divorce, is insufficient to give to the cause the character of a *lis pendens*, and no order for alimony can be made at such stage.

22. Sanford *v.* Sanford, 5 Day (Conn.) 353; Johnson *v.* Johnson, 31 Nebr. 385, 47 N. W. 1115; Park *v.* Park, 18 Hun (N. Y.) 466 [*affirmed* in 80 N. Y. 156], all holding that where process has been personally served within the court's jurisdiction a failure to appear does not prevent an award of alimony, even without notice of application therefor. See also *infra*, XIX, B, 3, a.

23. Wesner *v.* O'Brien, 56 Kan. 724, 44 Pac. 1090, 54 Am. St. Rep. 604, 32 L. R. A. 289.

Extent of jurisdiction.— Where notice is served by publication, orders as to alimony are binding only so far as the subject-matter out of which the alimony is allowed is within the territorial jurisdiction of the court. Twing *v.* O'Meara, 59 Iowa 326, 13 N. W. 321; Harshberger *v.* Harshberger, 26 Iowa 503; Thurston *v.* Thurston, 58 Minn. 279, 59 N. W. 1017; Bailey *v.* Bailey, 127 N. C. 474, 37 S. E. 502. *Compare* Massey *v.* Stimmel, 15 Ohio Cir. Ct. 439, 8 Ohio Cir. Dec. 237 (holding that the fact that defendant has property within the state does not give jurisdiction); Smith *v.* Smith, 74 Vt. 20, 51 Atl. 1060, 93 Am. St. Rep. 882.

24. Ellis *v.* Ellis, 13 Nebr. 91, 13 N. W. 29, holding that where in an application to modify a decree for alimony a motion by defendant's attorney is made to extend the time for filing a bill of exceptions to a judgment on the application, it is a general appearance and consequently a waiver of defects in the notice of application.

Notice in original process.— Failure to state in the original notice in the divorce suit that a claim for alimony is made does not invalidate a judgment for alimony. Darrow *v.* Darrow, 43 Iowa 411; McEwen *v.* McEwen, 26 Iowa 375. Where the underwriting in the subpœna stated that a personal decree for divorce was sought and that the bill was filed to reach interests in property, it was sufficient to indicate that property interests were involved so as to authorize an allowance of alimony. Seibly *v.* Person, 105 Mich. 584, 63 N. W. 528.

25. *Arkansas.*— Countz *v.* Countz, 30 Ark. 73.

Colorado.— Cowan *v.* Cowan, 10 Colo. 540, 16 Pac. 215; Daniels *v.* Daniels, 9 Colo. 133, 10 Pac. 657.

Florida.— Phelan *v.* Phelan, 12 Fla. 449.

Indiana.— Harrell *v.* Harrell, 39 Ind. 185.

Kansas.— Birdzell *v.* Birdzell, 35 Kan. 638, 11 Pac. 907.

New Jersey.— Disborough *v.* Disborough, 48 N. J. Eq. 646, 25 Atl. 20; Ballentine *v.* Ballentine, 5 N. J. Eq. 471.

New York.—Kennedy *v.* Kennedy, 73 N. Y. 369; Bucki *v.* Bucki, 70 Hun 598, 24 N. Y. Suppl. 374; Boubon *v.* Boubon, 3 Rob. 715; Rose *v.* Rose, 11 Paige 166; Worden *v.* Worden, 3 Edw. 387.

North Carolina.— Sparks *v.* Sparks, 69 N. C. 319; Little *v.* Little, 63 N. C. 22;

(II) *As To Resources of Husband.* Unless otherwise provided by statute the court's jurisdiction to award alimony is not dependent on allegations in the complaint as to the husband's resources,[26] although satisfactory proof of his financial ability must be made.[27]

(III) *As to Specific Property.* If a division and distribution of property is sought as alimony by either party, the petition should specifically describe the property affected.[28]

(IV) *Prayer For Relief.* It is proper practice in probably all jurisdictions for the complainant to pray for alimony in her petition,[29] although the relief, being necessarily involved in every suit wherein a decree of divorce is rendered, will be granted even if not asked for in the pleadings.[30]

(V) *Verification.* Alimony will not be granted on the unverified pleadings of either party, where the allegations therein are denied, and are not supported by affidavit or other proof.[31]

7. Ancillary Remedies Prior to Award — a. Attachment. Authority is conferred by statute in some states to issue an order of attachment against the property of defendant in a divorce case, for the purpose of satisfying any judgment or decree rendered by the court therein.[32]

b. Injunction Against Disposition of Property. In a proper case the court may grant an injunction restraining the alienation of the property of either party pending a determination of the issues.[33] Peril to the fund or sufficient cause for belief that an unlawful disposition is to be made of the property out of which relief is sought must be affirmatively shown on oath by the petitioner, either in

Erwin *v.* Erwin, 57 N. C. 82; Gaylord *v.* Gaylord, 57 N. C. 74.

Tennessee.— Lishey *v.* Lishey, 2 Tenn. Ch. 1; Ward *v.* Ward, 1 Tenn. Ch. 262.

Wisconsin.— Weishaupt *v.* Weishaupt, 27 Wis. 621; Krause *v.* Krause, 23 Wis. 354.

See 17 Cent. Dig. tit. "Divorce," § 594.

Recriminatory charge.— Where a wife sets up a recriminatory charge of adultery sufficiently definite to constitute a valid affirmative defense, counsel fees and alimony will be allowed her (Clark *v.* Clark, 7 Rob. (N. Y.) 284); and alimony may be allowed her, although her answer is not styled a counter-claim, where plaintiff has joined issue on the matter pleaded. Lacey *v.* Lacey, 95 Ky. 110, 23 S. W. 673, 15 Ky. L. Rep. 439.

26. Gaston *v.* Gaston, 114 Cal. 542, 46 Pac. 609, 55 Am. St. Rep. 86; Seibley *v.* Ingham Cir. Judge, 105 Mich. 584, 63 N. W. 528; Ross *v.* Griffin, 53 Mich. 5, 18 N. W. 534.

27. See *infra*, XIX, B, 4, h, (II); XIX, B, 5, e; XIX, D, 7; XIX, D, 8, c, (III), (A).

28. *California.*— Remington *v.* San Francisco Super. Ct., 69 Cal. 633, 11 Pac. 252.

Nevada.— Howe *v.* Howe, 4 Nev. 469.

Oregon.— Weber *v.* Weber, 16 Oreg. 163, 17 Pac. 866; Groslouis *v.* Northcut, 3 Oreg. 394.

Washington.— Philbrick *v.* Andrews, 8 Wash. 7, 35 Pac. 358.

West Virginia.— Handlan *v.* Handlan, 37 W. Va. 486, 16 S. E. 597.

Contra.— Twing *v.* O'Meara, 59 Iowa 326, 13 N. W. 321.

29. Oliver *v.* Oliver, 5 Ala. 75; Chandler *v.* Chandler, 13 Ind. 492; Rourke *v.* Rourke, 8 Ind. 427.

30. Hills *v.* Hills, 94 Ind. 436; Zuver *v.* Zuver, 36 Iowa 190.

Partition of community property.— Where the petition in an action for a separation contains no prayer for a partition of the common property, a division of property cannot be decreed at the time of rendering judgment for a separation (Edmonds *v.* Edmonds, 4 La. Ann. 489); but in California it has been held that such division may be made, although not prayed for in the complaint (Gimmy *v.* Gimmy, 22 Cal. 633).

31. Smith *v.* Smith, 10 N. J. L. J. 210; Monk *v.* Monk, 7 Rob. (N. Y.) 153. *Compare* Van Duzee *v.* Van Duzee, 65 Iowa 625, 22 N. W. 900.

32. Smith *v.* Smith, 61 Iowa 138, 15 N. W. 867 (holding that it is not error to issue the attachment without a bond, where petitioner is unable to give one); Daniels *v.* Morris, 54 Iowa 369, 6 N. W. 532; Burrows *v.* Purple, 107 Mass. 428.

33. *California.*— *In re* White, 113 Cal. 282, 45 Pac. 323; Remington *v.* San Francisco Super. Ct., 69 Cal. 633, 11 Pac. 252.

Georgia.— Johnson *v.* Johnson, 59 Ga. 613.

Indiana.— Frakes *v.* Brown, 2 Blackf. 295.

Iowa.—Wharton *v.* Wharton, 57 Iowa 696, 11 N. W. 638.

Kansas.— *In re* Pavey, 52 Kan. 675, 36 Pac. 878, holding that an order of injunction may be granted only by the district court or a judge thereof.

Maryland.— Ricketts *v.* Ricketts, 4 Gill 105.

New Jersey.— Anonymous, 10 N. J. L. J. 185.

New York.— Vermilyea *v.* Vermilyea, 14 How. Pr. 470.

Oklahoma.— Uhl *v.* Irwin, 3 Okla. 388, 41 Pac. 376.

Texas.— Wright *v.* Wright, 3 Tex. 168.

England.— Newton *v.* Newton, [1896] P. 36, 65 L. J. P. & Adm. 15.

See 17 Cent. Dig. tit. "Divorce," § 600.

the pleadings[34] or by affidavits; but the order granting the injunction cannot be collaterally attacked on the ground that an emergency therefor was not sufficiently shown.[35] The court may in its discretion set aside the injunction to the extent of enabling the husband to mortgage the property affected thereby for the payment of alimony and the expenses of the suit.[36] Such an injunction will not affect the rights of purchasers from the husband without notice.[37]

B. Temporary Alimony — 1. Right in General. Subject to the conditions hereinafter noted, a wife is entitled almost as a matter of course, the merits of the case not being carefully scrutinized,[38] to an allowance of temporary alimony, whether she be plaintiff[39] or defendant,[40] and although the statute makes no pro-

34. *Alabama.*— Norris *v.* Norris, 27 Ala. 519, where an allegation by the wife that "she has just cause to fear, and in fact does fear, that upon the filing and service of the bill he will remove or dispose of his whole property," was held insufficient because stating no facts causing such fears.

California.— Remington *v.* San Francisco Super. Ct., 69 Cal. 633, 11 Pac. 252, holding that where the issues do not embrace the disposition of property, the court has no jurisdiction to enjoin defendant from disposing of it until the determination of the suit.

Georgia.— See Johnson *v.* Johnson, 59 Ga. 613.

New York.— See Vermilyea *v.* Vermilyea, 14 How. Pr. 470, where plaintiff alleged that defendant threatened to dispose of his property, without making any provision for her support, and the injunction was allowed.

Texas.— Wright *v.* Wright, 3 Tex. 168, holding that the allegations upon which an application for an injunction is based must be verified.

35. Uhl *v.* Irwin, 3 Okla. 388, 41 Pac. 376.

36. White *v.* White, 97 Cal. 604, 32 Pac. 600, 33 Pac. 399.

37. Frakes *v.* Brown, 2 Blackf. (Ind.) 295. See *infra*, XIX, E, 5, c; XIX, F, 2, g.

38. *Alabama.*— Rast *v.* Rast, 113 Ala. 319, 21 So. 34; Jeter *v.* Jeter, 36 Ala. 391.

Colorado.— Daniels *v.* Daniels, 9 Colo. 133, 10 Pac. 657.

Georgia.— Swearingen *v.* Swearingen, 18 Ga. 316; Frith *v.* Frith, 18 Ga. 273, 63 Am. Dec. 289; Roseberry *v.* Roseberry, 17 Ga. 139; Methvin *v.* Methvin, 15 Ga. 97, 60 Am. Dec. 664.

Illinois.— Foss *v.* Foss, 100 Ill. 576; Jenkins *v.* Jenkins, 91 Ill. 167.

Kansas.— Litowich *v.* Litowich, 19 Kan. 451, 27 Am. Rep. 145.

Maryland.—Tayman *v.* Tayman, 2 Md. Ch. 393; Coles *v.* Coles, 2 Md. Ch. 341; Daiger *v.* Daiger, 2 Md. Ch. 335.

Mississippi.— Porter *v.* Porter, 41 Miss. 116, holding that on such an application the court will not investigate the conduct of the wife, or the merits of the original bill, or inquire into the truth of its allegations.

New Jersey.— Amos *v.* Amos, 4 N. J. Eq. 171; Johnson *v.* Johnson, 4 N. J. L. J. 241.

New York.— Hunter *v.* Hunter, 78 N. Y. App. Div. 631, 79 N. Y. Suppl. 618; Leslie *v.* Leslie, 6 Abb. Pr. N. S. 193; Fowler *v.* Fowler, 4 Abb. Pr. 411; Hammond *v.* Hammond, Clarke 151; Wright *v.* Wright, 1 Edw. 62; Denton *v.* Denton, 1 Johns. Ch. 364; Mix *v.* Mix, 1 Johns. Ch. 108.

North Carolina.— Sparks *v.* Sparks, 69 N. C. 319; Shearin *v.* Shearin, 58 N. C. 233; Taylor *v.* Taylor, 46 N. C. 528.

Tennessee.— Thompson *v.* Thompson, 3 Head 527.

See 17 Cent. Dig. tit. "Divorce," § 605.

When merits will be inquired into.—If there is reason to suspect that the suit was not brought by the consent or direction of the wife, it is the duty of the court, upon an application for temporary alimony, to institute some inquiry as to the good faith of the suit (Swearingen *v.* Swearingen, 18 Ga. 316); and the court may look into the merits of the case so far as disclosed by the pleadings and affidavits, where defendant has filed an answer and both parties have filed affidavits (Begbie *v.* Begbie, 7 N. J. Eq. 98).

39. *Alabama.*— *Ex p.* King, 27 Ala. 387; Richardson *v.* Richardson, 4 Port. 467, 30 Am. Dec. 538.

Arkansas.— Bauman *v.* Bauman, 18 Ark. 320, 68 Am. Dec. 171.

California.— Peyre *v.* Peyre, 79 Cal. 336, 21 Pac. 838; *Ex p.* Perkins, 18 Cal. 60.

Illinois.— Gamble *v.* Gamble, 57 Ill. App. 183.

Indiana.— McCue *v.* McCue, 149 Ind. 466, 49 N. E. 382; Sellers *v.* Sellers, 141 Ind. 305, 40 N. E. 699; Gruhl *v.* Gruhl, 123 Ind. 86, 23 N. E. 1101.

Michigan.—Rossman *v.* Rossman, 62 Mich. 429, 29 N. W. 33; Lapham *v.* Lapham, 40 Mich. 527; Goldsmith *v.* Goldsmith, 6 Mich. 285.

New York.— Griffin *v.* Griffin, 47 N. Y. 134; North *v.* North, 1 Barb. Ch. 241, 43 Am. Dec. 778; Denton *v.* Denton, 1 Johns. Ch. 364.

North Carolina.—Miller *v.* Miller, 75 N. C. 70; Taylor *v.* Taylor, 46 N. C. 528.

40. *Missouri.*— Waters *v.* Waters, 49 Mo. 385.

New Jersey.— Amos *v.* Amos, 4 N. J. Eq. 171.

New York.— Ford *v.* Ford, 10 Abb. Pr. N. S. 74; Leslie *v.* Leslie, 10 Abb. Pr. N. S. 64.

North Carolina.— Webber *v.* Webber, 79 N. C. 572.

Pennsylvania.— Powers' Appeal, 120 Pa. St. 320, 14 Atl. 60; Mann *v.* Mann, 7 Wkly. Notes Cas. 507.

See 17 Cent. Dig. tit. "Divorce," § 606.

vision therefor.[41] Such alimony will be allowed in actions for either absolute or limited divorce,[42] with the distinction, however, that, while in suits for absolute divorce the allowance is usually made as a matter of course, in suits for limited divorce a meritorious cause of action and actual injury must be shown before the relief will be granted.[43] The courts may award temporary alimony notwithstanding statutes conferring upon the wife the control of her separate property and the benefit of her own earnings,[44] although by such statutes the force of the reason for awarding temporary alimony is somewhat lessened, and the courts will not grant the relief so much as a matter of course.[45]

2. Discretion of Court. Allowance of temporary alimony is in the discretion of the court, and not a right belonging in all cases to the wife.[46] It is controlled by the circumstances in each particular case, and depends upon the probability of the success of the applicant's case, the pecuniary and social condition of the parties, and the other essentials hereinafter specified.[47] Moreover, this discretion is judicial and not arbitrary, and is subject to review on appeal.[48]

On the contrary it has been held that under statutes providing for alimony upon a decree of divorce being rendered, the court cannot order an allowance for the support of the wife pending a libel against her. Rowell *v.* Rowell, 63 N. H. 222; Hazen *v.* Hazen, 19 Vt. 603; Harrington *v.* Harrington, 10 Vt. 505. *Compare* Quincy *v.* Quincy, 10 N. H. 272; Parsons *v.* Parsons, 9 N. H. 309, 32 Am. Dec. 362. This rule has since been altered in Vermont by a statute (St. [1894] § 2687) authorizing temporary alimony to the wife in any case. In North Carolina it has been held that a defendant wife who does not set up a claim on her part for a divorce is not entitled to alimony *pendente lite*. Reeves *v.* Reeves, 82 N. C. 348.

Temporary alimony in ecclesiastical courts see *supra*, note 8.

41. See *supra*, XIX, A, 3. See, however, Rowell *v.* Rowell, 63 N. H. 222; Hazen *v.* Hazen, 19 Vt. 603; Harrington *v.* Harrington, 10 Vt. 505.

42. Bauman *v.* Bauman, 18 Ark. 320, 68 Am. Dec. 171.

43. Dougherty *v.* Dougherty, 8 N. J. Eq. 540; Davis *v.* Davis, 75 N. Y. 221; Bissell *v.* Bissell, 1 Barb. (N. Y.) 430; Hollerman *v.* Hollerman, 1 Barb. (N. Y.) 64; Boubon *v.* Boubon, 3 Rob. (N. Y.) 715; Solomon *v.* Solomon, 28 How. Pr. (N. Y.) 218; Worden *v.* Worden, 3 Edw. (N. Y.) 387; Bertschy *v.* Bertschy, 14 N. Y. Wkly. Dig. 111.

44. Wooley *v.* Wooley, 24 Ill. App. 431; Verner *v.* Verner, 62 Miss. 260; Marker *v.* Marker, 11 N. J. Eq. 256; Magurn *v.* Magurn, 11 Ont. App. 178; Snider *v.* Snider, 11 Ont. Pr. 140; Bradley *v.* Bradley, 10 Ont. Pr. 571.

45. Westerfield *v.* Westerfield, 36 N. J. Eq. 195.

46. *Arkansas.*— Plant *v.* Plant, 63 Ark. 128, 37 S. W. 308; Countz *v.* Countz, 30 Ark. 73; Hecht *v.* Hecht, 28 Ark. 92.

Colorado.— Cairnes *v.* Cairnes, 29 Colo. 260, 68 Pac. 233, 93 Am. St. Rep. 55; Cowan *v.* Cowan, 10 Colo. 540, 16 Pac. 215.

Georgia.— Wester *v.* Martin, 115 Ga. 776, 42 S. E. 81; Kendrick *v.* Kendrick, 105 Ga. 38, 31 S. E. 115; Heaton *v.* Heaton, 102 Ga. 578, 27 S. E. 677; Hill *v.* Hill, 47 Ga. 332; Wardlaw *v.* Wardlaw, 39 Ga. 53; Dicken *v.* Dicken, 38 Ga. 663.

Illinois.— Cooper *v.* Cooper, 185 Ill. 163, 56 N. E. 1059 [*affirming* 85 Ill. App. 575]; Foss *v.* Foss, 100 Ill. 576; Jenkins *v.* Jenkins, 91 Ill. 167; Blake *v.* Blake, 80 Ill. 523; Jolliff *v.* Jolliff, 32 Ill. 527; Foote *v.* Foote, 22 Ill. 425; Gray *v.* Gray, 74 Ill. App. 509; Lane *v.* Lane, 22 Ill. App. 529.

Indiana.— McCue *v.* McCue, 149 Ind. 466, 49 N. E. 382; Sellers *v.* Sellers, 141 Ind. 305, 40 N. E. 699; Gruhl *v.* Gruhl, 123 Ind. 86, 23 N. E. 1101; Henderson *v.* Henderson, 110 Ind. 316, 11 N. E. 432; Logan *v.* Logan, 90 Ind. 107; Corey *v.* Corey, 81 Ind. 469; Buckles *v.* Buckles, 81 Ind. 159; Eastes *v.* Eastes, 79 Ind. 363; Conn *v.* Conn, 57 Ind. 323; Powell *v.* Powell, 53 Ind. 513.

Iowa.— Small *v.* Small, 42 Iowa 111.

Kansas.— Litowich *v.* Litowich, 19 Kan. 451, 27 Am. Rep. 145.

Kentucky.— Campbell *v.* Campbell, 50 S. W. 849, 21 Ky. L. Rep. 19.

Michigan.— Harrison *v.* Harrison, 49 Mich. 240, 13 N. W. 581.

Minnesota.— Wagner *v.* Wagner, 39 Minn. 394, 40 N. W. 360.

New Hampshire.— Jellison *v.* Jellison, 70 N. H. 633, 47 Atl. 612.

New Jersey.— Marker *v.* Marker, 11 N. J. Eq. 256.

New York.— Collins *v.* Collins, 80 N. Y. 1; Bissell *v.* Bissell, 1 Barb. 430, 3 How. Pr. 242; Leslie *v.* Leslie, 6 Abb. Pr. N. S. 193; Jacobson *v.* Jacobson, 12 N. Y. Civ. Proc. 198; Jones *v.* Jones, 2 Barb. Ch. 146.

Pennsylvania.— Waldron *v.* Waldron, 55 Pa. St. 231; Horst *v.* Horst, 18 Lanc. L. Rev. 14; O'Hara *v.* O'Hara, 2 Pa. Dist. 452, 12 Pa. Co. Ct. 603; Stork *v.* Stork, 2 Wkly. Notes Cas. 336.

See 17 Cent. Dig. tit. "Divorce," § 613.

47. Jones *v.* Jones, 2 Barb. Ch. 146; Wait *v.* Wait, 7 Leg. Gaz. (Pa.) 382, 23 Pittsb. Leg. J. (Pa.) 57.

48. *Arkansas.*—Hecht *v.* Hecht, 28 Ark. 92.

California.— Bohnert *v.* Bohnert, 91 Cal. 428, 27 Pac. 732; Turner *v.* Turner, 80 Cal. 141, 22 Pac. 72.

Georgia.— Williams *v.* Williams, 114 Ga. 772, 40 S. E. 782; Kendrick *v.* Kendrick, 105

3. Pendency of Suit — a. In General. Service of process or appearance by defendant is essential to the exercise of the power of granting temporary alimony. Until such time the suit is not pending and the court has no jurisdiction over defendant.[49]

b. State of Pleadings and Issues. Temporary alimony should not be allowed upon the application of plaintiff before the suit has so far progressed as to show to the court that a meritorious cause of action exists.[50] It may be granted in the discretion of the court before defendant's answer is filed.[51]

c. Pending Appeal. Temporary alimony should be allowed the wife pending an appeal, where it is shown that the appeal was taken in good faith and that the allowance is necessary,[52] either by the court below or by the appellate court,

Ga. 38, 31 S. E. 115; Bender *v.* Bender, 98 Ga. 717, 25 S. E. 924; Carlton *v.* Carlton, 44 Ga. 216.

Illinois.— Foss *v.* Foss, 100 Ill. 576; Blake *v.* Blake, 80 Ill. 523; Foote *v.* Foote, 22 Ill. 425; Stewartson *v.* Stewartson, 15 Ill. 145; Cooper *v.* Cooper, 85 Ill. App. 575 [*affirmed* in 185 Ill. 163, 56 N. E. 1059]; Lind *v.* Lind, 37 Ill. App. 178; Wooley *v.* Wooley, 24 Ill. App. 431.

Indiana.— Peck *v.* Peck, 113 Ind. 168, 15 N. E. 12; Logan *v.* Logan, 90 Ind. 107; Corey *v.* Corey, 81 Ind. 469; Stewart *v.* Stewart, 28 Ind. App. 378, 62 N. E. 1023.

Michigan.— Ross *v.* Griffith, 53 Mich. 5, 18 N. W. 534; Haines *v.* Haines, 35 Mich. 138.

Minnesota.— Stiehm *v.* Stiehm, 69 Minn. 461, 72 N. W. 708.

Missouri.— Marx *v.* Marx, 94 Mo. App. 172, 67 S. W. 934; Motley *v.* Motley, 93 Mo. App. 471, 67 S. W. 741; Lawlor *v.* Lawlor, 76 Mo. App. 293; Penningroth *v.* Penningroth, 71 Mo. App. 438; Mahn *v.* Mahn, 70 Mo. App. 337; Adams *v.* Adams, 49 Mo. App. 592, all holding that the appellate court can review an allowance for alimony either in gross or pending suit for divorce.

New York.— Patterson *v.* Patterson, 4 N. Y. App. Div. 146, 38 N. Y. Suppl. 637; Aldrich *v.* Aldrich, 74 Hun 638, 26 N. Y. Suppl. 344; Pettee *v.* Pettee, 19 N. Y. Suppl. 311.

Oklahoma.— McKennon *v.* McKennon, 10 Okla. 400, 63 Pac. 704.

49. *California.*— Baker *v.* Baker, 136 Cal. 302, 68 Pac. 971.

Delaware.— Holland *v.* Holland, 4 Houst. 86.

Georgia.— Yoemans *v.* Yoemans, 77 Ga. 124, 3 S. E. 354.

Indiana.— Lytle *v.* Lytle, 48 Ind. 200; Beard *v.* Beard, 21 Ind. 321.

Louisiana.— Madden *v.* Fielding, 19 La. Ann. 505.

Maine.— Russell *v.* Russell, 69 Me. 336.

Missouri.— Ellison *v.* Martin, 53 Mo. 575.

Ohio.— Cox *v.* Cox, 19 Ohio St. 502, 2 Am. Rep. 415.

Pennsylvania.— Corbin *v.* Corbin, 16 Pa. Co. Ct. 448; Quelin *v.* Quelin, 11 Pa. Co. Ct. 265; Jones *v.* Jones, 16 Wkly. Notes Cas. 259; Slocum *v.* Slocum, 2 Phila. 217.

West Virginia.— Coger *v.* Coger, 48 W. Va. 135, 35 S. E. 823.

Wisconsin.— Weishaupt *v.* Weishaupt, 27 Wis. 621.

See 17 Cent. Dig. tit. "Divorce," § 610.

See also *supra*, XIX, A, 6, a, (III), (A).

Service of complaint.— A motion for alimony *pendente lite* should not be noticed until after a copy of the complaint has been served, although the suit has been commenced by the service of a summons. Reese *v.* Reese, 2 Code Rep. (N. Y.) 81.

Non-appearance and alias writ.— An order for alimony *pendente lite* made after a service and return of the subpœna is good, although made before an appearance by defendant or the issue of an alias. Gaylord *v.* Gaylord, 57 N. C. 74.

50. Weishaupt *v.* Weishaupt, 27 Wis. 621. See also *infra*, XIX, B, 4, c.

If the answer on oath denies or explains the charges in the bill so that the court cannot decide on the pleadings that plaintiff has a meritorious cause of action an allowance for temporary alimony will be denied. Bissell *v.* Bissell, 3 How. Pr. (N. Y.) 242. And see Cray *v.* Cray, 32 N. J. Eq. 25; Anthony *v.* Anthony, 11 N. J. Eq. 70; Tyrrell *v.* Tyrrell, (N. J. Ch. 1886) 3 Atl. 266; Miller *v.* Miller, 27 Misc. (N. Y.) 758, 59 N. Y. Suppl. 473.

51. Foss *v.* Foss, 100 Ill. 576; Moe *v.* Moe, 39 Wis. 308, holding that where the answer was served after the motion for temporary alimony was made and before it was determined, but was not filed until after its determination, and was not before the court on the hearing of the motion, the order granting alimony would not be disturbed if justified by the facts stated in the petition. *Contra*, Allen *v.* Allen, 30 Fed. Cas. No. 18,223, Hempst. 58.

52. *Alabama.*— *Ex p.* King, 27 Ala. 387.

California.— Reilly *v.* Reilly, 60 Cal. 624.

Georgia.— Holleman *v.* Holleman, 69 Ga. 676.

Illinois.— Hunter *v.* Hunter, 100 Ill. 477.

Iowa.— Miller *v.* Miller, 43 Iowa 325.

Michigan.— Zeigenfuss *v.* Zeigenfuss, 21 Mich. 414; Chaffee *v.* Chaffee, 14 Mich. 463; Goldsmith *v.* Goldsmith, 6 Mich. 285.

Missouri.— Motley *v.* Motley, 93 Mo. App. 473, 67 S. W. 741; Watkins *v.* Watkins, 66 Mo. App. 468; Clarkson *v.* Clarkson, 20 Mo. App. 94; Miller *v.* Miller, 12 Mo. App. 593.

Nebraska.— Callahan *v.* Callahan, 7 Nebr. 38.

New York.— McBride *v.* McBride, 119 N. Y.

according to the practice in the particular jurisdiction.[53] It has been held that in the discretion of the court temporary alimony continues until the termination of the litigation, including an appeal from the judgment rendered below.[54]

d. After Final Decree. Temporary alimony cannot be allowed after a final decree or dismissal of the suit, for then the suit is no longer pending and the court has no jurisdiction of the parties.[55]

4. Matters Essential to Allowance — a. Existence of Marriage — (i) *In General.* The right to alimony does not exist in the absence of a valid, subsisting, marital relation, since without this there is no obligation for the support of the alleged wife.[55]

(ii) *Common-Law or De Facto Marriage.* If a marriage *de facto* is admitted, and the parties have in good faith cohabited as husband and wife, the fact that the validity of the marriage as a marriage *de jure* is questioned will not preclude the right of the wife to an allowance of temporary alimony;[57] and a common-law marriage is also sufficient to authorize an allowance of temporary alimony.[58]

(iii) *Proof of Marriage.* In some jurisdictions, unless the marriage is admitted, there must be a preliminary investigation of the question of marriage

519, 23 N. E. 1065; Haddock *v.* Haddock, 75 N. Y. App. Div. 565, 78 N. Y. Suppl. 304; Wood *v.* Wood, 7 Lans. 204; Forrest *v.* Forrest, 3 Bosw. 661.

Pennsylvania.— Middleton *v.* Middleton, 19 Pa. Co. Ct. 353.

See 17 Cent. Dig. tit. "Divorce," § 625.

53. See *supra*, XIX, A, 6, a, (II).

54. Holleman *v.* Holleman, 69 Ga. 676; Watkins *v.* Watkins, 66 Mo. App. 468; McNeil *v.* McNeil, 19 Pa. Co. Ct. 93. See, however, Wood *v.* Wood, 7 Lans. (N. Y.) 204, holding that if reasons exist for the payment of alimony pending appeal, and the judgment contains no direction in that respect, a new application should be made therefor.

55. *Illinois.*— Chestnut *v.* Chestnut, 77 Ill. 346; Newman *v.* Newman, 69 Ill. 167.

Indiana.— Harrell *v.* Harrell, 39 Ind. 185.

Missouri.— Waters *v.* Waters, 49 Mo. 385.

New York.— McBride *v.* McBride, 119 N. Y. 519, 23 N. E. 1065; Erkenbach *v.* Erkenbach, 96 N. Y. 456; Kamp *v.* Kamp, 59 N. Y. 212; Winkemeier *v.* Winkemeier, 11 N. Y. App. Div. 199, 42 N. Y. Suppl. 586.

Tennessee.— Persons *v.* Persons, 7 Humphr. 183.

See, however, O'Neil *v.* O'Neil, 100 Iowa 743, 69 N. W. 523 (holding that the dismissal by the husband of his bill does not deprive the court of jurisdiction to grant a motion for an allowance to the wife for her expenses which was filed prior to the dismissal); Woodward *v.* Woodward, 84 Mo. App. 328 (holding that where a dismissal is made by plaintiff before alimony is allowed, the order of dismissal may be set aside to permit the allowance of alimony).

56. *California.*— Hite *v.* Hite, 124 Cal. 389, 57 Pac. 227, 71 Am. St. Rep. 82, 45 L. R. A. 793, 55 Pac. 900; Sharon *v.* Sharon, 75 Cal. 1, 16 Pac. 345.

Colorado.— Eickhoff *v.* Eickhoff, 29 Colo. 295, 68 Pac. 237, 93 Am. St. Rep. 64; Taylor *v.* Taylor, 7 Colo. App. 549, 44 Pac. 675; Kiefer *v.* Kiefer, 4 Colo. App. 506, 36 Pac. 621.

Florida.— Banks *v.* Banks, 42 Fla. 362, 29 So. 318.

Georgia.— Roberts *v.* Roberts, 114 Ga. 590, 40 S. E. 702; Roseberry *v.* Roseberry, 17 Ga. 139; McGee *v.* McGee, 10 Ga. 477.

Illinois.— McKenna *v.* McKenna, 70 Ill. App. 340.

Iowa.— Shaw *v.* Shaw, 92 Iowa 722, 61 N. W. 368; Smith *v.* Smith, 61 Iowa 138, 15 N. W. 867; McFarland *v.* McFarland, 51 Iowa 565, 2 N. W. 269; Wilson *v.* Wilson, 49 Iowa 544; York *v.* York, 34 Iowa 530; Blythe *v.* Blythe, 25 Iowa 266.

Kansas.— Wilhite *v.* Wilhite, 41 Kan. 154, 21 Pac. 173; Litowich *v.* Litowich, 19 Kan. 451, 27 Am. Rep. 145.

Louisiana.— Holbrook *v.* Holbrook, 32 La. Ann. 13.

Michigan.— Lapp *v.* Lapp, 43 Mich. 287, 5 N. W. 317.

New Jersey.— Freeman *v.* Freeman, 49 N. J. Eq. 102, 23 Atl. 113; Vreeland *v.* Vreeland, 18 N. J. Eq. 43.

New York.— Collins *v.* Collins, 71 N. Y. 269, 80 N. Y. 1; Mann *v.* Mann, 75 N. Y. 614; Brinkley *v.* Brinkley, 50 N. Y. 184, 10 Am. Rep. 460; Starkweather *v.* Starkweather, 29 Hun 488; Appleton *v.* Warner, 51 Barb. 270; Kinzey *v.* Kinzey, 7 Daly 460; Blinks *v.* Blinks, 5 Misc. 193, 25 N. Y. Suppl. 768; Herforth *v.* Herforth, 2 Abb. Pr. N. S. 483; Humphreys *v.* Humphreys, 49 How. Pr. 140.

Ohio.— Martin *v.* Martin, Wright 104.

South Dakota.— Bardin *v.* Bardin, 4 S. D. 305, 56 N. W. 1069, 46 Am. St. Rep. 791.

Virginia.— Purcell *v.* Purcell, 4 Hen. & M. 507.

See 17 Cent. Dig. tit. "Divorce," § 615. See, however, *infra*, XIX, D, 3.

57. Eickhoff *v.* Eickhoff, 29 Colo. 295, 68 Pac. 237, 93 Am. St. Rep. 64; Brown *v.* Brown, 18 Ill. App. 445; Cray *v.* Cray, 32 N. J. Eq. 25; Vroom *v.* Marsh, 29 N. J. Eq. 15; North *v.* North, 1 Barb. Ch. (N. Y.) 241.

58. *California.*— Sharon *v.* Sharon, 75 Cal. 1, 16 Pac. 345.

before temporary alimony is allowed,[59] and the burden of proving the marriage is upon the applicant.[60] The evidence of marriage required on this preliminary hearing need not, however, amount to absolute proof. It is sufficient if it shows a fair probability that the wife will on the final hearing succeed in establishing the marriage.[61]

b. Pecuniary Needs of Parties — (i) *Financial Ability of Wife.* The wife must show upon her application for temporary alimony that she has no means under her control sufficient to maintain herself pending the litigation. If she has sufficient means of her own to provide for her separate maintenance no such alimony will be allowed.[62]

Illinois.— Bowman *v.* Bowman, 24 Ill. App. 165.

Iowa.— McFarland *v.* McFarland, 51 Iowa 565, 2 N. W. 269.

Kentucky.— Strode *v.* Strode, 3 Bush 227, 96 Am. Dec. 211.

New York.— Vincent *v.* Vincent, 16 Daly 634, 17 N. Y. Suppl. 497; Herforth *v.* Herforth, 2 Abb. Pr. N. S. 483; Smith *v.* Smith, 1 Edw. 255.

Virginia.— Purcell *v.* Purcell, 4 Hen. & M. 507.

See also *supra*, VIII, A, note 68.

Meretricious cohabitation.—If the cohabitation relied upon as constituting the marriage be meretricious it will not suffice. York *v.* York, 34 Iowa 530; Humphreys *v.* Humphreys, 49 How. Pr. (N. Y.) 140.

59. Banks *v.* Banks, 42 Fla. 362, 29 So. 318 (holding that an unverified bill alleging marriage, which is specifically denied by defendant under oath, is not sufficient to justify an award of alimony *pendente lite*); McKenna *v.* McKenna, 70 Ill. App. 340; Shaw *v.* Shaw, 92 Iowa 722, 61 N. W. 368; Freeman *v.* Freeman, 49 N. J. Eq. 102, 23 Atl. 113 (holding that where in answer to the allegation of marriage facts are stated showing that the alleged wife was not competent, when the marriage took place, to contract matrimony, they must, in order to entitle the applicant to alimony *pendente lite*, be denied or explained to the satisfaction of the court). *Contra*, Schonwald *v.* Schonwald, 62 N. C. 215 (holding that the court is confined to the allegations of marriage contained in the wife's petition); Kline *v.* Kline, 1 Phila. (Pa.) 383 (holding that a wife who denies under oath plaintiff's charge of a preëxisting marriage is entitled to temporary alimony without a hearing on the question of marriage).

60. McFarland *v.* McFarland, 51 Iowa 565, 2 N. W. 269; Collins *v.* Collins, 80 N. Y. 1.

Where an actual marriage is admitted or shown, and its existence in law is sought to be avoided by some fact set up by the husband, the burden is on him to prove that fact, and unless he does so the alleged wife is entitled to temporary alimony. Carroll *v.* Carroll, 68 Mo. App. 190; Vandegrift *v.* Vandegrift, 30 N. J. Eq. 76; Brinkley *v.* Brinkley, 50 N. Y. 184, 10 Am. Rep. 460; Vincent *v.* Vincent, 16 Daly (N. Y.) 534, 17 N. Y. Suppl. 497. See also Kline *v.* Kline, 1 Phila. (Pa.) 383. See, however, Shaw *v.* Shaw, 92 Iowa 722, 61 N. W. 368; Freeman *v.* Freeman, 49 N. J. Eq. 102, 23 Atl. 113.

61. *Illinois.*— Bowman *v.* Bowman, 24 Ill. App. 165.

Montana.— Finkelstein *v.* Finkelstein, 14 Mont. 1, 34 Pac. 1090.

New Jersey.— Vandegrift *v.* Vandegrift, 30 N. J. Eq. 76.

New York.— Collins *v.* Collins, 71 N. Y. 269; Brinkley *v.* Brinkley, 50 N. Y. 184, 10 Am. Rep. 460; Vincent *v.* Vincent, 16 Daly 534, 17 N. Y. Suppl. 497; Herforth *v.* Herforth, 2 Abb. Pr. N. S. 483.

South Dakota.— Bardin *v.* Bardin, 4 S. D. 305, 56 N. W. 1069, 46 Am. St. Rep. 791.

A preponderance of testimony in favor of a marriage is sufficient to base a judgment for alimony pending suit. Fisk *v.* Fisk, 22 La. Ann. 401. Thus where the evidence is equally divided, and a disinterested person testifies that he knows the parties and was present at the marriage, the marriage is sufficiently established. Smith *v.* Smith, 61 Iowa 138, 15 N. W. 807. In California a preponderance of the evidence is necessary. A mere *prima facie* showing is not sufficient. Hite *v.* Hite, 124 Cal. 389, 57 Pac. 227, 71 Am. St. Rep. 82, 45 L. R. A. 793.

Character of evidence.— The proceeding should be based on legal evidence — hearsay and other species of illegal evidence being rejected. Freeman *v.* Freeman, 49 N. J. Eq. 102, 23 Atl. 113.

62. *Arkansas.*— Glenn *v.* Glenn, 44 Ark. 46.

California.— Turner *v.* Turner, 80 Cal. 141, 22 Pac. 72.

Florida.— Haddon *v.* Haddon, 36 Fla. 413, 18 So. 779.

Georgia.— Pinckard *v.* Pinckard, 22 Ga. 31, 68 Am. Dec. 481.

Illinois.— Jenkins *v.* Jenkins, 91 Ill. 167; Newman *v.* Newman, 69 Ill. 167; Carlin *v.* Carlin, 65 Ill. App. 160; Harding *v.* Harding, 40 Ill. App. 202 [*affirmed* in 144 Ill. 588, 32 N. E. 206, 21 L. R. A. 310]; Rawson *v.* Rawson, 37 Ill. App. 491. *Compare* Ayers *v.* Ayers, 41 Ill. App. 226, holding that there is no presumption that a married woman of sixteen years has property available for her support and the expenses of the litigation.

Indiana.— Kenemer *v.* Kenemer, 26 Ind. 330.

Maryland.— Coles *v.* Coles, 2 Md. Ch. 341.

Michigan.— Rose *v.* Rose, 53 Mich. 585, 19 N. W. 195; Ross *v.* Ross, 47 Mich. 185, 10 N. W. 193; Story *v.* Story, Walk. 421.

Mississippi.— Porter *v.* Porter, 41 Miss. 116.

(II) *Financial Ability of Husband.* The husband's ability to pay temporary alimony should be shown by the wife before the allowance is made.[63] The allowance may be based on the husband's earnings, or his earning capacity, although he is not possessed of money or property.[64]

c. Probability of Applicant's Success. No allowance for temporary alimony should be made, if it appears of record that the suit of the applicant, or the defense interposed by her, as the case may be, is without any just or reasonable foundation, so that there is no probability of her success,[65] as where for instance

Missouri.— Penningroth *v.* Penningroth, 71 Mo. App. 438; Mahn *v.* Mahn, 70 Mo. App. 337.

New Jersey.— Westerfield *v.* Westerfield, 36 N. J. Eq. 195; Marker *v.* Marker, 11 N. J. Eq. 256; Anthony *v.* Anthony, 9 N. J. L. J. 369.

New York.— Collins *v.* Collins, 80 N. Y. 1 (holding that the allowance of temporary alimony when the wife has sufficient means is not within the discretion of the court); Poillon *v.* Poillon, 75 N. Y. App. Div. 536, 78 N. Y. Suppl. 323; Maxwell *v.* Maxwell, 28 Hun 566; Morrell *v.* Morrell, 2 Barb. 480; Llamosas *v.* Llamosas, 4 Thomps. & C. 574; Hoffman *v.* Hoffman, 7 Rob. 474 (holding that if the wife is engaged in business for herself, or earns from her own labor sufficient to pay for her support, she is not entitled to temporary alimony, especially if the circumstances of the husband are no better than hers).

Pennsylvania.— Graves *v.* Cole, 19 Pa. St. 171; Shoemaker *v.* Shoemaker, 5 Pa. Dist. 449; Laciar *v.* Laciar, 6 Pa. Co. Ct. 406; Miller *v.* Miller, 1 Wkly. Notes Cas. 415; Toole *v.* Toole, 1 Wkly. Notes Cas. 96; Beers *v.* Beers, 4 Lanc. L. Rev. 154; Atkinson *v.* Atkinson, 1 Lehigh Val. L. Rep. 149.

Tennessee.—Thompson *v.* Thompson, 3 Head 527; Lishey *v.* Lishey, 2 Tenn. Ch. 1.

England.— Burrows *v.* Burrows, L. R. 1 P. 554; Thompson *v.* Thompson, L. R. 1 P. 553, both cases holding that a wife who has maintained herself during a separation of years and can still do so will apply in vain for temporary alimony, since such alimony "would improve her condition and thus promote litigation."

See 17 Cent. Dig. tit. "Divorce," § 616.

Adequacy of income of wife.— Temporary alimony will not be denied the wife because she possesses a separate estate if the income derived therefrom is not sufficient for her support. Killiam *v.* Killiam, 25 Ga. 186; Harding *v.* Harding, 144 Ill. 588, 32 N. E. 206, 21 L. R. A. 310; Campbell *v.* Campbell, 73 Iowa 482, 35 N. W. 522 (holding that a division of property made upon a separation does not bar the wife from temporary alimony, where her necessities are not met by the income of the property held by her); Potts *v.* Potts, 68 Mich. 492, 36 N. W. 240 (holding that the possession by the wife of non-productive property, or property not available in her hands to obtain the necessary means to prosecute a suit for divorce, will not prevent temporary alimony); Ross *v.* Griffin, 53 Mich. 5, 18 N. W. 534; Merritt *v.* Merritt, 99 N. Y. 643, 1 N. E. 605; Hoffman *v.* Hoffman, 7 Rob. (N. Y.) 474. She need not resort to the *corpus* of her estate before calling on that of the husband. Merritt *v.* Merritt, *supra*; Bailey *v.* Bailey, 127 N. C. 474, 37 S. E. 502; Miller *v.* Miller, 75 N. C. 70.

63. *California.*— Peyre *v.* Peyre, 79 Cal. 336, 21 Pac. 838.

Illinois.— Burgess *v.* Burgess, 25 Ill. App. 525; Becker *v.* Becker, 15 Ill. App. 247.

New York.— Poillon *v.* Poillon, 75 N. Y. App. Div. 536, 78 N. Y. Suppl. 323; Forrest *v.* Forrest, 8 Bosw. 640.

Pennsylvania.— Ormsby *v.* Ormsby, 1 Phila. 578; Wait *v.* Wait, 7 Leg. Gaz. 382, 23 Pittsb. Leg. J. 57.

Texas.— Wright *v.* Wright, 3 Tex. 168.

Washington.— Bachelor *v.* Bachelor, 30 Wash. 203, 70 Pac. 491.

England.— Phillips *v.* Phillips, 34 L. J. P. & Adm. 107, 4 Swab. & Tr. 129; Capstick *v.* Capstick, 33 L. J. P. & M. 105; Fletcher *v.* Fletcher, 31 L. J. P. & M. 82, 6 L. T. Rep. N. S. 134, 2 Swab. & Tr. 434, 10 Wkly. Rep. 448; Goodall *v.* Goodall, 2 Lee Eccl. 264, 6 Eng. Eccl. 119; Butler *v.* Butler, 1 Lee Eccl. 38, 5 Eng. Eccl. 299; Beavan *v.* Beavan, 8 Jur. N. S. 1110, 32 L. J. P. & M. 36, 7 L. T. Rep. N. S. 435, 2 Swab. & Tr. 652, 11 Wkly. Rep. 155.

Proof of his ability may be made by affidavits of the wife or others qualified to state his property and income. Glenn *v.* Glenn, 44 Ark. 46; Burgess *v.* Burgess, 25 Ill. App. 525; Gaylord *v.* Gaylord, 57 N. C. 74; Lilly *v.* Lilly, 1 Wkly. Notes Cas. (Pa.) 160.

Allegation of husband's ability see *supra*, XIX, A, 6, b, (II).

Inability to pay as a defense see *infra*, XIX, B, 5, e.

64. Peyre *v.* Peyre, 79 Cal. 336, 21 Pac. 838; Eidenmuller *v.* Eidenmuller, 37 Cal. 364.

65. *Georgia.*— Williams *v.* Williams, 114 Ga. 772, 40 S. E. 782.

Illinois.— Wooley *v.* Wooley, 24 Ill. App. 431.

Mississippi.— Porter *v.* Porter, 41 Miss. 116.

New Jersey.— Glasser *v.* Glasser, 28 N. J. Eq. 22.

New York.— Deisler *v.* Deisler, 65 N. Y. App. Div. 208, 72 N. Y. Suppl. 560; Stearns *v.* Stearns, 33 N. Y. App. Div. 630, 53 N. Y. Suppl. 348; Bailie *v.* Bailie, 30 N. Y. App. Div. 461, 52 N. Y. Suppl. 228; Downing *v.* Downing, 23 N. Y. App. Div. 559, 48 N. Y. Suppl. 727; Desbrough *v.* Desbrough, 29 Hun 592; Atwater *v.* Atwater, 53 Barb. 621; Snyder *v.* Snyder, 3 Barb. 621; Monk *v.* Monk, 7 Rob. 153; Glaser *v.* Glaser, 36 Misc. 231, 73 N. Y. Suppl. 284; Ronan *v.* Ronan, 32

her complaint charges adultery on information and belief, which is unequivocally denied by defendant.[66] If, however, there is some competent evidence of the husband's guilt, the wife will be allowed temporary alimony.[67]

d. Good Faith of Applicant. If it appears to the satisfaction of the court that the suit by the wife has not been instituted in good faith to secure a divorce, but merely to collect money from the husband or to compel him to support her, alimony *pendente lite* will not be allowed.[68]

5. Defenses and Objections — a. Misconduct of Wife. If the wife is guilty of marital misconduct, she is not entitled to temporary alimony.[69] Consequently if she admits, or does not deny, charges of misconduct in the complaint which are sufficient to entitle the husband to a divorce, her right to temporary alimony is barred.[70] The merits of the case will be investigated only to an extent sufficient to determine whether the bill is exhibited in good faith.[71] The fact that there is strong evidence in support of the wife's misconduct is not alone sufficient to preclude an allowance of temporary alimony,[72] and if the misconduct is denied, or a reasonable defense, such as condonation, connivance, or the like, is shown, her application will be allowed.[73]

b. Agreement as to Alimony. In some states the wife may make a *bona fide*

Misc. 467, 66 N. Y. Suppl. 799; Browne *v.* Browne, 9 N. Y. Civ. Proc. 180; Douglas *v.* Douglas, 13 Abb. Pr. N. S. 291; Fowler *v.* Fowler, 4 Abb. Pr. 411; Carpenter *v.* Carpenter, 19 How. Pr. 539; Bissell *v.* Bissell, 3 How. Pr. 242; Jones *v.* Jones, 2 Barb. Ch. 146. See, however, Strong *v.* Strong, 5 Rob. 612, holding that where there has been a previous trial, resulting in a disagreement of the jury, temporary alimony will be allowed the wife, although she has neither made oath to her own innocence, nor produced affidavits to support recriminatory charges made by her in defense.

North Carolina.— Scoggins *v.* Scoggins, 80 N. C. 318; Sparks *v.* Sparks, 69 N. C. 319.

Tennessee.— Burrow *v.* Burrow, 6 Lea 499; Lishey *v.* Lishey, 2 Tenn. Ch. 1.

See 17 Cent. Dig. tit. "Divorce," § 617.

66. Williams *v.* Williams, 114 Ga. 772, 40 S. E. 782; Downing *v.* Downing, 23 N. Y. App. Div. 559, 48 N. Y. Suppl. 727; Kock *v.* Kock, 42 Barb. (N. Y.) 515; Moriarty *v.* Moriarty, 58 N. Y. Super. Ct. 279, 10 N. Y. Suppl. 228; Monk *v.* Monk, 7 Rob. (N. Y.) 153.

67. Gray *v.* Gray, 78 Hun (N. Y.) 610, 28 N. Y. Suppl. 856.

68. Kirrigan *v.* Kirrigan, 15 N. J. Eq. 146. And see Bradford *v.* Bradford, 80 Miss. 467, 31 So. 963.

69. Bedell *v.* Bedell, 1 Johns. Ch. (N. Y.) 604, holding licentious conduct bars the right to temporary alimony.

Adultery.— Repeated acts of adultery since the marriage (Kock *v.* Kock, 42 Barb. (N. Y.) 515; Pratz *v.* Pratz, 11 Pa. Co. Ct. 252) or a continuance of adulterous cohabitation (Griffin *v.* Griffin, 23 How. Pr. (N. Y.) 189 [*affirming* 21 How. Pr. 364]; Brenner *v.* Brenner, 5 Kulp (Pa.) 6; Miller *v.* Miller, 2 Kulp (Pa.) 309) will preclude temporary alimony.

Fraud of wife.— Temporary alimony should not be refused in an action by the husband for a divorce on the ground that she was pregnant at the time of marriage and concealed the fact from him. Frith *v.* Frith, 18 Ga. 273, 63 Am. Dec. 289.

Provocation for cruelty.—The wife's jealous disposition does not excuse the violence on the part of the husband, and so preclude temporary alimony. Huffnagle *v.* Huffnagle, 10 N. J. L. J. 209.

70. Scott *v.* Scott, 17 Ind. 309; Marker *v.* Marker, 11 N. J. Eq. 256; Bray *v.* Bray, 6 N. J. Eq. 27; Collins *v.* Collins, 71 N. Y. 269; Palmer *v.* Palmer, Sheld. (N. Y.) 89 (the last two cases holding that where a recriminatory charge of adultery made by defendant against plaintiff wife is supported by uncontroverted evidence, an application for alimony *pendente lite* should be denied); Bailie *v.* Bailie, 30 N. Y. App. Div. 461, 52 N. Y. Suppl. 228; Bissell *v.* Bissell, 3 How. Pr. (N. Y.) 242. It has been held, however, that a wife applying for alimony is considered as innocent and hence, although not answering a charge of adultery in time, she is still entitled to an allowance (Smith *v.* Smith, 32 L. J. P. & M. 91, 4 Swab. & Tr. 228, 11 Wkly. Rep. 257), and that her supposed guilt is never to be taken into consideration against her (Crampton *v.* Crampton, 32 L. J. P. & M. 142).

71. Cooper *v.* Cooper, 85 Ill. App. 575 [*affirmed* in 185 Ill. 163, 56 N. E. 1059].

Conflicting affidavits.— The question of the wife's guilt should not be tried by conflicting affidavits. Great injustice might be done if the husband were not compelled to furnish to his wife the means of having so important a question of fact decided in the usual way. Boesenberg *v.* Boesenberg, 50 N. Y. App. Div. 622, 63 N. Y. Suppl. 770; Frickel *v.* Frickel, 4 Misc. (N. Y.) 382, 24 N. Y. Suppl. 483.

Good faith as essential to an allowance of alimony *pendente lite* see *supra*, XIX, B, 4, d.

72. Brooks *v.* Brooks, 18 Wkly. Notes Cas. (Pa.) 115.

73. Kendrick *v.* Kendrick, 105 Ga. 38, 31 S. E. 115; Boesenberg *v.* Boesenberg, 50 N. Y. App. Div. 622, 63 N. Y. Suppl. 770;

settlement for alimony with her husband which will be a bar to an additional provision for her support by way of temporary alimony.[74]

c. Other Provision For Wife's Support. Temporary alimony will not be allowed where ample provision has been otherwise made by the husband for the wife's support.[75]

d. Offer to Provide. The wife's refusal to accept support offered to her by her husband at his house does not constitute a defense to her application for temporary alimony.[76]

e. Poverty of Husband. In an action by a husband against his wife for divorce his poverty is no defense to an application for temporary alimony, since he should not be permitted to prosecute the action if he cannot furnish the wife with means to make her defense;[77] but where the suit is brought by the wife, the husband's poverty may be pleaded by him in defense to the application.[78]

f. Waiver of Defenses and Objections. Where a separation agreement pro-

Morrell *v.* Morrell, 2 Barb. (N. Y.) 480; Rublinsky *v.* Rublinsky, 24 N. Y. Suppl. 920; Leslie *v.* Leslie, 6 Abb. Pr. N. S. (N. Y.) 193; Strong *v.* Strong, 1 Abb. Pr. N. S. (N. Y.) 358; Miller *v.* Miller, 43 How. Pr. (N. Y.) 125; Hallock *v.* Hallock, 4 How. Pr. (N. Y.) 160; Osgood *v.* Osgood, 2 Paige (N. Y.) 621; Wood *v.* Wood, 2 Paige (N. Y.) 108; Hammond *v.* Hammond, Clarke (N. Y.) 151; Webber *v.* Webber, 79 N. C. 572.

Sufficiency of denial.— Ordinarily the wife's denial of the alleged misconduct is sufficient to entitle her to alimony unless the evidence produced against her is so strong as to render it improbable that she should succeed (Glaser *v.* Glaser, 36 Misc. (N. Y.) 231, 73 N. Y. Suppl. 284); but a denial which is merely formal, leaving actual facts testified to by reputable witnesses and which establish her guilt undenied and unexplained, is not sufficient to justify an award of alimony (Stearns *v.* Stearns, 33 N. Y. App. Div. 630, 53 N. Y. Suppl. 348).

74. Killiam *v.* Killiam, 25 Ga. 186; McLaren *v.* McLaren, 33 Ga. Suppl. 99; Gregory *v.* Gregory, 32 N. J. Eq. 424; Collins *v.* Collins, 80 N. Y. 1, 71 N. Y. 269 (holding that where, at the time an action for divorce is instituted, the parties are living apart in pursuance of articles of separation, and suitable provision has been made by the husband for the separate maintenance of the wife, alimony *pendente lite* should not be allowed); Grube *v.* Gruhe, 65 N. Y. App. Div. 239, 72 N. Y. Suppl. 529; Chase *v.* Chase, 29 Hun (N. Y.) 527. See also *infra*, XIX, B, 5, c. See, however, Moon *v.* Baum, 58 Ind. 194 (holding that an agreement made during the pendency of the suit without the sanction of the court will not be enforced); Campbell *v.* Campbell, 73 Iowa 482, 35 N. W. 522 (holding that a division of property made pursuant to a separation agreement does not bar the wife from temporary alimony where there was no stipulation therein to that effect).

75. Coles *v.* Coles, 2 Md. Ch. 341 (holding that where the wife had received, since the commencement of the suit, a sum of money in derogation of the marital rights of the husband, which he consented that she should retain and apply to the expenses of the suit, the court refused to order him to pay anything further to enable her to prosecute her suit, but granted her alimony *pendente lite*); McCloskey *v.* McCloskey, 68 Mo. App. 199 (where the husband permitted his wife and children to remain in the family residence and paid all the running expenses of the establishment, and an allowance for support during the pendency of the suit was denied); Bartlett *v.* Bartlett, Clarke (N. Y.) 460 (where the father of the wife had agreed with the husband to provide for her support on condition that the husband would make no claim for her services, and alimony *pendente lite* was denied). See also *supra*, XIX, B, 5, b.

However, the fact that the husband has provided for his wife's support in the past and promises to do so in the future does not divest the court of authority to award alimony if the circumstances of the case demand it. Anderson *v.* Anderson, 137 Cal. 225, 69 Pac. 1061; Pinckard *v.* Pinckard, 22 Ga. 31, 68 Am. Dec. 481. Offer to provide support as defense see *infra*, XIX, B, 5, d.

76. Downing *v.* Downing, 7 Kulp (Pa.) 138; Laciar *v.* Laciar, 6 Pa. Co. Ct. 406; Gleason *v.* Gleason, 12 Wkly. Notes Cas. (Pa.) 408.

Promise to furnish support as defense see *supra*, note 75.

77. Mangels *v.* Mangels, 6 Mo. App. 481; Cohen *v.* Cohen, 11 Misc. (N. Y.) 704, 32 N. Y. Suppl. 1082; Frickel *v.* Frickel, 4 Misc. (N. Y.) 382, 24 N. Y. Suppl. 483; Rublinsky *v.* Rublinsky, 24 N. Y. Suppl. 920; Hallock *v.* Hallock, 4 How. Pr. (N. Y.) 160.

78. Wester *v.* Martin, 115 Ga. 776, 42 S. E. 81; Vinson *v.* Vinson, 94 Ga. 492, 19 S. E. 898; Jenkins *v.* Jenkins, 69 Ga. 483; Laurie *v.* Laurie, 9 Paige (N. Y.) 234; Wait *v.* Wait, 7 Leg. Gaz. (Pa.) 382.

Mere lack of present means will not in all cases be sufficient as a defense, especially where the husband is physically able to earn money for the support of himself and his family. Lane *v.* Lane, 22 Ill. App. 529; Muse *v.* Muse, 84 N. C. 35.

Evidence.— The evidence produced by the husband must show convincingly that he is unable to pay alimony pending the suit. Ward *v.* Ward, 21 N. Y. Suppl. 795, 29 Abb. N. Cas. (N. Y.) 256.

vides that the husband shall pay to the wife a certain sum for her support, and that on default an order may be made granting alimony at the same rate, the husband cannot, on a motion for temporary alimony, object that the wife has not a meritorious cause of action;[79] nor can the husband set up in defense any misconduct of the wife not alleged by him in recrimination.[80]

6. PROCEDURE — a. Application. The practice in the several states controls the nature of the proceeding for an allowance of temporary alimony, and the form and sufficiency of the application. In some states the application is not required to be instituted by petition but may be made on affidavit and motion.[81]

b. Notice. It has been held that alimony *pendente lite* may be granted without notice,[82] but where under the practice it is granted upon motion, the notice required for motions should be given,[83] unless other notice is expressly provided by statute.[84]

c. Submission to Jury or Referee. The allowance of temporary alimony being within the discretion of the court,[85] it is not necessary or proper that the question should be submitted to a jury.[86] A reference, however, may be directed by the court in its discretion to aid it in the determination of the questions in issue.[87]

d. Proof. An order for temporary alimony will not be made upon a mere presumption. There must be sufficient and legal evidence in support of the essential facts,[88] either by affidavits of the applicant and other persons,[89] or by depositions taken upon notice to the other party,[90] or by the oral testimony of the applicant.[91]

7. AMOUNT — a. In General. The amount allowed as temporary alimony is within the judicial discretion of the court, as is also the allowance itself,[92] to be governed by the needs of the wife, the husband's ability to pay, and all the circumstances of the particular case.[93] Consideration should be given to any cir-

79. Thrall *v.* Thrall, 83 Hun (N. Y.) 188, 31 N. Y. Suppl. 591.

80. Pullen *v.* Pullen, (N. J. Ch. 1889) 17 Atl. 310.

81. Kirsch *v.* Kirsch, 18 N. Y. Suppl. 447; Reeves *v.* Reeves, 82 N. C. 348; Gaylord *v.* Gaylord, 57 N. C. 74.

82. Becker *v.* Becker, 15 Ill. App. 247. *Contra*, Goss *v.* Goss, 29 Ga. 109.

83. Sanchez *v.* Sanchez, 21 Fla. 346; Wilde *v.* Wilde, 2 Nev. 306; Longfellow *v.* Longfellow, Clarke (N. Y.) 344.

84. Zimmerman *v.* Zimmerman, 113 N. C. 432, 18 S. E. 334; Lea *v.* Lea, 104 N. C. 603, 10 S. E. 488, 17 Am. St. Rep. 692.

Order to show cause.— Where the statute authorizes the court to grant temporary alimony upon application of the wife, the court may make an order requiring the husband to appear and show cause why it should not be granted, and in such case no notice of the application need be given to the husband prior to the making of the order. Mudd *v.* Mudd, 98 Cal. 320, 33 Pac. 114; Fletcher *v.* Henley, 13 La. Ann. 150.

85. See *supra*, XIX, B, 2.

86. Swearingen *v.* Swearingen, 19 Ga. 265; Roseberry *v.* Roseberry, 17 Ga. 139; Amos *v.* Amos, 4 N. J. Eq. 171; Forest *v.* Forest, 3 Abb. Pr. (N. Y.) 144 [*affirmed* in 25 N. Y. 501].

87. Jeter *v.* Jeter, 36 Ala. 391; Ward *v.* Ward, 21 N. Y. Suppl. 795, 29 Abb. N. Cas. (N. Y.) 256; Herforth *v.* Herforth, 2 Abb. Pr. N. S. (N. Y.) 483; Gerard *v.* Gerard, 2 Barb. Ch. (N. Y.) 73.

88. Walling *v.* Walling, 16 N. J. Eq. 389. See, however, De Llamosas *v.* Llamosas, 62 N. Y. 618, holding that the court may determine the amount without testimony, relying upon its own experience, and upon the facts and circumstances of the case as they appear to it from the pleadings and other papers and proceedings.

89. Campbell *v.* Campbell, 50 S. W. 849, 21 Ky. L. Rep. 19; Story *v.* Story, Walk. (Mich.) 421; Cray *v.* Cray, 32 N. J. Eq. 25.

A verified answer may be read as an affidavit on a motion for temporary alimony, although the denial therein of the charges contained in the bill does not necessarily preclude the allowance of the alimony. Anthony *v.* Anthony, 11 N. J. Eq. 70; Tyrrell *v.* Tyrrell, (N. J. Ch. 1886) 3 Atl. 266. *Compare* Shearin *v.* Shearin, 58 N. C. 233.

90. Lilly *v.* Lilly, 1 Wkly. Notes Cas. (Pa.) 160.

91. Stewart *v.* Stewart, 28 Ind. App. 378, 62 N. E. 1023.

92. See *supra*, XIX, B, 2.

93. *Arkansas.*— Hecht *v.* Hecht, 28 Ark. 92; Bauman *v.* Bauman, 18 Ark. 320, 68 Am. Dec. 171.

California.— Schammel *v.* Schammel, 74 Cal. 36, 15 Pac. 364; White *v.* White, 73 Cal. 105, 14 Pac. 393.

Colorado.— Eickhoff *v.* Eickhoff, 29 Colo. 295, 68 Pac. 237, 93 Am. St. Rep. 64; Cairns *v.* Cairns, 29 Colo. 260, 68 Pac. 233, 93 Am. St. Rep. 55.

Georgia.— Campbell *v.* Campbell, 67 Ga. 423; Collins *v.* Collins, 29 Ga. 517; Swear-

cumstances increasing the wife's expenses during the progress of the suit beyond that which they would ordinarily be;[94] and the wife's ability[95] and the husband's disability[96] are both material to a proper determination of the amount which should be awarded. The allowance pending the suit should be no more than is necessary for the wife's temporary support,[97] but should be sufficient to furnish her with means to support herself comfortably pending the litigation in accordance with the station of life to which she was accustomed prior to the commencement thereof.[98] It seems that more than her mere wants may be provided for,[99] although the amount allowed should be moderate,[1] and should not be so large as to place her in a better position than she was in before the suit was instituted.[2] The right of the wife to support pending suit embraces a provision for the maintenance of herself and such children as are dependent upon her, including the expense of an ordinary education for such children, but will not be extended against the opposition or without the acquiescence of the husband, to include the professional training of a grown son not in the wife's custody.[3]

b. Adequacy or Excessiveness of Particular Sums. No fixed rule as to the definite sum to be allowed as temporary alimony can be generally stated or

ingen *v.* Swearingen, 19 Ga. 265; Methvin *v.* Methvin, 15 Ga. 97, 60 Am. Dec. 664; McGee *v.* McGee, 10 Ga. 477.

Illinois.— Cooper *v.* Cooper, 185 Ill. 163, 56 N. E. 1059; Harding *v.* Harding, 144 Ill. 588, 32 N. E. 206, 21 L. R. A. 310; Ressor *v.* Ressor, 82 Ill. 442; Andrews *v.* Andrews, 69 Ill. 609; Plaster *v.* Plaster, 67 Ill. 93; Foote *v.* Foote, 22 Ill. 425; Bergen *v.* Bergen, 22 Ill. 187.

Indiana.— Sellers *v.* Sellers, 141 Ind. 305, 40 N. E. 699; Gruhl *v.* Gruhl, 123 Ind. 86, 23 N. E. 1101; Logan *v.* Logan, 90 Ind. 107; Corey *v.* Corey, 81 Ind. 469; Buckles *v.* Buckles, 81 Ind. 159; Eastes *v.* Eastes, 79 Ind. 363; Conn *v.* Conn, 57 Ind. 323; Powell *v.* Powell, 53 Ind. 513; Harrell *v.* Harrell, 39 Ind. 185; Schlosser *v.* Schlosser, 29 Ind. 488; Rudman *v.* Rudman, 5 Ind. 63.

Kentucky.—Whitsell *v.* Whitsell, 8 B. Mon. 50.

Maine.— Call *v.* Call, 65 Me. 407.

Michigan.— Potts *v.* Potts, 68 Mich. 492, 36 N. W. 240.

Nebraska.— Small *v.* Small, 28 Nebr. 843, 45 N. W. 248 (holding that in apportioning alimony the court will consider the ability of the husband, the estate, if any, of the wife, and the situation of the parties, and will render such a decree as under the circumstances will be just and equitable); Smith *v.* Smith, 19 Nebr. 706, 28 N. W. 296; Shafer *v.* Shafer, 10 Nebr. 468, 6 N. W. 768.

New Jersey.—Amos *v.* Amos, 4 N. J. Eq. 171.

New York.— De Llamosas *v.* Llamosas, 62 N. Y. 618; Bissell *v.* Bissell, 1 Barb. 430; Forrest *v.* Forrest, 5 Bosw. 672; Hallock *v.* Hallock, 4 How. Pr. 160; Burr *v.* Burr, 7 Hill 207; Lynde *v.* Lynde, 2 Barb. Ch. 72; Lawrence *v.* Lawrence, 3 Paige 267; Worden *v.* Worden, 3 Edw. 387.

West Virginia.— Wass *v.* Wass, 42 W. Va. 460, 26 S. E. 440.

Wisconsin.— Sumner *v.* Sumner, 54 Wis. 642, 12 N. W. 21.

See 17 Cent. Dig. tit. "Divorce," § 632 *et seq.*

94. Bauman *v.* Bauman, 18 Ark. 320, 68 Am. Dec. 171; Cairns *v.* Cairns, 29 Colo. 260, 68 Pac. 233, 93 Am. St. Rep. 55; Moore *v.* Moore, 130 N. C. 333, 41 S. E. 943.

95. Methvin *v.* Methvin, 15 Ga. 97, 60 Am. Dec. 664; Banes *v.* Banes, 8 Phila. (Pa.) 250; Laciar *v.* Laciar, 6 Pa. Co. Ct. 406; Wait *v.* Wait, 7 Leg. Gaz. (Pa.) 382, 23 Pittsb. Leg. J. (Pa.) 57; Bonsor *v.* Bonsor, [1897] P. 77, 66 L. J. P. & Adm. 35, 76 L. T. Rep. N. S. 168, 45 Wkly. Rep. 304; Eaton *v.* Eaton, L. R. 2 P. 51, 21 L. T. Rep. N. S. 733; Smith *v.* Smith, 2 Phillim. 152, 1 Eng. Eccl. 220.

96. Ellis *v.* Ellis, 2 Wkly. Notes Cas. (Pa.) 49; Beers *v.* Beers, 4 Lanc. L. Rev. 154.

97. McGee *v.* McGee, 10 Ga. 477; Lawrence *v.* Lawrence, 3 Paige (N. Y.) 267. See also Morrell *v.* Morrell, 2 Barb. (N. Y.) 480; Leslie *v.* Leslie, 6 Abb. Pr. N. S. (N. Y.) 203.

98. Cooper *v.* Cooper, 85 Ill. App. 575 [*affirmed* in 185 Ill. 163, 56 N. E. 1059]; Leslie *v.* Leslie, 6 Abb. Pr. N. S. (N. Y.) 203; Lynde *v.* Lynde, 4 Sandf. Ch. (N. Y.) 373; Powell *v.* Powell, L. R. 3 P. 186, 43 L. J. P. & M. 9, 29 L. T. Rep. N. S. 466, 22 Wkly. Rep. 62.

99. Leslie *v.* Leslie, 6 Abb. Pr. N. S. (N. Y.) 203. *Contra*, Germond *v.* Germond, 4 Paige (N. Y.) 643, 645, where the court said: "As a general rule, to guard against any abuse of the privilege of the wife to obtain a temporary support pending a suit for a divorce or separation, and to prevent the bringing of improper suits for the mere purpose of obtaining a support during a protracted litigation, the temporary alimony must be limited to the actual wants of the wife, until the termination of the suit in her favor establishes the fact that she has been abused and is entitled to a more liberal allowance."

1. Amos *v.* Amos, 4 N. J. Eq. 171.

2. George *v.* George, L. R. 1 P. 554, 36 L. J. P. & M. 17, 16 Wkly. Rep. 112.

3. Streitwolf *v.* Streitwolf, 58 N. J. Eq. 563, 41 Atl. 876, 43 Atl. 683.

applied. In England[4] and in some of the states[5] it has been attempted to establish a fixed proportion of the joint incomes of the husband and wife to be paid the wife for her support pending the litigation; but such proportion is subject to variation with the circumstances of the parties and of the particular case,[6] and in the American cases allowances are made for the most part without effort to determine any fixed proportion of the husband's property and income.[7]

4. Hayward *v.* Hayward, 28 L. J. P. & M. 9, 1 Swab. & Tr. 85, 6 Wkly. Rep. 639; Brisco *v.* Brisco, 2 Hagg. Const. 199; Hawkes *v.* Hawkes, 1 Hagg. Eccl. 526, 3 Eng. Eccl. 230; Harris *v.* Harris, 1 Hagg. Eccl. 351, 3 Eng. Eccl. 153; Rees *v.* Rees, 3 Phillim. 387, 1 Eng. Eccl. 418.

5. Williams *v.* Williams, 29 Wis. 517, holding that where the wife has no income of her own, the general rule is to allow her one fifth of her husband's income, following in this respect a former rule obtaining in the English courts. See also Harding *v.* Harding, 144 Ill. 588, 32 N. E. 206, 21 L. R. A. 310.

6. Harding *v.* Harding, 144 Ill. 588, 32 N. E. 206, 21 L. R. A. 310, holding that the amount varies from a sum sufficient to meet the actual wants of the wife to a third and even a half of the income of the husband.

Grounds for variation.— Where the necessities of the wife and her claim upon the husband's estate were great, as much as one fourth of the joint income was allotted. Finlay *v.* Finlay, Milw. 575. The status of the parties (Hooper *v.* Hooper, 30 L. J. P. & M. 49, 3 Swab. & Tr. 251) and the vexatious nature of the suit (Hakewill *v.* Hakewill, 30 L. J. P. & M. 254) will be considered in varying such proportion; but marital delinquency does not affect it (Crampton *v.* Crampton, 32 L. J. P. & M. 142).

7. *Colorado.*—Eickhoff *v.* Eickhoff, 29 Colo. 295, 68 Pac. 237, 93 Am. St. Rep. 64 (holding that an allowance of temporary alimony at the rate of fifty dollars per month is not excessive where the husband is worth at least fifty thousand dollars and the wife is in indigent circumstances); Cowan *v.* Cowan, 10 Colo. 540, 16 Pac. 215 (holding that an allowance of twenty-five dollars per month, with three hundred dollars for attorneys' fees, fifty dollars for the wife's personal use, and one hundred dollars on account of court costs, is not an abuse of the court's discretion, where the husband owns city real estate of the value of twenty-two thousand dollars).

Georgia.— Collins *v.* Collins, 94 Ga. 490, 19 S. E. 823 (holding an allowance of twelve dollars per month reasonable where the husband was possessed of an estate valued at one thousand eight hundred dollars, against which there was a mortgage of seven hundred dollars); Collins *v.* Collins, 29 Ga. 517 (holding that an allowance of twenty-five dollars per month is not excessive where the husband is worth at least twelve thousand dollars).

Illinois.— Cooper *v.* Cooper, 185 Ill. 163, 56 N. E. 1059 (where it appeared that the husband had an annual income of at least two hundred thousand dollars; that preceding the separation the wife had received a monthly allowance averaging nine hundred and fifty dollars; that she had been accustomed to having large amounts expended on her account; and it was held that an allowance of six hundred dollars per month and house rent and one thousand five hundred dollars for suit money was not an abuse of discretion); Harding *v.* Harding, 144 Ill. 588, 32 N. E. 206, 21 L. R. A. 310 (where the husband had an annual income in excess of thirty thousand dollars, and the wife an annual income of about one thousand dollars, and an allowance of two hundred dollars a month was held not excessive); Umlauf *v.* Umlauf, 22 Ill. App. 580 (where the husband was possessed of five thousand dollars and was engaged in business, and it was held that an order allowing ten dollars a week should not be disturbed).

Indiana.— Sellers *v.* Sellers, 141 Ind. 305, 40 N. E. 699, holding that it is not an abuse of discretion to direct the payment by the husband of an allowance of four dollars a week, although the wife was possessed of realty in a foreign state valued at one thousand two hundred dollars.

Iowa.— Day *v.* Day, 84 Iowa 221, 50 N. W. 979; Maben *v.* Maben, 67 Iowa 284, 25 N. W. 244 (where an allowance of one hundred and fifty-two dollars to pay for taking a deposition and for the support of the wife and children was sustained, it appearing that defendant was actively engaged in business and earning money); Small *v.* Small, 42 Iowa 111 (where an allowance of twenty dollars a month for the support of the wife and her child was sustained, it appearing that she was destitute of means to defray the expenses of the suit and of her maintenance, and that the husband had property from which he was realizing an income).

Kentucky.— Brown *v.* Brown, 16 Ky. L. Rep. 317 (where it was held that an allowance of one hundred and sixty dollars per annum to the wife is not excessive, no matter how poor the husband may be); Pearce *v.* Pearce, 11 Ky. L. Rep. 485 (holding that where a husband earns one hundred and fifty dollars per month, twenty dollars per month is a small allowance).

Michigan.— Potts *v.* Potts, 68 Mich. 492, 36 N. W. 240, where an allowance of eight dollars per week for the support of the wife and an infant child was held not excessive, it appearing that the husband was worth more than twenty thousand dollars.

Montana.— Finkelstein *v.* Finkelstein, 14 Mont. 1, 34 Pac. 1090, holding that an allowance of thirty dollars per month as temporary alimony is not unreasonable, where defendant is conducting a large business.

8. Order[8] — a. In General. The facts on which a decree of temporary alimony is based must appear in the record.[9]

b. Conditional Allowance. The court cannot require the wife to surrender any right as a condition of granting the allowance.[10]

c. Modification. The court may in its discretion modify an order for temporary alimony by reducing or increasing it,[11] as may seem proper under the

New Jersey.— Finn *v.* Finn, 26 N. J. Eq. 290 (where it appeared that defendant had transferred to his daughters before his marriage property exceeding in value one hundred and forty-two thousand dollars, apparently for his sole benefit; that he derived from the bounty of his daughters an annual income of eight hundred dollars; that he had prior to the suit proposed a separation from his wife and offered to pay one thousand two hundred dollars a year; and that his circumstances had not changed since the offer was made; and an allowance of temporary alimony at the rate of six hundred dollars per year was held not excessive); Walling *v.* Walling, 16 N. J. Eq. 389 (where an allowance of two dollars a week was granted, it appearing that the husband's property did not exceed three thousand five hundred dollars in value, yielding an annual income of not more than two hundred dollars, and that he had no trade or business or other source of income).

New York.— Scragg *v.* Scragg, 18 N. Y. Suppl. 487 (holding that an allowance of ten dollars per week for the support of a wife and three children is not excessive, where the husband is receiving a weekly salary of twenty-five dollars); Llamosas *v.* Llamosas, 4 Thomps. & C. 574 (holding that an allowance of thirty-five dollars per week is not excessive, where the husband is engaged in a successful business, and has eighteen thousand dollars in one investment, and had received five thousand dollars through his wife); Lawrence *v.* Lawrence, 3 Paige 267 (where the income of the husband was one hundred and sixty-five dollars and the wife was allowed seventy-five dollars as temporary alimony).

North Carolina.—Moore *v.* Moore, 130 N. C. 333, 41 S. E. 943, holding an allowance of four thousand dollars as temporary alimony not excessive, where defendant was worth from eighty thousand dollars to one hundred thousand dollars, and his annual income from eight thousand dollars to ten thousand dollars.

Pennsylvania.— Turkes *v.* Turkes, 4 Kulp 221, holding that where the husband's annual income is one thousand four hundred and forty dollars, an allowance of one hundred and eighty dollars is reasonable.

See 17 Cent. Dig. tit. "Divorce," § 634.

Excessive allowances.— In the following cases the allowances of temporary alimony were deemed excessive: Sharon *v.* Sharon, 75 Cal. 1, 16 Pac. 345 (where the parties were secretly married, and the husband had agreed to allow the wife a certain amount per month until the marriage was announced, and it was held an abuse of discretion to allow her a greater sum as alimony *pendente lite*); Gardner *v.* Gardner, 54 Ga. 560 (where an allowance of forty dollars per month was reduced to twenty dollars, it appearing that the husband's estate was small and that he had supported and educated their only child until she was twenty-one); Cravens *v.* Cravens, 4 Bush (Ky.) 435 (where an allowance of seven hundred dollars was deemed exorbitant, the annual income of the husband not exceeding one thousand dollars); Boesenberg *v.* Boesenberg, 50 N. Y. App. Div. 622, 63 N. Y. Suppl. 770 (holding an allowance of twenty-five dollars per week excessive where the husband's income is claimed by him not to exceed one hundred dollars per month, and reducing the allowance to fifteen dollars per week, although it appeared that the parties had entered into articles of separation whereby the husband agreed to pay the wife twenty-five dollars per week); Hardy *v.* Hardy, 3 Silv. Supreme (N. Y.) 116, 6 N. Y. Suppl. 300 (where an allowance of one hundred and seventy-five dollars per month was reduced to one hundred dollars per month upon evidence that the wife was not wholly blameless, that the husband's income was five thousand dollars per annum, that he had debts amounting to four thousand five hundred dollars in part caused by his wife's extravagance, that he had deeded to her a comfortable home, and that no one was dependent upon her for support).

8. For form of order decreeing payment of temporary alimony see Cowan *v.* Cowan, 19 Colo. 315, 35 Pac. 547.

9. Adair *v.* Adair, 54 Ill. App. 502.

Findings of fact.— Under a statute providing for an allowance for temporary alimony, if plaintiff sets forth facts entitling her to such alimony which "shall be found by the judge to be true," the judge must make a finding of facts before rendering a decree for such alimony. Moody *v.* Moody, 118 N. C. 926, 23 S. E. 933; Zimmerman *v.* Zimmerman, 113 N. C. 432, 18 S. E. 334; Griffith *v.* Griffith, 89 N. C. 113.

10. Patterson *v.* Patterson, 4 N. Y. App. Div. 146, 38 N. Y. Suppl. 637; Lowenthal *v.* Lowenthal, 68 Hun (N. Y.) 366, 22 N. Y. Suppl. 858 [*disapproving* Sigel *v.* Sigel, 28 Abb. N. Cas. (N. Y.) 308, 19 N. Y. Suppl. 906], both cases holding that an order for temporary alimony cannot be made conditional upon the wife's consent to a trial of the cause without a jury. *Compare* Begbie *v.* Begbie, 7 N. J. Eq. 98, where the court awarded temporary alimony upon condition of the wife's offer to return to her husband and his refusal to receive her, she having left him for insufficient cause.

11. *Georgia.*— Gordon *v.* Gordon, 111 Ga. 844, 36 S. E. 296; McGee *v.* McGee, 10 Ga. 477.

circumstances of the particular case; and this may be done upon the application of either party, whether plaintiff or defendant.[12]

d. Vacation or Dismissal. Since the court has full discretion in respect to allowances as temporary alimony it may for the wife's misconduct[13] or for any other sufficient cause[14] vacate or set aside an order granting the allowance.

e. Enforcement. An order for temporary alimony may be enforced by contempt proceedings,[15] if instituted while the action is pending.[16]

9. Commencement and Termination. It has been stated as a general rule that temporary alimony can be decreed only for future support, and should commence only at the time of notice of an application for its payment,[17] although it has been held that the order may properly relate back to the commencement of the suit.[18] The allowance ceases upon the entry of a final decree dissolving the marriage relation,[19] or dismissing the complaint.[20]

Kentucky.— Morrison *v.* Morrison, 10 Ky. L. Rep. 683.

Missouri.— Waters *v.* Waters, 49 Mo. 385.

New Jersey.—Amos *v.* Amos, 4 N. J. Eq. 171; Mackin *v.* Mackin, 10 N. J. L. J. 301.

New York.— Kittle *v.* Kittle, 8 Daly 72 (holding that where an allowance was so small as to indicate poverty of defendant, an additional allowance will not be granted after trial on the ground that a new trial would be necessary, unless it is shown that defendant's circumstances have improved); Leslie *v.* Leslie, 11 Abb. Pr. N. S. 311.

Ohio.— King *v.* King, 38 Ohio St. 370.

Pennsylvania.— Com. *v.* Herbert, 7 Lack. Leg. N. 14.

Wisconsin.— Moe *v.* Moe, 39 Wis. 308.

England.— Cox *v.* Cox, 3 Add. Eccl. 276, 2 Eng. Eccl. 531.

See 17 Cent. Dig. tit. "Divorce," § 637.

An application for modification of an order directing the payment of alimony *pendente lite* should be referred to the justice who signed it. Newell *v.* Newell, 27 Misc. (N. Y.) 117, 57 N. Y. Suppl. 403.

An appellate court should not increase the allowance made by the court below where it is doubtful whether the husband is in a condition to pay more than has already been ordered. Grant *v.* Grant, 5 S. D. 17, 57 N. W. 1130. Jurisdiction of appellate court to grant temporary alimony see *supra*, XIX, A, 6, a, (II); XIX, B, 3, c.

12. Amos *v.* Amos, 4 N. J. Eq. 171.

13. Goldsmith *v.* Goldsmith, 6 Mich. 285. See, however, Stork *v.* Stork, 2 Wkly. Notes Cas. (Pa.) 336, 11 Phila. (Pa.) 324, holding that the wife's misconduct does not justify the revocation of an order for temporary alimony, where libellant has been in default for more than two years in the payment of the weekly sums allowed by the court to the wife.

14. Ulbricht *v.* Ulbricht, 89 Hun (N. Y.) 479, 35 N. Y. Suppl. 324; Sigel *v.* Sigel, 19 N. Y. Suppl. 906, 28 Abb. N. Cas. (N. Y.) 308; Jacobson *v.* Jacobson, 12 N. Y. Civ. Proc. 198; Longfellow *v.* Longfellow, Clarke (N. Y.) 344.

15. People *v.* District Ct., 21 Colo. 251, 40 Pac. 460, so holding, although the wife has released the husband from all liability under the order.

16. Dillon *v.* Shiawassee Circ. Judge, (Mich. 1902) 91 N. W. 1029, 9 Detroit Leg. N. 440.

17. Thrall *v.* Thrall, 83 Hun (N. Y.) 188, 31 N. Y. Suppl. 591. See also McCarthy *v.* McCarthy, 137 N. Y. 500, 33 N. E. 550; Beadleston *v.* Beadleston, 103 N. Y. 402, 8 N. E. 735; Collins *v.* Collins, 10 Hun (N. Y.) 272.

18. Swearingen *v.* Swearingen, 19 Ga. 265. The ecclesiastical courts applied the rule that temporary alimony should commence at the time of the return of the citation (Bain *v.* Bain, 2 Add. Eccl. 253, 2 Eng. Eccl. 293; Hamerton *v.* Hamerton, 1 Hagg. Eccl. 23, 3 Eng. Eccl. 17), since until then the wife may be considered as able to obtain subsistence on the credit of her husband (Loveden *v.* Loveden, 1 Phillim. 208).

19. Dawson *v.* Dawson, 37 Mo. App. 207; Wood *v.* Wood, 7 Lans. (N. Y.) 204; Moncrief *v.* Moncrief, 15 Abb. Pr. (N. Y.) 187; Stanford *v.* Stanford, 1 Edw. (N. Y.) 317 (holding that the wife is entitled to temporary alimony to the date of the entry of the decree, although the issues are found against her by the jury); Philadelphia *v.* Thiele, 10 Phila. (Pa.) 205.

20. *California.*— Langan *v.* Langan, 91 Cal. 654, 27 Pac. 1092, holding that an order was not erroneous because the requirement to pay the amount fixed by it was not expressly limited to such time as the action should be pending.

Illinois.— Chestnut *v.* Chestnut, 77 Ill. 346, holding that the dismissal of a bill by leave of court before an order for alimony had been signed or entered suspended all further proceedings as to alimony.

Nevada.— Wilde *v.* Wilde, 2 Nev. 306.

New York.—Anonymous, 15 Abb. Pr. N. S. 307.

Pennsylvania.— Heilbron *v.* Heilbron, 158 Pa. St. 297, 27 Atl. 967, 38 Am. St. Rep. 845, holding that it is error to decree alimony "until the further order of the court."

England.— Twisleton *v.* Twisleton, L. R. 2 P. 339, 26 L. T. Rep. N. S. 265, 20 Wkly. Rep. 448; Rolt *v.* Rolt, 34 L. J. P. & M. 51, 3 Swab. & Tr. 604.

See 17 Cent. Dig. tit. "Divorce," § 640.

C. Counsel Fees and Expenses[21]— **1. Allowance in General.** Either by virtue of express statutory enactment or by application of what is deemed the common-law doctrine governing the subject a husband may be required to make suitable allowances for the expenses incurred by the wife in a divorce suit instituted by or against him, and for the employment of counsel to aid her therein.[22] The rules governing the allowance of temporary alimony are for the most part applicable to allowances for expenses and counsel fees. The underlying doctrine is the same in both cases, and allowances are withheld for either purpose upon the same grounds.[23]

2. In What Proceedings Allowed. It has been held that a court of equity may, without the aid of a statute make an allowance to the wife for expenses and counsel fees in a suit brought by her to impeach the validity of a decree of divorce upon the ground of fraud;[24] and suit money has generally been allowed in proceedings instituted by either party to reduce or increase the amount of temporary alimony.[25]

3. Condition or Stage of Proceedings. As in the case of an allowance of temporary alimony, it has generally been held that an application for the payment of the expenses and counsel fees of the wife should be made while the suit is pending.[26]

21. Common-law liability of husband for legal services see *supra*, XVIII, D, 1.

Lien of attorney on judgment for alimony see Attorney and Client, 4 Cyc. 1012, note 81.

22. *Alabama.*— Rast *v.* Rast, 113 Ala. 319, 21 So. 34; *Ex p.* Smith, 34 Ala. 455; Pearson *v.* Darrington, 32 Ala. 227; *Ex p.* King, 27 Ala. 387.

Kentucky.— Newsome *v.* Newsome, 95 Ky. 383, 25 S. W. 878, 15 Ky. L. Rep. 801.

New Jersey.—Amos *v.* Amos, 4 N. J. Eq. 171.

New York.— Masey *v.* Masey, 58 N. Y. App. Div. 619, 68 N. Y. Suppl. 994; Morrell *v.* Morrell, 2 Barb. 480; Kunze *v.* Kunze, 53 N. Y. Suppl. 938, 5 N. Y. Annot. Cas. 8; Wood *v.* Wood, 8 Wend. 357.

Pennsylvania.— Miller *v.* Miller, 5 Pa. Co. Ct. 592.

Tennessee.— Shy *v.* Shy, 7 Heisk. 125.

See 17 Cent. Dig. tit. "Divorce," § 642 *et seq.*

23. See *supra*, XIX, B.

24. *Ex p.* Smith, 34 Ala. 455, which case was decided at a time when a decree of divorce was not absolute until it had received legislative sanction, and the suit to set aside the decree was brought before legislative action had been taken. In Wilson *v.* Wilson, 49 Iowa 544, however, it was held that since the statute authorizing an order for the payment of suit money applied only to actions for divorce, the court had no power to grant such an order in a suit to set aside a decree of divorce. And see Corder *v.* Speake, 37 Oreg. 105, 51 Pac. 647.

25. Stillman *v.* Stillman, 99 Ill. 196, 39 Am. Rep. 21 [*reversing* 7 Ill. App. 524]; O'Neil *v.* O'Neil, 100 Iowa 743, 69 N. W. 523; O'Brien *v.* O'Brien, 19 Nebr. 584, 27 N. W. 640; Helden *v.* Helden, 9 Wis. 557, 11 Wis. 554, where it is held that the wife was as much entitled to an allowance to defend a petition to diminish the alimony after divorce as to carry on the divorce suit originally.

In New York a different rule apparently exists. It has there been held that after a divorce a husband cannot be compelled to supply the wife with money for the prosecution or defense of suits brought in respect to an award of alimony, such as a proceeding by the wife to compel the payment of alimony. McQuien *v.* McQuien, 61 How. Pr. 280.

26. *California.*— Lacey *v.* Lacey, 108 Cal. 45, 40 Pac. 1056; Reynolds *v.* Reynolds, 67 Cal. 176, 7 Pac. 480.

Illinois.— Newman *v.* Newman, 69 Ill. 167; McCulloch *v.* Murphy, 45 Ill. 256, where it is held that if the controversy is settled, and the wife voluntarily returns to her husband, and the suit is abandoned before counsel have procured an order for the payment of their fees, their right to such order is gone.

Missouri.— Watkins *v.* Watkins, 66 Mo. App. 468.

Nevada.— Wilde *v.* Wilde, 2 Nev. 306.

New York.— McCarthy *v.* McCarthy, 137 N. Y. 500, 33 N. E. 550 (construing Code Civ. Proc. § 1769, providing that the court may, "during the pendency of the action," order the husband to pay any sums necessary to enable the wife to carry on the action, and holding that such section does not authorize an allowance for counsel fees after the referee's report in the wife's favor has been confirmed, although judgment thereon has not been entered); Poillon *v.* Poillon, 75 N. Y. App. Div. 536, 78 N. Y. Suppl. 323; Winton *v.* Winton, 31 Hun 290 [*reversing* 12 Abb. N. Cas. 159].

See 17 Cent. Dig. tit. "Divorce," § 644.

An action is pending, within a statute which authorizes the court during the pendency of the action to make orders directing the husband to pay such sums as may be necessary to enable the wife to prosecute or defend the action, until the final determination of an appeal. McBride *v.* McBride, 119 N. Y. 519, 23 N. E. 1065.

The reversal of a decree of divorce and the remanding of the case by the supreme court

4. DISCRETION OF COURT. The allowance of money for the expenses of the wife and her counsel fees is, as in the case of an allowance of temporary alimony,[27] largely within the discretion of the trial court,[28] and it will not be disturbed on appeal unless there is an abuse of discretion.[29]

5. MATTERS ESSENTIAL TO ALLOWANCE. The essential conditions under which allowances are made for counsel fees and expenses do not usually differ from those applicable to allowances of temporary alimony.[30] The existence of the marriage relation between the parties is ordinarily prerequisite to the allowance.[31] The wife need not prove the merits of her case,[32] although, as in the case of an application for temporary alimony, it must appear that she has good ground for bringing the suit.[33] She must show a necessity for the expenses incurred or to be incurred and for the services of counsel;[34] and finally must be without means of her own to meet such expenses and pay for such services.[35]

6. DEFENSES AND OBJECTIONS. An application for an allowance for expenses

does not affect the jurisdiction of the trial court to allow counsel fees for services in presenting the case on appeal. Harding *v.* Harding, 205 Ill. 105, 68 N. E. 754 [*affirming* 105 Ill. App. 363].

Where anything remains to be done to protect the rights of the wife in the suit, and further services of counsel will be necessary to conduct the litigation to its conclusion, the court has power to secure her the future services of counsel and to provide for the payment of expenses to be thereafter incurred. McBride *v.* McBride, 53 Hun (N. Y.) 448, 6 N. Y. Suppl. 447 [*affirmed* in 117 N. Y. 624, 22 N. E. 1127]. And see Lewis *v.* Lewis, 3 Lack. Leg. N. (Pa.) 362.

Past expenses.— The object of the allowance is to enable the wife to prosecute or defend the suit, and an allowance will not be made to pay expenses which have already been incurred. Lynch *v.* Lynch, 99 Ill. App. 454; Beadleston *v.* Beadleston, 103 N. Y. 402, 8 N. E. 735. *Contra*, Davis *v.* Davis, 141 Ind. 367, 40 N. E. 803; Courtney *v.* Courtney, 4 Ind. App. 221, 30 N. E. 914.

27. See *supra*, XIX, B, 2.

28. *California.*—Rose *v.* Rose, 109 Cal. 544, 42 Pac. 452.

Georgia.— Hinton *v.* Hinton, 117 Ga. 547, 43 S. E. 983.

Illinois.— Blake *v.* Blake, 80 Ill. 523.

Missouri.— McCloskey *v.* McCloskey, 68 Mo. App. 199.

New Jersey.— Johnson *v.* Johnson, 4 N. J. L. J. 241.

New York.—Starkweather *v.* Starkweather, 29 Hun 488; Green *v.* Green, 3 Daly 358; Douglas *v.* Douglas, 13 Abb. Pr. N. S. 291; Bissell *v.* Bissell, 3 How. Pr. 242; Jones *v.* Jones, 2 Barb. Ch. 146.

Pennsylvania.— Fernald *v.* Fernald, 5 Pa. Super. Ct. 629, 41 Wkly. Notes Cas. 214.

See 17 Cent. Dig. tit. "Divorce," § 645.

29. Chappell *v.* Chappell, 86 Md. 532, 39 Atl. 984; Schuster *v.* Schuster, 84 Minn. 403, 87 N. W. 1014; Stiehm *v.* Stiehm, 69 Minn. 461, 72 N. W. 708.

Appeal from order for temporary alimony see *infra*, XIX, G.

30. See *supra*, XIX, B, 3, 4.

31. Ober *v.* Ober, 5 Silv. Supreme (N. Y.) 37, 7 N. Y. Suppl. 843.

Proof of existence of marriage in application for temporary alimony see *supra*, XIX, B, 4, a.

As long as the husband asserts a marriage in a suit instituted by him for its dissolution, he is liable for the expense to which he puts his wife in defending his claim. Starkweather *v.* Starkweather, 29 Hun (N. Y.) 488; Bailie *v.* Bailie, 53 N. Y. Suppl. 866, 5 N. Y. Annot. Cas. 193.

32. *Illinois.*— Funk *v.* Funk, 81 Ill. App. 540.

Iowa.— Campbell *v.* Campbell, 73 Iowa 482, 35 N. W. 522.

Maryland.— McCurley *v.* McCurley, 60 Md. 185, 45 Am. Rep. 717.

New Jersey.— Johnson *v.* Johnson, 4 N. J. L. J. 241.

New York.— Douglas *v.* Douglas, 13 Abb. Pr. N. S. 291; Fowler *v.* Fowler, 4 Abb. Pr. 411; Bissell *v.* Bissell, 3 How. Pr. (N. Y.) 242, holding that the wife is entitled as of course to an allowance for expenses, unless there is an undenied charge of adultery against her.

See 17 Cent. Dig. tit. "Divorce," § 646.

Allowance of temporary alimony as a matter of course see *supra*, XIX, B, 1.

33. Bissell *v.* Bissell, 3 How. Pr. (N. Y.) 242; Worden *v.* Worden, 3 Edw. (N. Y.) 387.

Necessity of prima facie case for divorce on application for temporary alimony see *supra*, XIX, B, 4, c.

34. Maas *v.* Maas, 16 Wkly. Notes Cas. (Pa.) 130.

35. *Alabama.*— Turner *v.* Turner, 44 Ala. 437.

Florida.— Chaires *v.* Chaires, 10 Fla. 308.

Illinois.— Rawson *v.* Rawson, 37 Ill. App. 491.

Indiana.— Kenemer *v.* Kenemer, 26 Ind. 330.

Maryland.— Tayman *v.* Tayman, 2 Md. Ch. 393, holding that the husband may be compelled to supply his wife with money for counsel fees and expenses, although she continue living in his home.

New Hampshire.— Quincy *v.* Quincy, 10 N. H. 272.

New Jersey.— Westerfield *v.* Westerfield, 36 N. J. Eq. 195.

New York.— Chase *v.* Chase, 29 Hun 527

and counsel fees may as a rule be barred for the same causes as an application for temporary alimony,[36] although allowances for expenses have been made where temporary alimony was refused, it appearing that the investigation of the charges and counter charges will necessarily involve a long and expensive litigation;[37] and in Pennsylvania it is usual to make allowances for counsel fees, although the wife is guilty of adultery[38] or has been convicted of felony.[39] The poverty or inability of the husband may be a sufficient objection to an allowance for counsel fees or expenses,[40] except where he himself brings the suit.[41] A separation agreement whereby the husband has made suitable provision for the maintenance of his wife does not necessarily preclude an allowance for expenses and counsel fees.[42]

7. Agreements by Counsel. An allowance for counsel fees may be refused where counsel have agreed to render their services gratuitously,[43] or for a percentage of the property recovered as a result of the suit.[44] An agreement between the wife and her counsel, without the husband being a party thereto, fixing the amount to be paid for their services, is not binding upon the husband, and should not control the allowance made by the court.[45] An agreement made by an attorney, upon receipt of a certain amount as a counsel fee, that no application shall be made for further fees until the result of the action is reached, does not bar an application for counsel fees upon a new trial, where the jury disagreed in the first trial.[46]

8. Application and Proceedings — a. In General. The practice in most of the states is for the wife to apply for an allowance for expenses and counsel fees at the same time as for an allowance of temporary alimony, and the proceedings thereon are usually controlled by the same rules.[47] The application should be made by special motion prior to the final judgment.[48]

b. Sufficiency of Affidavit or Petition. The affidavit or petition used upon an application for counsel fees or expenses of suit must show that a meritorious cause for a divorce exists,[49] and where the suit is brought by the husband against the

[*reversing* 65 How. Pr. 308]; Morrell *v.* Morrell, 2 Barb. 480; Jones *v.* Jones, 2 Barb. Ch. 146.

Pennsylvania.— Thomas *v.* Thomas, 4 Kulp 305; Miller *v.* Miller, 1 Wkly. Notes Cas. 415.

Tennessee.—Lishey *v.* Lishey, 2 Tenn. Ch. 1. See 17 Cent. Dig. tit. "Divorce," § 646.

36. See *supra*, XIX, B, 5.

37. Shaw *v.* Shaw, 5 Misc. (N. Y.) 497, 26 N. Y. Suppl. 715.

38. Scott *v.* Scott, 8 Pa. Dist. 548, 9 Kulp (Pa.) 442; Pratz *v.* Pratz, 11 Pa. Co. Ct. 252; Brenner *v.* Brenner, 5 Kulp (Pa.) 6; Miller *v.* Miller, 2 Kulp (Pa.) 309, all holding that a wife who is guilty of adultery is entitled to an allowance for counsel fees, although temporary alimony will be refused.

39. Miller *v.* Miller, 19 Phila. (Pa.) 329, where the wife was allowed counsel fees, although she was actually undergoing imprisonment at the time.

40. Wuest *v.* Wuest, 17 Nev. 217, 30 Pac. 886.

Poverty as defense in application for temporary alimony see *supra*, XIX, B, 5, e.

41. Millowitsch *v.* Millowitsch, 44 Ill. App. 357; Purcell *v.* Purcell, 3 Edw. (N. Y.) 194.

42. Killiam *v.* Killiam, 25 Ga. 186; Collins *v.* Collins, 80 N. Y. 1; Miller *v.* Miller, 43 How. Pr. (N. Y.) 125. *Compare* Coles *v.* Coles, 2 Md. Ch. 341; Rose *v.* Rose, 11 Paige (N. Y.) 166.

Separation agreement as bar to temporary alimony see *supra*, XIX, B, 5, b.

43. Mudd *v.* Mudd, 98 Cal. 320, 33 Pac. 114.

44. White *v.* White, 86 Cal. 212, 24 Pac. 1030 (holding also that the existence of a contingent agreement does not preclude an allowance of counsel fees to other counsel not interested therein, if their services are necessary); Sharon *v.* Sharon, 75 Cal. 1, 16 Pac. 345 (holding that the wife has no necessity entitling her to an allowance for counsel fees, where her attorneys are faithfully and satisfactorily acting for her in pursuance of an agreement whereby they have, as compensation for their services, a contingent interest in the result of the litigation).

Agreement against public policy.—An agreement by a wife to compensate an attorney for conducting a suit against her husband for a separation, by the terms of which she agrees to give him certain percentages of such sums as should be awarded her for alimony, is void as against public policy. Van Vleck *v.* Van Vleck, 21 N. Y. App. Div. 272, 47 N. Y. Suppl. 470.

45. Turner *v.* Turner, 104 Ill. App. 253; Stillman *v.* Stillman, 4 Lea (Tenn.) 271.

46. Van Wormer *v.* Van Wormer, 57 Hun (N. Y.) 496, 11 N. Y. Suppl. 247.

47. See *supra*, XIX, B, 6.

48. Williams *v.* Williams, 3 Silv. Supreme (N. Y.) 385, 6 N. Y. Suppl. 645, 17 N. Y. Civ. Proc. 297.

Counsel fees as costs see *supra*, XVIII, B.

49. Whitney *v.* Whitney, 22 How. Pr. (N. Y.) 175; Bissell *v.* Bissell, 3 How. Pr.

wife she should deny upon oath the alleged misconduct or show that she has some other valid defense.[50] There should also be included a statement as to the services for which the allowance is required,[51] and as to the poverty of the wife and the ability of the husband to pay for such services.[52]

c. Who May Make Application. The allowance of expenses and counsel fees is for the benefit of the wife, and should be made upon an application in her name and not in the name of the attorneys.[53]

9. Amount and Purposes of Allowance — a. In General. The court may determine in its own discretion, from the facts and circumstances of each particular case as they appear from the pleadings and the proofs, the amount which should be allowed for the services of counsel and for the expenses of the wife in the prosecution or defense of the suit.[54] Only necessary litigation should be provided for,[55] and an allowance for attorney's services before the suit in devising schemes to secure evidence against the defendant is not proper,[56] although an allowance may be made for the services of an attorney in investigating the character and reputation of non-resident witnesses for plaintiff.[57] The amount allowed for counsel fees should not exceed the reasonable compensation of counsel under all circumstances of the case, without regard to what might properly be demanded, as between counsel and client, by the counsel actually employed.[58]

b. Number of Counsel. It is not within the discretion of the court to allow the wife money for unnecessary counsel.[59] Ordinarily an allowance for a single attorney is sufficient,[60] but the number of counsel for whose services the husband will be required to pay depends more or less upon the pecuniary ability of the husband and the character of the suit.[61]

(N. Y.) 242; Weishaupt *v.* Weishaupt, 27 Wis. 621.

50. Osgood *v.* Osgood, 2 Paige (N. Y.) 621; Lewis *v.* Lewis, 3 Johns. Ch. (N. Y.) 519. See, however, Fowler *v.* Fowler, 4 Abb. Pr. (N. Y.) 411, holding that proof of the wife's misconduct is admissible only to show that it was so glaring that no aid should be given her to prosecute the suit.

Denial of misconduct or proof of other defense in application for temporary alimony see *supra*, XIX, B, 5.

51. Emerson *v.* Emerson, 26 N. Y. Suppl. 291.

52. Blair *v.* Blair, 74 Iowa 311, 37 N. W. 385; Baer *v.* Baer, 3 Pa. Dist. 379, 7 Kulp (Pa.) 244. See, however, Ayers *v.* Ayers, 41 Ill. App. 226 (holding that proof that the wife has no means is not necessary); Quincy *v.* Quincy, 10 N. H. 272 (holding that the wife's affidavit is ordinarily sufficient evidence that she has no property).

53. *Illinois.*— Werres *v.* Werres, 102 Ill. App. 360; Lynch *v.* Lynch, 99 Ill. App. 454; Callies *v.* Callies, 91 Ill. App. 305.

Indiana.— Garrison *v.* Garrison, 150 Ind. 417, 50 N. E. 383.

Maryland.— Tayman *v.* Tayman, 2 Md. Ch. 393.

New York.— Kellogg *v.* Stoddard, 84 N. Y. Suppl. 1015. *Compare* Chase *v.* Chase, 29 Hun (N. Y.) 527 [*reversing* 65 How. Pr. 308].

Tennessee.— Carden *v.* Carden, (Ch. App. 1896) 37 S. W. 1022.

54. Peyre *v.* Peyre, 79 Cal. 336, 21 Pac. 838; Hilker *v.* Hilker, 153 Ind. 425, 55 N. E. 81; Schneider *v.* Schneider, 73 S. W. 1132, 24 Ky. L. Rep. 2190, 70 S. W. 287, 24 Ky. L. Rep. 924; De Llamosas *v.* Llamosas, 62 N. Y. 618; Browne *v.* Browne, 9 N. Y. Civ. Proc. 180.

Determination of amount of temporary alimony see *supra*, XIX, B, 7.

55. Uhlman *v.* Uhlman, 51 N. Y. Super. Ct. 361.

56. Rawson *v.* Rawson, 37 Ill. App. 491.

57. Merrill *v.* Merrill, 10 N. J. L. J. 142.

58. *Kentucky.*— Powell *v.* Lilly, 68 S. W. 123, 24 Ky. L. Rep. 193; Gordon *v.* Gordon, 6 Ky. L. Rep. 439, both cases holding that the character of the services rendered and the pecuniary ability of the husband should both be considered in determining the amount of the allowance.

Massachusetts.— Baldwin *v.* Baldwin, 6 Gray 341.

Mississippi.— Parker *v.* Parker, 71 Miss. 164, 14 So. 459.

New Jersey.—Amos *v.* Amos, 4 N. J. Eq. 171.

Pennsylvania.— Reeves *v.* Reeves, 1 Wkly. Notes Cas. 123.

See 17 Cent. Dig. tit. "Divorce," § 653.

59. Sharon *v.* Sharon, 75 Cal. 1, 16 Pac. 345.

60. Burgess *v.* Burgess, 1 Duv. (Ky.) 287; Dugan *v.* Dugan, 1 Duv. (Ky.) 289 (holding that an allowance of fees to four attorneys was unreasonable); Uhlman *v.* Uhlman, 51 N. Y. Super. Ct. 361; Williams *v.* Williams, 29 Wis. 517 (where objection was made to the allowance of fees to two attorneys and the court reduced the allowance from two thousand six hundred dollars to six hundred dollars).

61. Bishop Mar. Div. & Sep. § 987 [*citing* Suggate *v.* Suggate, 1 L. T. Rep. N. S. 306, 1

c. Adequacy or Excessiveness of Allowance. As already indicated it is impossible to lay down a fixed rule determining the actual amount which should be allowed for counsel fees and expenses. An allowance will be adequate or excessive according to the wants of the wife, the pecuniary ability of the husband, and the difficulties involved in a litigation of the suit.[62]

d. Allowances For Past Expenses. Allowances for past expenses may be made during the pendency of the action at any time before entry of judgment, if

Swab. & Tr. 497, 8 Wkly. Rep. 178; Money *v.* Money, 1 Spinks 117]. See also Rogers *v.* Rogers, 103 Ga. 763, 30 S. E. 659, holding that reasonable compensation for such counsel as are necessary should be the criterion in determining the amount to be allowed.

62. *California.*— Wolf *v.* Wolf, (1894) 37 Pac. 858, where an allowance of one hundred dollars for printer's fees and two hundred and fifty dollars as counsel fees on a pending appeal from a judgment in favor of the wife was deemed not excessive.

Georgia.— Collins *v.* Collins, 29 Ga. 517, holding that an allowance of five hundred dollars for counsel fees is not excessive where the husband is worth at least twelve thousand dollars.

Illinois.— Aurand *v.* Aurand, 157 Ill. 321, 41 N. E. 859 (holding an allowance of one hundred and fifty dollars as counsel fees not excessive, where both a bill and a cross bill are filed); Jenkins *v.* Jenkins, 91 Ill. 167 (where an allowance of three hundred dollars for counsel fees on an appeal by the husband from a decree of divorce was held not excessive); Davis *v.* Davis, 36 Ill. App. 643 (holding that an order for twenty-five dollars counsel fees is reasonable, although the husband is a laboring man and has nothing except what he earns).

Indiana.— Hilker *v.* Hilker, 153 Ind. 425, 55 N. E. 81 (where the appellate court refused to set aside an allowance of one hundred and fifty dollars for counsel fees, it appearing that thirty-seven witnesses were examined at the trial, which occupied two days, exclusive of argument); McCue *v.* McCue, 149 Ind. 466, 49 N. E. 382 (holding an allowance to the wife of one hundred dollars for expense money not excessive, where she was destitute and the husband owned property of the value of several thousand dollars); Harrell *v.* Harrell, 39 Ind. 185 (where an allowance of one hundred dollars was held reasonable, it appearing that the husband was the owner of real estate of the value of six thousand dollars and of personal property worth eight hundred dollars); De Ruiter *v.* De Ruiter, 28 Ind. App. 9, 62 N. E. 100, 91 Am. St. Rep. 107 (where an allowance of five hundred dollars for counsel fees was sustained, although the wife owned property worth one thousand nine hundred dollars above encumbrances).

Iowa.— Campbell *v.* Campbell, 73 Iowa 482, 35 N. W. 522, where an allowance of three hundred and fifty dollars as suit money was sustained, it appearing that the property of the wife consisted of one hundred and twenty acres of land, only a part of which was improved, and a small amount of personalty.

Minnesota.— Schuster *v.* Schuster, 84 Minn. 403, 87 N. W. 1014, where an allowance of one hundred and fifty dollars for attorneys' fees was sustained, although for services already rendered, it being necessary to enable the wife to further defend the action.

Mississippi.— Hall *v.* Hall, 77 Miss. 741, 27 So. 636, sustaining an allowance of fifty dollars for attorney's fees to enable the wife to defend an appeal by the husband.

Missouri.— Grove *v.* Grove, 79 Mo. App. 142, where the appellate court increased an allowance for counsel fees from twenty-five dollars to one hundred dollars, it appearing that the husband was worth over three thousand dollars, and that the wife was without means.

Nebraska.— Walton *v.* Walton, 57 Nebr. 102, 77 N. W. 392, where the court sustained an allowance of seven hundred dollars for counsel fees, it appearing that the husband was worth at least twenty-four thousand dollars.

New York.— Sinn *v.* Sinn, 3 Misc. 598, 23 N. Y. Suppl. 339, holding an allowance of seven hundred and fifty dollars for the expenses of the wife in conducting her defense to be reasonable, it appearing that the husband had a balance in bank of twenty thousand dollars and was in receipt of an annual income of a like amount; and that while the wife had nearly three thousand dollars on deposit in a bank, she had been unable to secure an engagement in her profession for more than a year.

Wisconsin.— Pauly *v.* Pauly, 69 Wis. 419, 34 N. W. 512 (where an allowance of five hundred dollars for attorney's fees was sustained, it appearing that the husband was able to pay such amount, and to avoid it, had fled from the jurisdiction); Varney *v.* Varney, 52 Wis. 120, 8 N. W. 739, 38 Am. Rep. 726 (holding that an allowance of five hundred and seventy-five dollars for counsel fees and expenses was not unreasonable, it appearing that the litigation was protracted and of a nature to require a large amount of labor in behalf of the wife to meet issues raised by the husband's counter charge).

See 17 Cent. Dig. tit. "Divorce," § 654.

Excessive allowances.— Where the sum of two thousand four hundred dollars had already been allowed for counsel fees, which was more than the husband had paid to his own attorneys, it is not an abuse of discretion on the part of the court to refuse a further allowance for counsel fees to the wife. White *v.* White, 86 Cal. 212, 24 Pac. 1031. A retainer fee of five hundred dollars is excessive where the annual income of the husband does not exceed one thousand dollars.

it be shown to be necessary to enable the wife further to prosecute or defend the suit, but this showing is essential.[63]

10. Order[64]— a. In General. The order may direct the payment of a specified sum for counsel fees and expenses generally, or may require the payment of a certain sum for a specific purpose.[65] It should direct the payment of the money to the wife and not to any other person.[66]

b. Modification and Additional Allowances. An order granting an allowance for counsel fees may, upon a showing of necessity, be modified by the court so as to direct the payment of an additional allowance.[67] The additional allowance cannot be granted after the wife has completed her case,[68] and where a further allowance is sought to cover expenses already incurred, it must be shown that it is necessary to enable her further to carry on the litigation.[69] Where an allowance is made by one judge, an application for a further allowance should not be made to another judge on substantially the same showing;[70] and where a suit is transferred from one county to another, the court in the latter county cannot refuse an allowance made by the court in the former.[71]

11. Allowance on Appeal. Where the wife takes an appeal in good faith from a judgment rendered against her, she is entitled in the discretion of the court to an allowance for expenses and counsel fees pending the appeal, if it appears probable that prejudicial error has been committed in the court below;[72] and where

Rogers *v.* Rogers, 103 Ga. 763, 30 S. E. 659. So where the husband is not worth over three hundred dollars after paying his debts, an allowance of more than fifty dollars is not justified. Fletcher *v.* Fletcher, 54 S. W. 953. Where the only services rendered by an attorney consist of drawing and filing a bill for divorce, an allowance of five hundred dollars is excessive and should be reduced to fifty dollars. Van der Beck *v.* Van der Beck, 124 Mich. 479, 83 N. W. 150.

63. Schuster *v.* Schuster, 84 Minn. 403, 87 N. W. 1014; McCarthy *v.* McCarthy, 137 N. Y. 500, 33 N. E. 550; Beadleston *v.* Beadleston, 103 N. Y. 402, 8 N. E. 735.

Reimbursement.— Money raised on the wife's own credit, and paid for expenses already incurred, is not reimbursable *pendente lite*, at the court's discretion, as money necessary to enable her to prosecute the action. Loveren *v.* Loveren, 100 Cal. 493, 35 Pac. 87.

64. For form of order making an allowance of counsel fees see Traylor *v.* Richardson, 2 Ind. App. 452, 28 N. E. 205.

65. Schloemer *v.* Schloemer, 49 N. Y. 82.

66. Sharon *v.* Sharon, 75 Cal. 1, 16 Pac. 345; Werres *v.* Werres, 102 Ill. 360; Miles *v.* Miles, 102 Ill. 130; Lynch *v.* Lynch, 99 Ill. App. 454; Callies *v.* Callies, 91 Ill. App. 305; Parker *v.* Parker, 71 Miss. 164, 14 So. 459. *Compare* People *v.* Second Judicial Dist. Ct., 21 Colo. 251, 40 Pac. 460, holding that an order providing in part for the payment of counsel fees directly to plaintiff's attorney is not void but at most only an irregular exercise of jurisdiction.

67. *California.*— Rose *v.* Rose, 109 Cal. 544, 42 Pac. 452, holding that an allegation in a complaint that a certain sum was a reasonable allowance for counsel fees, which sum was allowed shortly after the commencement of the suit, does not preclude the court from granting a further allowance.

Iowa.— Doolittle *v.* Doolittle, 78 Iowa 691, 43 N. W. 616, 6 L. R. A. 187; Clyde *v.* Peavy, 74 Iowa 47, 36 N. W. 883.

Missouri.— Waters *v.* Waters, 49 Mo. 385.

New York.— Forrest *v.* Forrest, 3 Bosw. 650.

Pennsylvania.— Beers *v.* Beers, 4 Lanc. L. Rev. 154.

See 17 Cent. Dig. tit. "Divorce," § 656.

68. Poutney *v.* Poutney, 10 N. Y. Suppl. 192.

69. Beadleston *v.* Beadleston, 103 N. Y. 402, 8 N. E. 735; Stampfer *v.* Stampfer, 58 N. Y. Super. Ct. 587, 11 N. Y. Suppl. 588.

70. Simonds *v.* Simonds, 57 Hun (N. Y.) 290, 10 N. Y. Suppl. 606.

71. Sheckels *v.* Sheckels, 3 Nev. 404.

72. *California.*— Bohnert *v.* Bohnert, 91 Cal. 428, 27 Pac. 732; Larkin *v.* Larkin, 71 Cal. 330, 12 Pac. 227.

Colorado.— Pleyte *v.* Pleyte, 15 Colo. 125, 25 Pac. 25.

Illinois.— Elzas *v.* Elzas, 183 Ill. 160, 55 N. E. 669 [*affirming* 83 Ill. App. 523]; Miles *v.* Miles, 102 Ill. App. 130; Earle *v.* Earle, 75 Ill. App. 351.

Michigan.— Van Voorhis *v.* Van Voorhis, 90 Mich. 276, 51 N. W. 281; Chaffee *v.* Chaffee, 14 Mich. 463.

Nevada.— Lake *v.* Lake, 16 Nev. 363.

New Jersey.— Disborough *v.* Disborough, 51 N. J. Eq. 306, 28 Atl. 3.

New York.— Haddock *v.* Haddock, 75 N. Y. App. Div. 565, 78 N. Y. Suppl. 304; McBride *v.* McBride, 55 Hun 401, 8 N. Y. Suppl. 448 [*affirmed* in 119 N. Y. 519]; Halsted *v.* Halsted, 11 Misc. 592, 32 N. Y. Suppl. 1080, 1 N. Y. Annot. Cas. 230; Anonymous, 15 Abb. Pr. N. S. 307.

South Dakota.— Pollock *v.* Pollock, 7 S. D. 331, 64 N. W. 165.

West Virginia.— Wass *v.* Wass, 42 W. Va. 460, 26 S. E. 440.

the appeal is taken by the husband, an allowance for counsel fees and expenses to enable the wife to resist it is granted almost as a matter of course.[73]

D. Permanent Alimony — 1. In General. Whatever distinction may have formerly existed, and whatever may have been the reasons therefor, the true doctrine under the modern law of divorce is to require a husband who has by his misconduct compelled his wife to live apart from him and secure a divorce to provide for her separate maintenance, whether the decree be for a suspension or an absolute dissolution of the marital relation.[74] The allowance of permanent alimony is commonly provided for by statute,[75] but even in the absence of express statutory authority it has been held that permanent alimony may be awarded as an incident to a decree of absolute divorce in the wife's favor.[76]

2. Misconduct or Non-Success of Wife in Suit. Generally speaking alimony is not allowed unless the decree of divorce is in the wife's favor.[77] In many jurisdictions, however, the general rule has been modified by statutes expressly or impliedly providing that permanent alimony may be awarded in favor of the wife, although a decree has been rendered against her.[78] Nevertheless the court

Wisconsin.— Friend *v.* Friend, 65 Wis. 412, 27 N. W. 34.

See 17 Cent. Dig. tit. "Divorce," § 657.

Merits of appeal.— An allowance for counsel fees to enable a wife to prosecute her appeal is not a matter of course in the supreme court; and when application is made the court will look into the record so far as to determine whether the appeal is obviously without merit; and if it is the motion will be denied. Friend *v.* Friend, 65 Wis. 412, 27 N. W. 34; Coad *v.* Coad, 40 Wis. 392; Krause *v.* Krause, 23 Wis. 354.

73. Hall *v.* Hall, 77 Miss. 741, 27 So. 636.

Allowance of temporary alimony pending appeal see *supra*, XIX, B, 3, c.

74. *Arkansas.*— Bauman *v.* Bauman, 18 Ark. 320, 68 Am. Dec. 171.

District of Columbia.— Alexander *v.* Alexander, 13 App. Cas. 334, 45 L. R. A. 806.

Georgia.— Campbell *v.* Campbell, 90 Ga. 687, 16 S. E. 960.

Utah.— Cast *v.* Cast, 1 Utah 112.

England.— Sidney *v.* Sidney, 11 Jur. N. S. 815, 34 L. J. P. & M. 122, 12 L. T. Rep. N. S. 826, 4 Swab. & Tr. 178.

See 17 Cent. Dig. tit. "Divorce," § 658 *et seq.*

75. *In re* Cave, 26 Wash. 213, 66 Pac. 425, 90 Am. St. Rep. 736, holding that a statute authorizing a disposition of the property of the parties in such manner as shall appear just and equitable confers power to award permanent alimony. See also *supra*, XIX, A, 3.

76. Chaires *v.* Chaires, 10 Fla. 308; Campbell *v.* Campbell, 90 Ga. 687, 16 S. E. 960; McGee *v.* McGee, 10 Ga. 477, all holding that when statutes authorize an absolute divorce for causes existing after marriage, they impliedly extend the power of the court to grant permanent alimony where such a decree is rendered. Darrow *v.* Darrow, 43 Iowa 411. *Contra*, Davol *v.* Davol, 13 Mass. 264; Romaine *v.* Chauncey, 129 N. Y. 566, 29 N. E. 826, 26 Am. St. Rep. 544, 14 L. R. A. 712; Erkenbrach *v.* Erkenbrach, 96 N. Y. 456.

Antenuptial cause of divorce.— If the cause of divorce is one existing at the time of marriage, such as impotency, it has been held that permanent alimony cannot be granted (Chase *v.* Chase, 55 Me. 21); although where the cause of divorce is that the husband had another wife living, reasonable alimony may be decreed (Vanvalley *v.* Vanvalley, 19 Ohio St. 588).

77. *Alabama.*— Lovett *v.* Lovett, 11 Ala. 763.

California.— Everett *v.* Everett, 52 Cal. 383.

Connecticut.— Allen *v.* Allen, 43 Conn. 419.

Illinois.— Spitler *v.* Spitler, 108 Ill. 120; Becklenberg *v.* Becklenberg, 102 Ill. App. 504, holding that where a divorce is granted to the husband for the habitual drunkenness of the wife he is not bound to pay her alimony.

Iowa.— Fivecoat *v.* Fivecoat, 32 Iowa 199, holding that where a divorce is granted the husband for adultery of the wife, she is not entitled to alimony.

Missouri.— McIntire *v.* McIntire, 80 Mo. 470; Motley *v.* Motley, 93 Mo. App. 473, 67 S. W. 741; De Hoog *v.* De Hoog, 65 Mo. App. 246, all decided pursuant to a statute providing that the wife if a guilty party forfeits her right to alimony for her maintenance.

Nebraska.— Shafer *v.* Shafer, 10 Nebr. 468, 6 N. W. 768.

New York.— Waring *v.* Waring, 100 N. Y. 570, 3 N. E. 289; Davis *v.* Davis, 75 N. Y. 221; Atwater *v.* Atwater, 53 Barb. 621; Fry *v.* Fry, 7 Paige 461; Palmer *v.* Palmer, 1 Paige 276; Perry *v.* Perry, 2 Barb. Ch. 311.

Pennsylvania.— See Wait *v.* Wait, 7 Leg. Gaz. 382, 23 Pittsb. Leg. J. 57.

Virginia.— Harris *v.* Harris, 31 Gratt. 13; Latham *v.* Latham, 30 Gratt. 307; Carr *v.* Carr, 22 Gratt. 168.

Wisconsin.— State *v.* Smith, 19 Wis. 531.

England.— Thompson *v.* Thompson, L. R. 1 P. 553.

See 17 Cent. Dig. tit. "Divorce," § 659 *et seq.*

78. *Illinois.*— Spitler *v.* Spitler, 108 Ill. 120; Deenis *v.* Deenis, 79 Ill. 74.

will in the exercise of its discretion deny the relief where the wife has wilfully abandoned her husband without justification,[79] as where she leaves him to live in criminal relations with another.[80] So alimony may be denied if she has been guilty of adultery.[81] If, however, the husband was at fault and materially contributed to his wife's desertion or other misconduct, he may be required to provide for her support, although he obtains a divorce from her.[82] In some states the legislature has gone so far as to authorize the court to allow permanent alimony to the wife, although her application for a divorce is denied.[83] Ordinarily, however, there can be no alimony where a divorce is denied,[84] and even under statutes providing otherwise, maintenance cannot be awarded unless a cause for

Indiana.— Hedrick *v.* Hedrick, 28 Ind. 291; Coon *v.* Coon, 26 Ind. 189; Cox *v.* Cox, 25 Ind. 303.

Iowa.— McDonald *v.* McDonald, 117 Iowa 307, 90 N. W. 603; Abel *v.* Abel, 89 Iowa 300, 56 N. W. 442; Barnes *v.* Barnes, 59 Iowa 456, 13 N. W. 441.

Kentucky.— Newsome *v.* Newsome, 95 Ky. 383, 25 S. W. 878, 15 Ky. L. Rep. 801; Lacey *v.* Lacey, 95 Ky. 110, 23 S. W. 673, 15 Ky. L. Rep. 439; Gains *v.* Gains, (Ky. 1892) 19 S. W. 829; Davis *v.* Davis, 86 Ky. 32, 4 S. W. 822, 9 Ky. L. Rep. 300.

Massachusetts.— Brigham *v.* Brigham, 147 Mass. 159, 16 N. E. 780; Graves *v.* Graves, 108 Mass. 314.

Michigan.—Reynolds *v.* Reynolds, 92 Mich. 104, 52 N. W. 295.

Nebraska.— Dickerson *v.* Dickerson, 26 Nebr. 318, 42 N. W. 9.

New Hampshire.— Janvrin *v.* Janvrin, 59 N. H. 23; Sheafe *v.* Laighton, 36 N. H. 240; Sheafe *v.* Sheafe, 24 N. H. 564.

Pennsylvania.— Miles *v.* Miles, 76 Pa. St. 357; Shoop's Appeal, 34 Pa. St. 233.

Wisconsin.— State *v.* Smith, 19 Wis. 531.

England.— Jee *v.* Thurlow, 2 B. & C. 547, 4 D. & R. 11, 2 L. J. K. B. O. S. 81, 26 Rev. Rep. 453, 9 E. C. L. 241; Goodden *v.* Goodden, [1892] P. 1, 65 L. T. Rep. N. S. 542, 40 Wkly. Rep. 49; Forth *v.* Forth, 36 L. J. P. & M. 122, 16 L. T. Rep. N. S. 574, 15 Wkly. Rep. 1091; Prichard *v.* Prichard, 3 Swab. & Tr. 523; Ashcroft *v.* Ashcroft, [1902] P. 270, 71 L. J. P. & Adm. 125, 87 L. T. Rep. N. S. 229, 51 Wkly. Rep. 292. See also Bent *v.* Bent, 30 L. J. P. & M. 189, 5 L. T. Rep. N. S. 120, 2 Swab. & Tr. 392, 10 Wkly. Rep. 448; Ratcliff *v.* Ratcliff, 29 L. J. P. & M. 171, 1 Swab. & Tr. 467, 7 Wkly. Rep. 727.

79. *Kentucky.*— Lee *v.* Lee, 1 Duv. 196.

Nebraska.— Shafer *v.* Shafer, 10 Nebr. 468, 6 N. W. 768.

New York.— Boubon *v.* Boubon, 3 Rob. 715.

Virginia.— Harris *v.* Harris, 31 Gratt. 13; Carr *v.* Carr, 22 Gratt. 168.

England.— Thompson *v.* Thompson, L. R. 1 P. 553.

See, however, Dupont *v.* Dupont, 10 Iowa 112, 74 Am. Dec. 378, holding that if the wife's subsequent conduct has been without reproach, she may be awarded alimony, although she left her husband without good cause.

80. Spitler *v.* Spitler, 108 Ill. 120; Hickling *v.* Hickling, 40 Ill. App. 73; Spaulding *v.* Spaulding, 133 Ind. 122, 32 N. E. 224, 36 Am. St. Rep. 534; Stork *v.* Stork, 2 Wkly. Notes Cas. (Pa.) 336, 11 Phila. (Pa.) 324.

81. Holmes *v.* Holmes, Walk. (Miss.) 474; Helden *v.* Helden, 7 Wis. 296, holding that, although adultery is not known and pleaded as a cause for divorce it may, if discovered after a decree, be set up as affecting the right to alimony. See, however, Cross *v.* Cross, 63 N. H. 444, holding that adultery is not as a matter of law a bar to alimony.

Insanity.—An act which would otherwise be adultery, committed while insane, does not preclude the allowance of permanent alimony. Wray *v.* Wray, 33 Ala. 187; Mims *v.* Mims, 33 Ala. 98.

82. Edwards *v.* Edwards, 84 Ala. 361, 3 So. 896; Rose *v.* Rose, 9 Ark. 507; Pore *v.* Pore, 50 S. W. 681, 20 Ky. L. Rep. 1980; Hoover *v.* Hoover, 21 S. W. 234, 14 Ky. L. Rep. 680, where the husband obtained a divorce for his wife's abandonment, which was caused by his false charges of incontinency.

83. *California.*— Hagle *v.* Hagle, 68 Cal. 588, 9 Pac. 842, holding that the court, while refusing the wife a divorce, may require the husband to provide for her separate maintenance, it appearing that they cannot live happily together.

Georgia.— Price *v.* Price, 90 Ga. 244, 15 S. E. 774.

Kentucky.— Tilton *v.* Tilton, 29 S. W. 290, 16 Ky. L. Rep. 290.

Louisiana.— Rowley *v.* Rowley, 19 La. 557.

New Jersey.— Miller *v.* Miller, 1 N. J. Eq. 386.

New York.— Ramsden *v.* Ramsden, 91 N. Y. 281; Davis *v.* Davis, 75 N. Y. 221; Ruckman *v.* Ruckman, 58 How. Pr. 278; Atwater *v.* Atwater, 36 How. Pr. 431; Palmer *v.* Palmer, 29 How. Pr. 390; P—— *v.* P——, 24 How. Pr. 197.

Ohio.— Graves *v.* Graves, 50 Ohio St. 196, 33 N. E. 720; Johnston *v.* Johnston, Wright 454; Duhme *v.* Duhme, 3 Ohio Dec. (Reprint) 95, 3 Wkly. L. Gaz. 186.

Tennessee.— Nicely *v.* Nicely, 3 Head 184.

Separate maintenance see HUSBAND AND WIFE.

84. Peyre *v.* Peyre, 79 Cal. 336, 21 Pac. 838; Doyle *v.* Doyle, 26 Mo. 545.

Power to award permanent alimony where no other relief is sought see *supra*, XIX, A, 5.

divorce or separation is established, and the decree is denied because of condonation or other defensive matter.[85]

3. Allowance After Divorce — a. In General. It is a general rule sustained by the weight of authority that an application for permanent alimony will not be entertained after a judgment for divorce has been rendered;[86] and this is so whether the divorce be absolute or limited.[87]

b. Reservation in Judgment. Alimony may be granted after a decree of divorce, if the right to have it subsequently determined is reserved therein.[88]

4. Determination of Right to Divorce. Permanent alimony should not be granted,[89] nor the question of the wife's right thereto considered,[90] until it is determined that a divorce should be granted, in the absence of statute authorizing alimony without divorce.[91]

5. Discretion of Court. As in the case of an allowance of temporary alimony,[92] an award of permanent alimony is within the sound discretion of the court,[93]

85. Reade *v.* Reade, (Cal. 1889) 22 Pac. 284; Peyre *v.* Peyre, 79 Cal. 336, 21 Pac. 838; Hagle *v.* Hagle, 74 Cal. 608, 16 Pac. 518; Davis *v.* Davis, 75 N. Y. 221; Ruckman *v.* Ruckman, 58 How. Pr. (N. Y.) 278; Atwater *v.* Atwater, 36 How. Pr. (N. Y.) 431.

86. *Alabama.*— Downey *v.* Downey, 98 Ala. 373, 13 So. 412, 21 L. R. A. 677 (holding that even where alimony is granted in proceedings seeking alimony as sole relief, courts will not award permanent alimony after a judgment of absolute divorce); Harrison *v.* Harrison, 20 Ala. 629, 56 Am. Dec. 627 (holding that the reason for the rule is that an absolute divorce puts an end to the marriage relation, and as a consequence all duties and obligations necessarily dependent upon that relation immediately cease).

Arkansas.— Bowman *v.* Worthington, 24 Ark. 522.

California.— Howell *v.* Howell, 104 Cal. 45, 37 Pac. 770, 43 Am. St. Rep. 70.

Indiana.— Fischli *v.* Fischli, 1 Blackf. 360, 12 Am. Dec. 251.

Iowa.— Alderson *v.* Alderson, 84 Iowa 198, 50 N. W. 671; Reid *v.* Reid, 74 Iowa 681, 39 N. W. 102; Van Orsdale *v.* Van Orsdale, 67 Iowa 35, 24 N. W. 579; Rouse *v.* Rouse, 47 Iowa 422; Wilde *v.* Wilde, 36 Iowa 319.

Kentucky.— Campbell *v.* Campbell, 74 S. W. 670, 25 Ky. L. Rep. 53.

Michigan.— Moross *v.* Moross, 129 Mich. 27, 87 N. W. 1035.

New York.— Erkenbrach *v.* Erkenbrach, 96 N. Y. 456; Kamp *v.* Kamp, 59 N. Y. 212; Ober *v.* Ober, 5 Silv. Supreme 37, 7 N. Y. Suppl. 843; Cullen *v.* Cullen, 55 N. Y. Super. Ct. 346; Johnson *v.* Johnson, 12 Daly 232, 65 How. Pr. 517.

Ohio.— Petersine *v.* Thomas, 28 Ohio St. 596, holding that where a suit for divorce and alimony has been finally determined by the court granting the divorce, and in lieu of alimony confirming an executed agreement as to the amount paid as alimony, a new action for alimony cannot be maintained.

Washington.— Metler *v.* Metler, 32 Wash. 494, 73 Pac. 535, holding that where the court has no jurisdiction to open a divorce decree, its subsequent order for alimony and suit money is void.

See also *supra*, XIX, A, 5.

Contra.— *Maine.*— Call *v.* Call, 65 Me. 407.

Mississippi.— Lawson *v.* Shotwell, 27 Miss. 630 (holding, however, that alimony should not be allowed after decree unless good reason be shown why the allowance was not made at the time the decree was rendered); Shotwell *v.* Shotwell, Sm. & M. Ch. 51.

New Hampshire.— Cross *v.* Cross, 63 N. H. 444; Sheafe *v.* Laighton, 36 N. H. 240; Sheafe *v.* Sheafe, 24 N. H. 564.

Pennsylvania.— McKarracher *v.* McKarracher, 3 Yeates 56.

Wisconsin.— Crugom *v.* Crugom, 64 Wis. 253, 25 N. W. 5; Cook *v.* Cook, 56 Wis. 195, 14 N. W. 33, 443, 43 Am. Rep. 706.

England.— Goodden *v.* Goodden, [1892] P. 1, 65 L. T. Rep. N. S. 542, 40 Wkly. Rep. 49; Bradley *v.* Bradley, 3 P. D. 47, 47 L. J. P. & Adm. 53, 39 L. T. Rep. N. S. 203, 26 Wkly. Rep. 831; Covell *v.* Covell, L. R. 2 P. 411, 41 L. J. P. & M. 81, 27 L. T. Rep. N. S. 324; Charles *v.* Charles, L. R. 1 P. 260, 36 L. J. P. & M. 17, 15 L. T. Rep. N. S. 416; Latham *v.* Latham, 7 Jur. N. S. 218, 30 L. J. P. & M. 163, 4 L. T. Rep. N. S. 308, 2 Swab. & Tr. 298, 9 Wkly. Rep. 680; Winstone *v.* Winstone, 30 L. J. P. & M. 109, 3 L. T. Rep. N. S. 895, 2 Swab. & Tr. 246.

See 17 Cent. Dig. tit. "Divorce," § 663.

87. Erkenbrach *v.* Erkenbrach, 96 N. Y. 456; Anderson *v.* Cullen, 16 Daly 15, 8 N. Y. Suppl. 643; Cullen *v.* Cullen, 55 N. Y. Super. Ct. 346; Goodden *v.* Goodden, [1892] P. 1, 65 L. T. Rep. N. S. 542, 40 Wkly. Rep. 49.

After a decree nisi has been rendered, however, the court may allow alimony in favor of the wife. Brigham *v.* Brigham, 147 Mass. 159, 16 N. E. 780.

88. Galusha *v.* Galusha, 138 N. Y. 272, 33 N. E. 1062; Lynde *v.* Lynde, 41 N. Y. App. Div. 280, 58 N. Y. Suppl. 567; Woods *v.* Waddle, 44 Ohio St. 449, 8 N. E. 297; Williams *v.* Williams, 29 Wis. 517.

89. Johnston *v.* Johnston, 54 Kan. 726, 39 Pac. 725.

90. Rae *v.* Rae, 53 Mich. 40, 18 N. W. 551.

91. See *supra*, XIX, A, 5.

92. See *supra*, XIX, B, 2.

93. *Illinois.*— Jolliff *v.* Jolliff, 32 Ill. 527; Bergen *v.* Bergen, 22 Ill. 187.

Maine.— Call *v.* Call, 65 Me. 407.

although if the award is erroneous on its face,[94] or unjust to either party or oppressive,[95] it is subject to revision and correction on appeal.

6. ARRANGEMENTS OR AGREEMENTS BETWEEN PARTIES — a. Settlements Upon Wife. Where a husband has already conveyed to the wife a fair share of his property, permanent alimony should not be decreed her upon obtaining a divorce for his misconduct.[96]

b. Antenuptial Contract. An antenuptial contract whereby each relinquished all rights to property then owned or afterward to be acquired by the other, and providing that upon the death of either party the property should descend to his or her heirs, does not preclude recovery of alimony by the wife upon her obtaining a decree of divorce.[97]

c. Validity and Effect — (1) *IN GENERAL.* The law upon reasons of public policy will ordinarily refuse to enforce contracts, made between a husband and his wife during the coverture, barring the wife from alimony;[98] and it has been generally held that a contract between the parties, executed pending the suit, whereby the husband agrees to pay a stipulated sum as alimony if a divorce be obtained is invalid as against public policy,[99] although a tripartite agreement entered into pending the suit, which does not depend upon the result thereof, is not open to the same objection.[1] If the agreement be made prior to suit brought, without anticipation of suit, it may be considered by the court in determining the amount to be allowed,[2] and, if there be no fraud or collusion and the agreement amply protects the interests of the wife and fairly disposes of the property and rights of the par-

Nebraska.— Brasch *v.* Brasch, 50 Nebr. 73, 69 N. W. 392.

New York.— McCarthy *v.* McCarthy, 143 N. Y. 235, 38 N. E. 288; Forrest *v.* Forrest, 3 Bosw. 661; McDonough *v.* McDonough, 26 How. Pr. 193.

Ohio.— Julier *v.* Julier, 62 Ohio St. 90, 56 N. E. 661, 78 Am. St. Rep. 697.

Virginia.— Brown *v.* Brown, (1896) 24 S. E. 238; Miller *v.* Miller, 92 Va. 196, 23 S. E. 232.

England.— Kaye *v.* Kaye, 86 L. T. Rep. N. S. 638, 50 Wkly. Rep. 499.

See 17 Cent. Dig. tit. "Divorce," § 665.

94. De Hoog *v.* De Hoog, 65 Mo. App. 246.

95. Masterson *v.* Masterson, 46 S. W. 20, 20 Ky. L. Rep. 631; Beeler *v.* Beeler, 44 S. W. 136, 19 Ky. L. Rep. 1936; Simons *v.* Simons, 23 Tex. 344.

96. Stevens *v.* Stevens, 49 Mich. 504, 13 N. W. 835; Harrison *v.* Harrison, 49 Mich. 240, 13 N. W. 581.

97. Stearns *v.* Stearns, 66 Vt. 187, 28 Atl. 875, 44 Am. St. Rep. 836. And see Morrison *v.* Morrison, 49 N. H. 69.

98. Seeley's Appeal, 56 Conn. 202, 14 Atl. 291; Daggett *v.* Daggett, 5 Paige (N. Y.) 509, 28 Am. Dec. 442. See also CONTRACTS, 9 Cyc. 520.

99. *Connecticut.*— Goodwin *v.* Goodwin, 4 Day 343.

Illinois.— Hamilton *v.* Hamilton, 89 Ill. 349.

Indiana.— Stokes *v.* Anderson, 118 Ind. 533, 21 N. E. 331, 4 L. R. A. 313; Moon *v.* Baum, 58 Ind. 194.

Iowa.— Darrow *v.* Darrow, 43 Iowa 411; Wilson *v.* Wilson, 40 Iowa 230.

Minnesota.— Adams *v.* Adams, 25 Minn. 72; Belden *v.* Munger, 5 Minn. 211, 80 Am. Dec. 407.

Missouri.— Speck *v.* Dausman, 7 Mo. App. 165.

New Hampshire.— Cross *v.* Cross, 58 N. H. 373.

New York.— Daggett *v.* Daggett, 5 Paige 509, 28 Am. Dec. 442.

See 17 Cent. Dig. tit. "Divorce," § 666 *et seq.*

Contra.— Dutton *v.* Dutton, 30 Ind. 452; Stratton *v.* Stratton, 77 Me. 373, 52 Am. Rep. 779; Burnett *v.* Paine, 62 Me. 122; Julier *v.* Julier, 62 Ohio St. 90, 56 N. E. 661, 78 Am. St. Rep. 697; Brown *v.* Brown, 5 Ohio S. & C. Pl. Dec. 568, 7 Ohio N. P. 605; Neely *v.* Neely, 9 Ohio Dec. (Reprint) 201, 11 Cinc. L. Bul. 191.

Collateral attack of decree embodying agreement.— Where the wife agreed not to contest an action for divorce, the husband agreeing in return that if he obtained a divorce the decree should contain a provision for the payment to her of a certain sum for support, it was held that, although the agreement was void as against public policy, its invalidity was not available in a collateral attack on the decree in a suit afterward brought by the wife to recover instalments due thereunder. France *v.* France, 79 N. Y. App. Div. 291, 79 N. Y. Suppl. 579.

Recovery on notes given by agreement.— The invalidity of such an agreement does not affect the validity of promissory notes given by the husband in accordance with the terms thereof, after the divorce is granted. Chapin *v.* Chapin, 135 Mass. 393.

1. Schmieding *v.* Doellner, 10 Mo. App. 373.

2. Martin *v.* Martin, 65 Iowa 255, 21 N. W. 595; Masterson *v.* Masterson, 46 S. W. 20, 20 Ky. L. Rep. 631; Crews *v.* Mooney, 74 Mo. 26; Julier *v.* Julier, 62 Ohio St. 90, 56 N. E. 661, 78 Am. St. Rep. 697.

ties, it may be sustained.[3] After a decree of divorce has been rendered, the parties may agree as to the sums to be paid the wife as alimony, and in furtherance of such an agreement may submit their claims to an arbitrator for determination.[4]

(11) *Separation Agreements.* A valid separation agreement whereby the husband is bound to contribute a named sum for the support of his wife is not avoided or annulled by a subsequent divorce of the parties, and the court in awarding alimony to the wife cannot disregard it and make provision for the wife inconsistent therewith.[5]

7. Pecuniary Ability of Parties. In most jurisdictions the necessities of the wife and the resources of the husband are matters to be considered in determining the wife's right to permanent alimony.[6] If the wife has a separate estate sufficient for her support,[7] or if she has lived apart from her husband for a number of years and during such time has supported herself,[8] and the husband has no

3. *Florida.*— Underwood *v.* Underwood, 12 Fla. 434, holding, however, that the agreement will not be sustained until on inquiry it is found to be equitable.

Illinois.— Buck *v.* Buck, 60 Ill. 241; Collier *v.* Collier, 66 Ill. App. 484.

Kentucky.— Parsons *v.* Parsons, 62 S. W. 719, 23 Ky. L. Rep. 223.

Maine.— Stratton *v.* Stratton, 77 Me. 373, 52 Am. Rep. 779; Snow *v.* Gould, 74 Me. 540, 43 Am. Rep. 604.

Ohio.— Julier *v.* Julier, 62 Ohio St. 90, 56 N. E. 661, 78 Am. St. Rep. 697.

An agreement for the support of a daughter, executed pending a suit for divorce, in pursuance of which the husband gave his note for the payment of a certain amount when the daughter should become eighteen years of age, with interest payable semi-annually, is not equivalent to or a substitute for alimony to the wife. Stilson *v.* Stilson, 46 Conn. 15.

For forms of agreements as to disposition of property and payments made in lieu of alimony see Parsons *v.* Parsons, 62 S. W. 719, 23 Ky. L. Rep. 223; Julier *v.* Julier, 62 Ohio St. 90, 56 N. E. 661, 78 Am. St. Rep. 697.

4. Carter *v.* Carter, 109 Mass. 306. And see Chapin *v.* Chapin, 135 Mass. 393.

A conveyance of land made in full payment and discharge of alimony decreed to be paid by the grantor, although made to the children of the grantor and his former wife, who was entitled to the alimony, is not a voluntary conveyance, but is founded upon a legal and binding consideration. Preston *v.* Williams, 81 Ill. 176.

An agreement obtained by fraud from a woman, to accept a different provision in lieu of alimony decreed in her favor, does not bar her right to such alimony. Gray *v.* Gray, 83 Mo. 106.

5. *Kentucky.*—Parsons *v.* Parsons, 62 S. W. 719, 23 Ky. L. Rep. 223.

New Jersey.— Calame *v.* Calame, 25 N. J. Eq. 548.

New York.— Lawrence *v.* Lawrence, 32 Misc. 503, 66 N. Y. Suppl. 393; Taylor *v.* Taylor, 32 Misc. 312, 66 N. Y. Suppl. 561.

Ohio.— Julier *v.* Julier, 62 Ohio St. 90, 56 N. E. 661, 78 Am. St. Rep. 697.

Pennsylvania.— Bloom *v.* Bloom, 8 Pa. Dist. 563, 22 Pa. Co. Ct. 433.

See 17 Cent. Dig. tit. "Divorce," § 666.

Adequacy of provision.— In Galusha *v.* Galusha, 116 N. Y. 635, 22 N. E. 1114, 15 Am. St. Rep. 453, 6 L. R. A. 487, the court held that the authority conferred upon the court by the code to require defendant to provide suitably for the support of plaintiff as justice requires is not so broad as to admit of a construction conferring upon the court power to ignore all existing rules as to parties, pleadings, and proof, and arbitrarily set aside a valid agreement, because in the judgment of the court one of the parties agreed to accept from the other a less sum of money than she ought But see Collins *v.* Collins, 80 N. Y. 1 (where the court held that the sufficiency of a provision contained in an agreement for the separate maintenance of a married woman may be considered, and if it is inadequate the deficiency may be made up); Fox *v.* Fox, 7 N. Y. St. 271.

6. Stutsman *v.* Stutsman, 30 Ind. App. 645, 66 N. E. 908, holding that the court may properly consider not only the value of the husband's estate, but also his income, the value of the wife's separate property, and the conduct of the husband toward the wife.

Determination of amount see *infra*, XIX, D, 8, c.

7. *Kentucky.*—Cottrell *v.* Cottrell, 74 S. W. 227, 24 Ky. L. Rep. 2417, where a husband was granted a divorce for the wife's fault, and it appeared that, on the settlement of a prior action for divorce brought by her, land was conveyed to her which she still owned, and that the husband was in feeble health and nearing old age and owned but little property, and a refusal to grant the wife alimony was held proper.

Michigan.— Thompson *v.* Thompson, 79 Mich. 124, 44 N. W. 424.

New Jersey.— Marker *v.* Marker, 11 N. J. Eq. 256.

Ohio.— De Witt *v.* De Witt, 67 Ohio St. 340, 66 N. E. 136.

Texas.— Wright *v.* Wright, 6 Tex. 29.

See 17 Cent. Dig. tit. "Divorce," § 669.

8. Abele *v.* Abele, 62 N. J. Eq. 644, 50 Atl. 686.

estate of his own,[9] the court may refuse to award alimony. But if the husband is capable of supporting his wife by his earnings, lack of other means will not justify a failure to make such an award.[10]

8. PROCEDURE — a. Application. Local practice will govern an application for permanent alimony. It is usual to include the application in pleadings praying for a decree of divorce.[11] The ecclesiastical practice was to apply for alimony in an ancillary proceeding, and this practice has been followed in some states.[12] Permanent alimony will not be awarded unless application therefor be made in some form.[13] The allegations to be made in pleadings for allowances of alimony have already been considered.[14]

b. Evidence — (I) *IN GENERAL.* Applications for alimony should be sustained by the oath of the applicant or by evidence *aliunde.*[15] The material facts, such as the husband's resources,[16] and the marriage of the parties,[17] must be fully established; and the husband should be permitted to produce any evidence which would tend to reduce the amount of alimony.[18] If the husband defaults in appearance or permits a bill to be taken as confessed the allegations contained in the complaint, so far as they relate to alimony, are to be taken as true;[19] and if the husband gives no evidence as to the value of his property or as to his ability to pay, the wife's statements in respect thereto will be deemed to be true.[20]

(II) *BURDEN OF PROOF.* The burden of proving the existence of essential facts is upon the applicant.[21]

c. Determination of Amount — (I) *IN GENERAL.* Unless otherwise provided by statute, no specific portion of the husband's estate need be awarded as alimony, although one third of the husband's income has often been held a proper apportionment.[22] The sum allowed should be such as from the circumstances of the

9. Garrett *v.* Garrett, 44 S. W. 112, 19 Ky. L. Rep. 1674; Feigley *v.* Feigley, 7 Md. 537, 61 Am. Dec. 375; Sheafe *v.* Sheafe, 36 N. H. 155.

10. *California.*— Eidenmuller *v.* Eidenmuller, 37 Cal. 364.

Georgia.— Campbell *v.* Campbell, 90 Ga. 687, 16 S. E. 960.

Kentucky.— Canine *v.* Canine, 16 S. W. 367, 13 Ky. L. Rep. 124.

Louisiana.— Dale *v.* Hauer, 109 La. 711, 33 So. 741.

New Jersey.— Downing *v.* Downing, (Ch. 1903) 54 Atl. 542.

New York.— Kirby *v.* Kirby, 1 Paige 261.

11. Prescott *v.* Prescott, 59 Me. 146; Damon *v.* Damon, 28 Wis. 510.

12. *Georgia.*— Roseberry *v.* Roseberry, 17 Ga. 139.

Illinois.— Becker *v.* Becker, 15 Ill. App. 247.

Kentucky.— Culver *v.* Culver, 8 B. Mon. 128.

New Jersey.— Bray *v.* Bray, 6 N. J. Eq. 27.

New York.— Kirch *v.* Kirch, 18 N. Y. Suppl. 447.

Scope of inquiry.— Upon a petition for an inquiry as to alimony after decree, the court is not restricted to the issues made by the bill and answer, but may inquire as to all matters touching the circumstances, character, temper, and conduct of the parties, as well after as before decree passed. Helden *v.* Helden, 7 Wis. 296.

13. Chandler *v.* Chandler, 13 Ind. 492.

14. See *supra*, XIX, A, 6, b.

15. Wright *v.* Wright, 3 Tex. 168.

16. See *supra*, XIX, D, 7.

17. See *supra*, XIX, B, 4, a.

18. Logan *v.* Logan, 90 Ind. 107; Forrest *v.* Forrest, 6 Duer (N. Y.) 102, 3 Abb. Pr. (N. Y.) 144.

19. Perry *v.* Perry, 2 Barb. Ch. (N. Y.) 285.

20. Pain *v.* Pain, 80 N. C. 322.

21. Glasscock *v.* Glasscock, 94 Ind. 163.

Presumption as to income.—Defendant having stated the amount of his property, it is to be presumed that it yields a reasonable income, unless he shows the contrary. Forrest *v.* Forrest, 5 Bosw. (N. Y.) 672. See, however, Price *v.* Price, 22 Tex. 334, holding that evidence that defendant had a good farm, was a good farmer, spent but little, in connection with proof of what his neighbors made, is too indefinite to sustain an allowance of alimony.

22. *Alabama.*— Turner *v.* Turner, 44 Ala. 437.

Arkansas.— Beene *v.* Beene, 64 Ark. 518, 43 S. W. 968, where this proportion is fixed by statute.

Delaware.— Jeans *v.* Jeans, 2 Harr. 142.

Indiana.— Musselman *v.* Musselman, 44 Ind. 106.

Kentucky.— Lockridge *v.* Lockridge, 3 Dana 28, 28 Am. Dec. 52.

Maryland.— Ricketts *v.* Ricketts, 4 Gill 105.

Minnesota.— Segelbaum *v.* Segelbaum, 39 Minn. 258, 39 N. W. 492.

Mississippi.— Armstrong *v.* Armstrong, 32 Miss. 279.

New Jersey.— Moran *v.* Moran, (Ch. 1886) 2 Atl. 777.

parties and the nature of the case shall appear just and reasonable.[23] Where the wife is the injured party alimony should be allowed her sufficient in amount to maintain her and her children in as good condition as if she were still living with her husband; the general rule being that the innocent party should not be left to suffer pecuniarily for having been compelled by the conduct of the other to seek a divorce.[24]

(II) *DISCRETION OF COURT.* The amount to be awarded as permanent alimony is largely in the discretion of the court.[25]

(III) *FACTS AFFECTING AMOUNT*—(A) *Ability of Husband.* The value of the husband's estate, if he has any, is a chief factor in the determination of the amount to be allowed; and if he has no estate his earning capacity becomes of first importance.[26] The sum allowed must be so clearly within the husband's

New York.— Forrest *v.* Forrest, 8 Bosw. 640.

Pennsylvania.— McClurg's Appeal, 66 Pa. St. 366.

Utah.— Griffin *v.* Griffin, 18 Utah 98, 55 Pac. 84.

Wisconsin.— Roelke *v.* Roelke, 103 Wis. 204, 78 N. W. 923.

England.— Kettlewell *v.* Kettlewell, [1898] P. 138, 67 L. J. P. & Adm. 16, 77 L. T. Rep. N. S. 631; Mytton *v.* Mytton, 3 Hagg. Eccl. 657, 5 Eng. Eccl. 249; Westmeath *v.* Westmeath, 3 Knapp 42, 12 Eng. Reprint 563; Hyde *v.* Hyde, 29 L. J. P. & M. 150; Otway *v.* Otway, 2 Phillim. 109, 1 Eng. Eccl. 200.

See 17 Cent. Dig. tit. "Divorce," § 675 *et seq.*

23. Andrews *v.* Andrews, 69 Ill. 609; Reavis *v.* Reavis, 2 Ill. 242; Musselman *v.* Musselman, 44 Ind. 106; Russell *v.* Russell, 4 Greene (Iowa) 26, 61 Am. Dec. 112.

24. *Illinois.*— Mussing *v.* Mussing, 104 Ill. 126; Johnson *v.* Johnson, 36 Ill. App. 152.

Indiana.— Yost *v.* Yost, 141 Ind. 584, 41 N. E. 11; De Ruiter *v.* De Ruiter, 28 Ind. App. 9, 62 N. E. 100, 91 Am. St. Rep. 107.

Kansas.— Packard *v.* Packard, 34 Kan. 53, 7 Pac. 628.

New Jersey.— Boyce *v.* Boyce, 27 N. J. Eq. 433; Calame *v.* Calame, 24 N. J. Eq. 440.

Wisconsin.— Barker *v.* Dayton, 28 Wis. 367.

25. *California.*—Anderson *v.* Anderson, 124 Cal. 48, 56 Pac. 630, 71 Am. St. Rep. 17.

Georgia.— Hill *v.* Hill, 47 Ga. 332; McGee *v.* McGee, 10 Ga. 477.

Illinois.— Parker *v.* Parker, 61 Ill. 369; Dooley *v.* Dooley, 19 Ill. App. 391.

Indiana.— Gussman *v.* Gussman, 140 Ind. 433, 39 N. E. 918; Peck *v.* Peck, 113 Ind. 168, 15 N. E. 12; Simons *v.* Simons, 107 Ind. 197, 8 N. E. 37; Powell *v.* Powell, 53 Ind. 513.

Iowa.— Camphell *v.* Camphell, 73 Iowa 482, 55 N. W. 522.

Kentucky.— Fishli *v.* Fishli, 2 Litt. 337; Coffman *v.* Coffman, 13 Ky. L. Rep. 204.

Maine.— Call *v.* Call, 65 Me. 407.

Pennsylvania.— Halferty *v.* Halferty, 6 Pa. Dist. 613; Walter *v.* Walter, 3 Kulp 39.

England.— Powell *v.* Powell, L. R. 3 P. 186, 43 L. J. P. & M. 9, 29 L. T. Rep. N. S. 466, 22 Wkly. Rep. 62; Jones *v* Jones, L. R. 2 P. 333, 20 Wkly. Rep. 320; Rees *v.* Rees, 3 Phillim. 387, 1 Eng. Eccl. 418.

Review of discretion.— It is only where there is a manifest abuse of discretion that an appellate court will interfere in an award of alimony. Peck *v.* Peck, 113 Ind. 168, 15 N. E. 12; Metzler *v.* Metzler, 99 Ind. 384; Logan *v.* Logan, 90 Ind. 107; Eastes *v.* Eastes, 79 Ind. 363; Conn *v.* Conn, 57 Ind. 323; Powell *v.* Powell, 53 Ind. 513; Ifert *v.* Ifert, 29 Ind. 473.

26. *California.*— *Ex p.* Spencer, 83 Cal. 460, 23 Pac. 395, 17 Am. St. Rep. 266; Eidenmuller *v.* Eidenmuller, 37 Cal. 364.

Georgia.— Ayers *v.* Ayers, 99 Ga. 325, 25 S. E. 674; Culpepper *v.* Culpepper, 98 Ga. 304, 25 S. E. 443; Carlton *v.* Carlton, 44 Ga. 216.

Illinois.— Elzas *v.* Elzas, 171 Ill. 632, 49 N. E. 717; Foote *v.* Foote, 22 Ill. 425.

Indiana.— Hedrick *v.* Hedrick, 128 Ind. 522, 26 N. E. 768.

Iowa.— Aitchison *v.* Aitchison, 99 Iowa 93, 68 N. W. 573.

Kentucky.— Snedager *v.* Kincaid, 60 S. W. 522, 22 Ky. L. Rep. 1347; Bristow *v.* Bristow, 51 S. W. 819, 21 Ky. L. Rep. 481; Canine *v.* Canine, 16 S. W. 367, 13 Ky. L. Rep. 124; Green *v.* Green, 12 S. W. 945, 11 Ky. L. Rep. 715.

Louisiana.— Gagneaux *v.* Desonier, 51 La. Ann. 1095, 25 So. 946.

Maryland.— Feigley *v.* Feigley, 7 Md. 537, 61 Am. Dec. 375.

Missouri.— Schmidt *v.* Schmidt, 26 Mo. 235.

Nebraska.— Zimmerman *v.* Zimmerman, 59 Nebr. 80, 80 N. W. 643.

New Jersey.— Streitwolf *v.* Streitwolf, (Ch. 1900) 47 Atl. 14; Holmes *v.* Holmes, 29 N. J. Eq. 9.

New York.— Stewart *v.* Stewart, 51 N. Y. App. Div. 629, 65 N. Y. Suppl. 927; Cowles *v.* Cowles, 29 N. Y. App. Div. 476, 51 N. Y. Suppl. 1057; Forrest *v.* Forrest, 8 Bosw. 640; Randall *v.* Randall, 29 Misc. 423, 60 N. Y. Suppl. 718; Lawrence *v.* Lawrence, 3 Paige 267.

North Carolina.— Muse *v.* Muse, 84 N. C. 35.

Pennsylvania.— Walter *v.* Walter, 3 Kulp 39.

Rhode Island.— Battey *v.* Battey, 1 R. I. 212.

Tennessee.— Boggers *v.* Boggers, 6 Baxt. 299.

Virginia.— Bailey *v.* Bailey, 21 Gratt. 43.

See 17 Cent. Dig. tit. "Divorce," § 676.

ability as not unreasonably to reduce his own means of living,[27] although the fact that the allowance is burdensome upon the husband is not material if it be otherwise reasonable and just.[28] If his income be exclusively derived from his personal labor, the amount allowed will be less proportionately than if he were the owner of income-producing property.[29] The husband's acquisitions after the divorce should not be taken into account in determining the amount.[30]

(B) *Suitable Provision For Wife.* The husband's ability being determined, the next matter for consideration is the suitability of provisions to be made for the wife.[31] In determining this question the social condition and circumstances of the parties are important subjects of inquiry.[32] The fact that she has a separate estate producing an income,[33] or receives earnings from her own labor or from a business in which she is engaged,[34] should be taken into account, but only for the purpose of determining what would be a fair allowance to her out of the husband's property.[35] The age and physical condition of the wife should be considered. If she is old and infirm and incapable of contributing to her own support, she should receive more than if she were young and vigorous.[36]

(C) *Wife Contributing to Husband's Estate.* If the wife by her labors materially aided in the accumulation of the husband's property,[37] or if through

Earning capacity.— If a statute provides that the amount allowed the wife as alimony shall not exceed the present value of one third of the husband's personal property and the value of her dower in his real estate a husband's income from his profession cannot be considered in determining the value of his estate. Wilson *v.* Wilson, 67 Minn. 444, 70 N. W. 154.

27. Forrest *v.* Forrest, 8 Bosw. (N. Y.) 640.

28. Bailey *v.* Bailey, 21 Gratt. (Va.) 43.

29. Lawrence *v.* Lawrence, 3 Paige (N. Y.) 267.

Amount of income allowed.— If the labor of the husband is of a comparatively unprofitable character, or he is sickly, allowance should be made for these circumstances. If on the other hand he is in good health and skilful, and is actually realizing considerable profits, the wife should not be refused a reasonable participation in them. Every case must be governed by its circumstances. Prince *v.* Prince, 1 Rich. Eq. (S. C.) 282. See Ayers *v.* Ayers, 99 Ga. 325, 25 S. E. 674; Gussman *v.* Gussman, 140 Ind. 433, 39 N. E. 918; Ensler *v.* Ensler, 72 Iowa 159, 33 N. W. 384.

30. Kamp *v.* Kamp, 59 N. Y. 212; Forrest *v.* Forrest, 9 Abb. Pr. (N. Y.) 289 (both cases holding that the amount of alimony should be determined according to the circumstances of the parties as they existed at the time the decree was pronounced); Cralle *v.* Cralle, 79 Va. 182. *Contra,* Cox *v.* Cox, 20 Ohio St. 439.

31. Forrest *v.* Forrest, 8 Bosw. (N. Y.) 640.

32. *Georgia.*— McGee *v.* McGee, 10 Ga. 477.
Illinois.— Foote *v.* Foote, 22 Ill. 425.
Kentucky.— Barrett *v.* Barrett, 6 Ky. L. Rep. 288.
Nebraska.— Zimmerman *v.* Zimmerman, 59 Nebr. 80, 80 N. W. 643.
New York.— Burr *v.* Burr, 7 Hill 207; Lawrence *v.* Lawrence, 3 Paige 267.

33. *Florida.*— Chaires *v.* Chaires, 10 Fla. 308.
Georgia.— Pinckard *v.* Pinckard, 22 Ga. 31, 68 Am. Dec. 481.
Indiana.— Morse *v.* Morse, 25 Ind. 156; Frederick *v.* Sault, 19 Ind. App. 604, 49 N. E. 909.
Kentucky.— Turner *v.* Turner, 23 Ky. L. Rep. 370, 62 S. W. 1022.
Nebraska.— Small *v.* Small, 28 Nebr. 843, 45 N. W. 248.
England.— Powell *v.* Powell, L. R. 3 P. 55, 186, 43 L. J. P. & M. 9, 29 L. T. Rep. N. S. 466, 22 Wkly. Rep. 62.

34. Hill *v.* Hill, 7 Ky. L. Rep. 92.

35. Frederick *v.* Sault, 19 Ind. App. 604, 49 N. E. 909; Renniman *v.* Renniman, 3 Kulp (Pa.) 341, holding that the separate earnings of the wife and the husband's indebtedness are both factors to be taken into consideration, but neither fact can be set up to relieve the husband of his entire obligation, so long as he is in the undisturbed enjoyment of his estate and in receipt of an income therefrom.

36. *Alabama.*— Lovett *v.* Lovett, 11 Ala. 763.
Indiana.— Schlosser *v.* Schlosser, 29 Ind. 488.
Massachusetts.— Bursler *v.* Bursler, 5 Pick. 427.
Michigan.— Brown *v.* Brown, 22 Mich. 242.
Missouri.— Gercke *v.* Gercke, 100 Mo. 237, 13 S. W. 400.
New Jersey.— Walling *v.* Walling, 16 N. J. Eq. 389.
Wisconsin.— Webster *v.* Webster, 64 Wis. 438, 25 N. W. 434.

Alimony should not be lavishly granted where the wife is young and healthy, brought no property to the husband, and did not assist him in accumulating any, obtained a divorce in order to marry him, and lived with him only a short time. Cummings *v.* Cummings, 50 Mich. 305, 15 N. W. 485.

37. *Alabama.*— Lovett *v.* Lovett, 11 Ala. 763.
Delaware.— Jeans *v.* Jeans, 2 Harr. 142.
Georgia.— McGee *v.* McGee, 10 Ga. 477.

her the husband has acquired property of value,[38] the allowance should be larger than where she has contributed nothing. Where the property has been acquired by the joint efforts of both parties an equal division of the property has been sustained.[39]

(D) *Maintenance and Education of Children.* The fact that the wife is awarded the custody of the children has been taken into consideration in determining the amount to be allowed,[40] although a provision for the children is usually awarded separately, and is not properly included in alimony to the wife.[41]

(E) *Conduct of Parties.* The conduct of the parties is a proper subject of inquiry in reaching a determination. The greater the enormity of the husband's misconduct and the more grievous the wrongs of the wife the more liberal should be the award.[42] If the wife by her misconduct has conduced to his fault

Illinois.— Robbins *v.* Robbins, 101 Ill. 416; Ressor *v.* Ressor, 82 Ill. 442; Dinet *v.* Eigenmann, 80 Ill. 274.

Indiana.— Hedrick *v.* Hedrick, 128 Ind. 522, 26 N. E. 768; Musselman *v.* Musselman, 44 Ind. 106; Bush *v.* Bush, 37 Ind. 164; Conner *v.* Conner, 29 Ind. 48.

Iowa.— Sesterhen *v.* Sesterhen, 60 Iowa 301, 14 N. W. 333.

Michigan.— Berryman *v.* Berryman, 59 Mich. 605, 26 S. W. 789; Cummings *v.* Cummings, 50 Mich. 305, 15 N. W. 485.

Missouri.— Gercke *v.* Gercke, 100 Mo. 237, 13 S. W. 400.

Nebraska.— Zimmerman *v.* Zimmerman, 59 Nebr. 80, 80 N. W. 643.

New York.— Burr *v.* Burr, 7 Hill 207.

Tennessee.— Stillman *v.* Stillman, 7 Baxt. 169.

Virginia.— Owens *v.* Owens, 96 Va. 191, 31 S. E. 72.

England.— Smith *v.* Smith, 2 Phillim. 152, 1 Eng. Eccl. 220; Cooke *v.* Cooke, 2 Phillim. 40, 1 Eng. Eccl. 178.

Joint labor of parties.— Where a husband and wife have lived together until they are too old to perform hard work, and have by their joint labor, management, and economy acquired property sufficient to support them both comfortably, and the wife then obtains a divorce, she will be entitled to such an amount of alimony as will support her comfortably, without reference to her ability to labor, and thereby contribute to her own support. Ressor *v.* Ressor, 82 Ill. 442. If, however, the property so acquired is not sufficient for the support of both, alimony ought not to be so large as to relieve the wife from all necessity for doing anything for her own support. Brown *v.* Brown, 22 Mich. 242.

38. *Iowa.*— Casey *v.* Casey, 116 Iowa 665, 88 N. W. 937.

Kentucky.— Lacey *v.* Lacey, 95 Ky. 110, 23 S. W. 673, 15 Ky. L. Rep. 439; Kefauver *v.* Kefauver, 57 S. W. 467, 22 Ky. L. Rep. 386; Young *v.* Young, 15 S. W. 780, 12 Ky. L. Rep. 886; Coffman *v.* Coffman, 13 Ky. L. Rep. 204; Barrett *v.* Barrett, 6 Ky. L. Rep. 288.

Nebraska.— Wilde *v.* Wilde, 37 Nebr. 891, 56 N. W. 724.

New Jersey.— Mayer *v.* Mayer, (Ch. 1901) 49 Atl. 1078.

New York.— Wright *v.* Wright, 1 Edw. 62.

Tennessee.— Payne *v.* Payne, 4 Humphr. 500, 40 Am. Dec. 660.

Wisconsin.— Cole *v.* Cole, 27 Wis. 531.

Where the wife has contributed nothing to the purchase of real property by her husband, the court is not justified on any principle in decreeing to the wife the title in fee to a portion of the husband's lands. Robbins *v.* Robbins, 101 Ill. 416; Dinet *v.* Eigenmann, 80 Ill. 274; Ross *v.* Ross, 78 Ill. 402; Von Glahn *v.* Von Glahn, 46 Ill. 134.

39. Ressor *v.* Ressor, 82 Ill. 442; Gercke *v.* Gercke, 100 Mo. 237, 13 S. W. 400.

40. Gussman *v.* Gussman, 140 Ind. 433, 39 N. E. 918; Hedrick *v.* Hedrick, 128 Ind. 522, 26 N. E. 768; Mercer *v.* Mercer, 114 Ind. 558, 17 N. E. 182; Jonas *v.* Jonas, 73 Ind. 601; Husband *v.* Husband, 67 Ind. 583, 33 Am. Rep. 107; Haight *v.* Haight, (Iowa 1900) 82 N. W. 443; Aitchison *v.* Aitchison, 99 Iowa 93, 68 N. W. 573; McCloskey *v.* McCloskey, 68 Mo. App. 199; Heninger *v.* Heninger, 90 Va. 271, 18 S. E. 193. However, an allowance will not be made for the support of a child which the husband is at the time actually supporting and which he has never refused to support. Bloom *v.* Bloom, 22 Pa. Co. Ct. 433.

A probability of an after-born child does not justify a court in granting permanent alimony to a wife out of the husband's separate property. Boyd *v.* Boyd, 22 Tex. Civ. App. 200, 54 S. W. 380.

41. See *infra*, XX, H.

42. *California.*—*Ex p.* Spencer, 83 Cal. 460, 23 Pac. 395, 17 Am. St. Rep. 266.

Illinois.— Mussing *v.* Mussing, 104 Ill. 126; Bergen *v.* Bergen, 22 Ill. 187.

Indiana.— Gussman *v.* Gussman, 140 Ind. 433, 39 N. E. 918.

Kentucky.— Davis *v.* Davis, 86 Ky. 32, 4 S. W. 822, 9 Ky. L. Rep. 300; Pence *v.* Pence, 6 B. Mon. 496.

New York.— Burr *v.* Burr, 7 Hill 207; Hammond *v.* Hammond, Clarke 151; Turrel *v.* Turrel, 2 Johns. Ch. 391.

Tennessee.— Lishey *v.* Lishey, 2 Tenn. Ch. 1.

Vermont.— Stearns *v.* Stearns, 66 Vt. 187, 28 Atl. 875, 44 Am. St. Rep. 836.

Virginia.— Owens *v.* Owens, 96 Va. 191, 31 S. E. 72.

Wisconsin.— Pauly *v.* Pauly, 69 Wis. 419, 34 N. W. 512.

England.— Mytton *v.* Mytton, 3 Hagg.

the award may be less.[43] So the refusal of the wife, without reason or excuse, to permit the husband to exercise his conjugal privileges may also be considered for the purpose of lessening the amount of the allowance.[44]

(IV) *EVIDENCE.* Any fact material to the determination of the value of the husband's estate[45] or of the wife's separate estate[46] should be admitted in evidence.

(V) *ADEQUACY OR EXCESSIVENESS OF ALLOWANCE.* The adequacy or excessiveness of an allowance of permanent alimony depends largely upon the circumstances of each particular case.[47]

Eccl. 657, 5 Eng. Eccl. 249; Durant *v.* Durant, 1 Hagg. Eccl. 528, 3 Eng. Eccl. 231; Rees *v.* Rees, 3 Phillim. 387, 1 Eng. Eccl. 418; Smith *v.* Smith, 2 Phillim. 235, 1 Eng. Eccl. 244; Otway *v.* Otway, 2 Phillim. 109, 1 Eng. Eccl. 200; Cooke *v.* Cooke, 2 Phillim. 40, 1 Eng. Eccl. 178.

Alimony as compensation.— Alimony is sometimes allowed by way of compensation for a wrong done to the wife (*Ex p.* Spencer, 83 Cal. 460, 23 Pac. 395, 17 Am. St. Rep. 266), or given to her for the support to which she was entitled by the marriage and which she has been compelled to forego (Stearns *v.* Stearns, 66 Vt. 187, 28 Atl. 875, 44 Am. St. Rep. 836; Noyes *v.* Hubbard, 64 Vt. 302, 23 Atl. 727, 33 Am. St. Rep. 928, 15 L. R. A. 394; Andrew *v.* Andrew, 62 Vt. 495, 20 Atl. 817; Foster *v.* Foster, 56 Vt. 540).

43. *Alabama.*— Jones *v.* Jones, 95 Ala. 443, 11 So. 11, 18 L. R. A. 95; Jeter *v.* Jeter, 36 Ala. 391; Lovett *v.* Lovett, 11 Ala. 763.

Illinois.— Stewartson *v.* Stewartson, 15 Ill. 145; Reavis *v.* Reavis, 2 Ill. 242.

Indiana.— Conner *v.* Conner, 29 Ind. 48.

Iowa.— Zuver *v.* Zuver, 36 Iowa 190.

Kentucky.— Dejarnet *v.* Dejarnet, 5 Dana 499; Thornberry *v.* Thornberry, 4 Litt. 251.

Michigan.— Stevens *v.* Stevens, 49 Mich. 504, 13 N. W. 835.

New York.— Palmer *v.* Palmer, 1 Paige 276; Peckford *v.* Peckford, 1 Paige 274; Hammond *v.* Hammond, Clarke 151.

Canada.— Severn *v.* Severn, 7 Grant Ch. (U. C.) 109.

44. Tumbleson *v.* Tumbleson, 79 Ind. 558.

45. Hedrick *v.* Hedrick, 128 Ind. 522, 26 N. E. 768 (holding that it is proper to show the amount of pension money which the husband receives); Horning *v.* Horning, 107 Mich. 587, 65 N. W. 555 (holding that it is error to exclude from consideration a lumbering contract held by the husband's firm which had several years to run and was a source of great profit to the firm); Janvrin *v.* Janvrin, 59 N. H. 23; Cox *v.* Cox, 20 Ohio St. 439 (holding that on a petition for alimony after divorce it is competent for the wife to show that the husband had received accessions of property by inheritance since the date of the divorce); Cralle *v.* Cralle, 84 Va. 198, 6 S. E. 12.

46. Morse *v.* Morse, 25 Ind. 156.

47. *Illinois.*— Elzas *v.* Elzas, 171 Ill. 632, 49 N. E. 717 (where an allowance of one thousand dollars per annum was sustained, it appearing that the husband's net income exceeded two thousand five hundred dollars per annum); Dawson *v.* Dawson, 110 Ill. 279 (sustaining an allowance of one hundred and fifty dollars per month, which was more than one half of the husband's net income); Firman *v.* Firman, 109 Ill. 63 (sustaining an allowance of seven hundred and twenty dollars per annum and the use of the homestead, where the husband had an income of three thousand eight hundred dollars per year); Becker *v.* Becker, 79 Ill. 532 (where an allowance of four hundred dollars annually in lieu of dower and all claims for the support of their two minor children was held reasonable, it appearing that the husband's estate was worth nine thousand dollars and that his indebtedness did not exceed nine hundred dollars.

Kentucky.— Trapp *v.* Trapp, 46 S. W. 213, 20 Ky. L. Rep. 335 (sustaining an allowance of two hundred dollars per year, where the husband was a capable business man with an estate worth ten thousand dollars, although he was past middle life and had a large family of children by a former marriage); Thiesing *v.* Thiesing, 26 S. W. 718, 16 Ky. L. Rep. 115 (sustaining an allowance of twenty-five dollars per month where the husband was worth three thousand dollars and earned one hundred and twenty-five dollars per month); McAllister *v.* McAllister, 15 Ky. L. Rep. 750 (sustaining an allowance of three hundred dollars per annum, where the husband's estate was valued at over five thousand dollars).

Maryland.— Ricketts *v.* Ricketts, 4 Gill 105, where the husband's income was estimated at nine hundred dollars per year, and the wife was allowed one third thereof.

Mississippi.— Verner *v.* Verner, 64 Miss. 184, 1 So. 52, where an allowance of one hundred and fifty dollars per annum was deemed reasonable, the husband having property worth more than one thousand two hundred dollars, and being able to earn more than his support by his labor.

New Jersey.— Streitwolf *v.* Streitwolf, (Ch. 1900) 47 Atl. 14 (where a husband having an annual income of two thousand three hundred dollars was required to pay his wife sixteen dollars per week); Boyce *v.* Boyce, 27 N. J. Eq. 433 (sustaining alimony of one thousand dollars per annum where that sum was sufficient to provide her with support equal to that which she would have a right to expect if living with her husband).

New York.— Harris *v.* Harris, 83 N. Y. App. Div. 123, 82 N. Y. Suppl. 568 (where it appeared that the husband's income was about four thousand five hundred dollars a year and the judgment awarded plaintiff the custody of the four children, and an allow-

(VI) *AWARD IN GROSS* — (A) *In General.* The ecclesiastical practice was to

ance of two thousand four hundred dollars alimony was held not excessive); Stewart *v.* Stewart, 51 N. Y. App. Div. 629, 65 N. Y. Suppl. 927 (sustaining an allowance of six hundred and fifty dollars per annum as alimony and five hundred dollars per annum for the maintenance and education of a child, where the husband's income was three thousand three hundred dollars per year, and he owned property valued at five thousand one hundred dollars, although the wife owned a house worth seven thousand eight hundred dollars, mortgaged for five thousand dollars, and had six thousand dollars awaiting investment, and an annual income of one hundred and twenty dollars from other sources); Forrest *v.* Forrest, 8 Bosw. 640 (holding that one third of the husband's income cannot be deemed in itself an extravagant proportion, and sustaining an allowance of four thousand dollars per annum, it appearing that the husband was worth between two hundred thousand and three hundred thousand dollars and had an annual income from his profession of twelve thousand dollars); Burr *v.* Burr, 10 Paige 20 [*affirmed* in 7 Hill 207] (where an allowance of ten thousand dollars per year was sustained, the husband being worth nearly a million, with but one relative having any claim on his money); Miller *v.* Miller, 6 Johns. Ch. 91 (where the court allowed one hundred dollars per year, the husband's annual income from his personal and real estate being three hundred and twenty-five dollars per year).

North Dakota.— De Roche *v.* De Roche, (1903) 94 N. W. 767, where the evidence disclosed that the husband and wife had accumulated fourteen thousand dollars, and the husband had a position which would support him, and the wife had the custody of three minor children, and an award of seven thousand dollars in gross was held not excessive.

Oregon.— Brandt *v.* Brandt, 40 Oreg. 477, 67 Pac. 508, sustaining an allowance of twenty dollars per month where the husband's property was worth nine thousand dollars, and he had an income sufficient for the maintenance of the family.

Virginia.— Owens *v.* Owens, 96 Va. 191, 31 S. E. 72 (sustaining an allowance of twenty dollars per month, where the property, valued at two thousand five hundred dollars, was purchased as a result of their joint labor, and the husband was a strong, healthy man between forty and forty-five years of age); Cralle *v.* Cralle, 84 Va. 198, 6 S. E. 12 (holding that an allowance of one hundred and fifty dollars per year is reasonable, it appearing that the husband is of good business habits and worth three thousand eight hundred dollars).

Wisconsin.— Hooper *v.* Hooper, 102 Wis. 598, 78 N. W. 753, 44 L. R. A. 725, where the husband was worth eighty thousand dollars, yielding an income of four thousand two hundred dollars, and in addition derived considerable income from his profession, and the parties occupied a high social position, and the wife was sixty years of age, an allowance in gross of seven thousand dollars and of one hundred dollars per month was sustained); Williams *v.* Williams, 29 Wis. 517 (sustaining an allowance of four hundred dollars per annum to the wife for her support and of five hundred dollars per annum for the support of a daughter of eighteen and a son of fourteen, where the value of the husband's property did not exceed thirty thousand dollars). See also Von Trott *v.* Von Trott, (1903) 94 N. W. 798.

See 17 Cent. Dig. tit. "Divorce," § 678.

Excessive allowances.— In the following cases allowances of alimony were deemed excessive: Culpepper *v.* Culpepper, 98 Ga. 304, 25 S. E. 443 (holding an allowance of twenty-five dollars per month to be excessive, where the husband had no property, was without a profession and out of employment, and had no home except upon his father's farm, where he worked for his board and clothing); Newsome *v.* Newsome, 95 Ky. 383, 25 S. W. 878, 15 Ky. L. Rep. 801 (where a husband worth thirty thousand dollars obtained a divorce which would have been granted on the application of either, and the wife was worth three thousand dollars, and an annual allowance to the wife of four hundred dollars was held excessive); Freeman *v.* Freeman, 13 S. W. 246, 11 Ky. L. Rep. 822 (where an allowance of four hundred and ten dollars per year was deemed unreasonable, it appearing that the husband was worth but three thousand dollars and was not able to work by reason of old age); Cowles *v.* Cowles, 29 N. Y. App. Div. 476, 51 N. Y. Suppl. 1057 (holding that one third of the husband's income is excessive, where the income is derived entirely from personal services which are liable to be reduced or taken away by conditions beyond his control); Williams *v.* Williams, 3 Silv. Supreme 385, 6 N. Y. Suppl. 645, 17 N. Y. Civ. Proc. 297 (reducing an allowance of one thousand dollars per year to five hundred dollars per year, where the husband's annual income was between three thousand and three thousand five hundred dollars, and the wife had an annual income of one thousand dollars, and an allowance of five hundred dollars per year had been made for the support of their child); Galnsha *v.* Galnsha, 43 Hun 181 (reducing the annual allowance to the wife from one-half the husband's income from invested property based on an estimate of five per cent to an allowance based on an estimate of four per cent); Heninger *v.* Heninger, 90 Va. 271, 18 S. E. 193 (where an allowance of one thousand dollars annually was deemed excessive, it appearing that although the husband's farm consisted of three thousand two hundred and ninety-six acres valued at thirty thousand

allow alimony payable in instalments at stated periods and not in gross,[48] and this practice seems to have been followed in many of the early cases in this country.[49] At the present time the practice seems to be to award alimony either in gross or in instalments according to the circumstances of the case and so as best to promote the rights and interests of the parties, and particularly of the injured wife.[50] The question is frequently controlled by statute,[51] either in general language admitting of a construction authorizing an allowance of a gross sum[52] or expressly requiring it to be made in such manner.[53] An award in gross cannot be made in the absence of proof of the wife's age and expectation of life.[54]

dollars, it produced very little income, being largely unimproved land).

The inadequacy of an allowance of one hundred and fifty dollars per month was asserted, and the allowance increased to two hundred dollars per month, where the husband had an annual net income of nearly ten thousand dollars. Emerson *v.* Emerson, 68 Hun (N. Y.) 37, 22 N. Y. Suppl. 684. See, however, Trimble *v.* Trimble, 97 Va. 217, 33 S. E. 531, holding sufficient an allowance of six dollars per month where the husband owned property worth fifteen hundred dollars.

48. Wilson *v.* Wilson, 3 Hagg. Eccl. 329 note c, 5 Eng. Eccl. 129; De Blaquiere *v.* De Blaquiere, 3 Hagg. Eccl. 322, 5 Eng. Eccl. 126; Cooke *v.* Cooke, 2 Phillim. 40, 1 Eng. Eccl. 178.

49. *Florida.*— Phelan *v.* Phelan, 12 Fla. 449.

Georgia.— Odom *v.* Odom, 36 Ga. 286.

Indiana.— Miller *v.* Clark, 23 Ind. 370.

Iowa.— Russell *v.* Russell, 4 Greene 26, 61 Am. Dec. 112.

Kentucky.— Maguire *v.* Maguire, 7 Dana 181.

Maryland.— Wallingsford *v.* Wallingsford, 6 Harr. & J. 485.

New Jersey.— Calame *v.* Calame, 25 N. J. Eq. 548.

New York.— Crain *v.* Cavana, 36 Barb. 410.

Virginia.— Almond *v.* Almond, 4 Rand. 662, 15 Am. Dec. 781; Purcell *v.* Purcell, 4 Hen. & M. 507.

50. *California.*— Robinson *v.* Robinson, 79 Cal. 511, 21 Pac. 1095.

Connecticut.— Lyon *v.* Lyon, 21 Conn. 185.

Illinois.— Dinet *v.* Eigenmann, 80 Ill. 274; Plaster *v.* Plaster, 47 Ill. 290; Wheeler *v.* Wheeler, 18 Ill. 39. *Compare* Von Glahn *v.* Von Glahn, 46 Ill. 134, where the court refused to sanction an allowance in gross, it appearing that the husband's estate was large and that the wife had contributed nothing to it.

Indiana.— Hedrick *v.* Hedrick, 28 Ind. 291.

Kentucky.— Irwin *v.* Irwin, 107 Ky. 24, 52 S. W. 927, 21 Ky. L. Rep. 622.

Maine.— Call *v.* Call, 65 Me. 407; Prescott *v.* Prescott, 59 Me. 146.

Massachusetts.— Burrows *v.* Purple, 107 Mass. 428; Orrok *v.* Orrok, 1 Mass. 341.

Michigan.— Horning *v.* Horning, 107 Mich. 587, 65 N. W. 555; Taylor *v.* Gladwin, 40 Mich. 232; McClung *v.* McClung, 40 Mich. 493, approving of an allowance in gross where it appeared that the husband would be likely to vexatiously delay or withhold periodical payments.

Missouri.— Crews *v.* Mooney, 74 Mo. 26, upholding an allowance in gross when made in pursuance of an agreement of the parties.

Nebraska.— McGechie *v.* McGechie, 43 Nebr. 523, 61 N. W. 692; Nygren *v.* Nygren, 42 Nebr. 408, 60 N. W. 885.

New Hampshire.—Whittier *v.* Whittier, 31 N. H. 452; Parsons *v.* Parsons, 9 N. H. 309, 32 Am. Dec. 362.

North Dakota.— De Roche *v.* De Roche, (1903) 94 N. W. 767.

Ohio.— Piatt *v.* Piatt, 9 Ohio 37.

Tennessee.— Boggers *v.* Boggers, 6 Baxt. 299.

Vermont.— Buckminster *v.* Buckminster, 38 Vt. 248.

Washington.— Madison *v.* Madison, 1 Wash. Terr. 60.

Wisconsin.— Hoernig *v.* Hoernig, 109 Wis. 229, 85 N. W. 346; Hooper *v.* Hooper, 102 Wis. 598, 78 N. W. 753, 44 L. R. A. 725.

See 17 Cent. Dig. tit. "Divorce," § 679.

51. *Alabama.*— Jeter *v.* Jeter, 36 Ala. 391.

Connecticut.— Benedict *v.* Benedict, 58 Conn. 326, 20 Atl. 428.

Georgia.— Halleman *v.* Halleman, 65 Ga. 476.

Wisconsin.— Campbell *v.* Campbell, 37 Wis. 206.

England.— See Medley *v.* Medley, 7 P. & D. 122, 51 L. J. P. & Adm. 74, 30 Wkly. Rep. 937; Jardine *v.* Jardine, 6 P. D. 213, 51 L. J. P. & Adm. 4, 30 Wkly. Rep. 91.

52. Robinson *v.* Robinson, 79 Cal. 511, 21 Pac. 1095; Taylor *v.* Gladwin, 40 Mich. 232; McGechie *v.* McGechie, 43 Nebr. 523, 61 N. W. 692; Williams *v.* Williams, 6 S. D. 284, 61 N. W. 38.

In New York it has been held that a statute authorizing the court to compel defendant to provide suitably for the support of the wife as justice requires, having regard to the circumstances of the respective parties, does not permit of a partition of the husband's estate. Sleeper *v.* Sleeper, 65 Hun 454, 20 N. Y. Suppl. 339 [*affirmed* in 142 N. Y. 625, 37 N. E. 565]. See also Crain *v.* Cavana, 62 Barb. 109.

53. Winemiller *v.* Winemiller, 114 Ind. 540, 17 N. E. 123; Hills *v.* Hills, 94 Ind. 436; Ifert *v.* Ifert, 29 Ind. 473.

54. Gooding *v.* Gooding, 104 Ky. 755, 47 S. W. 1090, 48 S. W. 432, 20 Ky. L. Rep. 955.

(B) *Adequacy or Excessiveness.* The amount to be allowed as alimony in a gross sum will usually be determined by a consideration of the same facts and circumstances controlling an allowance in instalments.[55] If by statute or agreement the allowance is in lieu of all claim for dower, it will be greater than where the dower is not affected by the decree.[56] In any event the adequacy or excessiveness of the allowance in gross is to be determined in each case according to the peculiar circumstances thereof.[57]

55. See *supra*, XIX, D, 8, c.

56. Plaster *v.* Plaster, 47 Ill. 290; Crane *v.* Fipps, 29 Kan. 585; Owen *v.* Yale, 75 Mich. 256, 42 N. W. 817; Gercke *v.* Gercke, 100 Mo. 237, 13 S. W. 400.

Allowance in lieu of dower.— The right of dower becomes vested by statute in Michigan as soon as the decree of divorce becomes final (Orth *v.* Orth, 69 Mich. 158, 37 N. W. 67; Percival *v.* Percival, 56 Mich. 297, 22 N. W. 807), and where a wife prays for a reasonable sum as permanent alimony, she elects to take the sum awarded in lieu of dower (Walton *v.* Walton, 57 Nebr. 102, 77 N. W. 392).

Allowance equal to dower.— Where a divorce has been obtained by the wife, and her conduct is blameless, an allowance equal to what the law gives her on the death of her husband is reasonable. Thornberry *v.* Thornberry, 4 Litt. (Ky.) 251.

57. *Alabama.*— Turner *v.* Turner, 44 Ala. 437 (sustaining a gross allowance of thirty per cent of the estimated value of the husband's estate); Jeter *v.* Jeter, 36 Ala. 391 (holding an allowance of twenty thousand dollars to be reasonable, where the husband's estate was worth at least forty-six thousand dollars, and he had already made ample provision for the elder of his two children).

California.— Robinson *v.* Robinson, 79 Cal. 511, 21 Pac. 1095, sustaining an allowance of one thousand five hundred dollars where the husband's property was worth five thousand dollars.

Illinois.— Draper *v.* Draper, 68 Ill. 17, holding that an allowance of three thousand dollars payable in semiannual instalments of five hundred dollars is not unreasonable, where the husband is worth four times that amount); Johnson *v.* Johnson, 36 Ill. App. 152 (sustaining an allowance of two thousand dollars where the husband is proven guilty of adultery and is worth at least six thousand dollars).

Indiana.— Hedrick *v.* Hedrick, 128 Ind. 522, 26 N. E. 768 (holding that an allowance of one thousand one hundred dollars is not excessive, where the husband is worth two thousand two hundred dollars, to which his wife has contributed three hundred dollars); Metzler *v.* Metzler, 99 Ind. 384 (sustaining an allowance of one thousand five hundred dollars out of property valued at three thousand five hundred dollars); Bush *v.* Bush, 37 Ind. 164 (holding an allowance of one fourth of the husband's estate to be reasonable where the property was accumulated by their joint efforts); Hedrick *v.* Hedrick, 28 Ind. 291 (where an allowance of three thousand five hundred dollars from an estate valued at thirteen thousand dollars was held reasonable); Rudman *v.* Rudman, 5 Ind. 63 (holding that an allowance of one thousand one hundred and eighty dollars is not excessive where the husband is worth between four thousand and five thousand dollars); De Ruiter *v.* De Ruiter, 28 Ind. App. 9, 62 N. E. 100 (sustaining an allowance of four thousand dollars out of an estate worth twenty thousand dollars).

Iowa.— Day *v.* Day, 84 Iowa 221, 50 N. W. 979 (sustaining an allowance of two thousand five hundred dollars where the husband was shown to be well-to-do); Doolittle *v.* Doolittle, 78 Iowa 691, 43 N. W. 616, 6 L. R. A. 187 (sustaining an allowance of three thousand five hundred dollars out of an estate valued at fourteen thousand dollars, where the wife was possessed of not more than two thousand dollars in her own name); Sesterhen *v.* Sesterhen, 60 Iowa 301, 14 N. W. 333 (where the husband possessed a homestead worth two thousand dollars, other lands worth two thousand six hundred dollars, and personal property valued at one thousand dollars, and was not in debt, and an allowance to the wife of the homestead and five hundred dollars in money was held not to be excessive).

Kansas.— Leach *v.* Leach, 46 Kan. 724, 27 Pac. 131, holding that an allowance of two thousand five hundred dollars is reasonable where the divorce was granted for the wife's fault, the property of the husband being worth between ten thousand and fourteen thousand dollars.

Kentucky.— Lacey *v.* Lacey, 95 Ky. 110, 23 S. W. 673, 15 Ky. L. Rep. 439 (sustaining an allowance of one thousand dollars out of an estate valued at from two thousand five hundred to three thousand dollars, where the wife was beyond middle life and had contributed to the accumulation of the estate); Evans *v.* Evans, 93 Ky. 510, 20 S. W. 605, 14 Ky. L. Rep. 628 (holding an allowance of five hundred dollars reasonable where the husband is worth from two thousand to three thousand dollars); Coffman *v.* Coffman, 13 Ky. L. Rep. 204 (sustaining an allowance of one thousand two hundred and fifty dollars where the husband's estate is worth four thousand five hundred dollars, to which the wife has contributed one thousand dollars).

Michigan.— Wagoner *v.* Wagoner, 128 Mich. 635, 87 N. W. 898 (sustaining an allowance of six hundred dollars, where the husband has one thousand five hundred dollars in cash and some real property); Templeton *v.* Templeton, 126 Mich. 44, 85 N. W. 247 (upholding an allowance of one thousand four hundred dollars where defendant's property

(VII) *AWARD OF SPECIFIC PROPERTY* — (A) *In General.* Ordinarily an

consisted of a farm valued at three thousand three hundred and fifty dollars and personal property worth one thousand one hundred and forty dollars); Adams *v.* Seibly, 115 Mich. 402, 73 N. W. 377 (sustaining an allowance of two thousand dollars in lieu of dower and any claim for temporary alimony and costs, where the husband was a man of ample means); Kirkland *v.* Kirkland, 111 Mich. 166, 69 N. W. 233 (upholding an allowance of two thousand five hundred dollars absolutely and of two thousand dollars on condition that the wife release her right of dower, where the husband is worth at least sixteen thousand dollars); Reed *v.* Reed, 86 Mich. 600, 49 N. W. 587; Berryman *v.* Berryman, 59 Mich. 605, 26 N. W. 789 (sustaining a decree of four thousand five hundred dollars for permanent alimony where the husband has an estate worth ten thousand or fifteen thousand dollars which the wife helped to accumulate).

Missouri.— Gercke *v.* Gercke, 100 Mo. 237, 13 S. W. 400 (holding that an allowance of six thousand dollars is not excessive, it appearing that the husband and wife by industry and economy have accumulated an estate worth about twelve thousand dollars); McCartin *v.* McCartin, 37 Mo. App. 471 (holding that alimony in gross for the support of the wife should not ordinarily exceed one half of the husband's estate).

Nebraska.— Heist *v.* Heist, 48 Nebr. 794, 67 N. W. 790 (holding that an allowance of two thousand two hundred and fifty dollars payable in six annual instalments is not excessive, where the wife is without property, and the husband is worth four thousand five hundred dollars, and the custody of the children is awarded to her); Wilde *v.* Wilde, 37 Nebr. 891, 56 N. W. 724 (sustaining an allowance of two thousand dollars where the husband's estate is worth eight thousand five hundred dollars, of which amount four thousand dollars was made by him since the marriage out of property held by him in trust for others).

Tennessee.— Stillman *v.* Stillman, 7 Baxt. 169 (sustaining an allowance of twenty thousand dollars out of an estate valued at one hundred thousand dollars, where the wife has contributed six thousand dollars to the husband's business); Chunn *v.* Chunn, Meigs 131 (sustaining a decree awarding to the wife an amount equal to the whole of the husband's property, where he had acquired more than such amount by the marriage).

Wisconsin.— Pauly *v.* Pauly, 69 Wis. 419, 34 N. W. 512 (holding that where the husband is possessed of good business ability and has always been successful in accumulating property, an allowance of five thousand dollars is not excessive, although it is not shown that he was at the time of the divorce in possession of an estate); Williams *v.* Williams, 36 Wis. 362 (providing for an allowance of three thousand dollars and a homestead valued at one thousand five hundred dollars and the household furniture, where the husband was worth, after deducting his debts, the sum of twenty thousand dollars); Moul *v.* Moul, 30 Wis. 203 (sustaining an allowance of three thousand dollars in gross, and an annual allowance of two hundred dollars for the support of three minor children, it appearing that the husband owned a farm worth ten thousand dollars, a house worth one thousand dollars, and personal property valued at one thousand dollars).

See 17 Cent. Dig. tit. "Divorce," § 680.

Excessive allowances.— In the following cases allowances of permanent alimony in gross were deemed excessive:

Colorado.— Cowan *v.* Cowan, 16 Colo. 335, 26 Pac. 934, where an allowance of sixteen thousand eight hundred dollars out of an estate of twenty-four thousand dollars was deemed excessive.

Illinois.— Wilson *v.* Wilson, 102 Ill. 297 (overruling an allowance of six sevenths of the husband's estate); Andrews *v.* Andrews, 69 Ill. 609 (reducing an allowance of two thousand eight hundred dollars to two thousand dollars, it appearing that the husband's property did not exceed seven thousand dollars in value).

Indiana.— Graft *v.* Graft, 76 Ind. 136 (reducing an allowance of four thousand dollars to two thousand five hundred dollars, it appearing that the husband was not worth more than seven thousand dollars, consisting largely of a farm of one hundred and twenty acres); Conner *v.* Conner, 29 Ind. 48 (where an allowance to the wife from whom the husband had obtained a divorce of one third of the husband's estate was held excessive); Rourke *v.* Rourke, 8 Ind. 427 (holding that an allowance of eight hundred and fifty dollars to the wife was excessive where the husband was worth only two thousand dollars and the wife owned a farm of forty acres).

Iowa.— Ensler *v.* Ensler, 72 Iowa 159, 33 N. W. 384, holding that an allowance of four hundred and fifty dollars out of an estate of one thousand seven hundred dollars is excessive where the husband is physically disabled and cannot earn more than five or six dollars per week.

Kentucky.— Fletcher *v.* Fletcher, 54 S. W. 953, 21 Ky. L. Rep. 1302 (holding that the wife is not entitled to more than one half of her husband's estate, worth three hundred dollars); Beall *v.* Beall, 80 Ky. 675 (holding alimony amounting to one third of the husband's estate to be excessive).

Michigan.— Cummings *v.* Cummings, 50 Mich. 305, 15 N. W. 485, where the husband's entire property does not exceed two thousand five hundred dollars in value, and an allowance of one thousand two hundred dollars was held excessive, it appearing that the wife did nothing to assist in its accumulation.

Nebraska.— McConahey *v.* McConahey, 21 Nebr. 463, 32 N. W. 300 (reducing an allowance of eight hundred dollars to five hundred dollars, where the husband's property

allotment of specific property to the wife by way of alimony will not be made.[58] Thus the court should not make an award of the husband's lands, absolutely divesting him of title thereto,[59] unless agreed upon by the parties,[60] or authorized by statute,[61] or unless the property was purchased with the wife's money,[62] or there are other circumstances in the case relating to the acquisition of the property or the condition of the parties which render it just and proper that certain lands should be conveyed to her.[63] However, a life-estate in specific real property owned by the husband may be given to the wife as alimony, to be held by her subject to the control of the court.[64]

(B) *Determination as to Award.* Where specific property may be allotted to the wife, the determination as to the award should be based upon much the

was valued at two thousand two hundred dollars and the wife was worth five hundred dollars); Smith *v.* Smith, 19 Nebr. 706, 28 N. W. 296 (reducing an allowance of six thousand dollars to four thousand dollars, where the husband's property was valued at sixteen thousand dollars, and the wife had already been allowed two thousand dollars as temporary alimony).

South Dakota.— Williams *v.* Williams, 6 S. D. 284, 61 N. W. 38, holding an allowance of thirty thousand dollars out of an estate of fifty-six thousand seven hundred dollars to be excessive, where the wife had been awarded three thousand dollars as temporary alimony.

Tennessee.— Belcher *v.* Belcher, (Ch. App. 1900) 57 S. W. 382, holding that where the homestead is granted to the wife as required by statute, her allowance of cash alimony should be reduced so that her entire allowance will not exceed one half of her husband's estate.

Adequacy of allowance.— An allowance of one hundred dollars is sufficient where the husband's property is worth but two thousand five hundred dollars and the wife has denied him conjugal rights without reason. Tumbleson *v.* Tumbleson, 79 Ind. 558. An allowance of one thousand dollars out of an estate of nine thousand eight hundred dollars is sufficient where the husband is physically unable to perform manual labor. Tietken *v.* Tietken, 60 Nebr. 138, 82 N. W. 367.

58. Doe *v.* Doe, 52 Hun (N. Y.) 405, 5 N. Y. Suppl. 514.

59. *Indiana.*— Green *v.* Green, 7 Ind. 113; Rice *v.* Rice, 6 Ind. 100; Frakes *v.* Brown, 2 Blackf. 295.

Kentucky.— Quisenberry *v.* Quisenberry, 1 Duv. 197; Caskey *v.* Caskey, 4 Ky. L. Rep. 811.

Maryland.— Wallingsford *v.* Wallingsford, 6 Harr. & J. 485.

Michigan.— Perkins *v.* Perkins, 16 Mich. 162.

New Jersey.— Calame *v.* Calame, 25 N. J. Eq. 548.

North Carolina.—Miller *v.* Miller, 75 N. C. 70.

Tennessee.— Robinson *v.* Robinson, 7 Humphr. 440; Chunn *v.* Chunn, Meigs 131.

Virginia.— Purcell *v.* Purcell, 4 Hen. & M. 507.

Wisconsin.— Bacon *v.* Bacon, 43 Wis. 197 [*citing* Donovan *v.* Donovan, 20 Wis. 586] (holding that the power of the court to divest the husband of his title to realty in favor of his wife rests entirely on the statute); Campbell *v.* Campbell, 37 Wis. 206; Moul *v.* Moul, 30 Wis. 203 (holding that a wife is not entitled as alimony to a life-estate in the lands of her husband, with remainder to the children).

See 17 Cent. Dig. tit. "Divorce," § 681.

60. Thomas *v.* Thomas, 64 Mo. 353.

61. Powell *v.* Campbell, 20 Nev. 232, 20 Pac. 156, 19 Am. St. Rep. 350, 2 L. R. A. 615; Wuest *v.* Wuest, 17 Nev. 221, 30 Pac. 886; Broadwell *v.* Broadwell, 21 Ohio St. 657.

Implied authority.— Where a statute authorizes the court, without qualification as to mode, to secure to the wife support out of the husband's estate or to make such order in relation to the property and the maintenance of the wife as shall be right and proper, the court may adjudge that the fee-simple title to a particular tract of land shall vest in the wife as permanent alimony. Twing *v.* O'Meara, 59 Iowa 326, 13 N. W. 321; Zuver *v.* Zuver, 36 Iowa 190; Inskeep *v.* Inskeep, 5 Iowa 204; Jolly *v.* Jolly, 1 Iowa 9 [all virtually *overruling* Russell *v.* Russell, 4 Greene (Iowa) 26, 61 Am. Dec. 112]; Berthelemy *v.* Johnson, 3 B. Mon. (Ky.) 90, 38 Am. Dec. 179.

62. Shaw *v.* Shaw, 114 Ill. 586, 3 N. E. 271.

63. Mussing *v.* Mussing, 104 Ill. 126; Wheeler *v.* Wheeler, 18 Ill. 39; Brick *v.* Brick, 65 Mich. 230, 31 N. W. 907, 33 N. W. 761, holding that although it is unusual to grant alimony to the wife in the shape of a conveyance of her husband's interest in land, yet where the land is of comparatively small value and the circumstances of its acquisition render it quite just that she should have it, the decree in her favor will not be disturbed for that informality.

64. Jeans *v.* Jeans, 2 Harr. (Del.) 142; Shaw *v.* Shaw, 114 Ill. 586, 3 N. E. 271; Keating *v.* Keating, 48 Ill. 241; Armstrong *v.* Armstrong, 35 Ill. 109; Jolliff *v.* Jolliff, 32 Ill. 527 (holding that it is not erroneous to decree that the wife should "hold her present homestead as alimony, with the right to rent the same until the youngest becomes of age, and, also, all the personal property in her possession"); Caskey *v.* Caskey, 4 Ky. L.

same facts and circumstances as where an allowance is made in gross or in instalments, except that the fact that the wife has contributed to the purchase of specific property may be of greater importance.[65] A decree awarding all the husband's property to the wife is unwarranted.[66] The award will necessarily vary in accordance with the condition of the parties and the circumstances of the case, ranging from the portion to which the wife would be entitled if her husband had died intestate,[67] to an allotment of one half of the husband's realty.[68] The allowance is within the discretion of the court, subject to revision on appeal for an abuse thereof.[69]

9. Judgment or Decree — a. Form and Sufficiency[70] — (I) *In General.* A decree for alimony will necessarily conform to the requirements of the practice in the particular jurisdiction. It may be rendered separately or as a part of a decree of divorce. It should state the time when the alimony commences, when payable,[71] and under what circumstances it will terminate.[72] Provisions should be included therein reserving the right to modify its terms.[73] The amount allowed for the support of the wife and children should be separately stated, although a failure so to do is not reversible error.[74]

(II) *Conditions and Penalties* — (A) *In General.* A decree for permanent alimony may properly impose reasonable conditions and penalties upon one or the other of the parties,[75] such as a provision that if the sum allowed is not paid at the time specified it shall draw interest at the rate of twelve per cent until paid,[76] or that if surety be given within thirty days for the payment of the sum awarded it may be paid in instalments, and if not, execution shall issue against the husband for the whole amount.[77]

(B) *In Lieu of Dower.*[78] Where the statute secures to the wife her right of dower upon a divorce for her husband's misconduct, the court cannot compel the wife to accept a gross sum in lieu of dower,[79] although it has been held

Rep. 811; Chunn *v.* Chunn, Meigs (Tenn.) 131.

65. See *supra*, XIX, D, 8, c, (III).

66. Ross *v.* Ross, 78 Ill. 402.

67. Quisenberry *v.* Quisenberry, 1 Duv. (Ky.) 197; Thornberry *v.* Thornberry, 4 Litt. (Ky.) 251; Fishli *v.* Fishli, 2 Litt. (Ky.) 337.

68. Douglass *v.* Douglass, 81 Iowa 258, 47 N. W. 92; Avery *v.* Avery, 33 Kan. 1, 5 Pac. 418, 52 Am. Rep. 523.

69. Robinson *v.* Robinson, 7 Humphr. (Tenn.) 440.

70. For forms of decrees ordering permanent alimony see the following cases:

California.— Robinson *v.* Robinson, 79 Cal. 511, 21 Pac. 1095.

Illinois.— Storey *v.* Storey, 125 Ill. 608, 18 N. E. 329, 8 Am. St. Rep. 417, 1 L. R. A. 320; Dawson *v.* Dawson, 110 Ill. 279.

Kansas.— Johnston *v.* Johnston, 54 Kan. 726, 39 Pac. 725.

New York.— Miller *v.* Miller, 6 Johns. Ch. 91.

Ohio.— Tolerton *v.* Williard, 30 Ohio St. 579.

71. Sampson *v.* Sampson, 16 R. I. 456, 16 Atl. 711, 3 L. R. A. 349, holding that an allowance of monthly payments may be made under a statute authorizing alimony "out of the real or personal estate of the husband or out of both," as the statute does not require alimony to be awarded out of the estate then owned by the husband.

The times of payment should be so adjusted as to avoid if possible a sacrifice of the husband's property to pay the amounts allowed. Farley *v.* Farley, 30 Iowa 353. In the absence of reason to the contrary, it should be made payable in the form of an annuity (Keating *v.* Keating, 48 Ill. 241), so that it may be modified as the changes in the condition of the parties may indicate to be proper and reasonable (Wilson *v.* Wilson, 102 Ill. 297).

72. See *infra*, XIX, D, 9, e.

73. Pearce *v.* Pearce, 16 S. W. 271, 13 Ky. L. Rep. 67; Beck *v.* Beck, 43 N. J. Eq. 668, 14 Atl. 812; Stahl *v.* Stahl, 12 N. Y. Suppl. 854 [*distinguishing* Kamp *v.* Kamp, 59 N. Y. 212].

74. Johnson *v.* Johnson, 36 Ill. App. 152.

75. Armstrong *v.* Armstrong, (N. J. Ch. 1886) 3 Atl. 407.

76. Blankenship *v.* Blankenship, 19 Kan. 159.

77. Rourke *v.* Rourke, 8 Ind. 427. *Compare* Perkins *v.* Perkins, 16 Mich. 162 (holding that a decree for alimony to be paid by instalments and directing a sale of real estate on default is improper, since the court cannot adjudicate for default in advance); Hart *v.* Hart, 1 Ohio S. & C. Pl. Dec. 94, 1 Ohio N. P. 56.

78. See also Dower.

79. Russell *v.* Russell, 1 Ind. 510; Wait *v.* Wait, 4 N. Y. 95; Crain *v.* Cavana, 36 Barb. (N. Y.) 410; Forrest *v.* Forrest, 6 Duer (N. Y.) 102, 3 Abb. Pr. (N. Y.) 144; De

that by consent of the wife an allowance may be made barring her right of dower.[80]

(III) *Construction and Effect.* The provisions of the decree should be construed so as to give it the intended effect,[81] having due regard for its expressed terms and the circumstances under which it was rendered. If it requires payment within a certain number of days it will be construed to mean that payment should be made within a certain number of days after its service.[82] If it provides for payment of a certain amount each month or semimonthly, it will be deemed to import an allowance of a correspondingly increased amount yearly or monthly, as the case may be.[83] An award of specific real property carries with it the crops growing thereon at the time the decree is rendered.[84]

b. Security For Payment — (I) *In General.* Statutes are in force in some of the states authorizing the court to require the husband to give security for the payment of the alimony decreed.[85]

(II) *Liens on Husband's Property.* A decree granting permanent alimony does not become a specific lien on the husband's estate unless so provided by statute,[86] and the jurisdiction of a court of equity over alimony cannot ordinarily be extended so as to authorize the creation of such a lien.[87] Under the practice in some of the states, however, the decree operates as a judgment against the husband, and like other judgments becomes a lien upon his property when duly filed or entered,[88] or it may include an express provision that the amount therein directed to be paid shall become a specific or general lien thereon,[89] including his

Witt *v.* De Witt, 67 Ohio St. 340, 66 N. E. 136.

80. Owen *v.* Yale, 75 Mich. 256, 42 N. W. 817; Tatro *v.* Tatro, 18 Nebr. 395, 25 N. W. 571, 53 Am. St. Rep. 820.

81. *Ex p.* Spencer, 83 Cal. 460, 23 Pac. 395, 17 Am. St. Rep. 266, holding that a permanent future allowance will not be defeated because granted under the misnomer of "permanent alimony," where it is made under a statute authorizing a suitable allowance to the wife for her support for life or for a shorter period.

82. Davis *v.* Davis, 39 Mich. 221.

83. Merrick *v.* Merrick, 5 Mo. App. 123; Mooney *v.* Mooney, 10 Misc. (N. Y.) 386, 31 N. Y. Suppl. 118.

84. Herron *v.* Herron, 47 Ohio St. 544, 25 N. E. 420, 21 Am. St. Rep. 854, 9 L. R. A. 667.

85. *Arkansas.*— Casteel *v.* Casteel, 38 Ark. 477.

Illinois.— Sapp *v.* Wightman, 103 Ill. 150.

Indiana.— Rourke *v.* Rourke, 8 Ind. 427.

Nebraska.— Swansen *v.* Swansen, 12 Nebr. 210, 10 N. W. 713.

New York.— Galusha *v.* Galusha, 108 N. Y. 114, 15 N. E. 63; Forrest *v.* Forrest, 6 Duer 102, 3 Abb. Pr. 144; Burr *v.* Burr, 10 Paige 20; Miller *v.* Miller, 6 Johns. Ch. 91.

Pennsylvania.— Melizet *v.* Melizet, 3 Pa. L. J. Rep. 45, 4 Pa. L. J. 381.

Wisconsin.— Wright *v.* Wright, 74 Wis. 439, 43 N. W. 145, holding that under such a statute the husband may be required to give a bond with a sufficient surety.

See 17 Cent. Dig. tit. "Divorce," § 687.

Lien to secure alimony see *infra,* XIX, D, 9, b, (II).

86. *Arkansas.*— Casteel *v.* Casteel, 38 Ark. 477; Kurtz *v.* Kurtz, 38 Ark. 119.

Georgia.— Coulter *v.* Lumpkin, 94 Ga. 225, 21 S. E. 461.

Nebraska.— Brotherton *v.* Brotherton, 14 Nebr. 186, 15 N. W. 347; Swansen *v.* Swansen, 12 Nebr. 210, 10 N. W. 713.

Pennsylvania.— Grove's Appeal, 68 Pa. St. 143.

Wisconsin.— Campbell *v.* Campbell, 37 Wis. 206.

87. Perkins *v.* Perkins, 16 Mich. 162, holding, however, that the husband may ratify a decree declaring a lien.

88. Hall *v.* Harrington, 7 Colo. App. 474, 44 Pac. 365; Frakes *v.* Brown, 2 Blackf. (Ind.) 295; Stoy *v.* Stoy, 41 N. J. Eq. 370, 2 Atl. 638, 7 Atl. 625, holding that alimony which accrues after the docketing of the decree becomes a lien on the lands of defendant as fast as it becomes due.

Priority of lien over attachment see Attachment, 4 Cyc. 653, note 28.

89. *California.*— Robinson *v.* Robinson, 79 Cal. 511, 21 Pac. 1095.

Colorado.— Johnson *v.* Johnson, 22 Colo. 20, 43 Pac. 130, 55 Am. St. Rep. 112.

Illinois.— Storey *v.* Storey, 125 Ill. 608, 18 N. E. 329, 8 Am. St. Rep. 417, 1 L. R. A. 320; Bruner *v.* Bruner, 115 Ill. 40, 3 N. E. 564; Sapp *v.* Wightman, 103 Ill. 150; Andrews *v.* Andrews, 69 Ill. 609; Errissman *v.* Errissman, 25 Ill. 136; Raymond *v.* Raymond, 12 Ill. App. 172.

Iowa.— Daniels *v.* Lindley, 44 Iowa 567; Abey *v.* Abey, 32 Iowa 575; Harshberger *v.* Harshberger, 26 Iowa 503 (holding that the district court of the county where plaintiff resides, having jurisdiction of an action for divorce and alimony, may enforce a lien for alimony against real estate of defendant situated in another county); Russell *v.* Russell, 4 Greene 26, 61 Am. Dec. 112.

homestead,[90] but not his personalty.[91] The order or decree declaring a specific lien should describe the property to be affected.[92]

c. Modification — (1) *In General.* A decree for permanent alimony is subject to modification because of fraud or mistake in the same manner and under the same circumstances as other decrees.[93] The general rule would seem to be that where the divorce is absolute a decree for permanent alimony containing no reservation of the power of modification cannot be altered after the expiration of the time within which an appeal may be perfected,[94] although it has been held that the court may modify a decree for alimony at any time upon proper allegations of the changed conditions and circumstances of the parties.[95] The ecclesiastical practice was to permit a modification of the rate of alimony after a decree of

Kansas.— Blankenship *v.* Blankenship, 19 Kan. 159; Brandon *v.* Brandon, 14 Kan. 342.

Maine.— Hills *v.* Hills, 76 Me. 486.

Michigan.— Glick *v.* Glick, 110 Mass. 304, 68 N. W. 153.

Minnesota.— Mahoney *v.* Mahoney, 59 Minn. 347, 61 N. W. 334.

New Jersey.— Stoy *v.* Stoy, 41 N. J. Eq. 370, 2 Atl. 638, 7 Atl. 625; Holmes *v.* Holmes, 29 N. J. Eq. 9; Calame *v.* Calame, 24 N. J. Eq. 440; Vreeland *v.* Jacobus, 19 N. J. Eq. 231.

New York.— Galusha *v.* Galusha, 108 N. Y. 114, 15 N. E. 63; Forrest *v.* Forrest, 6 Duer 102, 3 Abb. Pr. 144.

Ohio.— Conrad *v.* Everich, 50 Ohio St. 476, 35 N. E. 58, 40 Am. St. Rep. 679; Min Young *v.* Min Young, 47 Ohio St. 501, 25 N. E. 168; Tolerton *v.* Williard, 30 Ohio St. 579; Olin *v.* Hungerford, 10 Ohio 268; Hamlin *v.* Bevans, 7 Ohio 161, 28 Am. Dec. 625; Wilmot *v.* Cole, 10 Ohio Dec. (Reprint) 777, 23 Cinc. L. Bul. 339; Mullane *v.* Folger, 10 Ohio Dec. (Reprint) 485, 21 Cinc. L. Bul. 277; Webster *v.* Denuis, 4 Ohio Cir. Ct. 313, 2 Ohio Cir. Dec. 566.

Oklahoma.— Gardenshire *v.* Gardenshire, 2 Okla. 484, 37 Pac. 813.

Pennsylvania.— Melizet *v.* Melizet, 3 Pa. L. J. Rep. 45, 4 Pa. L. J. 381.

Vermont.— Foster *v.* Foster, 56 Vt. 540.

Washington.— King *v.* Miller, 10 Wash. 274, 38 Pac. 1020.

England.— Medley *v.* Medley, 7 P. D. 122, 51 L. J. P. & Adm. 74, 30 Wkly. Rep. 937; Clinton *v.* Clinton, L. R. 1 P. 215, 14 L. T. Rep. N. S. 257, 14 Wkly. Rep. 545; Hyde *v.* Hyde, 34 L. J. P. & M. 63, 12 L. T. Rcp. N. S. 235, 4 Swab. & Tr. 80, 13 Wkly. Rep. 545.

See 17 Cent. Dig. tit. "Divorce," § 688.

Construction of decree.— Alimony decreed to be paid "out of the husband's real and personal estate" does not become a charge upon his real estate. *In re* Lawton, 12 R. I. 210.

90. Abey *v.* Abey, 32 Iowa 575; Blankenship *v.* Blankenship, 19 Kan. 159; Mahoney *v.* Mahoney, 59 Minn. 347, 61 N. W. 334.

91. Johnson *v.* Johnson, 22 Colo. 20, 43 Pac. 130, 55 Am. St. Rep. 112; Yelton *v.* Handley, 28 Ill. App. 640.

92. Hills *v.* Hills, 76 Me. 486.

93. Senter *v.* Senter, 70 Cal. 619, 11 Pac. 782; Moon *v.* Baum, 58 Ind. 194; Gray *v.* Gray, 83 Mo. 106.

94. *Alabama.*— Smith *v.* Smith, 45 Ala. 264. This rule has since been changed by statute. See *infra*, note 98.

Indiana.— Martin *v.* Martin, 6 Blackf. 321.

Kansas.— Mitchell *v.* Mitchell, 20 Kan. 665.

Maine.— Stratton *v.* Stratton, 73 Me. 481.

New York.— Livingston *v.* Livingston, 173 N. Y. 377, 66 N. E. 123, 93 Am. St. Rep. 600, 61 L. R. A. 800; Walker *v.* Walker, 155 N. Y. 77, 49 N. E. 663; Erkenbrach *v.* Erkenbrach, 96 N. Y. 456; Park *v.* Park, 80 N. Y. 156; Kamp *v.* Kamp, 59 N. Y. 212; Cullen *v.* Cullen, 55 N. Y. Super. Ct. 346, 18 N. Y. St. 381; Gane *v.* Gane, 46 N. Y. Super. Ct. 218; Kerr *v.* Kerr, 59 How. Pr. 255. This rule has since been changed by statute. See *infra*, note 98.

Rhode Island.— Sampson *v.* Sampson, 16 R. I. 456, 16 Atl. 711, 3 L. R. A. 349; Sammis *v.* Medbury, 14 R. I. 214.

Texas.— Hardin *v.* Hardin, 38 Tex. 616.

Wisconsin.— Bacon *v.* Bacon, 43 Wis. 197. This rule has been modified by statute, however. See *infra*, note 98.

See 17 Cent. Dig. tit. "Divorce," § 691 *et seq.*

The reason of the rule is that the jurisdiction of the court over the subject-matter of the suit and of the parties terminates with the entry of a final judgment, except as to proceedings for its enforcement or for the correction of mistakes in the record. Walker *v.* Walker, 155 N. Y. 77, 49 N. E. 663; Erkenbrach *v.* Erkenbrach, 96 N. Y. 456; Kamp *v.* Kamp, 59 N. Y. 212.

Reservation of right.— The amount of alimony may at any time be enlarged by consent of defendant, where the court has preserved its jurisdiction by reservation in the final decree. Stahl *v.* Stahl, 12 N. Y. Suppl. 854. See also Jones *v.* Jones, 131 Ala. 443, 31 So. 91; Galusha *v.* Galusha, 138 N. Y. 272, 33 N. E. 1062. A reservation to the wife and not to the husband does not necessarily deprive the court of jurisdiction to entertain an application on the husband's part for a reduction. Alexander *v.* Alexander, 13 App. Cas. (D. C.) 334.

95. *Colorado.*— Stevens *v.* Stevens, 31 Colo. 188, 72 Pac. 1060.

Georgia.— McGee *v.* McGee, 10 Ga. 477.

Illinois.— Foote *v.* Foote, 22 Ill. 425; Wheeler *v.* Wheeler, 18 Ill. 39.

Iowa.— Fisher *v.* Fisher, 32 Iowa 20; Andrews *v.* Andrews, 15 Iowa 423; Jungk *v.* Jungk, 5 Iowa 541.

separation, where there was a material alteration of the circumstances of the parties,[96] and in following this practice the courts in this country have recognized a distinction between absolute and limited divorces, and have assumed to modify decrees for alimony granted in the latter case while refusing to do so in the former.[97] Statutes have been enacted in many of the states expressly conferring upon the courts the power to revise and alter decrees for permanent alimony.[98] Where such statutes refer to decrees for alimony generally they will be held applicable to decrees in both absolute and limited divorces without distinction.[99] They have been held not to apply where the allowance is payable in gross,[1] but where continuing alimony is granted the court is authorized to entertain a proceeding to secure an allowance in gross in lieu of instalments.[2] The power conferred by statute cannot be affected by provisions in the decree declaratory of its absolute and permanent effect;[3] but if the parties have agreed as to the amount

Kentucky.— Lockridge *v.* Lockridge, 2 B. Mon. 528; Bristow *v.* Bristow, 51 S. W. 819, 21 Ky. L. Rep. 481.

Minnesota.— Barbaras *v.* Barbaras, 88 Minn. 105, 92 N. W. 522.

North Carolina.— Rogers *v.* Vines, 28 N. C. 293.

Ohio.— Olney *v.* Watts, 43 Ohio St. 449, 3 N. E. 354; King *v.* King, 38 Ohio St. 370; Meissner *v.* Meissner, 11 Ohio Cir. Ct. 1.

England.— Whitton *v.* Whitton, [1901] P. 348, 71 L. J. P. & Adm. 10, 85 L. T. Rep. N. S. 646.

96. De Blaquiere *v.* De Blaquiere, 3 Hagg. Eccl. 322, 5 Eng. Eccl. 126; Otway *v.* Otway, 2 Phillim. 109, 1 Eng. Eccl. 200.

97. Mitchell *v.* Mitchell, 20 Kan. 665; Lockridge *v.* Lockridge, 2 B. Mon. (Ky.) 528. See Smith *v.* Smith, 45 Ala. 264; Tonjes *v.* Tonjes, 14 N. Y. App. Div. 542, 43 N. Y. Suppl. 941; Mildeberger *v.* Mildeberger, 12 Daly (N. Y.) 195; Miller *v.* Miller, 6 Johns. Ch. (N. Y.) 91.

Modification after decree nisi.— Upon a motion to make absolute a decree of divorce *nisi*, the decree for alimony may be revised because of altered circumstances of either or both of the parties; and for such purpose the former relations and conduct of the parties, the circumstances of the separation, and the facts upon which any former decree was founded, as well as any new facts bearing upon the question, may be taken into consideration. Sparhawk *v.* Sparhawk, 120 Mass. 390; Graves *v.* Graves, 108 Mass. 314.

98. *Alabama.*— Smith *v.* Smith, 45 Ala. 264.

Arkansas.— Kurtz *v.* Kurtz, 38 Ark. 119; Bauman *v.* Bauman, 18 Ark. 320, 68 Am. Dec. 171.

District of Columbia.— Alexander *v.* Alexander, 13 App. Cas. 334; Fries *v.* Fries, 1 MacArthur 291.

Illinois.— Welty *v.* Welty, 195 Ill. 335, 63 N. E. 161, 88 Am. St. Rep. 208; Cole *v.* Cole, 142 Ill. 19, 31 N. E. 109, 34 Am. St. Rep. 56, 19 L. R. A. 811; Robbins *v.* Robbins, 101 Ill. 416; Stillman *v.* Stillman, 99 Ill. 196, 39 Am. Rep. 21; Warren *v.* Warren, 101 Ill. App. 308; Shaw *v.* Shaw, 59 Ill. App. 268.

Iowa.— Alderson *v.* Alderson, 84 Iowa 198, 50 N. W. 671; Shaw *v.* McHenry, 52 Iowa 182, 2 N. W. 1096 (holding that the power to modify such a decree cannot, under the statute, be exercised in a collateral proceeding); Wilde *v.* Wilde, 36 Iowa 319; Blythe *v.* Blythe, 25 Iowa 266; Andrews *v.* Andrews, 15 Iowa 423; Jungk *v.* Jungk, 5 Iowa 541; O'Hagan *v.* O'Hagan, 4 Iowa 509.

Michigan.— Perkins *v.* Perkins, 12 Mich. 456.

Minnesota.— Barbaras *v.* Barbaras, 88 Minn. 105, 92 N. W. 522; Weld *v.* Weld, 28 Minn. 33, 8 N. W. 900.

Missouri.— Burnside *v.* Wand, 77 Mo. App. 382; Scales *v.* Scales, 65 Mo. App. 292.

Nebraska.— State *v.* Cook, 51 Nebr. 822, 71 N. W. 733; Ellis *v.* Ellis, 13 Nebr. 91, 13 N. W. 29.

New Hampshire.— Sheafe *v.* Sheafe, 36 N. H. 155.

New Jersey.— Rigney *v.* Rigney, 62 N. J. Eq. 8, 49 Atl. 460.

New York.— Goodsell *v.* Goodsell, 82 N. Y. App. Div. 65, 81 N. Y. Suppl. 806. The statute is unconstitutional in so far as it was attempted to make it retroactive. Livingston *v.* Livingston, 173 N. Y. 377, 66 N. E. 123, 93 Am. St. Rep. 600, 61 L. R. A. 800. See also Walker *v.* Walker, 155 N. Y. 77, 49 N. E. 663; Davis *v.* Davis, 78 N. Y. App. Div. 500, 79 N. Y. Suppl. 621; Hauscheld *v.* Hauscheld, 33 N. Y. App. Div. 296, 53 N. Y. Suppl. 831.

Oregon.— Brandt *v.* Brandt, 40 Oreg. 477, 67 Pac. 508; Henderson *v.* Henderson, 37 Oreg. 141, 60 Pac. 597, 61 Pac. 136, 82 Am. St. Rep. 741, 48 L. R. A. 766; Corder *v.* Speake, 37 Oreg. 105, 51 Pac. 647.

South Dakota.— Greenleaf *v.* Greenleaf, 6 S. D. 348, 61 N. W. 42.

Washington.— King *v.* Miller, 10 Wash. 274, 38 Pac. 1020.

Wisconsin.— Wright *v.* Wright, 74 Wis. 439, 43 N. W. 145; Blake *v.* Blake, 68 Wis. 303, 32 N. W. 48; Hopkins *v.* Hopkins, 40 Wis. 462; Campbell *v.* Campbell, 37 Wis. 206.

99. Bauman *v.* Bauman, 18 Ark. 320, 68 Am. Dec. 171; Jungk *v.* Jungk, 5 Iowa 541.

1. Smith *v.* Smith, 45 Ala. 264; Barkman *v.* Barkman, 94 Ill. App. 440; Shaw *v.* Shaw, 59 Ill. App. 268. *Contra*, Hopkins *v.* Hopkins, 40 Wis. 462.

2. Sparhawk *v.* Sparhawk, 120 Mass. 390; King *v.* Miller, 10 Wash. 274, 38 Pac. 1020.

3. Campbell *v.* Campbell, 37 Wis. 206.

of alimony, and an allowance is made in accordance therewith, it cannot be thereafter modified by the court upon the petition of the former husband.[4] After the prevailing party's remarriage the case will not be opened to permit of an adjustment of a matter of alimony.[5]

(II) *Changed Circumstances of Parties.* Unless it appears that the circumstances of the parties have changed since the decree was rendered,[6] or that there are material facts which existed prior to the decree of which the applicant was ignorant when it was rendered,[7] the decree is conclusive on the parties.[8] The conditions subject to change influencing a modification of the decree are usually of a pecuniary character, affecting the ability of the husband to pay[9] or the necessities of the wife.[10] While the fact that the custody of the children is awarded to the wife may be considered in determining the amount of permanent alimony, the subsequent removal of the burden of their maintenance and education is not necessarily a ground for reducing the amount,[11] although if the allowance was expressly made for both the support of the wife and the maintenance and education of the children, the amount may be reduced after the removal of the burden.[12] The court will consider whether the change of circumstances upon the

4. Storey *v.* Storey, 125 Ill. 608, 18 N. E. 329, 8 Am. St. Rep. 417, 1 L. R. A. 320; Law *v.* Law, 64 Ohio St. 369, 60 N. E. 560; Brandt *v.* Brandt, 40 Oreg. 477, 67 Pac. 508.

5. Nicholson *v.* Nicholson, 113 Ind. 131, 15 N. E. 223; De Graw *v.* De Graw, 7 Mo. App. 121; Nichols *v.* Nichols, 25 N. J. Eq. 60.

6. *Illinois.*— Cole *v.* Cole, 142 Ill. 19, 31 N. E. 109, 34 Am. St. Rep. 56, 19 L. R. A. 811; Warren *v.* Warren, 101 Ill. App. 308; Daugherty *v.* Daugherty, 71 Ill. App. 301.

Indiana.—Tobin *v.* Tobin, 29 Ind. App. 382, 64 N. E. 624.

Iowa.— Ferguson *v.* Ferguson, 111 Iowa 158, 82 N. W. 490; White *v.* White, 75 Iowa 218, 39 N. W. 277; Reid *v.* Reid, 74 Iowa 681, 39 N. W. 102; Wilde *v.* Wilde, 36 Iowa 319; Fisher *v.* Fisher, 32 Iowa 20; Blythe *v.* Blythe, 25 Iowa 266; Andrews *v.* Andrews, 15 Iowa 423.

Kentucky.— Bristow *v.* Bristow, 51 S. W. 819, 21 Ky. L. Rep. 481.

Massachusetts.— Sparhawk *v.* Sparhawk, 120 Mass. 390.

Michigan.— Perkins *v.* Perkins, 12 Mich. 456.

Minnesota.—Barbaras *v.* Barbaras, 88 Minn. 105, 92 N. W. 522; Weld *v.* Weld, 28 Minn. 33, 8 N. W. 900; Semrow *v.* Semrow, 23 Minn. 214.

Nebraska.— Beard *v.* Beard, 57 Nebr. 754, 78 N. W. 255.

New York.— Wetmore *v.* Wetmore, 162 N. Y. 503, 56 N. E. 997, 48 L. R. A. 666; Noble *v.* Noble, 20 N. Y. App. Div. 395, 46 N. Y. Suppl. 820; Forrest *v.* Forrest, 3 Bosw. 661; Kunze *v.* Kunze, 53 N. Y. Suppl. 938; Straus *v.* Straus, 14 N. Y. Suppl. 671; Lamport *v.* Lamport, 4 Alb. L. J. 190.

Ohio.— Olney *v.* Watts, 43 Ohio St. 499, 3 N. E. 354.

Pennsylvania.— Murphy *v.* Murphy, 9 Kulp 183.

South Dakota.— Greenleaf *v.* Greenleaf, 6 S. D. 348, 61 N. W. 42; Vert *v.* Vert, 3 S. D. 619, 54 N. W. 655.

See 17 Cent. Dig. tit. "Divorce," § 693.

7. Weld *v.* Weld, 28 Minn. 33, 8 N. W. 900; Semrow *v.* Semrow, 23 Minn. 214; Straus *v.* Straus, 14 N. Y. Suppl. 671.

8. Cole *v.* Cole, 142 Ill. 19, 31 N. E. 109, 34 Am. St. Rep. 56, 19 L. R. A. 811.

9. Graves *v.* Graves, 108 Mass. 314; Mildeberger *v.* Mildeberger, 12 Daly (N. Y.) 195 (where an allowance was increased upon a showing that the husband had inherited a large fortune since the decree); Lamport *v.* Lamport, 4 Alb. L. J. 190; Vert *v.* Vert, 3 S. D. 619, 54 N. W. 655.

Reduction of net profits from the husband's business is not of itself sufficient to justify a reduction of the sum ordered paid as alimony (Barrett *v.* Barrett, 41 N. J. Eq. 139, 3 Atl. 689), but a material depreciation in the value of his property since the divorce may furnish reasons for a reduction of an annual allowance to the divorced wife (Barbaras *v.* Barbaras, 88 Minn. 105, 92 N. W. 522).

Subsequent bankruptcy of the husband is not sufficient to show that his financial condition and necessities require a modification of a decree subjecting the income of a trust fund belonging to him to the payment of alimony. Wetmore *v.* Wetmore, 44 N. Y. App. Div. 220, 60 N. Y. Suppl. 711 [*reversed* on other grounds in 162 N. Y. 503, 56 N. E. 997, 48 L. R. A. 666].

10. Bursler *v.* Bursler, 5 Pick. (Mass.) 427, holding that additional alimony should be allowed the wife, who had secured a limited divorce from her husband, and who since the decree had been ill, requiring an extraordinary expenditure of nearly the entire amount originally allowed her, without regard solely to the husband's income. However, the allowance should not be augmented because the wife's expenses have been increased by reason of her assisting a person whom the husband is under no obligation to support. Halsted *v.* Halsted, 5 Duer (N. Y.) 659.

11. Thurston *v.* Thurston, 38 Ill. App. 464; Semrow *v.* Semrow, 23 Minn. 214; Dow *v.* Dow, 38 N. H. 188.

12. Brown *v.* Brown, 33 S. W. 830, 17 Ky. L. Rep. 1143; Kerr *v.* Kerr, 9 Daly (N. Y.)

part of the applicant was brought about by his own act, and if so, the decree will not be modified.[13]

(III) *Proceedings* — (A) *Application or Petition.* The time and manner of applying to the court for a modification of a decree of alimony is within the sound discretion of the court,[14] subject, however, to the provisions controlling generally the practice in similar proceedings. The facts relied upon to secure the relief desired must be set forth in the petition.[15]

(B) *Notice and Hearing.* Irregularities in the notice of an application for the modification of a decree for alimony are waived by a general appearance.[16] Ordinarily the hearing should be in open court or before a referee.[17]

(C) *Evidence.* All evidence introduced on the original hearing to determine the amount of alimony, and such other evidence as might have been then introduced but was not, is admissible on the hearing of an application for a modification of the judgment or decree.[18] It must be clearly shown that new or previously unknown facts require such modification.[19] Evidence as to the value of the wife's services and disbursements in the care and maintenance of a child of the parties is admissible.[20] If the husband seeks a modification he will ordinarily be required to show that the accrued instalments have been fully paid,[21] although the fact that they remain unpaid does not absolutely deprive the court of power to entertain the application.[22]

d. Vacating or Setting Aside — (I) *For Failure of Service of Process.* Where a decree of divorce containing a direction as to the payment of alimony is granted without personal service on defendant, who was not within the state when the suit was brought and made no appearance, so much of the decree as relates to alimony may be vacated and set aside.[23]

(II) *Subsequent Remarriage or Misconduct of Wife.* Where a wife has obtained an absolute divorce carrying with it the privilege of a remarriage, and permanent alimony is decreed to her, it is generally held that the husband upon her subsequent remarriage may secure an order vacating the decree as to alimony.[24]

517; Kiralfy *v.* Kiralfy, 36 Misc. (N. Y.) 407, 73 N. Y. Suppl. 708.

13. Fisher *v.* Fisher, 32 Iowa 20.

Remarriage of husband.— A divorced husband cannot escape the obligation to pay alimony imposed on him by the decree by a remarriage which increases his expenses so as to exhaust his income. State *v.* Brown, 31 Wash. 397, 72 Pac. 86, 62 L. R. A. 974.

14. Jungk *v.* Jungk, 5 Iowa 541; Snover *v.* Snover, 13 N. J. Eq. 261; Paff *v.* Paff, Hopk. (N. Y.) 584.

15. Gregg *v.* Gregg, 3 Ind. 305; Perkins *v.* Perkins, 12 Mich. 456.

16. Ellis *v.* Ellis, 13 Nebr. 91, 13 N. W. 29, holding that an application by an attorney for an extension of time to prepare a bill of exceptions to the granting of an application for the alteration of a decree of divorce in respect to an award of alimony is a general appearance and hence a waiver.

17. Hopkins *v.* Hopkins, 40 Wis. 462; Bacon *v.* Bacon, 34 Wis. 594.

18. Ela *v.* Ela, 63 N. H. 116.

19. Rigney *v.* Rigney, 62 N. J. Eq. 8, 49 Atl. 460; Straus *v.* Straus, 14 N. Y. Suppl. 671.

20. Thomas *v.* Thomas, 41 Wis. 229.

21. Rigney *v.* Rigney, 62 N. J. Eq. 8, 49 Atl. 460.

22. Craig *v.* Craig, 163 Ill. 176, 45 N. E. 153.

23. De la Montanya *v.* De la Montanya, 112 Cal. 101, 44 Pac. 345, 53 Am. St. Rep. 165, 32 L. R. A. 82. See also XIX, A, 6, a, (III), (A).

24. *Arkansas.*— Casteel *v.* Casteel, 38 Ark. 477; Brown *v.* Brown, 38 Ark. 324; Bowman *v.* Worthington, 24 Ark. 522.

Illinois.— Stillman *v.* Stillman, 99 Ill. 196, 39 Am. Rep. 21; Morgan *v.* Lowman, 80 Ill. App. 557.

Massachusetts.— Southworth *v.* Treadwell, 168 Mass. 511, 47 N. E. 93. See Albee *v.* Wyman, 10 Gray 222.

Mississippi.— Bankston *v.* Bankston, 27 Miss. 692.

Ohio.— Olney *v.* Watts, 43 Ohio St. 499, 3 N. E. 354.

Oregon.— Brandt *v.* Brandt, 40 Oreg. 477, 67 Pac. 508.

See 17 Cent. Dig. tit. "Divorce," § 696.

Contra.— Shepherd *v.* Shepherd, 1 Hun (N. Y.) 240 [*affirmed* in 58 N. Y. 644].

The remarriage does not ipso facto dissolve the obligation of the former husband to continue the payment of the allowance; it simply affords a cogent reason for the court to modify or cut off the allowance. King *v.* King, 38 Ohio St. 370; Brandt *v.* Brandt, 40 Oreg. 477, 67 Pac. 508. So the income of a trust fund created by will for the benefit of testator's son cannot be devoted to the support of his wife, under a decree for alimony,

Misconduct of the former wife occurring after an absolute divorce does not justify either the vacation of a decree allowing her permanent alimony[25] or a reduction of the amount allowed;[26] but in case of limited divorce the husband may be discharged from a decree for alimony because of the wife's subsequent misconduct.[27] The determination of this question depends largely on whether the allowance is based upon the restitution to the wife of property brought to the husband by reason of the marriage or the partition of property jointly accumulated by both parties.[28]

e. Commencement and Termination of Allowance. Alimony is generally payable from the date of the order granting it,[29] although in the discretion of the court the allowance of permanent alimony may be computed from any time subsequent to the commencement of the suit for divorce, especially where defendant has been at fault in delaying the litigation.[30] A claim for alimony is personal and usually terminates upon the death of either of the parties,[31] although a number of cases uphold the power of the court to decree alimony during the natural life of the wife, thus making it a charge upon the husband's estate should he die first.[32] The intention to continue the alimony beyond the death of defendant and to bind his estate thereby must be clearly expressed in the decree, however.[33] An order for alimony upon a divorce *a mensa et thoro* continues in force only until the reconciliation of the parties.[34]

after an absolute divorce in her favor, where she marries again and her husband's ability to support her is unquestioned. Wetmore *v.* Wetmore, 162 N. Y. 503, 56 N. E. 997, 48 L. R. A. 666.

25. Cole *v.* Cole, 142 Ill. 19, 31 N. E. 109, 34 Am. St. Rep. 56, 19 L. R. A. 811; Sloan *v.* Cox, 4 Hayw. (Tenn.) 75.

26. Cole *v.* Cole, 142 Ill. 19, 31 N. E. 109, 34 Am. St. Rep. 56, 19 L. R. A. 811; Forrest *v.* Forrest, 3 Bosw. (N. Y.) 661.

27. Cariens *v.* Cariens, 50 W. Va. 113, 40 S. E. 335, 55 L. R. A. 930.

28. Brandt *v.* Brandt, 40 Oreg. 477, 67 Pac. 508.

29. Coolidge *v.* Coolidge, 2 Phila. (Pa.) 295.

30. Forrest *v.* Forrest, 6 Duer (N. Y.) 102, 3 Abb. Pr. (N. Y.) 144 [*affirmed* in 25 N. Y. 501]; Burr *v.* Burr, 7 Hill (N. Y.) 207.

31. *Arkansas.*— Casteel *v.* Casteel, 38 Ark. 477; Brown *v.* Brown, 38 Ark. 324; Kurtz *v.* Kurtz, 38 Ark. 119; Bowman *v.* Worthington, 24 Ark. 522.

Illinois.— Craig *v.* Craig, 163 Ill. 176, 45 N. E. 153; Stillman *v.* Stillman, 99 Ill. 196, 39 Am. Rep. 21, holding that the personal representatives of the deceased wife are not permitted to recover any portion of the sum decreed as alimony except that which had become payable in her lifetime and remained unpaid at her death.

Kentucky.— Gaines *v.* Gaines, 9 B. Mon. 295, 48 Am. Dec. 425; Lockridge *v.* Lockridge, 3 Dana 28, 28 Am. Dec. 52.

Michigan.— Wagner *v.* Wagner, (1903) 93 N. W. 889.

New York.— Johns *v.* Johns, 44 N. Y. App. Div. 533, 60 N. Y. Suppl. 865 [*affirmed* in 166 N. Y. 613, 59 N. E. 1124]; Galusha *v.* Galusha, 43 Hun 181.

North Carolina.— Rogers *v.* Vines, 28 N. C. 293.

Vermont.— Nary *v.* Braley, 41 Vt. 180.

Wisconsin.— Maxwell *v.* Sawyer, 90 Wis. 352, 63 N. W. 283.

32. Storey *v.* Storey, 125 Ill. 608, 18 N. E. 329, 8 Am. St. Rep. 417, 1 L. R. A. 320; O'Hagan *v.* O'Hagan, 4 Iowa 509; Stratton *v.* Stratton, 77 Me. 373, 52 Am. Rep. 779; Miller *v.* Miller, 64 Me. 484; Burr *v.* Burr, 10 Paige (N. Y.) 20 [*affirmed* in 7 Hill 207]. *Contra,* Martin *v.* Martin, 33 W. Va. 695, 11 S. E. 12.

See 17 Cent. Dig. tit. "Divorce," § 699.

33. Craig *v.* Craig, 163 Ill. 176, 45 N. E. 153; Lennahan *v.* O'Keefe, 107 Ill. 620.

Payment to plaintiff during life.— The provision of a judgment directing the payment of alimony to plaintiff during her life does not extend its operation beyond the lifetime of either of the parties. Johns *v.* Johns, 44 N. Y. App. Div. 533, 60 N. Y. Suppl. 865 [*affirmed* in 166 N. Y. 613, 59 N. E. 1124]; Field *v.* Field, 15 Abb. N. Cas. (N. Y.) 434; Galusha *v.* Galusha, 43 Hun (N. Y.) 181 [*modified* on other grounds in 116 N. Y. 635, 22 N. E. 1114, 15 Am. St. Rep. 453, 6 L. R. A. 487].

Payment until further order of the court.— A judgment decreeing the payment of permanent alimony "until the further order of this court" and making the same a specific lien upon land continues only during the lifetime of both parties. Craig *v.* Craig, 163 Ill. 176, 45 N. E. 153. *Compare* Lennahan *v.* O'Keefe, 107 Ill. 620.

Payment until remarriage.— Under a consent decree providing for the payment of an annual sum to plaintiff so long as she remains unmarried, the obligation to pay does not terminate on the death of the husband, plaintiff remaining unmarried. Storey *v.* Storey, 125 Ill. 608, 18 N. E. 329, 8 Am. St. Rep. 417, 1 L. R. A. 320.

34. Rogers *v.* Vines, 28 N. C. 293; Tiffin *v.* Tiffin, 2 Binn. (Pa.) 202.

E. Disposition of Property — 1. In General. The statutes of some of the states provide for a division of the property of the husband upon the dissolution of the marriage, and for the transfer of a portion thereof to the wife for her support. Independently of the statute the court has no such power,[35] although courts of equity have assumed the power of restoring to the wife the whole or a portion of the property which by the marriage became vested in the husband.[36] The statutes vary materially in their terms. Some of them confer generally upon the court authority to make such disposition of the property of the parties as shall appear just and reasonable;[37] others in terms authorize the court to divide the real and personal property between the parties;[38] and it is sometimes provided that the wife upon an absolute divorce shall have a dower interest in the husband's real property, to be recovered and assigned to her in the same manner as though he were dead.[39]

2. Person Entitled. The statutes are usually so worded as to authorize a division of the property where the divorce was obtained either at the instance of the wife or of the husband,[40] and although the wife is in fault, she should be awarded a portion of the property acquired by the joint earnings of herself and husband during coverture.[41]

3. Agreements as to Property. It has been held that an arrangement entered into by the parties pending the litigation in regard to the disposition of the property is not binding unless approved of by the court and embodied in the decree.[42] If entered into prior to the commencement of the suit, and untainted with

If after reconciliation the wife separates from her husband in consequence of renewed acts of cruelty, the decree for alimony may be continued and enforced against him, notwithstanding the reconciliation. Nathans *v.* Nathans, 2 Phila. (Pa.) 393.

35. Alexander *v.* Alexander, 140 Ind. 560, 40 N. E. 55; Garnett *v.* Garnett, 114 Mass. 347; Page *v.* Estes, 19 Pick. (Mass.) 269; Dean *v.* Richmond, 5 Pick. (Mass.) 461.

36. See *infra*, XIX, E, 5, a.

37. Jackson *v.* Jackson, 1 MacArthur (D. C.) 34; Lake *v.* Bender, 18 Nev. 361, 4 Pac. 711, 7 Pac. 74; Wuest *v.* Wuest, 17 Nev. 217, 30 Pac. 886.

Community property.— In California the statute provides that the community property may be assigned to them in such proportions as the court may deem just, but in no event shall less than one half thereof be awarded to the innocent party, and where the cause of the divorce is desertion, neglect, or habitual intemperance, the property must be equally divided. Gaston *v.* Gaston, 114 Cal. 542, 46 Pac. 609, 55 Am. St. Rep. 86; Rose *v.* Rose, 112 Cal. 341, 44 Pac. 658; Reid *v.* Reid, 112 Cal. 274, 44 Pac. 564; White *v.* White, 86 Cal. 219, 24 Pac. 996; Simpson *v.* Simpson, 80 Cal. 237, 22 Pac. 167; Cummings *v.* Cummings, 75 Cal. 434, 17 Pac. 442; Harris *v.* Harris, 71 Cal. 314, 12 Pac. 274; Eslinger *v.* Eslinger, 47 Cal. 62; Eidenmuller *v.* Eidenmuller, 37 Cal. 364; Miller *v.* Miller, 33 Cal. 353.

Property standing in third person's name.— Where a wife claims that her husband is the owner of real estate standing in the name of a third person, the court in a divorce proceeding brought by her against her husband and the ostensible owner of the land has jurisdiction to determine the husband's interest therein and award the same to the wife as alimony. Van Vleet *v.* De Witt, 200 Ill. 153, 65 N. E. 677.

38. *Alabama.*— Quarles *v.* Quarles, 19 Ala. 363; Lovett *v.* Lovett, 11 Ala. 763.

District of Columbia.— Jackson *v.* Jackson, 1 MacArthur 34.

Kansas.— Johnston *v.* Johnston, 54 Kan. 726, 39 Pac. 725; Van Brunt *v.* Van Brunt, 52 Kan. 380, 34 Pac. 1117; Busenback *v.* Busenback, 33 Kan. 572, 7 Pac. 245; Blankenship *v.* Blankenship, 19 Kan. 159.

Kentucky.— Williams *v.* Gooch, 3 Metc. 486.

New Hampshire.— Swett *v.* Swett, 49 N. H. 264; Barker *v.* Cobb, 36 N. H. 344.

Texas.— Craig *v.* Craig, 31 Tex. 203; Simons *v.* Simons, 23 Tex. 344; Rice *v.* Rice, 21 Tex. 58; Trimble *v.* Trimble, 15 Tex. 18; Fitts *v.* Fitts, 14 Tex. 443; Young *v.* Young, (Civ. App. 1893) 23 S. W. 83.

Wisconsin.— Blake *v.* Blake, 75 Wis. 339, 43 N. W. 144.

See 17 Cent. Dig. tit. "Divorce," § 702.

39. See statutes of the different states.

Extreme cruelty is misconduct within the meaning of a statute which allows dower to the wife in a divorce suit on the ground of the husband's misconduct. Rea *v.* Rea, 63 Mich. 257, 29 N. W. 703.

40. Jackson *v.* Jackson, 1 MacArthur (D. C.) 34; Richardson *v.* Wilson, 8 Yerg. (Tenn.) 67.

41. Dailey *v.* Dailey, Wright (Ohio) 514.

Allowance of alimony out of property to the purchase of which the wife has contributed see *supra*, XIX, D, 8, c, (III), (C).

42. Sellon *v.* Reed, 21 Fed. Cas. No. 12,646, 5 Biss. 125.

Agreements in respect to permanent alimony see *supra*, XIX, D, 6.

fraud and without collusion, such agreements are doubtless enforceable,[43] although the court in making disposition of the community property may disregard such an agreement.[44]

4. Estate Subject to Division. The determination of the question as to what estates are subject to distribution between the parties is governed by the terms of the statute under which the distribution is made. In some states the community property is subject to division,[45] in which case the separate property of the wife is not included,[46] nor is that of the husband, until after the disposition of the community property.[47] Ordinarily, however, the statutes are construed to authorize a disposal of the separate, as well the joint, property of the husband or wife,[48] having due regard to the circumstances under which the estate was acquired.[49] A statute giving to the wife upon obtaining a divorce a one-third interest in the real estate owned by the husband at the time of the decree is construed to confer upon the wife lands the equitable title of which is in the husband.[50] So a statute giving the wife a dower interest in the husband's lands on absolute divorce entitles her to dower in all the lands of which he was seized during the coverture, although he may have conveyed them before the divorce.[51] Where a wife holds a life-estate in lands with remainder to her children, her estate may be disposed of, but the remainder is not affected.[52]

5. Restoration of Property — a. To Wife. The rule in equity has always been that property shall be restored to the wife upon a dissolution of the marriage because of the husband's misconduct, which belonged to her at the time of the marriage and which the husband had secured by unfair means to be vested in him.[53] The subject is usually controlled by statutes, authorizing in more or less general terms the restoration to the wife of property which came to the husband

43. Stockton *v.* Knock, 73 Cal. 425, 15 Pac. 51; Mann *v.* Mann, 24 La. Ann. 437; Burdick *v.* Burdick, 11 Wis. 126, holding that a wife suing for divorce may stipulate with her husband that she will release her right of dower.

A marriage settlement providing that if the parties shall fail to live together amicably, and shall separate either by abandonment or by divorce, the property owned by either before marriage shall be retained by each, and that neither shall claim any interest in the other's property acquired by reason of the marriage, and whereby each releases all claim to alimony in case of divorce, is illegal and will not be enforced in divorce proceedings. Neddo *v.* Neddo, 56 Kan. 507, 44 Pac. 1.

44. Loveren *v.* Loveren, 106 Cal. 509, 39 Pac. 801.

45. Cummings *v.* Cummings, 75 Cal. 434, 17 Pac. 442 (holding, however, that partition of community property will not be ordered where a mortgagee is in possession under a mortgage covering the whole land); Smith *v.* Smith, 12 Cal. 216, 73 Am. Dec. 533 (holding that a house built by a husband with community funds on lands purchased by him in the name of his children is community property and the wife on divorce is entitled to her share therein).

46. Reid *v.* Reid, 112 Cal. 274, 44 Pac. 564.

47. Cal. Civ. Code, § 141. See also *In re* Spencer, 82 Cal. 110, 23 Pac. 37, holding that the separate property referred to in that section does not embrace the earnings of the husband after divorce.

48. Rice *v.* Rice, 21 Tex. 58; Webster *v.* Webster, 2 Wash. 417, 26 Pac. 864. *Compare* Blethen *v.* Bonner, (Tex. Civ. App. 1899) 52 S. W. 571.

49. Gallagher *v.* Gallagher, 89 Wis. 461, 61 N. W. 1104, construing a statute authorizing the court to divide the estate of the husband, and so much of that "of the wife as shall have been derived from the husband," so that lands purchased from the joint earnings of both husband and wife, the title to which was in the wife's name, are subject to equitable division.

50. Wetmore *v.* Wetmore, 5 Oreg. 469.

51. Davol *v.* Howland, 14 Mass. 219.

52. Cason *v.* Walton, 62 Ga. 427.

53. *Kentucky.*— Golding *v.* Golding, 82 Ky. 51.

New York.— Holmes *v.* Holmes, 4 Barb. 295; Meehan *v.* Meehan, 2 Barb. 377.

Tennessee.— Sharp *v.* Sharp, 2 Sneed 496.

Texas.— Trimble *v.* Trimble, 15 Tex. 18.

Wisconsin.— Pauly *v.* Pauly, 69 Wis. 419, 34 N. W. 512, holding that property belonging to the wife in the hands of the husband will be restored to her almost as a matter of course.

See 17 Cent. Dig. tit. "Divorce," § 706.

The earnings of the wife during coverture are under the common law the property of the husband absolutely, and upon a divorce granted by reason of his adultery will not be decreed to her. Armstrong *v.* Armstrong, 32 Miss. 279.

Misconduct of wife.— A wife who without cause deserts her husband is not entitled to the aid of a court of equity in getting possession of such chattels as she has contributed to the furnishing and adornment of her hus-

by the marriage.[54] Statutes authorizing the restoration of the wife's property upon granting her a divorce are usually construed as affecting the property which the law gives the husband by reason of the marriage, and not property obtained from the wife by gift or contract.[55] The court in restoring the wife's property may inquire into waste committed by the husband on the land since the proceedings for divorce were begun,[56] but he cannot be required to account for rents of lands received by him through the wife.[57]

b. To Husband. A divorce granted to the wife does not justify an award to the husband of property voluntarily settled by him upon her during coverture;[58] and it would seem a general rule that property voluntarily conveyed to the wife by the husband without fraud or undue influence cannot, in the absence of statutory authority, be restored to him upon his obtaining a divorce for her misconduct.[59] Statutes are in force in some of the states, however, which permit a distribution to the husband of so much of the wife's estate as shall have been derived from her husband;[60] and in any event the voluntary conveyance by the husband to the wife, prior to the commencement of the divorce suit, of a portion

band's house. Black *v.* Black, 30 N. J. Eq. 215.

This question has lost much of its importance because of the statutory removal of the common-law disabilities of married women. See HUSBAND AND WIFE.

54. *Arkansas.*— Viser *v.* Bertrand, 16 Ark. 296.

California.— Haley *v.* Haley, (1887) 14 Pac. 92.

Georgia.— O'Halloran *v.* O'Halloran, 49 Ga. 301.

Iowa.— Casey *v.* Casey, 116 Iowa 655, 88 N. W. 937.

Kentucky.— Irwin *v.* Irwin, 107 Ky. 24, 52 S. W. 927, 21 Ky. L. Rep. 622; Flood *v.* Flood, 5 Bush 167; Faulkner *v.* Faulkner, 15 S. W. 523, 12 Ky. L. Rep. 21.

Maryland.— Tyson *v.* Tyson, 54 Md. 35; Tayman *v.* Tayman, 2 Md. Ch. 393.

Massachusetts.— Kriger *v.* Day, 2 Pick. 316.

Mississippi.— Tewksbury *v.* Tewksbury, 4 How. 109.

Tennessee.— McAllister *v.* McAllister, 10 Heisk. 345; Chunn *v.* Chunn, Meigs 131.

Property illegally acquired.— The fact that the property conveyed to the wife was purchased with the proceeds of a lottery ticket does not so taint the transaction that the chancellor will refuse to compel the property to be restored. Irwin *v.* Irwin, 107 Ky. 24, 52 S. W. 927, 21 Ky. L. Rep. 622.

55. Phillips *v.* Culliton, 153 Mass. 17, 28 N. E. 137 (holding that the statute does not include property coming to the husband by a trust deed made by the wife after marriage in settlement of differences arising between them); Dillon *v.* Starin, 44 Nebr. 881, 63 N. W. 12.

56. Grubb *v.* Grubb, 1 Harr. (Del.) 516.

57. McGill *v.* McGill, 19 Fla. 341.

58. Hinds *v.* Hinds, 18 D. C. 85; Jackson *v.* Jackson, 91 U. S. 122, 23 L. ed. 258.

59. Lewis *v.* Lewis, 75 Iowa 200, 39 N. W. 271; Orr *v.* Orr, 8 Bush (Ky.) 156; Kinzey *v.* Kinzey, 115 Mo. 496, 22 S. W. 497, 20 L. R. A. 222.

Wife's fraud.— Where the wife induced the marriage through false representations made to secure money from the husband, he is entitled, not only to a divorce, but to a decree for the money advanced by him to her before marriage. Munroe *v.* Munroe, 20 Oreg. 579, 26 Pac. 838.

60. Frackelton *v.* Frackelton, 103 Wis. 673, 79 N. W. 750.

In Kentucky the statutes provide that a decree for divorce shall contain an order of restitution of any property which either party may have obtained, directly or indirectly, from or through the other during marriage and in consideration thereof. Such section has been held not to apply to an award of alimony under a decree of divorce *a mensa et thoro* where the husband subsequently obtains a decree of absolute divorce (Johnson *v.* Johnson, 96 Ky. 391, 29 S. W. 322, 16 Ky. L. Rep. 660); nor does it include land conveyed by a husband to his wife after their marriage in consideration of love and affection (Phillips *v.* Phillips, 9 Bush 183). The consideration meant by the statute relates solely to the consideration passing between the husband and wife, and hence property purchased by the husband but conveyed directly to the wife by his order is within the statute. Bayer *v.* Fusche, 7 Ky. L. Rep. 832.

Money secured to a wife under a policy of insurance and to be paid to her under the terms thereof if she is living at the time of her husband's death may be "property in reversion," although the policy itself may not be a marriage settlement, and the court has power to compel her, if she is the guilty party in divorce proceedings, to settle her interests under the policy in favor of her husband and children. Stedall *v.* Stedall, 86 L. T. Rep. N. S. 124, 50 Wkly. Rep. 320.

Rents.— The wife, when required to restore property obtained from the husband in consideration of marriage, should be allowed to retain rents received by her from the property. Bennett *v.* Bennett, 43 S. W. 247, 19 Ky. L. Rep. 1243.

of his property should be considered by the court in determining the amount to be awarded the wife as permanent alimony.[61]

c. Rights of Creditors and Purchasers. The rights of creditors and *bona fide* purchasers and encumbrancers which attach prior to the institution of proceedings for the divorce cannot be defeated by a restoration to the wife of property obtained by the husband through the marriage.[62]

6. Assignment of Homestead. Where a division of the property of the parties is authorized the homestead may be awarded either to one or the other as the circumstances of the particular case demand.[63]

7. Division of Property. The determination of the particular proportion of the property which should be allotted to the parties depends upon the authority vested in the court by the statute. Where the power is generally conferred upon the court without statutory limitation the division should be made after a consideration of many of the same matters as in the case of an allowance of permanent alimony,[64] such as the cause for which the divorce was granted, the conduct of the parties, the value of the estate to be divided, and other facts and circumstances peculiar to the particular case.[65] Unless so provided by statute,[66] no fixed portion of the estate of either party is to be allotted to the other upon a divorce. An allotment to the wife of all the community property has been sustained,[67] and an allowance to the wife of a share equal to that which she would have obtained upon the death of her husband has been held reasonable.[68] The division is within the discretion of the court and will not be disturbed on appeal unless the rights of the parties are clearly disregarded.[69]

8. Procedure — a. Application. Ordinarily an application for a restoration or

61. See *supra*, XIX, D, 6, a.

62. Van Duzer *v.* Van Duzer, 6 Paige (N. Y.) 366, 31 Am. Dec. 257; Sackett *v.* Giles, 3 Barb. Ch. (N. Y.) 204; Jennings *v.* Montague, 2 Gratt. (Va.) 350. See also Cummings *v.* Cummings, 75 Cal. 434, 17 Pac. 442.

63. *California.*— Smith *v.* Smith, 124 Cal. 651, 57 Pac. 573 (sustaining an award of an undivided two thirds of a homestead to the wife); Huellmantel *v.* Huellmantel, 117 Cal. 407, 49 Pac. 574 (construing a statute which provides that the homestead shall be assigned to the former owner of the property, subject to the power of the court to assign it for a limited period to the innocent party, and holding that such limited period cannot exceed the life of the innocent party); Gimmy *v.* Doane, 22 Cal. 635.

Iowa.— Cole *v.* Cole, 23 Iowa 433, where the wife was awarded the homestead in addition to an allowance of alimony, it appearing that it was purchased with her means and that the title was in her name, although the husband's money had contributed to improvements thereon.

Kansas.— Brandon *v.* Brandon, 14 Kan. 342.

Michigan.— Reeves *v.* Reeves, 117 Mich. 526, 76 N. W. 4.

Texas.— Trigg *v.* Trigg, (Sup. 1891) 18 S. W. 313; Tiemann *v.* Tiemann, 34 Tex. 522; Stone *v.* Stone, (Civ. App. 1897) 40 S. W. 1022.

Wisconsin.— Webster *v.* Webster, 64 Wis. 438, 25 N. W. 434.

See 17 Cent. Dig. tit. "Divorce," § 712.

Effect of divorce on right of homestead see Homesteads.

64. See *supra*, XIX, D, 8, c.

65. *Alabama.*— Lovett *v.* Lovett, 11 Ala. 763.

California.— Eslinger *v.* Eslinger, 47 Cal. 62; Miller *v.* Miller, 33 Cal. 353.

Colorado.— Luthe *v.* Luthe, 12 Colo. 421, 21 Pac. 467.

Illinois.— Wilson *v.* Wilson, 102 Ill. 297; Robbins *v.* Robbins, 101 Ill. 416; Stewartson *v.* Stewartson, 15 Ill. 145.

Kansas.— Snodgrass *v.* Snodgrass, 40 Kan. 494, 20 Pac. 203.

Kentucky.— Wilmore *v.* Wilmore, 15 B. Mon. 49.

Texas.— Moore *v.* Moore, 59 Tex. 54; Simons *v.* Simons, 23 Tex. 344.

Wisconsin.— Gallagher *v.* Gallagher, 89 Wis. 461, 61 N. W. 1104; Donovan *v.* Donovan, 20 Wis. 586.

See 17 Cent. Dig. tit. "Divorce," § 715.

66. Wetmore *v.* Wetmore, 5 Oreg. 469, holding that the party obtaining a divorce is absolutely entitled by statute to an undivided one third of all the real estate owned by the other party at the time of the decree. See also Rees *v.* Rees, 7 Oreg. 47, holding that the court cannot grant more than an undivided one third of the real estate.

67. Johnson *v.* Johnson, (Cal. 1894) 35 Pac. 637 (where plaintiff was an invalid and defendant more than able to make his living); Strozynski *v.* Strozynski, 97 Cal. 189, 31 Pac. 1130; White *v.* White, 86 Cal. 219, 24 Pac. 996. *Contra*, Craig *v.* Craig, 31 Tex. 203.

68. Thornberry *v.* Thornberry, 4 Litt. (Ky.) 251.

69. Gorman *v.* Gorman, 134 Cal. 378, 66 Pac. 313; Miller *v.* Miller, 33 Cal. 353.

division of property may be made separately or be included in the petition for divorce. Where, however, it is sought to assign the wife's dower interests under a statute authorizing it, a separate proceeding should be instituted as if the husband were dead.[70] Notice of the application must be given to defendant.[71] Land held by the wife in her name for the benefit of her children cannot be partitioned in a suit for divorce unless the children are made parties.[72]

b. Evidence. In determining the portion to be allotted to the parties, any evidence tending to show the value of the estate, its character, and the source from which it was derived is admissible;[73] and the conduct of the parties may be considered.[74]

c. Judgment or Decree — (I) *Form and Contents.* The findings contained in the decree,[75] as well as the decree itself,[76] should conform with the pleadings. The decree should contain a description of the property adjudged to each of the parties sufficient for its identification.[77]

(II) *Construction and Effect.* The decree should be construed in connection with the statute conferring authority upon the court to render it.[78] A decree directing a restoration to the wife of property brought to her husband at marriage does not operate on articles consumed or disposed of at the time of the divorce;[79] but where the husband collects the rents pending the proceedings and takes the profits of community property assigned to the wife by the decree, he is accountable therefor.[80]

(III) *Revision and Modification.* Ordinarily a judgment providing for a division of real and personal property between the parties is final,[81] and cannot be modified by the trial court after the term at which it is rendered,[82] especially where the wife was acquainted with the specific parcels owned by the husband before the decree was entered, and permitted three years to elapse before attempting to set the division aside.[83] But where the judgment includes relief as to the division of property not demanded in the pleadings, that part of it relating to such division should be vacated.[84]

F. Judgment or Decree — 1. Nature and Effect — a. In General. Special matters relating to orders or decrees granting temporary alimony,[85] suit money,[86]

70. Smith *v.* Smith, 13 Mass. 231; Holmes *v.* Holmes, 54 Minn. 352, 56 N. W. 46.

71. Edmonds *v.* Edmonds, 4 La. Ann. 489; Handlan *v.* Handlan, 37 W. Va. 486, 16 S. E. 597.

72. Jones *v.* Jones, (Tex. Civ. App. 1897) 41 S. W. 413.

73. Rose *v.* Rose, 112 Cal. 341, 44 Pac. 658 (where a paper signed by defendant, containing an offer to divide the property and describing it as community property, was admitted, although it was an offer of compromise); Odom *v.* Odom, 36 Ga. 286 (admitting an antenuptial settlement to show the source of the property); Wilmore *v.* Wilmore, 15 B. Mon. (Ky.) 49.

Evidence as to the value of the property should refer to the value at the time the decree was rendered, without regard to subsequent changes. McClung *v.* McClung, 42 Mich. 53, 3 N. W. 250.

74. Wilmore *v.* Wilmore, 15 B. Mon. (Ky.) 49; Varney *v.* Varney, 58 Wis. 19, 16 N. W. 36, holding that the wife's unchastity before marriage, although no ground for dissolving the marriage, may be considered in the division of the property.

75. Weber *v.* Weber, 16 Oreg. 163, 17 Pac. 866 (reversing a decree finding that certain personal property is the wife's separate property where she alleged in her petition that it belonged to her husband); Hoh *v.* Hoh, 84 Wis. 378, 54 N. W. 731.

76. Cummings *v.* Cummings, 75 Cal. 434, 17 Pac. 442.

77. Bamford *v.* Bamford, 4 Oreg. 30; Young *v.* Young, (Tex. Civ. App. 1893) 23 S. W. 83, where a description by reference to deeds was held insufficient.

78. Simpson *v.* Simpson, 80 Cal. 237, 22 Pac. 167, holding that a decree awarding a homestead to the wife absolutely to be held by her "in trust for her support and that of her children" is not so construed as to qualify her absolute estate in the homestead, since under the statute the court can only assign it to the innocent party either absolutely or for a limited time.

79. Dean *v.* Dean, 5 Pick. (Mass.) 428.

80. Dillon *v.* Dillon, 35 La. Ann. 92.

81. Hopkins *v.* Hopkins, 40 Wis. 462.

82. Thompson *v.* Thompson, 73 Wis. 84, 40 N. W. 671; Webster *v.* Webster, 64 Wis. 438, 25 N. W. 434.

83. Ferry *v.* Ferry, 9 Wash. 239, 37 Pac. 431.

84. McMurray *v.* McMurray, 78 Tex. 584, 14 S. W. 895.

85. See *supra*, XIX, B, 8.

86. See *supra*, XIX, C, 10.

or permanent alimony[87] have already been considered. In this place a number of general propositions alike applicable to all such orders or decrees, including remedies for their enforcement, will be discussed.

b. Conclusiveness of Adjudication — (i) *In General.* A judgment or decree allowing alimony is final and concludes all parties,[88] unless an appeal be taken therefrom,[89] or an application be made for revision or modification under statutory authority.[90] Such a judgment or decree cannot be collaterally assailed,[91] unless it be shown that the court was without authority to render it,[92] or through failure of service of process or other cause had no jurisdiction of the subject-matter or of the party against whom it was rendered.[93]

(ii) *Rights Precluded.* The final judgment granting a divorce and awarding alimony or disposing of the property of the parties is a bar to a subsequent action by either party to determine any of the property rights which might have been settled in such action.[94] It will be presumed that the court in awarding per-

87. See *supra*, XIX, D, 9.

88. *California.*— Smith *v.* Smith, (1901) 64 Pac. 302.

District of Columbia.—Alexander *v.* Alexander, 20 D. C. 552.

Illinois.— Pool *v.* Tucker, 36 Ill. App. 377.

Iowa.— Darrow *v.* Darrow, 43 Iowa 411.

Kentucky.— McMakin *v.* Wickliffe, 16 Ky. L. Rep. 240.

Michigan.— Hyde *v.* Leisenring, 107 Mich. 490, 65 N. W. 536; Crittenden *v.* Crittenden, 39 Mich. 661, 33 Am. Rep. 40.

Missouri.— Hamill *v.* Talbott, 81 Mo. App. 210.

Ohio.— Coffman *v.* Finney, 65 Ohio St. 61, 61 N. E. 155, 55 L. R. A. 794; Andress *v.* Andress, 9 Ohio S. & C. Pl. Dec. 559, 7 Ohio N. P. 283; Voight *v.* Voight, 10 Am. L. Rec. 564.

Texas.— Hardin *v.* Hardin, 38 Tex. 616; Boyd *v.* Ghent, (Civ. App. 1901) 61 S. W. 723; Turner *v.* Gibson, 2 Tex. App. Civ. Cas. § 714.

Washington.— King *v.* Miller, 10 Wash. 274, 38 Pac. 1020.

See 17 Cent. Dig. tit. "Divorce," § 722.

A provisional allowance for the support of the deserting wife during the pendency of the action does not determine the question of desertion. Wagner *v.* Wagner, 39 Minn. 394, 40 N. W. 360.

Ex parte orders for the allowance of alimony cannot bind the opposite party, except that they may furnish one of the items of proof to justify a third person in demanding from the husband payment for the necessary supplies furnished the wife during the pendency of the suit. Fletcher *v.* Henley, 13 La. Ann. 150.

89. See *infra*, XIX, G.

90. See *supra*, XIX, B, 8, c, d; C, 10, b; XIX, D, 9, c, d; E, 8, c, (III).

91. *Illinois.*— Keith *v.* Keith, 104 Ill. 397 (holding that a decree for alimony payable in instalments cannot be attacked on the ground that no limit was fixed as to the duration of the obligation); Marvin *v.* Collins, 48 Ill. 156; Pool *v.* Tucker, 36 Ill. App. 377.

Michigan.— Taylor *v.* Gladwin, 40 Mich. 232.

Missouri.— Crews *v.* Mooney, 74 Mo. 26.

Ohio.— Hare *v.* Gibson, 32 Ohio St. 33, 30 Am. Rep. 568; Piatt *v.* Piatt, 9 Ohio 37; Sherer *v.* Price, 3 Ohio Cir. Ct. 107, 2 Ohio Cir. Dec. 61.

Oklahoma.— Uhl *v.* Irwin, 3 Okla. 388, 41 Pac. 376.

Washington.— *In re* Cave, 26 Wash. 213, 66 Pac. 425, 90 Am. St. Rep. 736.

See 17 Cent. Dig. tit. "Divorce," § 723.

Judgment as debt provable in bankruptcy see Bankruptcy, 5 Cyc. 326, note 46.

92. Davol *v.* Davol, 13 Mass. 264.

93. Cavanaugh *v.* Smith, 84 Ind. 380; Kamp *v.* Kamp, 59 N. Y. 212 [*reversing* 46 How. Pr. 143].

Non-appearance.— Where defendant was served with process, a decree for alimony cannot be collaterally assailed, although he made no appearance. Pool *v.* Tucker, 36 Ill. App. 377.

94. *Indiana.*— Natcher *v.* Clark, 151 Ind. 368, 51 N. E. 468; Thompson *v.* Thompson, 132 Ind. 288, 31 N. E. 529; Glaze *v.* Citizens' Nat. Bank, 116 Ind. 492, 18 N. E. 450; Behrley *v.* Behrley, 93 Ind. 255; Muckenburg *v.* Holler, 29 Ind. 139, 92 Am. Dec. 345.

Iowa.— Patton *v.* Loughridge, 49 Iowa 218.

Kansas.— Roe *v.* Roe, 52 Kan. 724, 35 Pac. 808, 39 Am. St. Rep. 367.

Mississippi.— Lawson *v.* Shotwell, 27 Miss. 630.

Nebraska.— Burnham *v.* Tizard, 31 Nebr. 781, 48 N. W. 823.

New Hampshire.— Janvrin *v.* Janvrin, 60 N. H. 169.

New York.— Kamp *v.* Kamp, 59 N. Y. 212 [*reversing* 44 How. Pr. 143]; Wood *v.* Wood, 7 Lans. 204; McDonough *v.* McDonough, 26 How. Pr. 193; Cook *v.* Cook, 1 Barb. Ch. 639.

Vermont.— Buckminster *v.* Buckminster, 38 Vt. 248, 88 Am. Dec. 652.

See 17 Cent. Dig. tit. "Divorce," § 724.

Finality of decree.— Under a statute authorizing a revision of a decree for alimony, where there was not a final division of the property belonging to the parties, a decree for the payment of a certain annual sum to the wife as alimony so long as she shall remain unmarried, in lieu of all other interest in her husband's estate, is not such a final

manent alimony estimated and adjusted the property rights of both husband and wife.[95] Such a judgment does not, however, preclude the wife from enforcing her rights against a third person to whom she had been fraudulently induced by her husband to convey property for the benefit of her husband.[96]

c. Rights of Wife's Creditors. In the absence of statutory authority, alimony directed to be paid the wife under a judgment or decree cannot be subjected to the payment of a debt contracted by her prior to the date of the adjudication.[97]

d. Payment of Amount. Alimony directed to be paid in instalments may be discharged by the payment of a stipulated sum.[98] Payment of temporary alimony cannot be refused by the husband upon the ground that the wife has appropriated to her own use household property greater in value than the sum awarded.[99] Interest may be required on instalments not paid when due,[1] not exceeding in any event the legal rate.[2]

e. Title to Property Awarded. An absolute assignment to the wife in the decree of a part of the husband's estate vests title thereto in her without conveyance from him.[3]

f. Effect of Death of Either Party as to Arrearages.[4] Alimony due the wife at the time of the husband's death is a legal claim against his estate;[5] and it has been held that arrears of alimony due the wife at the time of her death may be collected by her personal representatives,[6] although in some states such arrears are not so recoverable in the case of a limited divorce,[7] unless it appear that the husband had evaded payment and compelled the wife to contract debts.[8]

2. Enforcement — a. By Dismissal or Striking Out Petition. Failure of the husband to obey an order directing the payment of temporary alimony or counsel fees will not ordinarily justify a denial of his right to defend;[9] nor can he

division of the property as to preclude the court from afterward entertaining a petition in relation to the wife's assignment of such alimony. Kempster *v.* Evans, 81 Wis. 247, 51 N. W. 327, 15 L. R. A. 391.

95. Parker *v.* Albee, 86 Iowa 46, 52 N. W. 533 (holding also that no such presumption exists in case of a temporary allowance for maintenance and expenses during the litigation); Patton *v.* Loughridge, 49 Iowa 218.

96. Thompson *v.* Thompson, 132 Ind. 288, 31 N. E. 529.

97. Romaine *v.* Chauncey, 129 N. Y. 566, 29 N. E. 826, 26 Am. St. Rep. 544, 14 L. R. A. 712 [*affirming* 60 Hun 477, 15 N. Y. Suppl. 198, and *distinguishing* Stevenson *v.* Stevenson, 34 Hun 157]; Andrews *v.* Whitney, 82 Hun (N. Y.) 117, 31 N. Y. Suppl. 164; Parfrey *v.* Parfrey, 2 C. Pl. (Pa.) 257. *Compare* Scheffer *v.* Boy, 5 Pa. Co. Ct. 158.

98. Smith *v.* Smith, 43 N. Y. Super. Ct. 140; Neely *v.* Neely, 9 Ohio Dec. (Reprint) 201, 11 Cinc. L. Bul. 191.

99. Dayton *v.* Drake, 64 Iowa 714, 21 N. W. 158.

1. Winemiller *v.* Winemiller, 114 Ind. 540, 17 N. E. 123, holding, however, that instalments do not bear interest before they are due unless the decree expressly so provides, notwithstanding the provisions of a statute providing that in the absence of a contract money judgments shall bear six per cent interest from the return of the verdict or finding. And see Huellmantel *v.* Huellmantel, 124 Cal. 583, 57 Pac. 582.

2. Becker *v.* Becker, 79 Ill. 532.

3. Gholston *v.* Gholston, 54 Ga. 285; Faris *v.* Goins, 13 S. W. 2, 11 Ky. L. Rep. 752; Swett *v.* Swett, 49 N. H. 264; Gallagher *v.* Fleury, 36 Ohio St. 590; Broadwell *v.* Broadwell, 21 Ohio St. 657; Lefevre *v.* Murdock, Wright (Ohio) 205.

Division of community property.— After a decree directing that the property held in community by the husband and wife shall be equally divided, such property is held by them thereafter as tenants in common *eo nomine*. McLeran *v.* Benton, 31 Cal. 29.

Where lands are set out to the wife by metes and bounds, the fee to no land outside the boundaries will pass as appurtenant thereto. Wiggin *v.* Smith, 54 N. H. 213.

4. Termination of permanent alimony by death of either party see *supra*, XIX, D, 9, e.

5. Smith *v.* Smith, 1 Root (Conn.) 349.

Revival.—A decree for monthly instalments of alimony against a husband for which execution issued in his lifetime and was returned unsatisfied may be revived against his administrator without presenting the claim to him for allowance. McCoun *v.* Weiskettle, 6 Ohio Dec. (Reprint) 805, 8 Am. L. Rec. 303.

6. Miller *v.* Clark, 23 Ind. 370.

7. Clark *v.* Clark, 6 Watts & S. (Pa.) 85.

8. Bouslough *v.* Bouslough, 68 Pa. St. 495.

9. *California.*— Foley *v.* Foley, 120 Cal. 33, 52 Pac. 122, 65 Am. St. Rep. 147.

Georgia.— Cason *v.* Cason, 15 Ga. 405.

Illinois.— Gordon *v.* Gordon, 141 Ill. 160, 30 N. E. 446, 33 Am. St. Rep. 294, 21 L. R. A. 387 [*affirming* 41 Ill. App. 137].

Iowa.— Allen *v.* Allen, 72 Iowa 502, 34

for such reason be deprived of his right to appeal;[10] but in a proper case he may be punished by striking out his petition or by a dismissal of his suit.[11] Thus if he has ample means and vexatiously withholds payment of the sum which he is bound by the order to give to complainant for expediting her cause, his answer may be stricken out and he may be held in default.[12]

b. Execution. The enforcement of an order or decree for alimony by execution is usually controlled by the practice of the jurisdiction within which it was rendered. A decree for permanent alimony is usually treated as a judgment enforceable by execution like any other judgment;[13] but an order for the payment of temporary alimony or suit money, not being final, cannot be enforced by execution,[14] unless the statute directs otherwise;[15] nor can an agreement to pay temporary alimony be enforced by execution, in the absence of a decree in conformity therewith.[16] Where payment of permanent alimony is to be made in instalments, execution may issue to enforce payment of each instalment as it falls due, or of so many of them as may be due at any one time.[17] A statute authorizing a division of property between the parties to a divorce suit and impliedly conferring authority to charge the property adjudged to one of them with a payment directed to be made to the other does not permit the court to

N. W. 303; Baily *v.* Baily, 69 Iowa 77, 28 N. W. 443; Peel *v.* Peel, 50 Iowa 521.

Missouri.— McMakin *v.* McMakin, 68 Mo. App. 57.

New York.— Knott *v.* Knott, 6 N. Y. App. Div. 589, 39 N. Y. Suppl. 804; McCrea *v.* McCrea, 58 How. Pr. 220.

South Dakota.— Larson *v.* Larson, 9 S. D. 1, 67 N. W. 842.

Washington.— Bachelor *v.* Bachelor, 30 Wash. 639, 71 Pac. 193.

10. People *v.* Horton, 46 Ill. App. 434; Eastes *v.* Eastes, 79 Ind. 363; Martin *v.* Martin, 6 Blackf. (Ind.) 321; Dwelly *v.* Dwelly, 46 Me. 377.

11. *Arkansas.*— Casteel *v.* Casteel, 38 Ark. 477.

Iowa.— Peel *v.* Peel, 50 Iowa 521.

Missouri.— Waters *v.* Waters, 49 Mo. 385.

Pennsylvania.— Deemer *v.* Deemer, 7 Pa. Co. Ct. 554; Snyder *v.* Snyder, 8 Kulp 430.

Texas.— Wright *v.* Wright, 6 Tex. 29.

See 17 Cent. Dig. tit. "Divorce," § 738.

Service of the order directing payment of temporary alimony must ordinarily be personally made upon plaintiff, to authorize a dismissal of his suit. Scott *v.* Scott, 9 S. D. 125, 68 N. W. 194. See, however, Knott *v.* Knott, 6 N. Y. App. Div. 589, 39 N. Y. Suppl. 804.

Poverty.— Where the failure of a husband to pay an amount ordered for his wife's costs arises from poverty, he is not in contempt, nor is the dismissal of his suit warranted. Newhouse *v.* Newhouse, 14 Oreg. 290, 12 Pac. 422.

12. McClung *v.* McClung, 40 Mich. 493; Zimmerman *v.* Zimmerman, 7 Mont. 114, 14 Pac. 665; Clark *v.* Clark, 13 Daly 497 [*affirmed* in 117 N. Y. 622, 22 N. E. 1127] (holding that where a party is in contempt for failure to pay temporary alimony, the court may strike out his answer, especially where it was filed after default upon leave granted on condition that he pay certain of the fees); Walker *v.* Walker, 82 N. Y. 260; Knott *v.* Knott, 6 N. Y. App. Div. 589, 39 N. Y. Suppl. 804 (where defendant left the state after the order was granted so that it was not served on him, although he knew its contents); Brisbane *v.* Brisbane, 5 N. Y. Civ. Proc. 352, 67 How. Pr. (N. Y.) 184; Barker *v.* Barker, 15 How. Pr. (N. Y.) 568; Farnham *v.* Farnham, 9 How. Pr. (N. Y.) 231; Maharry *v.* Maharry, 5 Okla. 371, 47 Pac. 1051.

13. *California.*— Von Cleave *v.* Bucher, 79 Cal. 600, 21 Pac. 954.

Colorado.— Hall *v.* Harrington, 7 Colo. App. 474, 44 Pac. 365.

Delaware.— Jeans *v.* Jeans, 2 Harr. 142.

Kentucky.— Evans *v.* Stewart, 38 S. W. 697, 18 Ky. L. Rep. 941; Tyler *v.* Tyler, 99 Ky. 31, 34 S. W. 898, 17 Ky. L. Rep. 1341.

Massachusetts.— Newcomb *v.* Newcomb, 12 Gray 28; Howard *v.* Howard, 15 Mass. 196; Orrok *v.* Orrok, 1 Mass. 341.

Michigan.— Taylor *v.* Gladwin, 40 Mich. 232.

Missouri.— Schmidt *v.* Schmidt, 26 Mo. 235.

Nebraska.— Atkins *v.* Atkins, 18 Nebr. 474, 25 N. W. 724.

New Hampshire.— Sheafe *v.* Laighton, 36 N. H. 240; Sheafe *v.* Sheafe, 36 N. H. 155.

New York.— Miller *v.* Miller, 7 Hun 208; Lansing *v.* Lansing, 4 Lans. 377; Galinger *v.* Galinger, 61 Barb. 31; Hoffman *v.* Hoffman, 55 Barb. 269.

See 17 Cent. Dig. tit. "Divorce," § 739.

Effect of discharge in bankruptcy see BANKRUPTCY, 5 Cyc. 397.

14. Ford *v.* Ford, 41 How. Pr. (N. Y.) 169; Groves' Appeal, 68 Pa. St. 143. *Compare* Ward *v.* Ward, 6 Abb. Pr. N. S. (N. Y.) 79.

15. Halsted *v.* Halsted, 21 N. Y. App. Div. 466, 47 N. Y. Suppl. 649.

16. Brigham *v.* Brigham, 147 Mass. 159, 16 N. E. 780.

17. Schmidt *v.* Schmidt, 26 Mo. 235; Piatt *v.* Piatt, 9 Ohio 37. *Compare* French *v.* French, 4 Mass. 587.

direct the issuance of an execution in case such charge is not liquidated within a prescribed time.[18]

e. Sequestration and Receivership. The enforcement of a decree directing the payment of alimony may be procured by the sequestration of the husband's property,[19] upon a compliance with the requirements of the statutes providing therefor or with the practice in respect to the enforcement of other judgments directing the payment of money;[20] and an equitable action may in a proper case be maintained by the wife to reach property not subject to sequestration.[21] In sequestration proceedings it is usual for the court to appoint a receiver of the property sequestered, whose duty it is to receive the income of the property in his possession and apply the same to the payment of the alimony awarded.[22]

d. Action on Judgment or Decree — (i) *Place of Action.* An action to recover alimony accrued under a decree of a state court will lie in a federal court,[23] or in the courts of another state.[24]

(ii) *When Action Lies.* Where provision is not otherwise made for the enforcement of a decree for permanent alimony, an action at law may be brought to recover the amount thereof in the same manner as in the case of other judgments directing the payment of money.[25] A decree for temporary alimony, however, being interlocutory and subject to change, cannot be made the foundation of an action as upon a final judgment.[26]

e. Action Against Third Persons. Third persons are chargeable with notice of the wife's rights in property as declared in a decree of alimony, and where the property is conveyed by the husband it is subject to the rights of the wife, who may enforce them as against subsequent purchasers;[27] but property which is not

18. Gallagher *v.* Gallagher, 89 Wis. 461, 61 N. W. 1104.

19. Wightman *v.* Wightman, 45 Ill. 167; Michel *v.* Wiel, 25 La. Ann. 208.

20. Percival *v.* Percival, 14 N. Y. St. 255, holding that a court may sequester defendant's property, although no security has been directed to be given by him for payment of alimony.

Grounds.— Sequestration will not be ordered unless there is reason to suppose that the husband is about to remove his property from the jurisdiction of the court. Spiller *v.* Spiller, 2 N. C. 482; Anonymous, 2 N. C. 347.

Parties.— Proceedings to compel sequestration should be brought by the wife. Foster *v.* Townshend, 68 N. Y. 203.

Decree.— A description in the decree sufficiently definite to identify the particular estate intended is essential to secure a lien by sequestering lands for the payment of alimony. Stratton *v.* Stratton, 77 Me. 373, 52 Am. Rep. 779.

21. McGlynn *v.* McGlynn, 37 Misc. (N. Y.) 12, 74 N. Y. Suppl. 744, holding that where the husband has removed beyond the jurisdiction of the court, leaving no property which may be taken by sequestration, the wife may maintain an equitable action against him and his father's executors to reach the surplus of the beneficial income given to him in his father's will.

Writ of assistance see Assistance, Writ of, 4 Cyc. 291.

22. Garden *v.* Garden, 34 Misc. (N. Y.) 97, 69 N. Y. Suppl. 481, holding, however, that the receiver cannot sue without leave of court.

Action to set aside fraudulent transfer.— So long as the receiver's rights are not questioned, he has no concern with the title to the property and cannot sue to determine the validity of transfers made by the husband. Foster *v.* Townshend, 68 N. Y. 203.

Action in aid of receivership.— A separate action in aid of sequestration proceedings may be maintained by the wife to restrain executors from paying the husband a legacy in their hands and to compel them to pay it to the receiver. Garden *v.* Garden, 34 Misc. (N. Y.) 97, 69 N. Y. Suppl. 481.

23. Barber *v.* Barber, 21 How. (U. S.) 582, 16 L. ed. 226; Knapp *v.* Knapp, 59 Fed. 641. See also *supra*, V, A, 4.

24. See *infra*, XXI, A, 2.

25. *Connecticut.*— Lyon *v.* Lyon, 21 Conn. 185.

Indiana.— Hansford *v.* Van Auken, 79 Ind. 302.

Massachusetts.— Howard *v.* Howard, 15 Mass. 196.

Oregon.— McCracken *v.* Swartz, 5 Oreg. 62.

Pennsylvania.— Elmer *v.* Elmer, 150 Pa. St. 205, 24 Atl. 670.

See 17 Cent. Dig. tit. "Divorce," § 744.

26. Cutler *v.* Cutler, 88 Ill. App. 464 (holding that an action at law cannot be maintained on a decree granting temporary alimony, since complainant is entitled to relief on proper application to the chancery court and such litigation would involve unnecessary expense and conflicts of jurisdiction between law and equity); Vine *v.* Vine, 21 R. I. 190, 42 Atl. 871.

27. Blue *v.* Blue, 38 Ill. 9, 87 Am. Dec. 267. See *supra*, XIX, E, 5, c.

mentioned in the judgment and not specifically covered thereby is not to be subjected to the wife's claim for alimony,[28] unless it was transferred by the husband for the purpose of avoiding payment of her claim.[29]

f. Action to Subject Trust Fund. It has been held that a woman who upon procuring a divorce is awarded alimony is a creditor within the meaning of a statute providing that the income of a spendthrift trust beyond what is necessary for the support of the beneficiary shall be liable in equity to the claims of his creditors.[30] The right to subject a trust fund to the payment of alimony does not exist, however, until plaintiff has exhausted the ordinary remedies for the enforcement of the decree.[31]

g. Action to Set Aside Fraudulent Transfers — (I) *Right of Action.* A judgment or decree awarding alimony to the wife is sufficient to establish her rights as a creditor of the husband to impeach a conveyance made by him with intent to defraud her of the alimony.[32]

(II) *Fraudulent Transactions.* A transfer of the husband's property made by him with an intent to prevent the recovery of alimony is fraudulent as to the wife and may be set aside in an action brought by her,[33] although made

28. Russel *v.* Rice, 103 Ga. 310, 30 S. E. 37.

29. Fletcher *v.* Fletcher, 54 S. W. 953, 21 Ky. L. Rep. 1302; Maze *v.* Griffin, 65 Mo. App. 377; Maharry *v.* Maharry, 5 Okla. 371, 47 Pac. 1051. See also *infra*, XIX, F, 2, g.

30. Wetmore *v.* Wetmore, 149 N. Y. 520, 44 N. E. 169, 52 Am. St. Rep. 752, 33 L. R. A. 708 (holding that where defendant has departed from the state and the sum awarded to plaintiff cannot be collected by any of the statutory remedies, a court of equity may order the accumulated income of the trust fund of which defendant is a beneficiary to be applied in satisfaction of the alimony due, and provide for the payment of future instalments of alimony from the income thereafter accruing, with leave to defendant to apply for permission to share in the income according to his necessities); Thompson *v.* Thompson, 52 Hun (N. Y.) 456, 5 N. Y. Suppl. 604; Clinton *v.* Clinton, L. R. 1 P. 215, 14 L. T. Rep. N. S. 257, 14 Wkly. Rep. 545.

31. Halsted *v.* Halsted, 21 N. Y. App. Div. 466, 47 N. Y. Suppl. 649; Miller *v.* Miller, 7 Hun (N. Y.) 208.

32. *Colorado.*— Ruffenach *v.* Ruffenach, 13 Colo. App. 99, 56 Pac. 811; Hall *v.* Harrington, 7 Colo. App. 474, 44 Pac. 365.

Illinois.— Tyler *v.* Tyler, 126 Ill. 525, 21 N. E. 616, 9 Am. St. Rep. 642.

Indiana.— De Ruiter *v.* De Ruiter, 28 Ind. App. 9, 62 N. E. 100, 91 Am. St. Rep. 107.

Iowa.— Picket *v.* Garrison, 76 Iowa 347, 41 N. W. 38, 14 Am. St. Rep. 220, holding that, although a claim for alimony is not a debt within the ordinary meaning of that term, and must be ascertained according to equitable principles, it is a right which becomes vested with the right to divorce, and it can no more be defeated by a fraudulent conveyance than it could if it were fixed and certain in amount.

Kentucky.— Tyler *v.* Tyler, 99 Ky. 31, 34 S. W. 898, 17 Ky. L. Rep. 1341; Botts *v.* Botts, 74 S. W. 1093, 25 Ky. L. Rep. 300; Campbell *v.* Trosper, 57 S. W. 245, 22 Ky. L. Rep. 277; Davis *v.* Davis, 10 Ky. L. Rep. 193; McCarty *v.* McCarty, 9 S. W. 294, 10 Ky. L. Rep. 409.

Massachusetts.—Chase *v.* Chase, 105 Mass. 385.

Oregon.— Barrett *v.* Barrett, 5 Oreg. 411.

Pennsylvania.— Black *v.* Black, 5 Pa. Co. Ct. 356.

Vermont.— Foster *v.* Foster, 56 Vt. 540.

See 17 Cent. Dig. tit. "Divorce," § 749.

Participation in fraud.— A wife cannot maintain an action to set aside a conveyance made with her consent to forestall the effect of a possible judgment against the husband for breach of promise. Barrows *v.* Barrows, 108 Ind. 345, 9 N. E. 371.

33. *California.*— Brown *v.* Brown, 41 Cal. 88.

Colorado.— Gregory *v.* Filbeck, 12 Colo. 379, 21 Pac. 489.

Illinois.— Tyler *v.* Tyler, 126 Ill. 525, 21 N. E. 616, 9 Am. St. Rep. 642; Bruner *v.* Bruner, 115 Ill. 40, 3 N. E. 564; Draper *v.* Draper, 68 Ill. 17; Scott *v.* Magloughlin, 33 Ill. App. 162 [*affirmed* in 133 Ill. 33, 24 N. E. 1030].

Indiana.— De Ruiter *v.* De Ruiter, 28 Ind. App. 9, 62 N. E. 100, 91 Am. St. Rep. 107.

Iowa.— Boog *v.* Boog, 78 Iowa 524, 43 N. W. 515; Platner *v.* Platner, 66 Iowa 378, 23 N. W. 764; Sesterhen *v.* Sesterhen, 60 Iowa 301, 14 N. W. 333; Whitcomb *v.* Whitcomb, 52 Iowa 715, 2 N. W. 1000.

Kentucky.— Johnson *v.* Johnson, 2 S. W. 487, 8 Ky. L. Rep. 954.

Maine.— Bailey *v.* Bailey, 61 Me. 361.

Maryland.— Feigley *v.* Feigley, 7 Md. 537, 61 Am. Dec. 375.

Massachusetts.— Livermore *v.* Boutelle, 11 Gray 217, 71 Am. Dec. 708.

Michigan.— Reeg *v.* Burnham, 55 Mich. 39, 20 N. W. 708, 21 N. W. 431.

New Hampshire.— Janvrin *v.* Curtis, 63 N. H. 312.

Ohio.— Questel *v.* Questel, Wright 492; Jones *v.* Jones, Wright 155; Tate *v.* Tate, 19 Ohio Cir. Ct. 532, 10 Ohio Cir. Dec. 321.

before the divorce proceedings were instituted by the wife.[34] If at the time the conveyance was made there was no intention to defraud the wife, however, it cannot afterward be attacked by her for matters subsequently arising.[35]

(III) *NOTICE TO GRANTEE.* To invalidate the conveyance, the grantee must have had notice, either actual or constructive, that the conveyance to him was made by the husband for the purpose of avoiding payment of alimony in favor of the wife,[36] since an actual, fraudulent intent in both the husband and his grantee must be shown.[37] The mere fact that the husband and wife have separated is known to the purchaser is not of itself sufficient to defeat the conveyance;[38] but knowledge of the pendency of the suit or of the fact that the wife contemplates bringing the suit may be deemed sufficient notice to him.[39]

h. Attachment For Contempt — (I) *IN GENERAL.* The right to enforce payment of permanent alimony by contempt proceedings belongs inherently to a court having jurisdiction in divorce suits,[40] or is conferred upon them by statute as a necessary incident to the exercise of such jurisdiction;[41] nor does the imprisonment of the husband as a result of contempt proceedings violate a consti-

Oregon.— Weber *v.* Rothchild, 15 Oreg. 385, 15 Pac. 650, 3 Am. St. Rep. 162.

Tennessee.— Brooks *v.* Caughran, 3 Head 464.

Texas.— Berg *v.* Ingalls, 79 Tex. 522, 15 S. W. 579.

Vermont.— Green *v.* Adams, 59 Vt. 602, 10 Atl. 742, 59 Am. Rep. 761; Foster *v.* Foster, 56 Vt. 540.

Washington.— Fields *v.* Fields, 2 Wash. 441, 27 Pac. 267.

See 17 Cent. Dig. tit. "Divorce," § 750.

34. Gregory *v.* Filbeck, 12 Colo. 379, 21 Pac. 489; Platner *v.* Platner, 66 Iowa 378, 23 N. W. 764; Livermore *v.* Boutelle, 11 Gray (Mass.) 217, 71 Am. Dec. 708; Weber *v.* Rothchild, 15 Oreg. 385, 15 Pac. 650, 3 Am. St. Rep. 162.

35. Metzler *v.* Metzler, 99 Ind. 384.

36. Williams *v.* Gooch, 3 Metc. (Ky.) 486; Garesche *v.* MacDonald, 103 Mo. 1, 15 S. W. 379; Demarest *v.* House, 91 Hun (N. Y.) 290, 36 N. Y. Suppl. 291.

37. Richmond *v.* Smith, 117 Wis. 290, 94 N. W. 35.

38. Davis *v.* Davis, 10 Ky. L. Rep. 493.

39. Demarest *v.* House, 91 Hun (N. Y.) 290, 36 N. Y. Suppl. 291; Boils *v.* Boils, 1 Coldw. (Tenn.) 284.

40. Murray *v.* Murray, 84 Ala. 363, 4 So. 239 (holding that the duty and obligation of a husband to provide maintenance for his wife after a divorce is not merely contractual, but that a disregard thereof partakes largely of the nature of a tort); Andrew *v.* Andrew, 62 Vt. 495, 20 Atl. 817; Curtis *v.* Gordon, 62 Vt. 340, 20 Atl. 820.

41. *California.*—*Ex p.* Gordan, 95 Cal. 374, 30 Pac. 561.

Colorado.— People *v.* Second Judicial Dist. Ct., 21 Colo. 251, 40 Pac. 460.

Connecticut.— Lyon *v.* Lyon, 21 Conn. 185.

District of Columbia.—Tolman *v.* Leonard, 6 App. Cas. 224.

Georgia.— Goss *v.* Goss, 29 Ga. 109.

Illinois.— Barclay *v.* Barclay, 184 Ill. 471, 56 N. E. 821; Andrews *v.* Andrews, 69 Ill. 609; Wightman *v.* Wightman, 45 Ill. 167.

Kentucky.— Ballard *v.* Caperton, 2 Metc. 412.

Louisiana.— State *v.* King, 49 La. Ann. 1503, 22 So. 887.

Maine.— Russell *v.* Russell, 69 Me. 336; Dwelly *v.* Dwelly, 46 Me. 377.

Massachusetts.— Slade *v.* Slade, 106 Mass. 499.

Michigan.— Ervay *v.* Ervay, 120 Mich. 525, 79 N. W. 802; Haines *v.* Haines, 35 Mich. 138.

Minnesota.— State *v.* Jamison, 69 Minn. 427, 72 N. W. 451; Hurd *v.* Hurd, 63 Minn. 443, 65 N. W. 728.

New York.— Lynde *v.* Lynde, 162 N. Y. 405, 56 N. E. 979, 76 Am. St. Rep. 332, 48 L. R. A. 679 (holding, however, that the statute authorizing the punishment of non-payment of alimony as a contempt applies only to judgments for alimony rendered within the state); Winton *v.* Winton, 117 N. Y. 623, 22 N. E. 379 [*affirming* 53 Hun 4, 5 N. Y. Suppl. 537]; Park *v.* Park, 80 N. Y. 156; Delanoy *v.* Delanoy, 19 N. Y. App. Div. 295, 46 N. Y. Suppl. 106; Mercer *v.* Mercer, 73 Hun 192, 25 N. Y. Suppl. 867; Matter of Sims, 57 Hun 433, 11 N. Y. Suppl. 211; Kuhm *v.* Kuhm, 52 Hun 610, 4 N. Y. Suppl. 952; Ryckman *v.* Ryckman, 34 Hun 235; Mahon *v.* Mahon, 50 N. Y. Super. Ct. 92; Isaacs *v.* Isaacs, 10 Daly 306; Distasio *v.* Distasio, 26 Misc. 491, 57 N. Y. Suppl. 672; Hecht *v.* Hecht, 14 Misc. 597, 36 N. Y. Suppl. 271; Pritchard *v.* Pritchard, 4 Abb. N. Cas. 298.

North Carolina.— Pain *v.* Pain, 80 N. C. 322.

Ohio.— Myers *v.* Myers, 4 Ohio S. & C. Pl. Dec. 217, 3 Ohio N. P. 162; Effinger *v.* State, 11 Ohio Cir. Ct. 389, 5 Ohio Cir. Dec. 408; Hand *v.* Hand, 11 Ohio Dec. (Reprint) 202, 25 Cinc. L. Bul. 214; Stewart *v.* Stewart, 10 Ohio Dec. (Reprint) 662, 23 Cinc. L. Bul. 38.

Pennsylvania.— Hilt *v.* Hilt, 9 Pa. Dist. 169, 23 Pa. Co. Ct. 422; West *v.* West, 11 Pa. Co. Ct. 254; Wallen *v.* Wallen, 11 Pa. Co. Ct. 41; McInall *v.* McInall, 17 Wkly. Notes Cas. 312.

Washington.— *In re* Cave, 26 Wash. 213, 66 Pac. 425, 90 Am. St. Rep. 736; State *v.* Ditmar, 19 Wash. 324, 53 Pac. 350; State *v.* Smith, 17 Wash. 430, 50 Pac. 52.

tutional provision against imprisonment for debt.[42] An order for temporary alimony also may be enforced by contempt proceedings.[43]

(II) *Preliminary Requirements*— (A) *In General.* Under the statutes in some states execution must be issued and returned unsatisfied or other prescribed proceedings must be taken before an attachment will issue against defendant.[44]

(B) *Demand For Payment.* A specific demand must be made upon the husband for the amount alleged to be due for alimony before an attachment will issue against his person for a refusal to pay.[45]

(C) *Notice.* Before the husband can be punished by imprisonment as for contempt in failing to comply with a decree for alimony he must have notice of the contempt proceedings and an opportunity to be heard;[46] and in some states before process of contempt will issue it must appear that defendant has been duly served with the decree directing him to pay alimony,[47] or the order to

Wisconsin.— Staples *v.* Staples, 87 Wis. 592, 58 N. W. 1036, 24 L. R. A. 433; Wright *v.* Wright, 74 Wis. 439, 43 N. W. 145.

See 17 Cent. Dig. tit. "Divorce," § 756.

42. *Alabama.*— Murray *v.* Murray, 84 Ala. 363, 4 So. 239; *Ex p.* Hardy, 68 Ala. 303.

California.— *Ex p.* Perkins, 18 Cal. 60.

Connecticut.— Lyon *v.* Lyon, 21 Conn. 185.

Georgia.— Lewis *v.* Lewis, 80 Ga. 706, 6 S. E. 918, 12 Am. St. Rep. 281; Carlton *v.* Carlton, 44 Ga. 216.

Illinois.— Wightman *v.* Wightman, 45 Ill. 167.

Iowa.— *Ex p.* Grace, 12 Iowa 208, 79 Am. Dec. 529.

Kentucky.— Logan *v.* Logan, 2 B. Mon. 142; Ballard *v.* Caperton, 2 Metc. 412.

Louisiana.— State *v.* King, 49 La. Ann. 1503, 22 So. 887.

Massachusetts.—Chase *v.* Ingalls, 97 Mass. 524.

Minnesota.— Hurd *v.* Hurd, 63 Minn. 443, 65 N. W. 728.

New Hampshire.— Sheafe *v.* Sheafe, 36 N. H. 155.

New York.— Grimm *v.* Grimm, 1 E. D. Smith 190.

North Carolina.— Pain *v.* Pain, 80 N. C. 322.

Vermont.— Andrew *v.* Andrew, 62 Vt. 495, 20 Atl. 817.

Washington.— *In re* Cave, 26 Wash. 213, 66 Pac. 425, 90 Am. St. Rep. 736.

Contra.— Coughlin *v.* Ehlert, 39 Mo. 285. And see Steller *v.* Steller, 25 Mich. 159, holding that a constitutional provision prohibiting imprisonment for debt forbids imprisonment for non-compliance with an order directing the payment of alimony, unless there is something of wrong beyond the mere failure to pay the money, and the party, before he can be punished, must have an opportunity to be heard in his own explanation.

43. Haines *v.* Haines, 35 Mich. 138; Kaderabek *v.* Kaderabek, 3 Ohio Cir. Ct. 419, 2 Ohio Cir. Dec. 236.

44. Flower *v.* Flower, (N. J. Ch. 1901) 49 Atl. 158; Sandford *v.* Sandford, 44 Hun (N. Y.) 563, 9 N. Y. St. 46, 12 N. Y. Civ. Proc. 183; Lansing *v.* Lansing, 4 Lans. (N. Y.) 377; Cockefair *v.* Cockefair, 7 N. Y. Suppl. 170, 23 Abb. N. Cas. 219; Pritchard *v.* Pritchard, 4 Abb. N. Cas. 298; Ford *v.* Ford, 10 Abb. Pr. N. S. (N. Y.) 74, 41 How. Pr. (N. Y.) 169.

Execution in case of temporary alimony.— The nature and purpose of allowances to carry on litigation will not permit of their being required to depend for enforcement on execution; and not being recoverable by execution process of attachment will lie. Haines *v.* Haines, 35 Mich. 138.

Sequestration.— An order may be made requiring the husband to show cause why he should not be punished for contempt without any previous sequestration or direction to give security, where the court is satisfied that they would be ineffectual. Distasio *v.* Distasio, 26 Misc. (N. Y.) 491, 57 N. Y. Suppl. 672.

45. Edison *v.* Edison, 56 Mich. 185, 22 N. W. 264; Brown *v.* Brown, 22 Mich. 299; Delanoy *v.* Delanoy, 19 N. Y. App. Div. 295, 46 N. Y. Suppl. 106; Ryckman *v.* Ryckman, 32 Hun (N. Y.) 193.

Formal demand.— Where defendant has informed complainant that he would not pay, and has refused her attorney's fees ordered, no formal demand is necessary before instituting proceedings for contempt. Potts *v.* Potts, 68 Mich. 492, 36 N. W. 240.

Personal demand must be shown by affidavit. See Goldie *v.* Goldie, 77 N. Y. App. Div. 12, 79 N. Y. Suppl. 268; Flor *v.* Flor, 73 N. Y. App. Div. 262, 76 N. Y. Suppl. 813.

46. Steller *v.* Steller, 25 Mich. 159; Andrew *v.* Andrew, 62 Vt. 495, 20 Atl. 817.

The constitutional provision that no person shall be deprived of liberty without due process of law requires that before a person can be punished by imprisonment for a contempt in disobeying an order he must have had notice of it and an opportunity to be heard before a court clothed with authority to act and decide the questions involved. Goldie *v.* Goldie, 77 N. Y. App. Div. 12, 79 N. Y. Suppl. 268.

47. Johnson *v.* San Francisco Super. Ct., 63 Cal. 578; Flor *v.* Flor, 73 N. Y. App. Div. 262, 76 N. Y. Suppl. 813; Delanoy *v.* Delanoy, 19 N. Y. App. Div. 295, 46 N. Y. Suppl. 106; Sandford *v.* Sandford, 40 Hun (N. Y.) 540; Ryckman *v.* Ryckman, 32 Hun (N. Y.) 193; Mahon *v.* Mahon, 50 N. Y. Super. Ct. 92, 5 N. Y. Civ. Proc. 58; Waltram

show cause why he should not be punished for his failure to make the payment provided for in the decree.[48]

(III) *Defenses*—(A) *In General.* The fact that the decree directing payment of alimony is made a specific lien upon real estate does not deprive the court of its power to enforce payment by an attachment for contempt;[49] nor does the pendency of an action to recover the alimony[50] or a technical irregularity in complainant's proceedings justify defendant's non-compliance with the order.[51] The fact that the allowance of alimony was too large is no defense in contempt proceedings where the husband has not applied for a modification of the order.[52]

(B) *Inability to Pay.* A defendant cannot be imprisoned for contempt in failing to pay money awarded as alimony which he is unable to pay,[53] unless it appear that his inability was occasioned by his own act for the purpose of avoiding payment.[54] However, the husband cannot be punished for his failure to seek employment in order to earn money to pay alimony.[55] The burden is upon a husband alleging inability to show that fact.[56]

v. Waltram, 19 Wkly. Notes Cas. (Pa.) 181; Tobin *v.* Tobin, 12 Pa. Co. Ct. 374.

48. Goldie *v.* Goldie, 77 N. Y. App. Div. 12, 79 N. Y. Suppl. 268 [*overruling* by implication Mahon *v.* Mahon, 50 N. Y. Super. Ct. 92, 5 N. Y. Civ. Proc. 58; Zimmerman *v.* Zimmerman, 14 N. Y. Suppl. 444, 26 Abb. N. Cas. 366; Winton *v.* Livey, 56 N. Y. Suppl. 29, 16 N. Y. Civ. Proc. 348] (holding that a copy of such order must be served on defendant personally, service upon his attorney being insufficient); Stahl *v.* Stahl, 12 N. Y. Suppl. 854 (holding that an *ex parte* application for process against defendant for contempt cannot be granted, even though based on a decree which provides that such application may be made); Sandford *v.* Sandford, 40 Hun (N. Y.) 540 (holding that a service of a notice of motion is insufficient). *Compare Ex p.* Petrie, 38 Ill. 498.

49. O'Callaghan *v.* O'Callaghan, 69 Ill. 552; McSherry *v.* McSherry, 49 Ill. App. 90.

50. Lyon *v.* Lyon, 21 Conn. 185. See also Filer *v.* Filer, 77 Mich. 469, 43 N. W. 887, 6 L. R. A. 399.

51. Froman *v.* Froman, 53 Mich. 581, 19 N. W. 193.

52. Deen *v.* Bloomer, 191 Ill. 416, 61 N. E. 131. *Compare* Ronan *v.* Ronan, 32 Misc. (N. Y.) 467, 67 N. Y. Suppl. 799.

53. *California.*—*Ex p.* Silvia, 123 Cal. 293, 55 Pac. 988, 69 Am. St. Rep. 58; *Ex p.* Todd, 119 Cal. 57, 50 Pac. 1071; *Ex p.* Spencer, 83 Cal. 460, 23 Pac. 395, 17 Am. St. Rep. 266; *In re* Wilson, 75 Cal. 580, 17 Pac. 698; Galland *v.* Galland, 44 Cal. 475, 13 Am. Rep. 167.

Georgia.—Lester *v.* Lester, 63 Ga. 356; Carlton *v.* Carlton, 44 Ga. 216; Pinckard *v.* Pinckard, 23 Ga. 286.

Illinois.—Blake *v.* People, 80 Ill. 11; O'Callaghan *v.* O'Callaghan, 69 Ill. 552; Kadlowsky *v.* Kadlowsky, 63 Ill. App. 292; Schuele *v.* Schuele, 57 Ill. App. 189.

Iowa.—Peel *v.* Peel, 50 Iowa 521.

Kansas.—State *v.* Dent, 29 Kan. 416.

Kentucky.—Lockridge *v.* Lockridge, 3 Dana 28, 28 Am. Dec. 52.

Montana.—Nixon *v.* Nixon, 15 Mont. 6, 37 Pac. 839.

New York.—Noland *v.* Noland, 29 Hun 630. See, however, Strobridge *v.* Strobridge, 21 Hun 288, holding that a statute authorizing the court to release a person imprisoned in contempt proceedings in case of his inability to perform the requirements imposed applies only to persons actually imprisoned, and that the inability of a husband to pay temporary alimony cannot be shown on the return of an order requiring him to show cause why he should not be committed for failure to comply with the terms of the order directing the payment.

North Carolina.—Pain *v.* Pain, 80 N. C. 322.

Ohio.—Pancost *v.* State, 15 Ohio Cir. Ct. 246, 8 Ohio Cir. Dec. 546.

Oregon.—Newhouse *v.* Newhouse, 14 Oreg. 290, 12 Pac. 422.

Pennsylvania.—Ormsby *v.* Ormsby, 1 Phila. 578.

Washington.—State *v.* Ditmar, 19 Wash. 324, 53 Pac. 350; State *v.* Smith, 17 Wash. 430, 50 Pac. 52.

Wisconsin.—Wright *v.* Wright, 74 Wis. 439, 43 N. W. 145.

See 17 Cent. Dig. tit. "Divorce," § 760.

54. *Ex p.* Spencer, 83 Cal. 460, 23 Pac. 395, 17 Am. St. Rep. 266; Schuele *v.* Schuele, 57 Ill. App. 189.

Remarriage.—One who by marrying again in another state in defiance of a decree of divorce has rendered himself unable to pay the alimony ordered is entitled to no consideration when proceeded against for a contempt. Ryer *v.* Ryer, 33 Hun (N. Y.) 116.

55. *Ex p.* Todd, 119 Cal. 57, 50 Pac. 1071. However, an order directing a husband to pay monthly alimony or be confined for contempt will not be disturbed because his only means of acquiring money is by his labor. Lester *v.* Lester, 63 Ga. 356. And see Lansing *v.* Lansing, 41 How. Pr. (N. Y.) 248.

56. O'Callaghan *v.* O'Callaghan, 69 Ill. 552 (holding that the husband must show in his defense that his non-compliance with the terms of the order was not a mere wilful disobedience); Hurd *v.* Hurd, 63 Minn. 443, 65 N. W. 728; Holtham *v.* Holtham, 6 Misc. (N. Y.) 266, 26 N. Y. Suppl. 762; Rahl *v.* Rahl, 14 N. Y. Wkly. Dig. 560; State *v.*

(iv) *Discharge From Imprisonment.*[57] The husband should be discharged from imprisonment upon surrendering all his property to the court,[58] or upon full payment of the amount due at the time of his commitment together with the amount which has accrued during his imprisonment.[59]

G. Appeal[60] — **1. In General.** The jurisdiction of appellate courts in cases of alimony is exercised in conformity with the statutes in force in the several states. As a general rule decrees either allowing or refusing alimony are reviewable on appeal,[61] although under the practice or statutes in some states orders for the payment of temporary alimony and counsel fees are not appealable before the final determination of the suit.[62]

2. Supersedeas. Statutory provisions relating to undertakings to stay proceedings on a final judgment usually apply to a decree directing the payment of alimony.[63] The amount of the undertaking is ordinarily based upon the sum

Smith, 17 Wash. 430, 50 Pac. 52. See, however, *In re* Cowden, 139 Cal. 244, 73 Pac. 156, holding that where the order committing petitioner for contempt in failing to pay alimony does not recite that he was able to pay, and such fact was not proved by affidavit or otherwise, the commitment was illegal, although the order recited that petitioner wilfully refused to pay the amount adjudged.

Discharge for inability.— Defendant will not be discharged from imprisonment for failure to pay alimony on the ground of his inability, where it does not appear why he has made no effort to earn money for that purpose. Lansing *v.* Lansing, 41 How. Pr. (N. Y.) 248.

Evidence.—A conveyance by a husband with intent to prevent the execution of a decree for alimony, combined with the fact that the grantees were his son-in-law and daughter, is competent evidence in a contempt proceeding upon the question whether the husband has in his possession or control the means of paying the order of the court. Stuart *v.* Stuart, 123 Mass. 370.

57. Inability to pay as ground for discharge see *supra*, XIX, F, 2, h, (III), (B).

58. Blake *v.* People, 80 Ill. 11.

59. Graley *v.* Graley, 5 Rob. (N. Y.) 641, 31 How. Pr. (N. Y.) 475; Ayres *v.* Ayres, 71 L. J. P. & Adm. 18, 85 L. T. Rep. N. S. 648.

60. Appeals in divorce suits generally see *supra*, XVII.

61. *California.*— De la Montanya *v.* De la Montanya, 112 Cal. 101, 44 Pac. 345, 53 Am. St. Rep. 165, 32 L. R. A. 82; Loveren *v.* Loveren, 100 Cal. 493, 35 Pac. 87; White *v.* White, 82 Cal. 427, 23 Pac. 276, 7 L. R. A. 799.

Colorado.— Eickhoff *v.* Eickhoff, 27 Colo. 380, 61 Pac. 225.

Kentucky.— Lochnane *v.* Lochnane, 78 Ky. 467; Maguire *v.* Maguire, 7 Dana 181; Dejarnet *v.* Dejarnet, 5 Dana 499; Boggess *v.* Boggess, 4 Dana 307; Thornberry *v.* Thornberry, 4 Litt. 251; Alderson *v.* Alderson, 69 S. W. 700, 24 Ky. L. Rep. 595; Fletcher *v.* Fletcher, 54 S. W. 953, 21 Ky. L. Rep. 1302; Morrison *v.* Morrison, 10 Ky. L. Rep. 683; Fisher *v.* Fisher, 10 Ky. L. Rep. 283; Caskey *v.* Caskey, 4 Ky. L. Rep. 726, 811.

Louisiana.— Dale *v.* Hauer, 109 La. Ann. 711, 33 So. 741.

Massachusetts.— Brigham *v.* Brigham, 147 Mass. 159, 16 N. E. 780.

Minnesota.—Schuster *v.* Schuster, 84 Minn. 403, 87 N. W. 1014; Stiehm *v.* Stiehm, 69 Minn. 461, 72 N. W. 708; Wagner *v.* Wagner, 34 Minn. 441, 26 N. W. 450.

Nevada.— Lake *v.* Lake, 17 Nev. 230, 30 Pac. 878.

New York.— McCarthy *v.* McCarthy, 137 N. Y. 500, 33 N. E. 550; Beadleston *v.* Beadleston, 103 N. Y. 402, 8 N. E. 735; Forrest *v.* Forrest, 25 N. Y. 501; Galinger *v.* Galinger, 4 Lans. 473, 61 Barb. 31; Kamp *v.* Kamp, 37 N. Y. Super. Ct. 241; Leslie *v.* Leslie, 6 Abb. Pr. N. S. 193.

North Carolina.— Schonwald *v.* Schonwald, 62 N. C. 215.

Ohio.— Graves *v.* Graves, 50 Ohio St. 196, 33 N. E. 720; Laughery *v.* Laughery, 15 Ohio 404.

Oklahoma.— McKennon *v.* McKennon, 10 Okla. 400, 63 Pac. 704.

Tennessee.— McBee *v.* McBee, 1 Heisk. 558; Pearson *v.* Pearson, Peck 27.

Texas.— Andrews *v.* Andrews, Dall. 375.

See 17 Cent. Dig. tit. "Divorce," § 764.

See *supra*, XVII, B; XVII, H, note 49; XVII, I, 2, note 51; Appeal and Error, 2 Cyc. 604 note 49.

Waiver of right of review see *supra*, XVII, A, 2, note 37.

62. *Idaho.*— Wyatt *v.* Wyatt, 2 Ida. (Hasb.) 236, 10 Pac. 228.

Kansas.— Earls *v.* Earls, 26 Kan. 178.

Louisiana.— Malony *v.* Malony, 9 Rob. 116.

Maine.— Call *v.* Call, 65 Me. 407.

Maryland.— Chappell *v.* Chappell, 82 Md. 647, 33 Atl. 650.

Michigan.— Cooper *v.* Mayhew, 40 Mich. 528; Lapham *v.* Lapham, 40 Mich. 527; Perkins *v.* Perkins, 10 Mich. 425.

New York.— Moncrief *v.* Moncrief, 10 Abb. Pr. 315.

North Carolina.— Earp *v.* Earp, 54 N. C. 118.

Contra.— Schuster *v.* Schuster, 84 Minn. 403, 87 N. W. 1014.

63. Sharon *v.* Sharon, 67 Cal. 185, 7 Pac. 456, 635, 8 Pac. 709; Cowan *v.* Cowan, 19 Colo. 315, 35 Pac. 547; State *v.* Cornish, 48

due as alimony at the time the appeal is taken,[64] and the undertaking does not cover alimony accruing after affirmance and remittitur.[65] Security in addition to the undertaking is sometimes required.[66]

3. CONTENTS OF RECORD. The action of the court below cannot be reviewed in the absence of a complete record,[67] showing the evidence given on the hearing bearing upon the merits of the application.[68]

4. REVIEW. Where the testimony pertaining to matters upon which the allowance of alimony is made is conflicting the determination of the court below will not be reviewed;[69] nor will an appellate court interfere with the discretion of the lower court in determining whether temporary or permanent alimony should be allowed or in fixing the amount thereof, unless there has been an abuse of discretion.[70] Upon an appeal from an allowance of alimony in a decree of divorce, no question involving the granting of the divorce will be considered.[71]

5. DISPOSITION OF CAUSE. A modification of an allowance of alimony in a judgment or decree may, under the practice in most of the states, be made by the appellate court without a reversal, where all the facts necessary to enable it to do so are contained in the record on appeal.[72]

Nebr. 614, 67 N. W. 481; State *v.* Geiger, 20 Wash. 181, 54 Pac. 1129. See *supra*, XVII, E; APPEAL AND ERROR, 2 Cyc. 912 note 67.

64. Burr *v.* Burr, 10 Paige (N. Y.) 166.

65. Cowan *v.* Cowan, 19 Colo. 315, 35 Pac. 547.

Liability on bond see APPEAL AND ERROR, 2 Cyc. 952 note 4.

66. Galusha *v.* Galusha, 108 N. Y. 114, 15 N. E. 63; Samuels *v.* Samuels, 1 N. Y. Suppl. 787, both cases holding that in order to stay execution pending an appeal from a judgment requiring defendant to pay alimony and also to give plaintiff a mortgage as security therefor, defendant must not only execute an undertaking conditioned to pay the alimony due at the time the appeal is taken and which may become due pending the appeal, but he must also deposit in court the mortgage called for by the judgment.

67. Adair *v.* Adair, 51 Ill. App. 301.

68. *Illinois.*— Becker *v.* Becker, 15 Ill. App. 247.

Indiana.— Ifert *v.* Ifert, 29 Ind. 473.

Kentucky.— McMakin *v.* Wickliffe, 16 Ky. L. Rep. 240.

Missouri.— Adams *v.* Adams, 49 Mo. App. 592.

Tennessee.— Sowder *v.* Sowder, 5 Sneed 502.

Texas.— Withee *v.* Withee, 50 Tex. 327.

Virginia.— Engleman *v.* Engleman, 97 Va. 487, 34 S. E. 50.

See 17 Cent. Dig. tit. "Divorce," § 768.

The mere absence from the record of the evidence on which an order for payment of alimony was based is not ground for reversing the order, however. Rose *v.* Rose, 109 Cal. 544, 42 Pac. 452.

69. *California.*— Schammel *v.* Schammel, 74 Cal. 36, 15 Pac. 364; White *v.* White, 73 Cal. 105, 14 Pac. 393.

Florida.— Chaires *v.* Chaires, 10 Fla. 308.

Kansas.— Meyer *v.* Meyer, 60 Kan. 859, 57 Pac. 550.

New York.— Walsh *v.* Walsh, 4 Misc. 448, 24 N. Y. Suppl. 335.

Wisconsin.— Coad *v.* Coad, 41 Wis. 23.

See 17 Cent. Dig. tit. "Divorce," § 769.

70. Discretion of lower court as to allowance of counsel fees see *supra*, XIX, C, 4. Permanent alimony see *supra*, XIX, D, 5. Temporary alimony see *supra*, XIX, B, 2.

In New York on appeal to the court of appeals from an order granting alimony *pendente lite* the question of power in the court below is the only one reviewable. Kennedy *v.* Kennedy, 73 N. Y. 369. Where, however, the facts are such that on general principles of equity a plaintiff is not entitled to demand temporary alimony, the question becomes one of law reviewable by the court of appeals. Collins *v.* Collins, 71 N. Y. 269. And an order reducing the amount of alimony is subject to review on appeal. Livingston *v.* Livingston, 173 N. Y. 377, 66 N. E. 123, 93 Am. St. Rep. 600, 61 L. R. A. 800; Davis *v.* Davis, 78 N. Y. App. Div. 500, 79 N. Y. Suppl. 621.

In North Carolina the question whether a wife is entitled to alimony *pendente lite* in a particular case is one of law, which is reviewable on appeal by either party. Morris *v.* Morris, 89 N. C. 109.

71. Burgess *v.* Burgess, 25 Ill. App. 525 (holding that the controlling considerations in determining whether temporary alimony shall be allowed are probable cause for the suit, the husband's ability, and the wife's necessity, and that the determination is not affected by the question whether there was such extreme cruelty as would justify a divorce); Waite *v.* Waite, 18 Ill. App. 334; Harrell *v.* Harrell, 39 Ind. 185; Cox *v.* Cox, 19 Ohio St. 502, 2 Am. Rep. 415 (holding that the effect of an appeal from a decree for alimony is to reopen the issues of fact upon which the rights of the parties in respect to alimony depend, but that the judgment for divorce remains unaffected). *Compare* Underwood *v.* Underwood, 12 Fla. 434. See *supra*, XVII, I, 1, note 50.

72. Edwards *v.* Edwards, 84 Ala. 361, 3 So. 896; Forrest *v.* Forrest, 25 N. Y. 501 (holding also that the supreme court at a general

XX. CUSTODY AND SUPPORT OF CHILDREN.

A. Jurisdiction — 1. Of Subject-Matter. By express statutory provision, or in the absence of that by necessary implication, the court in which a divorce suit is brought has full authority to provide for the custody and support of the children of the marriage.[73] Statutes conferring such authority usually require it to be exercised by the court in which the divorce proceedings were instituted.[74] The jurisdiction is a continuing one, subject to be invoked at any time, and will not be interfered with by process issuing out of other courts.[75]

2. Of Person of Child. If defendant and the minor children are not within the jurisdiction of the court and a divoree is granted upon substituted service of process, the court cannot assume jurisdiction over the person of the children and award their custody to plaintiff;[76] but once having acquired jurisdiction of the person of defendant, the court retains it for the purpose of decreeing the custody of the children, although they may be removed from its territorial jurisdiction prior to the granting of the decree.[77] It is not necessary that the children be brought personally into court by writ of habeas corpus or otherwise.[78]

3. Necessity of Prayer in Pleading. Statutes usually authorize the court upon granting a divorce to award to either one or the other of the parties the custody of the children, even though no prayer therefor is contained in the pleadings.[79]

term, on appeal from the part of a judgment fixing alimony, may order a reference to ascertain the proper sum to be allowed); Haddock *v.* Haddock, 75 N. Y. App. Div. 565, 78 N. Y. Suppl. 304, 12 N. Y. Annot. Cas. 14; Gilbert *v.* Gilbert, 1 N. Y. Suppl. 534; Pollock *v.* Pollock, 9 S. D. 48, 68 N. W. 176. See *supra*, XVII, J, notes 69, 71, 73.

73. *California.*— McKay *v.* San Francisco Super. Ct., 120 Cal. 143, 52 Pac. 147, 40 L. R. A. 585; Bennett *v.* Southard, 35 Cal. 688.

Indiana.— Logan *v.* Logan, 90 Ind. 107; Bush *v.* Bush, 37 Ind. 164.

Iowa.— Andrews *v.* Andrews, 15 Iowa 423; Jolly *v.* Jolly, 4 Iowa 592.

Kansas.— *In re* Mitchell, 1 Kan. 643; Kendall *v.* Kendall, 5 Kan. App. 688, 48 Pac. 940.

Maine.— Stetson *v.* Stetson, 80 Me. 483, 15 Atl. 60.

Massachusetts.— Young *v.* McIntire, 156 Mass. 27, 30 N. E. 167.

Missouri.— Shannon *v.* Shannon, 97 Mo. App. 119, 71 S. W. 104.

Ohio.— *In re* Talhot, 8 Ohio Dec. (Reprint) 744, 9 Cinc. L. Bul. 271.

Oregon.— Doscher *v.* Blackiston, 7 Oreg. 403.

Texas.— Rice *v.* Rice, 21 Tex. 58.

United States.— Bennett *v.* Bennett, 3 Fed. Cas. No. 1,318, Deady 299.

See 17 Cent. Dig. tit. "Divorce," § 773.

74. *California.*— Bennett *v.* Southard, 35 Cal. 688.

Indiana.— Bush *v.* Bush, 37 Ind. 164; Williams *v.* Williams, 13 Ind. 523.

Iowa.— Hunt *v.* Hunt, 4 Greene 216.

Mississippi.— Cocke *v.* Hannum, 39 Miss. 423.

New York.— Davis *v.* Davis, 75 N. Y. 221; Price *v.* Price, 55 N. Y. 656.

Ohio.— Hoffman *v.* Hoffman, 15 Ohio St. 427; *In re* Talbot, 8 Ohio Dec. (Reprint) 744, 9 Cinc. L. Bul. 271.

75. *California.*— McKay *v.* San Francisco Super. Ct., 120 Cal. 143, 52 Pac. 147, 40 L. R. A. 585, jurisdiction having been exercised twelve years after the decree of divorce in favor of the wife and after her remarriage, where the maintenance of the children was not provided for by the decree.

Illinois.— Miner *v.* Miner, 11 Ill. 43; Cowls *v.* Cowls, 8 Ill. 435, 44 Am. Dec. 708, both cases holding that the court, in the exercise of its chancery jurisdiction, may at any time after a divorce make such orders in respect to the care and custody of the children as the circumstances may require; the children of divorced parties being in some sense the wards of the court.

Iowa.— Andrews *v.* Andrews, 15 Iowa 423.

Kansas.— Kendall *v.* Kendall, 5 Kan. App. 688, 48 Pac. 940.

Missouri.— *In re* Kohl, 82 Mo. App. 442.

Ohio.— Hoffman *v.* Hoffman, 15 Ohio St. 427.

76. De la Montanya *v.* De la Montanya, 112 Cal. 101, 44 Pac. 345, 53 Am. St. Rep. 165, 32 L. R. A. 82; Kline *v.* Kline, 57 Iowa 386, 10 N. W. 825, 42 Am. Rep. 47.

77. Baily *v.* Schrader, 34 Ind. 260; Stetson *v.* Stetson, 80 Me. 483, 15 Atl. 60; State *v.* Rhoades, 29 Wash. 61, 69 Pac. 389.

78. Power *v.* Power, (N. J. Ch. 1903) 55 Atl. 111.

79. *California.*— *Ex p.* Gordan, 95 Cal. 374, 30 Pac. 561.

District of Columbia.— Wells *v.* Wells, 11 App. Cas. 392.

Iowa.— Zuver *v.* Zuver, 36 Iowa 190.

Missouri.— *In re* Morgan, 117 Mo. 249, 21 S. W. 1122, 22 S. W. 913.

Ohio.— Parker *v.* Parker, 8 Ohio Cir. Ct. 363, 4 Ohio Cir. Dec. 539.

See 17 Cent. Dig. tit. "Divorce," § 775.

B. Custody Pending Action and After Decree — 1. Pending Action. The statutes in most jurisdictions are sufficiently broad to permit the courts to dispose of the custody of the children pending the action for divorce.[80]

2. After Divorce. Statutes conferring jurisdiction upon courts in relation to the custody and support of children are usually construed so as to authorize the court, upon decreeing a divorce, to determine which of the parents shall be intrusted with the custody of the children.[81] A decree of absolute divorce granted to the husband with no provision relating to the custody of a child precludes a subsequent application by the wife for an order permitting her to have access to the child;[82] but in the absence of statute the rule is otherwise where the decree is for a separation and makes no provision as to the children.[83]

3. On Dismissal or Denial of Divorce. Ordinarily where a decree of divorce has been refused to either party, the court will not pass on the question of the custody of the children,[84] but there are cases to the contrary.[85]

C. Award of Custody — 1. Interest or Welfare of Child. In determining the party in whose custody a child shall be placed after a divorce the leading if not the paramount consideration is the interest or welfare of the child.[86]

80. *Colorado.*— Gilpin *v.* Gilpin, 12 Colo. 504, 21 Pac. 612.

Illinois.— Foss *v.* Foss, 100 Ill. 576.

Iowa.— Green *v.* Green, 52 Iowa 403, 3 N. W. 429, holding that a statute authorizing the court to direct the payment of money for the separate support and maintenance of the wife and the children is sufficient to authorize the court to make such orders regarding the custody of the children pending the action as their welfare demands.

Missouri.— *In re* Morgan, 117 Mo. 249, 21 S. W. 1122, 22 S. W. 913, holding that where a court is authorized to dispose of the care, custody, and maintenance of the children when a divorce shall be adjudged, an *ad interim* order respecting such custody may be made.

North Carolina.— Scoggins *v.* Scoggins, 80 N. C. 318.

England.—Ryder *v.* Ryder, 30 L. J. P. & M. 44, 3 L. T. Rep. N. S. 678, 2 Swab. & Tr. 225, 9 Wkly. Rep. 440, holding also that in determining the propriety of making such an order, the court will consider all the existing circumstances at the time of the application, but will not allow affidavits to be read as to the truth or falsehood of charges contained in complainant's petition.

See 17 Cent. Dig. tit. "Divorce," § 776.

81. Hansford *v.* Hansford, 10 Ala. 561.

82. Crimmins *v.* Crimmins, 28 Hun (N. Y.) 200, 64 How. Pr. (N. Y.) 103.

Modification of order as to: Custody of children see *infra*, XX, G, 2. Support of children see *infra*, XX, H, 5, b.

83. Erkenbrach *v.* Erkenbrach, 5 N. Y. Civ. Proc. 184 [*affirmed* in 96 N. Y. 456].

84. *California.*—Brenot *v.* Brenot, 102 Cal. 294, 36 Pac. 672, holding that where a divorce is denied both parties, the court is not required to make an order as to the care and custody of a child, since in an action for divorce the question of the custody of the children is entirely incidental and dependent alone upon the divorce proceedings. But see Luck *v.* Luck, 92 Cal. 653, 28 Pac. 787.

Georgia.— Keppel *v.* Keppel, 92 Ga. 506, 17 S. E. 976.

Iowa.— Garrett *v.* Garrett, 114 Iowa 439, 87 N. W. 282.

Missouri.— King *v.* King, 42 Mo. App. 454, holding that upon a dismissal of the wife's petition for divorce, the parties, as to the custody of the children, stand as before the suit was instituted, the father being their natural guardian and entitled ordinarily to their custody.

New York.— Davis *v.* Davis, 75 N. Y. 221; Simon *v.* Simon, 6 N. Y. App. Div. 469, 39 N. Y. Suppl. 573 [*affirmed* in 159 N. Y. 549, 54 N. E. 1094]; Palmer *v.* Palmer, 29 How. Pr. 390.

See 17 Cent. Dig. tit. "Divorce," § 777.

85. Anonymous, 55 Ala. 428 (holding that a statute providing that in cases of voluntary separation a court of chancery may permit either the father or mother to have the custody of the children, includes cases in which the conduct of the husband, although not amounting to legal cruelty or other cause of divorce, has justified the wife in leaving his house and returning to her father, and that in such cases the custody of the children should be awarded to her); Power *v.* Power, (N. J. Ch. 1903) 55 Atl. 111 (holding that where a wife is denied a divorce because her husband's alleged desertion was in pursuance of an agreement for separation, the court may enter a decree relating to the custody of the children which the wife demanded as a part of the relief prayed in her bill). See also Cornelius *v.* Cornelius, 31 Ala. 479.

86. *Alabama.*— Anonymous, 55 Ala. 428; Goodrich *v.* Goodrich, 44 Ala. 670; Cornelius *v.* Cornelius, 31 Ala. 479.

Arkansas.— Beene *v.* Beene, 64 Ark. 518, 43 S. W. 968.

California.— Wand *v.* Wand, 14 Cal. 512.

District of Columbia.— Wells *v.* Wells, 11 App. Cas. 392.

Florida.— Williams *v.* Williams, 23 Fla. 324, 2 So. 768.

Illinois.— Umlauf *v.* Umlauf, 128 Ill. 378,

2. Award to Third Person. Unless it is clearly shown that both the parties are unqualified,[87] the court is not justified in awarding the custody of the children to a third person.[88]

3. Award to Father or Mother — a. In General. The respective rights of the parents should be considered in determining to whom the child's custody should be awarded.[89]

b. To Father. The rule at common law is that the primary right to the custody and control of the children, without regard to sex, and with slight qualification as to early infancy, is in the father, and unless he is shown to be unfit or unable to care for them their custody should be awarded him on a divorce being granted;[90] but statutes empowering the courts in their discretion to award the custody of the children to either parent and to decree the payment of support money in proper cases have placed the parents substantially on an equality so far as the right to the custody of children is concerned.[91]

21 N. E. 600; Miner *v.* Miner, 11 Ill. 43; Cowls *v.* Cowls, 8 Ill. 435, 44 Am. Dec. 708; People *v.* Hickey, 86 Ill. App. 20.

Indiana.— Bryan *v.* Lyon, 104 Ind. 227, 3 N. E. 880, 54 Am. Rep. 309.

Kentucky.— McBride *v.* McBride, 1 Bush 15; Masterson *v.* Masterson, 71 S. W. 490, 24 Ky. L. Rep. 1352; Fletcher *v.* Fletcher, 54 S. W. 953, 21 Ky. L. Rep. 1302; Irwin *v.* Irwin, 105 Ky. 632, 49 S. W. 432, 20 Ky. L. Rep. 1761.

Michigan.— Corrie *v.* Corrie, 42 Mich. 509, 4 N. W. 213.

Mississippi.— McShan *v.* McShan, 56 Miss. 413.

Missouri.— Lusk *v.* Lusk, 28 Mo. 91; Ashburn *v.* Ashburn, 101 Mo. App. 365, 74 S. W. 394.

New Jersey.— English *v.* English, 32 N. J. Eq. 738.

New York.— People *v.* Humphreys, 24 Barb. 521; Putnam *v.* Putnam, 3 Code Rep. 122; Cook *v.* Cook, 1 Barb. Ch. 639; Ahrenfeldt *v.* Ahrenfeldt, Hoffm. 497.

North Carolina.— *In re* D'Anna, 117 N. C. 462, 23 S. E. 431.

Oregon.— Bailey *v.* Bailey, 17 Oreg. 114, 19 Pac. 844; Lambert *v.* Lambert, 16 Oreg. 485, 19 Pac. 459; Pittman *v.* Pittman, 3 Oreg. 553.

Tennessee.— Lyle *v.* Lyle, 86 Tenn. 372, 6 S. W. 878.

Texas.— Haymond *v.* Haymond, 74 Tex. 414, 12 S. W. 90.

Virginia.— Myers *v.* Myers, 83 Va. 806, 6 S. E. 630.

Washington.— Kentzler *v.* Kentzler, 3 Wash. 166, 28 Pac. 370, 28 Am. St. Rep. 21.

Wisconsin.— Welch *v.* Welch, 33 Wis. 534.

England.— D'Alton *v.* D'Alton, 4 P. D. 87, 47 L. J. P. & Adm. 59; Suggate *v.* Suggate, 29 L. J. P. & M. 167, 1 Swab. & Tr. 489, 492, 8 Wkly. Rep. 20.

87. *Kentucky.*— Adams *v.* Adams, 1 Duv. 167.

Louisiana.— *In re* Laplain, (1890) 8 So. 615.

Oregon.— Lambert *v.* Lambert, 16 Oreg. 485, 19 Pac. 459.

Texas.— Rice *v.* Rice, 21 Tex. 58.

England.— Chetwynd *v.* Chetwynd, L. R. 1 P. 39, 11 Jur. N. S. 958, 35 L. J. P. & M. 21, 13 L. T. Rep. N. S. 474, 14 Wkly. Rep. 184.

Where defendant is not apprised that an order would be asked for committing the custody of his son to the child's grandfather, who was not a party to the proceeding, such an order is unauthorized. Wood *v.* Wood, 61 N. Y. App. Div. 96, 70 N. Y. Suppl. 72.

Intervention of third persons.— After a decree of separation in favor of the party in whose custody children of the marriage have been placed, the court may allow the intervention of any person in their behalf to question the propriety of the continuance of such custody. Godrich *v.* Godrich, L. R. 3 P. 134, 43 L. J. P. & M. 2, 29 L. T. Rep. N. S. 465, 22 Wkly. Rep. 71; March *v.* March, L. R. 1 P. 437.

88. Farrar *v.* Farrar, 75 Iowa 125, 39 N. W. 226; Hopkins *v.* Hopkins, 39 Wis. 167.

89. Hunt *v.* Hunt, 4 Greene (Iowa) 216.

90. *Connecticut.*— Bennett *v.* Bennett, 43 Conn. 313.

Illinois.— Miner *v.* Miner, 11 Ill. 43.

Indiana.— Bryan *v.* Lyon, 104 Ind. 227, 3 N. E. 880, 54 Am. Rep. 309; Conn *v.* Conn, 57 Ind. 323.

Iowa.— Farrar *v.* Farrar, 75 Iowa 125, 39 N. W. 226; Hunt *v.* Hunt, 4 Greene 216.

Kentucky.— McBride *v.* McBride, 1 Bush 15; Edwards *v.* Edwards, 64 S. W. 726, 23 Ky. L. Rep. 1051; Irwin *v.* Irwin, 105 Ky. 632, 49 S. W. 432, 20 Ky. L. Rep. 1761.

Louisiana.— Gahn *v.* Darby, 36 La. Ann. 70.

Mississippi.— Randall *v.* Randall, (1900) 28 So. 19.

Montana.— State *v.* Giroux, 19 Mont. 149, 47 Pac. 798.

New York.— McGown *v.* McGown, 19 N. Y. App. Div. 368, 46 N. Y. Suppl. 285 [*affirmed* in 164 N. Y. 558, 58 N. E. 1089]; Ahrenfeldt *v.* Ahrenfeldt, Hoffm. 497.

South Carolina.— *Ex p.* Hewitt, 11 Rich. 326.

Tennessee.— Evans *v.* Evans, (Ch. App. 1900) 57 S. W. 367.

Virginia.— Latham *v.* Latham, 30 Gratt. 307.

See 17 Cent. Dig. tit. "Divorce," § 782.

91. *Alabama.*— Anonymous, 55 Ala. 428; Cornelius *v.* Cornelius, 31 Ala. 479.

c. To Mother. Unless the mother is shown in the suit to have been guilty of gross misconduct necessarily affecting her moral qualities, she may be given the custody of children of tender age needing a mother's care and attention;[92] and other things being equal preference may be given her in the award of the custody of daughters.[93]

d. To Prevailing Party. In the absence of evidence that he or she is an unfit person, the custody of the children is usually awarded to the party that prevails in a suit for divorce, whether the divorce be awarded on the ground of adultery,[94]

California.— Wand *v.* Wand, 14 Cal. 512.
Iowa.— Green *v.* Green, 52 Iowa 403, 3 N. W. 429.
Kentucky.— Adams *v.* Adams, 1 Duv. 167.
New York.— Ahrenfeldt *v.* Ahrenfeldt, Hoffm. 497.
Pennsylvania.— Com. *v.* Addicks, 5 Binn. 520.
Tennessee.— Lyle *v.* Lyle, 86 Tenn. 372, 6 S. W. 878.
Texas.— Norris *v.* Norris, (Civ. App. 1898) 46 S. W. 405.
Wisconsin.— Welch *v.* Welch, 33 Wis. 534.
England.— Marsh *v.* Marsh, 5 Jur. N. S. 46, 28 L. J. P. & M. 13, 1 Swab. & Tr. 312, 7 Wkly. Rep. 129.

92. *Arkansas.*— Beene *v.* Beene, 64 Ark. 518, 43 S. W. 968.
Colorado.— Luthe *v.* Luthe, 12 Colo. 421, 21 Pac. 467.
Illinois.— Umlauf *v.* Umlauf, 128 Ill. 378, 21 N. E. 600; Draper *v.* Draper, 68 Ill. 17; Miner *v.* Miner, 11 Ill. 43; Iago *v.* Iago, 66 Ill. App. 462 [*reversed* on other grounds in 168 Ill. 339, 48 N. E. 30, 61 Am. St. Rep. 120, 39 L. R. A. 115].
Indiana.— Reeves *v.* Reeves, 75 Ind. 342.
Iowa.— Aitchison *v.* Aitchison, 99 Iowa 93, 68 N. W. 573; Schichtl *v.* Schichtl, 88 Iowa 210, 55 N. W. 309.
Kansas.— Brandon *v.* Brandon, 14 Kan. 342.
Kentucky.— Irwin *v.* Irwin, 96 Ky. 318, 28 S. W. 664, 30 S. W. 417, 16 Ky. L. Rep. 657; Thiesing *v.* Thiesing, 26 S. W. 718, 16 Ky. L. Rep. 115.
Maryland.— Harding *v.* Harding, 22 Md. 337.
Massachusetts.— Haskell *v.* Haskell, 152 Mass. 16, 24 N. E. 859.
Michigan.— Klein *v.* Klein, 47 Mich. 518, 11 N. W. 367.
Mississippi.— Johns *v.* Johns, 57 Miss. 530.
Missouri.— Messenger *v.* Messenger, 56 Mo. 329; Brown *v.* Brown, 53 Mo. App. 453; Wagner *v.* Wagner, 6 Mo. App. 573.
New Jersey.— Abele *v.* Abele, 62 N. J. Eq. 644, 50 Atl. 686; Johnson *v.* Johnson, 4 N. J. L. J. 241.
New York.— Osterhoudt *v.* Osterhoudt, 28 Misc. 285, 59 N. Y. Suppl. 797 [*affirmed* in 49 N. Y. App. Div. 636, 63 N. Y. Suppl. 1113].
North Carolina.— Scoggins *v.* Scoggins, 80 N. C. 318.
Ohio.— Leavitt *v.* Leavitt, Wright 719.
Rhode Island.— McKim *v.* McKim, 12 R. I. 462, 34 Am. Rep. 694.
Tennessee.— Lyle *v.* Lyle, 86 Tenn. 372, 6 S. W. 878.
Virginia.— Trimble *v.* Trimble, 97 Va. 217, 33 S. E. 531.
Washington.— Smith *v.* Smith, 15 Wash. 237, 46 Pac. 234.
See 17 Cent. Dig. tit. "Divorce," § 787.
Wrongful desertion.— A wife who has left her husband without good cause, however, is not entitled to the custody of a child, even though it be less than six months old, unless the health of the child imperatively demands the care of the mother. People *v.* Humphreys, 24 Barb. (N. Y.) 521.

93. *Alabama.*— Anonymous, 55 Ala. 428.
Kentucky.— Irwin *v.* Irwin, 105 Ky. 632, 49 S. W. 432, 20 Ky. L. Rep. 1761.
Maryland.— Levering *v.* Levering, 16 Md. 213.
Missouri.— Messenger *v.* Messenger, 56 Mo. 329.
New York.— People *v.* Winston, 65 N. Y. App. Div. 231, 72 N. Y. Suppl. 456.
South Dakota.— Greenleaf *v.* Greenleaf, 6 S. D. 348, 61 N. W. 42.
See 17 Cent. Dig. tit. "Divorce," § 787.

94. *California.*— Luck *v.* Luck, 92 Cal. 653, 28 Pac. 787.
Delaware.— Kingsberry *v.* Kingsberry, 3 Harr. 8; Jeans *v.* Jeans, 2 Harr. 142.
Louisiana.— J. F. C. *v.* M. E., 6 Rob. 135.
Maryland.— Kremelberg *v.* Kremelberg, 52 Md. 553.
Nebraska.— Small *v.* Small, 28 Nebr. 843, 45 N. W. 248.
New York.— Uhlmann *v.* Uhlmann, 17 Abb. N. Cas. 236.
Oregon.— Lambert *v.* Lambert, 16 Oreg. 485, 19 Pac. 459; Jackson *v.* Jackson, 8 Oreg. 402.
Virginia.— Owens *v.* Owens, 96 Va. 191, 31 S. E. 72.
Wisconsin.— Helden *v.* Helden, 7 Wis. 296.
England.— Handley *v.* Handley, [1891] P. 124, 55 J. P. 293, 63 L. T. Rep. N. S. 535, 39 Wkly. Rep. 97; D'Alton *v.* D'Alton, 4 P. D. 87, 47 L. J. P. & Adm. 59; Clout *v.* Clout, 30 L. J. P. & M. 176, 5 L. T. Rep. N. S. 139, 2 Swab. & Tr. 391; Bent *v.* Bent, 30 L. J. P. & M. 175, 5 L. T. Rep. N. S. 120, 2 Swab. & Tr. 392, 10 Wkly. Rep. 448; Boynton *v.* Boynton, 30 L. J. P. & M. 156, 4 L. T. Rep. N. S. 258, 2 Swab. & Tr. 275, 9 Wkly. Rep. 620; Hyde *v.* Hyde, 29 L. J. P. & M. 150; Martin *v.* Martin, 29 L. J. P. & M. 106, 2 L. T. Rep. N. S. 118, 8 Wkly. Rep. 367.
See 17 Cent. Dig. tit. "Divorce," § 783.

cruelty,[95] or desertion.[96] However, the custody of children may be awarded to the offending party where the circumstances are such that their welfare will be thereby promoted.[97]

e. Character and Conduct of Parties. Inasmuch as parental example has great influence in the development of young children, due regard should be had to the character and conduct of the parties in awarding the custody of the children. If it be shown that the daily conduct of the father is not a fit example for them to follow and the mother appears to be a suitable person, their custody should be awarded to her.[98] If on the other hand the mother is addicted to vicious habits and so is not a suitable person to rear and educate the children, the natural right of the husband will prevail, or the custody of the children may be awarded to a third person.[99]

f. Preference of Children. Where the children are of such an age as to know their own wants, and the rights and capabilities of the parents are evenly balanced, the court may consult and abide by the wishes of the former in determining to which of the parents their custody should be awarded.[1]

g. Discretion of Court. The award of the custody of children upon or after a divorce is within the discretion of the court, to be exercised with due regard to the welfare of the children and the rights of the parties.[2]

h. Agreements Between Parties. An agreement between the parents as to the custody of their children made previous to a decree for divorce will not

95. *Illinois.*—Becker *v.* Becker, 79 Ill. 532; Wilcox *v.* Wilcox, 16 Ill. App. 580.

Michigan.—Horning *v.* Horning, 107 Mich. 587, 65 N. W. 555.

Mississippi.— Johns *v.* Johns, 57 Miss. 530.

Ohio.— Duhme *v.* Duhme, 3 Ohio Dec. (Reprint) 95, 3 Wkly. L. Gaz. 186.

Virginia.— Myers *v.* Myers, 83 Va. 806, 6 S. E. 630.

See 17 Cent. Dig. tit. "Divorce," § 783.

96. Ahrenfeldt *v.* Ahrenfeldt, 4 Sandf. Ch. (N. Y.) 493; Carr *v.* Carr, 22 Gratt. (Va.) 168.

97. See *supra*, XX, C, 1; XX, C, 3, a.

98. *Alabama.*— Goodrich *v.* Goodrich, 44 Ala. 670.

Iowa.— Cole *v.* Cole, 23 Iowa 433.

Kentucky.— Theising *v.* Theising, 26 S. W. 718, 16 Ky. L. Rep. 115.

Mississippi.— Cocke *v.* Hannum, 39 Miss. 423.

New York.— Codd *v.* Codd, 2 Johns. Ch. 141.

Utah.— Griffin *v.* Griffin, 18 Utah 98, 55 Pac. 84.

Wisconsin.— Pauly *v.* Pauly, 69 Wis. 419, 34 N. W. 512.

See 17 Cent. Dig. tit. "Divorce," § 784.

Occasional intoxication which does not interfere with the father's business is not in itself sufficient to deprive him of his right to the custody of the children. Bryan *v.* Bryan, 34 Ala. 516.

99. Finley *v.* Finley, (Ky. 1887) 2 S. W. 554; Evans *v.* Evans, (Tenn. Ch. App. 1900) 57 S. W. 367.

Award of custody to third persons see *supra*, XX, C, 2.

1. *Florida.*— Williams *v.* Williams, 23 Fla. 324, 2 So. 768.

Illinois.— Umlauf *v.* Umlauf, 128 Ill. 378, 21 N. E. 600.

Michigan.—Horning *v.* Horning, 107 Mich. 587, 65 N. W. 555.

New Jersey.— English *v.* English, 32 N. J. Eq. 738.

New York.— Israel *v.* Israel, 38 Misc. 335, 77 N. Y. Suppl. 912.

See 17 Cent. Dig. tit. "Divorce," § 786.

Children under age of discretion.— While the children, if of the age of discretion, can be consulted, yet when very young the court must be guided by their best interests, in view of all the circumstances. McShan *v.* McShan, 56 Miss. 413.

2. *California.*—Dickerson *v.* Dickerson, 108 Cal. 351, 41 Pac. 475; Brenot *v.* Brenot, 102 Cal. 294, 36 Pac. 672; Luck *v.* Luck, 92 Cal. 653, 28 Pac. 787.

Colorado.— Luthe *v.* Luthe, 12 Colo. 421, 21 Pac. 467.

District of Columbia.— Wells *v.* Wells, 11 App. Cas. 392.

Illinois.— Bergen *v.* Bergen, 22 Ill. 187.

Indiana.— Powell *v.* Powell, 53 Ind. 513; Bush *v.* Bush, 37 Ind. 164; Darnall *v.* Mullikin, 8 Ind. 152.

Kansas.— Leach *v.* Leach, 46 Kan. 724, 27 Pac. 131.

Maine.— Stetson *v.* Stetson, 80 Me. 483, 15 Atl. 60.

Missouri.— Lusk *v.* Lusk, 28 Mo. 91.

New York.— Osterhoudt *v.* Osterhoudt, 168 N. Y. 358, 61 N. E. 285; People *v.* Allen, 105 N. Y. 628, 11 N. E. 143; Price *v.* Price, 55 N. Y. 656; Ahrenfeldt *v.* Ahrenfeldt, Hoffm. 497.

Oregon.— Bird *v.* Bird, 28 Oreg. 582, 42 Pac. 616; Pittman *v.* Pittman, 3 Oreg. 553.

Utah.— Thomson *v.* Thomson, 5 Utah 401, 16 Pac. 400.

England.—Ryder *v.* Ryder, 30 L. J. P. & M. 44, 3 L. T. Rep. N. S. 678, 2 Swab. & Tr. 225, 9 Wkly. Rep. 440.

See 17 Cent. Dig. tit. "Divorce," § 779.

necessarily control the decision of the court,[3] although if conducive to the general welfare of the children the court may direct a compliance with its provisions.[4]

D. Removal of Children From Jurisdiction. In some cases the court in awarding the custody of children has directed that they shall not without its permission be permanently removed from its jurisdiction.[5] On the other hand it has been held that if it is conducive to the best interests of the child its custody may be awarded to a parent who resides without the state[6] or is about to depart therefrom and reside elsewhere.[7]

E. Access to Children. Where a decree of divorce awards the custody of the child to either of the parties, it is proper to include a provision permitting the other to visit the child under such restrictions as the conduct of the parties and the circumstances of the particular case may warrant.[8] The court will not ordinarily give an adulterous wife access to her children, although it is not absolutely precluded from doing so;[9] and access has been given to an adulterous husband.[10] Although the decree contains no provision allowing the parent deprived of the custody of the child to visit it, he may nevertheless do so at convenient and proper times in a decent and respectful manner.[11]

F. Duration and Termination of Custody. The English rule is to permit the court to regulate the custody of children until they attain the age of sixteen.[12] On the death of the parent to whom the custody of the child is awarded, the other parent ordinarily succeeds to the right of custody.[13]

3. Lowrey *v.* Lowrey, 108 Ga. 766, 33 S. E. 421; Hunt *v.* Hunt, 4 Greene (Iowa) 216; Cook *v.* Cook, 1 Barb. Ch. (N. Y.) 639.

4. *Illinois.*— Buck *v.* Buck, 60 Ill. 241.

Iowa.— White *v.* White, 75 Iowa 218, 39 N. W. 277.

Maryland.— Kremelberg *v.* Kremelberg, 52 Md. 553.

New York.— Beadleston *v.* Beadleston, 2 N. Y. Suppl. 814.

Washington.— Ackley *v.* Burchard, 11 Wash. 128, 39 Pac. 372.

See 17 Cent. Dig. tit. "Divorce," § 780.

5. Miner *v.* Miner, 11 Ill. 43; Chase *v.* Chase, 70 Ill. App. 572; Joab *v.* Sheets, 99 Ind. 328; Ryce *v.* Ryce, 52 Ind. 64; Campbell *v.* Campbell, 37 Wis. 206.

To protect the father's right of access the court may require the mother, to whose custody an infant daughter is awarded, to give security that the child shall not be taken permanently from the jurisdiction of the court. People *v.* Paulding, 15 How. Pr. (N. Y.) 167. See also Deringer *v.* Deringer, 10 Phila. (Pa.) 190.

6. Stetson *v.* Stetson, 80 Me. 483, 15 Atl. 60.

7. Griffin *v.* Griffin, 18 Utah 98, 55 Pac. 84.

8. *Arkansas.*—Haley *v.* Haley, 44 Ark. 429.

Illinois.— Bates *v.* Bates, 166 Ill. 448, 46 N. E. 1078; Miner *v.* Miner, 11 Ill. 43, holding that, although the divorce was granted for the misconduct of the father and the custody of the child was awarded to the mother, the child must not be kept wholly aloof from the father, but he should be permitted to visit it on reasonable occasions, and that any attempt to alienate its affections from either parent is a contempt of court.

Kentucky.— Edwards *v.* Edwards, 64 S. W. 726, 23 Ky. L. Rep. 1051 (holding that, although the mother should be allowed to visit the children, the privilege should not be exercised in such a way as to interfere with the father's right to send them to a school or college as he may see fit); Bristow *v.* Bristow, 52 S. W. 818, 21 Ky. L. Rep. 585; Irwin *v.* Irwin, 105 Ky. 632, 49 S. W. 432, 20 Ky. L. Rep. 1761; Finley *v.* Finley, 2 S. W. 554, 8 Ky. L. Rep. 605.

Massachusetts.—Oliver *v.* Oliver, 151 Mass. 349, 24 N. E. 51.

New York.— McGown *v.* McGown, 29 N. Y. App. Div. 628, 53 N. Y. Suppl. 1108; Ahrenfeldt *v.* Ahrenfeldt, 4 Sandf. Ch. 493.

See 17 Cent. Dig. tit. "Divorce," § 788.

9. Handley *v.* Handley, [1891] P. 124, 55 J. P. 293, 63 L. T. Rep. N. S. 535, 39 Wkly. Rep. 97; Seddon *v.* Seddon, 31 L. J. P. & M. 101, 7 L. T. Rep. N. S. 253, 2 Swab. & Tr. 640. In Taylor *v.* Taylor, 39 L. J. P. & M. 23, 22 L. T. Rep. N. S. 140, such an order was made, but it seems that it was entered by consent.

10. Chetwynd *v.* Chetwynd, L. R. 1 P. 39, 11 Jur. N. S. 958, 35 L. J. P. & M. 21, 13 L. T. Rep. N. S. 474, 14 Wkly. Rep. 184.

11. Burge *v.* Burge, 88 Ill. 164.

12. Mallinson *v.* Mallinson, L. R. 1 P. 221, 35 L. J. P. & M. 84, 14 L. T. Rep. N. S. 636, 14 Wkly. Rep. 973; Ryder *v.* Ryder, 30 L. J. P. & M. 44, 3 L. T. Rep. N. S. 678, 2 Swab. & Tr. 225, 9 Wkly. Rep. 440. In an earlier case the court ordered the custody of the children to the mother until they respectively attained the age of fourteen years. Suggate *v.* Suggate, 29 L. J. P. & M. 167, 1 Swab. & Tr. 489, 492, 8 Wkly. Rep. 20.

13. Schammel *v.* Schammel, 105 Cal. 258, 38 Pac. 729; *In re* Blackburn, 41 Mo. App. 622; Matter of Robinson, 17 Abb. Pr. (N. Y.) 399 note; *In re* Neff, 20 Wash. 652, 56 Pac. 383.

G. Order or Decree as to Custody — 1. Operation and Effect. Unless modified or set aside,[14] a decree awarding the custody of a child is conclusive as to all questions affecting the matter existing at the time it was rendered,[15] and cannot be collaterally attacked.[16] The decree does not preclude further action by the court as new facts creating new issues arise, however.[17] An award of the custody of a child to the mother operates to divest the father of all right of control over the child.[18]

2. Modification — a. Power of Court. Power is usually conferred by statute upon the court to modify an order or decree disposing of the custody of a child by transferring it from one party to the other or by permitting the party deprived of the custody to visit the child.[19]

b. Application. An application for a modification of the decree as to the custody of the children should be made to the court in which the decree was rendered,[20]

14. See *infra*, XX, G, 2.

15. *Indiana.*—Leming *v.* Sale, 128 Ind. 317, 27 N. E. 619.

Nebraska.— Norval *v.* Zinsmaster, 57 Nebr. 158, 77 N. W. 373, 73 Am. St. Rep. 500.

North Dakota.— Glynn *v.* Glynn, 8 N. D. 233, 77 N. W. 594.

Ohio.— Hoffman *v.* Hoffman, 15 Ohio St. 427.

Texas.—Jordan *v.* Jordan, 4 Tex. Civ. App. 559, 23 S. W. 531.

See 17 Cent. Dig. tit. "Divorce," § 792.

16. Sullivan *v.* Learned, 49 Ind. 252; Shaw *v.* McHenry, 52 Iowa 182, 2 N. W. 1096; Bennett *v.* Bennett, 3 Fed. Cas. No. 1,318, Deady 299.

Effect of foreign decree as to custody of child see *infra*, XXI, A, 1, note 54; XXI, B, note 56.

17. People *v.* Hickey, 86 Ill. App. 20; Chase *v.* Chase, 70 Ill. App. 572; Shaw *v.* McHenry, 52 Iowa 182, 2 N. W. 1096.

18. Wilkinson *v.* Deming, 80 Ill. 342, 22 Am. Rep. 192.

Adoption of child without consent of parent to whom it was awarded see Adoption of Children, 1 Cyc. 922 note 48.

Refusal to disclose whereabouts of child as contempt see Contempt, 9 Cyc. 8 note 23.

19. *California.*— Crater *v.* Crater, 135 Cal. 633, 67 Pac. 1049; Younger *v.* Younger, 106 Cal. 377, 39 Pac. 779.

Florida.— McGill *v.* McGill, 19 Fla. 341.

Illinois.— Bates *v.* Bates, 166 Ill. 448, 46 N. E. 1078; Burge *v.* Burge, 88 Ill. 164; Chase *v.* Chase, 70 Ill. App. 572.

Indiana.— Stone *v.* Stone, 158 Ind. 628, 64 N. E. 86; Breedlove *v.* Breedlove, 27 Ind. App. 560, 61 N. E. 797, where a decree was modified so as to permit the father to visit the child.

Iowa.— Andrews *v.* Andrews, 15 Iowa 423, holding that the court may modify an order relating to the custody of children, although the parties have become residents of another state since the divorce.

Kentucky.— McFerran *v.* McFerran, 51 S. W. 307, 21 Ky. L. Rep. 252, holding that while the court may modify a judgment awarding the custody of children to the mother, it is an unreasonable interference with her custody to require them to visit the father in a distant county at various times during the year for a period of ten days at a time.

Maine.— Stratton *v.* Stratton, 73 Me. 481; Harvey *v.* Lane, 66 Me. 536.

Massachusetts.—Oliver *v.* Oliver, 151 Mass. 349, 24 N. E. 51.

Minnesota.— Arne *v.* Holland, 85 Minn. 401, 89 N. W. 3.

Missouri.—West *v.* West, 94 Mo. App. 683, 68 S. W. 753; Meyers *v.* Meyers, 91 Mo. App. 151; Cole *v.* Cole, 89 Mo. App. 228.

New York.— Matter of Haworth, 59 N. Y. App. Div. 393, 69 N. Y. Suppl. 843; Mersereau *v.* Mersereau, 51 N. Y. App. Div. 461, 64 N. Y. Suppl 635; Chamberlain *v.* Chamberlain, 63 Hun 96, 17 N. Y. Suppl. 578; Perry *v.* Perry, 17 Misc. 28, 39 N. Y. Suppl. 863; Van Buren *v.* Van Buren, 78 N. Y. Suppl. 23.

North Carolina.— *In re* D'Anna, 117 N. C. 462, 23 S. E. 431.

Ohio.— Rogers *v.* Rogers, 51 Ohio St. 1, 36 N. E. 310; Neil *v.* Neil, 38 Ohio St. 558; Hoffman *v.* Hoffman, 15 Ohio St. 427; Pfau *v.* Pfau, 8 Ohio Cir. Ct. 87, 4 Ohio Cir. Dec. 281.

Utah.— Karren *v.* Karren, 25 Utah 87, 69 Pac. 465, 95 Am. St. Rep. 815, 60 L. R. A. 294.

Vermont.— Buckminster *v.* Buckminster, 38 Vt. 248, 88 Am. Dec. 652.

Washington.— Koontz *v.* Koontz, 25 Wash. 336, 65 Pac. 546, where a decree was modified because of the changed condition of the child's health.

West Virginia.— Cariens *v.* Cariens, 50 W. Va. 113, 40 S. E. 335, 55 L. R. A. 930.

See 17 Cent. Dig. tit. "Divorce," § 793.

In the absence of statutory authority the decree cannot be modified where it contains no limitation as to the time of custody and no reservation of power to change it. Sullivan *v.* Learned, 49 Ind. 252.

20. McNees *v.* McNees, 97 Ky. 152, 30 S. W. 207, 17 Ky. L. Rep. 25.

An appellate court will not interfere to modify a decree awarding the custody of the children. The application must be made to the court below. Waring *v.* Waring, 100 N. Y. 570, 3 N. E. 289.

upon proper notice to the adverse party;[21] and it has been held that the application should be made in a proceeding brought expressly therefor, and not in a collateral proceeding such as a hearing on habeas corpus.[22]

c. Grounds. A modification of the decree awarding custody of the children will not be made unless it be shown that the circumstances of the parties have changed, or unless material facts are disclosed which at the time the decree was rendered were unknown and could not have been ascertained with reasonable diligence.[23] Where it is shown that the child is suffering for want of proper care, and that it is to its best interests that it be transferred from the custody to which it was awarded, the court will in its discretion modify the decree,[24] unless the court is deprived of this discretion by statute.[25]

H. Support of Children — 1. In General. The usual practice under the statutes is to provide in the decree granting the divorce for the support of the children, in addition to an allowance for alimony.[26] However, the power of the court to make an order directing the father to provide for the maintenance of the minor children under petition in the suit long after final decree has been entered is well established, where the decree contains no provision on the subject.[27]

21. Phillips *v.* Phillips, 24 W. Va. 591.

22. Jennings *v.* Jennings, 56 Iowa 288, 9 N. W. 222; Williams *v.* Crosby, 118 Ga. 296, 45 S. E. 282; Haire *v.* McCardle, 107 Ga. 775, 33 S. E. 683 (the last two cases holding, under a statute, that while the decree is *prima facie* evidence of the legal right to the custody of the child, it is not conclusive in habeas corpus proceedings, where neglect or mistreatment of the child arising since the date of the decree is involved); Bryan *v.* Lyon, 104 Ind. 227, 3 N. E. 880, 54 Am. Rep. 309 (holding that the decree is not conclusive against the father in a habeas corpus proceeding instituted by him after the mother's death against one who was not a party to the divorce proceedings).

23. *Illinois.*— Bates *v.* Bates, 166 Ill. 448, 46 N. E. 1078.

Indiana.—See Bryan *v.* Lyon, 104 Ind. 227, 3 N. E. 880, 55 Am. Rep. 309, holding that where the father was deprived of the custody of the children because of his misconduct, a judgment in a habeas corpus proceeding instituted by him denying him their custody will not be reversed, where they are advantageously and pleasantly situated, and the father fails to explain his past conduct or to show that he can give them a good home for the future, although there is some evidence of his present good character.

Kentucky.—Railey *v.* Railey, 66 S. W. 414, 23 Ky. L. Rep. 1891.

Michigan.— Flory *v.* Ostrom, 92 Mich. 622, 52 N. W. 1038; Chandler *v.* Chandler, 24 Mich. 176.

Nebraska.— Eckhard *v.* Eckhard, 29 Nebr. 457, 45 N. W. 466.

West Virginia.— Cariens *v.* Cariens, 50 W. Va. 113, 40 S. E. 335, 55 L. R. A. 930.

See 17 Cent. Dig. tit. "Divorce," § 795.

Evidence of past conduct of parties.— In a proceeding to modify a decree of a court of another state in awarding the custody of a minor child, evidence of the situation and conduct of the parties prior to the rendition of the decree is admissible in corroboration of evidence showing a similar situation or conduct since the decree and relied upon to effect a modification thereof. Wilson *v.* Elliott, 96 Tex. 472, 73 S. W. 946, 75 S. W. 368, 97 Am. St. Rep. 936.

Ability of parties.— A mother to whom children have been awarded will not be deprived of their custody upon the sole ground that the husband is better able to maintain and educate them, where she is suitably providing for their support and education. Hewitt *v.* Long, 76 Ill. 399; Johnson *v.* Johnson, 4 Ky. L. Rep. 446.

A modification which interferes with the child's schooling should not be made, although in other respects it might be advantageous to the child. Van Buren *v.* Van Buren, 75 N. Y. App. Div. 615, 78 N. Y. Suppl. 23, 11 N. Y. Annot. Cas. 381.

24. Crater *v.* Crater, 135 Cal. 633, 67 Pac. 1049; Sherwood *v.* Sherwood, 56 Iowa 608, 10 N. W. 98; Boggs *v.* Boggs, 49 Iowa 190; Miles *v.* Miles, 65 Kan. 676, 70 Pac. 631; West *v.* West, 94 Mo. App. 683, 68 S. W. 753.

25. Stevens *v.* Stevens, 31 Colo. 188, 72 Pac. 1061.

26. See *supra*, XIX, D, 8, c, (III), (D).

Alimony distinguished.— Alimony is not to be construed into an allowance for the support of the children, since in its proper signification it is not maintenance to the children but to the wife; and the fact that there has been a decree of divorce with alimony and custody of minor children to the wife will not of itself bar a subsequent claim against the husband for the maintenance of the children. Pretzinger *v.* Pretzinger, 45 Ohio St. 452, 15 N. E. 471, 4 Am. St. Rep. 542. *Contra*, Reid *v.* Reid, 74 Iowa 681, 39 N. W. 102, holding that where a divorced wife has been awarded alimony and the custody of a child she cannot compel her former husband to contribute to the support of the child unless she avers in her petition therefor a changed condition of the parties.

27. *Arkansas.*— Holt *v.* Holt, 42 Ark. 495.

California.— McKay *v.* San Francisco Super. Ct., 120 Cal. 143, 52 Pac. 147, 40 L. R. A. 585; Wilson *v.* Wilson, 45 Cal. 399.

2. Common-Law Liability. At common law the father remains primarily liable for the support of the children of the marriage as well after as before a divorce;[28] and the rule is the same where the custody of the children has been awarded to the mother,[29] unless the divorce was granted for her fault.[30] It has been held, however, that after a decree of divorce, either with or without an order for the custody of the children and in the absence of an order for their maintenance, there is no implied obligation on the part of a father to pay for support voluntarily furnished by the mother of the children, while she maintains the right to their custody.[31]

3. Children Entitled to Support. The power conferred upon the court to

Illinois.— Plaster *v.* Plaster, 47 Ill. 290.

Missouri.— Meyers *v.* Meyers, 91 Mo. App. 151.

New York.— Washburn *v.* Catlin, 97 N. Y. 623; Erkenbrach *v.* Erkenbrach, 96 N. Y. 456.

Ohio.— Pretzinger *v.* Pretzinger, 45 Ohio St. 452, 15 N. E. 471, 4 Am. St. Rep. 542.

Oregon.— McFarlane *v.* McFarlane, 43 Oreg. 477, 73 Pac. 203, 75 Pac. 139.

Vermont.— Buckminster *v.* Buckminster, 38 Vt. 248, 88 Am. Dec. 652.

28. *Delaware.*— State *v.* Rogers, 2 Marv. 439, 43 Atl. 250.

Georgia.— Maddox *v.* Patterson, 80 Ga. 719, 6 S. E. 581.

Illinois.— Plaster *v.* Plaster, 53 Ill. 445; Armstrong *v.* Armstrong, 35 Ill. 109; Cowls *v.* Cowls, 8 Ill. 435, 44 Am. Dec. 708; Steele *v.* People, 88 Ill. App. 186.

Kentucky.— Tuggles *v.* Tuggles, 30 S. W. 875, 17 Ky. L. Rep. 221; Shrader *v.* Shrader, 11 Ky. L. Rep. 441.

Maine.— Glynn *v.* Glynn, 94 Me. 465, 48 Atl. 105.

Michigan.— Courtright *v.* Courtright, 40 Mich. 633.

Missouri.— Meyers *v.* Meyers, 91 Mo. App. 151; Rankin *v.* Rankin, 83 Mo. App. 335.

New Hampshire.— Dolloff *v.* Dolloff, 67 N. H. 512, 38 Atl. 19.

Vermont.— Buckminster *v.* Buckminster, 38 Vt. 248, 88 Am. Dec. 652.

Washington.—Ditmar *v.* Ditmar, 27 Wash. 13, 67 Pac. 353, 91 Am. St. Rep. 817.

Wisconsin.— Thomas *v.* Thomas, 41 Wis. 229; McGoon *v.* Irvin, 1 Pinn. 526, 44 Am. Dec. 409.

See 17 Cent. Dig. tit. "Divorce," § 826.

In Connecticut this rule exists by statute. Welch's Appeal, 43 Conn. 342. See *infra*, note 31.

29. Holt *v.* Holt, 42 Ark. 495; Gibson *v.* Gibson, 18 Wash. 489, 51 Pac. 1041, 40 L. R. A. 587 (holding that the right to the services and the liability for the support of a child do not necessarily go together); Zilley *v.* Dunwiddie, 98 Wis. 428, 74 N. W. 126, 27 Am. St. Rep. 820, 40 L. R. A. 579.

Action by wife.— It has been held that where the wife has been granted a divorce for the husband's fault and awarded the custody of infant children without any order as to their maintenance, she may maintain an independent action against the father to recover for necessaries supplied to them. Gilley *v.* Gilley, 79 Me. 292, 9 Atl. 623, 1 Am. St. Rep. 307; Pretzinger *v.* Pretzinger, 45 Ohio St. 452, 15 N. E. 471, 4 Am. St. Rep. 542.

Action by third person.— The wife may pledge the husband's credit for necessaries furnished to a child in her custody, for which the creditor may maintain an action against the father. Bazeley *v.* Forder, L. R. 3 Q. B. 559. See, however, Johnson *v.* Onsted, 74 Mich. 437, 42 N. W. 62.

30. Fulton *v.* Fulton, 52 Ohio St. 229, 241, 39 N. E. 729, 49 Am. St. Rep. 720, 29 L. R. A. 678 (where the court said: "By the divorce *a vinculo*, the mother is as completely absolved from the marital relation as she would be by death, and if, in the course of the proceeding which ends in an absolute divorce, the minor children are put under her control, by her procurement or in response to her wishes, her direct obligation toward them so long as she retains them would seem to be founded upon as substantial considerations as if she were a widow. . . . If, under these circumstances, where her own misconduct has destroyed the family relation, and deprived the father of the custody and society of his children, she has in fact maintained her children, she has no claim, legal or moral, to demand re-imhursement from the father. She has simply discharged a duty cast upon her by the plainest principles of natural justice, for the reason that the necessity for it arose from her own misconduct"); Christoff *v.* Christoff, 6 Ohio Cir. Ct. 512; Fitler *v.* Fitler, 33 Pa. St. 50 (holding that the father, being able and willing to receive and support his child, cannot be made liable for its maintenance to one who wrongfully withholds it from him).

31. *Connecticut.*—Finch *v.* Finch, 22 Conn. 411 [*overruling* Stanton *v.* Willson, 3 Day 37, 3 Am. Dec. 255]. This rule has since been changed by statute. Welch's Appeal, 43 Conn. 342.

Indiana.— Ramsey *v.* Ramsey, 121 Ind. 215, 23 N. E. 69, 6 L. R. A. 682; Husband *v.* Husband, 67 Ind. 583, 33 Am. Rep. 107.

Iowa.— Cushman *v.* Hassler, 82 Iowa 295, 47 N. W. 1036.

Kansas.— Hampton *v.* Allee, 56 Kan. 461, 43 Pac. 779; Chandler *v.* Dye, 37 Kan. 765, 15 Pac. 925; Harris *v.* Harris, 5 Kan. 46.

Massachusetts.— Brow *v.* Brightman, 136 Mass. 187.

Michigan.— See Johnson *v.* Onsted, 74 Mich. 437, 42 N. W. 62.

New York.— Rich *v.* Rich, 88 Hun 566, 34 N. Y. Suppl. 854; Burritt *v.* Burritt, 29 Barb. 124.

require the husband to provide for the support of children before final judgment in divorce is limited to the issue of the marriage.[32] An order cannot be made for the support of a child who is of age at the time the divorce is granted,[33] although it is an invalid;[34] and if a child has attained such an age that it is capable of supporting itself the court will not require the father to contribute to its maintenance.[35]

4. Amount of Allowance. The amount allowed for the support of children depends largely upon the financial condition of the father and the needs and circumstances of the children.[36] If a mother to whom the custody of a child has been awarded has means of her own, she may be held to contribute toward its support, and thus diminish the amount to be paid by the father;[37] the rule in this respect not differing materially from that applied in the case of an allowance of permanent alimony.[38]

5. Order or Decree — a. In General. An order for support is not necessarily erroneous because the court has not previously made an order for the custody of the child.[39] The power of the court to make an order for the support is limited to the conditions existing at the time the order is made.[40] In some states, where a child is awarded to the mother, the court cannot direct that an amount awarded for its support be paid to its guardian instead of to the mother.[41] On the wife's motion for alimony and provision for a child the court may order the husband to pay separate sums for the support of both.[42] The order for support is not vitiated by irregularities which result in no prejudice to either party.[43]

b. Modification. The amount allowed for the support of children is subject to subsequent modification, where the changed condition of the parties requires it;[44] the conditions under which an allowance for support may be modified and

Rhode Island.— Brown *v.* Smith, 19 R. I. 319, 33 Atl. 466, 30 L. R. A. 680.

32. Wood *v.* Wood, 61 N. Y. App. Div. 96, 70 N. Y. Suppl. 72.

33. Amos *v.* Amos, 4 N. J. Eq. 171.

34. Chaffee *v.* Chaffee, 15 Mich. 184.

35. Plaster *v.* Plaster, 47 Ill. 290.

36. *California.*— Rogers *v.* Rogers, (1892) 31 Pac. 157.

Florida.— Phelan *v.* Phelan, 12 Fla. 449.

Illinois.— Plaster *v.* Plaster, 67 Ill. 93, holding that the tender age and health of a minor son for whose maintenance his mother is allowed alimony is to be considered in decreeing the amount.

Indiana.— Logan *v.* Logan, 90 Ind. 107.

Kentucky.— Irwin *v.* Irwin, 105 Ky. 632, 49 S. W. 432, 20 Ky. L. Rep. 1761.

Nevada.— Wuest *v.* Wuest, 17 Nev. 217, 30 Pac. 886.

New Jersey.— Richmond *v.* Richmond, 2 N. J. Eq. 90, holding that such an amount will be fixed as will enable the children to be maintained in a manner corresponding with the condition of their father.

South Dakota.— Pollock *v.* Pollock, 9 S. D. 48, 68 N. W. 176.

Texas.— Pape *v.* Pape, 13 Tex. Civ. App. 99, 35 S. W. 479.

Wisconsin.— Moul *v.* Moul, 30 Wis. 203.

England. — Webster *v.* Webster, 9 Jur. N. S. 182, 32 L. J. P. & M. 29, 7 L. T. Rep. N. S. 646, 3 Swab. & Tr. 106, 11 Wkly. Rep. 86; Whildon *v.* Whildon, 30 L. J. P. & M. 174, 5 L. T. Rep. N. S. 138, 2 Swab. & Tr. 388.

The earning capacity of the husband should be considered. Logan *v.* Logan, 90 Ind. 107; Pape *v.* Pape, 13 Tex. Civ. App. 99, 35 S. W. 479.

37. Webster *v.* Webster, 9 Jur. N. S. 182, 32 L. J. P. & M. 29, 7 L. T. Rep. N. S. 646, 3 Swab. & Tr. 106, 11 Wkly. Rep. 86: Seatle *v.* Seatle, 30 L. J. P. & M. 216, 4 Swab. & Tr. 230.

38. See *supra*, XIX, D, 8, c, (III).

39. David *v.* David, 87 Ill. App. 186.

40. Schammel *v.* Schammel, 105 Cal. 258, 38 Pac. 729.

41. Swiney *v.* Swiney, 107 Mich. 459, 65 N. W. 287. *Contra, Ex p.* Gordan, 95 Cal. 374, 30 Pac. 561. See Schammel *v.* Schammel, 105 Cal. 258, 38 Pac. 729.

42. Call *v.* Call, 65 Me. 407.

43. *Ex p.* Gordan, 95 Cal. 374, 30 Pac. 561 (holding that although the order describes the child by a wrong name, it is valid if it sufficiently identifies the child); Kinney *v.* Kinney, 1 Blackf. (Ind.) 481 (holding that a decree requiring a husband to pay a certain sum to his wife for their children's support is not vitiated by the fact that such sum is called alimony).

44. *Illinois.*—Hilliard *v.* Anderson, 197 Ill. 549, 64 N. W. 326 (where an allowance was increased because of the additional expense incurred in furnishing medical treatment to the child); Plaster *v.* Plaster, 53 Ill. 445; Umlauf *v.* Umlauf, 35 Ill. App. 624.

Indiana.— Cox *v.* Cox, 25 Ind. 303.

Iowa.— Jungk *v.* Jungk, 5 Iowa 541.

Kansas.— Miles *v.* Miles, 65 Kan. 676, 70 Pac. 631; Kendall *v.* Kendall, 5 Kan. App. 688, 48 Pac. 940.

Kentucky.— Mansfield *v.* Mansfield, 54 S. W. 16, 21 Ky. L. Rep. 1077.

the proceedings thereon being substantially the same as in the case of a modification of an allowance of permanent alimony.[45]

c. **Enforcement.** An allowance for the support of the children is usually made under the same authority as an allowance of alimony and its payment is usually enforced in the same manner.[46] Execution against the father may issue in the mother's favor,[47] a receiver may be appointed to take charge of the father's property and to apply the proceeds thereof to the children's support,[48] or the father may be proceeded against as for contempt, if authorized by statute.[49]

6. **Termination of Liability.** A decree directing a father to provide for the support of his minor children until the further order of the court is not necessarily discharged by his death;[50] but upon the death of the mother to whom the allowance was directed to be paid the decree becomes ineffective and the husband's duty to support the child becomes absolute.[51] Liability under the decree is also terminated by the child's attaining majority.[52]

I. Appeal. An order awarding the custody and support of infant children is generally appealable, but it will not be disturbed on appeal, unless there has been a clear abuse of discretion on the part of the trial court.[53]

XXI. FOREIGN DIVORCE.

A. Effect of Valid Divorce — 1. General Rule. A decree of divorce rendered in accordance with the laws of the forum by a court having jurisdiction of the subject-matter and of the parties is valid everywhere, and will be given full force and effect in all other states where the same matters come in issue.[54]

New York.— Kerr *v.* Kerr, 59 How. Pr. 255; Paff *v.* Paff, Hopk. 584.

South Dakota.— Greenleaf *v.* Greenleaf, 6 S. D. 348, 61 N. W. 42.

See 17 Cent. Dig. tit. "Divorce," § 803.

Child born after final decree.— Where a child of the marriage was born after the entry of the final decree in a divorce case, it was held that the court had power, upon petition therefor, to open the decree as to support and make provision for the care, custody, and support of such child. Shannon *v.* Shannon, 97 Mo. App. 119, 71 S. W. 104.

45. See *supra*, XIX, D, 9, c.

46. See *supra*, XIX, B, 8, e; XIX, F, 2.

47. Call *v.* Call, 65 Me. 407; North *v.* North, 39 Mich. 67.

48. Rice *v.* Rice, 21 Tex. 58.

49. Stonehill *v.* Stonehill, 146 Ind. 445, 45 N. E. 600.

50. Miller *v.* Miller, 64 Me. 484.

51. Matter of Robinson, 17 Abb. Pr. (N. Y.) 399.

52. Snover *v.* Snover, 13 N. J. Eq. 261.

53. *California.*— Dickerson *v.* Dickerson, 108 Cal. 351, 41 Pac. 475.

Colorado.— Luthe *v.* Luthe, 12 Colo. 421, 21 Pac. 467.

Indiana.— Powell *v.* Powell, 53 Ind. 513; Darnell *v.* Mullikin, 8 Ind. 152.

Massachusetts.— Oliver *v.* Oliver, 151 Mass. 349, 24 N. E. 51.

New York.— People *v.* Allen, 105 N. Y. 628, 11 N. E. 143; Waring *v.* Waring, 100 N. Y. 570, 3 N. E. 289; Price *v.* Price, 55 N. Y. 656.

Ohio.— Neil *v.* Neil, 38 Ohio St. 558.

Oregon.— Bird *v.* Bird, 28 Oreg. 582, 42 Pac. 616; Pittman *v.* Pittman, 3 Oreg. 472.

Wisconsin.— Welch *v.* Welch, 33 Wis. 534.

See 17 Cent. Dig. tit. "Divorce," § 806.

See, however, Rogers *v.* Rogers, 51 Ohio St. 1, 36 N. E. 310; Thomson *v.* Thomson, 5 Utah 401, 16 Pac. 400, both cases holding that an order providing for the support of infant children is not separately appealable.

An order made in an application to have the decree modified in respect to children owing to the changed condition and circumstances of the parties is subject to review on appeal. Greenleaf *v.* Greenleaf, 6 S. D. 348, 61 N. W. 42. Where, however, a decree awards the custody of the children to the mother, and a subsequent petition by the father to have the custody of the children changed is denied, the only inquiry on appeal from the order of denial is whether the court erred in not changing the custody because of a changed condition of the parties or the children or improper conduct of the mother since the decree. Umlauf *v.* Umlauf, 27 Ill. App. 375.

On appeal from an order denying a new trial the supreme court has no power to modify a provision of the decree for the support of a minor child until its majority. Bryan *v.* Bryan, (Cal. 1902) 70 Pac. 304.

Where on the reversal of a judgment to dismiss an action for divorce the court cannot from the evidence in the record make an award affecting property, the cause will be remanded to the trial court with instructions to enter a decree of divorce and make equitable provision for the support of the wife and child. McAllister *v.* McAllister, 28 Wash. 613, 69 Pac. 119.

54. *California.*— *In re* James, 99 Cal. 374, 33 Pac. 1122, 37 Am. St. Rep. 60.

2. Enforcement as to Alimony. An action may be maintained in the courts of one state to enforce the payment of a definite sum allowed as alimony under a judgment rendered in another state.[55]

Illinois.— Dunham *v.* Dunham, 162 Ill. 589, 44 N. E. 841, 35 L. R. A. 70.

Louisiana.— Smith *v.* Smith, 43 La. Ann. 1140, 10 So. 248.

Maine.— Slade *v.* Slade, 58 Me. 157; Harding *v.* Alden, 9 Me. 140, 23 Am. Dec. 549.

Massachusetts.— Barber *v.* Root, 10 Mass. 260.

Minnesota.— Kern *v.* Field, 68 Minn. 317, 71 N. W. 393, 64 Am. St. Rep. 479.

Missouri.— Williams *v.* Williams, 53 Mo. App. 617.

New York.— Jones *v.* Jones, 108 N. Y. 115, 15 N. E. 707, 2 Am. St. Rep. 447; Hunt *v.* Hunt, 72 N. Y. 217, 28 Am. Rep. 129 (holding that every state has the right to determine for itself upon what grounds the relation of marriage between persons domiciled within its territory may be dissolved, and may prescribe what legal proceedings may be had to that end); Vischer *v.* Vischer, 12 Barb. 640; Johnson *v.* Johnson, 67 How. Pr. 144; Bradshaw *v.* Heath, 13 Wend. 407.

Ohio.— Heikes *v.* Peepaugh, 1 Ohio Dec. (Reprint) 223, 4 West. L. J. 544.

South Carolina.— Hull *v.* Hull, 2 Strobh. Eq. 174, holding that a person who is lawfully divorced in a foreign state and thereafter has sexual intercourse with an unmarried person is not guilty of adultery.

Wisconsin.— Shafer *v.* Bushnell, 24 Wis. 372.

United States.— Cheever *v.* Wilson, 9 Wall. 108, 19 L. ed. 604.

See 17 Cent. Dig. tit. "Divorce," § 827.

This is especially true where the laws of the state in which the divorce was granted are substantially like those of the state where the decree comes into question. Van Orsdal *v.* Van Orsdal, 67 Iowa 35, 24 N. W. 579.

Constitutional law.— The provision of U. S. Const. art. 4, § 1, according full faith and credit in each state to the "judicial proceedings" in every other state applies to proceedings for divorce.

Indiana.— Hood *v.* State, 56 Ind. 263, 26 Am. Rep. 21.

New York.— Lacey *v.* Lacey, 38 Misc. 196, 77 N. Y. Suppl. 235.

North Carolina.— Arrington *v.* Arrington, 127 N. C. 190, 37 S. E. 212, 80 Am. St. Rep. 791, 52 L. R. A. 201.

Pennsylvania.— Sheetz *v.* Sheetz, 6 Lanc. L. Rev. 97.

Rhode Island.— Ditson *v.* Ditson, 4 R. I. 87.

Washington.— Dormitzer *v.* German Sav., etc., Soc., 23 Wash. 132, 62 Pac. 862.

See 17 Cent. Dig. tit. "Divorce," § 827½.

Foreign decree as bar to suit.— A foreign divorce granted to one party by a court having jurisdiction of the subject-matter and of the parties is a bar to a divorce to the other party in the courts of the state of his residence (Felt *v.* Felt, 57 N. J. Eq. 101, 40 Atl. 436; Coddington *v.* Coddington, 10 Abb. Pr. (N. Y.) 450; Cooper *v.* Cooper, 7 Ohio, Pt. II, 238), unless, as is provided in Michigan, the obtaining of a divorce in another state is in itself a cause for divorce (Van Inwagen *v.* Van Inwagen, 86 Mich. 333, 49 N. W. 154; Wright *v.* Wright, 24 Mich. 180).

Foreign decree as to custody of child.— A foreign decree determining the custody of a child in a suit for divorce in which the court had jurisdiction of the subject-matter and of the parties is conclusive of all questions as to the right of custody which might have been urged at the time the decree was rendered (Wakefield *v.* Ives, 35 Iowa 238; Wilson *v.* Elliott, 96 Tex. 472, 73 S. W. 946, 75 S. W. 368, 97 Am. St. Rep. 928), but is not a bar to a subsequent proceeding in a domestic court to modify the decree on proof that the situation and character of the parties have changed (Wilson *v.* Elliott, *supra*).

Failure to plead divorce.— Where one has obtained a valid divorce in one state, the fact that his wife afterward brings an action in another state for divorce from bed and board and for support and obtains judgment therefor, he not pleading his decree of divorce, will not change his status of a single man. *In re* James, 99 Cal. 374, 33 Pac. 1122, 37 Am. St. Rep. 60.

Foreign decree as fixing alimony see *infra*, XXI, A, 2.

Pendency of foreign action as ground for staying proceedings see Actions, 1 Cyc. 753 note 55.

55. *Illinois.*— Dow *v.* Blake, 148 Ill. 76, 35 N. E. 761, 39 Am. St. Rep. 156 [*affirming* 46 Ill. App. 329].

Indiana.— See Hilbish *v.* Hattle, 145 Ind. 59, 44 N. E. 20, 33 L. R. A. 783.

Kentucky.— Rogers *v.* Rogers, 15 B. Mon. 364.

Missouri.— Brisbane *v.* Dobson, 50 Mo. App. 170.

New Jersey.— Bullock *v.* Bullock, 57 N. J. L. 508, 31 Atl. 1024; Bennett *v.* Bennett, 63 N. J. Eq. 306, 49 Atl. 501; Van Orden *v.* Van Orden, 58 N. J. Eq. 545, 43 Atl. 882; Bullock *v.* Bullock, 52 N. J. Eq. 561, 30 Atl. 676, 46 Am. St. Rep. 528, 27 L. R. A. 213.

New York.— Rigney *v.* Rigney, 127 N. Y. 408, 28 N. E. 405, 24 Am. St. Rep. 462; Moore *v.* Moore, 40 Misc. 162, 81 N. Y. Suppl. 729; Wood *v.* Wood, 7 Misc. 579, 28 N. Y. Suppl. 154, 31 Abb. N. Cas. 235.

Pennsylvania.— McClung *v.* McClung, 11 Wkly. Notes Cas. 122, holding, however, that an action will not lie on an interlocutory order for alimony.

West Virginia.— Stewart *v.* Stewart, 27 W. Va. 167.

United States.— Lynde *v.* Lynde, 181 U. S. 183, 21 S. Ct. 555, 45 L. ed. 810 [*affirming*

B. Effect of Void Divorce. If a foreign divorce is void because the court was without jurisdiction of the subject-matter or of the parties, the decree is given no effect whatever in the courts of another state.[56]

C. Jurisdiction of Foreign Court — 1. In General. To give validity to a foreign divorce and so render it effectual in other states the court pronouncing the decree must have had jurisdiction of the subject-matter of the suit and of the parties thereto. This is equally true of decrees of courts of sister states; if there was no jurisdiction the decree is not entitled to the faith and credit guaranteed by the federal constitution.[57]

2. By Consent. If neither party resides in a foreign state they cannot confer jurisdiction on its courts by consent so as to authorize a valid decree of divorce.[58]

3. Residence of Parties — a. In General. The courts of one state cannot determine the status of citizens of another state. To give validity to a decree of divorce therefore at least one of the parties must be a resident of the state of the forum. Otherwise the courts of that state have no jurisdiction and the decree will not be given extraterritorial effect.[59]

162 N. Y. 405, 56 N. E. 979, 76 Am. St. Rep. 332, 48 L. R. A. 679].

See 17 Cent. Dig. tit. "Divorce," § 841.

See, however, Barber *v.* Barber, 2 Pinn. 297, 1 Chandl. 280.

Collateral remedies provided by the laws of the state in which the decree was rendered will not be applied in the domestic courts to enforce the payment of alimony. Bennett *v.* Bennett, 63 N. J. Eq. 306, 49 Atl. 501; Lynde *v.* Lynde, 162 N. Y. 405, 56 N. E. 979, 76 Am. St. Rep. 332, 48 L. R. A. 679.

Future alimony.— Suit can be brought to recover only a fixed and definite amount due at the time the suit is instituted, and cannot include provisions of the foreign decree as to future alimony. Lynde *v.* Lynde, 162 N. Y. 405, 56 N. E. 979, 76 Am. St. Rep. 332, 48 L. R. A. 679 [*affirmed* in 181 U. S. 183, 21 S. Ct. 555, 45 L. ed. 810]; Wood *v.* Wood, 7 Misc. (N. Y.) 579, 28 N. Y. Suppl. 154, 31 Abb. N. Cas. (N. Y.) 235.

56. Thompson *v.* State, 28 Ala. 12 (holding a void foreign divorce no defense to a prosecution for subsequent polygamy); State *v.* Fleak, 54 Iowa 429, 6 N. W. 689 (holding a void foreign divorce no defense to a prosecution for subsequent adultery); Com. *v.* Bolich, 18 Pa. Co. Ct. 401 (holding that a void foreign divorce is no defense to a prosecution for subsequent desertion).

A suit for divorce is not barred by a previous void foreign divorce. Dunham *v.* Dunham, 163 Ill. 589, 44 N. E. 841, 35 L. R. A. 70; Smith *v.* Smith, 13 Gray (Mass.) 209; Atherton *v.* Atherton, 155 N. Y. 129, 49 N. E. 933, 63 Am. St. Rep. 650, 40 L. R. A. 291; Cross *v.* Cross, 108 N. Y. 628, 15 N. E. 333; Cook *v.* Cook, 56 Wis. 195, 14 N. W. 33, 443, 43 Am. Rep. 706.

Custody of children.— A void foreign divorce has no effect on the right to the custody of children of the marriage. McGown *v.* McGown, 18 Misc. (N. Y.) 708, 43 N. Y. Suppl. 745; Harris *v.* Harris, 115 N. C. 587, 20 S. E. 187, 44 Am. St. Rep. 471.

Property rights of parties.— A void foreign divorce has no effect on the wife's right of dower (Reel *v.* Elder, 62 Pa. St. 308, 1 Am. Rep. 414; Colvin *v.* Reed, 55 Pa. St. 375), or her rights as widow (Cheely *v.* Clayton, 110 U. S. 701, 4 S. Ct. 328, 28 L. ed. 298), or her right to be appointed administratrix of the husband's estate (Andrews *v.* Andrews, 176 Mass. 92, 57 N. E. 333).

Remarriage of party.— A void foreign divorce does not give validity to a subsequent marriage contracted by one of the parties with a third person. State *v.* Armington, 25 Minn. 29; O'Dea *v.* O'Dea, 101 N. Y. 23, 4 N. E. 110; Vischer *v.* Vischer, 12 Barb. (N. Y.) 640; Borden *v.* Fitch, 15 Johns. (N. Y.) 121, 8 Am. Dec. 225; Irby *v.* Wilson, 21 N. C. 568.

Legitimacy of children.— Where a wife secures a divorce according to the laws of the place where domiciled and thereafter marries another, to whom a child is born, the child is legitimate everywhere, although the divorce and remarriage may not be recognized as legal elsewhere. Matter of Hall, 61 N. Y. App. Div. 266, 70 N. Y. Suppl. 406.

57. *District of Columbia.*— Barney *v.* De Kraft, 6 D. C. 361.

Indiana.— Hood *v.* State, 56 Ind. 263, 26 Am. Rep. 21.

Massachusetts.— Sewall *v.* Sewall, 122 Mass. 156, 23 Am. Rep. 299.

New York.— People *v.* Baker, 76 N. Y. 78, 32 Am. Rep. 274; Bradshaw *v.* Heath, 13 Wend. 407.

Pennsylvania.— Com. *v.* Taylor, 11 Lanc. Bar 134.

United States.— De Kraft *v.* Barney, 30 Fed. Cas. No. 18,288, 2 Hayw. & H. 405.

See 17 Cent. Dig. tit. "Divorce," § 829 *et seq.*

58. Harrison *v.* Harrison, 20 Ala. 629, 56 Am. Dec. 227; Andrews *v.* Andrews, 176 Mass. 92, 57 N. E. 333; Chase *v.* Chase, 6 Gray (Mass.) 157 (the two last cases holding that a general appearance by a non-resident defendant does not confer jurisdiction to decree a divorce, if plaintiff is not a *bona fide* resident); Hall *v.* Hall, 6 N. Y. St. 92.

59. *Indiana.*— Watkins *v.* Watkins, 125 Ind. 163, 25 N. E. 175, 21 Am. St. Rep. 217; Hood *v.* State, 56 Ind. 263, 26 Am. Rep. 21.

b. Of Plaintiff. If defendant does not reside in the state of the forum plaintiff must reside there, else the court has no jurisdiction to grant a decree.[60]

c. Of Defendant. If plaintiff is a resident of the state of the forum, residence of defendant therein is not necessary to confer jurisdiction on the court to dissolve the marriage.[61]

d. Genuineness and Sufficiency — (I) *In General.* To give the courts jurisdiction on the ground of plaintiff's residence in the state, his residence must be actual and genuine.[62]

(II) *Residence For Purpose of Procuring Divorce.* If a spouse leaves the family domicile and goes into another state for the sole purpose of obtaining a divorce, and with no intention of remaining, his residence there is not sufficient to confer jurisdiction on the courts of that state.[63] This is especially true

Kansas.— Litowich *v.* Litowich, 19 Kan. 451, 27 Am. Rep. 145.

Kentucky.— Maguire *v.* Maguire, 7 Dana 181.

Maine.— Gregory *v.* Gregory, 78 Me. 187, 3 Atl. 280, 57 Am. Rep. 792.

Massachusetts.—Andrews *v.* Andrews, 176 Mass. 92, 57 N. E. 333; Smith *v.* Smith, 13 Gray 209.

Minnesota.— Thelan *v.* Thelan, 75 Minn. 433, 78 N. W. 108 (holding that the decree in such a case is void for want of jurisdiction of the subject-matter); State *v.* Armington, 25 Minn. 29.

Nebraska.— Smith *v.* Smith, 19 Nebr. 706, 28 N. W. 296.

New Hampshire.— Leith *v.* Leith, 39 N. H. 20.

New York.— Hoffman *v.* Hoffman, 46 N. Y. 30, 7 Am. Rep. 299; Kerr *v.* Kerr, 41 N. Y. 272; Holmes *v.* Holmes, 4 Lans. 388; Hall *v.* Hall, 6 N. Y. St. 92; Pawling *v.* Willson, 13 Johns. 192, in which case, however, the query was put whether, if the parties, although domiciled in New York, were married in the state in which the divorce was decreed, the decree might not be valid.

Ohio.— Van Fossen *v.* State, 37 Ohio St. 317, 41 Am. Rep. 507.

Pennsylvania.— See Com. *v.* Taylor, 11 Lanc. Bar 134, holding that a divorce in another state while the parties have a common domicile in Pennsylvania is void in the latter state unless the record shows that the former court had jurisdiction of the parties and of the subject-matter.

Tennessee.— Gettys *v.* Gettys, 3 Lea 260, 31 Am. Rep. 637.

Texas.— Morgan *v.* Morgan, 1 Tex. Civ. App. 315, 21 S. W. 154.

Washington.— Dormitzer *v.* German Sav., etc., Soc., 23 Wash. 132, 62 Pac. 862.

Wisconsin.— St. Sure *v.* Lindsfelt, 82 Wis. 346, 52 N. W. 308, 33 Am. St. Rep. 50, 19 L. R. A. 515.

United States.— Streitwolf *v.* Streitwolf, 181 U. S. 179, 21 S. Ct. 553, 45 L. ed. 807; Bell *v.* Bell, 181 U. S. 175, 21 S. Ct. 551, 45 L. ed. 804.

60. *Alabama.*— Thompson *v.* State, 28 Ala. 12.

California.— *In re* James, 99 Cal. 374, 33 Pac. 1122, 37 Am. St. Rep. 60.

District of Columbia.— Cheever *v.* Wilson, 6 D. C. 149.

Illinois.—Dunham *v.* Dunham, 162 Ill. 589, 44 N. E. 841, 35 L. R. A. 70.

Indiana.— Hood *v.* State, 56 Ind. 263, 26 Am. Rep. 21.

Massachusetts.— Dickinson *v.* Dickinson, 167 Mass. 474, 45 N. E. 1091; Adams *v.* Adams, 154 Mass. 290, 28 N. E. 260, 13 L. R. A. 275; Hardy *v.* Smith, 136 Mass. 328; Barber *v.* Root, 10 Mass. 260.

Michigan.— People *v.* Dawell, 25 Mich. 247, 12 Am. Rep. 260.

New York.— Hoffman *v.* Hoffman, 46 N. Y. 30, 7 Am. Rep. 299; People *v.* Smith, 13 Hun 414; Stanton *v.* Crosby, 9 Hun 370; Phelps *v.* Baker, 60 Barb. 107; Moe *v.* Moe, 2 Thomps. & C. 647.

United States.— Bell *v.* Bell, 181 U. S. 175, 21 S. Ct. 551, 45 L. ed. 804 [*affirming* 157 N. Y. 719, 53 N. E. 1123 (*affirming* 4 N. Y. App. Div. 527, 40 N. Y. Suppl. 443)].

61. Loker *v.* Gerald, 157 Mass. 42, 31 N. E. 709, 34 Am. St. Rep. 252, 16 L. R. A. 497; Burlen *v.* Shannon, 115 Mass. 438.

Jurisdiction of person of non-resident defendant see *infra*, XXI, C, 4.

62. Dunham *v.* Dunham, 162 Ill. 589, 44 N. E. 841, 35 L. R. A. 70; Smith *v.* Smith, 43 La. Ann. 1140, 10 So. 248; Dickinson *v.* Dickinson, 167 Mass. 474, 45 N. E. 1091.

Prospective residence.— The fact that a person desires to become a resident of a foreign state is not sufficient to give its courts jurisdiction to decree him a divorce, where defendant also is a non-resident, although the statutes of that state authorize it.

Indiana.— Hood *v.* State, 56 Ind. 263, 26 Am. Rep. 21.

Kansas.—Litowich *v.* Litowich, 19 Kan. 451, 27 Am. Rep. 145.

Kentucky.— Davis *v.* Com., 13 Bush 318.

Massachusetts.—Hardy *v.* Smith, 136 Mass. 328.

Nebraska.— Smith *v.* Smith, 19 Nebr. 706, 28 N. W. 296.

New York.— People *v.* Smith, 13 Hun 414.

Temporary residence.— Either the husband or the wife must be a *bona fide* resident of the state in which the proceedings are instituted, else a decree of divorce is void. Mere temporary residence will not confer jurisdiction. Gettys *v.* Gettys, 3 Lea (Tenn.) 260, 31 Am. Rep. 637.

63. *Alabama.*—Thompson *v.* State, 28 Ala. 12.

where the cause of divorce is one not recognized by the laws of the state of his domicile.[64] If, however, the spouse leaves the state with no intention of returning, and takes up a permanent residence in a foreign state, he may lawfully acquire a divorce there which will be recognized in the state of his former domicile.[65]

(III) *Length of Residence.* In some states it is required by statute that an injured spouse must reside in the state a certain length of time before he can apply for a divorce.[66] The courts are in conflict, however, as to whether a foreign decree obtained by a *bona fide* resident of the foreign state is invalidated by the fact that his residence there has not continued for the prescribed period.[67]

(IV) *Separate Residence of Wife.* While the matrimonial domicile of the wife is usually that of the husband, yet if he is guilty of misconduct entitling her to a divorce, she may leave him and acquire a new residence in another state.[68] So if the husband deserts the wife and removes to a foreign state, the wife may remain and retain her original domicile.[69]

4. Jurisdiction of Person — a. In General. Although plaintiff may be a resident of the state in which a divorce is sought, yet if the court has not acquired jurisdiction over the person of defendant the decree is void.[70]

b. How Acquired — (I) *In General.* The courts of a foreign state may acquire jurisdiction of the person of defendant either by service of process in any

Illinois.— Dunham *v.* Dunham, 162 Ill. 589, 44 N. E. 841, 35 L. R. A. 70.

Kentucky.— Dunlop *v.* Dunlop, 3 Ky. L. Rep. 20.

Massachusetts.— Hanover *v.* Turner, 14 Mass. 227, 7 Am. Dec. 203.

New Jersey.— Streitwolf *v.* Streitwolf, 58 N. J. Eq. 563, 41 Atl. 876, 43 Atl. 683, 78 Am. St. Rep. 630.

New York.— Cross *v.* Cross, 108 N. Y. 628, 15 N. E. 333; Bell *v.* Bell, 4 N. Y. App. Div. 527, 40 N. Y. Suppl. 443 [*affirmed* in 157 N. Y. 719, 53 N. E. 1123 (*affirmed* in 181 U. S. 177, 21 S. Ct. 551, 45 L. ed. 804)]; Kinnier *v.* Kinnier, 58 Barb. 424; McGown *v.* McGown, 18 Misc. 708, 43 N. Y. Suppl. 745; Mellen *v.* Mellen, 10 Abb. N. Cas. 329; Jackson *v.* Jackson, 1 Johns. 424; Forrest *v.* Forrest, 2 Edm. Sel. Cas. 180.

Tennessee.— Gettys *v.* Gettys, 3 Lea 260, 31 Am. Rep. 637.

64. Dickinson *v.* Dickinson, 167 Mass. 474, 45 N. E. 1091; Cummington *v.* Belchertown, 149 Mass. 223, 21 N. E. 435, 4 L. R. A. 131; Loud *v.* Loud, 129 Mass. 14; Sewall *v.* Sewall, 122 Mass. 156, 23 Am. Rep. 299; Smith *v.* Smith, 13 Gray (Mass.) 209; Chase *v.* Chase, 6 Gray (Mass.) 157; Lyon *v.* Lyon, 2 Gray (Mass.) 367; Clark *v.* Clark, 8 Cush. (Mass.) 385.

Constitutional law.— The full faith and credit clause of the federal constitution is not violated by the refusal of a state court to give effect to a foreign decree of divorce obtained by one who had temporarily left the state for the purpose of obtaining the divorce for a cause which had occurred in the state while the parties resided there and which was not there a ground for divorce. Andrews *v.* Andrews, 188 U. S. 14, 23 S. Ct. 237, 47 L. ed. 366 [*affirming* 176 Mass. 92, 57 N. E. 333].

65. Dunham *v.* Dunham, 162 Ill. 589, 44 N. E. 841, 35 L. R. A. 70; Gregory *v.* Gregory, 76 Me. 535; Loker *v.* Gerald, 157 Mass. 42, 31 N. E. 709, 34 Am. St. Rep. 252, 16 L. R. A. 497, holding that a divorce obtained in another state is valid if plaintiff did not become a resident of the other state for the purpose of procuring the divorce, and the cause of action is one recognized by both states.

66. See *supra*, V, C, 2, d, (III).

67. *In re* James, 99 Cal. 374, 33 Pac. 1122, 37 Am. St. Rep. 60 (holding that a decree of divorce of another state may be impeached on the ground that the court had no jurisdiction by reason of plaintiff's not having been a resident of the state for the period prescribed by statute before bringing the action); Kern *v.* Field, 68 Minn. 317, 71 N. W. 393, 64 Am. St. Rep. 479 (where it was held that a judgment procured by a *bona fide* resident of another state who has not resided there the required length of time, although irregular, is not void, and hence is binding in a collateral suit).

68. Atherton *v.* Atherton, 155 N. Y. 129, 49 N. E. 933, 63 Am. St. Rep. 650, 40 L. R. A. 291; Arrington *v.* Arrington, 102 N. C. 491, 9 S. E. 200.

Genuineness of separate domicile.— The validity of a divorce obtained by the wife in a foreign state, if the husband has maintained his original domicile, will not be recognized, however, without full proof of the *bona fides* of the wife's separate domicile. Smith *v.* Smith, 43 La. Ann. 1140, 10 So. 248.

69. Campbell *v.* Campbell, 90 Hun (N. Y.) 233, 35 N. Y. Suppl. 280, 693; Gebhard *v.* Gebhard, 25 Misc. (N. Y.) 1, 54 N. Y. Suppl. 406; Colvin *v.* Reed, 55 Pa. St. 375.

70. Bailie *v.* Bailie, 30 N. Y. App. Div. 461, 52 N. Y. Suppl. 228; Borden *v.* Fitch, 15 Johns. (N. Y.) 121, 8 Am. Dec. 225; St. Sure *v.* Lindsfelt, 82 Wis. 346, 52 N. W. 308, 33 Am. St. Rep. 50, 19 L. R. A. 515. See also *supra*, XXI, C, 1.

Constitutional law.— The provision of the federal constitution that full faith and credit shall be given to the judicial proceedings of one state in the courts of another does not enable a state to assume jurisdiction of per-

constitutional mode recognized by the statutes of the state[71] or by a general appearance on the part of defendant.[72]

(II) *Constructive Service of Process.* If both parties are domiciled within the state where the action is brought a constructive service of process upon defendant is sufficient to insure the validity of the decree.[73] So a decree of divorce regularly obtained in the courts of one state by a plaintiff residing therein against a non-resident defendant constructively served with process in accordance with the practice in that state and which is valid and effectual there is equally valid in every other state.[74] In some states this rule has been accepted subject to qualifications[75] and in others it has been denied *in toto*.[76] Since, however, the

sons without her boundaries without service of process. Irby *v.* Wilson, 21 N. C. 568.

71. See cases cited *infra*, note 74.

Personal service of process on a non-resident in the state of his residence has been held not to confer jurisdiction on the foreign court. Matter of Kimball, 155 N. Y. 62, 49 N. E. 331; Williams *v.* Williams, 130 N. Y. 193, 29 N. E. 98, 27 Am. St. Rep. 517, 14 L. R. A. 220; Holmes *v.* Holmes, 4 Lans. (N. Y.) 388. See, however, Harding *v.* Alden, 9 Me. 140, 23 Am. Dec. 549.

Substituted service of process on a non-resident has also been held insufficient to confer jurisdiction on the foreign court. O'Dea *v.* O'Dea, 101 N. Y. 23, 4 N. E. 110; Gebhard *v.* Gebhard, 25 Misc. (N. Y.) 1, 54 N. Y. Suppl. 406.

72. See *infra*, XXI, C, 4, b, (IV).

73. Hunt *v.* Hunt, 72 N. Y. 217, 28 Am. Rep. 129; Matter of Denick, 92 Hun (N. Y.) 161, 36 N. Y. Suppl. 518.

74. *Alabama.*— Thompson *v.* Thompson, 91 Ala. 591, 8 So. 419, 11 L. R. A. 443; Thompson *v.* State, 28 Ala. 12.

California.— *In re* James, 99 Cal. 374, 33 Pac. 1122, 37 Am. St. Rep. 60; Newman's Estate, 75 Cal. 213, 16 Pac. 887, 7 Am. St. Rep. 146.

Illinois.— Dunham *v.* Dunham, 162 Ill. 589, 44 N. E. 841, 35 L. R. A. 70; Knowlton *v.* Knowlton, 155 Ill. 158, 39 N. E. 595; Roth *v.* Roth, 104 Ill. 35, 44 Am. Rep. 81.

Indiana.— Wilcox *v.* Wilcox, 10 Ind. 436; Tolen *v.* Tolen, 2 Blackf. 407, 21 Am. Dec. 742.

Iowa.— Van Orsdal *v.* Van Orsdal, 67 Iowa 35, 24 N. W. 579; Wakefield *v.* Ives, 35 Iowa 238.

Kansas.— Roe *v.* Roe, 52 Kan. 724, 35 Pac. 808, 39 Am. St. Rep. 367; Chapman *v.* Chapman, 48 Kan. 636, 29 Pac. 1071.

Kentucky.— Hawkins *v.* Ragsdale, 80 Ky. 353, 44 Am. Rep. 483.

Maine.— Harding *v.* Alden, 9 Me. 140, 23 Am. Dec. 531.

Massachusetts.— Loker *v.* Gerald, 157 Mass. 42, 31 N. E. 709, 34 Am. St. Rep. 252, 16 L. R. A. 497; Blackinton *v.* Blackinton, 141 Mass. 432, 5 N. E. 830, 55 Am. Rep. 484; Burlen *v.* Shannon, 115 Mass. 438; Hood *v.* Hood, 11 Allen 196, 87 Am. Dec. 709.

Minnesota.— Thurston *v.* Thurston, 58 Minn. 279, 59 N. W. 1017.

Mississippi.— Jones *v.* Jones, 67 Miss. 195, 6 So. 712, 19 Am. St. Rep. 299.

Missouri.— Gould *v.* Crow, 57 Mo. 200.

Nebraska.—Eldred *v.* Eldred, 62 Nebr. 613, 87 N. W. 340.

New Hampshire.— Frary *v.* Frary, 10 N. H. 61, 32 Am. Dec. 395.

Ohio.— Doerr *v.* Forsythe, 50 Ohio St. 726, 35 N. E. 1055, 40 Am. St. Rep. 703; McGill *v.* Deming, 44 Ohio St. 645, 11 N. E. 118.

Rhode Island.— Ditson *v.* Ditson, 4 R. I. 87.

Tennessee.— Thoms *v.* King, 95 Tenn. 60, 31 S. W. 983.

Texas.— Jones *v.* Jones, 60 Tex. 451; Trevino *v.* Trevino, 54 Tex. 261; Hare *v.* Hare, 10 Tex. 355.

United States.— Pennoyer *v.* Neff, 95 U. S. 714, 24 L. ed. 565.

75. Smith *v.* Smith, 43 La. Ann. 1140, 10 So. 248 (holding that if defendant has had constructive notice in accordance with the statutes of the state, the divorce will be held valid as to both parties by comity in such states as have adopted the policy of such divorce proceedings by similar legislation); Felt *v.* Felt, 59 N. J. Eq. 606, 45 Atl. 105, 49 Atl. 1071, 83 Am. St. Rep. 612, 47 L. R. A. 546 (holding that interstate comity requires that a decree of divorce pronounced by a court of the state in which complainant is domiciled, and which has jurisdiction of the subject-matter of the suit, shall in the absence of fraud be given effect in a sister state, notwithstanding that defendant does not reside within the jurisdiction of the court which pronounced the decree and has not been served with process therein; provided that a substantial service has been made in accordance with the statutes of that state, and that actual notice of the pendency of the suit has been given to defendant and a reasonable opportunity afforded him to put in a defense; and provided further that the ground upon which the decree rests is one which the public policy of the state in which it is sought to be enforced recognizes as a sufficient cause for divorce).

76. Winston *v.* Winston, 165 N. Y. 553, 59 N. E. 273; McGown *v.* McGown, 164 N. Y. 558, 58 N. E. 1089; Lynde *v.* Lynde, 162 N. Y. 405, 56 N. E. 979, 76 Am. St. Rep. 332, 48 L. R. A. 679; Atherton *v.* Atherton, 155 N. Y. 129, 49 N. E. 933, 63 Am. St. Rep. 650, 40 L. R. A. 291 [*reversed* in 181 U. S. 155, 21 S. Ct. 544, 45 L. ed. 794]; Matter of Kimball, 155 N. Y. 62, 49 N. E. 331; Williams *v.* Williams, 130 N. Y. 193, 29 N. E. 98, 27 Am. St. Rep. 517, 14 L. R. A. 220; De Meli *v.* De Meli, 120 N. Y. 485, 24 N. E.

rule has been announced by the supreme court of the United States and since, under the federal constitution, resort may be had to that court for the purpose of taking advantage of the judgments of the courts of a sister state these qualifications and denials of the rule are of no effect so far as sister-state judgments of divorce are concerned.[77]

(III) *Fraudulent Service of Process.* A foreign decree obtained by fraud affecting the service of process on defendant is void and may be attacked in a collateral proceeding.[78]

(IV) *Appearance.* Jurisdiction of the person of a defendant, whether he resides within the state or not, and whether or not he has been duly served with process, is acquired where he enters a general appearance in the suit.[79]

D. Collateral Attack — 1. In General. A foreign decree of divorce is subject to collateral attack only for fraud or for want of jurisdiction either of the subject-matter or of the parties.[80]

2. Want of Jurisdiction — a. In General. A judgment of divorce rendered in another state may be collaterally attacked by showing that the court was without jurisdiction, either of the subject-matter of the suit or of the person of defendant.[81] Thus the validity of the decree may be overcome by proof that the

996, 17 Am. St. Rep. 652; Cross *v.* Cross, 108 N. Y. 628, 15 N. E. 333; Jones *v.* Jones, 108 N. Y. 415, 15 N. E. 707, 2 Am. St. Rep. 447; O'Dea *v.* O'Dea, 101 N. Y. 23, 4 N. E. 110; People *v.* Baker, 76 N. Y. 78, 32 Am. Rep. 274; Hunt *v.* Hunt, 72 N. Y. 217, 28 Am. Rep. 129; Hoffman *v.* Hoffman, 46 N. Y. 30, 7 Am. Rep. 299; Starbuck *v.* Starbuck, 62 N. Y. App. Div. 437, 71 N. Y. Suppl. 104 [*reversed* on another ground in 173 N. Y. 503, 66 N. E. 193]; Matter of Swales, 60 N. Y. App. Div. 599, 70 N. Y. Suppl. 220; Campbell *v.* Campbell, 90 Hun (N. Y.) 233, 35 N. Y. Suppl. 280, 693; Phelps *v.* Baker, 60 Barb. (N. Y.) 107; McGiffert *v.* McGiffert, 31 Barb. (N. Y.) 69, 17 How. Pr. (N. Y.) 18; Vischer *v.* Vischer, 12 Barb. (N. Y.) 640; Hamilton *v.* Hamilton, 26 Misc. (N. Y.) 336, 56 N. Y. Suppl. 122; Davis *v.* Davis, 2 Misc. (N. Y.) 549, 22 N. Y. Suppl. 191; Matter of House, 20 N. Y. Civ. Proc. 130, 14 N. Y. Suppl. 275; Rundle *v.* Van Inwegan, 9 N. Y. Civ. Proc. 328; People *v.* McCraney, 6 Park. Cr. (N. Y.) 49; Harris *v.* Harris, 115 N. C. 587, 20 S. E. 187, 44 Am. St. Rep. 471; Irby *v.* Wilson, 21 N. C. 568; Zerfass' Appeal, 135 Pa. St. 522, 19 Atl. 1056; Van Storch *v.* Griffin, 71 Pa. St. 240; Reel *v.* Elder, 62 Pa. St. 308, 1 Am. Rep. 414; Colvin *v.* Reed, 55 Pa. St. 375; Com. *v.* Steiger, 2 Pa. Dist. 493, 12 Pa. Co. Ct. 334; Com. *v.* Bolich, 18 Pa. Co. Ct. 401; Board of Charities, etc. *v.* Moore, 6 Pa. Co. Ct. 66; Sheetz *v.* Sheetz, 6 Lanc. L. Rev. 97; Philadelphia *v.* Wetherby, 15 Phila. (Pa.) 403; Love *v.* Love, 10 Phila. (Pa.) 453; Com. *v.* Maize, 23 Wkly. Notes Cas. (Pa.) 572; Cook *v.* Cook, 56 Wis. 195, 14 N. W. 33, 443, 43 Am. Rep. 706. See also Moe *v.* Moe, 2 Thomps. & C. (N. Y.) 647; Platt's Appeal, 80 Pa. St. 501 (holding that where the cause of divorce did not arise within the state, and the parties had not lived together therein, although plaintiff had resided there nearly two years, and defendant was served with process by publication only and did not appear, the divorce was not binding in another state); Heins' Estate, 22 Pa. Super. Ct. 31; McCreery *v.* Davis, 44 S. C. 195, 22 S. E. 178, 51 Am. St. Rep. 794, 28 L. R. A. 655.

77. Bell *v.* Bell, 181 U. S. 175, 21 S. Ct. 551, 45 L. ed. 804; Atherton *v.* Atherton, 181 U. S. 155, 21 S. Ct. 544, 45 L. ed. 794 [*reversing* 155 N. Y. 129, 49 N. E. 933, 63 Am. St. Rep. 650, 40 L. R. A. 291].

78. Strait *v.* Strait, 3 MacArthur (D. C.) 415; Reed *v.* Reed, 52 Mich. 117, 17 N. W. 720, 50 Am. Rep. 247; Flower *v.* Flower, 42 N. J. Eq. 152, 7 Atl. 669; Doughty *v.* Doughty, 28 N. J. Eq. 581; Stanton *v.* Crosby, 9 Hun (N. Y.) 370; Vischer *v.* Vischer, 12 Barb. (N. Y.) 640; Matter of Baker, 2 Redf. Surr. (N. Y.) 179.

79. Lynde *v.* Lynde, 162 N. Y. 405, 56 N. E. 979, 76 Am. St. Rep. 332, 48 L. R. A. 679; Bailie *v.* Bailie, 30 N. Y. App. Div. 461, 52 N. Y. Suppl. 228 (*semble*); Arrington *v.* Arrington, 102 N. C. 491, 9 S. E. 200; St. Sure *v.* Lindsfelt, 82 Wis. 346, 52 N. W. 308, 33 Am. St. Rep. 50, 19 L. R. A. 515 (*semble*).

80. Hunt *v.* Hunt, 72 N. Y. 217, 28 Am. Rep. 129, holding that the decree cannot be attacked because plaintiff therein failed to make out a cause for divorce as prescribed by the laws of the state.

81. Atherton *v.* Atherton, 155 N. Y. 129, 49 N. E. 933, 63 Am. St. Rep. 650, 40 L. R. A. 291; Hunt *v.* Hunt, 72 N. Y. 217, 28 Am. Rep. 129; Morgan *v.* Morgan, 1 Tex. Civ. App. 315, 21 S. W. 154. See also State *v.* Giroux, 19 Mont. 149, 47 Pac. 798.

Constitutional law.—U. S. Const. art. 4, § 1, providing that full faith and credit shall be given in each state to the judicial proceedings of every other state, and the act of congress (1 St. 122) providing that records and proceedings thereof, properly authenticated, shall have such faith and credit given them in every court in the United States as they have in the state whence they may be taken, does not prevent an inquiry into the jurisdiction of the court rendering such judgment. People *v.* Dawell, 25 Mich. 247, 12 Am. Rep. 260; Hoffman *v.* Hoffman, 46 N. Y. 30, 7 Am.

parties were not domiciled within the territorial jurisdiction of the foreign court.[82]

b. Conclusiveness of Recitals of Decree. Recitals of the existence of jurisdictional facts in the foreign decree or findings of the foreign court are not conclusive on the domestic courts and may be contradicted in a collateral attack on the decree.[83]

c. Presumption of Jurisdiction. In the absence of evidence to the contrary, it is ordinarily presumed that a foreign court which has assumed to grant a divorce is authorized to do so by the statutes of the state of whose government it forms a part.[84] It has been held, however, that there is no presumption of jurisdiction where it does not appear by the foreign record that either of the parties was domiciled within the state,[85] and that defendant was legally served or voluntarily appeared.[86]

3. Fraud. A foreign decree may be collaterally impeached for fraud.[87]

Rep. 299; McCreery *v.* Davis, 44 S. C. 195, 22 S. E. 178, 51 Am. St. Rep. 794, 28 L. R. A. 655.

Evidence.— If the foreign decree does not affirmatively show that the court had jurisdiction, evidence is admissible to show that it did not. State *v.* Fleak, 54 Iowa 429, 6 N. W. 689; Litowich *v.* Litowich, 19 Kan. 451, 27 Am. Rep. 145.

82. *Iowa.*— Neff *v.* Beauchamp, 74 Iowa 92, 36 N. W. 905; State *v.* Fleak, 54 Iowa 429, 6 N. W. 689.

Massachusetts.— Shannon *v.* Shannon, 4 Allen 134.

Michigan.— People *v.* Dawell, 25 Mich. 247, 12 Am. Rep. 260.

Missouri.— Anthony *v.* Rice, 110 Mo. 223, 19 S. W. 423.

New York.— Kerr *v.* Kerr, 41 N. Y. 272; Munson *v.* Munson, 60 Hun 189, 14 N. Y. Suppl. 692; Bradshaw *v.* Heath, 13 Wend. 407.

See 17 Cent. Dig. tit. "Divorce," § 832.

Residence of plaintiff.— A foreign divorce may be attacked by showing that it was granted to a non-resident plaintiff. Dunham *v.* Dunham, 162 Ill. 589, 44 N. E. 841, 35 L. R. A. 70; Smith *v.* Smith, 43 La. Ann. 1140, 10 So. 248; Gregory *v.* Gregory, 78 Me. 187, 3 Atl. 280, 57 Am. Rep. 792; Leith *v.* Leith, 39 N. H. 20. *Contra*, Waldo *v.* Waldo, 52 Mich. 91, 94, 17 N. W. 709, 710; Magowan *v.* Magowan, 57 N. J. Eq. 322, 42 Atl. 330, 73 Am. St. Rep. 645; Kinnier *v.* Kinnier, 45 N. Y. 535, 6 Am. Rep. 132.

83. Sewall *v.* Sewall, 122 Mass. 156, 23 Am. Rep. 299.

Constitutional law.— Neither U. S. Const. art. 4, § 1, nor the act of congress passed in pursuance thereof, prevents an inquiry into the jurisdiction of the court of another state in which a judgment offered in evidence was rendered, and the judgment may be contradicted as to the facts necessary to give the court jurisdiction, even though the record recites that they did exist. Kerr *v.* Kerr, 41 N. Y. 272; Com. *v.* Bolich, 18 Pa. Co. Ct. 401.

A recital of appearance on the part of defendant may be disproved. Kerr *v.* Kerr, 41 N. Y. 272; Dormitzer *v.* German Sav., etc., Soc., 23 Wash. 132, 62 Pac. 862.

Residence.— A recital or a finding as to the residence of the parties may be contradicted.

Maine.— Gregory *v.* Gregory, 78 Me. 187, 3 Atl. 280, 57 Am. Rep. 792.

Michigan.— People *v.* Dawell, 25 Mich. 247, 12 Am. Rep. 260.

Minnesota.— Thelen *v.* Thelen, 75 Minn. 433, 78 N. W. 108.

New York.— Cross *v.* Cross, 108 N. Y. 628, 15 N. E. 333.

United States.— Cheever *v.* Wilson, 9 Wall. 108, 19 L. ed. 604, *quære*.

84. Thompson *v.* Thompson, 91 Ala. 591, 8 So. 419, 11 L. R. A. 443; Rendleman *v.* Rendleman, 118 Ill. 257, 8 N. E. 773; Hunt *v.* Hunt, 72 N. Y. 217, 28 Am. Rep. 129; James *v.* James, 81 Tex. 373, 16 S. W. 1087. However, the courts will not presume the existence in a foreign state of a law authorizing a divorce upon the ground of the husband's conviction of an offense without notice or hearing and two years after he and his wife had left the country and become citizens of another state. St. Sure *v.* Lindsfelt, 82 Wis. 346, 52 N. W. 308, 33 Am. St. Rep. 50, 19 L. R. A. 515.

Judicial notice.— Under U. S. Const. art. 4, § 1, requiring each state to give full faith and credit to the judicial proceedings of the courts of another state, judicial notice will be taken of the laws conferring jurisdiction on the court of a sister state which has granted a divorce. Dormitzer *v.* German Sav., etc., Soc., 23 Wash. 132, 62 Pac. 862.

85. State *v.* Armington, 25 Minn. 29.

86. Com. *v.* Blood, 97 Mass. 538. See also Northcut *v.* Lemery, 8 Oreg. 316, holding that where a court of general jurisdiction exercises a special power conferred upon it by statute, and not according to the course of the common law, it must strictly comply with the requirements of the statute, and this compliance must affirmatively appear from the record itself. See, however, Hilbish *v.* Hattle, 145 Ind. 59, 44 N. E. 20, 33 L. R. A. 783.

87. Dunham *v.* Dunham, 162 Ill. 589, 44 N. E. 841, 35 L. R. A. 70; People *v.* Darnell, 25 Mich. 247, 12 Am. Rep. 260; Magowan *v.* Magowan, 57 N. J. Eq. 322, 42 Atl. 330, 73 Am. St. Rep. 645; Hunt *v.* Hunt, 72 N. Y. 217, 28 Am. Rep. 129 (holding, however, that the

E. Estoppel Against Attack — 1. By Judgment Refusing to Vacate Decree. An attempt by defendant, made in a court of the state where the decree was granted, to set it aside, which was defeated upon technical grounds solely, does not preclude him from impeaching it in the state of his residence on the ground that neither he nor plaintiff was a resident of the state wherein it was granted.[88]

2. By Pleading. An allegation in a pleading that the judgment of another state is void by the laws of the state in which it is brought into question is a statement of a conclusion of law and is not admitted by a demurrer to the pleading.[89]

3. Right of Prevailing Party to Attack Decree. A party who has obtained a foreign divorce cannot thereafter be heard to impeach the decree or deny its validity.[90]

DIVORTIUM DICITUR A DIVERTENDO, QUIA VIR DIVERTITUR AB UXORE. Literally, "Divorce is called from *divertendo*, because a man is diverted from his wife." [1]

DIXIE LAND. A term which has been applied to those states which maintained slavery.[2]

DO. In English, to perform.[3] In Latin, literally, "I give." The ancient and aptest word of feoffment and of gift.[4]

DO AND PERFORM. To submit to, to stand to, or to abide.[5]

DOCK. As a noun, generally, a place for vessels, either excavated from the land, or surrounded by wharves;[6] a place for building, repairing, or laying up

fact that a party not competent as a witness under the laws of the state was permitted to testify in his own behalf is not a fraud, nor does it affect the jurisdiction, and so does not afford a reason for questioning the judgment collaterally); Kinnier *v.* Kinnier, 45 N. Y. 535, 6 Am. Rep. 132. See, however, Hood *v.* Hood, 11 Allen (Mass.) 196, 87 Am. Dec. 709; Kirrigan *v.* Kirrigan, 15 N. J. Eq. 146; Ruger *v.* Heckel, 21 Hun (N. Y.) 489 [*affirmed* in 85 N. Y. 483]; Davis *v.* Davis, 2 Misc. (N. Y.) 549, 22 N. Y. Suppl. 191; Thoms *v.* King, 95 Tenn. 60, 31 S. W. 983 (holding that it is not fraud for one whose bill for divorce was voluntarily dismissed by him before the joinder of issue in a court in one state to obtain a decree for divorce in another state without informing the court of the dismissal).

Constitutional law.— U. S. Const. art. 4, § 1, requiring a state to give full credit to the records of sister states, does not prevent the record of a decree granted in a sister state from being impeached for fraud. Dormitzer *v.* German Sav., etc., Soc., 23 Wash. 132, 62 Pac. 862.

Fraud as to service of process see *supra*, XXI, C, 4, b, (III).

88. Hoffman *v.* Hoffman, 46 N. Y. 30, 7 Am. Rep. 299.

89. Kinnier *v.* Kinnier, 45 N. Y. 535, 6 Am. Rep. 132.

90. Elliott *v.* Wohlfrom, 55 Cal. 384; Holmes *v.* Holmes, 8 Abb. Pr. N. S. (N. Y.) 1; Richardson's Estate, 132 Pa. St. 292, 19 Atl. 82. See, however, Holmes *v.* Holmes, 4 Lans. (N. Y.) 388.

This principle has been applied where a wife residing in one state obtains a divorce in another for a cause which is not recognized by the laws of the state in which she resided, upon a service of process by publication, and where after the death of her former husband she petitions for letters of administration upon his estate, claiming to be his widow. Matter of Swales, 60 N. Y. App. Div. 599, 70 N. Y. Suppl. 220 [*affirmed* in 172 N. Y. 651, 65 N. E. 1122]. The principle will also preclude a widow who has obtained such a divorce from recovering dower in the real property of her former husband. Starbuck *v.* Starbuck, 173 N. Y. 503, 66 N. E. 193, 93 Am. St. Rep. 631 [*reversing* 62 N. Y. App. Div. 437, 71 N. Y. Suppl. 104]. Nor can the administrators of a divorced husband be heard to allege the nullity of a judgment in an *ex parte* divorce action in favor of the husband, because of want of jurisdiction over the wife's person. Matter of Morrison, 52 Hun (N. Y.) 102, 5 N. Y. Suppl. 90.

1. Black L. Dict. [*citing* Coke Litt. 235].

2. U. S. *v.* The William Arthur, 28 Fed. Cas. No. 16,702, 3 Ware 276.

3. Webster Int. Dict.

"Do" either a particular act or an act to be appointed by a third person see Studholme *v.* Mandell, 1 Ld. Raym. 279, 280.

"Do or cause to be done" as used in a lease see Doe *v.* Stevens, 3 B. & Ad. 299, 302, 1 L. J. K. B. O. S. 101, 23 E. C. L. 137.

4. Burrill L. Dict. [*citing* 2 Blackstone Comm. 310, 316; Coke Litt. 9].

"Do and dedi" used in deeds of feoffment see 11 Cyc. 1046.

5. Hewins *v.* Currier, 62 Me. 236, 239, as used in a bail-bond.

6. Bingham *v.* Doane, 9 Ohio 165, 167, distinguishing "wharf" from "dock."

ships, or where ships are loaded or unloaded;[7] the space between wharves;[8] a space between two contiguous wharves;[9] in criminal courts, an inclosed space commonly appropriated to an accused person during trial.[10] As a verb, to clip, cut off a part: to diminish.[11] (See, generally, NAVIGABLE WATERS; WHARVES.)

DOCKAGE.[12] The pecuniary compensation, for the use of a dock, while a vessel is undergoing repairs;[13] the charge against vessels for the privilege of mooring to the wharves or in the slips;[14] wharfage;[15] a charge for the use of a wharf or dock;[16] compensation in the nature of rent.[17] (See, generally, WHARVES.)

DOCKET.[18] As a noun, in its primary sense, a formal record of judicial proceedings;[19] in its secondary meaning, a brief writing, on a small piece of paper or parchment, containing the substance of a larger writing;[20] an ABSTRACT, *q. v.*, an EPITOME,[21] *q. v.*; also a brief writing or statement of a judgment made from the record or roll, generally kept in books alphabetically arranged;[22] a DOCKET-BOOK,[23] *q. v.*; in practice, a list prepared by the clerk of cases ready for trial.[24] As a verb, to abstract and enter in a book; to enter in a book called a docket.[25] (Docket: Entry — As Part of Record, see APPEAL AND ERROR; Record of Appearance, see APPEARANCES. Fee, see COSTS. Of Civil Cause — For Trial, see TRIAL; On Appeal, see APPEAL AND ERROR. Of Criminal Cause, see CRIMINAL LAW. Of Judgment, see JUDGMENTS. Of Justice, see JUSTICES OF THE PEACE.)

DOCKET-BOOK. A record prescribed by the statute for the express purpose, among other things, of receiving the entry of the judgment.[26]

DOCKETED JUDGMENT. A lien on all the real property of the debtor in the county or counties in which it is docketed.[27] (See, generally, JUDGMENTS.)

DOCKET-FEE. In practice, a lump sum allowed to attorneys for all their fees in a case, except, alone, the disposition fee;[28] also a fee that is charged "of course."[29]

DOCK PRIVILEGES FOR UNLOADING. These words necessarily include the use of the perpendicular side of the dock as a berth for the vessel, as much as the use of the horizontal surface where her cargo is deposited.[30]

7. Worcester Dict. [*quoted* in Snow *v.* Morton, 8 Nova Scotia 237, 246].

8. Boston *v.* Lacraw, 17 How. (U. S.) 426, 434, 15 L. ed. 118.

9. Worcester Dict. [*quoted* in Snow *v.* Morton, 8 Nova Scotia 237, 246].

10. Abbott L. Dict.

11. Anderson L. Dict.

12. That contracts for dockage are of a maritime character and of admiralty jurisdiction see 1 Cyc. 830.

13. Ives *v.* The Buckeye State, 13 Fed. Cas. No. 7,117, 1 Newb. Adm. 69.

14. People *v.* Roberts, 92 Cal. 659, 664, 28 Pac. 689, as used in Cal. Pol. Code, § 2524, and distinguishing "wharfage" from "dockage."

15. People *v.* Roberts, 92 Cal. 659, 664, 28 Pac. 689; Empire Warehouse Co. *v.* The Brooklyn, 46 Fed. 132, 133.

16. Empire Warehouse Co. *v.* The Brooklyn, 46 Fed. 132, 133 [*citing* The George E. Berry, 25 Fed. 780], where it is said: "It may accrue from the use of the dock in mooring for the purposes of protection and safety only. But in this port such a charge is ordinarily for the purpose of loading or unloading cargo on the dock, and that includes necessarily a berth for the vessel, and a place of deposit for the cargo."

17. Ives *v.* The Buckeye State, 13 Fed. Cas. No. 7,117, 1 Newb. Adm. 69.

18. Assignment to dead docket see 8 Cyc. 924 note 72.

"Docketing" and "filing" are not convertible terms. Bird *v.* Gilliam, 123 N. C. 63, 64, 31 S. E. 267.

19. Bouvier L. Dict. [*cited* in Harrison *v.* Southern Porcelain Mfg. Co., 10 S. C. 278, 297].

20. Bouvier L. Dict. [*quoted* in Harrison *v.* Southern Porcelain Mfg. Co., 10 S. C. 278, 297].

21. Anderson L. Dict.

22. Stevenson *v.* Weisser, 1 Bradf. Surr. (N. Y.) 343, 344 [*citing* Bouvier L. Dict.; Graham Pr. 341; Tomlins L. Dict.].

23. Beuerlein *v.* Hodges, 10 N. Y. Suppl. 505, 506.

24. "And a case may be pending, and not on the docket." Bennett *v.* Bell, 46 S. W. 4, 701, 20 Ky. L. Rep. 308.

25. Anderson L. Dict.

26. Beuerlein *v.* Hodges, 10 N. Y. Suppl. 505, 506.

27. Dixon *v.* Dixon, 81 N. C. 323, 326; Hoskins *v.* Wall, 77 N. C. 249, 250, under a statute.

28. Goodyear *v.* Sawer, 17 Fed. 2, 7, where it is said: "And the use of that word indicates that it is not allowed for the work of going through a 'final hearing,' but for all the service in a case."

29. "As, for instance, for docketing a case or a judgment." Helena First Nat. Bank *v.* Neill, 13 Mont. 377, 381, 34 Pac. 180.

30. Empire Warehouse Co. *v.* The Brooklyn, 46 Fed. 132, 133.

DOCTOR. See PHYSICIANS AND SURGEONS.

DOCTOR AND STUDENT. The title of a work written by St. Germain in the reign of Henry VIII. in which many principles of the common law are discussed in a popular manner.[31]

DOCTORS' COMMONS. An institution near St. Paul's Churchyard, in London, where, for a long time previous to 1857, the ecclesiastical and admiralty courts used to be held.[32]

DOCTRINAL INTERPRETATION OF LAWS. In Spanish jurisprudence, the opinions given by jurisconsults and other persons versed in the law.[33]

DOCTRINE OF RES ADJUDICATA.[34] A doctrine which means that if an action be brought, and the merits of the question be discussed between the parties, and a final judgment be obtained by either party, the parties are concluded, and cannot again canvass the same question in another action.[35] (See, generally, ESTOPPEL; JUDGMENTS.)

DOCUMENT. That which conveys information; that which furnishes evidence, or proof; a written or printed instrument;[36] an instrument upon which is recorded, by means of letters, figures, or marks, matter which may evidentially be used;[37] any substance having any matter expressed and described upon it by marks capable of being read;[38] any matter expressed or described upon any substance by means of letters, figures, or marks, or by more than one of these means, intended to be used, or which may be used, for the purpose of recording that matter;[39] anything bearing a legible or significant inscription or legend; any-

31. Black L. Dict.

32. Black L. Dict.

33. Houston *v.* Robertson, 2 Tex. 1, 26 [*citing* Diccionario de Legislacion, p. 316].

34. "Or estoppel by judgment, as it is sometimes less accurately termed, is a rule of law founded on the soundest consideration of public policy." Wisconsin *v.* Torinus, 28 Minn. 175, 179, 9 N. W. 725.

"It is founded upon two maxims of the law, one of which is that 'a man should not be twice vexed for the same cause,' the other that 'it is for the public good that there be an end of litigation;' and it is undoubtedly true that if there be any one principle of law settled, it is that whenever a cause of action, in the language of the law, '*transit in rem adjudicatam*,' and the judgment thereupon remains in full force and unreversed, the original cause of action is merged and gone forever. After judgment on the merits a party cannot afterwards litigate the same question in another action, although some argument might have been urged on the first trial that would have led to a different result." Wisconsin *v.* Torinus, 28 Minn. 175, 179, 9 N. W. 725.

35. Wisconsin *v.* Torinus, 28 Minn. 175, 179, 9 N. W. 725.

36. Anderson L. Dict. [*quoted* in Patterson *v.* Churchman, 122 Ind. 379, 388, 22 N. E. 662, 23 N. E. 1082].

37. 1 Wharton Ev. § 614 [*quoted* in Arnold *v.* Pawtuxet Valley Water Co., 18 R. I. 189, 193, 26 Atl. 55, 19 L. R. A. 602; Johnson Steel Street-Rail Co. *v.* North Branch Steel Co., 48 Fed. 191, 194, in which case it is said: "In this sense the term applies to writings; to words printed, lithographed, or photographed; to seals, plates, or stones on which inscriptions are cut or engraved; to photographs and pictures; to maps and plans. So far as concerns admissibility, it makes no difference what is the thing on which the words or signs offered may be recorded. They may be on stones, or gems, or on wood, as well as on paper or parchment"].

38. Stephen Dig. L. of Ev. art. 1 [*quoted* in Hayden *v.* Van Cortlandt, 84 Hun (N. Y.) 150, 151, 32 N. Y. Suppl. 507; Fox *v.* Sleeman, 17 Ont. Pr. 492, 494].

39. Stephen Ev. 23 [*quoted* in Arnold *v.* Pawtuxet Valley Water Co., 18 R. I. 189, 193, 26 Atl. 55, 19 L. R. A. 602; Fox *v.* Sleeman, 17 Ont. Pr. 492, 494, in which case it is said: "This definition was criticized by a reviewer in the Solicitors' Journal of 2d September, 1876, vol. 20, at p. 858, and the following suggested as a substitute for it: 'Document' means any substance having any matter expressed or described upon it by means of letters, or figures, or marks, or by more than one of those means'"].

The word is "of very comprehensive signification." It may embrace a photograph (Fox *v.* Sleeman, 17 Ont. Pr. 492, 494); a record book of a corporation (Arnold *v.* Pawtuxet Valley Water Co., 18 R. I. 189, 195, 26 Atl. 55, 19 L. R. A. 602 [*cited* in Clark *v.* Rhode Island Locomotive Works, 24 R. I. 307, 310, 53 Atl. 47); a ring, a banner, a musical composition, or a tattooed savage (Chamberlayne Best Ev. [*quoted* in Hayden *v.* Van Cortlandt, 84 Hun (N. Y.) 150, 151, 32 N. Y. Suppl. 507]); a terminal tree (Hayden *v.* Van Cortlandt, 84 Hun (N. Y.) 150, 151, 32 N. Y. Suppl. 507); "wooden scores on which bakers, milkmen, etc., indicate by notches, the number of loaves of bread or quarts of milk supplied to their customers; the old exchequer tallies, and such like" (Best Ev. (8th ed.) 215 [*quoted* in Fox *v.* Sleeman, 17 Ont. Pr. 492, 494].

That memorandum books are not included within the term "documents" as used in a

thing that may be read or communicating an idea (including thus a tombstone, a seal, a coin, a signboard, etc., as well as paper writings);[40] all material substances on which the thoughts of men are represented by writing or any other species of conventional mark or symbol.[41] (Document: As Evidence — In Civil Action, see EVIDENCE; In Criminal Prosecution, see CRIMINAL LAW. Incorporating Document — In Bill of Exceptions, see APPEAL AND ERROR; CRIMINAL LAW; In Record of Appeal, see APPEAL AND ERROR. Production and Inspection of — Before Trial, see DISCOVERY; For Use on Trial, see EVIDENCE. Summary Proceedings For Possession of Documents of Public Office, see OFFICERS. Use by Witness to Explain Testimony, see WITNESSES.)

DOCUMENTARY. Pertaining to what is written; consisting of one or more documents.[42]

DOCUMENTARY EVIDENCE. See EVIDENCE.

DOES BUSINESS. Words equivalent in meaning to and expressive of the same thought as DOING BUSINESS,[43] *q. v.*

DOG. A domestic animal;[44] a well known domestic animal,[45] of the genus *canis*.[47] As defined by statute, the term embraces all animals of the canine species, both male and female.[47] (Dog:[48] Taxation of, see TAXATION. Transportation of, see CARRIERS. See, generally, ANIMALS.)

DOGGER. A light ship or vessel.[49] Also a term given to men who stand opposite a log as it is being sawed up, and kick off with their feet, and onto the rollers, slabs from the logs as they are cut.[50]

DOG-LATIN. The Latin of illiterate persons; Latin words put together on the English grammatical system.[51]

DO GRANT. In conveyancing, words which import a present, actual transfer.[52] (See CONVEY; CONVEYANCE; and, generally, DEEDS.)

DOING BUSINESS.[53] Any transaction with persons or any transaction concerning any property situated in the state through any agency whatever acting for it within the state;[54] DOING BUSINESS,[55] *q. v.* (See FOREIGN CORPORATIONS; INSURANCE; RAILROADS.)

DOLLAR.[56] The term is used in two distinct senses, both as the name of a

bill of lading see The St. Cuthbert, 97 Fed. 340, 342.

40. Century Dict. [*quoted* in Hayden *v.* Van Cortlandt, 84 Hun (N. Y.) 150, 151, 32 N. Y. Suppl. 507].

41. Best Ev. (8th ed.) § 25 [*quoted* in Fox *v.* Sleeman, 17 Ont. Pr. 492, 494]; Rice Ev. p. 185, § 125 [*quoted* in Hayden *v.* Van Cortlandt, 84 Hun (N. Y.) 150, 151, 32 N. Y. Suppl. 507].

42. Anderson L. Dict. [*quoted* in Patterson *v.* Churchman, 122 Ind. 379, 388, 22 N. E. 662, 23 N. E. 1082].

43. Sullivan *v.* Sullivan Timber Co., 103 Ala. 371, 378, 15 So. 941, 25 L. R. A. 543.

44. State *v.* Harriman, 75 Me. 562, 566, 46 Am. Rep. 423, dissenting opinion. See also 2 Cyc. 305, 429.

45. Bouvier L. Dict. [*quoted* in State *v.* Sumner, 2 Ind. 377, 378]; Johnson Dict. [*quoted* in State *v.* Harriman, 75 Me. 562, 566, 46 Am. Rep. 423, dissenting opinion].

46. Worcester Dict. [*quoted* in State *v.* Harriman, 75 Me. 562, 566, 46 Am. Rep. 423, dissenting opinion].

"In the encyclopedia he [a dog] is canis familiaris, and called a domestic animal." State *v.* Harriman, 75 Me. 562, 566, 46 Am. Rep. 423, dissenting opinion. But see Wilson *v.* Wilmington, etc., R. Co., 10 Rich. (S. C.) 52 [*quoted* in Patton *v.* State, 93 Ga. 111, 113, 19 S. E. 734, 24 L. R. A. 732].

47. Mo. Rev. St. (1899) § 6977.

48. Bequest for maintenance of horses and dogs see 6 Cyc. note 84.

49. Wharton L. Lex.

50. Rucks *v.* Minden Lumber Co., 109 La. 933, 935, 33 So. 926.

51. Black L. Dict.

52. Lauck *v.* Logan, 45 W. Va. 251, 255, 31 S. E. 986.

53. "The phrase . . . is to be interpreted with regard to something more than the mere linguistic signification of the words used to the ordinary ear." Cæsar *v.* Capell, 83 Fed. 403, 422.

"Doing and continuing to do business," means "continuing to supply goods." Colbourn *v.* Dawson, 10 C. B. 765, 774, 15 Jur. 680, 20 L. J. C. P. 154, 70 E. C. L. 765.

54. Romaine *v.* Union Ins. Co., 55 Fed. 751, 754, as defined under Tenn. Acts (1887), c. 226, p. 386.

55. Sullivan *v.* Sullivan Timber Co., 10 Ala. 371, 378, 15 So. 941, 25 L. R. A. 543.

Doing business of twenty-five thousand dollars per year, within the meaning of a revenue act, see Johnson *v.* Armour, 31 Fla. 413, 421, 12 So. 842.

56. The arbitrary sign or mark "$" in connection with figures is commonly used as an abbreviation of or to represent the term "dollar" or "dollars." Jackson *v.* Cum-

coin[57] and as an expression of value.[58] As the name of a coin, it may mean a gold coin;[59] one of the gold coins of the United States, which at the standard weight of twenty-five and eight-tenths grains shall be the unit of value;[60] a silver coin;[61] one of the silver coins of the United States.[62] As an expression or measure of value, it is a unit of our currency;[63] the legal money unit of this country, made so by the laws of the United States;[64] one hundred cents of the legal currency of the nation;[65] one hundred cents, no more, no less, whether it is silver, gold, or paper;[66] a certain quantity in weight and fineness of gold or silver, authenticated as such by the stamp of the government.[67] (See CURRENCY; CURRENT FUNDS; DOLLARS; DOLLARS AND CENTS; and, generally, BANKS AND BANKING; COMMERCIAL PAPER; COUNTERFEITING.)

DOLLARS. Coined dollars;[68] gold dollars;[69] gold or silver dollars.[70] As a word of description, it may be used to denote a number of cents or dimes as well

mings, 15 Ill. 449, 453; Hunt *v.* Smith, 9 Kan. 137, 153; Clark *v.* Stoughton, 18 Vt. 50, 52, 44 Am. Dec. 361; Webster Dict. [*quoted* in Hall *v.* King, 29 Ind. 205, 206]. See also 8 Cyc. 138 note 70; 1 Cyc. 138 note 13.

**Origin and meaning of the sign "$."**—In an article entitled "Arbitrary signs," under "Monetary and Commercial," the sign "$" is described thus: "'$' dollar or dollars, as $1, $200; and in a note it is said, 'the origin of the sign $ has been variously accounted for, but it is probably a modified figure 8, denoting a 'piece of eight,' i. e. eight reals, an old Spanish coin of the value of a dollar." Webster Dict. [*quoted* in Hall *v.* King, 29 Ind. 205, 206]. In Goodall *v.* Harrison, 2 Mo. 153, 154, the court hold that the mark "$" for dollar is not a character known to the English language as a character to express a word or a part of a word. They put the decision upon a statute requiring proceedings in court to be in the English tongue only, and "in words at length and not abbreviated, except such abbreviations as are now commonly used in the English language." But the latter case was criticized in Jackson *v.* Cummings, 15 Ill. 449, 452, where it is said: "We can not follow the precedent of the Missouri court. I do not know the date of the Missouri statute, nor of the adoption of the mark '$' as an abbreviation of 'dollar' into common use in business transactions. On entering into business I found it domiciliated into the family of English abbreviations for the word 'dollar,' and never heard its claims questioned until now, nor its signification applied to any other word. . . . Doubtless this court would have sustained the indorsed credit '50' on the note, in Gilpatrick *v.* Foster, 12 Ill. 355, 357, as a credit for fifty dollars, had the mark '$' been a prefix."

Compared with the definition of "pound" as given by Sir Robert Peel see Borie *v.* Trott, 5 Phila. (Pa.) 366, 403.

57. Howes *v.* Austin, 35 Ill. 396, 397; State *v.* Barr, 61 N. J. L. 131, 132, 38 Atl. 817; State *v.* Stimson, 24 N. J. L. 9, 27; Woodfin *v.* Sluder, 61 N. C. 200, 203.

A coin coined at the mint of the United States is not necessarily meant by the use of the word "dollar." Com. *v.* Stearns, 10 Metc. (Mass.) 256, 257.

"A Mexican dollar is not the less a dollar, nor is it inappropriately described as a dollar." Com. *v.* Stearns, 10 Metc. (Mass.) 256, 257.

The "dollar" in a United States note has been held to mean the coined dollar of the United States. New York *v.* New York County, 7 Wall. (U. S.) 26, 30, 19 L. ed. 60.

58. Leonard *v.* State, 115 Ala. 80, 82, 22 So. 564; Wilcoxen *v.* Reynolds, 46 Ala. 529, 532; State *v.* Barr, 61 N. J. L. 131, 132, 38 Atl. 817; State *v.* Stimson, 24 N. J. L. 9, 27; Borie *v.* Trott, 5 Phila. (Pa.) 366, 403; Austin *v.* Kinsman, 13 Rich. Eq. (S. C.) 259, 262 [*citing* Hockin *v.* Cooke, 4 T. R. 314]. See also Omohundro *v.* Crump, 18 Gratt. (Va.) 703, 705 [*quoted* in Hansbrough *v.* Utz, 75 Va. 959, 962].

59. Borie *v.* Trott, 5 Phila. (Pa.) 366. 403. See also McKane *v.* State, 11 Ind. 195, 196; Bronson *v.* Rodes, 7 Wall. (U. S.) 229, 250, 19 L. ed. 141.

60. U. S. Rev. St. (1878) § 3511 [U. S. Comp. St. (1901) p. 2343].

61. Borie *v.* Trott, 5 Phila. (Pa.) 366, 403; Austin *v.* Kinsman, 13 Rich. Eq. (S. C.) 259, 262; Bronson *v.* Rodes, 7 Wall. (U. S.) 229, 250, 19 L. ed. 141.

62. U. S. Rev. St. (1878) § 3513 [U. S. Comp. St. (1901) p. 2345].

63. U. S. *v.* Van Auken, 96 U. S. 366, 368, 24 L. ed. 852.

64. Hunt *v.* Smith, 9 Kan. 137, 153. And see State *v.* Downs, 148 Ind. 324, 327, 47 N. E. 670; Knox *v.* Lee, 12 Wall. (U. S.) 457, 623, 20 L. ed. 287, dissenting opinion.

65. Wilcoxen *v.* Reynolds, 46 Ala. 529, 532.

66. Wilson *v.* Morgan, 4 Rob. (N. Y.) 58, 70.

67. New York *v.* New York County, 7 Wall. (U. S.) 26, 30, 19 L. ed. 60.

68. Ransford *v.* Marvin, 8 Abb. Pr. N. S. (N. Y.) 432, 436.

69. Bierne *v.* Brown, 10 W. Va. 748, 758, where it is said: "This word would be interpreted to mean 'gold dollars,' if the contract was made in this country; but if made in a foreign country, it would mean the dollar of that country."

70. State Bank *v.* Crease, 6 Ark. 292, 295, applied to salaries of certain officers fixed by the legislature.

as dollars;[71] coin;[72] lawful[73] or legal currency of the United States;[74] money[75] of the United States;[76] CURRENT MONEY,[77] *q. v.*; legal[78] money of the United States;[79] money recognized and established in the express power vested in congress to coin money, regulate the value thereof and of foreign coin;[80] specie currency;[81] specie or legal tender notes of the United States.[82] The common abbreviation is "$,"[83] and common abbreviations are "dols."[84] and "dolls."[85] (See DOLLAR; DOLLARS AND CENTS.)

DOLLARS AND CENTS.[86] The common definition is, the unit of money by which values of commodities are measured.[87] The legal meaning is, specie, that is gold and silver, or whatever thing or article or paper the laws of the United States [declare] to be a legal tender.[88] (See DOLLAR; DOLLARS.)

DOLO FACIT QUI PETIT QUOD REDDITURUS EST. A maxim meaning "He acts with guile who demands that which he will have to return."[89]

DOLO MALO PACTUM SE NON SERVATURUM. A maxim meaning "An agreement induced by fraud cannot stand."[90]

71. State *v.* Barr, 61 N. J. L. 131, 132, 38 Atl. 817.

72. Howes *v.* Austin, 35 Ill. 396, 397.

73. Hinnemann *v.* Rosenback, 39 N. Y. 98, 105, 6 Transcr. App. (N. Y.) 257, dissenting opinion. See also Bailey *v.* Dilworth, 10 Sm. & M. (Miss.) 404, 410, 48 Am. Dec. 760.

74. Halsted *v.* Meeker, 18 N. J. Eq. 136, 139.

75. State *v.* Downs, 148 Ind. 324, 327, 47 N. E. 670 [*citing* Burrows *v.* State, 137 Ind. 474, 37 N. E. 271, 45 Am. St. Rep. 210]; Hart *v.* Flynn, 8 Dana (Ky.) 190, 191; Hines *v.* Chambers, 29 Minn. 7, 11, 11 N. W. 129; U. S. *v.* Van Auken, 96 U. S. 366, 368, 24 L. ed. 852; 4 Cyc. 495 note 3; 2 Cyc. 28 note 46.

76. Kirk *v.* State, 35 Tex. Cr. 224, 230, 32 S. W. 1045.

77. Howes *v.* Austin, 35 Ill. 396, 397; Beardsley *v.* Southmayd, 14 N. J. L. 534, 543.

78. *Ex p.* Norton, 44 Ala. 177, 189.

79. Stoughton *v.* Hill, 21 Fed. Cas. No. 13,501, 3 Woods 404.

80. Knox *v.* Lee, 12 Wall. (U. S.) 457, 623, 20 L. ed. 287, dissenting opinion. *Compare* Austin *v.* Kinsman, 13 Rich. Eq. (S. C.) 259, 262.

81. Hilb *v.* Peyton, 22 Gratt. (Va.) 550, 561.

82. Miller *v.* Lacy, 33 Tex. 351, 353.

Compared with and distinguished from Confederate dollars and money see the following cases:

Alabama.— Riddle *v.* Hill, 51 Ala. 224, 231; Hightower *v.* Maull, 50 Ala. 495, 496; Wilcoxen *v.* Reynolds, 46 Ala. 529, 532; *Ex p.* Norton, 44 Ala. 177, 189.

Arkansas.— Roane *v.* Green, 24 Ark. 210, 214.

South Carolina.— Chalmers *v.* Jones, 23 S. C. 463.

Tennessee.—Carmichael *v.* White, 11 Heisk. 262, 267; Alderson *v.* Clear, 7 Heisk. 667.

Texas.— Taylor *v.* Bland, 60 Tex. 29, 30.

Virginia.— Hanshrough *v.* Utz, 75 Va. 959, 962; Omohundro *v.* Crump, 18 Gratt. 703, 706.

West Virginia.—Bierne *v.* Brown, 10 W. Va. 748, 758.

United States.— Cook *v.* Lillo, 103 U. S. 792, 793, 26 L. ed. 460; Atlantic, etc., R. Co. *v.* Carolina Nat. Bank, 19 Wall. 548, 557, 22 L. ed. 196; Thorington *v.* Smith, 8 Wall. 1, 13, 19 L. ed. 361.

See also 8 Cyc. 329 note 7, 562.

83. See *supra*, p. 825 note 56.

84. Short *v.* State, (Tex. Cr. App. 1895) 29 S. W. 1072, 1073.

85. Salisbury *v.* Shirley, 66 Cal. 223, 226, 5 Pac. 104 [*citing* People *v.* Hastings, 34 Cal. 571; People *v.* San Francisco Sav. Union, 31 Cal. 132]; Linck *v.* Litchfield, 141 Ill. 469, 481, 31 N. E. 123.

86. The term has a well recognized meaning as commonly used. People *v.* Lammerts, 164 N. Y. 137, 143, 58 N. E. 22.

"**The usual marks expressive of dollars and cents,** when employed according to general and long practice, (as in stating accounts and the like) may, to that extent, be treated as part of our language by adoption and use." Clark *v.* Stoughton, 18 Vt. 50, 51, 44 Am. Dec. 361. See also Linck *v.* Litchfield, 141 Ill. 469, 481, 31 N. E. 123.

Use of the decimal point.— "Whenever figures are used intending to represent money, such figures must, of course, be understood to represent 'dollars,' unless a different intention is clearly expressed. The point or dot, resembling a period in punctuation, separating certain figures on the right from those on the left, is the decimal point. It makes the figures on the right decimals of a unit of whatever is intended to be expressed by those on the left. Those on the left, as we have already seen, are intended to represent dollars, hence those on the right must represent decimals of dollars. As only two figures on the right are thus separated from the others, these two figures must represent hundredths of dollars; or, in other words, 'cents.' This is well settled by almost universal usage everywhere in the United States." Hunt *v.* Smith, 9 Kan. 137, 153.

87. People *v.* Lammerts, 164 N. Y. 137, 143, 58 N. E. 22.

88. Miller *v.* Lacy, 33 Tex. 351, 353.

89. Black L. Dict. [*citing* Broom Leg. Max. 346]. See also Pennell *v.* Roy, 3 De G. M. & G. 126, 134, 17 Jur. 247, 22 L. J. Ch. 409, 1 Wkly. Rep. 237, 52 Eng. Ch. 98.

90. Black L. Dict. See also Broom Leg. Max. 731.

DOLOSUS VERSATUR IN GENERALIBUS.[91] A maxim meaning "A person intending to deceive deals in general terms."[92]

DOLUM EX INDICIIS PERSPICUIS PROBARI CONVENIT. A maxim meaning "Fraud should be proved by clear proofs."[93]

DOLUS. Any wrongful act tending to the damage of another.[94] (See CULPA; and, generally, FRAUD.)

DOLUS AUCTORIS NON NOCET SUCCESSORI. A maxim meaning "The fraud of a predecessor does not prejudice the successor."[95]

DOLUS CIRCUITU NON PURGATUR.[96] A maxim meaning "You cannot fraudulently do that indirectly which you cannot do directly."[97]

DOLUS EST MACHINATIO, CUM ALIUD DISSIMULAT ALIUD AGIT. A maxim meaning "Deceit is an artifice, since it pretends one thing and does another."[98]

DOLUS ET FRAUS NEMINI PATROCINENTUR (PATROCINARI DEBENT).[99] A maxim meaning "Deceit and fraud shall excuse or benefit no man (they themselves need to be excused.)"[1]

DOLUS ET FRAUS UNA IN PARTE SANARI DEBENT. A maxim meaning "Deceit and fraud should always be remedied."[2]

DOLUS LATET IN GENERALIBUS. A maxim meaning "Fraud or deceit lurks in generalities."[3]

DOLUS PRÆSUMITUR CONTRA VERSANTEM IN ILLICITO. A maxim meaning "Dole (fraud, or bad intention) is presumed against one engaged in an illegal act or transaction."[4]

DOMAIN. The ownership of land; immediate or absolute ownership; paramount or ultimate ownership; an estate of patrimony which one has in his own right; land of which one is absolute owner.[5] (See EMINENT DOMAIN; ESTATES; PUBLIC LANDS.)

DOME-SHAPED. Something having the form of an inverted cup or half globe.[6] (See, generally, PATENTS.)

DOMESTIC. Attached to the occupations of the home or the family; pertaining to home life, or to household affairs or interests.[7]

DOMESTIC ADMINISTRATOR. See EXECUTORS AND ADMINISTRATORS.

DOMESTIC ANIMAL. See ANIMALS.

DOMESTIC ATTACHMENT. See ATTACHMENT.

91. "A maxim of the civil law adopted by all our courts, frequently referred to by the judges, no where more frequently than in the Scotch courts, and one which I have oftentimes heard cited both in the general assembly and in the civil courts." Auchterarder *v.* Kinnoull, Macl. & R. 220, 292, 9 Eng. Reprint 78.

92. Broom Leg. Max.

Applied or quoted in Post *v.* Stiger, 29 N. J. Eq. 554, 557; Stone *v.* Grubbam, 2 Bulstr. 217, 218; Specot's Case, 5 Coke 56*b*, 57 *b*; Doddington's Case, 2 Coke 32*a*, 34*b*; Auchterarder *v.* Kinnoull, Macl. & R. 220, 292, 9 Eng. Reprint 78.

93. Bouvier L. Dict. [*citing* 1 Story Contr. § 625].

94. Thompson *v.* Hopper, E. B. & E. 1038, 1046, 27 L. J. Q. B. 441, 6 Wkly. Rep. 857, 96 E. C. L. 1038.

95. Bouvier L. Dict.

96. "The maxim of Lord Bacon."—Tilton *v.* Hamilton F. Ins. Co., 1 Bosw. (N. Y.) 367, 397, dissenting opinion.

97. Thompson *v.* Hopper, E. B. & E. 1038, 1046, 27 L. J. Q. B. 441, 6 Wkly. Rep. 857, 96 E. C. L. 1038.

Applied or quoted in Tilton *v.* Hamilton F. Ins. Co., 1 Bosw. (N. Y.) 367, 397 (dissenting opinion); Thompson *v.* Hopper, E. B. & E. 1038, 1046, 27 L. J. Q. B. 441, 6 Wkly. Rep. 857, 96 E. C. L. 1038; Jeffries *v.* Alexander, 8 H. L. Cas. 594, 637, 7 Jur. N. S. 221, 31 L. J. Ch. 9, 2 L. T. Rep. N. S. 768.

98. Black L. Dict.

99. "The rule of equity as well as of law."—Hinman *v.* Devlin, 31 N. Y. App. Div. 590, 594, 52 N. Y. Suppl. 124.

1. Bouvier L. Dict. [*citing* Story Eq. Jur. § 295].

Applied or quoted in Hinman *v.* Devlin, 31 N. Y. App. Div. 590, 594, 52 N. Y. Suppl. 124; Seymour *v.* Seymour, 28 N. Y. App. Div. 495, 498, 51 N. Y. Suppl. 130. See also Fermor's Case, 3 Coke 76*b*, 78*a*.

2. Adams Gloss. [*citing* Noy Max. No. 32, p. 45].

3. Trayner Leg. Max.

4. Trayner Leg. Max.

5. Burrill L. Dict. [*quoted* in People *v.* Shearer, 30 Cal. 645, 658].

"The public lands of a State are frequently termed the public domain, or domain of the State." Burrill L. Dict. [*quoted* in People *v.* Shearer, 30 Cal. 645, 658].

6. Russell *v.* Hyde, 39 Fed. 614, 615.

7. Century Dict.

"Many statutes have used the word 'do-

DOMESTIC BILL OF EXCHANGE. Under statutory provisions, a bill drawn by a person in the state, or dated at a place in the state, on a person therein.[8] (See generally, COMMERCIAL PAPER.)

DOMESTIC COMMERCE. Commerce within a state.[9] (See, generally, COMMERCE.)

DOMESTIC CORPORATION. A corporation created by or under the laws of the state, or located in the state, and created by or under the laws of the United States.[10] (See, generally, FOREIGN CORPORATIONS.)

DOMESTIC DISTILLED SPIRITS. A term which means *ex visceribus suis*, those manufactured within a state.[11]

DOMESTIC FIXTURES. All such articles as a tenant attaches to a dwelling-house in order to render his occupation more comfortable or convenient, and may be separated from it without doing substantial injury.[12] (See, generally, FIXTURES; LANDLORD AND TENANT.)

DOMESTIC INSURANCE COMPANY. As defined by statute, a company incorporated or formed within the commonwealth.[13] (See, generally, FOREIGN CORPORATIONS; INSURANCE.)

DOMESTIC JUDGMENT. See JUDGMENTS.

DOMESTIC MANUFACTURES. See MANUFACTURES.

DOMESTIC NAVIGATION. As defined by statute, a term applied to ships when passing from place to place within the United States.[14] (See, generally, ADMIRALTY; SHIPPING.)

DOMESTIC PRODUCT. A product exclusively belonging to, and within the sovereign jurisdiction of the state.[15] (See, generally, MANUFACTURES.)

DOMESTIC PURPOSE. A term which has reference to the use of water for domestic purposes as known and recognized at common law by riparian proprietors;[16] also to all uses of water which contribute to the health, comfort, and convenience of a family in the enjoyment of their dwelling as a home.[17] As defined by statute, and with reference to water, the term includes water for the household, and a sufficient amount for the use of domestic animals kept with and for the use of the household.[18]

DOMESTIC RATES. Terms used as signifying rates allowed to be charged where water is furnished for domestic purposes.[19]

mestic.' There are provisions in regard to 'domestic animals,' 'domestic wines,' 'domestic distilled spirits,' 'domestic servants,' 'domestic business concerns of a family,' 'domestic persons.'" Crosby *v.* Montgomery, 108 Ala. 498, 504, 18 So. 723 [*citing* Bouvier L. Dict.].

Quinine is not a "domestic remedy" within the meaning of an act "to regulate the practice of pharmacy." Cook *v.* People, 125 Ill. 278, 17 N. E. 849.

8. Ragsdale *v.* Franklin, 25 Miss. 143, 145.

9. Louisville, etc., R. Co. *v.* Tennessee R. Commission, 19 Fed. 679, 701.

10. N. Y. Code Civ. Proc. § 3343, subs. 18 [*quoted* in Northampton First Nat. Bank *v.* Doying, 13 Daly (N. Y.) 509, 510; Matter of Cushing, 40 Misc. (N. Y.) 505, 506, 82 N. Y. Suppl. 795; Farmers', etc., Nat. Bank *v.* Rogers, 1 N. Y. Suppl. 757, 758].

A corporation formed by a consolidation of a domestic and a foreign corporation, pursuant to Minn. Laws (1881), c. 94, must be deemed a "domestic corporation." *In re* St. Paul, etc., R. Co., 36 Minn. 85, 87, 30 N. W. 432.

The term embraces a municipal corporation within N. Y. Code Civ. Proc. § 1778, providing that judgment by default may be rendered in an action, etc. Moran *v.* Long Island City, 101 N. Y. 439, 440, 5 N. E. 80.

11. Com. *v.* Giltinan, 64 Pa. St. 100, 103.

12. "Such as furnaces, stoves, cupboards, and shelves, bells, bell-pulls, gas-fixtures, &c.; or things merely ornamental,—as painted wainscots, pier and chimney glasses, although attached to the walls with screws, marble chimney-pieces, grates, beds nailed to the walls, window-blinds, and curtains." Wright *v.* Du Bignon, 114 Ga. 765, 771, 40 S. E. 747, 57 L. R. A. 669.

13. Ala. Code (1896), § 2575; Ky. St. (1903) § 751; Me. Rev. St. (1903) p. 486, c. 49, § 77; 2 Mass. Rev. Laws (1902), p. 1120; Tenn. Code (1896), § 3274.

14. N. D. Rev. Codes (1899), § 3470; S. D. Civ. Code (1903), § 387, distinguishing "domestic navigation" from "foreign navigation."

15. Com. *v.* Giltinan, 64 Pa. St. 100, 103.

16. Crawford Co. *v.* Hathaway, (Nebr. 1903) 93 N. W. 781, 797 [*citing* Gould Water Rights, § 205].

17. Crosby *v.* Montgomery, 108 Ala. 498, 504, 18 So. 723 [*citing* Bouvier L. Dict.].

18. Ida. Civ. Code (1901), § 2591.

19. Birmingham Water Works Co. *v.* Truss, 135 Ala. 530, 33 So. 657.

DOMESTIC RELATIONS. See HUSBAND AND WIFE.

DOMESTIC SERVANT. See MASTER AND SERVANT.

DOMESTIC SHIP. A ship in a port of the state or territory to which it belongs.[20] (See generally, ADMIRALTY; SHIPPING.)

DOMESTIC TRADE. The exchange or buying or selling of goods within a country.[21]

DOMESTIC WINE. As defined by statute, wine made from berries, grapes, or other fruits grown in the state.[22]

20. Cal. Civ. Code (1899), § 963; N. D. Rev. Codes (1899), § 3471; S. D. Civ. Code (1903), § 388, distinguishing "domestic ships" from "foreign ships."

21. *In re* Roofing, etc., Contractors Assoc., 9 Pa. Dist. 569, 570.

22. Ga. Acts (1890–1891), p. 130; Ga. Pol. Code (1895), § 1523.

DOMICILE

By H. Gerald Chapin
Editor of "The American Lawyer" *

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I. IN GENERAL.

A. Definition. That place is properly the domicile of a person in which he has voluntarily fixed his abode not for a mere special or temporary purpose but with a present intention of making it his permanent home.[1] Never-

1. Other definitions are: "A habitation fixed in some place with the intention of remaining there alway." Vattel L. Nat. 163 [*quoted* in Smith *v.* Croom, 7 Fla. 81, 150; New York *v.* Genet, 4 Hun (N. Y.) 487, 489; Bartlett *v.* New York, 5 Sandf. (N. Y.) 44; *In re* Thompson, 1 Wend. (N. Y.) 43, 45; Hascall *v.* Hafford, 107 Tenn. 355, 65 S. W. 423, 89 Am. St. Rep. 952; Stratton *v.* Brigham, 2 Sneed (Tenn.) 420; Johnson *v.* Twenty-One Bales, etc., 13 Fed. Cas. No. 7,417, 2 Paine 601, 3 Wheel. Cr. (N. Y.) 433. But this definition of Vattel has been criticized as inapplicable to the conditions prevailing in this country and the rule laid down that domicile is the "habitation . . . fixed [in any place] without any present intention of removing therefrom." Merrill *v.* Morrissett, 76 Ala. 433, 437; Dow *v.* Gould, etc., Silver Min. Co., 31 Cal. 629, 650; Gilman *v.* Gilman, 52 Me. 165, 173, 83 Am. Dec. 502; Putnam *v.* Johnson, 10 Mass. 488, 501; *In re* High, 2 Dougl. (Mich.) 515, 523; Hart *v.* Lindsey, 17 N. H. 235, 243, 43 Am. Dec. 597; State *v.* Moore, 14 N. H. 451, 454; Crawford *v.* Wilson, 4 Barb. (N. Y.) 504, 519; Brown *v.* Ashbough, 40 How. Pr. (N. Y.) 260, 263; Hindman's Appeal, 85 Pa. St. 446; Carey's Appeal, 75 Pa. St. 201, 205; Hascall *v.* Hafford, 107 Tenn. 355, 65 S. W. 423, 89 Am. St. Rep. 952; Stratton *v.* Brigham, 2 Sneed (Tenn.) 421; *Ex p.* Blumer, 27 Tex. 734. See also *In re* Craignish, [1892] 3 Ch. 180, 67 L. T. Rep. N. S. 689; Maltass *v.* Maltass, 1 Rob. Eccl. 67.

"A residence acquired as a final home." Hartford *v.* Champion, 58 Conn. 268, 275, 20 Atl. 471; White *v.* Tennant, 31 W. Va. 790, 8 S. E. 596, 13 Am. St. Rep. 896.

"A residence at a particular place, accompanied by an intention, either positive or presumptive, to remain there permanently, or for an indefinite length of time." Phillimore Dom. 13 [*quoted* in Merrill *v.* Morrissett, 76 Ala. 433, 437; Littlefield *v.* Brooks, 50 Me. 475, 477; Stout *v.* Leonard, 37 N. J. L. 492, 495; State *v.* Bordentown Tp., 32 N. J. L. 192; Cadwalader *v.* Howell, 18 N. J. L. 138, 144; Hegeman *v.* Fox, 31 Barb. (N. Y.) 475; *In re* Wrigley, 8 Wend. (N. Y.) 134, 142; Guier *v.* O'Daniel, 1 Binn. (Pa.) 349 note; Mitchell *v.* U. S., 21 Wall. (U. S.) 350, 22 L. ed. 584; Chambers *v.* Prince, 75 Fed. 176; White *v.* Brown, 29 Fed. Cas. No. 17,538, 1 Wall. Jr. 217; Matter of Steer, 3 H. & N. 594, 28 L. J. Exch. 22].

"That place in which a man has voluntarily fixed the habitation of himself and family, not for a mere special or temporary purpose, but with the present intention of making a permanent home, until some unexpected event shall occur to induce him to adopt some other permanent home." Black L. Dict. And see Harral *v.* Harral, 39 N. J. Eq. 279, 285, 51 Am. Rep. 17; Lord *v.* Colvin, 4 Drew. 366, 5 Jur. N. S. 351, 28 L. J. Ch. 361, 7 Wkly. Rep. 250; Wadsworth *v.* McCord, 12 Can. Supreme Ct. 466.

"That place or country either in which he in fact resides with the intention of residence or in which, having so resided, he continues actually to reside, though no longer retaining the intention of residence, or with regard to which having so resided there, he retains the intention of residence though he in fact no longer resides there." Dicey Confl. L. 81 [*quoted* in Cruger *v.* Phelps, 21 Misc. (N. Y.) 252, 262, 47 N. Y. Suppl. 61; Dean *v.* Cannon, 37 W. Va. 123, 128, 16 S. E. 444; White *v.* Tennant, 31 W. Va. 790, 8 S. E. 596, 13 Am. St. Rep. 896].

"[That place] where he has his true, fixed, permanent home and principal establishment, and to which whenever he is absent, he has the intention of returning." Story Confl. Laws, § 41 [*quoted* in Smith *v.* Croom, 7 Fla. 81, 152; Hayes *v.* Hayes, 74 Ill. 312, 314; Steers' Succession, 47 La. Ann. 1551, 18 So. 503; Cole *v.* Lucas, 2 La. Ann. 946, 950; Tanner *v.* King, 11 La. 175, 178; *In re* High, 2 Dougl. (Mich.) 515, 522; Hairston *v.* Hairston, 27 Miss. 704, 718, 61 Am. Dec. 530; Hart *v.* Lindsey, 17 N. H. 235, 243, 43 Am. Dec. 597; Cadwalader *v.* Howell, 18 N. J. L.

theless the term "domicile" may have a variety of significations dependent upon its various applications. In common parlance it is often taken to mean simply the house in which a man may have his abode for the time being. Again a man may have a commercial, a political, or a forensic domicile, and all of these may exist at one and the same time and in different localities.[2]

B. Synonymous With "Home." No one word is more nearly synonymous with "domicile" than "home."[3]

138, 144; Plant *v.* Harrison, 36 Misc. (N. Y.) 649, 74 N. Y. Suppl. 411; Matter of Dimock, 11 Misc. (N. Y.) 610, 32 N. Y. Suppl. 927; Hannon *v.* Grizzard, 89 N. C. 115, 120; Horne *v.* Horne, 31 N. C. 99, 107; Price *v.* Price, 156 Pa. St. 617, 626, 27 Atl. 291; *In re* Fry, 71 Pa. St. 302, 10 Am. Rep. 698; Hascall *v.* Hafford, 107 Tenn. 355, 65 S. W. 423, 89 Am. St. Rep. 952; Pearce *v.* State, 1 Sneed (Tenn.) 63, 66, 60 Am. Dec. 135; Benavides *v.* Gussett, 8 Tex. Civ. App. 198, 28 S. W. 113; Anderson *v.* Anderson, 42 Vt. 350, 352, 1 Am. Rep. 334; Anderson *v.* Laneuville, 2 Spinks 41, 22 Eng. L. & Eq. 641].

"The place where a man carries on his established business or professional occupation, and has a home and permanent residence." 2 Kent Comm. 431 note [*quoted* in Pearce *v.* State, 1 Sneed (Tenn.) 63, 66, 63 Am. Dec. 135; Hall *v.* Hall, 25 Wis. 600, 608].

"The place where one is established and resides with his wife, children and family, and the greater part of his movable property." El Diccionario de Legislacion [*quoted* in Holliman *v.* Peebles, 1 Tex. 673, 688].

Domicile of succession.— "In this sense it [domicile] is termed 'the domicile of succession.' . . . When the term 'domicile' is used in this connection, the legal apprehension promptly comprehends its full signification, viz; that it is the actual residence of a man, within some particular jurisdiction, of such a character as shall, in accordance with certain well established principles of public law, give direction to the succession to his personal estate." Smith *v.* Croom, 7 Fla. 81, 150.

"Domicile is an idea of the law. 'It is the relation which the law creates between an individual and a particular locality or country.'" Bell *v.* Kennedy, L. R. 1 H. L. Sc. 307; *In re* Tootal, 23 Ch. D. 532, 538, 52 L. J. Ch. 664, 48 L. T. Rep. N. S. 816, 31 Wkly. Rep. 653; Wadsworth *v.* McCord, 12 Can. Supreme Ct. 466.

The Roman Codes described domicile as follows: "In whatever place an individual has set up his household gods and made the chief seat of his affairs and interest, from which without some special avocation he has no intention of departing: from which when he has departed he is considered to be from home and to which when he has returned he is considered to have returned home. In this place there is no doubt whatever he has his domicile." Phillimore Dom. 11. And see Morgan *v.* Nunes, 54 Miss. 308; Chaine *v.* Wilson, 1 Bosw. (N. Y.) 673, 8 Abb. Pr. (N. Y.) 78; Desesbats *v.* Berquier, 1 Binn. (Pa.) 336, 2 Am. Dec. 448; White *v.* White, 3 Head (Tenn.) 404, 409; White *v.* Brown, 29 Fed. Cas. No. 17,538, 1 Wall. Jr. 217; Lord *v.* Colvin, 4 Drew. 366, 5 Jur. N. S. 351, 28 L. J. Ch. 361, 7 Wkly. Rep. 350.

2. Smith *v.* Croom, 7 Fla. 81, 151. See also Chariton County *v.* Moberly, 59 Mo. 238, 242.

Commercial domicile see Chaine *v.* Wilson, 1 Bosw. (N. Y.) 673, 8 Abb. Pr. (N. Y.) 78.

Distinguished from "inhabitancy" see *infra*, I, C.

Distinguished from "residence" see *infra*, I, C.

3. *Arkansas.*— Krone *v.* Cooper, 43 Ark. 547, 549.

Connecticut.— Salem *v.* Lyme, 29 Conn. 74, 79.

Florida.— Smith *v.* Croom, 7 Fla. 81, 153.

Kansas.— Hart *v.* Horn, 4 Kan. 232, 238.

Minnesota.— Venable *v.* Paulding, 19 Minn. 488.

Nebraska.— Wood *v.* Roeder, 45 Nebr. 311, 315, 63 N. W. 853.

New Hampshire.— Foss *v.* Foss, 58 N. H. 283.

New York.— Matter of Dimock, 11 Misc. 616, 32 N. Y. Suppl. 927; Chaine *v.* Wilson, 1 Bosw. 673, 8 Abb. Pr. 78.

Pennsylvania.— *In re* Fry, 71 Pa. St. 302, 10 Am. Rep. 698.

West Virginia.—Dean *v.* Cannon, 37 W. Va. 123, 127, 16 S. E. 444.

United States.— White *v.* Brown, 29 Fed. Cas. No. 17,538, 1 Wall. Jr. 217.

England.— Doucet *v.* Geoghegan, 9 Ch. D. 441, 26 Wkly. Rep. 825; *In re* Craignish, [1892] 3 Ch. 180, 67 L. T. Rep. N. S. 689; Atty.-Gen. *v.* Rowe, 1 H. & C. 31, 8 Jur. N. S. 823, 31 L. J. Exch. 314, 6 L. T. Rep. N. S. 438, 10 Wkly. Rep. 718; Whicker *v.* Hume, 7 H. L. Cas. 124, 4 Jur. N. S. 933, 28 L. J. Ch. 396, 6 Wkly. Rep. 813, 11 Eng. Reprint 50; Atty.-Gen. *v.* Winans, 65 J. P. 819, 85 L. T. Rep. N. S. 508.

"We like this conception of the word home, which constitutes the commanding element of the definition given in the Roman law, as well as those given by these two modern jurists. It is the word whose essential meaning comes up fully to our idea of domicil. It is a word which admits not of qualification. To speak of a permanent home is to perpetrate a tautology — to speak of a temporary home is to involve a contradiction of terms. It is a word which finds its true interpretation in the instincts of our nature. It is a word the full meaning of which is of universal appreciation; it is understood alike by the degraded savage and the classic Greek — by the Republican serf and the refined

C. Distinguished From "Residence" and "Inhabitancy." "Domicile" and "residence" are not convertible terms. The former is of more extensive signification and includes beyond mere physical presence at the particular locality positive or presumptive proof of an intention to constitute it a permanent abiding place.[4] Nor is "domicile" synonymous with "inhabitancy," as the latter is deemed to include citizenship[5] and municipal relations.[6] As used in many statutes,[7] however, particularly those relating to the qualification of

Roman. Wherever that spot is found there the law fixes the domicil of succession, it matters not whether that be upon the wasted hills of the 'North State' or on the virgin plains of the 'Land of Flowers.'" Smith *v.* Croom, 7 Fla. 81, 153.

4. *Arkansas.*— Krone *v.* Cooper, 43 Ark. 547.

Connecticut.— Salem *v.* Lyme, 29 Conn. 74.

Illinois.— Tazewell County *v.* Davenport, 40 Ill. 197.

Iowa.—Savage *v.* Scott, 45 Iowa 130; Cohen *v.* Daniels, 25 Iowa 88; Love *v.* Cherry, 24 Iowa 204.

Kansas.— Keith *v.* Stetter, 25 Kan. 100.

Louisiana.—Steers' Succession, 47 La. Ann. 1551, 18 So. 503.

Massachusetts.— Briggs *v.* Rochester, 16 Gray 337.

Mississippi.— Morgan *v.* Nunes, 54 Miss. 308; Alston *v.* Newcomer, 42 Miss. 186.

Missouri.— Chariton County *v.* Moberly, 59 Mo. 238; Johnson *v.* Smith, 43 Mo. 499; Walker *v.* Walker, 1 Mo. App. 404.

New Jersey.— Stout *v.* Leonard, 37 N. J. L. 492.

New York.— Haggart *v.* Morgan, 5 N. Y. 422, 55 Am. Dec. 350; New York *v.* Genet, 4 Hun 487; Crawford *v.* Wilson, 4 Barb. 504; Weitkamp *v.* Loehr, 53 N. Y. Super. Ct. 79; Burrill *v.* Jewett, 2 Rob. 701; Douglas *v.* New York, 2 Duer 110; Bartlett *v.* New York, 5 Sandf. 44; Eaves Costume Co. *v.* Pratt, 2 Misc. 420, 22 N. Y. Suppl. 74; Frost *v.* Brisbin, 19 Wend. 11, 32 Am. Dec. 423; *In re* Thompson, 1 Wend. 43.

North Carolina.— Hannon *v.* Grizzard, 89 N. C. 115.

Tennessee.— Foster *v.* Hall, 4 Humphr. 346.

Texas.— Brown *v.* Boulden, 18 Tex. 431.

Virginia.— Long *v.* Ryan, 30 Gratt. 718.

West Virginia.— Atkinson *v.* Washington, etc., College, (1903) 46 S. E. 253; Dean *v.* Cannon, 37 W. Va. 123, 16 S. E. 444.

Wisconsin.— Hall *v.* Hall, 25 Wis. 600.

United States.— Collins *v.* Ashland, 112 Fed. 175; Chambers *v.* Prince, 75 Fed. 176; Brisenden *v.* Chamberlain, 53 Fed. 307.

England.— Bell *v.* Kennedy, L. R 1 H. L. Sc. 307; *In re* Patience, 29 Ch. D. 976, 54 L. J. Ch. 897, 52 L. T. Rep. N. S. 687, 33 Wkly. Rep. 501; Reg. *v.* Stapleton, 1 E. & B. 766, 17 Jur 549, 22 L. J. M. C. 102, 72 E. C. L. 766, 18 Eng. L. & Eq. 300; Walcot *v.* Botfield, 18 Jur. 570, Kay 534, 2 Wkly. Rep. 393.

Canada.— Wadsworth *v.* McCord, 12 Can. Supreme Ct. 466; Wanzer Lamp Co. *v.* Woods, 13 Ont. Pr. 511.

See 17 Cent. Dig. tit. "Domicile," § 2; and 5 Cyc. 242 note 22.

"Any person may have his domicile in one place and his residence, for the time being, in another. Domicile and residence are not convertible terms. Thus, a citizen of Mississippi may retain his dwelling here, with its furniture undisturbed, in charge of his neighbor or some friend, for a year or more, while he is educating his children in another, and occupying a hired house there, for that purpose. In such case, it is obvious that Mississippi continues to be the place of his domicile; and it is equally clear that he becomes, notwithstanding, a temporary resident of the other State where he is educating his children." Alston *v.* Newcomer, 42 Miss. 186, 192.

"The derivation of the two words, domicile and residence, fully points out the distinction in their meaning. A home (*domus*) is something more than a temporary place of remaining (*residendi*) however long such stay may continue." Burrill *v.* Jewett, 2 Rob. (N. Y.) 701, 702.

"There is a wide difference between domicile and mere residence. Of course they may be, and usually are, at the same place, and it is quite obvious that they may be at different places. But domicile is but the established, fixed, permanent, and may therefore be said to be the ordinary, dwelling place or place of residence of a party, as distinguished from his temporary and transient though actual place of residence. One is his legal residence as distinguished from his temporary place of abode; or, to use the language of the charge, one is his home, as distinguished from the place or places to which business or pleasure may temporarily call him." Salem *v.* Lyme, 29 Conn. 74, 79.

5. See CITIZENS, 7 Cyc. 132.

6. Lyman *v.* Fiske, 17 Pick. (Mass.) 231, 28 Am. Dec. 293; Harvard College *v.* Gore, 5 Pick. (Mass.) 370; State *v.* Ross, 23 N. J. L. 517.

7. "In all cases where a statute prescribes residence as a qualification for the enjoyment of a privilege, or the exercise of a franchise, the word residence is equivalent to the place of domicile of the person who claims its benefit." Matter of Dimock, 11 Misc. (N. Y.) 610, 613, 32 N. Y. Suppl. 927.

Residence has been deemed equivalent to domicile when used in a statute regulating conscription (*Ex p.* Blumer, 27 Tex. 734), the abode of a public official (Kempster *v.* Milwaukee, 97 Wis. 343, 72 N. W. 743), jurisdiction generally (Wood *r.* Roeder, 45 Nebr. 311, 63 N. W. 853), or the right to tuition in public schools (State *v.* Superior School Dist., 55 Nebr. 317, 75 N. W. 855).

voters,[8] to homesteads,[9] to taxation,[10] to the statute of limitations,[11] to succession, guardianship, and administration,[12] and in those prescribing the jurisdictional prerequisites to the maintenance of actions for divorce or separation the term "residence" has been held equivalent to "domicile."[13]

II. NECESSITY AND LIMITATION.

It is a settled principle that no man shall be deemed to be without a domicile, although he can have but one only at any given time,[14] or, as the rule is usually

See also Gardner *v.* Board of Education, 5 Dak. 259, 38 N. W. 433. The term "residence," as employed in the statute requiring the true residence to be stated in an affidavit to verify a plea in abatement, means the party's domicile or home. Lambe *v.* Smythe, 10 Jur. 394, 15 L. J. Exch. 287, 15 M. & W. 433.

In the several provincial statutes of 1692, 1701, and 1767, upon this subject, the terms "coming to sojourn or dwell," "being an inhabitant," "residing and continuing one's residence," and "coming to reside and dwell" are frequently and variously used, and, we think, they are used indiscriminately, and all mean the same thing, namely, to designate the place of a person's domicile. Abington *v.* North Bridgewater, 23 Pick. (Mass.) 170. See also Com. *v.* Swan, 1 Pick. (Mass.) 194; Burlington *v.* Calais, 1 Vt. 385, 18 Am. Dec. 691.

8. *District of Columbia.*— Mead *v.* Carroll, 6 D. C. 338.

Massachusetts.— Opinion of Justices, 5 Metc. 587.

Nebraska.— Berry *v.* Wilcox, 44 Nebr. 82, 62 N. W. 249, 48 Am. St. Rep. 706.

New Jersey.— Cadwalader *v.* Howell, 18 N. J. L. 138.

New York.— Crawford *v.* Wilson, 4 Barb. 504.

North Carolina.— Hannon *v.* Grizzard, 89 N. C. 115.

Pennsylvania.— *In re* Fry, 71 Pa. St. 302, 10 Am. Rep. 698.

See 17 Cent. Dig. tit. "Domicile," § 2; and, generally, ELECTIONS.

9. Hascall *v.* Hafford, 107 Tenn. 355, 65 S. W. 423, 89 Am. St. Rep. 952; Potts *v.* Davenport, 79 Ill. 455. And see, generally, HOMESTEADS.

10. *Indiana.*— Culbertson *v.* Floyd County, 52 Ind. 361.

Minnesota.—Venable *v.* Paulding, 19 Minn. 488.

New York.— Crawford *v.* Wilson, 4 Barb. 504, 522.

Pennsylvania.— Dauphin County *v.* Banks, 1 Pears. 40.

Wisconsin.— Kellogg *v.* Winnebago County Sup'rs, 42 Wis. 97.

See 17 Cent. Dig. tit. "Domicile," § 2; and, generally, TAXATION.

11. Langdon *v.* Doud, 6 Allen (Mass.) 423, 83 Am. Dec. 641; Collester *v.* Hailey, 6 Gray (Mass.) 517; Campbell *v.* White, 22 Mich. 178. *Contra*, Johnson *v.* Smith, 43 Mo. 499. See also LIMITATIONS OF ACTIONS.

12. Allgood *v.* Williams, 92 Ala. 551, 8 So. 722; Merrill *v.* Morrissett, 76 Ala. 433; *In re* Henning, 128 Cal. 214, 60 Pac. 762, 79 Am. St. Rep. 43; Modern Woodmen of America *v.* Hester, 66 Kan. 129, 71 Pac. 279; Kennedy *v.* Ryall, 67 N. Y. 379; Matter of Cruger, 36 Misc. 477, 73 N. Y. Suppl. 812.

See 17 Cent. Dig. tit. "Domicile," § 2; and, generally, DESCENT AND DISTRIBUTION; EXECUTORS AND ADMINISTRATORS; GUARDIAN AND WARD.

13. *Iowa.*— Hinds *v.* Hinds, 1 Iowa 36.

Massachusetts.— Shaw *v.* Shaw, 98 Mass. 158.

New Jersey.— Hervey *v.* Hervey, 56 N. J. Eq. 166, 38 Atl. 767; Firth *v.* Firth, 50 N. J. Eq. 137, 24 Atl. 916; Coddington *v.* Coddington, 20 N. J. Eq. 263; Winship *v.* Winship, 16 N. J. Eq. 107.

New York.— De Meli *v.* De Meli, 120 N. Y. 485, 24 N. E. 996, 17 Am. St. Rep. 652 [*affirming* 5 N. Y. Civ. Proc. 306, 67 How. Pr. 20]; Matter of Colebrook, 26 Misc. 139, 55 N. Y. Suppl. 861.

Wisconsin.— Hall *v.* Hall, 25 Wis. 600.

See 17 Cent. Dig. tit. "Domicile," § 2; and, generally, DIVORCE.

14. *Alabama.*— Allgood *v.* Williams, 92 Ala. 551, 8 So. 722; Merrill *v.* Morrissett, 76 Ala. 433.

California.— *In re* Samuel, Myr. Prob. 228.

Connecticut.— New Haven First Nat. Bank *v.* Balcom, 35 Conn. 351.

Delaware.— State *v.* Frest, 4 Harr. 558.

Illinois.— Behrensmeyer *v.* Kreitz, 135 Ill. 591, 26 N. E. 704.

Indiana.— Culbertson *v.* Floyd County, 52 Ind. 361.

Iowa.— Love *v.* Cherry, 24 Iowa 204.

Kansas.— Graham *v.* Trimmer, 6 Kan. 230.

Louisiana.—Steers' Succession, 47 La. Ann. 1551, 18 So. 503.

Maine.— Gilman *v.* Gilman, 52 Me. 165, 83 Am. Dec. 502; Littlefield *v.* Brooks, 50 Me. 475; Church *v.* Rowell, 49 Me. 367.

Massachusetts.— Pickering *v.* Cambridge, 144 Mass. 244, 10 N. E. 827; Hallet *v.* Bassett, 100 Mass. 167; Shaw *v.* Shaw, 98 Mass. 158; Whitney *v.* Sherborn, 12 Allen 111; Opinion of Justices, 5 Metc. 587; Thorndike *v.* Boston, 1 Metc. 242; Abington *v.* North Bridgewater, 23 Pick. 170. But *compare* Greene *v.* Greene, 11 Pick. 410, 411, where it was intimated that more than one domicile might exist for jurisdictional purposes in suits for divorce, although there could be but one for purposes of succession to personalty.

Michigan.— Beecher *v.* Detroit, 114 Mich. 228, 72 N. W. 206; Warren *v.* Board of Registration, 72 Mich. 398, 40 N. W. 553, 2 L. R. A. 203; *In re* High, 2 Dougl. 515.

stated, he can have but one domicile at the same time for one and the same purpose.[15]

III. CLASSIFICATION.

A. In General. Domicile may be divided into domicile of origin, domicile of choice, and domicile by operation of law.[16]

B. Domicile of Origin. A domicile of origin is that which every infant has upon attaining majority, being the domicile of the parents at that time.[17]

C. Domicile of Choice. A domicile of choice is that which the individual has elected and chosen for himself to displace the domicile (whether of origin or of choice) previously obtained.[18]

Mississippi.— Morgan *v.* Nunes, 54 Miss. 308.

New York.—Dupuy *v.* Wurtz, 53 N. Y. 556; Crawford *v.* Wilson, 4 Barb. 504; Matter of Bye, 2 Daly 525; Cruger *v.* Phelps, 21 Misc. 252, 47 N. Y. Suppl. 61; Brown *v.* Ashbough, 40 How. Pr. 260; Lee *v.* Stanley, 9 How. Pr. 272; Graham *v.* Public Adm'r, 4 Bradf. Surr. 127.

Pennsylvania.— Hindman's Appeal, 85 Pa. St. 466; Guier *v.* O'Daniel, 1 Binn. 349 note; Desesbats *v.* Berquier, 1 Binn. 336, 2 Am. Dec. 448; Dauphin County *v.* Banks, 1 Pears. 40.

West Virginia.— White *v.* Tennant, 31 W. Va. 790, 8 S. E. 596, 13 Am. St. Rep. 896.

Wisconsin.— Kempster *v.* Milwaukee, 97 Wis. 343, 72 N. W. 743; Kellogg *v.* Winnebago County Sup'rs, 42 Wis. 97; Hall *v.* Hall, 25 Wis. 600.

England.— Udny *v.* Udny, L. R. 1 H. L. Sc. 441; Bell *v.* Kennedy, L. R. 1 H. L. Sc. 307; *In re* Craignish, [1892] 3 Ch. 180, 67 L. T. Rep. N. S. 689; Forbes *v.* Forbes, 2 Eq. Rep. 178, 18 Jur. 642, Kay 341, 23 L. J. Ch. 724, 2 Wkly. Rep. 253; Matter of Steer, 3 H. & N. 594, 28 L. J. Exch. 22; Walcot *v.* Botfield, 18 Jur. 570, Kay 534, 2 Wkly. Rep. 393; Aikman *v.* Aikman, 7 Jur. N. S. 1017, 4 L. T. Rep. N. S. 374, 3 Macq. H. L. 854; Maxwell *v.* McClure, 6 Jur. N. S. 407, 2 L. T. Rep. N. S. 65, 3 Macq. H. L. 852, 8 Wkly. Rep. 370; Crookenden *v.* Fuller, 5 Jur. N. S. 1222, 29 L. J. P. 1, 1 L. T. Rep. N. S. 70, 1 Swab & Tr. 441, 8 Wkly. Rep. 49; Somerville *v.* Somerville, 5 Ves. Jr. 750, 5 Rev. Rep. 155, 31 Eng. Reprint 839.

Canada.— Jones *v.* St. John, 30 Can. Supreme Ct. 122; Wadsworth *v.* McCord, 12 Can. Supreme Ct. 466; Cartwright *v.* Hinds, 3 Ont. 384; Wanzer Lamp Co. *v.* Woods, 13 Ont. Pr. 511; Brochu *v.* Bissonnette, 13 Quebec Super. Ct. 271.

See 17 Cent. Dig. tit. "Domicile," § 1 *et seq.*

15. See, generally, cases cited *supra*, note 14. It is obvious, however, from an examination of the cases that the last clause is a weak attempt to qualify what for all practical purposes is an absolute proposition, since the apparent exceptions (such as the so-called "commercial domicile") bear not upon domicile in its true sense but upon residence.

16. Smith *v.* Croom, 7 Fla. 81; Story Confl. L. § 48.

Domicile of origin see *infra*, III, B.

Domicile of choice see *infra*, III, C.

Domicile by operation of law see *infra*, III, D.

17. See the following cases:

Delaware.— Prettyman *v.* Conaway, 9 Houst. 221, 32 Atl. 15.

Florida.— Smith *v.* Croom, 7 Fla. 81.

Georgia.— Taylor *v.* Jeter, 33 Ga. 195, 81 Am. Dec. 202.

Maine.— Littlefield *v.* Brooks, 50 Me. 475.

Massachusetts.— Bangs *v.* Brewster, 111 Mass. 382; Abington *v.* North Bridgewater, 23 Pick. 170; Harvard College *v.* Gore, 5 Pick. 370.

Michigan.— *In re* High, 2 Dougl. 515.

New York.— Crawford *v.* Wilson, 4 Barb. 504; Matter of Bye, 2 Daly 525.

Pennsylvania.— Price *v.* Price, 156 Pa. St. 617, 27 Atl. 291; Guier *v.* O'Daniel, 1 Binn. 349 note.

United States.— Johnson *v.* Twenty-One Bales, etc., 13 Fed. Cas. No. 7,417, 2 Paine 601, 3 Wheel. Cr. (N. Y.) 433; Powers *v.* Mortee, 19 Fed. Cas. No. 11,362.

England.— Udny *v.* Udny, L. R. 1 H. L. Sc. 441; Loustalan *v.* Loustalan, [1900] P. 211, 69 L. J. P. 75, 82 L. T. Rep. N. S. 806, 48 Wkly. Rep. 509; Brown *v.* Smith, 15 Beav. 444, 21 L. J. Ch. 356; *In re* Craignish [1892] 3 Ch. 180, 67 L. T. Rep. N. S. 689; *In re* Grove, 40 Ch. D. 216, 58 L. J. Ch. 57, 59 L. T. Rep. N. S. 587, 37 Wkly. Rep. 1; Urquhart *v.* Butterfield, 37 Ch. D. 357, 57 L. J. Ch. 521, 58 L. T. Rep. N. S. 750; Hoskins *v.* Matthews, 8 De G. M. & G. 13, 2 Jur. N. S. 196, 25 L. J. Ch. 689, 4 Wkly. Rep. 216, 57 Eng. Ch. 10; Forbes *v.* Forbes, 2 Eq. Rep. 178, 18 Jur. 642, Kay 341, 23 L. J. Ch. 724, 2 Wkly. Rep. 253; Atty.-Gen. *v.* Winans, 65 J. P. 819, 85 L. T. Rep. N. S. 508; Aikman *v.* Aikman, 7 Jur. N. S. 1017, 4 L. T. Rep. N. S. 374, 3 Macq. H. L. 854; Somerville *v.* Somerville, 5 Ves. Jr. 750, 5 Rev. Rep. 155, 31 Eng. Reprint 839.

Canada.— Wadsworth *v.* McCord, 12 Can. Supreme Ct. 466.

See 17 Cent. Dig. tit. "Domicile," § 3.

While a domicile of origin, so called, attaches at the instant of birth, being subject to modification, it cannot be conclusively fixed until the infant becomes *sui juris*. This definition is therefore submitted rather than that commonly given as possessing greater accuracy. See Story Confl. L. § 48; and cases cited *supra*, note 17.

Disability of infants see INFANTS.

18. *Florida.*— Smith *v.* Croom, 7 Fla. 81.

D. Domicile by Operation of Law. Domicile by operation of law is consequential, as that of a wife arising from marriage.[19]

IV. ACQUISITION.

A. Elements in General. Domicile of choice is entirely a question of residence[20] and intent[21] or, as it is usually put, the *factum* and the *animus*. Both must concur in order that the domicile may be deemed established.[22]

Pennsylvania.— Price *v.* Price, 156 Pa. St. 617, 27 Atl. 291.

United States.— Johnson *v.* Twenty-one Bales, etc., 16 Fed. Cas. No. 7,417, 2 Paine 601, 3 Wheel. Cr. (N. Y.) 433.

England.—Haldane *v.* Eckford, L. R. 8 Eq. 631, 21 L. T. Rep. N. S. 87, 17 Wkly. Rep. 1059; Udny *v.* Udny, L. R. 1 H. L. Sc. 441; Abd-Ul-Messih *v.* Farra, 13 App. Cas. 431, 57 L. J. P. C. 88, 59 L. T. Rep. N. S. 106; Platt *v.* Atty.-Gen., 3 App. Cas. 336, 47 L. J. P. C. 26, 38 L. T. Rep. N. S. 74, 26 Wkly. Rep. 516; Urquhart *v.* Butterfield, 37 Ch. D. 357, 57 L. J. Ch. 521, 58 L. T. Rep. N. S. 750; *In re* Tootal, 23 Ch. D. 532, 52 L. J. Ch. 664, 48 L. T. Rep. N. S. 816, 31 Wkly. Rep. 653; Lord *v.* Colvin, 4 Drew. 366, 5 Jur. N. S. 351, 28 L. J. Ch. 361, 7 Wkly. Rep. 250; *In re* Duleep Singh, 7 Morr. Bankr. Cas. 228.

Canada.— Wadsworth *v.* McCord, 12 Can. Supreme Ct. 466.

See 17 Cent. Dig. tit. "Domicile," § 6 *et seq.*; and Story Confl. L. § 48.

19. Story Confl. L. § 48. And see Smith *v.* Croom, 7 Fla. 81.

"Domicile may be either national or domestic. The former is one in which nationality a man is domiciled, and the latter in which subdivision of the nation." Steers' Succession, 47 La. Ann. 1551, 1553, 18 So. 503.

Domicile of married woman see *infra*, V, B, 2.

20. Residence as an element see *infra*, IV, B.

21. Intent as an element see *infra*, IV, C.

22. *Alabama.*— Merrill *v.* Morrissett, 76 Ala. 433; Murphy *v.* Hunt, 75 Ala. 438; Bragg *v.* State, 69 Ala. 204; Talmadge *v.* Talmadge, 66 Ala. 199; Glover *v.* Glover, 18 Ala. 367; State *v.* Hallett, 8 Ala. 159.

Dakota.— Gardner *v.* Board of Education, 5 Dak. 259, 38 N. W. 433.

Delaware.— State *v.* Frest, 4 Harr. 558.

Florida.— Smith *v.* Croom, 7 Fla. 81.

Georgia.— Lamar *v.* Mahony, Dudley 92.

Illinois.— Hayes *v.* Hayes, 74 Ill. 312; Wells *v.* People, 44 Ill. 40.

Indiana.— Brittenham *v.* Robinson, 18 Ind. App. 502, 48 N. E. 616.

Iowa.— Vanderpoel *v.* O'Hanlon, 53 Iowa 246, 5 N. W. 119, 36 Am. Rep. 216; Cohen *v.* Daniels, 25 Iowa 88.

Kansas.— Adams *v.* Evans, 19 Kan. 174.

Louisiana.— Sanderson *v.* Ralston, 20 La. Ann. 312; Cole *v.* Lucas, 2 La. Ann. 946; McKowen *v.* McGuire, 15 La. Ann. 637; Gravillon *v.* Richards, 13 La. 293, 33 Am. Dec. 563; Tanner *v.* King, 11 La. 175.

Maine.— Saunders *v.* Getchell, 76 Me. 158, 49 Am. Rep. 606; Stockton *v.* Staples, 66 Me. 187; Church *v.* Rowell, 49 Me. 367; Wayne *v.* Greene, 21 Me. 357; Hallowell *v.* Saco, 5 Me. 143.

Maryland.— Ringgold *v.* Barley, 5 Md. 186, 59 Am. Dec. 107 note.

Massachusetts.— Viles *v.* Waltham, 157 Mass. 542, 32 N. E. 901, 34 Am. St. Rep. 311; Pickering *v.* Cambridge, 144 Mass. 244, 10 N. E. 827; Hallet *v.* Bassett, 100 Mass. 167; Whitney *v.* Sherborn, 12 Allen 111; Holmes *v.* Greene, 7 Gray 299; Opinion of Justices, 5 Metc. 587; Lyman *v.* Fiske, 17 Pick. 231, 28 Am. Dec. 293; Harvard College *v.* Gore, 5 Pick. 370.

Michigan.— Beecher *v.* Detroit, 114 Mich. 228, 72 N. W. 206; *In re* High, 2 Dougl. 515.

Mississippi.— Morgan *v.* Nunes, 54 Miss. 308; Hairston *v.* Hairston, 27 Miss. 704, 61 Am. Dec. 530.

Missouri.— State *v.* Dayton, 77 Mo. 678; Johnson *v.* Smith, 43 Mo. 499.

Nebraska.— State *v.* Superior School Dist., 55 Nebr. 317, 75 N. W. 855.

New Hampshire.— Concord *v.* Rumney, 45 N. H. 423; State *v.* Daniels, 44 N. H. 383; Leach *v.* Pillsbury, 15 N. H. 137; Moore *v.* Wilkins, 10 N. H. 452.

New Jersey.— Valentine *v.* Valentine, 61 N. J. Eq. 400, 48 Atl. 593; Harral *v.* Harral, 39 N. J. Eq. 279, 51 Am. Rep. 17.

New York.— De Meli *v.* De Meli, 120 N. Y. 485, 24 N. E. 996, 17 Am. St. Rep. 652 [*affirming* 5 N. Y. Civ. Proc. 306, 67 How. Pr. 20]; Hegeman *v.* Fox, 31 Barb. 475; Vischer *v.* Vischer, 12 Barb. 640; Chaine *v.* Wilson, 1 Bosw. 673; Plant *v.* Harrison, 36 Misc. 649, 74 N. Y. Suppl. 411; Eaves Costume Co. *v.* Pratt, 2 Misc. 420, 22 N. Y. Suppl. 74; Brown *v.* Ashbough, 40 How. Pr. 260; Graham *v.* Public Adm'r, 4 Bradf. Surr. 127.

North Carolina.— Plummer *v.* Brandon, 40 N. C. 190; Horne *v.* Horne, 31 N. C. 99.

Pennsylvania.— Price *v.* Price, 156 Pa. St. 617, 27 Atl. 291; Carey's Appeal, 75 Pa. St. 201; Reed's Appeal, 71 Pa. St. 378; *In re* Fry, 71 Pa. St. 302, 10 Am. Rep. 698; Pfoutz *v.* Comford, 36 Pa. St. 420; Casey's Case, 1 Ashm. 126; Malone *v.* Lindley, 1 Phila. 192; McDaniel's Case, 2 Pa. L. J. Rep. 82, 3 Pa. L. J. 310; Peters *v.* Coby, 24 Pittsb. Leg. J. 99.

South Carolina.— Bradley *v.* Lowry, Speers Eq. 1, 39 Am. Dec. 142.

Tennessee.— Kellar *v.* Baird, 5 Heisk. 39; White *v.* White, 3 Head 404; Foster *v.* Hall, 4 Humphr. 346; McClellan *v.* Carroll, (Ch. App. 1897) 42 S. W. 185.

Texas.— *Ex p.* Blumer, 27 Tex. 734; Rus-

B. Residence — **1. In General.** Residence at the place in question must be shown to have existed in order that the party's domicile may be deemed to have been established there.[23]

2. Character of Residence. The character of the residence is of no importance in fixing the domicile,[24] and it is immaterial whether the party lives in a hired house, in a boarding-house or hotel, or in his own dwelling.

3. Time of Residence. Nor is any specified length of time required,[25] and the

sell *v.* Randolph, 11 Tex. 460; State *v.* Young, Dall. 464.

Virginia.— Lindsay *v.* Murphy, 76 Va. 428; Long *v.* Ryan, 30 Gratt. 718; Pilson *v.* Bushong, 29 Gratt. 229.

West Virginia.—Dean *v.* Cannon, 37 W. Va. 123, 16 S. E. 444; White *v.* Tennant, 31 W. Va. 790, 8 S. E. 596, 13 Am. St. Rep. 896.

Wisconsin.— Kempster *v.* Milwaukee, 97 Wis. 343, 72 N. W. 743.

United States.— Chambers *v.* Prince, 75 Fed. 176; Mitchell *v.* U. S., 21 Wall. 350, 22 L. ed. 584; Ennis *v.* Smith, 14 How. 400, 14 L. ed. 472; White *v.* Brown, 29 Fed. Cas. No. 17,538, 1 Wall. Jr. 217.

England.— Stevenson *v.* Masson, L. R. 17 Eq. 78, 43 L. J. Ch. 134, 29 L. T. Rep. N. S. 666, 22 Wkly. Rep. 150; Haldane *v.* Eckford, L. R. 8 Eq. 631, 21 L. T. Rep. N. S. 87, 17 Wkly. Rep. 1059; Udny *v.* Udny, L. R. 1 H. L. Sc. 441; Bell *v.* Kennedy, L. R. 1 H. L. Sc. 307; Brown *v.* Smith, 15 Beav. 444, 21 L. J. Ch. 356; *In re* Grove, 40 Ch. D. 216, 58 L. J. Ch. 57, 59 L. T. Rep. N. S. 587, 37 Wkly. Rep. 1; Urquhart *v.* Butterfield, 37 Ch. D. 357, 57 L. J. Ch. 521, 58 L. T. Rep. N. S. 750; *In re* Marrett, 36 Ch. D. 400, 57 L. T. Rep. N. S. 896, 36 Wkly. Rep. 344; King *v.* Foxwell, 3 Ch. D. 518, 45 L. J. Ch. 693, 24 Wkly. Rep. 629; Hamilton *v.* Dallas, 1 Ch. D. 257, 45 L. J. Ch. 15, 33 L. T. Rep. N. S. 495, 24 Wkly. Rep. 264; Lord *v.* Colvin, 4 Drew. 366, 5 Jur. N. S. 351, 28 L. J. Ch. 361, 7 Wkly. Rep. 250; Atty.-Gen. *v.* Fitzgerald, 3 Drew. 610, 25 L. J. Ch. 743, 4 Wkly. Rep. 797; Forbes *v.* Forbes, 2 Eq. Rep. 178, 18 Jur. 642, Kay 341, 23 L. J. Ch. 724, 2 Wkly. Rep. 253; Atty.-Gen. *v.* Winans, 65 J. P. 819, 85 L. T. Rep. N. S. 508; *In re* Cooke, 56 L. J. Ch. 637, 56 L. T. Rep. N. S. 737, 35 Wkly. Rep. 608; Lyall *v.* Paton, 25 L. J. Ch. 746, 4 Wkly. Rep. 798.

Canada.— Jones *v.* St. John, 30 Can. Supreme Ct. 122; Magurn *v.* Magurn, 3 Ont. 570; Brochu *v.* Bissonnette, 13 Quebec Super. Ct. 271.

See 17 Cent. Dig. tit. "Domicile," § 9.

23. *Florida.*— Smith *v.* Croom, 7 Fla. 81.

Iowa.— Cohen *v.* Daniels, 25 Iowa 88.

Louisiana.— Alter *v.* Waddill, 20 La. Ann. 246.

Maine.— Fayette *v.* Livermore, 62 Me. 229; Greene *v.* Windham, 13 Me. 225.

Massachusetts.— Viles *v.* Waltham, 157 Mass. 542, 32 N. E. 901, 34 Am. St. Rep. 311; Shaw *v.* Shaw, 98 Mass. 158; Holmes *v.* Greene, 7 Gray 299; Sears *v.* Boston, 1 Metc. 250.

Mississippi.— Hairston *v.* Hairston, 27 Miss. 704, 61 Am. Dec. 500.

New Hampshire.— Concord *v.* Rumney, 45 N. H. 423.

New York.—Hegeman *v.* Fox, 31 Barb. 475; Eaves Costume Co. *v.* Pratt, 2 Misc. 420, 22 N. Y. Suppl. 74; Graham *v.* Public Adm'r, 4 Bradf. Surr. 127.

Tennessee.— Kellar *v.* Baird, 5 Heisk. 39; White *v.* White, 3 Head 404; Foster *v.* Hall, 4 Humphr. 346.

Texas.— *Ex p.* Blumer, 27 Tex. 734.

Virginia.— Lindsay *v.* Murphy, 76 Va. 428; Pilson *v.* Bushong, 29 Gratt. 229.

United States.— Ennis *v.* Smith, 14 How. 400, 14 L. ed. 472; Johnson *v.* Twenty-One Bales, etc., 13 Fed. Cas. No. 7,417, 2 Paine 601, 3 Wheel. Cr. (N. Y.) 433; White *v.* Brown, 29 Fed. Cas. No. 17,538, 1 Wall. Jr. 217.

England.— *In re* Tootal, 23 Ch. D. 532, 52 L. J. Ch. 664, 48 L. T. Rep. N. S. 816, 31 Wkly. Rep. 653; King *v.* Foxwell, 3 Ch. D. 518, 45 L. J. Ch. 693, 24 Wkly. Rep. 629.

Canada.— Brochu *v.* Bissonnette, 13 Quebec Super. Ct. 271.

See 17 Cent. Dig. tit. "Domicile," § 9.

24. *Louisiana.*— Steers' Succession, 47 La. Ann. 1551, 18 So. 503.

Maine.— Wilton *v.* Falmouth, 15 Me. 479; Waterborough *v.* Newfield, 8 Me. 203; Richmond *v.* Vassalborough, 5 Me. 396.

New York.— Ames *v.* Duryea, 6 Lans. 155; Sherwood *v.* Judd, 3 Bradf. Surr. 267.

Pennsylvania.— Guier *v.* O'Daniel, 1 Binn. 349 note; Burch *v.* Taylor, 1 Phila. 224; Reed *v.* Ketch, 1 Phila. 105.

South Carolina.— Bradley *v.* Lowry, Speers Eq. 1, 39 Am. Dec. 142.

Texas.— *Ex p.* Blumer, 27 Tex. 734.

England.— *In re* Craignish, [1892] 3 Ch. 180, 67 L. T. Rep. N. S. 689; *In re* Patience, 29 Ch. D. 976, 54 L. J. Ch. 897, 52 L. T. Rep. N. S. 687, 33 Wkly. Rep. 501; Aikman *v.* Aikman, 7 Jur. N. S. 1017, 4 L. T. Rep. N. S. 374, 3 Macq. H. L. 854.

Canada.— Jones *v.* St. John, 30 Can. Supreme Ct. 122.

See 17 Cent. Dig. tit. "Domicile," § 12.

Need not reside in any particular house.— It has been held that one may be considered as "dwelling and having his home" in a certain town, within the meaning of "the pauper settlement act," although he has no particular house there as the place of his fixed abode. Parsonfield *v.* Perkins, 2 Me. 411.

25. *Connecticut.*— Easterly *v.* Goodwin, 35 Conn. 279, 95 Am. Dec. 237.

Georgia.— Fain *v.* Crawford, 91 Ga. 30, 16 S. E. 106; Lamar *v.* Mahony, Dudley 92.

shortest period of residence, even if it be but for a day, will be sufficient when coupled with the element of intent.

C. Intent[26] — **1. In General.** Coupled with the fact of residence must be the *animus manendi* — the present settled intention to remain in the chosen locality for an indefinite time.[27]

Louisiana.— Verret *v.* Bonvillain, 33 La. Ann. 1304.

Maine.— Stockton *v.* Staples, 66 Me. 187; Littlefield *v.* Brooks, 50 Me. 475.

Michigan.— Beecher *v.* Detroit, 114 Mich. 228, 72 N. W. 206.

Mississippi.— Hairston *v.* Hairston, 27 Miss. 704, 61 Am. Dec. 530.

New York.— Vischer *v.* Vischer, 12 Barb. 640; Plant *v.* Harrison, 36 Misc. 649, 74 N. Y. Suppl. 411.

North Carolina.— Plummer *v.* Brandon, 40 N. C. 190; Horne *v.* Horne, 31 N. C. 99.

Pennsylvania.— Price *v.* Price, 156 Pa. St. 617, 27 Atl. 291; Guier *v.* O'Daniel, 1 Binn. 349 note.

South Carolina.— Bradley *v.* Lowry, Speers Eq. 1, 39 Am. Dec. 142.

Tennessee.— Kellar *v.* Baird, 5 Heisk. 39; White *v.* White, 3 Head 404.

Texas.— Russell *v.* Randolph, 11 Tex. 460; Republic *v.* Young, Dall. 464.

West Virginia.— White *v.* Tennant, 31 W. Va. 790, 8 S. E. 596, 13 Am. St. Rep. 896.

Wisconsin.— Kempster *v.* Milwaukee, 97 Wis. 343, 72 N. W. 743.

United States.— White *v.* Brown, 29 Fed. Cas. No. 17,538, 1 Wall. Jr. 217.

England.— Craigie *v.* Lewin, 3 Curt. Eccl. 435, 7 Jur. 519; Stanley *v.* Bernes, 3 Hagg. Eccl. 373; Cockerell *v.* Cockerell, 4 Jur. N. S. 727, 25 L. J. Ch. 730, 4 Wkly. Rep. 730; Hodgson *v.* De Beauchesne, 12 Moore P. C. 285, 7 Wkly. Rep. 397, 14 Eng. Reprint 920.

Canada.— Brochu *v.* Bissonnette, 13 Quebec Super. Ct. 271.

See 17 Cent. Dig. tit. "Domicile," § 13.

26. Concurrence of intent on loss of domicile see *infra*, VII, B.

27. *Connecticut.*— Hartford *v.* Champion, 58 Conn. 268, 20 Atl. 471.

Florida.— Smith *v.* Croom, 7 Fla. 81.

Iowa.— Church *v.* Crossman, 49 Iowa 444.

Louisiana.— Verret *v.* Vonvillain, 33 La. Ann. 1304.

Maine.— Stockton *v.* Staples, 66 Me. 187; Church *v.* Rowell, 49 Me. 367; Wilton *v.* Falmouth, 15 Me. 479.

Massachusetts.— Viles *v.* Waltham, 157 Mass. 542, 32 N. E. 901, 34 Am. St. Rep. 311; McConnell *v.* Kelley, 138 Mass. 372; Wilbraham *v.* Ludlow, 99 Mass. 587; Shaw *v.* Shaw, 98 Mass. 158; Whitney *v.* Sherborn, 12 Allen 111; Sears *v.* Boston, 1 Metc. 250; Jennison *v.* Hapgood, 10 Pick. 77.

Mississippi.— Hairston *v.* Hairston, 27 Miss. 704, 61 Am. Dec. 530.

Missouri.—Hall *v.* Schoenecke, 128 Mo. 661, 31 S. W. 97; State *v.* Dayton, 77 Mo. 678.

New Hampshire.— State *v.* Palmer, 65 N. H. 9, 17 Atl. 977; Concord *v.* Rumney, 45 N. H. 423; Hart *v.* Lindsey, 17 N. H. 235, 53 Am. Dec. 597.

New Jersey.— Stout *v.* Leonard, 37 N. J. L. 492; *In re* Russell, 64 N. J. Eq. 313, 53 Atl. 169; Valentine *v.* Valentine, 61 N. J. Eq. 400, 48 Atl. 593; Firth *v.* Firth, 50 N. J. Eq. 137, 24 Atl. 916; Harral *v.* Harral, 39 N. J. Eq. 279, 51 Am. Rep. 17.

New York.—Hegeman *v.* Fox, 31 Barb. 475; Eaves Costume Co. *v.* Pratt, 2 Misc. 420, 22 N. Y. Suppl. 74; Brown *v.* Ashbough, 40 How. Pr. 260; *In re* Thompson, 1 Wend. 43.

North Carolina.— Horne *v.* Horne, 31 N. C. 99.

Pennsylvania.— Price *v.* Price, 156 Pa. St. 617, 27 Atl. 291; *In re* Fry, 71 Pa. St. 302, 10 Am. Rep. 698; *In re* Casey, 1 Ashm. 126.

Tennessee.— Kellar *v.* Baird, 5 Heisk. 39; White *v.* White, 3 Head 404; Foster *v.* Hall, 4 Humphr. 346.

Texas.— *Ex p.* Blumer, 27 Tex. 734; Russell *v.* Randolph, 11 Tex. 460; Benavides *v.* Gussett, 8 Tex. Civ. App. 198, 28 S. W. 113.

Vermont.—Barton *v.* Irasburgh, 33 Vt. 159.

Virginia.— Lindsay *v.* Murphy, 76 Va. 428; Pilson *v.* Bushong, 29 Gratt. 229.

Wisconsin.— Frame *v.* Thormann, 102 Wis. 653, 79 N. W. 39.

United States.— Chicago, etc., R. Co. *v.* Ohle, 117 U. S. 123, 6 S. Ct. 632, 29 L. ed. 837; Mitchell *v.* U. S., 21 Wall. 350, 22 L. ed. 584; Ennis *v.* Smith, 14 How. 400, 14 L. ed. 472; The Nereide, 9 Cranch 388, 3 L. ed. 769; Kemna *v.* Brockhaus, 5 Fed. 762, 10 Biss. 128; White *v.* Brown, 29 Fed. Cas. No. 17,538, 1 Wall. Jr. 217.

England.—Douglas *v.* Douglas, L. R. 12 Eq. 617, 41 L. J. Ch. 74, 25 L. T. Rep. N. S. 530, 20 Wkly. Rep. 55; Haldane *v.* Eckford, L. R. 8 Eq. 631, 21 L. T. Rep. N. S. 87, 17 Wkly. Rep. 1059; Udny *v.* Udny, L. R. 1 H. L. Sc. 441; Loustalan *v.* Loustalan, [1900] P. 211, 69 L. J. P. C. 75, 82 L. T. Rep. N. S. 806, 48 Wkly. Rep. 509; Urquhart *v.* Butterfield, 37 Ch. D. 357, 57 L. J. Ch. 521, 58 L. T. Rep. N. S. 750; *In re* Marrett, 36 Ch. D. 400, 57 L. T. Rep. N. S. 896, 36 Wkly. Rep. 344; King *v.* Foxwell, 3 Ch. D. 518, 45 L. J. Ch. 693, 24 Wkly. Rep. 629; Moorhouse *v.* Lord, 10 H. L. Cas. 272, 9 Jur. N. S. 677, 32 L. J. Ch. 295, 8 L. T. Rep. N. S. 212, 1 New Rep. 555, 11 Wkly. Rep. 637, 11 Eng. Reprint 1030; Firebrace *v.* Firebrace, 4 P. D. 63, 47 L. J. P. 41, 39 L. T. Rep. N. S. 94, 26 Wkly. Rep. 617.

See 17 Cent. Dig. tit. "Domicile," § 9 *et seq.*

"**The requisite animus** is the present intention of permanent or indefinite residence in a given place or country, or, negatively expressed, the absence of any present intention of not residing there permanently or indefinitely." Price *v.* Price, 156 Pa. St. 617, 626, 27 Atl. 291.

2. Character of Intent. This does not, however, presuppose an intent to make the new place his permanent home,[28] or to end his days there.[29]

3. Change of Nationality. Nor does it involve a change of nationality by requiring an intent to cast off all allegiance to the country of the former domicile.[30]

4. Intention to Return — a. Definite Intent. This excludes any definite intention to return to the place of the previous domicile.[31]

b. "Floating" Intent. When once removed to his new domicile, however, the party's purpose to remain need not be fixed and unalterable. If it becomes a place of fixed present residence, it will not be sufficient to defeat the domicile that there may be a floating intention to return to their former place of abode at some future and indefinite period.[32]

5. Residence For Business, Health, Pleasure, Etc. Hence residence obtained

28. Brittenham *v.* Robinson, 18 Ind. App. 502, 48 N. E. 616; Palmer *v.* Hampden, 182 Mass. 511, 65 N. E. 817; State *v.* Superior School Dist., 55 Nebr. 317, 75 N. W. 855; Bump *v.* New York, etc., R. Co., 165 N. Y. 636, 59 N. E. 1119 [*affirming* 38 N. Y. App. Div. 60, 55 N. Y. Suppl. 962].

29. Greene *v.* Windham, 13 Me. 225; Valentine *v.* Valentine, 61 N. J. Eq. 400, 48 Atl. 593; *Ex p.* Blumer, 27 Tex. 734.

30. Harral *v.* Harral, 39 N. J. Eq. 279, 51 Am. Rep. 17; Douglas *v.* Douglas, L. R. 12 Eq. 617, 41 L. J. Ch. 74, 25 L. T. Rep. N. S. 530, 20 Wkly. Rep. 55; Brunel *v.* Brunel, L. R. 12 Eq. 298, 25 L. T. Rep. N. S. 378, 19 Wkly. Rep. 970; Haldane *v.* Eckford, L. R. 8 Eq. 631, 21 L. T. Rep. N. S. 87, 17 Wkly. Rep. 1059; Udny *v.* Udny, L. R. 1 H. L. Sc. 441; *In re* Grove, 40 Ch. D. 216, 58 L. J. Ch. 57, 59 L. T. Rep. N. S. 587, 37 Wkly. Rep. 1; Atty.-Gen. *v.* Winans, 65 J. P. 819, 85 L. T. Rep. N. S. 508; Wadsworth *v.* McCord, 12 Can. Supreme Ct. 466. *Contra*, Atty.-Gen. *v.* Blucher de Wahlstatt, 3 H. & C. 374, 10 Jur. N. S. 1159, 34 L. J. Exch. 29, 11 L. T. Rep. N. S. 454, 13 Wkly. Rep. 163; Atty.-Gen. *v.* Rowe, 1 H. & C. 31, 8 Jur. N. S. 823, 31 L. J. Exch. 314, 6 L. T. Rep. N. S. 438, 10 Wkly. Rep. 718; Moorhouse *v.* Lord, 10 H. L. Cas. 272, 9 Jur. N. S. 677, 32 L. J. Ch. 295, 8 L. T. Rep. N. S. 212, 1 New Rep. 555, 11 Wkly. Rep. 637, 11 Eng. Reprint 1030; Drevon *v.* Drevon, 10 Jur. N. S. 717, 34 L. J. Ch. 129, 10 L. T. Rep. N. S. 730, 4 New Rep. 316, 12 Wkly. Rep. 946. And *compare* Wilbraham *v.* Ludlow, 99 Mass. 587.

31. *Massachusetts.*—Wilbraham *v.* Ludlow, 99 Mass. 587; Sears *v.* Boston, 1 Metc. 250; Jennison *v.* Hapgood, 10 Pick. 77.

Missouri.— Hall *v.* Schoenecke, 128 Mo. 661, 31 S. W. 97.

New Jersey.— Cadwalader *v.* Howell, 18 N. J. L. 138.

South Carolina.—Bradley *v.* Lowry, Speers Eq. 1, 39 Am. Dec. 142.

Tennessee.— White *v.* White, 3 Head 404.

United States.— Woodworth *v.* St. Paul, etc., R. Co., 18 Fed. 282, 5 McCrary 574.

England.— Craigie *v.* Lewin, 3 Curt. Eccl. 435, 7 Jur. 519; Anderson *v.* Laneuville, 9 Moore P. C. 325, 2 Spinks 41, 14 Eng. Reprint 320.

See 17 Cent. Dig. tit. "Domicile," § 22.

A subsequently formed purpose to return to the original abode cannot affect the domicile already acquired. Blair *v.* Western Female Seminary, 3 Fed. Cas. No. 1,486, 1 Bond 578.

32. *Alabama.*— Merrill *v.* Morrissett, 76 Ala. 433.

Delaware.— State *v.* Frest, 4 Harr. 558.

District of Columbia.— Bradstreet *v.* Bradstreet, 18 D. C. 229.

Iowa.— State *v.* Groome, 10 Iowa 308.

Kansas.— Graham *v.* Trimmer, 6 Kan. 230.

Louisiana.— Steers' Succession, 47 La. Ann. 1551, 18 So. 503.

Maryland.— Ringgold *v.* Barley, 5 Md. 186, 59 Am. Dec. 107.

Massachusetts.— Palmer *v.* Hampden, 182 Mass. 511, 65 N. E. 817; Hallet *v.* Bassett, 100 Mass. 167; Holmes *v.* Greene, 7 Gray 299.

Michigan.— *In re* High, 2 Dougl. 515.

Missouri.— Johnson *v.* Smith, 43 Mo. 499.

Nebraska.— State *v.* Superior School Dist., 55 Nebr. 317, 75 N. W. 855.

New Hampshire.— Hart *v.* Lindsey, 17 N. H. 235, 43 Am. Dec. 597.

New Jersey.— Valentine *v.* Valentine, 61 N. J. Eq. 400, 48 Atl. 593.

New York.— Eaves Costume Co. *v.* Pratt, 2 Misc. 420, 22 N. Y. Suppl. 74.

Pennsylvania.— Hindman's Appeal 85 Pa. St. 466.

Tennessee.— Kellar *v.* Baird, 5 Heisk. 39; Stratton *v.* Brigham, 2 Sneed 420.

Texas.— State *v.* Casinova, 1 Tex. 401.

Vermont.— Anderson *v.* Anderson, 42 Vt. 350, 1 Am. Rep. 334; Barton *v.* Irasburgh, 33 Vt. 159.

Wisconsin.— Frame *v.* Thormann, 102 Wis. 653, 79 N. W. 39.

United States.— Wright *v.* Schneider, 32 Fed. 705; Harris *v.* Firth, 11 Fed. Cas. No. 6,120, 4 Cranch C. C. 701.

England.— Atty.-Gen. *v.* Kent, 1 H. & C. 12, 31 L. J. Exch. 391, 6 L. T. Rep. N. S. 864, 10 Wkly. Rep. 722; Aikman *v.* Aikman, 7 Jur. N. S. 1017, 4 L. T. Rep. N. S. 374, 3 Macq. H. L. 854.

See 17 Cent. Dig. tit. "Domicile," § 22; and Story Confl. L. § 46.

merely for the purpose of transacting or carrying on business,[33] for the sake of health[34] or pleasure[35] while on a visit,[36] or for the education of the party's children[37] is not sufficient to constitute a domicile.

33. *Georgia.*—Knight *v.* Bond, 112 Ga. 828, 38 S. E. 206.

Indiana.— Astley *v.* Capron, 89 Ind. 167.

Kansas.— Keith *v.* Stetter, 25 Kan. 100.

Louisiana.—Steers' Succession, 47 La. Ann. 1551, 18 So. 503.

Maine.—Knox *v.* Waldoborough, 3 Me. 455.

Massachusetts.— Com. *v.* Kelleher, 115 Mass. 103; Ross *v.* Ross, 103 Mass. 575; Wilbraham *v.* Ludlow, 99 Mass. 587; Holmes *v.* Greene, 7 Gray 299; Greene *v.* Greene, 11 Pick. 410; Williams *v.* Whiting, 11 Mass. 424.

Michigan.— Spaulding *v.* Steel, 129 Mich. 237, 88 N. W. 627.

Missouri.— State *v.* Dayton, 77 Mo. 678.

New York.— Hart *v.* Kip, 148 N. Y. 306, 42 N. E. 712; Crawford *v.* Wilson, 4 Barb. 504; Chaine *v.* Wilson, 1 Bosw. 673; Eaves Costume Co. *v.* Pratt, 2 Misc. 420, 22 N. Y. Suppl. 74; *In re* Wrigley, 8 Wend. 134.

Pennsylvania.— *In re* Miller, 3 Rawle 312, 24 Am. Dec. 345. But see Malone *v.* Lindley, 1 Phila. 192, where other facts concurred.

South Carolina.— Horn *v.* McRae, 53 S. C. 51, 30 S. E. 701.

Texas.— *Ex p.* Blumer, 27 Tex. 734; Penman *v.* Wayne, 1 Dall. 348, 1 L. ed. 169.

United States.— State Sav. Assoc. *v.* Howard, 31 Fed. 433; Woodworth *v.* St. Paul, etc., R. Co., 18 Fed. 282, 5 McCrary 574.

England.— Loustalan *v.* Loustalan, [1900] P. 211, 69 L. J. P. 75, 82 L. T. Rep. N. S. 806, 48 Wkly. Rep. 509; Bruce *v.* Bruce, 2 B. & P. 229 note; *In re* Grove, 40 Ch. D. 216, 58 L. J. Ch. 57, 59 L. T. Rep. N. S. 587, 37 Wkly. Rep. 1; Jopp *v.* Wood, 4 De G. J. & S. 616, 11 Jur. N. S. 212, 34 L. J. Ch. 212, 12 L. T. Rep. N. S. 41, 5 New Rep. 422, 13 Wkly. Rep. 481, 69 Eng. Ch. 472.

See 17 Cent. Dig. tit. "Domicile," § 14 *et seq.*

But where one abandons his home and works in different places with no opinions, desires, or intentions in relation to his residence, he may be regarded as having a domicile in each successive place where he works. Palmer *v.* Hampden, 182 Mass. 511, 65 N. E. 817. And see Wilbraham *v.* Ludlow, 99 Mass. 587; Barton *v.* Irasburgh, 33 Vt. 159.

Residence for purpose of selecting homestead claim.— S left Missouri for Oklahoma, in August, 1893, and was there at the opening of that territory to settlement. Selecting a claim, he went upon it, and plowed the land for a few days. He went to the land-office to file his homestead claim and finding his rights contested then abandoned them. He went from there to Kansas where he rented a house and remained until Dec. 20, 1893, when he started back to Missouri where he arrived in January, 1894. He never moved his family into the claim selected nor into the territory, and testified that when he went to Oklahoma it was his intention if he was successful in securing a homestead to remain and if not to return to Missouri. It was held that his mere residence for the purpose of selecting a claim would not be sufficient to constitute domicile. Lankford *v.* Gebhart, 130 Mo. 621, 32 S. W. 1127, 51 Am. St. Rep. 585. And see Preston *v.* Culbertson, 58 Cal. 198.

34. *Illinois.*— Wilkins *v.* Marshall, 80 Ill. 74.

Louisiana.— Steers' Succession, 47 La. Ann. 1551, 18 So. 503.

Michigan.— *In re* High, 2 Dougl. 515.

Mississippi.— Still *v.* Woodville, 38 Miss. 646.

Missouri.— Walker *v.* Walker, 1 Mo. App. 404.

New York.— Dupuy *v.* Wurtz, 53 N. Y. 556; Cruger *v.* Phelps, 21 Misc. 252, 47 N. Y. Suppl. 61. But see Hegeman *v.* Fox, 31 Barb. 475, where, other facts showing an intention to permanently remain, the party was held domiciled at the new place of abode.

Pennsylvania.— Hindman's Appeal, 85 Pa. St. 466; Guier *v.* O'Daniel, 1 Binn. 349 note.

South Carolina.— Bradley *v.* Lowry, Speers Eq. 1, 39 Am. Dec. 142.

Texas.— *Ex p.* Blumer, 27 Tex. 734.

England.— Haldane *v.* Eckford, L. R. 8 Eq. 631, 21 L. T. Rep. N. S. 87, 17 Wkly. Rep. 1059; Udny *v.* Udny, L. R. 1 H. L. Sc. 441; Bruce *v.* Bruce, 2 B. & P. 229 note; Hoskins *v.* Matthews, 8 De G. M. & G. 13, 2 Jur. N. S. 196, 25 L. J. Ch. 689, 4 Wkly. Rep. 216, 57 Eng. Ch. 10; Moorhouse *v.* Lord, 10 H. L. Cas. 272, 9 Jur. N. S. 677, 32 L. J. Ch. 295, 8 L. T. Rep. N. S. 212, 1 New Rep. 555, 11 Wkly. Rep. 637, 11 Eng. Reprint 1030; Atty.-Gen. *v.* Winans, 65 J. P. 819, 85 L. T. Rep. N. S. 508; Allardice *v.* Onslow, 10 Jur. N. S. 352, 33 L. J. Ch. 434, 9 L. T. Rep. N. S. 674, 12 Wkly. Rep. 397.

See 17 Cent. Dig. tit. "Domicile," § 15.

35. *Kansas.*—Keith *v.* Stetter, 25 Kan. 100.

Louisiana.—Steers' Succession, 47 La. Ann. 1551, 18 So. 503.

Massachusetts.— Holmes *v.* Greene, 7 Gray 299; Sears *v.* Boston, 1 Metc. 250.

New York.— Hart *v.* Kip, 148 N. Y. 306, 42 N. E. 712.

Pennsylvania.— Hindman's Appeal, 85 Pa. St. 466.

South Carolina.—Bradley *v.* Lowry, Speers Eq. 1, 39 Am. Dec. 142.

England.— Moorhouse *v.* Lord, 10 H. L. Cas. 272, 9 Jur. N. S. 677, 32 L. J. Ch. 295, 8 L. T. Rep. N. S. 212, 1 New Rep. 555, 11 Wkly. Rep. 637, 11 Eng. Reprint 1030; Aikman *v.* Aikman, 7 Jur. N. S. 1017, 4 L. T. Rep. N. S. 374, 3 Macq. H. L. 854; Atty.-Gen. *v.* Dunn, 6 M. & W. 511.

See 17 Cent. Dig. tit. "Domicile," § 15.

36. Church *v.* Crossman, 49 Iowa 444; *Ex p.* Blumer, 27 Tex. 734; Bruce *v.* Bruce, 2 B. & P. 229 note.

37. *Dakota.*— Gardner *v.* Board of Education, 5 Dak. 259, 38 N. W. 433.

D. Commencement. While, as has been seen, a temporary residence will not be sufficient, yet the *animus manendi* may afterward be grafted thereon in order to fix domicile.[38] Therefore as soon as a point of time is reached when residence and intent concur the domicile is obtained.[39]

V. CAPACITY TO ACQUIRE.

A. In General. Subject to the qualifications hereinafter mentioned[40] everyone may at will acquire a separate domicile of his own.

B. Absolute Incapacity — 1. INFANTS — a. During Father's Lifetime. An infant being *non sui juris* is incapable of fixing his domicile, which therefore during his minority follows that of the father, provided such child is legitimate;[41]

Georgia.— Peacock *v.* Collins, 110 Ga. 281, 34 S. E. 611.

Louisiana.— McGehee *v.* Brown, 4 La. Ann. 186.

Mississippi.—Alston *v.* Newcomer, 42 Miss. 186.

Missouri.— Hall *v.* Schoenecke, 128 Mo. 661, 31 S. W. 97.

Nebraska.— State *v.* Superior School Dist., 55 Nebr. 317, 75 N. W. 855.

New York.— Eaves Costume Co. *v.* Pratt, 2 Misc. 420, 22 N. Y. Suppl. 74.

England.— Lord *v.* Colvin, 4 Drew. 366, 5 Jur. N. S. 351, 28 L. J. Ch. 361, 7 Wkly. Rep. 250; Moorhouse *v.* Lord, 10 H. L. Cas. 272, 9 Jur. N. S. 677, 32 L. J. Ch. 295, 8 L. T. Rep. N. S. 212, 1 New Rep. 555, 11 Wkly. Rep. 637, 11 Eng. Reprint 1030.

See 17 Cent. Dig. "Domicile," § 15.

38. *Louisiana.*— Steers' Succession, 47 La. Ann. 1551, 18 So. 503.

Maine.— Hampden *v.* Levant, 59 Me. 557.

Missouri.— Johnson *v.* Smith, 43 Mo. 499, 501, where it is said: "For a man's domicile is where he has fixed his ordinary dwelling, without a present intention of removal, and that domicile may be changed to another, notwithstanding the party, on his departure, may cherish a secret purpose of returning at some indefinite time in the future. Nor does the intent at the time of removal necessarily decide anything, since the party's intentions may change at a subsequent period. He may come to a different mind, and fix his dwelling in another locality with no present purpose of leaving it, and thus become domiciled there, notwithstanding his original purpose."

Pennsylvania.— Carey's Appeal, 75 Pa. St. 201.

Texas.— *Ex p.* Blumer, 27 Tex. 734.

England.— Brunel *v.* Brunel, L. R. 12 Eq. 298, 25 L. T. Rep. N. S. 378, 18 Wkly. Rep. 970; Haldane *v.* Eckford, L. R. 8 Eq. 631, 21 L. T. Rep. N. S. 87, 17 Wkly. Rep. 1059; Udny *v.* Udny, L. R. 1 H. L. Sc. 441; Platt *v.* Atty.-Gen., 3 App. Cas. 336, 47 L. J. P. C. 26, 38 L. T. Rep. N. S. 74, 26 Wkly. Rep. 516; Bruce *v.* Bruce, 2 B. & P. 229 note; *In re* Grove, 40 Ch. D. 216, 58 L. J. Ch. 57, 59 L. T. Rep. N. S. 587, 37 Wkly. Rep. 1; Atty.-Gen. *v.* Winans, 65 J. P. 819, 85 L. T. Rep. N. S. 508.

Canada.— Wadsworth *v.* McCord, 12 Can. Supreme Ct. 466.

See 17 Cent. Dig. tit. "Domicile," § 33.

39. *Alabama.*—State *v.* Hallett, 8 Ala. 159.

Illinois.— Carter *v.* Putnam, 141 Ill. 133, 30 N. E. 681; Behrensmeyer *v.* Kreitz, 135 Ill. 591, 26 N. E. 704.

Kansas.— Hart *v.* Horn, 4 Kan. 232.

Louisiana.— Verret *v.* Bonvillain, 33 La. Ann. 1304; Gravillon *v.* Richard, 13 La. 293, 33 Am. Dec. 563. *Contra*, State *v.* Judge New Orleans Probate Ct., 2 Rob. 449, where, under special statute, residence of one year was held requisite before domicile could be established.

Maine.— Littlefield *v.* Brooks, 50 Me. 475.

Massachusetts.— Williams *v.* Roxbury, 12 Gray 21; Williams *v.* Whiting, 11 Mass. 424.

New York.— Black *v.* Black, 4 Bradf. Surr. 174.

South Carolina.— Bradley *v.* Lowry, Speers Eq. 1, 39 Am. Dec. 142.

Tennessee.— Vaughn *v.* Ballentine, 1 Tenn. Cas. 596.

40. See *infra*, V, B, C.

41. *Alabama.*— Allgood *v.* Williams, 92 Ala. 551, 8 So. 722; Kelly *v.* Garrett, 67 Ala. 304; Metcalf *v.* Lowther, 56 Ala. 312; Daniel *v.* Hill, 52 Ala. 430; Johnson *v.* Copeland, 35 Ala. 521.

Arkansas.— Johnson *v.* Turner, 29 Ark. 280; Grimmett *v.* Witherington, 16 Ark. 377, 63 Am. Dec. 66.

California.— *In re* Henning, 128 Cal. 214, 60 Pac. 762, 79 Am. St. Rep. 43; *In re* Vance, 92 Cal. 195, 28 Pac. 229.

District of Columbia.— Matter of Afflick, 3 MacArthur 95.

Georgia.— Harkins *v.* Arnold, 46 Ga. 656; Taylor *v.* Jeter, 33 Ga. 195, 81 Am. Dec. 202.

Illinois.— Van Matre *v.* Sankey, 148 Ill. 536, 36 N. E. 628, 39 Am. St. Rep. 196, 23 L. R. A. 665; Freeport *v.* Stephenson County, 41 Ill. 495.

Indiana.— Maddox *v.* State, 32 Ind. 111; McCollem *v.* White, 23 Ind. 43; Wheeler *v.* Burrow, 18 Ind. 14; Warren *v.* Hofer, 13 Ind. 167; Hiestand *v.* Kuns, 8 Blackf. 345, 46 Am. Dec. 481.

Kansas.— Modern Woodmen of America *v.* Hester, 66 Kan. 129, 71 Pac. 279.

Kentucky.—Munday *v.* Baldwin, 79 Ky. 121.

Louisiana.—Winn's Succession, 3 Rob. 303; Robert's Succession, 2 Rob. 427.

Maine.— Parsonsfield *v.* Kennebunkport, 4 Me. 47.

Michigan.— *In re* High, 2 Dougl. 515.

Missouri.— Lacy *v.* Williams, 27 Mo. 280; De Jarnett *v.* Harper, 45 Mo. App. 415; Lewis *v.* Castello, 17 Mo. App. 593.

and the mere separation[42] of the parents does not affect the application of this rule.[43] Where the minor is *non compos mentis* and so continues throughout his majority, his domicile remains continuously subject to the control of his father.[44]

b. After Father's Death. If the father dies during the infant's minority the power to fix the domicile devolves upon the mother who may alter it at pleasure, provided it be without fraudulent motives respecting the succession to the estate[45]

New Hampshire.—Hart *v.* Lindsey, 17 N. H. 235, 43 Am. Dec. 597.

New Jersey.— *In re* Russell, 64 N. J. Eq. 313, 53 Atl. 169; Blumenthal *v.* Tannenholz, 31 N. J. Eq. 194.

New York.— Kennedy *v.* Ryall, 67 N. Y. 379 [*affirming* 40 N. Y. Super. Ct. 347]; Ames *v.* Duryea, 6 Lans. 155; Crawford *v.* Wilson, 4 Barb. 504; Matter of Rice, 7 Daly 22; Matter of Kiernan, 38 Misc. 394, 77 N. Y. Suppl. 924; Eaves Costume Co. *v.* Pratt, 2 Misc. 420, 22 N. Y. Suppl. 74; Van Hoffman *v.* Ward, 4 Redf. Surr. 244; *Ex p.* Bartlett, 4 Bradf. Surr. 221; *Ex p.* Dawson, 3 Bradf. Surr. 130.

Pennsylvania.— West Chester *v.* James, 2 Watts & S. 568, 37 Am. Dec. 525; Guier *v.* O'Daniel, 1 Binn. 349 note; Foly's Estate, 1 Wkly. Notes Cas. 301, 11 Phila. 47; Connon's Estate, 15 Pa. Co. Ct. 312.

Tennessee.— Farris *v.* Sipes, 99 Tenn. 298, 41 S. W. 443; Allen *v.* Thomason, 11 Humphr. 536, 54 Am. Dec. 55.

Texas.— Trammell *v.* Trammell, 20 Tex. 406; Wheeler *v.* Hollis, 19 Tex. 522, 70 Am. Dec. 363, 33 Tex. 512; Russell *v.* Randolph, 11 Tex. 460; Hardy *v.* De Leon, 5 Tex. 211.

West Virginia.—Mears *v.* Sinclair, 1 W. Va. 185.

United States.— Lamar *v.* Micou, 112 U. S. 452, 5 S. Ct. 221, 28 L. ed. 751; Dresser *v.* Edison Illuminating Co., 49 Fed. 257; Powers *v.* Mortee, 19 Fed. Cas. No. 11,362.

England.— Udny *v.* Udny, L. R. 1 H. L. Sc. 441; Sharpe *v.* Crispin, L. R. 1 P. 611, 38 L. J. P. 17, 20 L. T. Rep. N. S. 41, 17 Wkly. Rep. 368; D'Etchegoyen *v.* D'Etchegoyen, 13 P. D. 132, 57 L. J. P. 104, 37 Wkly. Rep. 64; Firebrace *v.* Firebrace, 4 P. D. 63, 47 L. J. P. 41, 39 L. T. Rep. N. S. 94, 26 Wkly. Rep. 617; *In re* Beaumont, [1893] 3 Ch. 490, 62 L. J. Ch. 923, 8 Reports 9, 42 Wkly. Rep. 142; *In re* Macreight, 30 Ch. D. 165, 55 L. J. Ch. 28, 53 L. T. Rep. N. S. 146, 33 Wkly. Rep. 838; Jopp *v.* Wood, 4 De G. J. & S. 616, 11 Jur. N. S. 212, 34 L. J. Ch. 212, 12 L. T. Rep. N. S. 41, 5 New Rep. 422, 13 Wkly. Rep. 481, 69 Eng. Ch. 472; Forbes *v.* Forbes, 2 Eq. Rep. 178, 18 Jur. 642, Kay 341, 23 L. J. Ch. 724, 2 Wkly. Rep. 253; Walcot *v.* Botfield, 18 Jur. 570, Kay 534, 2 Wkly. Rep. 393; *In re* Patten, 6 Jur. N. S. 151; Potinger *v.* Wightman, 3 Meriv. 67, 17 Rev. Rep. 20, 36 Eng. Reprint 26; *In re* Duleep Singh, 7 Morr. Bankr. Cas. 228; Somerville *v.* Somerville, 5 Ves. Jr. 750, 5 Rev. Rep. 155, 31 Eng. Reprint 839.

Canada.— Wadsworth *v.* McCord, 12 Can. Supreme Ct. 466.

See 17 Cent. Dig. tit. "Domicile," § 27 *et seq.*

Adopted children.—The rule applies equally to adopted children. Matter of Johnson, 87 Iowa 130, 54 N. W. 69; Woodward *v.* Woodward, 87 Tenn. 644, 11 S. W. 892.

Where child abandoned by father.— The general rule that the domicile of the father during his life is the domicile of the minor child does not apply where such child has been abandoned by the father. *In re* Vance, 92 Cal. 195, 28 Pac. 229; People *v.* Dewey, 23 Misc. (N. Y.) 267, 50 N. Y. Suppl. 1013.

42. But where a divorce has been granted to the wife with custody of the infant, the domicile of the mother fixes that of the child. Fox *v.* Hicks, 81 Minn. 197, 83 N. W. 538, 50 L. R. A. 663.

43. Von Hoffman *v.* Ward, 4 Redf. Surr. (N. Y.) 244.

44. Sharpe *v.* Crispin, L. R. 1 P. 611, 617, 38 L. J. P. 17, 20 L. T. Rep. N. S. 41, 17 Wkly. Rep. 368, where the court said, per Wilde, J.: "I can find no authority which defines the effect of a change of domicile in a father upon a lunatic son. It would probably depend upon circumstances. If a man had grown up, married and established himself in business in the country of his original domicile, and had afterwards become lunatic and in that state had been taken charge of by his father, the emigration of his father to a foreign country with the view of becoming domiciled there, taking his son with him, might fail to work a change in the domicile of that son. It is not difficult to conceive cases in which great injustice might be done to the interests of others, if the general proposition were admitted that the custody of a lunatic necessarily carried with it the power of changing his domicile at will. But the hypothesis under which I am now considering the circumstances of the present case is free from the necessity of asserting any such general proposition. For I am assuming that George Crispin was of unsound mind throughout his majority,— in other words, that there never was a period during which he could think and act for himself in the matter of domicile otherwise than as a minor could. And if this be so, it would seem to me that the same reasoning which attaches the domicile of the son to that of his father while a minor would continue to bring about the same result, after the son had attained his majority, if he was continuously of unsound mind."

45. *Alabama.*— Carlisle *v.* Tuttle, 30 Ala. 613.

of the infant; but this power may be exercised only so long as she remains a widow, since, should she remarry, by reason of her own domicile becoming subordinate to that of her husband, that of the infant becomes fixed and ceases to follow any further change by the mother.[46]

c. Illegitimate Children. If the child be illegitimate, his domicile will be governed by that of the mother.[47]

d. Apprentices. The domicile of the master is the domicile of his apprentice.[48]

e. Orphans. The domicile of the infant after the death of both parents will be that of the parent who died last[49] subject to the previous rule as to the incapacity of the mother after remarriage.[50]

f. Wards. While the domicile of the guardian is not that of the ward, where they are living in separate places,[51] the former is generally[52] held to possess the

District of Columbia.— *In re* Afflick, 3 MacArthur 95.

Kansas.— Modern Woodmen of America *v.* Hester, 66 Kan. 129, 71 Pac. 279.

Louisiana.— Winn's Succession, 3 Rob. 303.

Missouri.— De Jarnett *v.* Harper, 45 Mo. App. 415; Lewis *v.* Castello, 17 Mo. App. 593.

New Jersey.— *In re* Russell, 64 N. J. Eq. 313, 53 Atl. 169.

New York.— Kennedy *v.* Ryall, 67 N. Y. 379 [*affirming* 40 N. Y. Super. Ct. 347]; Eaves Costume Co. *v.* Pratt, 2 Misc. 420, 22 N. Y. Suppl. 74; Brown *v.* Lynch, 2 Bradf. Surr. 214.

Pennsylvania.— West Chester *v.* James, 2 Watts & S. 568, 37 Am. Dec. 525.

United States.— Lamar *v.* Micou, 112 U. S. 452, 5 S. Ct. 221, 28 L. ed. 751.

England.— Sharpe *v.* Crispin, L. R. 1 P. 611, 38 L. J. P. 17, 20 L. T. Rep. N. S. 41, 17 Wkly. Rep. 368; *In re* Beaumont, [1893] 3 Ch. 490, 62 L. J. Ch. 923, 8 Reports 9, 42 Wkly. Rep. 142; Johnstone *v.* Beattie, 10 Cl. & F. 42, 7 Jur. 1023, 8 Eng. Reprint 657; Potinger *v.* Wightman, 3 Meriv. 67, 17 Rev. Rep. 20, 36 Eng. Reprint 26.

Insanity of mother.— "The mother's domicile (whether she be sane or insane) is the domicile of the minor child." De Jarnett *v.* Harper, 45 Mo. App. 415, 421.

46. In other words the stepfather possesses no control of the domicile of his wife's children.

Alabama.— Johnson *v.* Copeland, 35 Ala. 521.

Georgia.— Harkins *v.* Arnold, 46 Ga. 656.

New York.— Kennedy *v.* Ryall, 67 N. Y. 379 [*affirming* 40 N. Y. Super. Ct. 347]; Brown *v.* Lynch, 2 Bradf. Surr. 214.

Pennsylvania.— West Chester *v.* James, 2 Watts & S. 568, 37 Am. Dec. 525.

Tennessee.—Allen *v.* Thomason, 11 Humphr. 536, 54 Am. Dec. 55.

West Virginia.— Mears *v.* Sinclair, 1 W. Va. 185.

England.— *In re* Beaumont, [1893] 3 Ch. 490, 62 L. J. Ch. 923, 8 Reports 9, 4 Wkly. Rep. 142.

See 17 Cent. Dig. tit. "Domicile," § 27 *et seq.*

Contra.— Wheeler *v.* Hollis, 19 Tex. 522, 70 Am. Dec. 363, 33 Tex. 512; Lewis' Succession, 10 La. Ann. 789, 63 Am. Dec. 600; Winn's Succession, 3 Rob. (La.) 303.

47. Blythe *v.* Ayers, 96 Cal. 532, 31 Pac. 915, 19 L. R. A. 40; Robert's Succession, 2 Rob. (La.) 427; Udny *v.* Udny, L. R. 1 H. L. Sc. 441; *In re* Grove, 40 Ch. D. 216, 58 L. J. Ch. 57, 59 L. T. Rep. N. S. 587, 37 Wkly. Rep. 1; Urquhart *v.* Butterfield, 37 Ch. D. 357, 57 L. J. Ch. 521, 58 L. T. Rep. N. S. 750; Wadsworth *v.* McCord, 12 Can. Supreme Ct. 466.

On legitimation of a child by the marriage of the parents and acknowledgment by the father, the domicile of the father at the time of the child's birth becomes the domicile of the child's origin. Blythe *v.* Ayers, 96 Cal. 532, 31 Pac. 915, 19 L. R. A. 40; McNicoll *v.* Ives, 4 Ohio S. & C. Pl. Dec. 75, 3 Ohio N. P. 6.

48. Maddox *v.* State, 32 Ind. 111.

49. *District of Columbia.*— Matter of Afflick, 3 MacArthur 95.

Kentucky.— Louisville *v.* Sherley, 80 Ky. 71.

Louisiana.—Lewis' Succession, 10 La. Ann. 789, 63 Am. Dec. 600.

Missouri.— Lewis *v.* Castello, 17 Mo. App. 593.

New York.— Matter of Kiernan, 38 Misc. 394, 77 N. Y. Suppl. 924.

United States.— Sprague *v.* Litherberry, 22 Fed. Cas. No. 13,251, 4 McLean 442.

50. See *supra*, V, B, 1, b.

51. Louisville *v.* Sherley, 80 Ky. 71; West Chester *v.* James, 2 Watts & S. (Pa.) 568, 37 Am. Dec. 525.

But in Louisiana it is provided that the domicile of minors is that of their father, mother, or tutor. Civ. Code art. 30 [*cited* in Stephens' Succession, 19 La. Ann. 499; State *v.* Judge Probate Ct., 4 Rob. (La.) 84, 2 Rob. (La.) 418; Winn's Succession, 3 Rob. (La.) 303; Robert's Succession, 2 Rob. (La.) 427; Robins *v.* Weeks, 5 Mart. N. S. (La.) 379].

52. Effect of testamentary provisions.—In White *v.* Howard, 52 Barb. (N. Y.) 294, 318 [*quoted* in Matter of Kiernan, 38 Misc. (N. Y.) 394, 398, 77 N. Y. Suppl. 924], the testator died domiciled at New Haven, Conn. His property was to be held in trust by his executors for the benefit of his child. By his will, he named as the guardian of such child a lady residing in New York, and in the event of her death, a successor, who was also a resident of New York. The child went to

right to change the latter's abode subject to the court's restraining power upon application made, in case such right is improperly exercised.[53]

g. Marriage of Minor. The domicile of a minor remains unaffected by his or her marriage.[54]

2. Married Women — a. In General. Following out the theory of an identity of person, the law fixes the domicile of the wife by that of the husband and denies to her during cohabitation the power of acquiring a domicile of her own separate and apart from him.[55]

live with the guardian in New York, and died during minority, while attending school in Connecticut. In passing upon the question the court said: "I think the determination of the question as to the domicile of the testator's daughter at the time of her death does not depend upon the determination of any question as to her power, while a minor and a ward, or the power of her guardian to choose or create a new or another domicile. It is manifest, from the will, that her father expected and intended that she should, upon and after his death, during her minority, reside in New York, under the care and protection of her guardian residing there. It is evident that her father intended, by his will, upon and after his death, to change her domicile from Connecticut to New York." But see *contra*, Wood *v.* Wood, 5 Paige (N. Y.) 596, 28 Am. Dec. 451 note, where the will required the separation from the mother of children of tender years and their removal to a distant state. A testamentary provision directing the removal of a child will not be enforced where the tutor refuses to accede thereto, as he is invested with absolute power over the minor's person. Percy *v.* Provan, 15 La. 69.

53. *Alabama.*—Daniel *v.* Hill, 52 Ala. 430; Cook *v.* Wimberly, 24 Ala. 486.

California.— *In re* Henning, 128 Cal. 214, 60 Pac. 762, 79 Am. St. Rep. 43.

District of Columbia.— Matter of Afflick, 3 MacArthur 95.

Indiana.— Hiestand *v.* Kuns, 8 Blackf. 345, 46 Am. Dec. 481.

Kentucky.— Mills *v.* Hopkinsville, 11 S. W. 776, 11 Ky. L. Rep. 164.

Massachusetts.— Kirkland *v.* Whately, 4 Allen 462; Holyoke *v.* Haskins, 5 Pick. 20, 16 Am. Dec. 372.

Minnesota.— State *v.* Lawrence, 86 Minn. 310, 90 N. W. 769, 58 L. R. A. 931; Townsend *v.* Kendall, 4 Minn. 412, 77 Am. Dec. 534.

Missouri.— Marheineke *v.* Grothaus, 72 Mo. 204.

New York.— Matter of Kiernan, 38 Misc. 394, 77 N. Y. Suppl. 924 (stating reasons for American doctrine); *Ex p.* Bartlett, 4 Bradf. Surr. 221.

Ohio.— Pedan *v.* Robb, 8 Ohio 227.

Pennsylvania.— *In re* Wilkins, 146 Pa. St. 585, 23 Atl. 325; West Chester *v.* James, 2 Watts & S. 568, 37 Am. Dec. 525; Fulton's Estate, 14 Phila. 298.

Rhode Island.— Mowry *v.* Latham, 17 R. I. 480, 23 Atl. 13.

Texas.— Wheeler *v.* Hollis, 19 Tex. 522, 70 Am. Dec. 363, 33 Tex. 512.

United States.— Lamar *v.* Micou, 112 U. S. 452, 5 S. Ct. 221, 28 L. ed. 751.

See 17 Cent. Dig. tit. "Domicile," § 32.

Contra, in Louisiana in the case of a natural guardian whose power over the ward's domicile is unlimited. Cass's Succession, 42 La. Ann. 381, 7 So. 617; Bailey *v.* Morrison, 4 La. Ann. 523; Percy *v.* Provan, 15 La. 69; Delacroix *v.* Boisblanc, 4 Mart. 715.

In England a more strict rule is applied and the guardian is not permitted to remove the ward to a point beyond the court's jurisdiction without first obtaining permission. Nugent *v.* Vetzera, L. R. 2 Eq. 704, 12 Jur. N. S. 781, 35 L. J. Ch. 777, 15 L. T. Rep. N. S. 33, 14 Wkly. Rep. 960; *In re* Callaghan, 28 Ch. D. 186, 54 L. J. Ch. 292, 52 L. T. Rep. N. S. 7, 33 Wkly. Rep. 157; Johnstone *v.* Beattie, 10 Cl. & F. 42, 7 Jur. 1023, 8 Eng. Reprint 657; Dawson *v.* Jay, 3 De G. M. & G. 764, 52 Eng. Ch. 596 [*approving* Wyndham *v.* Ennismore, 1 Keen 467, 15 Eng. Ch. 467; Campbell *v.* Mackay, 2 Myl. & C. 31, 14 Eng. Ch. 31; Stephens *v.* James, 1 Myl. & K. 627, 7 Eng. Ch. 627; *In re* Medley, Ir. R. 6 Eq. 339; Mountstuart *v.* Mountstuart, 6 Ves. Jr. 363, 31 Eng. Reprint 1095].

Removal by stranger.— Where the infant's removal has been effected by one who is neither parent nor guardian, the domicile is not changed. Matter of Willett, 71 Hun (N. Y.) 195, 24 N. Y. Suppl. 506. And see Taylor *v.* Jeter, 33 Ga. 195, 81 Am. Dec. 202.

54. Blumenthal *v.* Tannenholz, 31 N. J. Eq. 194; Trammell *v.* Trammell, 20 Tex. 406. *Contra*, Robert's Succession, 2 Rob. (La.) 427.

55. *Alabama.*— Talmadge *v.* Talmadge, 66 Ala. 199; Hanberry *v.* Hanberry, 29 Ala. 719; Thompson *v.* State, 28 Ala. 12; Harrison *v.* Harrison, 20 Ala. 629, 56 Am. Dec. 227.

Arkansas.— Johnson *v.* Turner, 29 Ark. 280.

California.— Dow *v.* Gould, etc., Silver Min. Co., 31 Cal. 629; Kashaw *v.* Kashaw, 3 Cal. 312.

Georgia.— Wingfield *v.* Rhea, 77 Ga. 84.

Illinois.— Cooper *v.* Beers, 143 Ill. 25, 33 N. E. 61; Behrensmeyer *v.* Kreitz, 135 Ill. 591, 26 N. E. 704; Kennedy *v.* Kennedy, 87 Ill. 250; Freeport *v.* Stephenson County, 41 Ill. 495; Phillips *v.* Springfield, 39 Ill. 83; Davis *v.* Davis, 30 Ill. 180; Ashbaugh *v.* Ashbaugh, 17 Ill. 476; Channel *v.* Capen, 46 Ill. App. 234; Derby *v.* Derby, 14 Ill. App. 645.

Indiana.— Jenness *v.* Jenness, 24 Ind. 355, 87 Am. Dec. 335; McCollem *v.* White, 23 Ind. 43; Parrett *v.* Palmer, 8 Ind. App. 356, 35 N. E. 713, 52 Am. St. Rep. 479.

b. Effect of Separation — (i) *Not Under Judicial Decree.* Regarding the rule just stated as absolute, it has been held not to be affected by the fact that the husband and wife are living apart in the absence of a judicial decree of separation or divorce.[56] Later cases, however, have broken away from the rule where the wife has been abandoned[57] or foreed by brutal treatment to leave the

Kentucky.— McAfee *v.* Kentucky University, 7 Bush 135; Maguire *v.* Maguire, 7 Dana 181; Dunlop *v.* Dunlop, 3 Ky. L. Rep. 20.

Louisiana.— Marks *v.* Germania Sav. Bank, 110 La. 659, 34 So. 725; McKenna's Succession, 23 La. Ann. 369; Villere *v.* Butman, 23 La. Ann. 515; Christie's Succession, 20 La. Ann. 383, 96 Am. Dec. 411; Sanderson *v.* Ralston, 20 La. Ann. 312; Winn's Succession, 3 Rob. 303; Dugat *v.* Markham, 2 La. 29.

Maine.— Harding *v.* Alden, 9 Me. 140, 23 Am. Dec. 549.

Massachusetts.— Burlen *v.* Shannon, 115 Mass. 438; Mason *v.* Homer, 105 Mass. 116; Hood *v.* Hood, 11 Allen 196, 87 Am. Dec. 709; Harteau *v.* Harteau, 14 Pick. 181, 25 Am. Dec. 372; Greene *v.* Greene, 11 Pick. 410.

Michigan.— Spaulding *v.* Steel, 129 Mich. 237, 88 N. W. 627.

Mississippi.—Hairston *v.* Hairston, 27 Miss. 704, 61 Am. Dec. 530.

Nebraska.— Smith *v.* Smith, 19 Nebr. 706, 28 N. W. 296.

New Jersey.— Baldwin *v.* Flagg, 43 N. J. L. 495; Hackettstown Bank *v.* Mitchell, 28 N. J. L. 516.

New York.— O'Dea *v.* O'Dea, 101 N. Y. 23, 4 N. E. 110; Hunt *v.* Hunt, 72 N. Y. 217, 28 Am. Rep. 129; Matter of Colebrook, 26 Misc. 139, 55 N. Y. Suppl. 861; McGown *v.* McGown, 18 Misc. 708, 43 N. Y. Suppl. 745; Mellen *v.* Mellen, 10 Abb. N. Cas. 329; Jackson *v.* Jackson, 1 Johns. 424; Brown *v.* Lynch, 2 Bradf. Surr. 214; *In re* Paulding, 1 Tuck. Surr. 47.

North Carolina.— Hicks *v.* Skinner, 71 N. C. 539, 17 Am. Rep. 16; Smith *v.* Morehead, 59 N. C. 360.

Pennsylvania.— Dougherty *v.* Snyder, 15 Serg. & R. 84, 16 Am. Dec. 520.

Rhode Island.— White *v.* White, 18 R. I. 292, 27 Atl. 506; Ditson *v.* Ditson, 4 R. I. 87.

South Carolina.— Cone *v.* Cone, 61 S. C. 512, 39 S. E. 748; Hair *v.* Hair, 10 Rich. Eq. 163.

Tennessee.— Hascall *v.* Hafford, 107 Tenn. 355, 65 S. W. 423, 89 Am. St. Rep. 952; Farris *v.* Sipes, 99 Tenn. 298, 41 S. W. 443; Williams *v.* Saunders, 5 Coldw. 60; McClellan *v.* Carroll, (Ch. App. 1897) 42 S. W. 185.

Texas.— Clements *v.* Lacy, 51 Tex. 150; Henderson *v.* Ford, 46 Tex. 627; Lacey *v.* Clements, 36 Tex. 661; Russell *v.* Randolph, 11 Tex. 460; Hare *v.* Hare, 10 Tex. 355; State *v.* Young, Dall. 464.

United States.— Atherton *v.* Atherton, 181 U. S. 155, 21 S. Ct. 544, 45 L. ed. 794; Cheely *v.* Clayton, 110 U. S. 701, 4 S. Ct. 328, 28 L. ed. 298; Chambers *v.* Prince, 75 Fed. 176; Burnham *v.* Rangeley, 4 Fed. Cas. No. 2,176, 1 Woodb. & M. 7.

England.— Firebrace *v.* Firebrace, 4 P. D. 63, 47 L. J. P. 41, 39 L. T. Rep. N. S. 94, 26 Wkly. Rep. 617; Chichester *v.* Donegal, 1 Add. 5 [*affirmed* in 6 Madd. 375]; Harvey *v.* Farnie, 8 App. Cas. 43, 47 J. P. 308, 52 L. J. P. C. 33, 48 L. T. Rep. N. S. 273, 31 Wkly. Rep. 433; *Re* Daly, 25 Beav. 456, 4 Jur. N. S. 525, 27 L. J. Ch. 751, 6 Wkly. Rep. 533; Warrender *v.* Warrender, 9 Bligh N. S. 89, 5 Eng. Reprint 1227; New York Security, etc., Co. *v.* Keyser, [1901] 1 Ch. 666, 70 L. J. Ch. 330, 84 L. T. Rep. N. S. 43, 49 Wkly. Rep. 371; Brown *v.* McDouall, 7 Cl. & F. 817, 7 Eng. Reprint 1279; Whitcomb *v.* Whitcomb, 2 Curt. Eccl. 351; Dolphin *v.* Robins, 7 H. L. Cas. 390, 5 Jur. N. S. 1271, 29 L. J. P. 11, 3 Macq. H. L. 563, 7 Wkly. Rep. 674, 11 Eng. Reprint 156; *In re* Raffenel, 9 Jur. N. S. 386, 32 L. J. P. 203, 8 L. T. Rep. N. S. 211, 1 New Rep. 569, 3 Swab. & Tr. 49, 11 Wkly. Rep. 549; Yelverton *v.* Yelverton, 6 Jur. N. S. 24, 29 L. J. P. & M. 34, 1 L. T. Rep. N. S. 194, 1 Swab. & Tr. 574, 8 Wkly. Rep. 134; *In re* Cooke, 56 L. J. Ch. 637, 56 L. T. Rep. N. S. 737, 35 Wkly. Rep. 608; *In re* Marshland, 55 L. J. Ch. 581, 54 L. T. Rep. N. S. 635, 34 Wkly. Rep. 540.

Canada.— MacDonald *v.* MacDonald, 5 Can. L. J. 66; Edwards *v.* Edwards, 20 Grant Ch. (U. C.) 392; Guest *v.* Guest, 3 Ont. 344.

See 17 Cent. Dig. tit. "Domicile," § 25.

56. *Alabama.*— Harrison *v.* Harrison, 20 Ala. 629, 56 Am. Dec. 227.

Illinois.— Davis *v.* Davis, 30 Ill. 180.

Louisiana.—Villere *v.* Butman, 23 La. Ann. 515.

Mississippi.— Hairston *v.* Hairston, 27 Miss. 704, 61 Am. Dec. 530.

North Carolina.— Smith *v.* Morehead, 59 N. C. 360.

Pennsylvania.—Cannon's Estate, 15 Pa. Co. Ct. 312.

Rhode Island.— Howland *v.* Granger, 22 R. I. 1, 45 Atl. 740.

South Carolina.— Cone *v.* Cone, 61 S. C. 512, 39 S. E. 748; Colburn *v.* Holland, 14 Rich. Eq. 176; Hair *v.* Hair, 10 Rich. Eq. 163.

England.— *Re* Daly, 25 Beav. 456, 4 Jur. N. S. 525, 27 L. J. Ch. 751, 6 Wkly. Rep. 533; Warrender *v.* Warrender, 9 Bligh N. S. 89, 5 Eng. Reprint 1227; Tovey *v.* Lindsay, 1 Dow. 117, 3 Eng. Reprint 643; Dolphin *v.* Robins, 7 H. L. Cas. 390, 5 Jur. N. S. 1271, 29 L. J. P. 11, 11 Eng. Reprint 156, 3 Macq. H. L. 563, 7 Wkly. Rep. 674; Yelverton *v.* Yelverton, 6 Jur. N. S. 24, 29 L. J. P. & M. 34, 1 L. T. Rep. N. S. 194, 1 Swab. & Tr. 574, 8 Wkly. Rep. 134.

Canada.— Edwards *v.* Edwards, 20 Grant Ch. (U. C.) 392.

See 17 Cent. Dig. tit. "Domicile," § 25 *et seq.*

57. Watertown *v.* Greaves, 112 Fed. 183, 50 C. C. A. 172, 56 L. R. A. 865. And see Moffatt *v.* Moffatt, 5 Cal. 280; Shute *v.* Sargent,

husband, when she is permitted to establish a domicile for herself;[58] and in New York it seems to have been repudiated altogether.[59]

(11) *Under Judicial Decree.* On the other hand, where husband and wife are living apart under a judicial decree of divorce or separation, the wife may acquire a separate domicile of her own which will remain unaffected by any change of residence on the part of the husband.[60]

c. **Domicile For Purposes of Divorce.** Where the husband has been guilty of such dereliction of duty in the marital relation as entitles the wife to have it either partially or totally dissolved, she may acquire a separate domicile of her own for the purpose of conferring jurisdiction on the proper tribunal in a proceeding for divorce or separation.[61]

d. **Widows.** After the husband's death, the wife has of course a right to elect her own domicile.[62]

3. **Persons Non Compos Mentis.** The mere fact that a person is of unsound mind does not necessarily preclude him from establishing his domicile, as the question must depend entirely upon the extent to which his reason has been impaired. In general it may be stated that but a comparatively slight degree of understanding is required in order that his action may be recognized.[63]

67 N. H. 305, 36 Atl. 282; Hopkins *v.* Hopkins, 35 N. H. 474.

58. Shaw *v.* Shaw, 98 Mass. 158; Lyon *v.* Lyon, 30 Hun (N. Y.) 455; Arrington *v.* Arrington, 102 N. C. 491, 9 S. E. 200.

Abandonment by wife without just cause. — But a wife who has left her husband and is living apart from him without just cause can acquire no separate domicile. Maguire *v.* Maguire, 7 Dana (Ky.) 181; Burlen *v.* Shannon, 115 Mass. 438; McGown *v.* McGown, 18 Misc. (N. Y.) 708, 43 N. Y. Suppl. 745; Edwards *v.* Edwards, 20 Grant Ch. (U. C.) 392. *Contra*, Prater *v.* Prater, 87 Tenn. 78, 9 S. W. 361, 10 Am. St. Rep. 623.

59. Matter of Florance, 54 Hun (N. Y.) 328, 7 N. Y. Suppl. 578; Rundle *v.* Van Inwegan, 9 N. Y. Civ. Proc. 328.

60. Hunt *v.* Hunt, 72 N. Y. 217, 28 Am. Rep. 129; Vischer *v.* Vischer, 12 Barb. (N. Y.) 640; People *v.* Dewey, 23 Misc. (N. Y.) 267, 50 N. Y. Suppl. 1013; Howland *v.* Granger, 22 R. I. 2, 45 Atl. 740; Barber *v.* Barber, 21 How. (U. S.) 582, 16 L. ed. 226; Bennett *v.* Bennett, 3 Fed. Cas. No. 1,318, Deady 299; Williams *v.* Dormer, 16 Jur. 366, 2 Rob. Eccl. 505.

61. *Alabama.*— Hanberry *v.* Hanberry, 29 Ala. 719.

California.— Moffatt *v.* Moffatt, 5 Cal. 280.

Illinois.— Chapman *v.* Chapman, 129 Ill. 386, 21 N. E. 806; Lazovert *v.* Lazovert, 14 Ill. App. 653; Derby *v.* Derby, 14 Ill. App. 645. *Contra*, Davis *v.* Davis, 30 Ill. 180.

Indiana.— Jenness *v.* Jenness, 24 Ind. 355, 87 Am. Dec. 335; Tolen *v.* Tolen, 2 Blackf. 407, 21 Am. Dec. 743.

Iowa.— Kline *v.* Kline, 57 Iowa 386, 10 N. W. 825.

Kentucky.— Johnson *v.* Johnson, 12 Bush 485.

Maine.— Harding *v.* Alden, 9 Me. 140, 23 Am. Dec. 549.

Massachusetts.— Watkins *v.* Watkins, 135 Mass. 83; Shaw *v.* Shaw, 98 Mass. 158 [*overruling* Greene *v.* Greene, 11 Pick. (Mass.) 410]; Harteau *v.* Harteau, 14 Pick. 181, 25 Am. Dec. 372.

New Hampshire.— Hopkins *v.* Hopkins, 35 N. H. 474; Payson *v.* Payson, 34 N. H. 518; Frary *v.* Frary, 10 N. H. 61, 32 Am. Dec. 395.

New York.— Hunt *v.* Hunt, 72 N. Y. 217, 28 Am. Rep. 129; Kinnier *v.* Kinnier, 45 N. Y. 535, 6 Am. Rep. 132; Matter of Colebrook, 26 Misc. 139, 55 N. Y. Suppl. 861; Vence *v.* Vence, 15 How. Pr. 497.

North Carolina.— Irby *v.* Wilson, 21 N. C. 568.

Pennsylvania.— Colvin *v.* Reed, 55 Pa. St. 375.

Rhode Island.— White *v.* White, 18 R. I. 292, 27 Atl. 506; Ditson *v.* Ditson, 4 R. I. 87.

Wisconsin.— Craven *v.* Craven, 27 Wis. 418; Shafer *v.* Bushnell, 24 Wis. 372.

United States.— Cheever *v.* Wilson, 9 Wall. 108, 19 L. ed. 604.

See 17 Cent. Dig. tit. "Domicile," § 25.

But see Dolphin *v.* Robins, 7 H. L. Cas. 390, 5 Jur. N. S. 1271, 29 L. J. P. 11, 3 Macq. H. L. 563, 7 Wkly. Rep. 674, 11 Eng. Reprint 156, as intimating the contrary.

Fraudulent marriage.— Nor is the rule that the domicile of the husband becomes that of the wife applicable in proceedings for divorce based upon the allegation that the marriage was procured by fraud, force, or coercion and has not since been confirmed. Hines *v.* Hines, 10 Pa. Co. Ct. 74.

62. Cheely *v.* Clayton, 110 U. S. 701, 4 S. Ct. 328, 28 L. ed. 298.

63. *Connecticut.*— Culver's Appeal, 48 Conn. 165.

Illinois.— Freeport *v.* Stephenson County, 41 Ill. 495.

Louisiana.— Robert's Succession, 2 Rob. 427.

Maryland.— Ensor *v.* Graff, 43 Md. 291.

Massachusetts.— Talbot *v.* Chamberlain, 149 Mass. 57, 20 N. E. 305, 3 L. R. A. 254; Holyoke *v.* Haskins, 5 Pick. 20, 16 Am. Dec. 372; Upton *v.* Northbridge, 15 Mass. 237.

C. Quasi-Incapacity — 1. Soldiers. In general it can be said that a domicile is neither gained nor lost during military service, and although a soldier, if both the fact and intent concur, can establish a new domicile during his term of enlistment, this will not be deemed to have occurred in the absence of the clearest and most unequivocal proof. No domicile will be acquired merely from having been stationed in the line of duty at any particular place.[64]

2. Sailors. The roving occupation of a mariner necessarily precludes the idea of his establishing any fixed domicile during his short stoppage in various ports. His abode as established upon the adoption of his career is deemed to continue unchanged, although he can of course, if he so desires, fix upon a residence elsewhere which will be considered as his home.[65]

New Hampshire.— Concord *v.* Rumney, 45 N. H. 423.

Rhode Island.— Mowry *v.* Latham, 17 R. I. 480, 23 Atl. 13.

Vermont.— Anderson *v.* Anderson, 42 Vt. 350, 1 Am. Rep. 334.

England.— Sharpe *v.* Crispin, L. R. 1 P. 611, 38 L. J. P. 17, 20 L. T. Rep. N. S. 41, 17 Wkly. Rep. 368; Urquhart *v.* Butterfield, 37 Ch. D. 357, 57 L. J. Ch. 521, 58 L. T. Rep. N. S. 750; Hepburn *v.* Skirving, 9 Wkly. Rep. 764.

See 17 Cent. Dig. tit. "Domicile," § 31.

"The selection of a home . . . draws after it no very important consequences, and may be changed by the party at pleasure, and under the influence of very slight reasons. For an act of so slight importance, a high grade of intellectual power could hardly be required. The mind of a party might be much impaired, or it might be very generally under the influence of insane delusions, and yet if those insane influences had no bearing upon the selection of a home, the legal capacity to choose a place of residence might not be affected. 'If it were admitted . . . that idiots and persons wholly bereft of understanding are incapable of changing their domicile, it would not follow that the same incapacity would attach to all degrees of mental imbecility. There are those, and not a few, who may be unable to manage their property and other concerns with good judgment and discretion, and may need guardians to protect them from imposition, and who nevertheless have sufficient understanding to choose their homes.' This question is therefore a matter of fact to be settled by a jury." Concord *v.* Rumney, 45 N. H. 423, 428.

Authority of the guardian of an incompetent person to remove the latter's domicile see Insane Persons. Discussing the subject generally see State *v.* Lawrence, 86 Minn. 310, 90 N. W. 769, 58 L. R. A. 931.

64. *California.*—People *v.* Riley, 15 Cal. 48.

District of Columbia.— Mead *v.* Carrol, 6 D. C. 338.

Kansas.— Hunt *v.* Richards, 4 Kan. 549.

Maine.— Brewer *v.* Linnaeus, 36 Me. 428.

Massachusetts.— Mooar *v.* Harvey, 128 Mass. 219; Sears *v.* Boston, 1 Metc. 250.

New York.— Ames *v.* Duryea, 61 N. Y. 609 [*affirming* 6 Lans. 155]; Crawford *v.* Wilson, 4 Barb. 504; Tibbitts *v.* Townsend, 15 Abb. Pr. 221.

Ohio.— Egan *v.* Lumsden, 2 Disn. 168.

Oregon.— Wood *v.* Fitzgerald, 3 Oreg. 568.

Texas.— *Ex p.* Blumer, 27 Tex. 734.

England.— *Ex p.* Cunningham, 13 Q. B. D. 418, 53 L. J. Ch. 1067, 51 L. T. Rep. N. S. 447, 1 Morr. Bankr. Cas. 137, 33 Wkly. Rep. 22; *In re* Lauderdale Peerage, 10 App. Cas. 692; Bruce *v.* Bruce, 2 B. & P. 229 note; *In re* Macreight, 30 Ch. D. 165, 55 L. J. Ch. 28, 53 L. T. Rep. N. S. 146, 33 Wkly. Rep. 838; Reg. *v.* East Stonehouse, 3 C. L. R. 855, 4 E. & B. 901, 1 Jur. N. S. 573, 24 L. J. M. C. 121, 3 Wkly. Rep. 375, 82 E. C. L. 901; Atty.-Gen. *v.* Napier, 6 Exch. 217, 15 Jur. 253, 20 L. J. Exch. 173; Allardice *v.* Onslow, 10 Jur. N. S. 352, 33 L. J. Ch. 434, 9 L. T. Rep. N. S. 674, 12 Wkly. Rep. 397; Yelverton *v.* Yelverton, 6 Jur. N. S. 24, 29 L. J. P. & M. 34, 1 L. T. Rep. N. S. 194, 1 Swab. & Tr. 574, 8 Wkly. Rep. 134; *In re* Duleep Singh, 7 Morr. Bankr. Cas. 228; Firebrace *v.* Firebrace, 4 P. B. 63, 47 L. J. P. 41, 39 L. T. Rep. N. S. 94, 26 Wkly. Rep. 617; Somerville *v.* Somerville, 5 Ves. Jr. 750, 5 Rev. Rep. 155, 31 Eng. Reprint 839.

See 17 Cent. Dig. tit. "Domicile," § 33.

65. *Illinois.*— Knowlton *v.* Knowlton, 155 Ill. 158, 39 N. E. 595 [*reversing* 51 Ill. App. 71].

Louisiana.— Erwin *v.* Butler, 5 La. 330.

Maine.— Boothbay *v.* Wiscasset, 3 Me. 354.

Massachusetts.— Bangs *v.* Brewster, 111 Mass. 382; Hallet *v.* Bassett, 100 Mass. 167; Sears *v.* Boston, 1 Metc. 250.

New York.— Matter of Bye, 2 Daly 525; Matter of Scott, 1 Daly 534; Sherwood *v.* Judd, 3 Bradf. Surr. 265.

Pennsylvania.— Guier *v.* O'Daniel, 1 Binn. 349 note.

England.— *Ex p.* Cunningham, 13 Q. B. D. 418, 53 L. J. Ch. 1067, 51 L. T. Rep. N. S. 447, 1 Morr. Bankr. Cas. 137, 33 Wkly. Rep. 22; Reg. *v.* East Stonehouse, 3 C. L. R. 855, 4 E. & B. 901, 1 Jur. N. S. 573, 24 L. J. M. C. 121, 3 Wkly. Rep. 375, 82 E. C. L. 901; Aikman *v.* Aikman, 7 Jur. N. S. 1017, 4 L. T. Rep. N. S. 374, 3 Macq. H. L. 854; *In re* Patten, 6 Jur. N. S. 151. But see as to acquiring domicile by naval officers on half pay Cockerell *v.* Cockerell, 2 Jur. N. S. 727, 25 L. J. Ch. 730, 4 Wkly. Rep. 730.

See 17 Cent. Dig. tit. "Domicile," § 35.

Fishermen.— The domicile of a fisherman who usually lives in his boat in the summer was held to be in the place where he boards in the winter. Boothbay *v.* Wiscasset, 3 Me. 354.

3. STUDENTS. Ordinarily, a student at an institution of learning is not domiciled there in the legal sense of the term, although there is nothing to prevent his abandoning his former abode and establishing a new home at the place where his studies are pursued should he so desire.[66]

4. PERSONS IN OFFICIAL SERVICE. Ambassadors, consuls, and other persons in governmental service are deemed to acquire no domicile at the place where they actually reside in the absence of the clearest proof of a contrary intent.[67]

Masters of vessels.— "There is a wide difference between a mariner shipping from one port to another, and equally at home in any, without a single tie to attach him — and the master of a vessel, a man of substance, having his business always centered in one spot, from which he is absent only for a temporary purpose, to which he constantly returns, where he marries and lives with his wife, where he describes his residence in a sworn official document, and where he dies. The home of the former is about as unstable and floating as the element on which he earns his livelihood, that of the latter as determined, constant, and settled as the nature of his pursuits admits. As to the former, we may be compelled to resort to the domicile of origin in default of finding any other, as to the latter, there can be no difficulty in discovering his usual abode and habitation." Sherwood *v.* Judd, 3 Bradf. Surr. (N. Y.) 267, 276.

66. *Iowa.*— Vanderpoel *v.* O'Hanlon, 53 Iowa 246, 5 N. W. 119, 36 Am. Rep. 216.

Maine.— Sanders *v.* Getchell, 76 Me. 158, 49 Am. Rep. 606.

Massachusetts.— Opinion of Justices, 5 Metc. 587; Putnam *v.* Johnson, 10 Mass. 488.

Missouri.— Hall *v.* Schoenecke, 128 Mo. 661, 31 S. W. 97.

Nebraska.— Berry *v.* Wilcox, 44 Nebr. 82, 62 N. W. 249, 48 Am. St. Rep. 706.

New York.— *In re* Garvey, 147 N. Y. 117, 41 N. E. 439; *In re* Goodman, 146 N. Y. 284, 40 N. E. 769; Matter of Rice, 7 Daly 22.

Pennsylvania.— *In re* Fry, 71 Pa. St. 302, 10 Am. Rep. 698; *In re* Lower Oxford Contested Election, 11 Phila. 641.

See 17 Cent. Dig. tit. "Domicile," § 34.

"Going to a public institution, and residing there solely for the purpose of education, would not, of itself, give him a right to vote there, because it would not necessarily change his domicile; but in such case, his right to vote at that place would depend upon all the circumstances connected with such residence. If he has a father living; if he still remains a member of his father's family; if he returns to pass his vacations; if he is maintained and supported by his father; these are strong circumstances, repelling the presumption of a change of domicile. So, if he have no father living; if he have a dwelling-house of his own, or real estate, of which he retains the occupation; if he have a mother or other connexions, with whom he has before been accustomed to reside, and to whose family he returns in vacations; if he describes himself of such place, and otherwise manifests his intent to continue his domicile there; these are all circumstances tending to prove that his domicile is not changed. But if, having a father or mother, they should remove to the town where the college is situated, and he should still remain a member of the family of the parent; or if, having no parent, or being separated from his father's family, not being maintained or supported by him; or, if he has a family of his own, and removes with them to such town; or by purchase or lease takes up his permanent abode there, without intending to return to his former domicile; if he depend on his own property, income or industry for his support;— these are circumstances, more or less conclusive, to show a change of domicile, and the acquisition of a domicile in the town where the college is situated. In general, it may be said that an intent to change one's domicile and place of abode is not so readily presumed from a residence at a public institution for the purposes of education, for a given length of time, as it would be from a like removal from one town to another, and residing there for the ordinary purposes of life; and therefore stronger facts and circumstances must concur to establish the proof of change of domicile, in the one case than in the other. But where the proofs of change of domicile, drawn from the various sources already indicated, are such as to overcome the presumption of the continuance of the prior domicile, such preponderance of proof, concurring with an actual residence of the student in the town where the public institution is situated, will be sufficient to establish his domicile, and give him a right to vote in that town." Opinion of Justices, 5 Metc. (Mass.) 587, 589. See also, generally, ELECTIONS.

67. *California.*— People *v.* Holden, 28 Cal. 123, employees of Indian reservations.

District of Columbia.— Bradstreet *v.* Bradstreet, 18 D. C. 229, clerk of senate judiciary committee.

Louisiana.— Walden *v.* Canfield, 2 Rob. 466, ambassador, senator, and member of cabinet.

Missouri.— Lankford *v.* Gebhart, 130 Mo. 621, 32 S. W. 1127, 51 Am. St. Rep. 585, land-office and railway mail service.

New York.— Crawford *v.* Wilson, 4 Barb. 504, ambassador.

North Carolina.— State *v.* Grizzard, 89 N. C. 115, government watchman.

Ohio.— Egan *v.* Lumsden, 2 Disn. 168, public officials abroad.

Tennessee.— Hascall *v.* Hafford, 107 Tenn. 355, 65 S. W. 423, 89 Am. St. Rep. 952; Stratton *v.* Brigham, 2 Sneed 420, ambassadors.

England.— Heath *v.* Samson, 14 Beav. 441; Bruce *v.* Bruce, 2 B. & P. 229 note; Urquhart

VI. WHERE RESIDENCE IS ON THE BORDER LINE.

When the boundary line between two localities passes through the residence of one whose domicile is at issue, if the portion of the house on one side of the line is sufficient to constitute a habitation by itself while the other portion is not, the first will be considered the domicile. If the line divides more equally, then that portion is deemed the domicile where the occupant mainly and substantially performs those offices which characterize his home (such as sleeping, eating, sitting, and receiving visitors); but in the event of a still closer division, then that part where he habitually sleeps is so considered in the absence of other facts showing a positively contrary intention.[68]

VII. LOSS.

A. In General. A domicile of origin is retained until changed by acquiring another. So each successive domicile of choice continues until another is obtained, and the acquisition of a new domicile at the same instant terminates the preceding one.[69]

v. Butterfield, 37 Ch. D. 357, 57 L. J. Ch. 521, 58 L. T. Rep. N. S. 750; Atty.-Gen. *v.* Rowe, 1 H. & C. 31, 8 Jur. N. S. 823, 31 L. J. Exch. 314, 6 L. T. Rep. N. S. 438, 10 Wkly. Rep. 718; Atty.-Gen. *v.* Pottinger, 6 H. & N. 733, 7 Jur. N. S. 470, 30 L. J. Exch. 284, 4 L. T. Rep. N. S. 368, 9 Wkly. Rep. 578.

See 17 Cent. Dig. tit. "Domicile," § 33.

Residence to constitute a domicile must not be such as is prescribed by the duties of office. Haldane *v.* Eckford, L. R. 8 Eq. 631, 21 L. T. Rep. N. S. 87, 17 Wkly. Rep. 1059; Udny *v.* Udny, L. R. 1 H. L. Sc. 441.

Where the party's home is in the country to which he becomes subsequently accredited, his acceptance of an office in the public service of another nation does not operate to divest the domicile already acquired. Sharpe *v.* Crispin, L. R. 1 P. 611, 38 L. J. P. 17, 20 L. T. Rep. N. S. 41, 17 Wkly. Rep. 368; Atty.-Gen. *v.* Kent, 1 H. & C. 12, 31 L. J. Exch. 391, 6 L. T. Rep. N. S. 864, 10 Wkly. Rep. 722.

68. Judkins *v.* Reed, 48 Me. 386; Chenery *v.* Waltham, 8 Cush. (Mass.) 327; Abington *v.* North Bridgewater, 23 Pick. (Mass.) 170. And *compare* Follweiler *v.* Lutz, 112 Pa. St. 107, 2 Atl. 721, where the domicile was held to be fixed by declarations.

69. *Alabama.*— Allgood *v.* Williams, 92 Ala. 551, 8 So. 722; Caldwell *v.* Pollak, 91 Ala. 353, 8 So. 546; Merrill *v.* Morrissett, 76 Ala. 433; Murphy *v.* Hunt, 75 Ala. 438; Talmadge *v.* Talmadge, 66 Ala. 199; Daniel *v.* Hill, 52 Ala. 430; Glover *v.* Glover, 18 Ala. 367; State *v.* Hallett, 8 Ala. 159.

California.— *In re* Samuel, Myr. Prob. 228.

Connecticut.— Hartford *v.* Champion, 58 Conn. 268, 20 Atl. 471; New Haven First Nat. Bank *v.* Balcom, 35 Conn. 351.

Delaware.— State *v.* Frest, 4 Harr. 558.

Florida.— Smith *v.* Croom, 7 Fla. 81.

Georgia.— Taylor *v.* Jeter, 33 Ga. 195, 81 Am. Dec. 202.

Illinois.— Cooper *v.* Beers, 143 Ill. 25, 33 N. E. 61; Behrensmeyer *v.* Kreitz, 135 Ill. 591, 26 N. E. 704; Hayes *v.* Hayes, 74 Ill. 312.

Indiana.— Astley *v.* Capron, 89 Ind. 167.

Iowa.— Botna Valley State Bank *v.* Silver City Bank, 87 Iowa 479, 54 N. W. 472; Vanderpoel *v.* O'Hanlon, 53 Iowa 246, 5 N. W. 119, 36 Am. Rep. 216; Nugent *v.* Bates, 51 Iowa 77, 50 N. W. 76, 33 Am. Rep. 117; Church *v.* Crossman, 49 Iowa 444. But *compare* Ludlow *v.* Szold, 90 Iowa 175, 57 N. W. 676.

Louisiana.— Simmons' Succession, 109 La. 1095, 34 So. 101; Steers' Succession, 47 La. Ann. 1551, 18 So. 503; Sanderson *v.* Ralston, 20 La. Ann. 312; Franklin's Succession, 7 La. Ann. 395; Cole *v.* Lucas, 2 La. Ann. 946; Gravillon *v.* Richards, 13 La. 293, 33 Am. Dec. 563.

Maine.— Fayette *v.* Livermore, 62 Me. 229; Gilman *v.* Gilman, 52 Me. 165, 83 Am. Dec. 502; Littlefield *v.* Brooks, 50 Me. 475; Brewer *v.* Linnaeus, 36 Me. 428; Wayne *v.* Greene, 21 Me. 357.

Massachusetts.— Pickering *v.* Cambridge, 144 Mass. 244, 10 N. E. 827; Bangs *v.* Brewster, 111 Mass. 382; Hallet *v.* Bassett, 100 Mass. 167; Shaw *v.* Shaw, 98 Mass. 158; Wilson *v.* Terry, 11 Allen 206; Opinion of Justices, 5 Metc. 587; Kilburn *v.* Bennett, 3 Metc. 199; Thorndike *v.* Boston, 1 Metc. 242; Abington *v.* North Bridgewater, 23 Pick. 170; Jennison *v.* Hapgood, 10 Pick. 77.

Michigan.— Beecher *v.* Detroit, 114 Mich. 228, 72 N. W. 206; Warren *v.* Board of Registration, 72 Mich. 398, 40 N. W. 553, 2 L. R. A. 203; Campbell *v.* White, 22 Mich. 178; *In re* High, 2 Dougl. 515.

Mississippi.— Morgan *v.* Nunes, 54 Miss. 308.

Missouri.— Walker *v.* Walker, 1 Mo. App. 404.

New Hampshire.— Ayer *v.* Weeks, 65 N. H. 248, 18 Atl. 1108, 23 Am. St. Rep. 37, 6 L. R. A. 716; Hart *v.* Lindsey, 17 N. H. 235, 43 Am. Dec. 597; Moore *v.* Wilkins, 10 N. H. 452.

New Jersey.— Clark *v.* Likens, 26 N. J. L.

B. Concurrence of Factum and Animus — 1. In General. The acquisition of the new domicile must have been completely perfected and hence there must have been a concurrence both of the *factum* of removal and the *animus* to remain in the new locality before the former domicile can be considered lost.[70]

207; Cadwalader *v.* Howell, 18 N. J. L. 138; *In re* Russell, 64 N. J. Eq. 313, 53 Atl. 169; Valentine *v.* Valentine, 61 N. J. Eq. 400, 48 Atl. 593; Hervey *v.* Hervey, 56 N. J. Eq. 166, 38 Atl. 767; Firth *v.* Firth, 50 N. J. Eq. 137, 24 Atl. 916.

New York.— De Meli *v.* De Meli, 120 N. Y. 485, 24 N. E. 996, 17 Am. St. Rep. 652 [*affirming* 5 N. Y. Civ. Proc. 306, 67 How. Pr. 20]; Dupuy *v.* Wurtz, 53 N. Y. 556; Ames *v.* Duryea, 6 Lans. 155; Hegeman *v.* Fox, 31 Barb. 475; Crawford *v.* Wilson, 4 Barb. 504; Chaine *v.* Wilson, 1 Bosw. 673; Matter of Bye, 2 Daly 525; Roberti *v.* Methodist Book Concern, 1 Daly 3; Matter of Colebrook, 26 Misc. 139, 55 N. Y. Suppl. 861; Matter of Dimock, 11 Misc. 610, 32 N. Y. Suppl. 927; Eaves Costume Co. *v.* Pratt, 2 Misc. 420, 22 N. Y. Suppl. 74; *In re* Gould, 9 N. Y. Suppl. 603; Brown *v.* Ashbough, 40 How. Pr. 260; Graham *v.* Public Adm'r, 4 Bradf. Surr. 127; Isham *v.* Gibbons, 1 Bradf. Surr. 69.

North Carolina.— Plummer *v.* Brandon, 40 N. C. 190; Horne *v.* Horne, 31 N. C. 99. *Contra*, Hicks *v.* Skinner, 72 N. C. 1, holding that one may abandon a domicile and until another is acquired "he is without domicile, except the domicile of actual residence."

Pennsylvania.— Price *v.* Price, 156 Pa. St. 617, 27 Atl. 291; Hindman's Appeal, 85 Pa. St. 466; Reed's Appeal, 71 Pa. St. 378; Fry's Election Case, 71 Pa. St. 302, 10 Am. Rep. 698; *In re* Hood, 21 Pa. St. 106; Guier *v.* O'Daniel, 1 Binn. 349 note; Desesbats *v.* Berquier, 1 Binn. 336, 2 Am. Dec. 448; Labe *v.* Brauss, 2 Pa. Dist. 157, 12 Pa. Co. Ct. 255; Burch *v.* Taylor, 1 Phila. 224.

South Carolina.— Bradley *v.* Lowry, Speers Eq. 1, 39 Am. Dec. 142.

Tennessee.— Kellar *v.* Baird, 5 Heisk. 39; Williams *v.* Saunders, 5 Coldw. 60; White *v.* White, 3 Head 404; Layne *v.* Pardee, 2 Swan 232.

Texas.— Trammell *v.* Trammell, 20 Tex. 406; State *v.* Barrow, 14 Tex. 179, 65 Am. Dec. 109; McIntyre *v.* Chappell, 4 Tex. 187; Holliman *v.* Peebles, 1 Tex. 673.

Vermont.—Anderson *v.* Anderson, 42 Vt. 350, 1 Am. Rep. 334.

Virginia.— Lindsay *v.* Murphy, 76 Va. 428; Pilson *v.* Bushong, 29 Gratt. 229.

West Virginia.— White *v.* Tennant, 31 W. Va. 790, 8 S. E. 596, 13 Am. St. Rep. 896.

Wisconsin.— Kempster *v.* Milwaukee, 97 Wis. 343, 72 N. W. 743; Kellogg *v.* Winnebago County Sup'rs, 42 Wis. 97.

United States.— Desmare *v.* U. S., 93 U. S. 605, 23 L. ed. 959; Mitchell *v.* U. S., 21 Wall. 350, 22 L. ed. 584; The Friendschaft, 3 Wheat. 14, 4 L. ed. 322; Johnson *v.* Twenty-One Bales, etc., 13 Fed. Cas. No. 7,417, 2 Paine 601, 3 Wheel. Cr. (N. Y.) 433; Powers *v.* Mortee, 19 Fed. Cas. No. 11,362; White *v.* Brown, 29 Fed. Cas. No. 17,538, 1 Wall. Jr. 217.

England.— Udny *v.* Udny, L. R. 1 H. L. Sc. 441; Bell *v.* Kennedy, L. R. 1 H. L. Sc. 307; Bruce *v.* Bruce, 2 B. & P. 229 note; *In re* Grove, 40 Ch. D. 216, 58 L. J. Ch. 57, 59 L. T. Rep. N. S. 587, 37 Wkly. Rep. 1; Urquhart *v.* Butterfield, 37 Ch. D. 357, 57 L. J. Ch. 521, 58 L. T. Rep. N. S. 750; *In re* Marrett, 36 Ch. D. 400, 57 L. T. Rep. N. S. 896, 36 Wkly. Rep. 344; Munro *v.* Munro, 7 Cl. & F. 842, 7 Eng. Reprint 1288; Cragie *v.* Lewin, 3 Curt. Eccl. 435, 7 Jur. 519; De Bonneval *v.* De Bonneval, 1 Curt. Eccl. 856; Jopp *v.* Wood, 4 De G. J. & S. 616, 11 Jur. N. S. 212, 34 L. J. Ch. 212, 12 L. T. Rep. N. S. 41, 5 New Rep. 422, 13 Wkly. Rep. 481, 69 Eng. Ch. 472; Reg. *v.* Stapleton, 1 E. & B. 766, 17 Jur. 549, 22 L. J. M. C. 102, 72 E. C. L. 766, 18 Eng. L. & Eq. 300; Forbes *v.* Forbes, 2 Eq. Rep. 178, 18 Jur. 642, Kay 341, 23 L. J. Ch. 724, 2 Wkly. Rep. 253; Atty.-Gen. *v.* Winans, 65 J. P. 819, 85 L. T. Rep. N. S. 508; Walcot *v.* Botfield, 18 Jur. 570, Kay 534, 2 Wkly. Rep. 393; Atty.-Gen. *v.* Blucher de Wahlstatt, 3 H. & C. 374, 10 Jur. N. S. 1159, 34 L. J. Exch. 29, 11 L. T. Rep. N. S. 454, 5 New Rep. 135, 13 Wkly. Rep. 163; Atty.-Gen. *v.* Rowe, 1 H. & C. 31, 8 Jur. N. S. 823, 31 L. J. Exch. 314, 6 L. T. Rep. N. S. 438, 10 Wkly. Rep. 718; Aikman *v.* Aikman, 7 Jur. N. S. 1017, 4 L. T. Rep. N. S. 374, 3 Macq. H. L. 854; Crookenden *v.* Fuller, 5 Jur. N. S. 1222, 29 L. J. P. 1, 1 L. T. Rep. N. S. 70, 1 Swab. & Tr. 441, 8 Wkly. Rep. 49; Lyall *v.* Paton, 25 L. J. Ch. 746, 4 Wkly. Rep. 798; Munroe *v.* Douglas, 5 Madd. 379; Atty.-Gen. *v.* Dunn, 6 M. & W. 511; Somerville *v.* Somerville, 5 Ves. Jr. 750, 5 Rev. Rep. 155, 31 Eng. Reprint 839.

Canada.— Jones *v.* Saint John, 30 Can. Supreme Ct. 122; Wadsworth *v.* McCord, 12 Can. Supreme Ct. 466; Magurn *v.* Magurn, 3 Ont. 570; Wanzer Lamp Co. *v.* Woods, 13 Ont. Pr. 511.

See 17 Cent. Dig. tit. "Domicile," § 9 *et seq.*

70. *Alabama.*— Allgood *v.* Williams, 92 Ala. 551, 8 So. 722; Caldwell *v.* Pollak, 91 Ala. 353, 8 So. 546; Young *v.* Pollak, 85 Ala. 439, 5 So. 279; Merrill *v.* Morrissett, 76 Ala. 433; Bragg *v.* State, 69 Ala. 204.

Connecticut.— Hartford *v.* Champion, 58 Conn. 268, 20 Atl. 471.

Delaware.— State *v.* Frest, 4 Harr. 558.

Florida.— Smith *v.* Croom, 7 Fla. 81.

Illinois.— Hayes *v.* Hayes, 74 Ill. 312; Smith *v.* People, 44 Ill. 16; Channel *v.* Capen, 46 Ill. App. 234.

Iowa.— Vanderpoel *v.* O'Hanlon, 53 Iowa 246, 5 N. W. 119, 36 Am. Rep. 216.

Kansas.— Keith *v.* Stetter, 25 Kan. 100; Hart *v.* Horn, 4 Kan. 232.

Louisiana.— Marks *v.* Germania Sav. Bank, 110 La. 659, 34 So. 725; Simmon's Succession, 109 La. 1095, 34 So. 101; Steers' Succession, 47 La. Ann. 1551, 18 So. 503; Verret *v.* Bon-

When once it is ascertained what is necessary to constitute one's domicile in any place, it is easy to point out what must be done in order to effect a change of

villain, 33 La. Ann. 1304; Sanderson *v.* Ralston, 20 La. Ann. 312; Williams *v.* Henderson, 18 La. 557; Nelson *v.* Botts, 16 La. 596; Hennen *v.* Hennen, 12 La. 190; Waller *v.* Lea, 8 La. 213.

Maine.— Gilman *v.* Gilman, 52 Me. 165, 83 Am. Dec. 502; Warren *v.* Thomaston, 43 Me. 406, 69 Am. Dec. 69; Church *v.* Rowell, 49 Me. 367; Greene *v.* Windham, 13 Me. 225; Hallowell *v.* Saco, 5 Me. 143.

Maryland.— Ringgold *v.* Barley, 5 Md. 186, 59 Am. Dec. 107.

Massachusetts.— Pickering *v.* Cambridge, 144 Mass. 244, 10 N. E. 827; McConnell *v.* Kelley, 138 Mass. 372; Bangs *v.* Brewster, 111 Mass. 382; Shaw *v.* Shaw, 98 Mass. 158; Holmes *v.* Greene, 7 Gray 299; Jennison *v.* Hapgood, 10 Pick. 77; Harvard College *v.* Gore, 5 Pick. 370.

Michigan.— Beecher *v.* Detroit, 114 Mich. 228, 72 N. W. 206; Campbell *v.* White, 22 Mich. 178.

Nebraska.— State *v.* Superior School Dist., 55 Nebr. 317, 75 N. W. 855; Wood *v.* Roeder, 45 Nebr. 311, 63 N. W. 853.

New Jersey.— Valentine *v.* Valentine, 61 N. J. Eq. 400, 48 Atl. 593.

New York.—Bump *v.* New York, etc., R. Co., 165 N. Y. 636, 59 N. E. 1119 [*affirming* 38 N. Y. App. Div. 60, 55 N. Y. Suppl. 962]; De Meli *v.* De Meli, 120 N. Y. 485, 24 N. E. 996, 17 Am. St. Rep. 652 [*affirming* 5 N. Y. Civ. Proc. 306, 67 How. Pr. 20]; Dupuy *v.* Wurtz, 53 N. Y. 556; Plant *v.* Harrison, 36 Misc. 649, 47 N. Y. Suppl. 411; Cruger *v.* Phelps, 21 Misc. 252, 47 N. Y. Suppl. 61; Matter of Dimock, 11 Misc. 610, 32 N. Y. Suppl. 927; Chaine *v.* Wilson, 1 Bosw. 673; Hegeman *v.* Fox, 31 Barb. 475; Vischer *v.* Vischer, 12 Barb. 640; Crawford *v.* Wilson, 4 Barb. 504; Black *v.* Black, 4 Bradf. Surr. 174.

North Carolina.— Horne *v.* Horne, 31 N. C. 99.

Pennsylvania.— Price *v.* Price, 156 Pa. St. 617, 27 Atl. 291; Hindman's Appeal, 85 Pa. St. 466; Reed's Appeal, 71 Pa. St. 378; *In re* Fry, 71 Pa. St. 302, 10 Am. Rep. 698; Pfoutz *v.* Comford, 36 Pa. St. 420; Casey's Case, 1 Ashm. 126.

Tennessee.— Kellar *v.* Baird, 5 Heisk. 39; Williams *v.* Saunders, 5 Coldw. 60; White *v.* White, 3 Head 404; Layne *v.* Pardee, 2 Swan 232.

Texas.— State *v.* Barrow, 14 Tex. 179, 65 Am. Dec. 109; Russell *v.* Randolph, 11 Tex. 460; McIntyre *v.* Chappell, 4 Tex. 187.

Vermont.— Barton *v.* Irasburgh, 33 Vt. 159.

Virginia.— Lindsay *v.* Murphy, 76 Va. 428; Pilson *v.* Bushong, 29 Gratt. 229.

West Virginia.— White *v.* Tennant, 31 W. Va. 790, 8 S. E. 596, 31 Am. St. Rep. 896.

Wisconsin.— Frame *v.* Thorman, 102 Wis. 653, 79 N. W. 39; Kellogg *v.* Winnebago County Sup'rs, 42 Wis. 97; Carter *v.* Sommermeyer, 27 Wis. 665; Hall *v.* Hall, 25 Wis. 600.

United States.— Morris *v.* Gilmer, 129 U. S. 315, 9 S. Ct. 289, 32 L. ed. 690; Mitchell *v.* U. S., 21 Wall. 350, 22 L. ed. 584; Alabama Great Southern R. Co. *v.* Carroll, 84 Fed. 772, 28 C. C. A. 207; Chambers *v.* Prince, 75 Fed. 176; Kamna *v.* Brockhaus, 5 Fed. 762, 10 Biss. 128; White *v.* Brown, 29 Fed. Cas. No. 17,538, 1 Wall. Jr. 217.

England.— Udny *v.* Udny, L. R. 1 H. L. Sc. 441; Loustalan *v.* Loustalan, [1900] P. 211, 69 L. J. P. 75, 82 L. T. Rep. N. S. 806, 48 Wkly. Rep. 509; *In re* Grove, 40 Ch. D. 216, 58 L. J. Ch. 57, 59 L. T. Rep. N. S. 587, 37 Wkly. Rep. 1; Urquhart *v.* Butterfield, 37 Ch. D. 357, 57 L. J. Ch. 521, 58 L. T. Rep. N. S. 750; *In re* Marrett, 36 Ch. D. 400, 57 L. T. Rep. N. S. 896, 36 Wkly. Rep. 344; Doucet *v.* Geoghegan, 9 Ch. D. 441, 26 Wkly. Rep. 825; Craigie *v.* Lewin, 3 Curt. Eccl. 435, 7 Jur. 519; Munro *v.* Munro, 7 Cl. & F. 842, 7 Eng. Reprint 1288; Brown *v.* McDouall, 7 Cl. & F. 817, 7 Eng. Reprint 1279; De Bonneval *v.* De Bonneval, 1 Curt. Eccl. 856; Jopp *v.* Wood, 4 De G. J. & S. 616, 11 Jur. N. S. 212, 34 L. J. Ch. 212, 12 L. T. Rep. N. S. 41, 5 New Rep. 422, 13 Wkly. Rep. 481, 69 Eng. Ch. 472; Atty.-Gen. *v.* Rowe, 1 H. & C. 31, 8 Jur. N. S. 823, 31 L. J. Exch. 314, 6 L. T. Rep. N. S. 438, 10 Wkly. Rep. 718; Moorhouse *v.* Lord, 10 H. L. Cas. 272, 9 Jur. N. S. 677, 32 L. J. Ch. 295, 8 L. T. Rep. N. S. 212, 1 New Rep. 555, 11 Wkly. Rep. 637, 11 Eng. Reprint 1030; Whicker *v.* Hume, 7 H. L. Cas. 124, 4 Jur. N. S. 933, 28 L. J. Ch. 398, 6 Wkly. Rep. 813, 11 Eng. Reprint 50; Matter of Steer, 3 H. & N. 594, 28 L. J. Exch. 22; Drevon *v.* Drevon, 10 Jur. N. S. 717, 34 L. J. Ch. 129, 10 L. T. Rep. N. S. 730, 4 New Rep. 316, 12 Wkly. Rep. 946; Aikman *v.* Aikman, 7 Jur. N. S. 1017, 4 L. T. Rep. N. S. 374, 3 Macq. H. L. 854; Maxwell *v.* McClure, 6 Jur. N. S. 407, 2 L. T. Rep. N. S. 65, 3 Macq. H. L. 852, 8 Wkly. Rep. 370; Cockerell *v.* Cockerell, 2 Jur. N. S. 727, 25 L. J. Ch. 730, 4 Wkly. Rep. 730; Lyall *v.* Paton, 25 L. J. Ch. 746, 4 Wkly. Rep. 798; Munroe *v.* Douglas, 5 Madd. 379; Hodgson *v.* De Beauchesne, 12 Moore P. C. 285, 7 Wkly. Rep. 397, 14 Eng. Reprint 920; Somerville *v.* Somerville, 5 Ves. Jr. 750, 5 Rev. Rep. 155, 31 Eng. Reprint 839.

Canada.— Wadsworth *v.* McCord, 12 Can. Supreme Ct. 466; Magurn *v.* Magurn, 3 Ont. 570; Wanzer Lamp Co. *v.* Woods, 13 Ont. Pr. 511; Briendit Desroehers *v.* Marchildon, 15 Quebec Super. Ct. 318.

See 17 Cent. Dig. tit. "Domicile," § 9.

In Louisiana it is provided (Civ. Code, art. 42) that the intention is proved by a written declaration made before the recorders of the parishes from which and to which he shall intend to remove. In the absence of such a declaration "proof of this intention shall depend upon circumstances." Judson *v.* Lathrop, 1 La. Ann. 78; Waller *v.* Lea, 8 La. 213; Hyde *v.* Henry, 4 Mart. N. S. 51; Leonard *v.* Mandeville, 9 Mart. 489. But this ap-

that person's domicile to another place. All the conditions which are required to constitute the domicile in the given place must be transferred to the new place. When this is done the domicile is changed, and until this is done the domicile is not changed.[71]

2. Intention to Abandon. It follows as a corollary therefore that there must exist a present fixed intent to abandon the former domicile, for where there is a purpose either secret or open to return no change will result.[72]

3. Motive of Change Immaterial. So long, however, as the intent to abandon has actually existed, the law will not scrutinize the motives which prompted the change.[73]

plies only to persons already domiciled within the state. One coming from another state acquires a domicile only by a residence of twelve months. Rist *v.* Hagan, 8 Rob. 106; Lowry *v.* Erwin, 6 Rob. 192, 39 Am. Dec. 556; Boone *v.* Savage, 14 La. 169.

71. Hartford *v.* Champion, 58 Conn. 268, 20 Atl. 471.

72. *Alabama.*— Allgood *v.* Williams, 92 Ala. 551, 8 So. 722; Murphy *v.* Hunt, 75 Ala. 438; Kelly *v.* Garrett, 67 Ala. 304; McConnaughy *v.* Baxter, 55 Ala. 379; Boyd *v.* Peck, 29 Ala. 703; State *v.* Judge Ninth Judicial Cir., 13 Ala. 805.

California.— Dow *v.* Gould, etc., Silver Min. Co., 31 Cal. 629.

Connecticut.— Hartford *v.* Champion, 58 Conn. 268, 20 Atl. 471.

District of Columbia.— Gorham *v.* Shepherd, 6 Mackey 596.

Illinois.— Carter *v.* Putnam, 141 Ill. 133, 30 N. E. 681; Wilkins *v.* Marshall, 80 Ill. 74; Potts *v.* Davenport, 79 Ill. 455; Hayes *v.* Hayes, 74 Ill. 312; Smith *v.* People, 44 Ill. 16.

Indiana.— Astley *v.* Capron, 89 Ind. 167; Culbertson *v.* Floyd County, 52 Ind. 361.

Louisiana.— Tullos *v.* Lane, 45 La. Ann. 333, 12 So. 508; Cole *v.* Lucas, 2 La. Ann. 946; Tanner *v.* King, 11 La. 175.

Maine.— Warren *v.* Thomaston, 43 Me. 406, 69 Am. Dec. 69; Waterborough *v.* Newfield, 8 Me. 203.

Maryland.— Risewick *v.* Davis, 19 Md. 82.

Massachusetts.— Hallet *v.* Bassett, 109 Mass. 167; Sears *v.* Boston, 1 Metc. 250; Jennison *v.* Hapgood, 10 Pick. 77.

Missouri.— Johnson *v.* Smith 43 Mo. 499; Walker *v.* Walker, 1 Mo. App. 404.

New Hampshire.— Concord *v.* Rumney, 45 N. H. 423; Hart *v.* Lindsey, 17 N. H. 235, 53 Am. Dec. 597; Atherton *v.* Thornton, 8 N. H. 178.

New Jersey.— Cadwalader *v.* Howell, 18 N. J. L. 138; *In re* Russell, 64 N. J. Eq. 313, 53 Atl. 169.

New York.— De Meli *v.* De Meli, 120 N. Y. 485, 24 N. E. 996, 17 Am. St. Rep. 652; Dupuy *v.* Wurtz, 53 N. Y. 556; Plant *v.* Harrison, 36 Misc. 649, 74 N. Y. Suppl. 411; People *v.* Winston, 25 Misc. 676, 56 N. Y. Suppl. 323; Crawford *v.* Wilson, 4 Barb. 504.

Ohio.— Egan *v.* Lumsden, 2 Disn. 168.

Pennsylvania.— *In re* Miller, 3 Rawle 312, 24 Am. Dec. 345; Guier *v.* O'Daniel, 1 Binn. 349 note.

Tennessee.— Stratton *v.* Brigham, 2 Sneed 420.

Texas.— Sabriego *v.* White, 30 Tex. 576; Benavides *v.* Gussett, 8 Tex. Civ. App. 198, 28 S. W. 113.

West Virginia.— White *v.* Tennant, 31 W. Va. 790, 8 S. E. 596, 13 Am. St. Rep. 896.

Wisconsin.— Kempster *v.* Milwaukee, 97 Wis. 343, 72 N. W. 743.

United States.— Mitchell *v.* U. S., 21 Wall. 350, 22 L. ed. 584; The Friendschaft, 3 Wheat. 14, 4 L. ed. 322; Collins *v.* Ashland, 112 Fed. 175; Johnson *v.* Twenty-One Bales, etc., 13 Fed. Cas. No. 7,417, 2 Paine 601, 3 Wheel. Cr. (N. Y.) 433; White *v.* Brown, 29 Fed. Cas. No. 17,538, 1 Wall. Jr. 217.

England.— De Bonneval *v.* De Bonneval, 1 Curt. Eccl. 856; Hoskins *v.* Matthews, 8 De G. M. & G. 13, 2 Jur. N. S. 196, 25 L. J. Ch. 689, 4 Wkly. Rep. 216, 57 Eng. Ch. 10; Allardice *v.* Onslow, 10 Jur. N. S. 352, 33 L. J. Ch. 434, 9 L. T. Rep. N. S. 674, 12 Wkly. Rep. 397.

Canada.— Magurn *v.* Magurn, 3 Ont. 570.

See 17 Cent. Dig. tit. "Domicile," § 9 *et seq.*

Intention to ultimately abandon.—A domicile is not lost by removing therefrom and locating in a new place with the possible purpose to make the latter a permanent home at some future time. The intent must be present and fixed, not ultimate. Astley *v.* Capron, 89 Ind. 167. Thus where plaintiff, a resident of Kansas, went to Colorado intending if successful in obtaining a situation in the public schools to remain there, and if not to return to Kansas, but was seriously injured before the result of the civil service examination which she had taken was known and thereupon went back to Kansas where she has since remained, it was held that at no time did she cease to be a resident of Kansas. Denver *v.* Sherret, 88 Fed. 226, 31 C. C. A. 499.

73. *Georgia.*— Lamar *v.* Mahoney, Dudley 92.

Louisiana.— Hennen *v.* Hennen, 12 La. 190; Tanner *v.* King, 11 La. 175. But *compare* Cole *v.* Lucas, 2 La. Ann. 946, where the change was merely for the purpose of having the laws of the new locality operate on certain notes.

Massachusetts.— Thayer *v.* Boston, 124 Mass. 132, 26 Am. Rep. 650.

New Jersey.—Harral *v.* Harral, 39 N. J. Eq. 279, 51 Am. Rep. 17.

United States.— Morris *v.* Gilmer, 129 U. S. 315, 9 S. Ct. 289, 32 L. ed. 690; Briggs *v.* French, 3 Fed. Cas. No. 1,871, 2 Sumn. 251; Butler *v.* Farnsworth, 4 Fed. Cas. No. 2,240,

4. Legal or Moral Duty. Nor will the question be affected by the fact that it was the legal or moral duty of the individual to reside in a given place.[74]

5. Removal Must Be Voluntary. The removal must be voluntary.[75]

6. Removal of Family.[76] When it is evident by unequivocal acts that the intention to remove existed, the change of domicile is complete, although the family may remain temporarily in the place of former abode.[77] Nor is one's

4 Wash. 101; Case *v.* Clarke, 5 Fed. Cas. No. 2,490, 5 Mason 70.

England.— Firebrace *v.* Firebrace, 4 P. D. 63, 47 L. J. P. 41, 39 L. T. Rep. N. S. 94, 26 Wkly. Rep. 617; *In re* Cooke, 56 L. J. Ch. 637, 56 L. T. Rep. N. S. 737, 35 Wkly. Rep. 608.

See 17 Cent. Dig. tit. "Domicile," § 10.

"A man has a right to change his domicile for any reasons satisfactory to himself. In determining whether there has been such a change from one place to another, the test is to inquire whether he has in fact removed his home to the latter place with the intention of making it his residence permanently or for an indefinite time. If he has he loses his old domicile and acquires a new one with all its rights and incidents; and the law does not inquire into the purposes or motives which induced him to make such change. It may be because he prefers the laws of the new place of domicile, or because he can diminish his taxes and other burdens, or because he desires to bring a suit in a court which would not otherwise have jurisdiction. His status as an inhabitant depends upon the fact that he has made a change of his home, and not upon the motives or reasons which influenced him to do so." Frame *v.* Thormann, 102 Wis. 653, 666, 79 N. W. 39. See also McConnell *v.* Kelley, 138 Mass. 372. *Contra*, however, where the motive was to make valid a testamentary disposition which would not have been sustained under the laws of the former domicile, in which case the motive may be considered as reflecting on the *bona fides* of the intent. Plant *v.* Harrison, 36 Misc. (N. Y.) 649, 74 N. Y. Suppl. 411.

74. Thus the fact that one has left his wife and is living with another woman will not prevent the court from holding that a removal has taken place. Greene *v.* Windham, 13 Me. 225. And see Richmond *v.* Vassalborough, 5 Me. 396.

75. There must be the opportunity of exercising a choice. Urquhart *v.* Butterfield, 37 Ch. D. 357, 57 L. J. Ch. 521, 58 L. T. Rep. N. S. 750.

Involuntary confinement.— A change of domicile does not result from removal under arrest or from confinement in a penitentiary (Young *v.* Pollak, 85 Ala. 439, 5 So. 279; Barton *v.* Barton, 74 Ga. 761; Grant *v.* Dalliber, 11 Conn. 234); or in a poorhouse (Clark *v.* Robinson, 88 Ill. 498; Freeport *v.* Stephenson County, 41 Ill. 495. *Contra*, Sturgeon *v.* Korte, 34 Ohio St. 525, as the Ohio statute permits the inmates to leave whenever they desire).

An unpaid helper in a public hospital who merely receives board and lodging in exchange for certain labor is "kept" there within the meaning of the New York constitution, art. 2, § 3, declaring that "for the purpose of voting, no person shall be deemed to have gained or lost a residence, by reason of his presence or absence, while . . . kept at any almshouse, or other asylum, or institution wholly or partly supported at public expense, or by charity." People *v.* Hagan, 165 N. Y. 607, 58 N. E. 1091 [*affirming* 48 N. Y. App. Div. 203, 62 N. Y. Suppl. 816].

Escaping arrest.— Where the party has fled from his home to escape arrest for a violation of the criminal law, his removal will not be considered as having been effected under compulsion. Young *v.* Pollak, 85 Ala. 439, 5 So. 279. *Compare* Loustalan *v.* Loustalan, [1900] P. 211, 69 L. J. P. 75, 82 L. T. Rep. N. S. 806, 48 Wkly. Rep. 509, where the court differed among themselves as to this.

A refugee in time of war will not be considered, in the absence of a definitely proven intent to the contrary, as having lost his domicile, whether his removal be under compulsion of one of the belligerent powers (*In re* Duleep-Singh, 7 Morr. Bankr. Cas. 228. And see Hardy *v.* De Leon, 5 Tex. 211. [But removal from a conquered country where there was no compulsion and merely because of a dislike to the new sovereignty will not be deemed involuntary. Ennis *v.* Smith, 14 How. (U. S.) 400, 14 L. ed. 472), or by his own will but prompted solely by a desire to save his person or property (Weaver *v.* Norwood, 59 Miss. 665; White *v.* Brown, 29 Fed. Cas. No. 17,538, 1 Wall. Jr. 217; De Bonneval *v.* De Bonneval, 1 Curt. Eccl. 856).

Ill-health is not such compulsion as will prevent the acquiring of a new domicile. Therefore when the deceased went to Florida from New York because of the rigor of the climate in the latter state, his residence in Florida being intended by him to be of a permanent character, a change of domicile was effected. Hegeman *v.* Fox, 1 Redf. Surr. (N. Y.) 297.

76. Presumption arising from domicile of family see *infra*, VIII, B, 3.

77. *Illinois.*— Wells *v.* People, 44 Ill. 40.

Massachusetts.—Cambridge *v.* Charlestown, 13 Mass. 501.

Missouri.— Lankford *v.* Gebhart, 130 Mo. 621, 32 S. W. 1127, 51 Am. St. Rep. 585.

Pennsylvania.—Reed *v.* Ketch, 1 Phila. 105.

Tennessee.— Whitly *v.* Steakly, 3 Baxt. 393.

West Virginia.— See White *v.* Tennant, 31 W. Va. 790, 8 S. E. 596, 13 Am. St. Rep. 896.

See 17 Cent. Dig. tit. "Domicile," § 16.

Where under special facts involved the change of domicile was held not to have been consummated until the removal of the family see the following cases:

Alabama.— State *v.* Hallett, 8 Ala. 159.

personal presence necessary at the new domicile when the intent to change has been manifested and carried out by sending the wife and family there.[78]

C. Death or Abandonment of Intention In Itinere. A domicile not being lost until another is actually acquired, where death occurs,[79] or the intention is abandoned while on a journey to the new locality no change results.[80] An exception to the foregoing rule has been made where a domicile of choice was definitely abandoned with an intent to resume the original domicile, in which event the latter immediately reverts, even although a return to the original abode is not consummated.[81]

VIII. EVIDENCE.

A. Admissibility — 1. In General. Domicile cannot be shown by testimony which under the general rules of evidence is incompetent and inadmissible;[82]

Illinois.— Carter *v.* Putnam, 141 Ill. 133, 30 N. E. 681; Behrensmeyer *v.* Kreitz, 135 Ill. 591, 26 N. E. 704.

Kansas.— Hart *v.* Horn, 4 Kan. 232.

Massachusetts.— Williams *v.* Whiting, 11 Mass. 424.

Michigan.—Cass *v.* Gunnison, 68 Mich. 147, 36 N. W. 45.

North Carolina.— Plummer *v.* Brandon, 40 N. C. 190.

78. Thus where a mariner sends his wife and family to the place of their new abode, the fact and intent are deemed to have concurred at the time of their arrival. Bangs *v.* Brewster, 111 Mass. 382.

79. *Florida.*— Smith *v.* Croom, 7 Fla. 81.

Illinois.— Cooper *v.* Beers, 143 Ill. 25, 33 N. E. 61.

Maine.— Fayette *v.* Livermore, 62 Me. 229.

New York.—Hegeman *v.* Fox, 31 Barb. 475; Graham *v.* Public Adm'r, 4 Bradf. Surr. 127.

North Carolina.— Horne *v.* Horne, 31 N. C. 99.

Texas.— Mills *v.* Alexander, 21 Tex. 154.

England.— Udny *v.* Udny, L. R. 1 H. L. Sc. 441; Bell *v.* Kennedy, L. R. 1 H. L. Sc. 307; Lyall *v.* Paton, 25 L. J. Ch. 746, 4 Wkly. Rep. 798; Munroe *v.* Douglas, 5 Madd. 379; *In re* Raffenel, 9 Jur. N. S. 386, 32 L. J. P. 203, 8 L. T. Rep. N. S. 211, 1 New Rep. 569, 3 Swab. & Tr. 49, 11 Wkly. Rep. 549.

See 17 Cent. Dig. tit. "Domicile," § 9.

80. Lamar *v.* Mahony, Dudley (Ga.) 92; Littlefield *v.* Brooks, 50 Me. 475; Ringgold *v.* Barley, 5 Md. 186, 59 Am. Dec. 107; Cross *v.* Black, 9 Gill & J. (Md.) 198; Shaw *v.* Shaw, 98 Mass. 158.

Civil law contra.— While *in transitu* the old one remains. . . . The Roman law was otherwise. '*Siquis domicilio relicto naviget vel iter faciat, quærens quo se conferet atque ubi constituat, hunc puto sine domicilio esse.*' Dig. 50, 1, 27. But such is not our law." Littlefield *v.* Brooks, 50 Me. 475, 477.

81. *Alabama.*—State *v.* Hallett, 8 Ala. 159.

New York.— *In re* Wrigley, 8 Wend. 134.

Pennsylvania.— Reed's Appeal, 71 Pa. St. 378; *In re* Miller, 3 Rawle 312, 24 Am. Dec. 345; Bremme's Estate, 2 Pa. Dist. 455, 13 Pa. Co. Ct. 177.

Tennessee.—Allen *v.* Thomason, 11 Humphr. 536, 54 Am. Dec. 55.

United States.— The Venus, 8 Cranch 253, 3 L. ed. 553; The Ann Green, 1 Fed. Cas. No. 414, 1 Gall. 274; Catlin *v.* Gladding, 5 Fed. Cas. No. 2,520, 4 Mason 308.

England.— Firebrace *v.* Firebrace, 4 P. D. 63, 47 L. J. P. 41, 39 L. T. Rep. N. S. 94, 26 Wkly. Rep. 617; Urquhart *v.* Butterfield, 37 Ch. D. 357, 57 L. J. Ch. 521, 58 L. T. Rep. N. S. 750; *In re* Marrett, 36 Ch. D. 400, 57 L. T. Rep. N. S. 896, 36 Wkly. Rep. 344; King *v.* Foxwell, 3 Ch. D. 518, 45 L. J. Ch. 693, 24 Wkly. Rep. 629; Munro *v.* Munro, 7 Cl. & F. 842, 7 Eng. Reprint 1288; Brown *v.* McDouall, 7 Cl. & F. 817, 7 Eng. Reprint 1279; The Indian Chief, 3 C. Rob. 17; *In re* Cooke, 56 L. J. Ch. 637, 56 L. T. Rep. N. S. 737, 35 Wkly. Rep. 608.

See 17 Cent. Dig. tit. "Domicile." § 9.

Contra.— Bell *v.* Kennedy, L. R. 1 H. L. Sc. 307; Lyall *v.* Paton, 25 L. J. Ch. 746, 4 Wkly. Rep. 798.

But this principle has reference to a native domicile in its enlarged sense and grows out of native allegiance or citizenship. It has no application where the question is between a native and an acquired domicile where both are under the same natural jurisdiction. New Haven First Nat. Bank *v.* Balcom, 35 Conn. 351; Steers' Succession, 47 La. Ann. 1551, 18 So. 503.

Intent to abandon necessary.— But even though the acquired domicile has been left and the death occurs while *in transitu* to the original home, the domicile of choice will not be lost unless there was a definite intent to abandon it. Mills *v.* Alexander, 21 Tex. 154; White *v.* Brown, 29 Fed. Cas. No. 17,538, 1 Wall. Jr. 217.

82. See, generally, Evidence. Thus evidence is inadmissible as to the intention of the party whose evidence is in dispute to engage in business at a particular place. Fulham *v.* Howe, 60 Vt. 351, 14 Atl. 652.

Catalogues of an academy containing a list of the students with their addresses are inadmissible to prove the domicile of one whose name appeared therein, in the absence of proof that the address as given was inserted at his direction or by his consent. State *v.* Daniels, 44 N. H. 383.

Evidence as to ownership by defendant of real property situated in another state was held properly excluded. Gould *v.* Smith, 48 Mo. 43.

Hearsay.— The general understanding and report in a community as to the domicile of

but it has been held admissible evidence[83] to prove the domicile of him against whom it was offered to show that during the time in question he acted as treasurer of a certain school-district,[84] or served as highway inspector;[85] that his name appeared on the official registrar's list of electors,[86] or that a notification, duly addressed, warning him to attend a district school-meeting in a certain town was delivered to him.[87] So it is permissible to ask one who has changed his residence as to the intent with which such change was made.[88]

2. Declarations — a. Oral. Oral declarations made at the time of removal by the party whose domicile is in dispute, as to the intent with which removal was accomplished, being part of the *res gestæ*, are admissible in evidence in a contest to which he is a party.[89] But the declarations of a wife as to her husband's domicile are not admissible against him.[90]

b. Written. Written declarations as to domicile, whether contained in letters,[91]

a particular individual is hearsay and incompetent. Pfister *v.* Dascey, 68 Cal. 572, 10 Pac. 117. See also Griffin *v.* Wall, 32 Ala. 149.

83. Hartford *v.* Champion, 58 Conn. 268, 20 Atl. 471; Fleming *v.* Straley, 23 N. C. 305.

84. Buchanan *v.* Cook, 70 Vt. 168, 40 Atl. 102.

85. Cole *v.* Cheshire, 1 Gray (Mass.) 441.

86. Enfield *v.* Ellington, 67 Conn. 459, 34 Atl. 818; West Boylston *v.* Sterling, 17 Pick. (Mass.) 126. But see Fisk *v.* Chester, 8 Gray (Mass.) 506, where evidence was held inadmissible to show that the selectmen had placed plaintiff's name on the voting list, it not having been shown that they did so at his request.

87. West Boylston *v.* Sterling, 17 Pick. (Mass.) 126.

88. *Illinois.*— Wilkins *v.* Marshall, 80 Ill. 74.

Massachusetts.— Reeder *v.* Holcomb, 105 Mass. 93; Fisk *v.* Chester, 8 Gray 506.

New York.— Kennedy *v.* Ryall, 67 N. Y. 379.

North Carolina.— Hannon *v.* Grizzard, 89 N. C. 115.

Vermont.— Hulett *v.* Hulett, 37 Vt. 581.

United States.— Kemna *v.* Brockhaus, 5 Fed. 762, 10 Biss. 128.

89. *Alabama.*— Merrill *v.* Morrissett, 76 Ala. 433; Griffin *v.* Wall, 32 Ala. 149; Scott *v.* State, 30 Ala. 503; Pitts *v.* Burroughs, 6 Ala. 733.

Illinois.—Wallace *v.* Lodge, 5 Ill. App. 507.

Indiana.— Burgess *v.* Clark, 3 Ind. 250; Brittenham *v.* Robinson, 18 Ind. App. 502, 48 N. E. 616.

Louisiana.— Gardner *v.* O'Connell, 5 La. Ann. 353; Cole *v.* Lucas, 2 La. Ann. 946.

Maine.— Etna *v.* Brewer, 78 Me. 377, 5 Atl. 884; Church *v.* Rowell, 49 Me. 367; Corinth *v.* Lincoln, 34 Me. 310; Wayne *v.* Greene, 21 Me. 357; Gorham *v.* Canton, 5 Me. 266, 17 Am. Dec. 231.

Massachusetts.— Viles *v.* Waltham, 157 Mass. 542, 32 N. E. 901, 34 Am. St. Rep. 311; Pickering *v.* Cambridge, 144 Mass. 244, 10 N. E. 827; Reeder *v.* Holcomb, 105 Mass. 93; Wilson *v.* Terry, 91 Mass. 214; Cole *v.* Cheshire, 1 Gray 411; Kilburn *v.* Bennett, 3 Metc. 199.

Mississippi.—Beason *v.* State, 34 Miss. 602.

New Hampshire.—Chase *v.* Chase, 66 N. H. 588, 29 Atl. 553.

New Jersey.— Clark *v.* Likens, 26 N. J. L. 207.

New York.— Matter of Roberts, 8 Paige 519.

Pennsylvania.— Guier *v.* O'Daniel, 1 Binn. 349 note. In a case where the boundary line between two counties passes through a dwelling-house evidence of declarations is admissible to show in which county it was his intention to fix a domicile. Follweiler *v.* Lutz, 112 Pa. St. 107, 2 Atl. 721.

Tennessee.—Allen *v.* Thomason, 11 Humphr. 536, 54 Am. Dec. 55.

Texas.— *Ex p.* Blumer, 27 Tex. 734.

United States.— Burnham *v.* Rangeley, 4 Fed. Cas. No. 2,176, 1 Woodb. & M. 7.

England.— Doe *v.* Arkwright, 5 C. & P. 575, 24 E. C. L. 715; Hodgson *v.* De Beauchesne, 12 Moore P. C. 285, 7 Wkly. Rep. 397, 14 Eng. Reprint 920.

See 17 Cent. Dig. tit. "Domicile," § 38.

Declarations not contemporaneous with removal are not admissible. Fulham *v.* Howe, 62 Vt. 386, 20 Atl. 101. And see Corinth *v.* Lincoln, 34 Me. 310. Where plaintiff's domicile on May 1, 1883, was in question and it was claimed that about October, 1881, he had removed from the town of C to the town of G, evidence of a statement made by him in the autumn of 1880 that he should refuse to accept a nomination for the common council of C or to serve if elected, "on the ground that he had no connection with, or interest in, the affairs of C" as well as one made in November, 1881, to the superintendent of his farm in G, that he had now made G his residence and domicile, were held to have been properly excluded. Pickering *v.* Cambridge, 144 Mass. 244, 10 N. E. 827. But see in this connection Kilburn *v.* Bennett, 3 Metc. (Mass.) 199 (where declarations made three weeks before removal were held admissible); Matter of Roberts, 8 Paige (N. Y.) 519 (where declarations made by decedent after removal as to the character of her then residence were held admissible).

90. Chambers *v.* Prince, 75 Fed. 176.

91. Burgess *v.* Clark, 3 Ind. 250 (postmarks); Thorndike *v.* Boston, 1 Metc. (Mass.)

in the recitals of deeds[92] and wills,[93] or in other instruments,[94] are admissible evidence, provided they are offered against the party making them or accompany or explain some act, thus forming part of the *res gestæ*.[95]

3. Conduct. Evidence of the party's conduct afterward as well as before the date in question may be received as an aid in ascertaining his intention.[96]

4. Taxation. Evidence that a party has paid a poll-tax or tax on personal property is competent to prove his intention with respect to the place at which such tax was levied;[97] but evidence that he has paid taxes upon real property is not admissible.[98]

B. Presumptions[99] **— 1. As to Continuance of Domicile and Identity With Residence — a. In General.** The place of residence is *prima facie* that of domicile;[1] and the rule applies not only in interstate habitation, but also where a citizen

242; Ennis *v.* Smith, 14 How. (U. S.) 400, 14 L. ed. 472.

92. New Orleans *v.* Sheppard, 10 La. Ann. 268; Davis *v.* Binion, 5 La. Ann. 248; Greenfield *v.* Camden, 74 Me. 56; Weld *v.* Boston, 126 Mass. 166.

Limits of rule.—When offered by the grantor in a suit against the grantee "the acceptance of a deed by a grantee is slight evidence that the description of his residence therein is correct. He is presumed to know his own residence, and to have an interest in having it correctly stated. But a grantee cannot be presumed to know the residence of the grantor, and his acceptance of the deed, therefore, cannot be held to be an implied admission that the grantor's residence is correctly stated." Wright *v.* Boston, 126 Mass. 161, 164. The recitals contained in a deed that is offered in evidence in proof of title cannot be considered as evidence of the domicile of the parties when it is a necessary element of title. Dohan *v.* Murdock, 40 La. Ann. 376, 4 So. 338.

93. Wilson *v.* Terry, 9 Allen (Mass.) 214; Tucker *v.* Field, 5 Redf. Surr. (N. Y.) 139; *In re* Harberger, 13 Phila. (Pa.) 368. *Compare* Ennis *v.* Smith, 14 How. (U. S.) 400, 14 L. ed. 472. But see Gilman *v.* Gilman, 52 Me. 165, 83 Am. Dec. 502, where it was said that the fact of a description in a will did not "make any material difference."

94. An application for admission to membership in a lodge written a few days before suit was brought, in which defendant described himself as resident of a certain county, is competent evidence against him on the question of domicile. Robertson *v.* Ephrian, 18 Tex. 118.

A writ drawn and dated on the day as to when the domicile was disputed is admissible to show the domicile of plaintiff as recited therein, although it was never served and the attorney who drew it had no knowledge as to such plaintiff's residence, except as had been stated to him at the time. Oldtown *v.* Shapleigh, 33 Me. 278.

But the mere fact that a party dates his business papers within the state of Missouri is not competent evidence to prove him a resident of that state. Greene *v.* Beckwith, 38 Mo. 384.

95. Viles *v.* Waltham, 157 Mass. 542, 32 N. E. 901, 34 Am. St. Rep. 311; Weld *v.* Boston, 126 Mass. 166; Wright *v.* Boston, 126 Mass. 161; Chase *v.* Chase, 66 N. H. 588, 29 Atl. 553. In a controversy between creditors of W the latter's unsworn answer to interrogatories as to his residence are not admissible, they being merely declarations made since the controversy arose by a party having no interest therein. Ayer *v.* Weeks, 65 N. H. 248, 18 Atl. 1108, 23 Am. St. Rep. 37, 6 L. R. A. 716.

96. Richmond *v.* Vassalborough, 5 Me. 396; Viles *v.* Waltham, 157 Mass. 542, 23 N. E. 901, 34 Am. St. Rep. 311; Follweiler *v.* Lutz, 112 Pa. St. 107, 2 Atl. 721.

97. Chase *v.* Chase, 66 N. H. 588, 29 Atl. 553; State *v.* Grizzard, 89 N. C. 115; Fulham *v.* Howe, 60 Vt. 351, 14 Atl. 652; Hurlbut *v.* Green, 42 Vt. 316; Hulett *v.* Hulett, 37 Vt. 581; Mitchell *v.* U. S., 21 Wall. (U. S.) 350, 22 L. ed. 584.

98. Chase *v.* Chase, 66 N. H. 588, 29 Atl. 553.

99. The fact that a will executed abroad is drawn in accordance with the formalities prescribed by the domicile of origin raises the presumption of an intent to retain such original domicile. Tucker *v.* Field, 5 Redf. Surr. (N. Y.) 139.

The mere fact that an individual bears an English name and is an officer in the British army raises no presumption that his domicile is English as distinguished from Scotch or Irish. *Ex p.* Cunningham, 13 Q. B. D. 418, 53 L. J. Ch. 1067, 51 L. T. Rep. N. S. 447, 1 Morr. Bankr. Cas. 137, 33 Wkly. Rep. 22.

1. *Alabama.*— Hightower *v.* Ogletree, 114 Ala. 94, 21 So. 934.

California.—Dow *v.* Gould, etc., Silver Min. Co., 31 Cal. 629.

District of Columbia.— Bradstreet *v.* Bradstreet, 7 Mackey 229.

Louisiana.— Alter *v.* Waddill, 20 La. Ann. 246.

Maine.— Greenfield *v.* Camden, 74 Me. 56.

Michigan.— Beecher *v.* Detroit, 114 Mich. 228, 72 N. W. 206.

Mississippi.— Hairston *v.* Hairston, 27 Miss. 704, 61 Am. Dec. 530.

Nebraska.— State *v.* Superior School Dist., 55 Nebr. 317, 75 N. W. 855.

New Hampshire.— Hart *v.* Lindsey, 17 N. H. 235, 43 Am. Dec. 597.

New Jersey.— Cadwalader *v.* Howell, 18 N. J. L. 138.

removes to a foreign country.[2] Again, a domicile when once obtained or acquired is presumed to continue, and the burden of proving a change rests upon the party alleging it;[3] but the presumption as to continuance will not be applied where its

New York.— Kennedy *v.* Ryall, 67 N. Y. 379 [*affirming* 40 N. Y. Super. Ct. 347]; Ames *v.* Duryea, 6 Lans. 155; Vischer *v.* Vischer, 12 Barb. 640.

North Carolina.— Horne *v.* Horne, 31 N. C. 99.

Pennsylvania.— Carey's Appeal, 75 Pa. St. 201; *In re* Hood, 21 Pa. St. 106.

South Carolina.— Graveley *v.* Graveley, 25 S. C. 1, 60 Am. Rep. 478; Bradley *v.* Lowry, Speers Eq. 1, 39 Am. Dec. 142.

Tennessee.— Prater *v.* Prater, 87 Tenn. 78, 9 S. W. 361, 10 Am. St. Rep. 623; Kellar *v.* Baird, 5 Heisk. 39.

Texas.— *Ex p.* Blumer, 27 Tex. 734.

Wisconsin.— Hall *v.* Hall, 25 Wis. 600.

United States.— Anderson *v.* Watts, 138 U. S. 694, 11 S. Ct. 449, 34 L. ed. 1078; Mitchell *v.* U. S., 21 Wall. (U. S.) 350, 22 L. ed. 584; Ennis *v.* Smith, 14 How. (U. S.) 400, 14 L. ed. 472; Collins *v.* Ashland, 112 Fed. 175; Butler *v.* Farnsworth, 4 Fed. Cas. No. 2,240, 4 Wash. 101; Johnson *v.* Twenty-one Bales, etc., 13 Fed. Cas. No. 7,417, 2 Paine 601, 3 Wheel. Cr. (N. Y.) 433; Rogers *v.* The Amado, 20 Fed. Cas. No. 12,005, Newb. Adm. 400.

England.— Bell *v.* Kennedy, L. R. 1 H. L. Sc. 307; Sharpe *v.* Crispin, L. R. 1 P. 611, 38 L. J. P. 17, 20 L. T. Rep. N. S. 41, 17 Wkly. Rep. 368; Bruce *v.* Bruce, 2 B. & P. 229 note; Bempde *v.* Johnstone, 3 Ves. Jr. 198, 30 Eng. Reprint 967; *In re* Patience, 29 Ch. D. 976, 54 L. J. Ch. 897, 52 L. T. Rep. N. S. 687, 33 Wkly. Rep. 501; De Bonneval *v.* De Bonneval, 1 Curt. Eccl. 856; Jopp *v.* Wood, 4 De G. J. & S. 616, 11 Jur. N. S. 212, 34 L. J. Ch. 212, 12 L. T. Rep. N. S. 41, 5 New Rep. 422, 13 Wkly. Rep. 481, 69 Eng. Ch. 472; Stanley *v.* Bernes, 3 Hagg. Eccl. 373; Bempde *v.* Johnstone, 3 Ves. Jr. 198, 30 Eng. Reprint 967.

See 17 Cent. Dig. tit. "Domicile," § 36.

2. Thus where a citizen of Pennsylvania removed to Cuba, settled there, and engaged in trade, it was held that the presumption in favor of the domicile of choice lay upon him and that the burden of disproving the domicile of choice lay upon him who denied it. *In re* Hood, 21 Pa. St. 106 [*cited* in Carey's Appeal, 75 Pa. St. 201].

3. *Alabama.*— Caldwell *v.* Pollak, 91 Ala. 353, 8 So. 546; Bragg *v.* State, 69 Ala. 204; Glover *v.* Glover, 18 Ala. 367.

Arkansas.— Prather *v.* Palmer, 4 Ark. 456.

Dakota.— Gardner *v.* Board of Education, 5 Dak. 259, 38 N. W. 433.

Iowa.— Nugent *v.* Bates, 51 Iowa 77, 50 N. W. 76, 33 Am. Rep. 117.

Kansas.— Keith *v.* Stetter, 25 Kan. 100; Deitrich *v.* Lang, 11 Kan. 636.

Louisiana.— Simmons' Succession, 109 La. 1095, 34 So. 101; Steers' Succession, 47 La. Ann. 1551, 18 So. 503; Franklin's Succession, 7 La. Ann. 395; Cole *v.* Lucas, 2 La. Ann. 946; Tanner *v.* King, 11 La. 175.

Maine.— Greenfield *v.* Camden, 74 Me. 56.

Massachusetts.— Harvard College *v.* Gore, 5 Pick. 370.

Missouri.— Walker *v.* Walker, 1 Mo. App. 404.

New Mexico.— Berry *v.* Hull, 6 N. M. 643, 30 Pac. 936.

New York.—Dupuy *v.* Wurtz, 53 N. Y. 556; People *v.* Crowley, 21 N. Y. App. Div. 304, 47 N. Y. Suppl. 457; Nixon *v.* Palmer, 10 Barb. 175; Chaine *v.* Wilson, 1 Bosw. 673; Matter of Colebrook, 26 Misc. 139, 55 N. Y. Suppl. 861; People *v.* Winston, 25 Misc. 676, 56 N. Y. Suppl. 323; Cruger *v.* Phelps, 21 Misc. 252, 47 N. Y. Suppl. 61; Matter of Dimock, 11 Misc. 610, 32 N. Y. Suppl. 927; *In re* Gould, 9 N. Y. Suppl. 603; Matter of Roberts, 8 Paige 519; Tucker *v.* Field, 5 Redf. Surr. 139.

North Carolina.— Ferguson *v.* Wright, 113 N. C. 537, 18 S. E. 691.

Pennsylvania.— Price *v.* Price, 156 Pa. St. 617, 27 Atl. 291; Hindman's Appeal, 85 Pa. St. 466; Carey's Appeal, 75 Pa. St. 201; Reed's Appeal, 71 Pa. St. 378; Pfoutz *v.* Comford, 36 Pa. St. 420; *In re* Hood, 21 Pa. St. 106.

Tennessee.—Williams *v.* Saunders, 5 Coldw. 60; White *v.* White, 3 Head 404; Layne *v.* Pardee, 2 Swan 232.

Texas.— Mills *v.* Alexander, 21 Tex. 154; Russell *v.* Randolph, 11 Tex. 460.

Virginia.— Starke *v.* Scott, 78 Va. 180; Lindsay *v.* Murphy, 76 Va. 428; Pilson *v.* Bushong, 29 Gratt. 229.

United States.— Anderson *v.* Watts, 138 U. S. 694, 11 S. Ct. 449, 34 L. ed. 1078; Mitchell *v.* U. S., 21 Wall. 350, 22 L. ed. 584; Ennis *v.* Smith, 14 How. 400, 14 L. ed. 472; Chambers *v.* Prince, 75 Fed. 176; Burnham *v.* Rangeley, 4 Fed. Cas. No. 2,176, 1 Woodb. & M. 7; White *v.* Brown, 29 Fed. Cas. No. 17,538, 1 Wall. Jr. 217; Quigley's Case, 13 Ct. Cl. 368.

England.— Douglas *v.* Douglas, L. R. 12 Eq. 617, 41 L. J. Ch. 74, 25 L. T. Rep. N. S. 530, 20 Wkly. Rep. 55; Bell *v.* Kennedy, L. R. 1 H. L. Sc. 307; Loustalan *v.* Loustalan, [1900] P. 211, 69 L. J. P. 75, 82 L. T. Rep. N. S. 806, 48 Wkly. Rep. 509; *In re* Lauderdale Peerage, 10 App. Cas. 692; *In re* Patience, 29 Ch. D. 976, 54 L. J. Ch. 897, 52 L. T. Rep. N. S. 687, 33 Wkly. Rep. 501; *In re* Tootal, 23 Ch. D. 532, 52 L. J. Ch. 664, 48 L. T. Rep. N. S. 816, 31 Wkly. Rep. 653; Munro *v.* Munro, 7 Cl. & F. 842, 7 Eng. Reprint 1288; Brown *v.* McDouall, 7 Cl. & F. 817, 7 Eng. Reprint 1279; De Bonneval *v.* De Bonneval, 1 Curt. Eccl. 856; Atty.-Gen. *v.* Blucher de Wahlstatt, 3 H. & C. 374, 10 Jur. N. S. 1159, 34 L. J. Exch. 29, 11 L. T. Rep. N. S. 454, 5 New Rep. 135, 13 Wkly. Rep. 163; Atty.-Gen. *v.* Rowe, 1 H. & C. 31, 8 Jur. N. S. 823, 31 L. J. Exch. 314, 6 L. T. Rep. N. S. 438, 10 Wkly. Rep. 718; Aikman *v.* Aikman, 7 Jur. N. S. 1017, 4 L. T. Rep.

operation would be to impress the individual with a character hostile to the state.[4]

b. Conflict Between These Presumptions. It is obvious that these two presumptions may at first blush be deemed to conflict; therefore it is held that residence elsewhere,[5] particularly when it is of such a length[6] or characterized by such circumstances as indicate an intention to adopt the new locality as a domicile,[7] rebuts the presumption as to the continuance of the original abode; but mere residence elsewhere will not rebut the presumption as to continuance, unless it is inconsistent with an intent to return to the original domicile.[8]

N. S. 374, 3 Macq. H. L. 854; Maxwell *v.* McClure, 6 Jur. N. S. 407, 2 L. T. Rep. N. S. 65, 3 Macq. H. L. 852, 8 Wkly. Rep. 370; Crookenden *v.* Fuller, 5 Jur. N. S. 1222, 29 L. J. P. 1, 1 L. T. Rep. N. S. 70, 1 Swab. & Tr. 441, 8 Wkly. Rep. 49; Somerville *v.* Somerville, 5 Ves. Jr. 750, 5 Rev. Rep. 155, 31 Eng. Reprint 839.

Canada.— Wadsworth *v.* McCord, 12 Can. Supreme Ct. 466; Magurn *v.* Magurn, 3 Ont. 570; Brien dit Desrochers *v.* Marchidon, 15 Quebec Super. Ct. 318.

See 17 Cent. Dig. tit. "Domicile," § 36 *et seq.*

Presumption prospective.— Domicile at any time being shown, there is a presumption that it will continue, but none as to when it began. The presumption is prospective not retrospective. Clough *v.* Kyne, 40 Ill. App. 234.

4. Hence where it was shown that plaintiff had his residence in Georgia on Jan. 8, 1860, no presumption can be had that he continued to dwell there until December, 1863, or during the Civil war, since this would convert him into the character of an enemy to the government. Stoughton *v.* Hill, 23 Fed. Cas. No. 13,501, 3 Woods 404.

5. State *v.* Superior School Dist., 55 Nebr. 317, 75 N. W. 855; Ennis *v.* Smith, 14 How. (U. S.) 400, 14 L. ed. 472. And see Bradstreet *v.* Bradstreet, 18 D. C. 229; Ames *v.* Duryea, 6 Lans. (N. Y.) 155.

6. *District of Columbia.*— Bradstreet *v.* Bradstreet, 18 D. C. 229, thirteen years.

Michigan.— Beecher *v.* Detroit, 114 Mich. 228, 72 N. W. 206, four years.

Mississippi.—Hairston *v.* Hairston, 27 Miss. 704, 61 Am. Dec. 530, ten years.

New York.— Elbers *v.* United Ins. Co., 16 Johns. 128 (two years); Weston *v.* Weston, 14 Johns. 428 (seven years).

United States.— Shelton *v.* Tiffin, 6 How. 163, 12 L. ed. 387 (two years); Johnson *v.* Twenty-one Bales, etc., 13 Fed. Cas. No. 7,417, 2 Paine 601, 3 Wheel. Cr. (N. Y.) 433 (sixteen years); White *v.* Brown, 29 Fed. Cas. No. 17,538, 1 Wall. Jr. 217 (forty-eight years).

England.— Haldane *v.* Eckford, L. R. 8 Eq. 631, 21 L. T. Rep. N. S. 87, 17 Wkly. Rep. 1059 (twenty-four years); *In re* Grove, 40 Ch. D. 216, 58 L. J. Ch. 57, 59 L. T. Rep. N. S. 587, 37 Wkly. Rep. 1 (eleven years); King *v.* Foxwell, 3 Ch. D. 518, 45 L. J. Ch. 693, 24 Wkly. Rep. 629 (fifteen years); Lord *v.* Colvin, 4 Drew. 366, 28 L. J. Ch. 361, 5 Jur. N. S. 351, 7 Wkly. Rep. 250 (five years); Atty.-Gen. *v.* Winans, 65 J. P. 819, 85 L. T. Rep. N. S. 508 (twenty-seven years); Drevon *v.* Drevon, 10 Jur. N. S. 717, 34 L. J. Ch. 129, 10 L. T. Rep. N. S. 730, 4 New Rep. 316, 12 Wkly. Rep. 946 (twenty years); Cockerell *v.* Cockerell, 2 Jur. N. S. 727, 25 L. J. Ch. 730, 4 Wkly. Rep. 730 (ten years); *In re* Marshland, 55 L. J. Ch. 581, 24 L. T. Rep. N. S. 635, 34 Wkly. Rep. 540 (twenty years); Lyall *v.* Paton, 25 L. J. Ch. 746, 4 Wkly. Rep. 798 (twenty years); Anderson *v.* Laneuville, 9 Moore P. C. 325, 2 Spinks 41, 14 Eng. Reprint 320 (thirteen years). But see *In re* Patience, 29 Ch. D. 976, 54 L. J. Ch. 897, 52 L. T. Rep. N. S. 687, 33 Wkly. Rep. 501 [*citing* Udny *v.* Udny, L. R. 1 H. L. Sc. 441; Bell *v.* Kennedy, L. R. 1 H. L. Sc. 307; Doucet *v.* Geoghegan, 9 Ch. D. 441, 26 Wkly. Rep. 825; Munro *v.* Munro, 7 Cl. & F. 842, 7 Eng. Reprint 1288; Hodgson *v.* De Beauchesne, 12 Moore P. C. 285, 7 Wkly. Rep. 397, 14 Eng. Reprint 920], where it was held that the mere fact of residence in England for twenty-two years was insufficient when accompanied by a shifting about from place to place showing a fluctuating and unsettled mind as to the place of definite abode.

7. Beecher *v.* Detroit, 114 Mich. 228, 72 N. W. 206; Kennedy *v.* Ryall, 67 N. Y. 379 [*affirming* 40 N. Y. Super. Ct. 347]; *In re* Hood, 21 Pa. St. 106. Thus when a person sells all his land, gives up his entire business in the state in which he had lived, takes his movable property with him, and establishes his home in another state, such acts *prima facie* prove a change of domicile, nor can vague and uncertain evidence remove the legal presumption thus created. Hindman's Appeal, 85 Pa. St. 466 [*citing* Wilbraham *v.* Ludlow, 99 Mass. 587; Harris *v.* Firth, 11 Fed. Cas. No. 6,120, 4 Cranch C. C. 710].

Removal of family see *infra*, note 11.

8. *Mississippi.*— Hairston *v.* Hairston, 27 Miss. 704, 61 Am. Dec. 530.

Nebraska.— State *v.* Superior School Dist., 55 Nebr. 317, 75 N. W. 855.

New York.— Kennedy *v.* Ryall, 67 N. Y. 379 [*affirming* 40 N. Y. Super. Ct. 347]; Ames *v.* Duryea, 6 Lans. 155.

North Carolina.— Plummer *v.* Brandon, 40 N. C. 190.

South Carolina.— Graveley *v.* Graveley, 25 S. C. 1, 60 Am. Rep. 478.

Texas.— *Ex p.* Blumer, 27 Tex. 734.

United States.— Butler *v.* Farnsworth, 4 Fed. Cas. No. 2,240, 4 Wash. 101.

England.— Sharpe *v.* Crispin, L. R. 1 P. 611, 38 L. J. P. 17, 20 L. T. Rep. N. S. 41, 17

2. In Favor of Original or Domestic Domicile. Where facts are conflicting the presumption is strongly in favor of an original as against an acquired domicile,[8] and a domestic rather than a foreign.[10]

3. That Domicile of Married Man Is Where Family Resides. The domicile of a married man is presumed to be at the place where his wife or family resides;[11]

Wkly. Rep. 368; Bruce *v.* Bruce, 2 B. & P. 229 note; De Bonneval *v.* De Bonneval, 1 Curt. Eccl. 856; Bempde *v.* Johnstone, 3 Ves. Jr. 198, 30 Eng. Reprint 967.

Canada.— Wadsworth *v.* McCord, 12 Can. Supreme Ct. 466.

See 17 Cent. Dig. tit. "Domicile," § 36 *et seq.*

9. *Delaware.*— Prettyman *v.* Conaway, 9 Houst. 221, 32 Atl. 15.

Louisiana.— Cole *v.* Lucas, 2 La. Ann. 946; Gravillon *v.* Richard, 13 La. 293, 33 Am. Dec. 563.

Maine.— Gilman *v.* Gilman, 52 Me. 165, 83 Am. Dec. 502.

New York.— Eaves Costume Co. *v.* Pratt, 2 Misc. 420, 22 N. Y. Suppl. 74; Sherwood *v.* Judd, 3 Bradf. Surr. 267.

Pennsylvania.— Guier *v.* O'Daniel, 1 Binn. 349 note.

United States.— Catlin *v.* Gladding, 4 Fed. Cas. No. 2,520, 4 Mason 308; Johnson *v.* Twenty-One Bales, etc., 13 Fed. Cas. No. 7,417, 2 Paine 601, 3 Wheel. Cr. (N. Y.) 433.

England.— Stevenson *v.* Masson, L. R. 17 Eq. 78, 43 L. J. Ch. 134, 29 L. T. Rep. N. S. 666, 22 Wkly. Rep. 150; *In re* Lauderdale Peerage, 10 App. Cas. 692; Anderson *v.* Laneuville, 9 Moore P. C. 325, 2 Spinks 41, 14 Eng. Reprint 320.

Canada.— Magurn *v.* Magurn, 3 Ont. 570; Wanzer Lamp Co. *v.* Woods, 13 Ont. Pr. 511; Brien dit Desrochers *v.* Marchildon, 15 Quebec Super. Ct. 318.

10. Dupuy *v.* Wurtz, 53 N. Y. 556; Lord *v.* Colvin, 4 Drew. 366, 5 Jur. N. S. 351, 28 L. J. Ch. 361, 7 Wkly. Rep. 250; Moorhouse *v.* Lord, 10 H. L. Cas. 272, 9 Jur. N. S. 677, 32 L. J. Ch. 295, 8 L. T. Rep. N. S. 212, 1 New Rep. 555, 11 Wkly. Rep. 637, 11 Eng. Reprint 1030; Whicker *v.* Hume, 7 H. L. Cas. 124, 4 Jur. N. S. 933, 28 L. J. Ch. 396, 6 Wkly. Rep. 813, 11 Eng. Reprint 50; Crookenden *v.* Fuller, 5 Jur. N. S. 1222, 29 L. J. P. 1, 1 L. T. Rep. N. S. 70, 1 Swab. & Tr. 441, 8 Wkly. Rep. 49; Magurn *v.* Magurn, 3 Ont. 570.

"A change of domicile to a foreign country is so injurious to the welfare of families and affects so radically the validity and construction of testamentary acts, the disposition of property in case of intestacy, the rights of married women, the relations of husband and wife, and everything affected by legal principles depending for their solution upon the place of domicile, that it should only be established by the clearest and most convincing and satisfactory evidence." Cruger *v.* Phelps, 21 Misc. (N. Y.) 252, 262, 47 N. Y. Suppl. 61.

11. *Alabama.*— Merrill *v.* Morrissett, 76 Ala. 433.

Connecticut.— Grant *v.* Dalliber, 11 Conn. 234.

Florida.— Smith *v.* Croom, 7 Fla. 81.

Georgia.— Knight *v.* Bond, 112 Ga. 828, 38 S. E. 206; Peacock *v.* Collins, 110 Ga. 281, 34 S. E. 611; Daniel *v.* Sullivan, 46 Ga. 277; Cunningham *v.* Maund, 2 Ga. 171.

Iowa.— State *v.* Groome, 10 Iowa 308.

Kansas.— Keith *v.* Stetter, 25 Kan. 100.

Maine.— Brewer *v.* Linnaeus, 36 Me. 428; Greene *v.* Windham, 13 Me. 225; Knox *v.* Waldoborough, 3 Me. 455.

Massachusetts.— Greene *v.* Greene, 11 Pick. 410; Jennison *v.* Hapgood, 10 Pick. 77.

New Jersey.— Cadwalader *v.* Howell, 18 N. J. L. 138.

New York.— Chaine *v.* Wilson, 1 Bosw. 673; Matter of Bye, 2 Daly 525; Roberti *v.* Methodist Book Concern, 1 Daly 3; Sherwood *v.* Judd, 3 Bradf. Surr. 267.

Pennsylvania.— Dauphin County *v.* Banks, 1 Pearson 40.

South Carolina.— Bradley *v.* Lowry, Speers Eq. 1, 39 Am. Dec. 142.

Texas.— Blucher *v.* Milsted, 31 Tex. 621.

Vermont.— Anderson *v.* Anderson, 42 Vt. 350, 1 Am. Rep. 334.

United States.— Catlin *v.* Gladding, 5 Fed. Cas. No. 2,520, 4 Mason 308.

England.— D'Etchegoyen *v.* D'Etchegoyen, 13 P. D. 132, 57 L. J. P. 104, 37 Wkly. Rep. 64; Platt *v.* Atty.-Gen., 3 App. Cas. 336, 47 L. J. P. C. 26, 38 L. T. Rep. N. S. 74, 26 Wkly. Rep. 516; *In re* Patience, 29 Ch. D. 976, 54 L. J. Ch. 897, 52 L. T. Rep. N. S. 687, 33 Wkly. Rep. 501; Forbes *v.* Forbes, 2 Eq. Rep. 178, 18 Jur. 642, Kay 341, 23 L. J. Ch. 724, 2 Wkly. Rep. 253; *Re* Bullen-Smith, 58 L. T. Rep. N. S. 578.

Canada.— Jones *v.* Saint John, 30 Can. Supreme Ct. 122.

See 17 Cent. Dig. tit. "Domicile," § 36 *et seq.*

Choice in deference to wife's wishes.— "The rule that a man will be considered as domiciled in the place where his wife permanently resides, and in which he has fixed his establishment, is not affected by the circumstance that the choice of residence has been made in deference to the wishes of the wife, and that the house has been bought and furnished at her instance and with her money." Aitchison *v* Dixon, L. R. 10 Eq. 589, 39 L. J. Ch. 705, 23 L. T. Rep. N. S. 97, 18 Wkly. Rep. 989.

Presumption from residence of mistress.— D in 1860 began living with R as her husband, although not actually married, and had one child born. In August, 1863, he married her. Speaking of an attempt to draw a conclusion as to his residence from that of the wife, Wickens, V. C., said: "It may not be immaterial to remark, that the relation between the testator in this case and his wife and children was not quite the normal one, so that the general rule, if it existed, might not apply to this quite so strongly as in ordinary cases." Douglas *v.* Douglas, L. R. 12

but where a separation has taken place the presumption will cease.[12] This presumption is by no means conclusive and may be rebutted by facts showing a contrary intent.[13]

4. That Domicile of Unmarried Man Is Where He Transacts Business, Etc. The place where an unmarried man transacts business and exercises his political rights is presumed to be his domicile, although like the foregoing this is not conclusive.[14]

5. That Domicile Is at Place of Decease. It has been said that the domicile of a decedent in his lifetime must ordinarily be presumed to be at the place of his decease;[15] but this proposition has been as authoritatively denied.[16]

C. Weight and Sufficiency — 1. In General. Domicile is a question of so exceedingly complex a character, depending as it does almost wholly upon intent, that precedents with necessarily varying facts are of but slight assistance. A fact of controlling importance in one case is more than likely to have but slight significance in relation to all the facts of another. The problem therefore depends for its solution not upon a consideration of any single circumstance but upon all

Eq. 617, 647, 41 L. J. Ch. 74, 25 L. T. Rep. N. S. 530, 20 Wkly. Rep. 55.

Speaking of the effect of a removal of the family Shaw, C. J., observed: "The actual change of one's residence, with his family, and the taking up of a residence elsewhere, without any intention of returning, is one of the strong indications of change of domicile, and, unless controlled by other circumstances, is decisive. It was for the jury to determine whether there were any circumstances sufficient to control such conclusion." Thorndike *v.* Boston, 1 Metc. (Mass.) 242, 246.

12. And this is true despite Ga. Civ. Code, § 1824, providing that the domicile of a married man is the place where his family shall permanently reside. Gilmer *v.* Gilmer, 32 Ga. 685. But *compare* Villere *v.* Butman, 23 La. Ann. 515, 516, where it was said: "The wife, not separated in bed and board from her husband, can have no other domicile than that of her husband; but it by no means follows that the defendant's domicile must necessarily be in St. Tammany because his wife resides in that parish and has never resided in Tangipahoa."

13. *Alabama.*— Thompson *v.* State, 28 Ala. 12.

Connecticut.— Grant *v.* Dalliber, 11 Conn. 234.

Florida.— Smith *v.* Croom, 7 Fla. 81.

Georgia.— Gilmer *v.* Gilmer, 32 Ga. 685.

Iowa.— Scholes *v.* Murray Iron Works Co., 44 Iowa 190.

Louisiana.— Villere *v.* Butman, 23 La. Ann. 515.

Maine.—Porterfield *v.* Augusta, 67 Me. 556; Parsons *v.* Bangor, 61 Me. 457; Green *v.* Windham, 13 Me. 225; Dixmont *v.* Biddeford, 3 Me. 205.

Missouri.— Exchange Bank *v.* Cooper, 40 Mo. 169.

New Jersey.— McPherson *v.* Housel, 13 N. J. Eq. 35.

New York.— Matter of Bye, 2 Daly 525.

South Carolina.— Bradley *v.* Lowry, Speers Eq. 1, 39 Am. Dec. 142.

Tennessee.— Pearce *v.* State, 1 Sneed 63, 60 Am. Dec. 135.

United States.— Blair *v.* Western Female Seminary, 3 Fed. Cas. No. 1,486, 1 Bond 578.

England.— Forbes *v.* Forbes, 2 Eq. Rep. 178, 18 Jur. 642, Kay 341, 23 L. J. Ch. 724, 2 Wkly. Rep. 253.

See 17 Cent. Dig. tit. "Domicile," § 36 *et seq.*

14. State *v.* Frest, 4 Harr. (Del.) 558; *In re* High, 2 Dougl. (Mich.) 515; Malone *v.* Lindley, 1 Phila. (Pa.) 192. But where an unmarried man, a citizen of Rhode Island, went to New York as a merchant but failed and subsequently returned to the family home, he was held a citizen of Rhode Island, although he had afterward located in Connecticut, acting as clerk in his brother's store there. Catlin *v.* Gladding, 5 Fed. Cas. No. 2,520, 4 Mason 308.

Construing Ga. Civ. Code, § 1824, fixing the domicile of a person having no family as "the place where such person shall generally lodge." See Knight *v.* Bond, 112 Ga. 828, 38 S. E. 206; Hinton *v.* Lindsay, 20 Ga. 746.

Mere evidence that a person had transacted business at a certain place for two years is insufficient to show as matter of law that a domicile had been established in the absence of declarations of an intention to do so or evidence of the exercise of political rights, payment of personal taxes, or the selection of a place of residence or business. Tuttle *v.* Wood, 115 Iowa 507, 88 N. W. 1056.

15. Guier *v.* O'Daniel, 1 Binn. (Pa.) 349 note; Kellar *v.* Baird, 5 Heisk. (Tenn.) 39; King *v.* U. S., 27 Ct. Cl. 529; Anderson *v.* Laneuville, 2 Spinks 41, 22 Eng. L. & Eq. 641.

16. Harvard College *v.* Gore, 5 Pick. (Mass.) 370; Somerville *v.* Somerville, 5 Ves. Jr. 750, 5 Rev. Rep. 155, 31 Eng. Reprint 839.

"The casual death of a person at a given place very clearly can have no tendency to show that his domicile was there, unless the fact stands alone and unexplained by any rebutting evidence. It is the fact of such per-

the circumstances taken in connection with each other.[17] Thus exercise of the elective franchise is important to be considered,[18] as well as holding office[19] (including service on juries),[20] payment of taxes upon personalty and poll,[21] and

son being there at all, and not his death, which may sometimes constitute a *prima facie* case of domicile." Merrill *v.* Morrissett, 76 Ala. 433, 438.

17. *Alabama.*— Merrill *v.* Morrissett, 76 Ala. 433.

Dakota.— Gardner *v.* Board of Education, 5 Dak. 259, 38 N. W. 433.

Florida.— Smith *v.* Croom, 7 Fla. 81.

Massachusetts.— Olivieri *v.* Atkinson, 168 Mass. 28, 46 N. E. 422; Thorndike *v.* Boston, 1 Metc. 242; Abington *v.* North Bridgewater, 23 Pick. 170; Lyman *v.* Fiske, 17 Pick. 231, 28 Am. Dec. 293; Harvard College *v.* Gore, 5 Pick. 370.

Michigan.— *In re* High, 2 Dougl. 515.

Mississippi.— Hairston *v.* Hairston, 27 Miss. 704, 61 Am. Dec. 530.

New York.— Dupuy *v.* Wurtz, 53 N. Y. 556; Chaine *v.* Wilson, 1 Bosw. 673; Plant *v.* Harrison, 36 Misc. 649, 74 N. Y. Suppl. 411.

Pennsylvania.— Hindman's Appeal, 85 Pa. St. 466; Guier *v.* O'Daniel, 1 Binn. 349 note; Dauphin County *v.* Banks, 1 Pearson 40.

England.— Craigie *v.* Lewin, 3 Curt. 435, 7 Jur. 519; Maxwell *v.* McClure, 6 Jur. N. S. 407, 2 L. T. Rep. N. S. 65, 3 Macq. H. L. 852, 8 Wkly. Rep. 370; Cockerell *v.* Cockerell, 2 Jur. N. S. 727, 25 L. J. Ch. 730, 4 Wkly. Rep. 730.

Canada.— Jones *v.* Saint John, 30 Can. Supreme Ct. 122.

See 17 Cent. Dig. tit. "Domicile," § 39.

18. *Alabama.*— Danforth *v.* Nabors, 120 Ala. 430, 24 So. 891; Merrill *v.* Morrissett, 76 Ala. 433.

Connecticut.—Enfield *v.* Ellington, 67 Conn. 459, 34 Atl. 818; Easterly *v.* Goodwin, 35 Conn. 279, 95 Am. Dec. 237.

Louisiana.— Marks *v.* Germania Sav. Bank, 110 La. 659, 34 So. 725; Hewes *v.* Baxter, 48 La. Ann. 1303, 20 So. 701, 36 L. R. A. 531; Steers' Succession, 47 La. Ann. 1551, 18 So. 503; State *v.* Steele, 33 La. Ann. 910; Franklin's Succession, 7 La. Ann. 395; Sanderson *v.* Ralston, 20 La. Ann. 312; Folger *v.* Slaughter, 19 La. Ann. 323; Oakey *v.* Eastin, 4 La. 69.

Maine.— East Livermore *v.* Farmington, 74 Me. 154.

Michigan.— Spaulding *v.* Steel, 129 Mich. 237, 88 N. W. 627.

Mississippi.— Hairston *v.* Hairston, 27 Miss. 704, 61 Am. Dec. 530.

Missouri.— Charitou County *v.* Moberly, 59 Mo. 238.

Nebraska.— Mallard *v.* North Platte First Nat. Bank, 40 Nebr. 784, 59 N. W. 511, merely registering as a voter without actually voting.

New Mexico.— Berry *v.* Hull, 6 N. M. 643, 30 Pac. 936.

New York.— Mackenzie *v.* Mackenzie, 3 Misc. 200, 23 N. Y. Suppl. 270.

Pennsylvania.— Guier *v.* O'Daniel, 1 Binn. 349 note; Dauphin County *v.* Banks, 1 Pearson 40.

Vermont.— Fulham *v.* Howe, 60 Vt. 351, 14 Atl. 652.

Wisconsin.— Wolf *v.* McGavock, 23 Wis. 516; Kellogg *v.* Oshkosh, 14 Wis. 623.

United States.— Shelton *v.* Tiffin, 6 How. 163, 12 L. ed. 387; Woodworth *v.* St. Paul, etc., R. Co., 18 Fed. 282, 5 McCrary 574.

England.— Drevon *v.* Drevon, 10 Jur. N. S. 717, 34 L. J. Ch. 129, 10 L. T. Rep. N. S. 730, 4 New Rep. 316, 12 Wkly. Rep. 946.

See 17 Cent. Dig. tit. "Domicile," § 15 *et seq.*

But where the fact of voting was held to be of slight importance, having been overbalanced by other circumstances, see the following cases:

Florida.— Smith *v.* Croom, 7 Fla. 81.

Illinois.— Hayes *v.* Hayes, 74 Ill. 312.

Louisiana.— Mandeville *v.* Huston, 15 La. Ann. 281; Franklin's Succession, 7 La. Ann. 395. And see Villere *v.* Butman, 23 La. Ann. 515.

Michigan.— Beecher *v.* Detroit, 114 Mich. 228, 72 N. W. 206.

Tennessee.— Hascall *v.* Hafford, 107 Tenn. 355, 65 S. W. 423, 89 Am. St. Rep. 952.

19. Villere *v.* Butman, 23 La. Ann. 515; Hennen *v.* Hennen, 12 La. 190; Oakey *v.* Eastin, 4 La. 69; Harvard College *v.* Gore, 5 Pick. 370; Mackenzie *v.* Mackenzie, 3 Misc. 200, 23 N. Y. Suppl. 270; Drevon *v.* Drevon, 10 Jur. N. S. 717, 34 L. J. Ch. 129, 10 L. T. Rep. N. S. 730, 4 New Rep. 316, 12 Wkly. Rep. 946.

See 17 Cent. Dig. tit. "Domicile," § 15 *et seq.*

Accepting the office of and acting as executrix and natural tutrix without bonds, in Louisiana, which can only be done in that state by a resident thereof, justifies a determination that the party is domiciled there. Watson *v.* Bondurant, 30 La. Ann. 1.

20. Villere *v.* Butman, 23 La. Ann. 515; Sanderson *v.* Ralston, 20 La. Ann. 312; Mackenzie *v.* Mackenzie, 3 Misc. (N. Y.) 200, 23 N. Y. Suppl. 270.

21. Danforth *v.* Nabors, 120 Ala. 430, 24 So. 891; Lyman *v.* Fiske, 17 Pick. 231, 28 Am. Dec. 293; Harvard College *v.* Gore, 5 Pick. 370; Beecher *v.* Detroit, 114 Mich. 228, 72 N. W. 206; Guier *v.* O'Daniel, 1 Binn. (Pa.) 349 note; Malone *v.* Lindley, 1 Phila. (Pa.) 192; Crossley *v.* Demott, 2 Leg. Op. (Pa.) 161.

See 17 Cent. Dig. tit. "Domicile," § 15 *et seq.*

22. Beecher *v.* Detroit, 114 Mich. 228, 72 N. W. 206; Price *v.* Price, 156 Pa. St. 617, 27 Atl. 291; Woodworth *v.* St. Paul, etc., R. Co., 18 Fed. 282, 5 McCrary 574; D'Etchegoyen *v.* D'Etchegoyen, 13 P. D. 132, 57 L. J. P. 104, 37 Wkly. Rep. 64; *In re* Patience, 29 Ch. D. 976, 54 L. J. Ch. 897, 52 L. T. Rep. N. S. 687, 33 Wkly. Rep. 501; Hoskins *v.* Matthews,

ownership[22] or lease of real estate when coupled with the residence of the person in question thereon either actual or intended.[23]

2. Declarations. Declarations made by the party whose domicile is in dispute, whether orally[24] or in a deed,[25] will,[26] or other document,[27] are to be con-

8 De G. M. & G. 13, 2 Jur. N. S. 196, 25 L. J. Ch. 689, 4 Wkly. Rep. 216, 57 Eng. Ch. 10; Forbes *v.* Forbes, 2 Eq. Rep. 178, 18 Jur. 642, Kay 341, 23 L. J. Ch. 724, 2 Wkly. Rep. 253; Cockerell *v.* Cockerell, 2 Jur. N. S. 727, 25 L. J. Ch. 730, 4 Wkly. Rep. 730; Anderson *v.* Laneuville, 9 Moore P. C. 325, 2 Spinks 41, 14 Eng. Reprint 320.

Buying land for speculative purposes is of no weight in fixing domicile. Hayes *v.* Hayes, 74 Ill. 312; Atty.-Gen. *v.* Winans, 65 J. P. 819, 85 L. T. Rep. N. S. 508.

Purchase of a burial lot may be taken into account. Heath *v.* Samson, 14 Beav. 441; *In re* Patience, 29 Ch. D. 976, 54 L. J. Ch. 897, 52 L. T. Rep. N. S. 687, 33 Wkly. Rep. 501. But if the facts are at all conflicting it will be given but slight consideration. Frame *v.* Thormann, 102 Wis. 653, 79 N. W. 39; Platt *v.* Atty.-Gen., 3 App. Cas. 336, 47 L. J. P. C. 26, 38 L. T. Rep. N. S. 74, 26 Wkly. Rep. 516; Capdevielle *v.* Capdevielle, 21 L. T. Rep. N. S. 660, 18 Wkly. Rep. 107.

Examining a house with an alleged view of purchasing was held to be entitled to slight weight. Plant *v.* Harrison, 36 Misc. (N. Y.) 649, 74 N. Y. Suppl. 411.

23. Loustalan *v.* Loustalan, [1900] P. 211, 69 L. J. P. 75, 82 L. T. Rep. N. S. 806, 48 Wkly. Rep. 509; Munro *v.* Munro, 7 Cl. & F. 842, 7 Eng. Reprint 1288; Brown *v.* McDouall, 7 Cl. & F. 817, 7 Eng. Reprint 1279; De Bonneval *v.* De Bonneval, 1 Curt. Eccl. 856; Lord *v.* Colvin, 4 Drew. 366, 5 Jur. N. S. 351, 28 L. J. Ch. 361, 7 Wkly. Rep. 250; Whicker *v.* Hume, 7 H. L. Cas. 124, 4 Jur. N. S. 933, 28 L. J. Ch. 396, 6 Wkly. Rep. 813, 11 Eng. Reprint 50; Atty.-Gen. *v.* Winans, 65 J. P. 819, 85 L. T. Rep. N. S. 508; Drevon *v.* Drevon, 10 Jur. N. S. 717, 34 L. J. Ch. 129, 10 L. T. Rep. N. S. 730, 4 New Rep. 316, 12 Wkly. Rep. 946. *Aliter*, however, where it appeared that the house was taken merely as a place of temporary sojourn in the course of travel (Sears *v.* Boston, 1 Metc. (Mass.) 250), or for the purpose of establishing a mistress (Aikman *v.* Aikman, 7 Jur. N. S. 1017, 4 L. T. Rep. N. S. 374, 3 Macq. H. L. 854). Nor will the fact that one's lease has not expired at the time of his removal, even when coupled with the fact of leaving considerable property and household effects at the place of former abode, be deemed sufficient to negative a clearly shown intent to change the domicile. Behrensmeyer *v.* Kreitz, 135 Ill. 591, 26 N. E. 704.

24. *Alabama.*— Danforth *v.* Nahors, 120 Ala. 430, 24 So. 891; Merrill *v.* Morrissett, 76 Ala. 433; Griffin *v.* Wall, 32 Ala. 149.

Mississippi.— Beason *v.* State, 34 Miss. 602; Hairston *v.* Hairtson, 27 Miss. 704, 61 Am. Dec. 530.

New Hampshire.— Leach *v.* Pillsbury, 15 N. H. 137.

New York.— Matter of Cruger, 36 Misc. 477, 73 N. Y. Suppl. 812; Matter of Roberts, 8 Paige 519.

Texas.— *Ex p.* Blumer, 27 Tex. 734.

United States.— Chambers *v.* Prince, 75 Fed. 176.

Canada.—Jones *v.* Saint John, 30 Can. Supreme Ct. 122.

The lowest species of evidence.— "Such evidence, though admissible, has been considered by many authorities as the lowest species of evidence, especially when, as in this case, encountered by conflicting declarations." Doucet *v.* Geoghegan, 9 Ch. D. 441, 456, 26 Wkly. Rep. 825; Hodgson *v.* De Beauchesne, 12 Moore P. C. 285, 7 Wkly. Rep. 397, 14 Eng. Reprint 920.

25. *Florida.*— Smith *v.* Croom, 7 Fla. 81.

Louisiana.—Steers' Succession, 47 La. Ann. 1551, 18 So. 503; Sanderson *v.* Ralston, 20 La. Ann. 312; New Orleans *v.* Sheppard, 10 La. Ann. 268.

Massachusetts.— Ward *v.* Oxford, 8 Pick. 476.

Michigan.— Spaulding *v.* Steel, 129 Mich. 237, 88 N. W. 627.

New York.— Cruger *v.* Phelps, 21 Misc. 252, 47 N. Y. Suppl. 61.

May be rebutted.— Davis *v.* Binion, 5 La. Ann. 248; Hill *v.* Spangenberg, 4 La. Ann. 553.

26. *Maine.*—Gilman *v.* Gilman, 52 Me. 165, 83 Am. Dec. 502.

Massachusetts.— Jennison *v.* Hapgood, 10 Pick. 77.

New York.—Cruger *v.* Phelps, 21 Misc. 252, 47 N. Y. Suppl. 61; Matter of Stover, 4 Redf. Surr. 82.

North Carolina.— Horne *v.* Horne, 31 N. C. 99.

Pennsylvania.— *In re* Harberger, 13 Phila. 368. *Compare In re* Hood, 21 Pa. St. 106.

United States.— Ennis *v.* Smith, 14 How. 400, 14 L. ed. 472.

England.— Lord *v.* Colvin, 4 Drew. 366, 5 Jur. N. S. 351, 28 L. J. Ch. 361, 7 Wkly. Rep. 250; Atty.-Gen. *v.* Pottinger, 6 H. & N. 733, 7 Jur. N. S. 470, 30 L. J. Exch. 284, 4 L. T. Rep. N. S. 368, 9 Wkly. Rep. 578; Matter of Steer, 3 H. & N. 594, 28 L. J. Exch. 22; Drevon *v.* Drevon, 10 Jur. N. S. 717, 34 L. J. Ch. 129, 10 L. T. Rep. N. S. 730, 4 New Rep. 316, 12 Wkly. Rep. 946. *Compare* Hoskins *v.* Matthews, 8 De G. M. & G. 13, 2 Jur. N. S. 196, 25 L. J. Ch. 689, 4 Wkly. Rep. 216, 57 Eng. Ch. 10, where the will of an Englishman, resident in Tuscany, was prepared according to English law.

27. Custom-house declaration.— Sherwood *v.* Judd, 3 Bradf. Surr. (N. Y.) 267.

Descriptions in legal proceedings are but lightly regarded. New Orleans *v.* Shepherd, 10 La. Ann. 268; De Bonneval *v.* De Bonneval, 1 Curt. Eccl. 856.

Entries in hotel register are entitled to but

sidered in connection with the other facts of the case and given due credit as an index of his intention, written declarations being given greater weight than oral.[28] Such declarations, however, must not be unreasonable in themselves, inconsistent with other facts, or under circumstances creating suspicion as to their integrity.[29]

IX. PROVINCE OF COURT AND JURY.

The existence or non-existence of a domicile in a given locality, where the facts are conflicting, is a mixed question of law and fact. So far as it involves questions of fact, including the ascertainment of the intention of the party, it is solely within the province of the jury whose determination is conclusive, unless the verdict is set aside as having been against the evidence.[30] But while the question is one of mixed law and fact, yet in proceedings to procure the appointment of an administrator, the question is to be decided by the court.[31] And generally speaking the question what shall be considered the domicile of a party is in all

little weight. Smith *v.* Croom, 7 Fla. 81; Chambers *v.* Prince, 75 Fed. 176. But repeated registerings are strong links in the chain of facts and circumstances going to establish an intention to make the place of declared residence his domicile. Marks *v.* Germania Sav. Bank, 110 La. 659, 34 So. 725.

Insurance policies.— Beecher *v.* Detroit, 114 Mich. 228, 72 N. W. 206.

Letters.— Hamilton *v.* Dallas, 1 Ch. D. 257, 45 L. J. Ch. 15, 33 L. T. Rep. N. S. 495, 24 Wkly. Rep. 264; Hoskins *v.* Matthews, 8 De G. M. & G. 13, 2 Jur. N. S. 196, 25 L. J. Ch. 689, 4 Wkly. Rep. 216, 57 Eng. Ch. 10. And see Smith *v.* Croom, 7 Fla. 81.

28. Dupuy *v.* Wurtz, 53 N. Y. 556; Cruger *v.* Phelps, 21 Misc. (N. Y.) 252, 47 N. Y. Suppl. 61; De Bonneval *v.* De Bonneval, 1 Curt. Eccl. 856. But see Plant *v.* Harrison, 36 Misc. (N. Y.) 649, 670, 74 N. Y. Suppl. 411 [*citing* Kreitz *v.* Behrensmeyer, 125 Ill. 141, 17 N. E. 232, 8 Am. St. Rep. 349], where it was said: "Written declarations, like oral ones, must be considered in the light of all the circumstances of the case. While they are *prima facie* entitled to more weight as being presumably made with greater deliberation, yet even they are within the class that have been designated as the 'lowest species of evidence.'"

29. Declarations of no avail when not borne out by the party's acts (Ida County Sav. Bank *v.* Seidensticker, (Iowa 1902) 92 N. W. 862; Keith *v.* Stetter, 25 Kan. 100; Yerkes *v.* Broom, 10 La. Ann. 94; Holmes *v.* Greene, 7 Gray (Mass.) 299; Hegeman *v.* Fox, 31 Barb. (N. Y.) 475; Eaves Costume Co. *v.* Pratt, 2 Misc. (N. Y.) 420, 22 N. Y. Suppl. 74; Gourlay *v.* Gourlay, 15 R. I. 572, 10 Atl. 592; Butler *v.* Farnsworth, 4 Fed. Cas. No. 2,240, 4 Wash. 101; Jopp *v.* Wood, 4 De G. J. & S. 616, 11 Jur. N. S. 212, 34 L. J. Ch. 212, 12 L. T. Rep. N. S. 41, 5 New Rep. 422, 13 Wkly. Rep. 481, 69 Eng. Ch. 472; Atty.-Gen. *v.* Kent, 1 H. & C. 12, 31 L. J. Exch. 391, 6 L. T. Rep. N. S. 864, 10 Wkly. Rep. 722; Matter of Steer, 3 H. & N. 594, 28 L. J. Exch. 22; Anderson *v.* Laneuville, 9 Moore P. C. 325, 2 Spinks 41, 14 Eng. Reprint 320), when conflicting (Merrill *v.* Morrissett, 76 Ala. 433; Smith *v.* Croom, 7 Fla. 81; Doucet *v.* Geoghegan, 9 Ch. D. 441, 26 Wkly. Rep. 825; Hodgson *v.* De Beauchesne, 12 Moore P. C. 285, 7 Wkly. Rep. 397, 14 Eng. Reprint 920), or when evidently made for the purpose of manufacturing evidence in his favor (Plant *v.* Harrison, 36 Misc. (N. Y.) 649, 74 N. Y. Suppl. 411; Watson *v.* Simpson, 13 La. Ann. 337).

A party's own evidence as to his past intention "must be accepted with a very considerable reserve." Bell *v.* Kennedy, L. R. 1 H. L. Sc. 307; *In re* Craignish, [1892] 3 Ch. 180, 67 L. T. Rep. N. S. 689. But where it is not inconsistent with his actions or declarations it is controlling. Collins *v.* Ashland, 112 Fed. 175.

Merely speaking of a place at which the party did not reside as a home amounts to nothing, in the absence of proof of acts showing an intention to return to it. Pennsylvania *v.* Ravenel, 21 How. (U. S.) 103, 16 L. ed. 33. *Aliter,* where there was a return when the fact that the subsequent abode has been referred to as "home" will be given some weight. *In re* Craignish, [1892] 3 Ch. 180, 67 L. T. Rep. N. S. 689.

30. *Alabama.*— Murphy *v.* Hunt, 75 Ala. 438.

Georgia.— Lamar *v.* Mahony, Dudley 92.

Massachusetts.— Mooar *v.* Harvey, 128 Mass. 219; Wright *v.* Boston, 126 Mass. 161; Cochrane *v.* Boston, 4 Allen 177; Fitchburg *v.* Wincherdon, 4 Cush. 190; Lyman *v.* Fiske, 17 Pick. 231, 28 Am. Dec. 293.

Minnesota.— Venable *v.* Paulding, 19 Minn. 488.

New Hampshire.— Chase *v.* Chase, 66 N. H. 588, 29 Atl. 553; State *v.* Palmer, 65 N. H. 9, 17 Atl. 977; Foss *v.* Foss, 58 N. H. 283.

New York.— Dorn *v.* Backer, 61 N. Y. 261.

Vermont.— Fulham *v.* Howe, 62 Vt. 386, 20 Atl. 101.

Wisconsin.— Johnston *v.* Oshkosh, 65 Wis. 473, 27 N. W. 320.

United States.— Chicago, etc., R. Co. *v.* Ohle, 117 U. S. 123, 6 S. Ct. 632, 29 L. ed. 837; Pennsylvania *v.* Ravenel, 21 How. 103, 16 L. ed. 33.

See 17 Cent. Dig. tit. "Domicile," § 40.

31. *In re* Weed, 120 Cal. 634, 53 Pac. 30.

cases rather a question of fact than of law.[32] Nevertheless it is incumbent upon the trial judge to properly instruct the jury.[33]

DOMICILIATION. A term which is said to be, in most respects, equivalent to naturalization.[1] (See, generally, ALIENS; DOMICILE.)

DOMINANT TENEMENT. See EASEMENTS.

DOMINIO. In Spanish law, the right or power to dispose freely of a thing, if the law, the will of the testator, or some agreement does not prevent.[2]

DOMINIO DIRECTO. In Spanish law, the right a person has to control the disposition of a thing, the use (*utilidad*) of which he has ceded.[3]

DOMINION. The right in a corporal thing, from which arises the power of disposition and of claiming it from others.[4]

DOMINIO PLENO Y ABSOLUTO. In Spanish law, the power which one has over anything to alienate independently of another — to receive its fruits — to exclude all others from its use.[5]

DOMINIO UTIL. In Spanish law, the right to receive all the fruits of a thing subject to some contribution or tribute, which is paid to him who reserves in it the "*dominium directum*."[6]

DOMINIUM NON POTEST ESSE IN PENDENTE. A maxim meaning "A fee or right of property cannot be in suspension — i. e., it must always be vested in some one."[7]

DOMINUS ALIQUANDO NON POTEST ALIENARE. A maxim meaning "A lord sometimes cannot alienate."[8]

DOMINUS CAPITALIS LOCO HÆREDIS HABETUR, QUOTIES PER DEFECTUM VEL DELICTUM EXTINGUITUR SANGUIS SUI TENENTIS. A maxim meaning "The supreme lord takes the place of the heir, as often as the blood of the tenant is extinct through deficiency or crime."[9]

DOMINUS NON MARITABIT PUPILLUM NISI SEMEL. A maxim meaning "A lord cannot give a ward in marriage but once."[10]

DOMINUS OMNIUM IN REGNO TERRARUM REX HABENDUS; ET AB EO OMNES TENENT ITA TAMEN, UT SUUM CUIQUE SIT. A maxim meaning "The sovereign

32. Palmer *v.* Hampden, 182 Mass. 511, 65 N. E. 817; Olivieri *v.* Atkinson, 168 Mass. 28, 46 N. E. 422; Williams *v.* Roxbury, 12 Gray (Mass.) 21; Dupuy *v.* Wurtz, 53 N. Y. 556; Cruger *v.* Phelps, 21 Misc. (N. Y.) 252, 47 N. Y. Suppl. 61; Bradley *v.* Lowry, Speers Eq. 1, 39 Am. Dec. 142; Bempde *v.* Johnstone, 3 Ves. Jr. 198, 30 Eng. Reprint 967.

33. Risewick *v.* Davis, 19 Id. 82; Benavides *v.* Gussett, 8 Tex. Civ. App. 198, 28 S. W. 113; Pennsylvania *v.* Ravenel, 21 How. (U. S.) 103, 16 L. ed. 33. And see, generally, TRIAL.

In determining the question of a change of domicile, it is incumbent upon the trial judge to instruct the jury as to what constitutes domicile; what it is when contrasted with a temporary place of abode; what it is necessary to prove in order to show an abandonment of an old domicile; and what to show that a new one had been acquired in the place claimed. Hartford *v.* Champion, 58 Conn. 268, 20 Atl. 471. Plaintiff was not entitled to a ruling that, as a proposition of law, failure on the part of defendant to show any particular act of plaintiff, such as voting, holding office, etc., or declarations made by him evincing an intent to change his residence from New York to Ludlow, would entitle plaintiff to a verdict. Fulham *v.* Howe, 62 Vt. 386, 20 Atl. 101.

1. Yates *v.* Iams, 10 Tex. 168, 169.

2. Castillero *v.* U. S., 2 Black (U. S.) 17, 227, 17 L. ed. 360, where it is said: "It is divided into the full, and the less than full — '*dominio pleno y menos pleno.*'"

3. Castillero *v.* U. S., 2 Black (U. S.) 17, 227, 17 L. ed. 360. See also Hart *v.* Burnett, 15 Cal. 530, 557.

4. Coles *v.* Perry, 7 Tex. 109, 136 [*citing* 1 White Recop. 342, and *quoted* in Baker *v.* Westcott, 73 Tex. 129, 132, 11 S. W. 157], where it is said: "All dominion has two causes, proximate and remote. Remote, is the title which vests a right to the thing and gives cause of action against the vendor who has not delivered the thing sold; and proximate, is the obtaining possession by delivery of the thing sold, which, without anything else, being preceded by the title, vests the right in the thing, which is the dominion." "**The holder has the dominion** of the bill [of exchange]." Gould *v.* Robson, 8 East 576, 580, 9 Rev. Rep. 498.

5. Castillero *v.* U. S., 2 Black (U. S.) 17, 227, 17 L. ed. 360.

6. Castillero *v.* U. S., 2 Black (U. S.) 17, 227, 17 L. ed. 360.

7. Trayner Leg. Max.

8. Wharton L. Lex.

9. Wharton L. Lex. [*citing* Coke Litt. 18].

10. Wharton L. Lex. [*citing* Coke Litt. 9].

is first seized of all lands; of him all others hold, so that everyone has his own."[11]

DOMINUS REX NULLUM HABERE POTEST PAREM MULTO MINUS SUPERIOREM. A maxim meaning "The king cannot have an equal, much less a superior."[12]

DOMINUS VEL CAUSAM SERVI VEL PERSONAM INCULPATIO DEFENDET, ETIAM UBI ALII NON LICERET. A maxim meaning "The master may defend his servant's cause, even when it is not lawful for another."[13]

DOMO REPARANDA. A writ that lay for one against his neighbour, by the anticipated fall of whose house he feared a damage and injury to his own.[14]

DOMUM SUAM UNICUIQUE REFICERE LICET, DUM NON OFFICIAT INVITO ALTERI IN QUO JUS NON HABET. A maxim meaning "It is lawful for everyone to repair his own house, provided he does it not to the injury of another over whom he has no rights."[15]

DOMUS.[16] As applied to a seat of learning, the word may mean the walls of the college; or those who live within the walls; or only that society which is incorporated.[17]

DOMUS SUA CUIQUE EST TUTISSIMUM REFUGIUM. A maxim meaning "Every man's house is his castle."[18]

DONA CLANDESTINA SUNT SEMPER SUSPICIOSA. A maxim meaning "Clandestine gifts are always open to suspicion."[19]

DONARI VIDETUR, QUOD NULLO JURE COGENTE, CONCEDITUR. A maxim meaning "That is considered to be given which is granted without the obligation of any law."[20]

DONATE. To give, generally for a specific object; to bestow freely; to grant;[21] to give gratuitously, or without any consideration;[22] to APPROPRIATE,[23] *q. v.* (See, generally, CHARITIES; GIFTS; TRUSTS; WILLS.)

DONATIO CAUSA MORTIS. See GIFTS.

DONATIO INTER VIVOS. See GIFTS.

DONATION. See GIFTS.

DONATIO NON PRÆSUMITUR. A maxim meaning "A gift is not presumed."[24]

DONATIONUM ALIA PERFECTA, ALIA INCEPTA ET NON PERFECTA; UT SI DONATIO LECTA FUIT ET CONCESSA, AC TRADITIO NONDUM FUERIT SUBSECUTA. A maxim meaning "Some gifts are perfect, others incipient and not perfect; as if a gift were read and agreed to, but delivery had not then followed."[25]

DONATIO PERFICITUR POSSESSIONE ACCIPIENTIS.[26] A maxim meaning "A gift is perfected [made complete] by the possession of the receiver."[27]

11. Peloubet Leg. Max.
12. Wharton L. Lex.
13. Morgan Leg. Max.
14. Wharton L. Lex.
15. Morgan Leg. Max.
16. It "is a very extensive word, and has different significations according to the subject-matter to which it is applied." Rex *v.* Ely, 2 T. R. 290, 339, 344. And it has been "adjudged to be *nomen collectivum*." Ruisbrook's Case, 4 Leon. 16 [*cited* in Bennet *v.* Bittle, 4 Rawle (Pa.) 339, 342].

Domus mansionalis considered in connection with the crime of burglary see Thompson *v.* Ward, L. R. 6 C. P. 327, 358, 1 Hopw. & C. 530, 537, 40 L. J. C. P. 169, 24 L. T. Rep. N. S. 679.

17. Rex *v.* Ely, 2 T. R. 290, 344.

Under statutes relating to educational institutions, it may mean "the society," and only the master and scholars. Rex *v.* Ely, 2 T. R. 290, 341, where Buller, J., said: "It is extremely clear that neither in this nor in any other part of the statutes is the word 'domus' used as signifying the house or building. Throughout the statutes it means the persons of the college, and . . . I think it means only those who are the members of the foundation."

18. Broom Leg. Max.

Applied in Palmer *v.* Foley, 36 N. Y. Super. Ct. 14, 22.

19. Broom Leg. Max. 290.

Applied in Twyne's Case, 3 Coke 80*a*, 81*a*.

20. Adams Gloss. [*citing* Broom Leg. Max.].

21. Webster Dict. [*quoted* in State *v.* Sioux City, etc., R. Co., 7 Nebr. 357, 373].

22. Goodhue *v.* Beloit, 21 Wis. 636, 642.

23. Weary *v.* State University, 42 Iowa 335, 358.

24. Bouvier L. Dict. [*citing* Jenkins Cent.].

25. Bouvier L. Dict. [*citing* Coke Litt. 56].

26. One of the ancient maxims of the English law. Hatch *v.* Atkinson, 56 Me. 324, 329, 96 Am. Dec. 464.

27. Adams Gloss. [*citing* Broom Leg. Max.; Jenkins Cent. 109, case 9].

Applied in Trustees of Bishop's Fund *v.*

DONATIO PRINCIPIS INTELLIGITUR SINE PRÆJUDICIO TERTII. A maxim meaning "A gift of the prince is understood without prejudice of a third party."[28]

DONATIO QUÆLIBET EX VI LEGIS SORTITUR EFFECTUM. A maxim meaning "A donation obtains its effect by force of the law."[29]

DONATOR NUNQUAM DESINIT POSSIDERE ANTEQUAM DONATARIUS INCIPIAT POSSIDERE. A maxim meaning "He that gives never ceases to possess until he that receives begins to possess."[30]

DONE.[31] Completed; finished; decided; accepted.[32]

DONEE. In general, one who takes without valuable consideration.[33] In the law of trusts, one to whom is given a naked power.[34] (See DONOR; and, generally, TRUSTS.)

DONOR. The party conferring a power.[35] (See DONEE; and, generally, TRUSTS.)

DOOMING. See TAXATION.

DOOR. A movable barrier of wood, metal, or stone, or other material, consisting sometimes of one piece, but generally of several pieces together, and commonly placed on hinges, for closing a passage into a building, room, or other inclosure.[36]

DORMANT EXECUTION. See EXECUTIONS.

DORMANT. Sleeping, silent, not known, not acting.[37]

DORMANT JUDGMENT. See JUDGMENTS.

DORMANT PARTNER. See PARTNERSHIP.

DORMITORY. A room, suite of rooms, or building used to sleep in; a bedroom; sleeping quarters or sleeping-house; a lodging-house.[38]

DORMIUNT ALIQUANDO LEGES, NUNQUAM MORIUNTUR. A maxim meaning "The laws sometimes sleep, they never die."[39]

DOS. At common law, dower.[40] (See, generally, DOWER; HUSBAND AND WIFE.)

Rider, 13 Conn. 87, 95; Hatch *v.* Atkinson, 56 Me. 324, 329, 96 Am. Dec. 464.

28. Adams Gloss.

29. Morgan Leg. Max.

30. Bouvier L. Dict. [*citing* Bracton 41*b*].

31. **"The word 'done' has no specific meaning, except in cookery.** Bread is said to be done, and meat, done, when they are sufficiently cooked for use as food. But when is corn done? The lumber was to be delivered 'when corn was done.' 'Done' is not a word of art or trade, and requires no expert to tell us its meaning." Silverthorn *v.* Fowle, 49 N. C. 362, 363.

Distinguished from "made" see Burrill L. Dict.

32. Century Dict.

"Do or cause to be done" [as used in a lease] import an act. Doe *v.* Stevens, 3 B. & Ad. 299, 303, 1 L. J. K. B. 101, 23 E. C. L. 137.

An "act done" may include the rejection of proof of a debt by a trustee in bankruptcy (Brandon *v.* McHenry, [1891] 1 Q. B. 538, 543, 60 L. J. Q. B. 448, 39 Wkly. Rep. 372); or residence (Rex *v.* St. John, 2 A. & E. 548, 550, 4 L. J. M. C. 51, 4 N. & M. 336, 29 E. C. L. 258).

"The words 'act done,' in the statute, [relative to the default of a principal] means such judicial ascertainment" of a default. Alexander *v.* Bryan, 110 U. S. 414, 418, 4 S. Ct. 107, 28 L. ed. 195.

"Words spoken" are "an act done or fact committed" under a statute which prescribed notice of proof "for anything done." Royal Aquarium, etc., Soc. *v.* Parkinson, [1892] 1 Q. B. 431, 445, 56 J. P. 404, 61 L. J. Q. B. 409, 66 L. T. Rep. N. S. 513, 40 Wkly. Rep. 450.

33. Worthy *v.* Caddell, 76 N. C. 82, 85.

34. Dulin *v.* Moore, 96 Tex. 135, 138, 70 S. W. 742, distinguishing "donee" from "trustee."

35. Burrill L. Dict.

36. Century Dict. [*quoted* in State *v.* McBeth, 49 Kan. 584, 588, 31 Pac. 145].

37. Bouvier L. Dict. [*quoted* in Elmira Iron, etc., Rolling-Mill Co. *v.* Harris, 124 N. Y. 280, 287, 26 N. E. 541].

38. Hillsdale College *v.* Rideout, 82 Mich. 94, 104, 46 N. W. 373.

39. Adams Gloss. [*citing* 2 Coke Inst. 161].

40. A term used to indicate that portion of lands or tenements which the wife hath for terme of her life of the lands or tenements of her husband after his decease, for the sustenance of herself and the nurture and education of her children. Sutherland *v.* Sutherland, 69 Ill. 481, 485 [*quoting* 1 Coke Litt. 30*b*, 31*a*; and *citing* 2 Blackstone Comm. 129; 4 Kent Comm. 33].

Lord Coke says, "Dos, the very name doth import freedom; for the law doth give her therewith many freedoms: *secundum consuetudinem regni mulieres viduæ debent esse quietæ de tallagiis*: Coke Litt. 31*a*." Deitz *v.* Beard, 2 Watts (Pa.) 170, 172.

DOS DE DOTE PETI NON DEBET.[41] A maxim meaning "Dower ought not to be sought from dower." [42]

DOT. The fortune, portion, or dowry which a woman brings to her husband by the marriage.[43]

DOTAGE. See INSANE PERSONS.

DOTAL PROPERTY. See HUSBAND AND WIFE.

DOTE. To be delirious, silly, or insane.[44]

DOTE UNDE NIHIL HABET. A writ of dower that lies for the widow, against the tenant of lands whereof he was solely seized in fee-simple, or fee-tail, and of which she is dowable.[45] (See, generally, DOWER.)

DOTI LEX FAVET; PRÆMIUM PUDORIS EST, IDEO PARCATUR. A maxim meaning "The law favors dower; it is the reward of chastity, therefore let it be preserved." [46]

DOUBLE APPEAL. See APPEAL AND ERROR.

DOUBLE AUDIT. As applied to public claims, an examination and adjustment by a comptroller and an auditor before payment.[47]

DOUBLE COSTS. See COSTS.

DOUBLE DAMAGES. Twice the amount of actual damages as found by the verdict of a jury.[48] (Double Damages: In General, see DAMAGES. For Fires Set by Railroads, see RAILROADS. For Forcible Entry and Detainer, see FORCIBLE ENTRY AND DETAINER. For Injuries — To Bridges, see BRIDGES; To Stock by Railroad, see RAILROADS. For Trespass, see TRESPASS.)

DOUBLE DEAD-WOOD. See DEAD-WOOD.

DOUBLE EAGLE. A gold coin of the United States of the value of twenty dollars.[49] (See COIN.)

DOUBLE INSURANCE. See FIRE INSURANCE; MARINE INSURANCE.

DOUBLE PLEADING. See PLEADING.

DOUBLE TAXATION. See TAXATION.

DOUBLE USE. In the law of patents, the application of an old process to a new use.[50] (See, generally, PATENTS.)

DOUBT. Uncertainty, uncertainty of mind;[51] a condition or state of the mind where the judgment is not at rest, and is not decidedly on one side or the other of a question;[52] that state of mind in which we hesitate as to two contradictory conclusions; a want of settled conviction or opinion upon a proposition considered.[53]

DOUBTFUL CREDIT. When used without words of limitation or qualification, reputation or standing in the community, as distinguished from the estimate of particular individuals.[54] (See CREDIT.)

DOUBTFUL TITLE. A title which the court does not consider to be so clear that it will enforce its acceptance by a purchaser, nor so defective as to declare it

41. "[A maxim] which is American as well as English law." Jourdan *v.* Haran, 56 N. Y. Super. Ct. 185, 207, 3 N. Y. Suppl. 541.

42. Bouvier L. Dict. [*citing* Coke Litt. 31; 4 Dane Abr. 671].

Applied or quoted in Brooks *v.* Everett, 13 Allen (Mass.) 457, 459; Jourdan *v.* Haran, 56 N. Y. Super. Ct. (N. Y.) 185, 207, 3 N. Y. Suppl. 541; Safford *v.* Safford, 7 Paige (N. Y.) 259, 260, 32 Am. Dec. 633; Dunham *v.* Osborn, 1 Paige (N. Y.) 634, 636; Bustard's Case, 4 Coke 121*a*, 122*b*.

43. Bouvier L. Dict. [*citing* Buisson *v.* Thompson, 7 Mart. N. S. (La.) 460].

44. Gates *v.* Meredith, 7 Ind. 440, 441 [*citing* Webster Dict.].

45. Wharton L. Lex.

46. Bouvier L. Dict. [*citing* Branch Princ.; Coke Litt. 31].

Applied in McCartee *v.* Teller, 2 Paige (N. Y.) 511, 562 [*citing* Coke Litt. 36*b*].

47. Cavan *v.* Brooklyn, 5 N. Y. Suppl. 758, 759.

48. Black L. Dict.

"Double the damages sustained by him" see Daniel *v.* Vaccaro, 41 Ark. 316, 329.

49. Black L. Dict.; U. S. Rev. St. (1878) § 3511 [U. S. Comp. St. (1901) p. 2343].

50. De Lamar *v.* De Lamar Min. Co., 110 Fed. 538, 542.

51. Webster Dict. [*quoted* in Rowe *v.* Baber, 93 Ala. 422, 426, 8 So. 865].

52. West Jersey Traction Co. *v.* Camden Horse R. Co., 52 N. J. Eq. 452, 29 Atl. 333, 346.

53. Century Dict. [*quoted* in Smith *v.* Missouri Pac. R. Co., 143 Mo. 33, 37, 44 S. W. 718].

54. Merchants' Bank *v.* Bank of Commerce, 24 Md. 12, 54.

a bad title, but only subject to so much doubt that a purchaser ought not to be compelled to accept it.[55]

DOVER'S POWDERS. A well known medicinal preparation containing opium as one of its ingredients.[56]

DOWEL. A pin used to connect adjacent pieces, penetrating a part of its length into each piece at right angles to the plane of junction.[57]

DOWEL-PIN. A piece of wood or metal used for joining two pieces, as of wood, stones, etc., by inserting part of its length in one piece, the rest of it entering a corresponding hole in the other.[58]

55. Heller *v.* Cohen, 15 Misc. (N. Y.) 378, 383, 36 N. Y. Suppl. 668 [*quoting* Bouvier L. Dict.].

"Every title is doubtful which invites or exposes the party holding it to litigation." Speakman *v.* Forepaugh, 44 Pa. St. 363, 371 [*quoted* in Herman *v.* Somers, 158 Pa. St. 424, 428, 27 Atl. 1050, 38 Am. St. Rep. 851].

56. Higbee *v.* Guardian Mut. L. Ins. Co., 66 Barb. (N. Y.) 462, 472.

57. Knight Mech. Dict. (1876) 735 [*quoted* in Perry *v.* Revere Rubber Co., 103 Fed. 314, 43 C. C. A. 248].

58. Webster Dict. [*quoted* in Perry *v.* Revere Rubber Co., 103 Fed. 314, 43 C. C. A. 248].

DOWER

By Frank B. Gilbert*

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CROSS-REFERENCES

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Administration of Husband's Estate, see EXECUTORS AND ADMINISTRATORS.
Alienage as Affecting Dower, see ALIENS.
Allowance to Widow by Statute, see EXECUTORS AND ADMINISTRATORS.
Attachment of Unassigned Dower, see ATTACHMENT.
Community Property, see HUSBAND AND WIFE.
Conversion of Property as Affecting Dower, see CONVERSION.
Conveyance of Dower Right as Champertous, see CHAMPERTY AND MAINTENANCE.
Creditor's Suit to Reach Unassigned Dower, see CREDITORS' SUITS.
Curtesy, see CURTESY.
Dower:
In Personal Property, see DESCENT AND DISTRIBUTION.
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Effect as to Covenants, see COVENANTS.
Election Between:
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Testamentary Provision and Dower, see WILLS.
Estoppel of Dowress to Dispute Husband's Title, see ESTOPPEL.
Homestead, see HOMESTEADS.
Outstanding Dower Right as Encumbrance:
Affecting Vendor's Title, see VENDOR AND PURCHASER.
Within Covenant Against Encumbrances, see COVENANTS.
Possession of Widow as Adverse, see ADVERSE POSSESSION.
Quarantine Right of Widow, see EXECUTORS AND ADMINISTRATORS.
Sale in Bankruptcy as a Bar, see BANKRUPTCY.
Tacking Dower, see ADVERSE POSSESSION.
Wife's Rights as Heir, Distributee, or Survivor, see DESCENT AND DISTRIBUTION.

I. DEFINITION.

Dower has been defined as that portion of lands or tenements which the wife hath for the term of her life of the lands or tenements of her husband after his decease, for the sustenance of herself and the nurture and education of her children.[1] It consists at common law of a third part of all the lands and tenements of which the husband was seized in fee simple or fee tail at any time during the coverture, and of which any issue which she might have had might by possibility have been heir, to be held by the wife for the term of her natural life.[2] The term "dower,"

1. Coke Litt. 30*a* [*quoted* in Sutherland *v.* Sutherland, 69 Ill. 481, 485]. See *infra*, IV, A.

2. 2 Blackstone Comm. 129, 131; Coke Litt. 30*a*; 1 Tiffany Real Prop. 417. And see the following cases:

in its proper sense, is applicable only to real property, and to the widow's life-estate therein;[3] but it is sometimes applied in statutes, wills, or contracts, to a widow's share in the personal property of her deceased husband, and in some states "dower" is expressly given in personal property.[4]

II. CLASSIFICATION AND GRADES.

A. Kinds of Dower — 1. In General. Blackstone and Littleton speak of five species of dower: (1) Dower by the common law; (2) dower by particular custom; (3) dower *ad ostium ecclesiæ*; (4) dower *ex assensu patris*; and (5) dower *de la pluis beale*.[5]

2. Dower by the Common Law. Dower by the common law has already been defined as a one-third part of all the lands and tenements of which the husband was seized in fee simple or fee tail at any time during the coverture, and of which any issue which she might have had might by possibility have been heir, to be held by the wife for the term of her natural life.[6]

3. Dower by Particular Custom. Dower by particular custom was where by the custom of a particular locality the wife was entitled to a peculiar and unusual allotment of dower; in some places one half of the husband's lands being allotted to her, and in others one third, and in others one quarter.[7]

4. Dower Ad Ostium Ecclesiæ. Dower *ad ostium ecclesiæ*, or at the church door, was where a tenant in fee simple of full age, openly at the church door, where all marriages were formerly celebrated, after affiance made and troth plighted between them, endowed his wife with the whole, or such quantity as he pleased, of his lands, at the same time specifying and ascertaining the same; on which the wife, after the husband's death, might enter without further ceremony.[8]

5. Dower Ex Assensu Patris. Dower *ex assensu patris*, or by assent of the father, was where the father was seized of lands in fee, and his son by his consent expressly given, at the time of his marriage, and at the church door, endowed

Alabama.— Neil *v.* Johnson, 11 Ala. 615.

Arkansas.— Tate *v.* Jay, 31 Ark. 576; Hill *v.* Mitchell, 5 Ark. 608, 610.

Delaware.— Bush *v.* Bush, 5 Del. Ch. 144.

Illinois.— Sisk *v.* Smith, 6 Ill. 503, 506.

Kentucky.— Butler *v.* Cheatham, 8 Bush 594; Casky *v.* Casky, 5 Ky. L. Rep. 769.

Massachusetts.— See Johnson *v.* Goss, 132 Mass. 274.

Michigan.— May *v.* Specht, 1 Mich. 187 [*quoting* 3 Bacon Abr. 191].

Nebraska.— Butler *v.* Fitzgerald, 43 Nebr. 192, 61 N. W. 640, 47 Am. St. Rep. 741, 27 L. R. A. 252.

New York.— House *v.* Jackson, 50 N. Y. 161, 164.

Pennsylvania.— Gray *v.* McCune, 23 Pa. St. 447, 451.

Tennessee.— Combs *v.* Young, 4 Yerg. 218, 26 Am. Dec. 225.

See also *infra*, IV, B.

"The words 'dower,' 'dowery,' and 'dowry' are regarded by lexicographers as etymologically different forms of the same word; 'dowery' has become obsolete, and 'dower' and 'dowry' have in modern times acquired both in law and in popular use distinct significations. The various senses in which the word *dos* was used by the old common-law writers are well known. Sir Edward Coke in his Commentary on Littleton, 31*a*, says: 'And at this day *dos* or dower is not taken by the professors of the common law, either for the land which the wife bringeth with her in marriage to her husband, for then it is either called in frank-marriage or in marriage, as hath been said, nor for the portion of money or other goods or chattels which she bringeth with her in marriage, for that is called her marriage portion. And yet of ancient time *dos mulieris*, the dower or dowrie of the woman was also applied to them. But it is commonly taken for her third part, which she hath of her husband's lands or tenements.'" Johnson *v.* Goss, 132 Mass. 274, 276.

3. Ditson *v.* Ditson, 85 Iowa 276, 52 N. W. 203; *In re* Davis, 36 Iowa 24; Dow *v.* Dow, 36 Me. 211; Brackett *v.* Leighton, 7 Me. 383; Johnson *v.* Goss, 132 Mass. 274; Bryant *v.* McCune, 49 Mo. 546.

4. In Arkansas, Florida, and some of the other states "dower" is extended so as to include personal as well as real property. Stull *v.* Graham, 60 Ark. 461, 31 S. W. 46; Woodberry *v.* Matherson, 19 Fla. 778; and *infra*, VI, A, 9. The word "dower" may stand so connected in a will as to mean the widow's share of personal property as well as dower in real property. Adamson *v.* Ayres, 5 N. J. Eq. 349.

5. Coke Litt. 33*b*. And see 2 Blackstone Comm. 132, 133; 1 Scribner Dower 18 *et seq.*

6. See *supra*, I, note 2.

7. 2 Blackstone Comm. 132; Coke Litt. 33*b*; 1 Scribner Dower 18.

8. 2 Blackstone Comm. 132, 133; Coke Litt. 34*a*.

his wife of a portion of the same. This species of dower bore a close relation to dower *ad ostium ecclesiæ*.[9] As in the case of dower *ad ostium ecclesiæ* the wife entered upon her dower immediately upon the death of her husband, although the father still lived.[10]

6. Dower De La Pluis Beale. Dower *de la pluis beale* was where the husband was seized of lands, part in socage and part by knight's service, and died leaving a widow and a son within the age of fourteen years, in which case the widow took her dower wholly out of the lands in socage, and the lord of whom the land was held by knight's service entered upon that portion as guardian in chivalry during the nonage of the infant.[11]

7. Species Abolished. Dower *ad ostium ecclesiæ* and dower *ex assensu patris* were abolished in England by a statute of William IV,[12] while dower *de la pluis beale* had previously been abolished together with the military tenures, of which it was a consequence;[13] and of all these species dower by the common law is the only one which has ever prevailed in the United States, being either expressly continued or modified or enlarged by statutory enactment.[14]

B. Grades of Estate. Dower is: (1) Inchoate after seizin of the husband and during coverture; (2) consummate after the death of the husband, but prior to its assignment, when the widow's right to demand and enter upon the enjoyment of her dower interest commences; and (3) assigned or vested, when the widow enters into possession of the estate assigned to her for use during her life, either by process of law or by the acts of interested parties.[15] The nature of these particular interests is hereinafter considered.[16]

III. Origin and Development.

A. In General. The origin of dower is involved in much doubt and obscurity. Its introduction in England is of such antiquity that its origin cannot be traced with any degree of certainty.[17] Blackstone does not attempt to definitely declare its origin, but rests content with the statement that in England it may be the relic of an early Danish custom.[18] It is certain that dower is recognized in the Magna Charta of King John, granted June 15, 1215, and subsequently amended and confirmed in the reigns of Henry III and Edward I.[19] In the Magna Charta, as thus amended and confirmed, the law of dower in its modern sense and enlarged extent, as applying to all the lands of which the husband was seized during the coverture, was clearly defined and firmly established.[20] Since the Magna Charta was declaratory of existing customs and regulations and was enacted for their preservation, dower must have existed as a distinct institution prior to the enactment of that instrument. Coke says that it was certainly the law of England before the Norman conquest that a widow should continue a whole year in her husband's house, after his death, within which time her dower was to be assigned her.[21]

9. 1 Scribner Dower 19. And see 2 Blackstone Comm. 133; Coke Litt. 35*a*.
10. Coke Litt. 35*b*.
11. Coke Litt. 38*a*; 1 Scribner Dower 19.
12. 3 & 4 Wm. IV, c. 105, § 13.
13. 2 Blackstone Comm. 132.
14. Randall *v.* Krieger, 23 Wall. (U. S.) 137, 23 L. ed. 124. See *infra*, III, B, 1.
15. Park Dower 247, 250.
16. See *infra*, VIII, A; IX, A; XII, A.
17. Wright *v.* Jennings, 1 Bailey (S. C.) 277, 278. It is difficult to trace the origin of dower, but all writers admit it to be of great antiquity. Hill *v.* Mitchell, 5 Ark. 608, 610. It is so ancient an institution that neither Coke nor Blackstone can trace it to its origin. Combs *v.* Young, 4 Yerg. (Tenn.) 218, 227, 26 Am. Dec. 225.
18. 2 Blackstone Comm. 129, where it is said: "It is possible, therefore, that it might be with us the relic of a Danish custom; since, according to the historians of that country, dower was introduced into Denmark by Swein, the father of our Canute the Great, out of gratitude to the Danish ladies, who sold all their jewels to ransom him when taken prisoner by the Vandals."
19. 1 Scribner Dower 14, 15. And see Hill *v.* Mitchell, 5 Ark. 608, 610.
20. 4 Kent Comm. 36.
21. Coke Litt. 32*b*.

B. In the United States — 1. Adoption, Modification, and Abolition. In many of the United States dower, exactly or substantially as it existed at common law, has been recognized as in force or adopted by judicial declaration or by express constitutional or statutory provisions, while in others it has been very materially changed by statute.[22] In other states dower has been abolished altogether, and a different right or interest substituted, as for example a certain portion of the husband's real property in fee simple,[23] or a certain portion of community property or both.[24]

2. Effect of Modification or Abolition — a. In General. In some states, as in California, where property acquired by the husband after marriage becomes community property and jointly vests in both husband and wife, the common-law right of dower is done away with entirely and the wife's interest in the common

Widow's quarantine see Executors and Administrators.

22. See the statutes in the several states and the following cases:

Alabama.— Glenn *v.* Glenn, 41 Ala. 571; Hilliard *v.* Binford, 10 Ala. 977; Langdon *v.* Stephens, 6 Ala. 730.

Arkansas.—Tate *v.* Jay, 31 Ark. 576; Kirby *v.* Vantrece, 26 Ark. 368; Brown *v.* Collins, 14 Ark. 421; Menifee *v.* Menifee, 8 Ark. 9; Hill *v.* Mitchell, 5 Ark. 608.

Connecticut.—Deforest's Appeal, 1 Root 50.

Delaware.— Bush *v.* Bush, 5 Houst. 245.

Georgia.— Flowers *v.* Flowers, 89 Ga. 632, 15 S. E. 834, 18 L. R. A. 75; Slaughter *v.* Culpepper, 44 Ga. 319.

Illinois.— Shoot *v.* Galbreath, 128 Ill. 214, 21 N. E. 217; Tyson *v.* Postlethwaite, 13 Ill. 727; Sisk *v.* Smith, 6 Ill. 503; Cool *v.* Jackman, 13 Ill. App. 560.

Indiana.— Matlock *v.* Matlock, 5 Ind. 403. Dower has been since abolished. See *infra*, note 23.

Iowa.—Penser *v.* Hixon, 8 Iowa 402; O'Ferrall *v.* Simplot, 4 Iowa 381. Dower has been since abolished. See *infra*, note 23.

Kentucky.— Casky *v.* Casky, 5 Ky. L. Rep. 769.

Massachusetts.— Sears *v.* Sears, 121 Mass. 267.

Michigan.—Seager *v.* McCabe, 92 Mich. 186, 52 N. W. 299, 16 L. R. A. 247; Pratt *v.* Tefft, 14 Mich. 191.

Mississippi.— Quin *v.* Coleman, 42 Miss. 386; Magee *v.* Young, 40 Miss. 164, 90 Am. Dec. 322.

Missouri.— Riddick *v.* Walsh, 15 Mo. 519; Hamilton *v.* O'Neil, 9 Mo. 11.

Nebraska.— Butler *v.* Fitzgerald, 43 Nebr. 192, 61 N. W. 640, 47 Am. St. Rep. 741, 27 L. R. A. 252.

New Hampshire.— Burt *v.* Randlett, 59 N. H. 130; Robinson *v.* Tuttle, 37 N. H. 243.

New York.— Moore *v.* New York, 8 N. Y. 110, 59 Am. Dec. 473; Lawrence *v.* Brown, 5 N. Y. 394; Sutliff *v.* Forgey, 1 Cow. 89.

North Carolina.— O'Kelly *v.* Williams, 84 N. C. 281.

Ohio.— Vattier *v.* Cheseldine, 1 Ohio Dec. (Reprint) 127, 2 West. L. J. 475.

Pennsylvania.— Vensel's Appeal, 77 Pa. St. 71; Smith's Appeal, 23 Pa. St. 9; Hinnershits *v.* Bernhard, 13 Pa. St. 518; McNickle *v.* Henry, 8 Phila. 87.

Rhode Island.— Kenyon *v.* Kenyon, 17 R. I. 539, 23 Atl. 101, 24 Atl. 787.

Tennessee.— Lunsford *v.* Jarrett, 11 Lea 192; Keys *v.* Keys, 11 Heisk. 425; Apple *v.* Apple, 1 Head 348; Combs *v.* Young, 4 Yerg. 218, 26 Am. Dec. 225.

Utah.— Knudsen *v.* Hannberg, 8 Utah 203, 30 Pac. 749.

Vermont.— Hendrick *v.* Cleaveland, 2 Vt. 329.

Washington.— Ebey *v.* Ebey, 1 Wash. Terr. 185. Dower has been since abolished. Hamilton *v.* Hirsch, 2 Wash. Terr. 223, 5 Pac. 215.

United States.— Mayburry *v.* Brien, 15 Pet. 21, 10 L. ed. 646.

See 17 Cent. Dig. tit. "Dower," §§ 1, 2, 5, 6.

23. *Indiana.*— Graves *v.* Fligor, 140 Ind. 25, 38 N. E. 853; Pearson *v.* Pearson, 135 Ind. 377, 35 N. E. 288; Matthews *v.* Pate, 93 Ind. 443; Bowen *v.* Preston, 48 Ind. 367; Sullivan *v.* McGowen, 33 Ind. 139; Fletcher *v.* Holmes, 32 Ind. 497; Gaylord *v.* Dodge, 31 Ind. 41; Barnes *v.* Allen, 25 Ind. 222; State *v.* Mason, 21 Ind. 171.

Iowa.— Purcell *v.* Lang, 97 Iowa 610, 66 N. W. 887; Ditson *v.* Ditson, 85 Iowa 276, 52 N. W. 203; Kendall *v.* Kendall, 42 Iowa 464; Mock *v.* Watson, 41 Iowa 241.

Kansas.— Hatch *v.* Small, 61 Kan. 242, 59 Pac. 262; Chapman *v.* Chapman, 48 Kan. 636, 29 Pac. 1071; Crane *v.* Fipps, 29 Kan. 585.

Minnesota.— Morrison *v.* Rice, 35 Minn. 436, 29 N. W. 168.

Washington.— Hamilton *v.* Hirsch, 2 Wash. Terr. 223, 5 Pac. 215.

Wyoming.— France *v.* Connor, 3 Wyo. 445, 27 Pac. 569 [*affirmed* in 161 U. S. 65, 16 S. Ct. 497, 40 L. ed. 619], holding that the Edmunds-Tucker act of congress (March 3, 1887), giving the right of dower, applied exclusively to Utah, and did not repeal the Wyoming statute (Rev. St. § 2221) abolishing dower.

United States.— Peirce *v.* O'Brien, 29 Fed. 402, Iowa statute.

See Descent and Distribution; and *infra*, III, B, 2, a.

24. Beard *v.* Knox, 5 Cal. 252, 63 Am. Dec. 125; Hamilton *v.* Hirsch, 2 Wash. Terr. 223, 5 Pac. 215.

Community property see Husband and Wife.

property becomes absolute at the death of her husband.[25] In some states a statute substituting for dower a fee simple estate in one third or other portion of the husband's lands abolishes dower.[26] In other states such a statute is regarded not as abolishing but merely as enlarging the dower estate.[27] Even where dower is expressly abolished the word may still be properly used in pleadings to designate the wife's interest given by the statute in the lands of her deceased husband.[28]

b. As to Existing Interests. It has been held that a statute abolishing dower and substituting a fee simple in one third of the deceased husband's lands takes away the inchoate right of dower existing at the time of the enactment of the statute.[29] Some of the statutes, however, do not have this effect but expressly or impliedly save preëxisting rights.[30] A statute abolishing dower cannot defeat a widow's dower right after it has become consummate by the death of her husband.[31]

c. Construction of Statutes. A statute in derogation of a widow's common-law right of dower should be so construed if possible as to protect her fully in such right.[32] All statutes relating to dower are to be considered as parts of an entire system and are to be construed *in pari materia*.[33]

d. Constitutionality of Statutes. It is within the power of the legislature to diminish, alter, or abolish dower, where the right thereto is merely inchoate and has not become consummated by the death of the husband; but a statute taking away the right of dower after it has already become consummate and vested by the death of the husband is unconstitutional and void.[34] And it has been held that a statute restoring to married women the common-law right of dower is unconstitutional so far as applicable to marriages contracted and land acquired by

25. Beard *v.* Knox, 5 Cal. 252, 63 Am. Dec. 125.

26. In Indiana the statute giving a widow a certain portion (one third or more according to the circumstances) of her husband's lands in fee simple abolishes dower, and her rights are to be determined solely by reference to the provisions of the statute. Gaylord *v.* Dodge, 31 Ind. 41. She takes as heir and by descent from her husband, and not as dowress. Fletcher *v.* Holmes, 32 Ind. 497; State *v.* Mason, 21 Ind. 171. See DESCENT AND DISTRIBUTION.

27. Kendall *v.* Kendall, 42 Iowa 464. And see Purcell *v.* Lang, 97 Iowa 610, 66 N. W. 887, holding that the statute providing that "estates of dower and curtesy are hereby abolished," merely abolished the use of the words "dower" and "curtesy" as descriptive of the enlarged estate.

28. Daugherty *v.* Daugherty, 69 Iowa 677, 29 N. W. 778.

29. Duncan *v.* Terre Haute, 85 Ind. 104; May *v.* Fletcher, 40 Ind. 575; Strong *v.* Clem, 12 Ind. 37, 74 Am. Dec. 200; Noel *v.* Ewing, 9 Ind. 37, holding that such a statute leaves dower consummate untouched, and substitutes a third in fee for dower inchoate, when consistent with the rights of third parties.

A conveyance in fee simple by the husband or sale on execution or foreclosure prior to the passage of the act abolishing dower has been held in Indiana to divest the wife of her right to dower. Although the husband dies after the taking effect of the act substituting a fee simple right in her, in place of dower, this does not entitle her to take one third in fee of the lands so conveyed by her husband, although she did not join in his deed. Strong *v.* Clem, 12 Ind. 37, 74 Am. Dec. 200. And see Fletcher *v.* Holmes, 32 Ind. 497; Harrow *v.* Myers, 29 Ind. 469; Gaines *v.* Walker, 16 Ind. 361; Talbott *v.* Armstrong, 14 Ind. 254; Logan *v.* Walton, 12 Ind. 639.

Constitutionality of statutes see *infra*, III, B, 2, d.

30. See Vattier *v.* Cheseldine, 1 Ohio Dec. (Reprint) 127, 2 West. L. J. 475, holding that the repealing clauses in the several acts relating to dower from 1805 to 1824, without any express saving of preëxisting rights, did not take away such rights, because each act contains in itself a saving clause by manifest implication.

31. **Constitutionality of statutes** see *infra*, III, B, 2, d.

32. May *v.* Rumney, 1 Mich. 1; Hinds *v.* Pugh, 48 Miss. 268; Apple *v.* Apple, 1 Head (Tenn.) 348.

33. Hilliard *v.* Binford, 10 Ala. 977.

34. See CONSTITUTIONAL LAW, 8 Cyc. 909.

"Vested" right under statute.— But where a statute expressly provided that the right of dower should become "vested" in the wife before the husband's death as to all land acquired by him during coverture, it was held that the legislature could not affect her right of dower by an act passed after marriage and the acquisition of property by the husband, and before his death. O'Kelly *v.* Williams, 84 N. C. 281. And see *In re* Alexander, 53 N. J. Eq. 96, 30 Atl. 817.

What law governs right of dower see *infra*, IV, D, 1.

the husband previous to its passage,[35] although not so applicable to land acquired by him after its passage, although the marriage was entered into before.[36] A statute divesting a grantee of land of one third of the fee and vesting the same in the deceased grantor's widow is unconstitutional and void.[37] Dower does not result from contract, and therefore a statute enacted in the lifetime of a husband, modifying or otherwise affecting his wife's inchoate right of dower, is not unconstitutional as impairing the obligation of a contract.[38] Nor is the inchoate right of dower during the lifetime of the husband "property" within the constitutional guaranties for the protection of property.[39]

IV. NATURE AND OBJECT.

A. In General. The object in allowing dower is to furnish means and sustenance for the wife and for the nurture and education of the younger children after the death of the husband and father,[40] and looking to this object dower is held sacred and has been strongly fortified against invasion.[41] As has often been said, it is a legal, an equitable, and a moral right, favored in a high degree by law, and next to life and liberty held sacred.[42] But dower exists also for reasons of public policy, not dependent entirely upon the maintenance and nurture of the widow and her children; it is recognized in this country as a positive and definite institution of the state.[43] Although there is early authority to the

35. Reeves *v.* Haynes, 88 N. C. 310; O'Kelly *v.* Williams, 84 N. C. 281; Jenkins *v.* Jenkins, 82 N. C. 208; Bruce *v.* Strickland, 81 N. C. 267; Wesson *v.* Johnson, 66 N. C. 189; Sutton *v.* Askew, 66 N. C. 172, 8 Am. Rep. 500.

36. O'Kelly *v.* Williams, 84 N. C. 281.

37. Carr *v.* Brady, 64 Ind. 28; Taylor *v.* Sample, 51 Ind. 423; Bowen *v.* Preston, 48 Ind. 367; Hoskins *v.* Hutchings, 37 Ind. 324; Morton *v.* Noble, 22 Ind. 160; Strong *v.* Clem, 12 Ind. 37, 74 Am. Dec. 200.

38. See *infra*, IV, A, note 45.

39. Chouteau *v.* Missouri Pac. R. Co., 122 Mo. 375, 22 S. W. 458, 30 S. W. 299.

40. 2 Blackstone Comm. 130; Coke Litt. 30*a*; 4 Kent Comm. 35. And see the following cases:

Alabama.— Irvine *v.* Armistead, 46 Ala. 363; Neil *v.* Johnson, 11 Ala. 615.

Illinois.— Sutherland *v.* Sutherland, 69 Ill. 481; Sisk *v.* Smith, 6 Ill. 503.

Indiana.— Noel *v.* Ewing, 9 Ind. 37.

Maryland.— Chew *v.* Chew, 1 Md. 163.

Michigan.— Seager *v.* McCabe, 92 Mich. 186, 52 N. W. 299, 16 L. R. A. 247.

Mississippi.— Hinds *v.* Pugh, 48 Miss. 268.

New York.— Wait *v.* Wait, 4 Barb. 192.

Tennessee.— Combs *v.* Young, 4 Yerg. 218, 26 Am. Dec. 225.

41. Sisk *v.* Smith, 6 Ill. 503.

It is a maxim that three things be favored in law: Life, liberty, and dower. Thomas Coke 14. See also Bacon Uses 37; 2 Blackstone Comm. 129, 133; Gilbert Uses 354 *et seq.*

42. Coke Litt. 124*b*; Park Dower 2, where it is said: "Dower was, indeed, proverbially the foster-child of the law, and so highly was it rated in the catalogue of social rights, as to be placed in the same scale of importance with liberty and life. *Favorabilia in lege sunt, vita, fiscus, dos, libertas*, was the maxim in the courts; and is frequently cited by the old text writers and reporters." See also the following cases:

Alabama.— Irvine *v.* Armistead, 46 Ala. 363; Martin *v.* Martin, 22 Ala. 86.

Connecticut.— Meigs *v.* Dimock, 6 Conn. 458.

Indiana.— Bishop *v.* Boyle, 9 Ind. 169, 68 Am. Dec. 615; Noel *v.* Ewing, 9 Ind. 37.

Maryland.— Chew *v.* Chew, 1 Md. 163; Bowie *v.* Berry, 3 Md. Ch. 359.

Michigan.— Bear *v.* Stahl, 61 Mich. 203, 28 N. W. 69; Greiner *v.* Klein, 28 Mich. 12.

Mississippi.— Hinds *v.* Pugh, 48 Miss. 268.

New Jersey.— *In re* Alexander, 53 N. J. Eq. 96, 30 Atl. 817.

New York.— Lasher *v.* Lasher, 13 Barb. 106; Church *v.* Bull, 2 Den. 430, 43 Am. Dec. 754.

North Carolina.— Gore *v.* Townsend, 105 N. C. 228, 11 S. E. 160, 8 L. R. A. 443.

Ohio.— Mandel *v.* McClave, 46 Ohio St. 407, 22 N. E. 290, 15 Am. St. Rep. 627, 5 L. R. A. 519.

Pennsylvania.— Thompson *v.* Morrow, 5 Serg. & R. 289, 9 Am. Dec. 358; Kennedy *v.* Nedrow, 1 Dall. 415, 1 L. ed. 202.

South Carolina.—Callaham *v.* Robinson, 30 S. C. 249, 9 S. E. 120, 3 L. R. A. 497.

Washington.— Ebey *v.* Ebey, 1 Wash. Terr. 185.

United States.— Mayburry *v.* Brien, 15 Pet. 21, 10 L. ed. 646.

England.—Banks *v.* Sutton, 2 P. Wms. 700, 24 Eng. Reprint 922.

43. *Alabama.*— Martin *v.* Martin, 22 Ala. 86.

Michigan.—Seager *v.* McCabe, 92 Mich. 186, 196, 52 N. W. 299, 16 L. R. A. 247.

Minnesota.— Guerin *v.* Moore, 25 Minn. 462.

Mississippi.—Magee *v.* Young, 40 Miss. 164, 90 Am. Dec. 322.

contrary,[44] it must now be regarded as settled that dower is not the result of any contract between husband and wife, either express or implied, but is an institution of the state, founded upon public policy, and made by positive law an incident of the marriage relation.[45] We shall consider in subseqnent sections the nature and incidents of the inchoate right of dower,[46] the right of dower consummate before assignment,[47] and the right after assignment.[48]

B. Extent of Estate. The common-law right of dower, as we have seen, entitles the wife to a life-estate, and a life-estate only, in one third of all the lands and tenements of which the husband was seized of an estate of inheritance at any time during the coverture.[49] In some states this is still the extent of the widow's interest, but in other states her estate has been enlarged or modified by statute.[50] In some states the widow's right to dower is unaffected by a statute permitting the widow of an intestate who leaves no deseendants to inherit a certain portion of the real property of which the intestate died seized, and she is entitled to both,[51] while in other states such provision is in lieu of dower [52] or ineludes dower.[53] Upon the assignment of dower the widow acquires no new freehold, but her title is a continuation of that of her husband,[54] and relates back to the time of the marriage, if her husband was then seized, and if not it relates back to the time when he was first seized.[55]

C. Right of Non-Resident Widow.[56] At common law and under the statutes in most of the states the widow of a citizen of one state is entitled to dower in lands situated within another state of which the husband was seized at any time during coverture, or at the time of his death.[57] But under a statute giving

New York.— Moore *v.* New York, 8 N. Y. 110, 59 Am. Dec. 473.

North Carolina.— Norwood *v.* Marrow, 20 N. C. 578.

Ohio.— Weaver *v.* Gregg, 6 Ohio St. 547, 67 Am. Dec. 355.

44. Banks *v.* Sutton, 2 P. Wms. 700, 24 Eng. Reprint 922.

45. *Alabama.*— Boyd *v.* Harrison, 36 Ala. 533; Martin *v.* Martin, 22 Ala. 86, 105 [*quoting* Park Dower 5].

Indiana.— Noel *v.* Ewing, 9 Ind. 37.

Iowa.— Lucas *v.* Sawyer, 17 Iowa 517.

Minnesota.— Morrison *v.* Rice, 35 Minn. 436, 29 N. W. 168.

Mississippi.—Magee *v.* Young, 40 Miss. 164, 90 Am. Dec. 322.

Missouri.— Higgins *v.* Breen, 9 Mo. 497, 501.

New York.— Witthaus *v.* Schack, 105 N. Y. 332, 11 N. E. 649; Moore *v.* New York, 8 N. Y. 110, 59 Am. Dec. 473; Lawrence *v.* Miller, 2 N. Y. 245.

North Carolina.— Norwood *v.* Marrow, 20 N. C. 578.

Ohio.— Weaver *v.* Gregg, 6 Ohio St. 547, 67 Am. Dec. 355.

Pennsylvania.— Melizet's Appeal, 17 Pa. St. 449, 55 Am. Dec. 573.

Wisconsin.— Bennett *v.* Harms, 51 Wis. 251, 8 N. W. 222.

United States.— Randall *v.* Krieger, 23 Wall. 137, 23 L. ed. 124.

Constitutionality of statutes.— It follows that a statute modifying or otherwise affecting a wife's inchoate right of dower does not impair the obligation of any contract. See the cases above cited; and CONSTITUTIONAL LAW, 8 Cyc. 992.

As to vested rights see *supra*, III, B, 2, d.

46. See *infra*, VIII.

47. See *infra*, IX.

48. See *infra*, XII.

49. See *supra*, 1, note 2.

50. See *supra*, III, B, 1.

51. Shoot *v.* Galbreath, 128 Ill. 214, 21 N. E. 217; Sutherland *v.* Sutherland, 69 Ill. 481; Ringhouse *v.* Keever, 49 Ill. 470; Tyson *v.* Postlethwaite, 13 Ill. 727; Knudsen *v.* Hannberg, 8 Utah 203, 30 Pac. 749.

52. In Indiana, where dower is abolished and the statute gives the widow a certain portion of the lands of her deceased husband, she takes as heir and by descent from him, and not as doweress. Fletcher *v.* Holmes, 32 Ind. 497; State *v.* Mason, 21 Ind. 171. See *supra*, III, B, 2, a.

53. Burt *v.* Randlett, 59 N. H. 130.

54. *Connecticut.*— Goddard *v.* Prentice, 17 Conn. 546.

Kentucky.— Stevens *v.* Stevens, 3 Dana 371.

Massachusetts.— Jones *v.* Brewer, 1 Pick. 314; Conant *v.* Little, 1 Pick. 189; Windam *v.* Portland, 4 Mass. 384.

New Jersey.— Budd *v.* Hiler, 27 N. J. L. 43; Shields *v.* Hunt, 39 N. J. Eq. 485.

New York.— Moore *v.* New York, 8 N. Y. 110, 59 Am. Dec. 473; Lawrence *v.* Brown, 5 N. Y. 394; Lawrence *v.* Miller, 2 N. Y. 245; Sutliff *v.* Forgey, 1 Cow. 89.

North Carolina.— Norwood *v.* Marrow, 20 N. C. 578.

See also *infra*, XII, A, 2.

55. Lawrence *v.* Brown, 5 N. Y. 394. And see Lawrence *v.* Miller, 2 N. Y. 245.

56. Right to dower in case of alienage of husband or wife see ALIENS, 2 Cyc. 96.

57. Mitchell *v.* Word, 60 Ga. 525; Pratt *v.* Tefft, 14 Mich. 191; Jones *v.* Gerock, 59 N. C. 190; Lamar *v.* Scott, 3 Strobh. (S. C.) 562.

What law governs see *infra*, IV, D, 2.

dower to a widow residing out of the state in lands within the state of which her husband died seized, it has been held that the widow is not entitled to dower in lands so situated, but which have been conveyed by the husband in good faith prior to his death.[58]

D. Law Governing Estate — 1. Law in Force at Death of Husband. Since it is within the power of the legislature to diminish, alter, or abolish dower so long as the right thereto is merely inchoate, but not after it becomes consummate by the death of the husband,[59] it follows as a general rule that the widow's right to dower in lands of which the husband died seized is governed by the law in force at the time of his death.[60] But in North Carolina it is held that a statute giving or enlarging a right to dower cannot affect the husband's right to convey land, where the marriage was entered into and the land was acquired by him before the enactment of the statute, although it is otherwise as to land acquired after its enactment.[61] And where real property is aliened or mortgaged by the husband during his lifetime the right of the widow to dower as against the alienee or mortgagee will be determined by the laws in force at the time the property was conveyed or mortgaged.[62] The rule as applicable in all cases seems to be

58. Ligare *v.* Semple, 32 Mich. 438; Pratt *v.* Tefft, 14 Mich. 191; Atkins *v.* Atkins, 18 Nebr. 474, 25 N. W. 724; Thornburn *v.* Doscher, 32 Fed. 810, 13 Sawy. 60. Such a statute is constitutional. Buffington *v.* Sears, 46 Kan. 730, 27 Pac. 137, 13 L. R. A. 282; Bennett *v.* Harms, 51 Wis. 251, 8 N. W. 222.

Alienation by husband as a bar to dower see *infra*, VIII, D, 15.

Conveyance to defraud wife.— Although under the Michigan statute a non-resident wife is not entitled to dower in lands conveyed by the husband while a non-resident, that rule does not apply when the purchase and sale of lands within the state is a part of a scheme to defraud the wife of her dower. Bear *v.* Stahl, 61 Mich. 203, 28 N. W. 69. See also *infra*, VIII, D, 15, b, (v).

59. Power of legislature see *supra*, III, B, 2, d.

60. *Alabama.*—Ware *v.* Owens, 42 Ala. 212, 94 Am. Dec. 672; Boyd *v.* Harrison, 36 Ala. 533.

Arkansas.—Hatcher *v.* Buford, 60 Ark. 169, 29 S. W. 641, 27 L. R. A. 507.

Illinois.— Virgin *v.* Virgin, 189 Ill. 144, 59 N. E. 586; McNeer *v.* McNeer, 142 Ill. 388, 32 N. E. 681, 19 L. R. A. 256; Henson *v.* Moore, 104 Ill. 403.

Indiana.— Derry *v.* Derry, 74 Ind. 560; Noel *v.* Ewing, 9 Ind. 37; Hendrickson *v.* Hendrickson, 7 Ind. 13. And see Bowen *v.* Preston, 48 Ind. 367; May *v.* Fletcher, 40 Ind. 575; Hoskins *v.* Hutchins, 37 Ind. 324; Frantz *v.* Harrow, 13 Ind. 507.

Iowa.—Burke *v.* Barron, 8 Iowa 132; Davis *v.* O'Ferrall, 4 Greene 168. And see Lucas *v.* Sawyer, 17 Iowa 517; McCraney *v.* McCraney, 5 Iowa 232, 68 Am. Dec. 702.

Kansas.— Hatch *v.* Small, 61 Kan. 242, 59 Pac. 262; Chapman *v.* Chapman, 48 Kan. 636, 29 Pac. 1071.

Maine.— Barbour *v.* Barbour, 46 Me. 9.

Michigan.— Pratt *v.* Tefft, 14 Mich. 191.

Minnesota.—See Morrison *v.* Rice, 35 Minn. 436, 29 N. W. 168.

Mississippi.—Magee *v.* Young, 40 Miss. 164, 90 Am. Dec. 322.

Missouri.— Chouteau *v.* Missouri Pac. R. Co., 122 Mo. 375, 22 S. W. 458, 30 S. W. 299; Walker *v.* Deaver, 5 Mo. App. 139 [*affirmed* in 79 Mo. 664].

New Hampshire.— Merrill *v.* Sherburne, 1 N. H. 199, 8 Am. Dec. 52.

New York.— Moore *v.* New York, 8 N. Y. 110, 59 Am. Dec. 473 [*affirming* 4 Sandf. 456]; Jourdan *v.* Haran, 56 N. Y. Super. Ct. 185, 3 N. Y. Suppl. 541.

North Carolina.— Fortune *v.* Watkins, 94 N. C. 304; Sutton *v.* Askew, 66 N. C. 172, 8 Am. Rep. 500. *Compare*, however, O'Kelly *v.* Williams, 84 N. C. 281.

Ohio.— Weaver *v.* Gregg, 6 Ohio St. 547, 67 Am. Dec. 355.

Pennsylvania.—Melizet's Appeal, 17 Pa. St. 449, 55 Am. Dec. 573.

Washington.— Hamilton *v.* Hirsch, 2 Wash. Terr. 223, 5 Pac. 215.

West Virginia.— Thornburg *v.* Thornburg, 18 W. Va. 522.

Wisconsin.— Bennett *v.* Harms, 51 Wis. 251, 8 N. W. 222.

United States.— Randall *v.* Krieger, 23 Wall. 137, 23 L. ed. 124; Richards *v.* Bellingham Bay Land Co., 54 Fed. 209, 4 C. C. A. 290 [*affirming* 47 Fed. 854].

Compare, however, *In re* Alexander, 53 N. J. Eq. 96, 30 Atl. 817.

See 17 Cent. Dig. tit. "Dower," § 4.

61. O'Kelly *v.* Williams, 84 N. C. 281; Sutton *v.* Askew, 66 N. C. 172, 8 Am. Rep. 500; and other cases cited *supra*, III, B, 2, d.

62. *Indiana.*— Joseph *v.* Fisher, 122 Ind. 399, 23 N. E. 856; Strong *v.* Clem, 12 Ind. 37, 74 Am. Dec. 200. See also Wiseman *v.* Beckwith, 90 Ind. 185; Colman *v.* De Wolf, 53 Ind. 428; Taylor *v.* Sample, 51 Ind. 423; Bowen *v.* Preston, 48 Ind. 367; May *v.* Fletcher, 40 Ind. 575; Hoskins *v.* Hutchings, 37 Ind. 324; Frantz *v.* Harrow, 13 Ind. 507; Giles *v.* Gullion, 13 Ind. 487.

Iowa.— Purcell *v.* Lang, 97 Iowa 610, 66 N. W. 887. See also Felch *v.* Finch, 52 Iowa 563, 3 N. W. 570; Kendall *v.* Kendall, 42 Iowa 464; Craven *v.* Winter, 38 Iowa

that a widow takes dower in her husband's estate, as against those whose rights to such estate originate at the same time as her right of dower, according to the laws in force at the death of the husband; but as against those who have specific rights against such estate prior to the death of the husband her right to dower will depend upon the law in force at the time such rights originated.[63]

2. LOCATION OF PROPERTY. The widow's right to dower, in her husband's lands, the time and manner of assigning the same, and the causes by which it may be defeated are all determined by the law of the place where the property subject to dower is located.[64] But dower in personal property is governed by the law of the domicile of the husband.[65]

3. ACTS OF CONGRESS AND TERRITORIAL LAWS. The right to dower in lands situated in the territories is governed by the laws of the territories except in so far as they have been superseded by act of congress.[66]

V. REQUISITES.

A. In General. Three things are necessary to the consummation of the widow's right of dower: A valid marriage, seizin of the husband, and his death. This is the rule at common law, and is very generally followed in the states where the estate is recognized or created by statute.[67] The estate in all its grades

471; Moore *v.* Kent, 37 Iowa 20, 18 Am. Rep. 1; O'Ferrall *v.* Simplot, 4 Iowa 381; Young *v.* Wolcott, 1 Iowa 174; Davis *v.* O'Ferrall, 4 Greene 168.

Maryland.— Hopkins *v.* Frey, 2 Gill 359.

Minnesota.— Morrison *v.* Rice, 35 Minn. 436, 29 N. W. 168.

United States.— Peirce *v.* O'Brien, 29 Fed. 402, Iowa statute.

See 17 Cent. Dig. tit. "Dower," § 4.

Bar of dower by alienation by husband, see VIII, D, 15, b.

63. Kennerly *v.* Missouri Ins. Co., 11 Mo. 204.

64. *Arkansas.*— Apperson *v.* Bolton, 29 Ark. 418.

Georgia.— Mitchell *v.* Word, 60 Ga. 525.

Michigan.— Pratt *v.* Tefft, 14 Mich. 191.

Mississippi.— Duncan *v.* Dick, Walk. 281.

New Jersey.— Burnet *v.* Burnet, 46 N. J. Eq. 144, 18 Atl. 374.

North Carolina.— Jones *v.* Gerock, 59 N. C. 190.

South Carolina.— Lamar *v.* Scott, 3 Strobh. 562; Barnes *v.* Cunningham, 9 Rich. Eq. 475.

Right of non-resident widow see *supra*, IV, C.

What law governs validity of marriage see *infra*, V, B, 5.

65. Garland *v.* Rowan, 2 Sm. & M. (Miss.) 617 [*qualifying* to this extent Duncan *v.* Dick, Walk. (Miss.) 281]. See also DESCENT AND DISTRIBUTION, 14 Cyc. 21.

66. *Colorado.*— Holladay *v.* Dailey, 1 Colo. 460, dower abolished in the territory of Colorado.

Iowa.— Pense *v.* Hixon, 8 Iowa 402; O'Ferrall *v.* Simplot, 4 Iowa 381, ordinance of 1787 for government of the Northwest Territory.

Michigan.— May *v.* Rumney, 1 Mich. 1, ordinance of 1787 for government of the Northwest Territory.

Missouri.— Riddick *v.* Walsh, 15 Mo. 519, dower given by territorial act in lieu of interest under Spanish law.

Utah.— Knudsen *v.* Hannberg, 8 Utah 203, 30 Pac. 749.

Washington.—Hamilton *v.* Hirsch, 2 Wash. Terr. 223, 5 Pac. 215 (dower abolished); Ebey *v.* Ebey, 1 Wash. Terr. 185 (formerly entitled to dower).

Wyoming.— France *v.* Connor, 3 Wyo. 445, 27 Pac. 569 [*affirmed* in 161 U. S. 65, 16 S. Ct. 497, 40 L. ed. 619].

The act of congress known as the Edmunds-Tucker Act (Act March 3, 1887), giving the right of dower, related exclusively to Utah territory, and did not repeal the Wyoming statute (Rev. St. § 2221) abolishing dower in that territory. France *v.* Connor, 161 U. S. 65, 16 S. Ct. 497, 40 L. ed. 619 [*affirming* 3 Wyo. 445, 27 Pac. 569].

67. 2 Blackstone Comm. 130; Coke Litt. 30*a*; 4 Kent Comm. 36; 1 Washburn Real Prop. (6th ed.) 182. And see the following cases:

Alabama.— King *v.* King, 61 Ala. 479; Brooks *v.* Woods, 40 Ala. 538; Martin *v.* Martin, 22 Ala. 86.

Arkansas.— Tate *v.* Jay, 31 Ark. 576; Hill *v.* Mitchell, 5 Ark. 608.

Georgia.— Chapman *v.* Schroeder, 10 Ga. 321.

Illinois.— Sisk *v.* Smith, 6 Ill. 503.

Iowa.— McCraney *v.* McCraney, 5 Iowa 232, 68 Am. Dec. 702.

Kentucky.— Stevens *v.* Smith, 4 J. J. Marsh. 64, 20 Am. Dec. 205.

Maine.— Kidder *v.* Blaisdell, 45 Me. 461.

Michigan.— May *v.* Rumney, 1 Mich. 1.

Missouri.— Null *v.* Howell, 111 Mo. 273, 20 S. W. 24.

New York.— Moore *v.* New York, 8 N. Y. 110, 59 Am. Dec. 473; Wait *v.* Wait, 4 N. Y. 95.

North Carolina.— Gatewood *v.* Tomlinson, 113 N. C. 312, 18 N. E. 318.

demands for its existence the marriage and seizin, but it does not become perfect until after the husband's death.[68]

B. Marriage[69]— **1. In General.** There can be no right of dower unless there is a valid marriage.[70] There must have been legal capacity in the parties to enter into the relationship, and therefore if at the time of the marriage either party was incapable of consenting thereto because of idiocy or lunacy, and the marriage is absolutely void for this reason in the particular jurisdiction, no right of dower will accrue.[71] The same is true if for any other reason the marriage of the parties is absolutely void.[72] Unless it is otherwise by express statutory enactment, a marriage is valid and is sufficient to entitle the wife to dower, although without ceremonial celebration.[73]

2. Voidable Marriages. It is a well-established rule that all marriages which are not absolutely void but merely voidable, and which have not been annulled during the lifetime of the parties confer a right to dower upon the wife.[74] But such

68. McCraney *v.* McCraney, 5 Iowa 232, 68 Am. Dec. 702; Sewall *v.* Lee, 9 Mass. 363; Null *v.* Howell, 111 Mo. 273, 20 S. W. 24; Wait *v.* Wait, 4 N. Y. 95. "The concurrence of the two former circumstances is properly the ground work of the title of which the death of the husband is the consummation." May *v.* Rumney, 1 Mich. 1, 5. See *infra*, V, D; VIII, A; IX, A.

69. **Evidence and presumption of marriage** see *infra*, XI, G.

70. Coke Litt. 33*a*; and the following cases:

Alabama.— Martin *v.* Martin, 22 Ala. 86.

Arkansas.— Jones *v.* Jones, 28 Ark. 19.

Kentucky.— Donnelly *v.* Donnelly, 8 B. Mon. 113.

Mississippi.—Smart *v.* Whaley, 6 Sm. & M. 308.

Missouri.— Higgins *v.* Breen, 9 Mo. 497.

New Jersey.—Pearson *v.* Howey, 11 N. J. L. 12; Besson *v.* Gribble, 39 N. J. Eq. 111.

New York.— Cropsey *v.* Ogden, 11 N. Y. 228.

United States.— De France *v.* Johnson, 26 Fed. 891.

See 17 Cent. Dig. tit. "Dower," § 9; *infra*, XI, G; and other cases in the notes following.

Marriage is sufficient without cohabitation, and although the want of cohabitation is due to refusal on the part of the wife. Potier *v.* Barclay, 15 Ala. 439.

A statement by the man that he will not live with the woman, made prior to the marriage ceremony, does not render the marriage invalid or defeat the right to dower, particularly where the parties do cohabit. Brooke *v.* Brooke, 60 Md. 524.

71. Jenkins *v.* Jenkins, 2 Dana (Ky.) 102, 26 Am. Dec. 437; Park Dower 16; 1 Scribner Dower 122. Dower in the estate of an insane person will not be given to the widow where the marriage was contracted after legal inquisition determining the husband's insanity. Jenkins *v.* Jenkins, 2 Dana (Ky.) 102, 26 Am. Dec. 437. The insanity must have existed at the time the marriage was entered into; the widow's right of dower will not be affected by insanity occurring subsequent to the marriage. Park Dower 17; 1 Scribner Dower 124.

If the marriage is voidable merely and has never been annulled the rule is otherwise. Wiser *v.* Lockwood, 42 Vt. 720. See *infra*, V, B, 2.

Invalidity of marriage with insane person see Marriage.

72. **Consanguinity or affinity.**— If a marriage is absolutely void because of consanguinity or affinity it does not entitle the woman to dower in the man's estate. McIlvain *v.* Scheibley, 109 Ky. 455, 59 S. W. 498, 22 Ky. L. Rep. 942. It is otherwise, however, if the marriage is voidable merely and has not been annulled. Bonham *v.* Badgley, 7 Ill. 622; Adkins *v.* Holmes, 2 Ind. 197. See also *infra*, V, B, 2.

A marriage solemnized by a justice of the peace out of the county for which he was commissioned as a justice was held not to be valid, so as to entitle the woman to dower. Pearson *v.* Howey, 11 N. J. L. 12.

73. Mathewson *v.* Phœnix Iron Foundry, 20 Fed. 281, holding that a written contract of marriage, although not provided for by statute, was a good contract of marriage *per verba de præsenti*, and was sufficient to confer upon the wife the right of dower. See also Adams *v.* Adams, 57 Miss. 267, under a constitutional provision declaring married persons cohabiting as husband and wife without having been formally married.

Validity of common-law marriages see Marriage.

74. Coke Litt. 33*a*; Park Dower 14, 21; 1 Scribner Dower 114; and the following cases:

Illinois.— Bonham *v.* Badgley, 7 Ill. 622.

Indiana.— Adkins *v.* Holmes, 2 Ind. 197.

Kentucky.—Tomppert *v.* Tomppert, 13 Bush 326, 26 Am. Rep. 197, marriage procured by fraud.

Maryland.— Fornshill *v.* Murray, 1 Bland 479, 18 Am. Dec. 344.

New York.— Price *v.* Price, 124 N. Y. 589, 27 N. E. 383, 12 L. R. A. 359 [*reversing* 54 Hun 349, 7 N. Y. Suppl. 474]; Cropsey *v.* McKinney, 30 Barb. 47.

North Carolina.— Gathings *v.* Williams, 27 N. C. 487, 44 Am. Dec. 49.

Vermont.— Wiser *v.* Lockwood, 42 Vt. 720.

What marriages are merely voidable see Marriage.

right is not conferred, in the absence of a statute, where the marriage is annulled in their lifetime.[75]

3. Bigamous Marriages. As a rule a woman acquires no right to dower by a marriage with a man who has a former wife living at the time, as such second marriage is absolutely null and void.[76] The same is true where a woman marries a second time while her first husband is living.[77] By the weight of authority the rule is not changed, in the absence of a statute, by the fact that the marriage was contracted by the parties in good faith, in the belief that the former husband or wife was dead;[78] but it has been held that, although at the time of the second marriage the former wife was living, a continuance of the marital relation after the death of the first wife is sufficient to raise a presumption of marriage in fact after the death of the former wife, and to give dower to the second wife.[79] A statute authorizing divorce or annulment in the case of bigamous marriages does not necessarily render such marriages voidable and not void.[80] In some jurisdictions, by express provision, they are made void only after their annulment, where they are entered into in good faith after long absence of the former spouse;[81] but their annulment bars the second wife's right to dower.[82] The fact that a woman had married a man knowing that he had a wife living does not render invalid or bar her right of dower as an incident to her subsequent marriage to another man.[83]

4. Remarriage of Divorced Persons. Where the remarriage of a husband or wife who has been divorced for his or her misconduct is prohibited by statute for a period prescribed therein, the subsequent remarriage of either of such parties within the period which is prescribed is not sufficient to support a claim for dower.[84] This does not apply, however, where the parties marry in another state where the marriage is valid.[85]

5. What Law Governs. As a general rule, if a marriage was valid in the state in which it was contracted, its validity will be recognized in another state

Bigamous marriages rendered merely voidable by statute see *infra*, V, B, 3.

75. Price *v.* Price, 124 N. Y. 589, 27 N. E. 383, 12 L. R. A. 359, and other authorities in the note preceding.

76. *Kentucky.*— Donnelly *v.* Donnelly, 8 B. Mon. 113.

Mississippi.— Smart *v.* Whaley, 6 Sm. & M. 308.

Missouri.— Higgins *v.* Breen, 9 Mo. 497.

New York.— Price *v.* Price, 124 N. Y. 589, 27 N. E. 383, 12 L. R. A. 359.

North Carolina.—Ward *v.* Bailey, 118 N. C. 55, 23 S. E. 926.

Ohio.— Kennelly *v.* Cowle, 6 Ohio S. & C. Pl. Dec. 170, 4 Ohio N. P. 105.

United States.— De France *v.* Johnson, 26 Fed. 891.

See 17 Cent. Dig. tit. "Dower," § 9. And see, generally, Marriage.

77. Spicer *v.* Spicer, 16 Abb. Pr. N. S. (N. Y.) 112; Smith *v.* Smith, 5 Ohio St. 32.

78. Price *v.* Price, 124 N. Y. 589, 27 N. E. 383, 12 L. R. A. 359; Kennelly *v.* Cowle, 6 Ohio S. & C. Pl. Dec. 170, 4 Ohio N. P. 105; De France *v.* Johnson, 26 Fed. 891.

Contra.— Woods *v.* Woods, 2 Bay (S. C.) 476, where it appeared that a husband removed out of the state and was reported to be dead, and his wife married again after seven years. It was held that she was entitled to dower in the estate of the second husband.

79. Donnelly *v.* Donnelly, 8 B. Mon. (Ky.) 113; Jackson *v.* Claw, 18 Johns. (N. Y.) 346.

80. A statute authorizing proceedings to obtain a divorce where either spouse had a former spouse living when the second marriage was solemnized does not make the second marriage voidable only so as to entitle a woman to dower in the lands of the second husband where her first husband was living when the second marriage occurred. Smith *v.* Smith, 5 Ohio St. 32. See also Kennelly *v.* Cowle, 6 Ohio S. & C. Pl. Dec. 170, 4 Ohio N. P. 105, where the husband had a former wife living.

81. See Cropsey *v.* McKinney, 30 Barb. (N. Y.) 47.

82. Where a second marriage contracted in the belief that the husband's first wife is dead, she having been absent for five successive years and being unknown by him to be living, is annulled upon the discovery that the first wife is living, the second wife is not entitled, either at law or under the statute, to dower in the lands of which the second husband was seized at the date of the decree of nullity. Price *v.* Price, 124 N. Y. 589, 27 N. E. 383, 12 L. R. A. 359 [*reversing* 54 Hun 349, 7 N. Y. Suppl. 474].

83. Martin *v.* Martin, 22 Ala. 86.

84. Cropsey *v.* Ogden, 11 N. Y. 228; Smith *v.* Woodworth, 44 Barb. (N. Y.) 198.

85. Putnam *v.* Putnam, 8 Pick. (Mass.) 433; Dickson *v.* Dickson, 1 Yerg. (Tenn.) 110, 24 Am. Dec. 444. See also Van Voorhis

so as to entitle the woman to dower in lands in the latter state, although the marriage would not have been valid if contracted in such state.[86]

C. Seizin — 1. Necessity of Seizin. To entitle a widow to dower at common law, and generally under the statutes, the husband must have been seized of an estate of inheritance in real property at some time during coverture,[87] or under some statutes, changing the common law in this respect, at the time of the husband's

v. Brintnall, 86 N. Y. 18, 40 Am. Rep. 505. And see, generally, Marriage.

86. *Kentucky.*— McIlvain *v.* Scheibley, 109 Ky. 455, 59 S. W. 498, 22 Ky. L. Rep. 942.

Maryland.— Fornshill *v.* Murray, 1 Bland 479, 18 Am. Dec. 344.

Massachusetts.— Putnam *v.* Putnam, 8 Pick. 433.

New Jersey.— Smith *v.* Smith, 52 N. J. L. 207, 19 Atl. 255.

New York.— Smith *v.* Woodworth, 44 Barb. 198. And see Van Voorhis *v.* Brintnall, 86 N. Y. 18, 40 Am. Rep. 505.

Tennessee.— Dickson *v.* Dickson, 1 Yerg. 110, 24 Am. Dec. 444.

And see, generally, Marriage.

87. Coke Litt. 31*a*; and the following cases:

Alabama.— Norton *v.* Norton, 94 Ala. 481, 10 So. 436.

Arkansas.— Tate *v.* Jay, 31 Ark. 576; Blakeney *v.* Ferguson, 20 Ark. 547.

Connecticut.—Deforest's Appeal, 1 Root 50.

Delaware.— Bush *v.* Bush, 5 Houst. 245.

Georgia.—Hart *v.* McCollum, 28 Ga. 478.

Illinois.— Kirkpatrick *v.* Kirkpatrick, 197 Ill. 144, 64 N. E. 267; Owen *v.* Robbins, 19 Ill. 545; Stribling *v.* Ross, 16 Ill. 122; Sisk *v.* Smith, 6 Ill. 503.

Iowa.— Burgoon *v.* Whitney, 121 Iowa 76, 95 N. W. 229.

Kentucky.— Smallridge *v.* Hazlett, 112 Ky. 841, 66 S. W. 1043, 23 Ky. L. Rep. 2228; Fontaine *v.* Dunlap, 82 Ky. 321; Butler *v.* Cheatham, 8 Bush 594; Gully *v.* Ray, 18 B. Mon. 107; Eubank *v.* Eubank, 7 Ky. L. Rep. 291.

Maine.— Mann *v.* Edson, 39 Me. 25; Fickett *v.* Dyer, 19 Me. 58.

Maryland.— Spangler *v.* Stanler, 1 Md. Ch. 36.

Massachusetts.— Hill *v.* Pike, 174 Mass. 582, 55 N. E. 324; Brooks *v.* Everett, 13 Allen 457; Blood *v.* Blood, 23 Pick. 80; Atwood *v.* Atwood, 22 Pick. 283.

Michigan.— Wheeler *v.* Smith, 50 Mich. 93, 15 N. W. 108.

Missouri.— Ellis *v.* Kyger, 90 Mo. 600, 3 S. W. 23; Gentry *v.* Woodson, 10 Mo. 224; Warren *v.* Williams, 25 Mo. App. 22.

New York.— Phelps *v.* Phelps, 143 N. Y. 197, 38 N. E. 280, 25 L. R. A. 625; Durando *v.* Durando, 23 N. Y. 331; Nichols *v.* Park, 78 N. Y. App. Div. 95, 79 N. Y. Suppl. 547, 12 N. Y. Annot. Cas. 306; Bedlow *v.* Stillwell, 91 Hun 384, 36 N. Y. Suppl. 129; McIntyre *v.* Costello, 47 Hun 289, 14 N. Y. St. 370; Carpenter *v.* Weeks, 2 Hill 341; Jackson *v.* Waltermire, 5 Cow. 299; Embree *v.* Ellis, 2 Johns. 119; Dunham *v.* Osborn, 1 Paige 634. And see Hicks *v.* Stebbins, 3 Lans. 39.

North Carolina.—Barnes *v.* Raper, 90 N. C. 189; Thomas *v.* Thomas, 32 N. C. 123; Arrington *v.* Arrington, 4 N. C. 232.

Ohio.— Rands *v.* Kendall, 15 Ohio 671; Jaquess *v.* Hamilton County, 1 Disn. 121, 12 Ohio Dec. (Reprint) 524, 2 Wkly. L. Gaz. 81.

Pennsylvania.— Pritts *v.* Ritchey, 29 Pa. St. 71; Sharp *v.* Pettit, 4 Dall. 212, 1 L. ed. 805; Myer *v.* Philadelphia, 2 Leg. Rec. 39.

Rhode Island.— Sammis *v.* Sammis, 23 R. I. 499, 51 Atl. 105; Gardner *v.* Greene, 5 R. I. 104.

South Carolina.— Bowman *v.* Bailey, 20 S. C. 550.

Tennessee.— Apple *v.* Apple, 1 Head 348.

Virginia.— James *v.* Upton, 96 Va. 296, 31 S. E. 255; Waller *v.* Waller, 33 Gratt. 83; Wilson *v.* Davisson, 2 Rob. 384; Cocke *v.* Philips, 12 Leigh 248.

West Virginia.— Kanawha Valley Bank *v.* Wilson, 29 W. Va. 645, 2 S. E. 768.

Wisconsin.— Dudley *v.* Dudley, 76 Wis. 567, 45 N. W. 602, 8 L. R. A. 814.

United States.— Robison *v.* Codman, 20 Fed. Cas. No. 11,970, 1 Sumn. 121.

England.— Duncomb *v.* Duncomb, 3 Lev. 437.

Canada.— Leitch *v.* McLellan, 2 Ont. 587; Beatty *v.* Beatty, 17 U. C. C. P. 484.

See 17 Cent. Dig. tit. "Dower," § 10; and other cases under the sections following.

Lands held under contract of purchase.—A widow is not entitled to dower in lands which were held by her husband under a contract of purchase, where the husband's interest was aliened during coverture. Hicks *v.* Stebbins, 3 Lans. (N. Y.) 39. See *infra*, VI, B, 5, d, (I).

Rights of widow of heir.— If a father die and his land descends to his son as heir, subject to the dower of the mother, and dower is assigned to her in the premises, and the son dies during the continuance of her estate, the widow of the son will be entitled to dower in the remaining two thirds, but will not be entitled to dower in the reversion of that part which was assigned to the mother as tenant in dower. As to that part the moment the mother is endowed her seizin relates back to the death of the husband, and is considered a continuance of his seizin, so that there never was any seizin in the son. Dunham *v.* Osborn, 1 Paige (N. Y.) 634. But possession of a widow under an unassigned right of dower does not prevent the vesting of the estate of inheritance in the son, and the son's wife is vested with the inchoate right of dower in such land, which right becomes consummate upon the son's death. Null *v.* Howell, 111 Mo. 273, 20 S. W. 24. The heir at law, however, will not acquire seizin of the lands of his ancestor so long as the same remains in the possession

death.[88] Seizin at common law need not be actual, as in the case of curtesy;[89] but a seizin in law is sufficient without a seizin in fact.[90] In other words there must be either an actual possession of a freehold estate, or a right to immediate possession or enjoyment of such an estate.[91]

2. OF ESTATE OF INHERITANCE. The seizin at common law must have been of an estate of inheritance, with a freehold vested in the deceased husband.[92]

3. REMAINDER OR REVERSION. There can be no seizin sufficient to endow the widow of a remainder or a reversion, expectant upon an estate for life, although vested, unless by a surrender or purchase of the outstanding estate to or by her husband, or by the death of the immediate fee-holder, the estate becomes entire during coverture, or unless the rule has been changed by statute.[93] The rule does not apply to a reversion after a term of years only.[94]

4. RIGHT OF ENTRY. A mere right of entry, or a right of action to obtain seizin, in the husband, is not sufficient to entitle his widow to dower,[95] unless, as is the case in some jurisdictions, the common-law rule in this respect has been changed by statute.[96] Thus where the seizin of a man is divested by the entry

and control of the administrator and there are outstanding debts. Nor will the widow of the heir acquire a right of dower in land so held. Tate *v.* Jay, 31 Ark. 576.

Title by adverse possession.— Where the husband by length of adverse possession has acquired the right to possession of land, dower therein is assignable to the wife. Hawkins *v.* Page, 4 T. B. Mon. (Ky.) 136.

Property and estates or interests subject to dower see *infra*, VI.

88. Deforest's Appeal, 1 Root (Conn.) 50; and other cases in the note preceding. See also *infra*, VIII, D, 15, b, (II).

89. See CURTESY, 12 Cyc. 1005.

90. *Arkansas.*— Tate *v.* Jay, 31 Ark. 576.

Delaware.— Bush *v.* Bush, 5 Houst. 245.

Georgia.— Day *v.* Solomon, 40 Ga. 32; Bowen *v.* Collins, 15 Ga. 100.

Kentucky.— Fontaine *v.* Dunlap, 82 Ky. 321; Butler *v.* Cheatham, 8 Bush 594; Stevens *v.* Smith, 4 J. J. Marsh. 64, 20 Am. Dec. 205; Nolen *v.* Rice, 67 S. W. 36, 23 Ky. L. Rep. 2321; Eubank *v.* Eubank, 7 Ky. L. Rep. 291.

Maine.— Mann *v.* Edson, 39 Me. 25.

Maryland.— Chew *v.* Chew, 1 Md. 163.

Massachusetts.— Green *v.* Chelsea, 24 Pick. 71; Blood *v.* Blood, 23 Pick. 80; Atwood *v.* Atwood, 22 Pick. 283; Brown *v.* Wood, 17 Mass. 68; Eldredge *v.* Forrestal, 7 Mass. 253.

Mississippi.— Torrence *v.* Carbry, 27 Miss. 697; Ware *v.* Washington, 6 Sm. & M. 737.

Missouri.— Bartlett *v.* Tinsley, 175 Mo. 319, 75 S. W. 143; Null *v.* Howell, 111 Mo. 273, 20 S. W. 24; Davis *v.* Evans, 102 Mo. 164, 14 S. W. 875; Warren *v.* Williams, 25 Mo. App. 22.

New York.— Durando *v.* Durando, 23 N. Y. 331; Nichols *v.* Park, 78 N. Y. App. Div. 95, 79 N. Y. Suppl. 547, 12 N. Y. Annot. Cas. 306; McIntyre *v.* Costello, 47 Hun 289, 14 N. Y. St. 370.

North Carolina.— Barnes *v.* Raper, 90 N. C. 189; Houston *v.* Smith, 88 N. C. 312.

Ohio.— Borland *v.* Marshall, 2 Ohio St. 308.

South Carolina.— Secrest *v.* McKenna, 6 Rich. Eq. 72.

Tennessee.— Apple *v.* Apple, 1 Head 348.

West Virginia.— Kanawha Valley Bank *v.* Wilson, 29 W. Va. 645, 2 S. E. 768.

See 17 Cent. Dig. tit. "Dower," § 10.

The reason given for the distinction on this point between dower and curtesy, it being essential for curtesy that there should have been a seizin in fact, is that it is not in the wife's power to procure an actual seizin by the husband's entry, whereas the husband has always the power of procuring seizin of the wife's land. 4 Kent Comm. 37.

91. If the husband had a complete and perfect title to the estate, whether he was in actual possession, or someone else holding in subordination to his title, the wife is endowable. Day *v.* Solomon, 40 Ga. 32; Nolen *v.* Rice, 67 S. W. 36, 23 Ky. L. Rep. 2321. While the true and substantial test of the right of dower is whether the issue of the wife by the marriage might inherit the estate from the husband as his heirs, there must nevertheless be an actual seizin or the right thereto by the husband. Butler *v.* Cheatham, 8 Bush (Ky.) 594. Possession by the husband under a warranty deed and the making of improvements with claim of ownership is sufficient *prima facie* evidence of title for the purpose of a claim of dower as against a party showing no better right. Wheeler *v.* Smith, 50 Mich. 93, 15 N. W. 108. Mere possession by the husband, the title being in another, although he paid for the land, is insufficient. Nichols *v.* Park, 78 N. Y. App. Div. 95, 79 N. Y. Suppl. 547, 12 N. Y. Annot. Cas. 306. See also McIntyre *v.* Costello, 47 Hun 289, 14 N. Y. St. 370; Houston *v.* Smith, 88 N. C. 312.

92. Spangler *v.* Stanler, 1 Md. Ch. 36; Tenbrook *v.* Jessup, 60 N. J. Eq. 234, 46 Atl. 516; Barnes *v.* Raper, 90 N. C. 189; Houston *v.* Smith, 88 N. C. 312; Pritts *v.* Richey, 29 Pa. St. 71. And see *infra*, VI, B, 1.

93. See *infra*, VI, B, 4, a.

94. Boyd *v.* Hunter, 44 Ala. 705. See *infra*, VI. B, 4, a.

95. 1 Scribner Dower 255. And see Ellis *v.* Kyger, 90 Mo. 600, 3 S. W. 23; Thompson *v.* Thompson, 46 N. C. 430.

96. St. 3 & 4 Wm. IV, c. 105, § 3; Ky. St. (1903) § 2134; Va. Code (1887), § 2268.

of a disseizor before his marriage, and continues thus divested during the coverture, the husband has a right of entry upon the lands, but unless such right is exercised prior to his death, the want of seizin in him deprives his widow of her right to dower.[97] Where seizin is lost before marriage by a conveyance of land on a condition subsequent, and such condition is not complied with, thus vesting the grantor with a right of reëentry, the widow of the grantor is not entitled to dower in the lands conveyed unless the grantor has exercised such right during his lifetime.[98]

5. Unrecorded Conveyances. The general rule in the United States is that an unrecorded deed is good not only as against the grantor, his heirs and devisees, but also as against all persons having notice of the rights of the grantee, and therefore as against all such persons the wife is entitled to her dower, although the deed to her husband was not recorded;[99] although it will be otherwise if *bona fide* purchasers or judgment creditors acquire rights as against the unrecorded conveyance.[1] On the other hand an unrecorded deed made and delivered by the husband before marriage will divest his seizin and prevent a right of dower from attaching.[2] In North Carolina, however, it has been held that seizin is not complete, so as to entitle the widow to dower, unless the deed vesting title in the husband was duly recorded.[3]

6. Beneficial Seizin. It is well settled that to entitle a widow to dower the seizin of the husband must have been for his own use and benefit, and not in trust for another.[4]

7. Duration of Seizin. If the title to land becomes vested in the husband for his own use and benefit, although but for a moment, the right of dower attaches.[5]

97. 4 Dane Abr. 669; 1 Washburn Real Prop. § 390. And see Thompson *v.* Thompson, 46 N. C. 430.

Seizin of heir.— So where an ancestor has been disseized during his lifetime and dies before entry, a mere right of entry descends to the heir, and in respect of such right it makes no difference whether it comes to him before or after the marriage. In either case until he has prosecuted the right to an actual seizin the wife will not be entitled to dower. Park Dower 26; 1 Scribner Dower 256. But if land descends to a husband as heir, and he dies before entry, his wife will be entitled to her dower, and this would be the case even if a stranger should in the intermediate time by way of abatement enter upon the land, for the law contemplates a space of time between the death of the ancestor and the entry of the abator, during which time the husband has a seizin in law as heir. 4 Kent Comm. 38; Perkins, §§ 371, 372; Coke Litt. 31*a*.

98. Ellis *v.* Kyger, 90 Mo. 600, 3 S. W. 23, where lands were conveyed to a railroad company, on the condition subsequent that, if the railroad should not be constructed through the lands granted, and a station established thereon, the deed should be void, and such condition was not fulfilled within a reasonable time. And see Thompson *v.* Thompson, 46 N. C. 430.

Conveyance by husband before marriage as affecting dower right see *infra*, VIII, D, 15, a.

99. See Corliss *v.* Corliss, 8 Vt. 373; and Deeds, 13 Cyc. 594.

1. Stribling *v.* Ross, 16 Ill. 122.

2. Blood *v.* Blood, 23 Pick. (Mass.) 80.

Alienation by husband see *infra*, VIII, D, 15.

3. Thomas *v.* Thomas, 32 N. C. 123.

4. *Alabama.*—Edmondson *v.* Welsh, 27 Ala. 578.

Connecticut.— Goddard *v.* Prentice, 17 Conn. 546.

Illinois.— King *v.* Bushnell, 121 Ill. 656, 13 N. E. 245; Hagunin *v.* Cochrane, 51 Ill. 302, 2 Am. Rep. 303.

Kentucky.— Fontaine *v.* Dunlap, 82 Ky. 321; Bartlett *v.* Gouge, 5 B. Mon. 152.

Maine.— Stanwood *v.* Dunning, 14 Me. 290.

Maryland.— McCauley *v.* Grimes, 2 Gill & J. 318, 20 Am. Dec. 434.

Massachusetts.—Small *v.* Procter, 15 Mass. 495.

New Hampshire.— Hallett *v.* Parker, 68 N. H. 598, 39 Atl. 433; Adams *v.* Hill, 29 N. H. 202.

New Jersey.— Ocean Beach Assoc. *v.* Brinley, 34 N. J. Eq. 438.

Ohio.— Derush *v.* Brown, 8 Ohio 412.

Tennessee.—Gannaway *v.* Tarpley, 1 Coldw. 572.

Virginia.— Chapman *v.* Chapman, 92 Va. 537, 24 S. E. 225, 53 Am. St. Rep. 823; Waller *v.* Waller, 33 Gratt. 83; Wilson *v.* Davisson, 2 Rob. 384.

United States.— Mayburry *v.* Brien, 15 Pet. 21, 10 L. ed. 646.

See 17 Cent. Dig. tit. "Dower," §§ 13, 48.

Title in husband as trustee see *infra*, VI, B, 5, d, (II).

5. 2 Blackstone Comm. 132; Coke Litt. 31*a*; 4 Kent Comm. 39; 1 Scribner Dower 278. And see the following cases:

Illinois.—Sutherland *v.* Sutherland, 69 Ill. 481.

But such a seizin in the husband is not sufficient to sustain a claim of dower unless it be for the use and benefit of the husband.[6]

8. Transitory Seizin — a. In General. Where the seizin of the husband is merely transitory, as where the same act which gives him the estate conveys it out of him, or where he is only a mere conduit for the passage of the title, the wife is not entitled to dower.[7]

b. Simultaneous Deed and Mortgage. A familiar illustration of the doctrine that transitory seizin is not sufficient to confer upon the wife the right of dower is where a deed for land is executed and simultaneously therewith the purchaser gives to the vendor or any other person a mortgage upon the same lands to secure the payment of any portion of the purchase-money. In such a case the purchaser acquires no such seizin, as against the holder of the mortgage, as will entitle his wife to dower.[8] The deed and mortgage, although in themselves separate and

Kentucky.— McClure *v.* Harris, 12 B. Mon. 261; Tevis *v.* Steele, 4 T. B. Mon. 339.

Maine.— Graub *v.* Dodge, 43 Me. 489; Gage *v.* Ward, 25 Me. 101; Stanwood *v.* Dunning, 14 Me. 290.

Maryland.— McCauley *v.* Grimes, 2 Gill & J. 318, 20 Am. Dec. 434.

Massachusetts.— Holbrook *v.* Finney, 4 Mass. 566, 3 Am. Dec. 243.

Mississippi.— Randolph *v.* Doss, 3 How. 205.

New Jersey.— Griggs *v.* Smith, 12 N. J. L. 22.

New York.— Coates *v.* Cheever, 1 Cow. 460.

South Carolina.— Douglass *v.* Dickson, 11 Rich. 417; Avant *v.* Robertson, 2 McMull. 215; Crafts *v.* Crafts, 2 McCord 54.

England.— Thus where a father and son were joint tenants of land and both were hanged in one cart, but from evidence of the shaking of the son's legs it appeared that he survived the father, it was held that his widow was entitled to dower. Broughton *v.* Randall, Cro. Eliz. 502.

See 17 Cent. Dig. tit. "Dower," § 12.

Tortious seizin.— Seizin for an instant in the husband entitles his widow to dower as against strangers and those claiming under him, although the seizin was tortious. Randolph *v.* Doss, 3 How. (Miss.) 205.

6. Stanwood *v.* Dunning, 14 Me. 290; McCauley *v.* Grimes, 2 Gill & J. (Md.) 318, 20 Am. Dec. 434; Waller *v.* Waller, 33 Gratt. (Va.) 83; Wilson *v.* Davisson, 2 Rob. (Va.) 384; Mayburry *v.* Brien, 15 Pet. (U. S.) 21, 10 L. ed. 646. Where a husband is beneficially seized the wife is entitled to dower. Tevis *v.* Steele, 4 T. B. Mon. (Ky.) 339. The doctrine is established that instantaneous seizin is not *per se* inconsistent with a claim of dower, but that any beneficial interest in the husband, no matter how slight or fleeting, will create a right of dower. McClure *v.* Harris, 12 B. Mon. (Ky.) 261.

Necessity for beneficial seizin see *supra*, V, C, 6.

7. 2 Blackstone Comm. 132; Coke Litt. 31*b*; 4 Kent Comm. 38; Park Dower 43; 1 Scribner Dower 271; and the following cases:

Illinois.— Hugunin *v.* Cochrane, 51 Ill. 302, 2 Am. Rep. 303.

Indiana.— Johnson *v.* Plume, 77 Ind. 166.

Kentucky.— Gully *v.* Ray, 18 B. Mon. 107.

Maine.—Grant *v.* Dodge, 43 Me. 489; Gammon *v.* Freeman, 31 Me. 243; Stanwood *v.* Dunning, 14 Me. 290.

Maryland.— McCauley *v.* Grimes, 2 Gill & J. 318, 20 Am. Dec. 434.

Massachusetts.— Smith *v.* McCarty, 119 Mass. 519; Holbrook *v.* Finney, 4 Mass. 566, 3 Am. Dec. 243.

Mississippi.— Wooldridge *v.* Wilkins, 3 How. 360.

New Hampshire.— Hallett *v.* Parker, 68 N. H. 598, 39 Atl. 433; Adams *v.* Hill, 29 N. H. 202; Bullard *v.* Bowers, 10 N. H. 500; Moore *v.* Esty, 5 N. H. 479.

New Jersey.— Griggs *v.* Smith, 12 N. J. L. 22.

New York.— Stow *v.* Tifft, 15 Johns. 458, 8 Am. Dec. 266.

Ohio.— Culver *v.* Harper, 27 Ohio St. 464.

United States.—Mayburry *v.* Brien, 15 Pet. 21, 10 L. ed. 646.

England.— Sneyd *v.* Sneyd, 1 Atk. 442, 26 Eng. Reprint 282; Nash *v.* Preston, Cro. Car. 190; Amcotts *v.* Catherick, Cro. Jac. 615.

See 17 Cent. Dig. tit. "Dower," §§ 12, 13.

Seizin for purpose of passing title.— A widow is not entitled to dower of land of which her husband was never beneficially seized, and was only seized as a mere conduit for the passage of the title (Edmondson *v.* Welsh, 27 Ala. 578); as where the husband merely received title to the land as agent or trustee for the purpose of conveying it to another (Bartlett *v.* Gouge, 5 B. Mon. (Ky.) 152). And where a disseizor employs an agent to procure a deed of land from the owner for the purpose of confirming his possession, and the agent takes the deed in his own name, the agent does not thereby acquire a seizin sufficient to confer the right of dower upon his wife. Small *v.* Procter, 15 Mass. 495. This principle applies where a conveyance is effected by two deeds, delivered at the same time, one conveying title to the husband and the other conveying it from him. Fontaine *v.* Boatmen's Sav. Inst., 57 Mo. 552. See also Ocean Beach Assn. *v.* Brinley, 34 N. J. Eq. 438.

8. 4 Kent Comm. 39; 1 Scribner Dower 273; and the following cases:

Alabama.—Eslava *v.* Lepretre, 21 Ala. 504, 56 Am. Dec. 266.

distinct instruments, are nevertheless regarded as parts of the same contract. They are held to constitute a single act and to result in clothing the purchaser with a transitory seizin only.[9] The two instruments need not correspond in date, provided they are delivered at the same time, since they take effect from the time of delivery only.[10] The fact that other premises of the mortgagor are included in the same mortgage as a further security for the purchase-money is not material.[11]

9. Joint Seizin. At common law the seizin of the husband must be sole. Upon estates held in joint tenancy no right of dower will attach.[12] The mere

Indiana.— Nottingham *v.* Calvert, 1 Ind. 527.

Iowa.— Thomas *v.* Hanson, 44 Iowa 651.

Kentucky.— Gully *v.* Ray, 18 B. Mon. 107; Garton *v.* Bates, 4 B. Mon. 366.

Maine.— Moore *v.* Rollins, 45 Me. 493; Grant *v.* Dodge, 43 Me. 489; Smith *v.* Stanley, 37 Me. 11, 58 Am. Dec. 771; Gammon *v.* Freeman, 31 Me. 243; Hobbs *v.* Harvey, 16 Me. 80; Stanwood *v.* Dunning, 14 Me. 290.

Maryland.— Glenn *v.* Clark, 53 Md. 580; McCauley *v.* Grimes, 2 Gill & J. 318, 20 Am. Dec. 434; Purdy *v.* Purdy, 3 Md. Ch. 547.

Massachusetts.— Smith *v.* McCarty, 119 Mass. 519; King *v.* Stetson, 11 Allen 407; Pendleton *v.* Pomeroy, 4 Allen 510; Webster *v.* Campbell, 1 Allen 313; Clark *v.* Munroe, 14 Mass. 351; Holbrook *v.* Finney, 4 Mass. 566, 3 Am. Dec. 243.

Mississippi.— Whitehead *v.* Middleton, 2 How. 692.

New Hampshire.— Hinds *v.* Ballou, 44 N. H. 619; Adams *v.* Hill, 29 N. H. 202; Bullard *v.* Bowers, 10 N. H. 500.

New Jersey.— Griggs *v.* Smith, 12 N. J. L. 22.

New York.— Mills *v.* Van Voorhies, 20 N. Y. 412; Cunningham *v.* Knight, 1 Barb. 399; Sherwood *v.* Vandenburgh, 2 Hill 303; Jackson *v.* Dewitt, 6 Cow. 316; Coates *v.* Cheever, 1 Cow. 460; Stow *v.* Tifft, 15 Johns. 458, 8 Am. Dec. 266; Bell *v.* New York, 10 Paige 49; Kittle *v.* Van Dyck, 1 Sandf. Ch. 76.

Ohio.— Culver *v.* Harper, 27 Ohio St. 464; Welch *v.* Buckins, 9 Ohio St. 331; Rands *v.* Kendall, 15 Ohio 671.

Pennsylvania.— Reed *v.* Morrison, 12 Serg. & R. 18.

South Carolina.— Pledger *v.* Ellerbe, 6 Rich. 266, 60 Am. Dec. 123; Bogie *v.* Rutledge, 1 Bay 312; Henagan *v.* Harllee, 10 Rich. Eq. 285; Frazier *v.* Center, 1 McCord Eq. 270.

Virginia.— Wheatley *v.* Calhoun, 12 Leigh 264, 37 Am. Dec. 654; Seekright *v.* Moore, 4 Leigh 30, 24 Am. Dec. 704.

West Virginia.— George *v.* Cooper, 15 W. Va. 666.

United States.—Mayburry *v.* Brien, 15 Pet. 21, 10 L. ed. 646.

See 17 Cent. Dig. tit. "Dower," § 57 *et seq.*

Acceptance of purchaser's notes in payment.— In McClure *v.* Harris, 12 B. Mon. (Ky.) 261, where the purchaser of lands gave to the vendor his notes for the payment of the purchase-price, which notes were secured by a mortgage upon the property purchased, it was held that the acceptance of the notes amounted to a waiver of the vendor's equitable lien, and that the title of the purchaser therefore was clear and unencumbered, and the purchaser was seized with such an interest as to confer upon the wife the right of dower, although the original consideration had not been actually paid.

Under the Georgia Code, § 1944, which declares that a mortgage is only a lien and conveys no title, the doctrine that the right of the widow to dower does not attach where a deed and mortgage are executed simultaneously because the seizin of the husband is only transitory does not apply. Slaughter *v.* Culpepper, 44 Ga. 319; Rust *v.* Billingslea, 44 Ga. 306.

Dower in proceeds of mortgage sale see *infra*, VI, A, 8, d.

Dower in equity of redemption see *infra*, VI, B, 5, e.

Priority of rights of mortgagees see *infra*, VII, C.

9. Fontaine *v.* Boatmen's Sav. Inst., 57 Mo. 552.

10. Fontaine *v.* Boatmen's Sav. Inst., 57 Mo. 552; Reed *v.* Morrison, 12 Serg. & R. (Pa.) 18; Mayburry *v.* Brien, 15 Pet. (U. S.) 21, 10 L. ed. 646. In Rawlings *v.* Lowndes, 34 Md. 639, land was conveyed by deed executed and acknowledged on a certain date, and recorded on the following day, and as security for the purchase-money the purchaser executed a mortgage of like date upon the same land, but the mortgage was not acknowledged and delivered until sixteen days after the execution and acknowledgment of the deed. It was held that the purchaser acquired such a seizin in the land as would entitle his widow to dower. The rule was laid down that the deed and mortgage should be executed and delivered simultaneously, or if executed on different days should be delivered at the same time. *Compare*, however, Wheatley *v.* Calhoun, 12 Leigh (Va.) 264, 37 Am. Dec. 654.

11. Moore *v.* Rollins, 45 Me. 493.

12. Mayburry *v.* Brien, 15 Pet. (U. S.) 21, 10 L. ed. 646; Coke Litt. 37*b*; 4 Kent Comm. 37; Park Dower 37; 1 Scribner Dower 269.

If the husband, being a joint tenant, conveys his interest to another, and thus at once destroys the right of survivorship and deprives himself of the property, his wife will not be entitled to dower. Mayburry *v.* Brien, 15 Pet. (U. S.) 21, 10 L. ed. 646. See *infra*, VIII, D, 15, b, (III).

possibility of the estate being defeated by survivorship prevents any dower from attaching.[13] The statutes in most of the states affecting the doctrine of survivorship in joint tenancy, and in effect changing what at common law would be a joint tenancy to a tenancy in common, have produced a modification of this rule, so that in nearly all the states at the present time a widow is entitled to dower in lands of which her husband was seized as joint tenant or tenant in common.[14]

D. Death of Husband. The last essential for the consummation of the wife's dower is the death of the husband, and by this a natural death is intended.[15] Civil death, as where the husband became a monk,[16] or where he has been convicted of a crime and sentenced for life, is not sufficient to authorize the recovery of dower,[17] unless by statutory provision.[18] In claims for dower as in other cases the husband's death may be proved presumptively by absence for a certain number of years without knowledge concerning his whereabouts.[19]

VI. PROPERTY AND ESTATES OR INTERESTS SUBJECT TO DOWER.

A. In General — 1. Lands and Tenements. As a general rule dower attaches to all lands and tenements of which the husband was seized of an estate of inheritance at any time during coverture, or under some statutes at the time of his death.[20]

13. Cockrill *v.* Armstrong, 31 Ark. 580; Babbitt *v.* Day, 41 N. J. Eq. 392, 5 Atl. 275; Mayburry *v.* Brien, 15 Pet. (U. S.) 21, 10 L. ed. 646 [*citing* Fitzherbert N. B. 147; Park Dower 37; 3 Preston Abst. 367; 1 Rolle Abr. 676].

The reason for the rule is thus stated in Coke Litt. 37*b*: "It is to be understood, that the wife shall not be endowed of lands or tenements, which her husband holdeth joyntly with another at the time of his death; . . . [and] the reason of this diversity is, for that the jointenant, which surviveth, claimeth the land by the feoffment, and by survivorshippe, which is above the title of dower, and may plead the feoffment made to himselfe without naming of his compagnion that died."

14. *Arkansas.*— Drewry *v.* Montgomery, 28 Ark. 256; Harvill *v.* Holloway, 24 Ark. 19; Menifee *v.* Menifee, 8 Ark. 9.

Georgia.— Harris *v.* Coates, 75 Ga. 415; Ross *v.* Wilson, 58 Ga. 249.

Indiana.— Davis *v.* Bartholomew, 3 Ind. 485.

Kentucky.— Davis *v.* Logan, 9 Dana 185; Dehoney *v.* Bell, 30 S. W. 400, 17 Ky. L. Rep. 76.

Massachusetts.— Pynchon *v.* Lester, 6 Gray 314; Holbrook *v.* Finney, 4 Mass. 566, 3 Am. Dec. 243.

Michigan.—Rockwell *v.* Rockwell, 81 Mich. 493, 46 N. W. 8.

Mississippi.— James *v.* Rowan, 6 Sm. & M. 393.

Missouri.— Shipp *v.* Snyder, 121 Mo. 155, 25 S. W. 900.

New Hampshire.— Whitney *v.* Whitney, 45 N. H. 311.

New York.— Steltz *v.* Schreck, 60 Hun 74, 14 N. Y. Suppl. 106 [*affirmed* in 128 N. Y. 263, 28 N. E. 510, 26 Am. St. Rep. 475, 13 L. R. A. 325]; Smith *v.* Smith, 6 Laus. 313.

North Carolina.— Weir *v.* Tate, 39 N. C. 264.

Ohio.— Docktermann *v.* Elder, 11 Ohio Dec. (Reprint) 506, 27 Cinc. L. Bul. 195.

Rhode Island.— Hudson *v.* Steere, 9 R. I. 106.

South Carolina.— Reed *v.* Kennedy, 2 Strobh. 67.

Tennessee.— Clift *v.* Clift, (Sup. 1888) 9 S. W. 198; Walker *v.* Walker, 6 Coldw. 571.

United States.— Nutt *v.* Mechanics' Bank, 18 Fed. Cas. No. 10,382, 4 Cranch C. C. 102.

See 17 Cent. Dig. tit. "Dower," § 61. And see *infra*, VI, B, 1, d.

Dower in partnership property see *infra*, VI, B, 1, f.

15. *Illinois.*— Sisk *v.* Smith, 6 Ill. 503.

Iowa.—McCraney *v.* McCraney, 5 Iowa 232, 68 Am. Dec. 702.

Maine.— Barbour *v.* Barbour, 46 Me. 9.

New York.— Wait *v.* Wait, 4 N. Y. 95.

North Carolina.— Gatewood *v.* Tomlinson, 113 N. C. 312, 18 S. E. 318.

West Virginia.— Thornburg *v.* Thornburg, 18 W. Va. 522.

United States.— Randall *v.* Krieger, 23 Wall. 137, 23 L. ed. 124.

Dower consummate before assignment see *infra*, IX.

16. 2 Crabbe Real Prop. 131.

17. See Avery *v.* Everett, 110 N. Y. 317, 18 N. E. 148, 6 Am. St. Rep. 368, 1 L. R. A. 264; Matter of Zeph, 50 Hun (N. Y.) 523, 3 N. Y. Suppl. 460; Frazer *v.* Fulcher, 17 Ohio 260; Davis *v.* Laning, 85 Tex. 39, 19 S. W. 846, 34 Am. St. Rep. 784, 18 L. R. A. 82. And see Wooldridge *v.* Lucas, 7 B. Mon. (Ky.) 49. See also Civil Death; Descent and Distribution.

18. By statute in Michigan imprisonment for life dissolves the marriage and the wife is thereupon entitled to dower as if the husband were dead. Comp. L. (1897) § 8639.

19. Sherod *v.* Elwell, 104 Iowa 253, 73 N. W. 493.

Presumption and evidence of death see *infra*, XI, G.

20. 2 Blackstone Comm. 131; 4 Kent Comm. 41; 1 Washburn Real Prop. (6th ed.) 361. And see Pinkham *v.* Pinkham, 55 Nebr.

Dower cannot be assigned in a burial lot.[21] Nor is there any right of dower in an easement.[22]

2. Hereditaments, Corporeal and Incorporeal. It has been said that all hereditaments, whether corporeal or incorporeal, which savor of the realty are as a general rule subject to dower.[23] Thus certain incorporeal hereditaments which belong to the husband as an inheritance, such as rights of fishing,[24] rents,[25] or any other similar right appendant to and growing out of the realty may be allotted to a widow for her dower.[26]

3. Estates at Will and Revocable Licenses. If the husband's interest in lands is in the nature of an estate at the will of the grantor, or is a revocable privilege or license to use lands for a certain specified purpose, there can be no dower under the common law.[27]

729, 76 N. W. 411; Crawl *v.* Harrington, 33 Nebr. 107, 49 N. W. 1118; Kennedy *v.* Kennedy, 29 N. J. L. 185; Miller *v.* Wilson, 15 Ohio 108; Gist *v.* East, 16 Tex. Civ. App. 274, 41 S. W. 396, location of land certificate.

Conversion of realty into personalty see Conversion, 9 Cyc. 852.

21. Price *v.* Price, 54 Hun (N. Y.) 349, 7 N. Y. Suppl. 474 [*reversed* on other grounds in 124 N. Y. 589, 27 N. E. 383, 12 L. R. A. 359]. See also Chouteau *v.* Missouri Pac. R. Co., 122 Mo. 375, 22 S. W. 458, 30 S. W. 299.

22. Chouteau *v.* Missouri Pac. R. Co., 122 Mo. 375, 22 S. W. 458, 30 S. W. 299.

23. Park Dower 110; 1 Scribner Dower 198. And see Buckeride *v.* Ingram, 2 Ves. Jr. 652, 30 Eng. Reprint 834. The word "hereditaments," it has been said, is properly omitted by Littleton from his classification of the property to which dower attaches, since there may be hereditaments which do not in any degree savor of the realty, although descendible from ancestor to heir, and of such hereditaments as these a woman is not dowable. Park Dower 111.

24. Bracton 98, 208; Coke Litt. 32*a*; Fletcher, lib. 5, c. 23. And see Wyman *v.* Oliver, 75 Me. 421.

25. Park Dower 111; Perkins, §§ 345, 347. And see Chaplin *v.* Chaplin, 3 P. Wms. 229, 24 Eng. Reprint 1040. A woman may be endowed of a rent service, rent charge, or rent-seck. Chase's Case, 1 Bland (Md.) 206, 17 Am. Dec. 277; Park Dower 111. If a wife join her husband in a lease for years she is still entitled to dower in the rent. Herbert *v.* Wren, 7 Cranch (U. S.) 370, 3 L. ed. 374. See also Boyd *v.* Hunter, 44 Ala. 705; Sykes *v.* Sykes, 49 Miss. 190; Williams *v.* Cox, 3 Edw. (N. Y.) 178.

26. Right of wharfage.— A pier erected for the use of a wharf, the wharf itself being attached to the fee of a street, under and in pursuance of a statute, and by the permission of the city giving a right to use and maintain the pier in perpetuity, upon land under water belonging to the state, is real property and therefore subject to the dower right of the widow of the owner of the fee of the street and wharf to which the pier is attached. Bedlow *v.* Stillwell, 158 N. Y. 292, 53 N. E. 26 [*affirming* 91 Hun 384, 36 N. Y. Suppl. 129].

Right of ferry.— Dower has been allowed in a ferry franchise appurtenant to land. Stevens *v.* Stevens, 3 Dana (Ky.) 371.

Riparian accretions.— The widow of one who during coverture was a riparian proprietor becomes dowable upon his death in the accretions to the riparian estate. Gale *v.* Kinzie, 80 Ill. 132; Lombard *v.* Kinzie, 73 Ill. 446.

Lands under water.— A widow is entitled to dower in flats owned by her husband, although they are covered by tide waters and remain unimproved down to the time of his decease. Brackett *v.* Persons Unknown, 53 Me. 238, 87 Am. Dec. 548.

Water rights.—But a widow is not entitled to dower in the right to take and use for hydraulic purposes a portion of the surplus waters of the Erie canal granted by the canal commissioners. Kingman *v.* Sparrow, 12 Barb. (N. Y.) 201.

27. Even a copyhold, which was practically an estate of inheritance, but was legally an estate at the will of the lord, was not liable to dower except by and according to local custom. 2 Blackstone Comm. 132; 1 Scribner Dower 369. See Duncan *v.* Navassa Phosphate Co., 137 U. S. 647, 11 S. Ct. 242, 34 L. ed. 825 [*affirming* 35 Fed. 474]; Black *v.* Elkhorn Min. Co., 163 U. S. 445, 16 S. Ct. 1101, 41 L. ed. 221 [*affirming* 52 Fed. 859, 3 C. C. A. 312].

The right conferred by the United States, under the Guano Islands Act of 1856 (U. S. Rev. St. § 5570 *et seq.* [U. S. Comp. St. (1901) p. 3739]) upon the discoverer of guano and his assigns, to occupy at the pleasure of congress, for the purpose of removing the guano, an island determined by the president to appertain to the United States, is not such an estate in land as to be subject to dower, notwithstanding the act of 1872, c. 81 (U. S. Rev. St. § 5572 [U. S. Comp. St. (1901) p. 3739]) extending the provisions of the act of 1856, "to the widow, heirs, executors or administrators of such discoverer" if he dies before fully complying with its provisions. Duncan *v.* Navassa Phosphate Co., 137 U. S. 647, 11 S. Ct. 242, 34 L. ed. 825 [*affirming* 35 Fed. 474].

Mining claim.— The mere possessory right given by U. S. Rev. St. § 2322, to the locator of a mining claim is not such an estate that dower can be predicated thereon by state

4. Corporate Stock. It was formerly held that shares of stock in land, ferry, and railroad corporations, whose property consisted entirely or chiefly of land, were real estate and as such subject to dower.[28] But it is now generally agreed, and in some states expressly provided by statute, that such shares are personal property, and a widow therefore is not entitled to dower therein.[29]

5. Crops and Timber. Crops growing upon the land at the time it was assigned to the widow as dower will pass with the land and be deemed a part of her dower estate.[30] Timber while standing on the land is of course part of the realty and the widow's dower attaches; but if severed prior to the death of the husband it becomes personalty and the widow cannot claim dower therein.[31]

6. Mines and Quarries. Mines and quarries owned by the husband in fee and opened and worked at any time during coverture are subject to dower;[32] but at common law there can be no dower in unopened mines or quarries on the husband's lands, even if such lands have been assigned to the widow as her dower.[33]

7. Wild Lands. In this country the rule is general, although not universal, that a wife is dowable of wild lands which are not susceptible of cultivation and in

legislation as against the United States or its grantee. Black *v.* Elkhorn Min. Co., 163 U. S. 445, 16 S. Ct. 1101, 41 L. ed. 221 [*affirming* 52 Fed. 859, 3 C. C. A. 312].

28. Copeland *v.* Copeland, 7 Bush (Ky.) 349; Price *v.* Price, 6 Dana (Ky.) 107. See Corporations, 10 Cyc. 366.

29. McDougald *v.* Hepburn, 5 Fla. 568 (land company); Johns *v.* Johns, 1 Ohio St. 350 (railroad company). See Corporations, 10 Cyc. 367.

30. Washburn Real Prop. (6th ed.) § 384. And see Ralston *v.* Ralston, 3 Greene (Iowa) 533; Parker *v.* Parker, 17 Pick. (Mass.) 236; Clark *v.* Battorf, 1 Thomps. & C. (N. Y.) 58. A different rule exists in Ohio by statute. Davis *v.* Brown, 2 Ohio Dec. (Reprint) 644, 4 West. L. Month. 272.

31. Hallett *v.* Hallett, 8 Ind. App. 305, 34 N. E. 740.

32. Burton Real Prop. § 1164; 4 Kent Comm. 41; Park Dower 115; 1 Scribner Dower 205; 1 Washburn Real Prop. (6th ed.) § 380; and the following cases:

Illinois.— Priddy *v.* Griffith, 150 Ill. 560, 37 N. E. 999, 41 Am. St. Rep. 397; Lenfers *v.* Henke, 73 Ill. 405, 24 Am. Rep. 263.

Indiana.— Hendrix *v.* McBeth, 61 Ind. 473, 28 Am. Rep. 680.

Kentucky.— Whittaker *v.* Lindley, 3 S. W. 9, 8 Ky. L. Rep. 690.

Maine.— Moore *v.* Rollins, 45 Me. 493.

Massachusetts.— Adams *v.* Briggs Iron Co., 7 Cush. 361, 367; Billings *v.* Taylor, 10 Pick. 460, 20 Am. Dec. 533.

New Jersey.— Gaines *v.* Green Pond Iron Min. Co., 33 N. J. Eq. 603; Reed *v.* Reed, 16 N. J. Eq. 248; Rockwell *v.* Morgan, 13 N. J. Eq. 384.

New York.— Coates *v.* Cheever, 1 Cow. 460.

Pennsylvania.— Sayers *v.* Hoskinson, 110 Pa. St. 473, 1 Atl. 308; Irwin *v.* Covode, 24 Pa. St. 162; Neel *v.* Neel, 19 Pa. St. 323; Maffet's Estate, 8 Kulp 184.

Tennessee.— Clift *v.* Clift, 87 Tenn. 17, 9 S. W. 360.

Virginia.— Crouch *v.* Puryear, 1 Rand. 258, 10 Am. Dec. 528; Findlay *v.* Smith, 6 Munf. 134, 8 Am. Dec. 733.

See 17 Cent. Dig. tit. "Dower," §§ 23, 373.

Opening and discontinuing.— It seems to be the well settled rule that a widow is entitled to dower in such mines and quarries as were actually opened and used during the lifetime of the husband, and it makes no difference whether the husband continued to work them to the period of his death, or whether they have been continued since his death by the heir or his assignee. Billings *v.* Taylor, 10 Pick. (Mass.) 460, 20 Am. Dec. 533. See also Coates *v.* Cheever, 1 Cow. (N. Y.) 460; Maffet's Estate, 8 Kulp (Pa.) 184.

The leading English case is Stoughton *v.* Leigh, 1 Taunt. 402, 11 Rev. Rep. 810. See also Rex *v.* Dunsford, 2 A. & E. 568, 593, 1 H. & N. 93, 4 L. J. M. C. 59, 4 N. & M. 349; Quarrington *v.* Arthur, 11 L. J. Exch. 418, 10 M. & W. 335; Hoby *v.* Hoby, 1 Vern. Ch. 218, 23 Eng. Reprint 425, 2 Ch. Cas. 160, 22 Eng. Reprint 894; Thynn *v.* Thynn, Style Pr. Reg. 67.

33. Coates *v.* Cheever, 1 Cow. (N. Y.) 460, and other cases cited in the note preceding. See also *infra*, XII, C, 3.

The distinction taken between mines which have been opened and those which have not appears to rest upon the theory that it is an act of waste for a doweress or any other tenant for life to open mines, and therefore it is not permissible for her to do so. Bracton 316, pl. 1, 2; 1 Scribner Dower 206. And see Lenfers *v.* Henke, 73 Ill. 405, 408, 24 Am. Rep. 263.

Under the statutes of Michigan in relation to dower a widow is entitled to dower rights in the royalties realized from a lease by the guardians of minor heirs of mineral lands which were undeveloped at the time of her husband's death and solely valuable for the minerals afterward discovered therein. *In re* Seager, 92 Mich. 186, 52 N. W. 299.

Opening mines after the husband's death under contract made with him entitles widow to dower. Priddy *v.* Griffith, 150 Ill. 560, 37 N. E. 999, 41 Am. St. Rep. 397.

no wise valuable except for the timber thereon.[34] In some of the states, however, statutes have excluded the widow from dower in wild and uncultivated lands, unless used in connection with the dwelling-house or with cultivated lands, in which case she is entitled.[35]

8. Proceeds of Sale or Condemnation of Land — a. In General. Where the husband's lands are sold after his death under a statute or by order of court, courts of equity will generally allow a widow her dower out of the proceeds of such sale, rather than assign it out of the real estate itself.[36] And where lands are sold for a specific purpose after the husband's death free from the widow's dower, her dower nevertheless attaches to the surplus proceeds of such sale,[37] the general rule being that such surplus shall be considered as land so far as to vest it in the persons who would have been entitled if the land had remained unsold.[38] Where land has been sold for a specific purpose, although the wife joined in the conveyance, the surplus has been held subject to her right of dower,[39] but this doctrine is not universally accepted.[40] Where a husband conveys his lands by voluntary assignment for the benefit of his creditors, without his wife joining with him in such conveyance, she is entitled to dower in the entire proceeds of the sale;[41] and where the wife joins with her husband in a deed of trust of lands for the benefit of creditors, she is entitled upon the death of the husband to

34. *Arkansas.*— Pike *v.* Underhill, 24 Ark. 124.

Georgia.— Chapman *v.* Schroeder, 10 Ga. 321.

Illinois.— Schnebly *v.* Schnebly, 26 Ill. 116.

Kentucky.— Hickman *v.* Irvine, 3 Dana 121.

Michigan.— *In re* Campbell, 2 Dougl. 141.

New Jersey.— Brown *v.* Richards, 17 N. J. Eq. 32.

New York.— Walker *v.* Schuyler, 10 Wend. 480.

Ohio.— Allen *v.* McCoy, 8 Ohio 418.

Virginia.— Macaulay *v.* Dismal Swamp Land Co., 2 Rob. 507.

Canada.— Titus *v.* Haines, 11 Nova Scotia 542.

See 17 Cent. Dig. tit. "Dower," § 35.

Contra.— Conner *v.* Shepherd, 15 Mass. 164.

35. See Ford *v.* Erskine, 50 Me. 227; Stevens *v.* Owen, 25 Me. 94; Mosher *v.* Mosher, 15 Me. 371; Kuhn *v.* Kaler, 14 Me. 409; Shattuck *v.* Gragg, 23 Pick. (Mass.) 88; White *v.* Willis, 7 Pick. (Mass.) 143; Webb *v.* Townsend, 1 Pick. (Mass.) 21, 11 Am. Dec. 132; Fuller *v.* Watson, 7 N. H. 341; Johnson *v.* Perley, 2 N. H. 56, 9 Am. Dec. 35.

36. *Alabama.*— Chaney *v.* Chaney, 38 Ala. 35; Williamson *v.* Mason, 23 Ala. 488.

Illinois.— Bonner *v.* Peterson, 44 Ill. 253.

Maryland.—Maccubbin *v.* Cromwell, 2 Harr. & G. 443.

New Jersey.— Cook *v.* Cook, 20 N. J. Eq. 375.

South Carolina.— Jeffries *v.* Allen, 33 S. C. 268, 11 S. E. 764.

See 17 Cent. Dig. tit. "Dower, § 30 *et seq.*

Contra.— Tiner *v.* Christian, 27 Ark. 396, holding that on a sale of land by the administrator under order of the probate court, the widow must look to the specific estate rather than the fund arising from the sale thereof.

One purchasing shares of certain tenants in common of land pending a suit in equity for its partition becomes seized of such shares, and if he die, and the decree in the suit direct the land to be sold, his widow will be entitled to her dower in the proceeds arising from his shares. Church *v.* Church, 3 Sandf. Ch. (N. Y.) 434.

37. Buzick *v.* Buzick, 44 Iowa 259, 24 Am. Rep. 740; Brewer *v.* Vanarsdale, 6 Dana (Ky.) 204; Williams *v.* Woods, 1 Humphr. (Tenn.) 408; Hurst *v.* Dulaney, 87 Va. 444, 12 S. E. 800. Where land is for certain purposes required to be converted into money, and more is sold than is required for that purpose, the excess of the proceeds will be considered as land. Oberly *v.* Lerch, 18 N. J. Eq. 346. Where proceedings for the sale of land to pay decedent's debts are regular, and the orphan's court orders the land to be sold free from the widow's right of dower, the sale thereunder divests her of all claim upon the land and transfers her interest to the money derived from such sale. Schmitt *v.* Willis, 40 N. J. Eq. 515, 4 Atl. 767.

38. Williamson *v.* Mason, 23 Ala. 488. See also Conversion, 9 Cyc. 844.

39. Gwynne *v.* Estes, 14 Lea (Tenn.) 662; Hollis *v.* Hollis, 4 Baxt. (Tenn.) 524; Broyles *v.* Nowlin, 3 Baxt. (Tenn.) 191; Daniel *v.* Leitch, 13 Gratt. (Va.) 195.

40. Kauffman *v.* Peacock, 16 Ill. App. 582, holding that a woman who joins her husband in a trust deed for payment of his debts loses her dower in the surplus.

41. Blackman's Estate, 6 Phila. (Pa.) 160. Where a husband with the concurrence of his wife mortgaged his real estate, of which he was seized in fee, and afterward for the benefit of his creditors executed a deed in trust of the same property, but his wife did not concur in the deed of trust, and the property was sold by the trustees, and the surplus beyond the amount necessary to pay the mortgage debt was claimed by a judgment creditor, it was held that the widow was entitled to dower in the surplus only. Bank of

dower in the proceeds of the sale of such lands after the payment of the husband's debts.[42]

b. Sale Directed by Testator. Where land is directed to be sold by a testator and the proceeds to be distributed among the persons named in the will, neither of such persons takes such an interest in the land as to entitle his wife to dower.[43]

c. Condemnation Proceedings. Where a husband's land is taken and condemned for a public use after his death, his widow having dower in the land must in equity be held to have dower in the money paid as compensation for its appropriation to the public.[44] The effect of condemnation in the lifetime of the husband is elsewhere considered.[45]

d. Sale to Satisfy Mortgage. Where a wife joins with her husband in a mortgage and the premises are sold upon a foreclosure after the husband's death, the widow is entitled to dower in any surplus remaining after the satisfaction of the mortgage debt and costs.[46] Where the foreclosure takes place before the husband's death the authorities differ as to the widow's right of dower in the surplus. In some states the right is protected and fully preserved,[47] but in other

Commerce *v.* Owens, 31 Md. 320, 1 Am. Rep. 60.

42. Price *v.* Hobbs, 47 Md. 359; Miller *v.* Miller, 42 Md. 631.

43. Berrien *v.* Berrien, 4 N. J. Eq. 37; Hoover *v.* Landis, 76 Pa. St. 354. The rule is that when land is directed by a testator to be sold and turned into money, courts of equity in dealing with the subject will consider it as personalty. See CONVERSION, 9 Cyc. 830. But where such proceeds are directed to be reinvested in land they will be regarded as so invested, and the widow will be entitled to dower in the fund, although it has not been so invested. Haggard *v.* Rout, 6 B. Mon. (Ky.) 247.

44. Bonner *v.* Peterson, 44 Ill. 253; *In re* Hall, L. R. 9 Eq. 179, 39 L. J. Ch. 392.

45. See *infra*, VIII, D, 8, b.

46. *Delaware.*— Cornog *v.* Cornog, 3 Del. Ch. 407.

Kentucky.— Willet *v.* Beatty, 12 B. Mon. 172.

Michigan.— Burrall *v.* Clark, 61 Mich. 624, 28 N. W. 739; Burrall *v.* Bender, 61 Mich. 608, 28 N. W. 731.

New Jersey.— Burnet *v.* Burnet, 46 N. J. Eq. 144, 18 Atl. 374; Brown *v.* Richards, 17 N. J. Eq. 32; Hinchman *v.* Stiles, 9 N. J. Eq. 361; Hartshorne *v.* Hartshorne, 2 N. J. Eq. 349.

New York.— Elmendorf *v.* Lockwood, 57 N. Y. 322 [*affirming* 4 Lans. 393]; Simar *v.* Canaday, 53 N. Y. 298, 13 Am. Rep. 523; Mathews *v.* Duryee, 3 Abb. Dec. 220, 4 Keyes 525 [*affirming* 45 Barb. 69]; Vartie *v.* Underwood, 18 Barb. 561; Denton *v.* Nanny, 8 Barb. 618; New York L. Ins. Co. *v.* Mayer, 19 Abb. N. Cas. 92 [*affirming* 14 Daly 318]; Snelling *v.* McIntyre, 6 Abb. N. Cas. 469; Hawley *v.* Bradford, 9 Paige 200, 37 Am. Dec. 390; Titus *v.* Neilson, 5 Johns. Ch. 452; Tabele *v.* Tabele, 1 Johns. Ch. 45; Smith *v.* Jackson, 2 Edw. 28.

Ohio.— State Bank *v.* Hinton, 21 Ohio St. 509; Baker *v.* Fetters, 16 Ohio St. 596; Savings Soc. *v.* Drake, 10 Ohio Cir. Ct. 59, 6 Ohio Cir. Dec. 31; Holmes *v.* Book, 1 Ohio N. P. 58.

Rhode Island.—Chaffee *v.* Franklin, 11 R. I. 578.

South Carolina.—Keith *v.* Trapier, 1 Bailey Eq. 63.

Tennessee.— Hopkins *v.* Bryant, 85 Tenn. 520, 3 S. W. 827; Thompson *v.* Cochran, 7 Humphr. 72, 46 Am. Dec. 68.

Contra, Dean *v.* Phillips, 17 Ind. 406.

See 17 Cent. Dig. tit. "Dower," § 32.

Statutory provision.— The widow's dower in the surplus arising from a sale of mortgaged premises is protected by statute in Michigan. Burrall *v.* Bender, 61 Mich. 608, 28 N. W. 731. The right of the widow, under the Indiana statute, to one third of the real estate of her deceased husband is absolute against creditors, unless by joining with her husband she has waived her right, and even then the waiver operates only in favor of the mortgagee. Perry *v.* Borton, 25 Ind. 274. See, generally, DESCENT AND DISTRIBUTION.

47. *Kentucky.*—Tisdale *v.* Risk, 7 Bush 139.

New Jersey.— Schmitt *v.* Willis, 40 N. J. Eq. 515, 4 Atl. 767.

New York.— Mills *v.* Van Voorhies, 20 N. Y. 412; Mathews *v.* Duryee, 3 Abb. Dec. 220, 4 Keyes 525; Raynor *v.* Raynor, 21 Hun 36; Elmendorf *v.* Lockwood, 4 Lans. 393; Jackson *v.* Edwards, 7 Paige 386. *Contra*, Frost *v.* Peacock, 4 Edw. 678.

Ohio.— Unger *v.* Leiter, 32 Ohio St. 210.

Rhode Island.— De Wolf *v.* Murphy, 11 R. I. 630.

South Carolina.—Keith *v.* Trapier, 1 Bailey Eq. 63.

Virginia.— Robinson *v.* Schacklett, 29 Gratt. 99.

See 17 Cent. Dig. tit. "Dower," § 32; and *infra*, VIII, B, 2.

Statutes in Kentucky provide that if the wife joins in a conveyance creating a lien upon her husband's lands, and the lands so encumbered are sold to satisfy such lien, she shall not be endowed thereof, but may have compensation out of the surplus. Gen. St. c. 52, art. 4, § 5. See Schweitzer *v.* Wagner, 94 Ky. 458, 22 S. W. 883, 15 Ky. L. Rep. 229; Tisdale *v.* Risk, 7 Bush 139.

In Virginia the statute provides that if a

states such surplus is held to belong absolutely to the husband freed from dower rights and subject to the claims of the husband's creditors and heirs.[48] As a general rule the widow is entitled to dower in the surplus proceeds of her husband's lands after satisfying a mortgage for the purchase-money.[49]

9. Personal Property and Choses in Action. As has already been noticed[50] the definition of dower at common law and generally under the statutes confines its application to real property, and a widow is not entitled to dower in her husband's personal property or choses in action.[51] In a few states, however, the statute gives "dower" in personal property also.[52] Where personalty settled, upon marriage, to the use of the parties for life, with remainder to their issue, is converted into land by the husband after the death of the wife, his second wife will be entitled to dower in the land, although it is in other respects to be treated as personalty.[53]

10. Insurance Money. Where insured buildings on an estate in which the widow is entitled to dower have been burned after the death of the husband, she is entitled to a portion of the insurance money.[54]

B. Estates and Interests — 1. Estates of Inheritance — a. In General. Dower, from its nature and essential characteristics, only applies to estates of inheritance, legal or equitable, and the husband must have had such an estate, at some time during the coverture, or by statute in some states at the time of his death, or the widow has no dower.[55] Since the dower of the widow is a mere continuance of the estate of her husband, if his estate were less than one of

surplus of the proceeds remain after satisfying the lien or encumbrance, in the creation of which the wife had joined, a court of equity may make such order as may seem to it proper to secure her right. Code (1887) § 2269. See Robinson *v.* Shacklett, 29 Gratt. 99.

48. Kauffman *v.* Peacock, 16 Ill. App. 582; Newhall *v.* Lynn Five Cents Sav. Bank, 101 Mass. 428, 3 Am. Rep. 387.

49. *Kentucky.*— Ratcliffe *v.* Mason, 92 Ky. 190, 17 S. W. 438, 13 Ky. L. Rep. 551.

New York.— Blydenburgh *v.* Northrop, 13 How. Pr. 289.

Ohio.— Fox *v.* Pratt, 27 Ohio St. 512; Culver *v.* Harper, 27 Ohio St. 464.

Tennessee.— Thompson *v.* Cochran, 7 Humphr. 72, 46 Am. Dec. 68.

West Virginia.—George *v.* Cooper, 15 W. Va. 666.

Wisconsin.— Thompson *v.* Lyman, 28 Wis. 266, holding that the widow's dower only attaches to such surplus, although she did not join in the mortgage.

See 17 Cent. Dig. tit. "Dower," § 32.

50. See *supra*, I.

51. *Arkansas.*— A widow is not entitled to dower in the choses in action of her husband. Mulhollan *v.* Thompson, 13 Ark. 232; Hill *v.* Mitchell, 5 Ark. 608.

Iowa.— *In re* Davis, 36 Iowa 24.

Maine.— Dow *v.* Dow, 36 Me. 211; Brackett *v.* Leighton, 7 Me. 383; Perkins *v.* Little, 1 Me. 148.

Missouri.— Bryant *v.* McCune, 49 Mo. 546.

South Carolina.— Lamar *v.* Scott, 3 Strobh. 562.

Conversion of realty into personalty see Conversion, 9 Cyc. 852.

52. Stull *v.* Graham, 60 Ark. 461, 31 S. W. 46; Hatcher *v.* Buford, 60 Ark. 169, 29 S. W. 641, 27 L. R. A. 507; Hewitt *v.* Cox, 55 Ark. 225, 15 S. W. 1026, 17 S. W. 873; Lenow *v.* Fones, 48 Ark. 557, 4 S. W. 56; Street *v.* Saunders, 27 Ark. 554; Haynes *v.* Bessellieu, 25 Ark. 499; Menifee *v.* Menifee, 8 Ark. 9; Hill *v.* Mitchell, 5 Ark. 608; Woodberry *v.* Matherson, 19 Fla. 778; Garland *v.* Rowan, 2 Sm. & M. (Miss.) 617. And see Descent and Distribution.

53. Potts *v.* Cogdell, 1 Desauss. (S. C.) 454.

54. Campbell *v.* Murphy, 55 N. C. 357.

55. *Arkansas.*— Kirby *v.* Vantrece, 26 Ark. 368.

Delaware.— Bush *v.* Bush, 5 Del. Ch. 144.

Illinois.— Nicoll *v.* Todd, 70 Ill. 295; Atkin *v.* Merrell, 39 Ill. 62; Nicoll *v.* Ogden, 29 Ill. 323, 81 Am. Dec. 811; Davenport *v.* Farrar, 2 Ill. 314; Clybourn *v.* Pittsburg, etc., R. Co., 4 Ill. App. 463.

Maine.— Fickett *v.* Dyer, 19 Me. 58.

Maryland.— Lynn *v.* Gephart, 27 Md. 547; Spangler *v.* Stanler, 1 Md. Ch. 36.

Nebraska.— Crawl *v.* Harrington, 33 Nebr. 107, 49 N. W. 1118.

New Jersey.— Kennedy *v.* Kennedy, 29 N. J. L. 185; Tenbrook *v.* Jessup, 60 N. J. Eq. 234, 46 Atl. 516.

New York.— Jourdan *v.* Haran, 56 N. Y. Super. Ct. 185, 3 N. Y. Suppl. 541; Dunham *v.* Osborn, 1 Paige 634.

North Carolina.— Barnes *v.* Raper, 90 N. C. 189; Houston *v.* Smith, 88 N. C. 312.

Ohio.— Miller *v.* Wilson, 15 Ohio 108; Jaquess *v.* Hamilton County, 1 Disn. 121, 12 Ohio Dec. (Reprint) 524, 2 Wkly. L. Gaz. 81.

Oregon.— Farnum *v.* Loomis, 2 Oreg. 29.

Pennsylvania.— Pritts *v.* Ritchey, 29 Pa. St. 71; Dodson *v.* Davis, 2 Yeates 168; Myer *v.* Philadelphia, 2 Leg. Rec. 39.

Tennessee.— Apple *v.* Apple, 1 Head 348.

inheritance her right could not extend beyond his own life.[56] While birth of issue is in no way a prerequisite to the existence of the widow's dower, the estate of the husband to which her dower attaches must be one to which her issue by possibility may or might have inherited if living.[57]

b. Exclusion of Dower by Will. Where a testator violates no rule of law he may so dispose of his lands for the benefit of a particular person that the latter's wife will not be entitled to dower therein.[58]

c. Estates Exchanged. The common law recognizes the rule that if a husband exchanges lands of which he is seized of an estate of inheritance for other lands his widow shall not have dower of both, but must make her election between the lands given or those taken in exchange.[59] To put the wife to her election there must be a mutual grant of equal interests in the respective parcels of land.[60] The statutes in some of the states recognize this rule.[61]

d. Estates in Common or Joint Tenancy. As has already been noticed, a wife is not entitled at common law to dower in an estate held by her husband as a joint tenant; but she is entitled to dower in estates held by him in common, and in most states the same is now true of estates in joint tenancy under statutes abolishing the right of survivorship and providing that the share of a joint tenant shall go to his heirs, or changing estates in joint tenancy to estates in common.[62] If partition of an estate in common is made during the lifetime of the husband his wife's dower is limited to the portion set apart to him.[63] But partition need not precede the setting aside of the widow's dower. It may first be set aside and partition be afterward made.[64]

England.— *In re* Michell, [1892] 2 Ch. 87, 61 L. J. Ch. 326, 66 L. T. Rep. N. S. 366, 40 Wkly. Rep. 375.

See 17 Cent. Dig. tit. "Dower," § 36 *et seq.*; and *supra*, V, C, 2.

56. 1 Washburn Real Prop. (6th ed.) § 362.

57. Park Dower 47; and cases above cited. The general test of what tenements are subject to dower is to inquire whether the widow's issue, if any, would have been entitled to inherit them from the husband as his heir. If they are so entitled she is endowed. 2 Blackstone Comm. 131.

The widow of a tenant in tail who dies without issue is entitled to dower. Whiting *v.* Whiting, 4 Conn. 179; Smith's Appeal, 23 Pa. St. 9; Chaplin *v.* Chaplin, 3 P. Wms. 229, 24 Eng. Reprint 1040. See also Northcut *v.* Whipp, 12 B. Mon. (Ky.) 65.

Entry by issue in tail.— Whiting *v.* Whiting, 4 Conn. 179.

58. Thompson *v.* Vance, 1 Metc. (Ky.) 669; Germond *v.* Jones, 2 Hill (N. Y.) 569.

59. Hartwell *v.* De Vault, 159 Ill. 325, 42 N. E. 789; Stevenson *v.* Brasher, 90 Ky. 23, 13 S. W. 242, 11 Ky. L. Rep. 799; Mahoney *v.* Young, 3 Dana (Ky.) 588, 28 Am. Dec. 114; Stevens *v.* Smith, 4 J. J. Marsh. (Ky.) 64, 20 Am. Dec. 205; Mosher *v.* Mosher, 32 Me. 412; Wilcox *v.* Randall, 7 Barb. (N. Y.) 633.

The rule is not applicable where the deeds contain no evidence of an exchange, as where A and B agree by parol to exchange farms and in pursuance of such agreement convey to each other their farms by deeds in common form. In such a case the widow of A was held entitled to be endowed in both farms. Cass *v.* Thompson, 1 N. H. 65, 8 Am. Dec. 36.

Rescission of exchange for fraud.— Where a husband's seizin in land for which he has traded is defeated by his election to rescind the trade for fraud, his wife's dower therein necessarily fails. Hammond *v.* Pennock, 61 N. Y. 145.

Exchange after husband's death.— A widow is dowable in land conveyed to the husband's estate after his death in exchange of land in which she had been dowable. De Witt *v.* De Witt, 202 Pa. St. 255, 51 Atl. 987.

60. Coke Litt. 31*b*; Perkins, § 319. And see Hartwell *v.* De Vault, 159 Ill. 325, 42 N. E. 789; Wilcox *v.* Randall, 7 Barb. (N. Y.) 633; Boykin *v.* Springs, 66 S. C. 362, 44 S. E. 934.

What does not constitute exchange.—A conveyance of lands in which the wife of the grantor joins in consideration of a note, for which the grantee transfers an undivided interest in other lands and also other property, does not constitute an "exchange" of the lands so as to prevent the wife from claiming dower in the lands aequired, and also retaining the consideration received for the release of her dower in the lands conveyed. Hartwell *v.* De Vault, 159 Ill. 325, 42 N. E. 789. If the lands exchanged are of unequal value, one paying the difference in value to the other, the transaction takes the character of an ordinary transfer of lands, and the widow may claim dower in both parcels. Mosher *v.* Mosher, 32 Me. 412.

61. See Hartwell *v.* De Vault, 159 Ill. 325, 42 N. E. 789; Wilcox *v.* Randall, 7 Barb. (N. Y.) 633.

62. See *supra*, V, C, 9.

63. Potter *v.* Wheeler, 13 Mass. 504; Wilkinson *v.* Parish, 3 Paige (N. Y.) 653; Docktermann *v.* Elder, 11 Ohio Dec. (Reprint) 506, 27 Cinc. L. Bul. 195.

64. Harris *v.* Coats, 75 Ga. 415; Ross *v.* Wilson, 58 Ga. 249.

e. Estates by Entirety. An estate by the entirety is not an estate of inheritance and is not subject to dower.[65]

f. Partnership Estates — (i) *In General.* Partnership real property purchased with partnership funds and held for the purposes of the partnership, although in law regarded as held by the partners as tenants in common, in equity is regarded as an estate of the partnership to be sold and applied if necessary for the payment of the partnership debts.[66] To the extent necessary for the adjustment of the partnership obligations and the payment of any balance found to be due from one partner to the other on winding up the partnership affairs, such property is in equity deemed to be changed to personalty.[67]

(ii) *When Dower Rights Attach.* The general rule seems to be in this country that after the satisfaction of the debts of the partnership and the claims of the other partners the widow of the deceased partner is entitled to dower in the partnership real estate.[68] Prior to the payment of the partnership debts dower will not attach, although the title to the property was taken in the individual

On partition between a widow and the heirs of lands formerly held by a decedent and his wife as tenants in common, the widow is entitled to dower in the part allotted to the heirs. Dehoney *v.* Bell, 30 S. W. 400, 17 Ky. L. Rep. 76.

65. Roulston *v.* Hall, 66 Ark. 305, 50 S. W. 690, 74 Am. St. Rep. 97; McCreary *v.* McCorkle, (Tenn. Ch. App. 1899) 54 S. W. 53. See, generally, Husband and Wife.

66. 1 Washburn Real Prop. (6th ed.) § 373.

67. Darrow *v.* Calkins, 154 N. Y. 503, 49 N. E. 61, 61 Am. St. Rep. 637, 48 L. R. A. 299. See, generally, Partnership.

68. *Alabama.*—Espy *v.* Comer, 76 Ala. 501; Brewer *v.* Browne, 68 Ala. 210; Andrew *v.* Brown, 21 Ala. 437, 56 Am. Dec. 252.

Arkansas.— Welch *v.* McKenzie, 66 Ark. 251, 50 S. W. 505; Lenow *v.* Fones, 48 Ark. 557, 4 S. W. 56. See also Drewry *v.* Montgomery, 28 Ark. 256.

Florida.— Loubat *v.* Nourse, 5 Fla. 350.

Georgia.—Ferris *v.* Van Ingen, 110 Ga. 102, 35 S. E. 347.

Illinois.— Trowbridge *v.* Cross, 117 Ill. 109, 7 N. E. 347; Bopp *v.* Fox, 63 Ill. 540. See also Strong *v.* Lord, 107 Ill. 25.

Indiana.— Grissom *v.* Moore, 106 Ind. 296, 6 N. E. 629, 55 Am. Rep. 742; Hale *v.* Plummer, 6 Ind. 121.

Iowa.— Mallory *v.* Russell, 71 Iowa 63, 32 N. W. 102, 60 Am. Rep. 776.

Kentucky.— Ratcliffe *v.* Mason, 92 Ky. 190, 17 S. W. 438, 13 Ky. L. Rep. 551; Davidson *v.* Richmond, 69 S. W. 794, 24 Ky. L. Rep. 699; Sherley *v.* Thomasson, 1 S. W. 530, 8 Ky. L. Rep. 351; Given *v.* Clark, 7 Ky. L. Rep. 292. And see Lowe *v.* Lowe, 13 Bush 688; Casky *v.* Casky, 5 Ky. L. Rep. 769.

Maryland.— See Goodburn *v.* Stevens, 5 Gill 1.

Massachusetts.— Shearer *v.* Shearer, 98 Mass. 107; Howard *v.* Priest, 5 Metc. 582; Dyer *v.* Clark, 5 Metc. 562, 49 Am. Dec. 697; Burnside *v.* Merrick, 4 Metc. 537. And see Wilcox *v.* Wilcox, 13 Allen 252.

Michigan.— Free *v.* Beatley, 95 Mich. 426, 45 N. W. 910.

Minnesota.—Woodward-Holmes Co. *v.* Nudd, 58 Minn. 236, 59 N. W. 1010, 49 Am. St. Rep. 503, 27 L. R. A. 340.

Mississippi.— Sykes *v.* Sykes, 49 Miss. 190; Wooldridge *v.* Wilkins, 3 How. 360.

Missouri.—Young *v.* Thrasher, 115 Mo. 222, 21 S. W. 1104; Willet *v.* Brown, 65 Mo. 138, 27 Am. Rep. 265; Collins *v.* Warren, 29 Mo. 236; Duhring *v.* Duhring, 20 Mo. 174.

New Jersey.—Morris *v.* Hinze, 6 N. J. L. J. 240; Campbell *v.* Campbell, 30 N. J. Eq. 415; Uhler *v.* Semple, 20 N. J. Eq. 288.

New York.— Greenwood *v.* Marvin, 111 N. Y. 423, 19 N. E. 228; Riddell *v.* Riddell, 85 Hun 482, 33 N. Y. Suppl. 99; Dawson *v.* Parsons, 10 Misc. 428, 31 N. Y. Suppl. 78; Smith *v.* Jackson, 2 Edw. 28.

North Carolina.— Sparger *v.* Moore, 117 N. C. 449, 23 S. E. 359; Ferguson *v.* Hass, 62 N. C. 113; Stroud *v.* Stroud, 61 N. C. 525; Patton *v.* Patton, 60 N. C. 572, 86 Am. Dec. 448.

Ohio.— Sumner *v.* Hampson, 8 Ohio 328, 32 Am. Dec. 722; Greene *v.* Greene, 1 Ohio 535, 13 Am. Dec. 642.

Pennsylvania.— Foster's Appeal, 74 Pa. St. 391, 15 Am. Rep. 553; Warfel *v.* Calder, 8 Lanc. Bar 205.

Rhode Island.— Mowry *v.* Bradley, 11 R. I. 370.

South Carolina.— Bowman *v.* Bailey, 20 S. C. 550.

Vermont.— Hughes *v.* Allen, 66 Vt. 95, 28 Atl. 882.

West Virginia.—Martin *v.* Smith, 25 W. Va. 579.

United States.— Clay *v.* Freeman, 118 U. S. 97, 8 S. Ct. 964, 30 L. ed. 104; *In re* Ransom, 17 Fed. 331; Hiscock *v.* Jaycock, 12 Fed. Cas. No. 6,531.

See 17 Cent. Dig. tit. "Dower," § 62; and cases cited in the notes following.

In Arkansas, where the statute gives dower on personal property, it has been held that upon the death of a member of a partnership his widow will take her dower in the surplus of the real estate of the partnership which remains after paying the partnership debts, for life, as in real estate, and not absolutely, as in personal property, unless there was an agreement between the partners for a conversion and sale of the lands after the partnership affairs should be settled, and a distribution of the proceeds. In that case she

name of the husband and not in the name of the firm.[69] But where the real estate has once vested in the husband, the dower right of the wife cannot be defeated by a subsequent appropriation of the property by a firm of which the husband was a member.[70] The entire question of the widow's right of dower in partnership property is controlled by the agreement of the parties that the property is to be applied and treated as assets of the firm. If it is understood and agreed that such property is to remain the individual property of the members of the firm it retains its character as realty and will be subject to dower in the same manner and to the same extent as other real property.[71]

(III) *ENGLISH RULE.* The English rule as to partnership real property seems to be that whether purchased or used for partnership purposes or not, provided only that it was intended by the partners to constitute a part of the partnership property, it becomes *ipso facto* in the view of a court of equity converted into personalty for all purposes, as well for the purpose of the adjustment of the partnership debts and the claims of the partners *inter se* as for the purpose of determining the rights of the personal representatives or widows of deceased partners.[72] The English rule is recognized in Canada,[73] and has been to a limited extent adopted in Virginia.[74]

2. ESTATES LESS THAN OF INHERITANCE — a. Interests in Public Lands. A preëmption interest in public lands under the laws of the United States or of a state is a preferential right created by statute to purchase such land at a fixed price within a limited time. It is not in law or equity an estate of inheritance prior to making the payments of which a widow can be endowed.[75] The same is true of the interest of the locator of a mining claim prior to the payment of

would take dower absolutely as in personalty. Lenow *v.* Fones, 48 Ark. 557, 4 S. W. 56.

69. Bopp *v.* Fox, 63 Ill. 540; Mallory *v.* Russell, 71 Iowa 63, 32 N. W. 102, 60 Am. Rep. 776; Willet *v.* Brown, 65 Mo. 138, 27 Am. Rep. 265; *In re* Ransom, 17 Fed. 331. And see the other cases in the preceding note; and *infra*, VII, E.

70. Ratcliffe *v.* Mason, 92 Ky. 190, 17 S. W. 438, 13 Ky. L. Rep. 551; Perin *v.* Megibben, 53 Fed. 86, 3 C. C. A. 443.

71. Wooldridge *v.* Wilkins, 3 How. (Miss.) 360; Hughes *v.* Allen, 66 Vt. 95, 28 Atl. 882. Where the purchase of lands was not in pursuit of the partnership business, although purchased with partnership funds, such lands are subject to a right of dower, where it is not necessary to have recourse to the land in order to pay the firm debts, and where there is no special agreement between the parties that the land shall be considered as personalty. Markham *v.* Merritt, 7 How. (Miss.) 437, 40 Am. Dec. 76.

72. Darrow *v.* Calkins, 154 N. Y. 503, 49 N. E. 61, 61 Am. St. Rep. 637, 48 L. R. A. 299; Essex *v.* Essex, 20 Beav. 442; Darby *v.* Darby, 3 Drew. 495, 2 Jur. N. S. 271, 25 L. J. Ch. 371, 4 Wkly. Rep. 413; English Partn. Act, 1890 (53 & 54 Vict. c. 39), §§ 20, 22.

73. *In re* Music Hall Block, 8 Ont. 225.

74. It is settled law in Virginia, as it is in England, that real estate purchased with partnership funds for partnership purposes is so far considered as personalty as not to be subject to dower or curtesy in favor of the consort of a deceased partner. Parrish *v.* Parrish, 88 Va. 529, 14 S. E. 325. See also Deering *v.* Kerfoot, 89 Va. 491, 16 S. E. 671; Wheatley *v.* Calhoun, 12 Leigh (Va.) 264, 37 Am. Dec. 654; Pierce *v.* Trigg, 10 Leigh (Va.) 406.

75. *Alabama.*— Rogers *v.* Rawlings, 8 Port. 325 (lands purchased but subsequently forfeited for default in payments); Chinnubbee *v.* Nicks, 3 Port. 362 (land selected by Indian but conveyed by him to a purchaser); Gillespie *v.* Somerville, 3 Stew. & P. 447 (lands purchased from a town but not fully paid for).

Arkansas.— Drenner *v.* Walker, 21 Ark. 539.

Illinois.— Davenport *v.* Farrar, 2 Ill. 314.

Iowa.— Langworthy *v.* Heeb, 46 Iowa 64; Bowers *v.* Keesecker, 14 Iowa 301 [*overruling* Davis *v.* O'Ferrall, 4 Greene 358, so far as it pertains to the right of a widow to dower in lands to which the husband had only a preëmption right].

Michigan.— Beebe *v.* Lyle, 73 Mich. 114, 40 N. W. 944, school lands purchased from the state.

Missouri.— Wells *v.* Moore, 16 Mo. 478.

Nebraska.— Crawl *v.* Harrington, 33 Nebr. 107, 49 N. W. 1118, school lands purchased from the state.

Pennsylvania.— Dodson *v.* Davis, 2 Yeates 168, land held under warrant from state.

Tennessee.— Tipton *v.* Davis, 5 Hayw. 278. See also *infra*, VI, B, 5, d, (I), note 15.

Where the husband sold his preëmption claim and bound himself to procure title to the land and convey to the purchaser, it was held that he had no beneficial interest in the title he subsequently obtained from the United States and that his widow was not entitled to dower therein. Langworthy *v.* Heeb, 46 Iowa 64.

money for the grant of a patent as required by statute. It is only a right to the exclusive possession of the land, based on the performance of certain conditions subsequent, and is not an estate which can be subjected to dower.[76] The rule does not apply, however, where the husband had complied with the statutory requisites, but a title in him was not perfected at the time of his death.[77]

b. Estates For Life. Where an estate is created in a husband for his life only, and there is no inheritable quality attached thereto, and the title to the property passes to another, there is no estate in him to which dower can attach;[78] but if the title passes to his heirs the widow may have her dower therein.[79] It has been held that a husband cannot deprive his wife of her dower by taking a conveyance of land purchased with his own money during coverture to himself for life, with remainder to his child.[80]

c. Leasehold Interests. A perpetual leasehold estate is not an estate of inheritance within the meaning of the statute allowing dower in all lands of which the husband was seized as of an estate of inheritance.[81] Nor is a leasehold estate for a term of years an estate to which dower will attach, although the term is for ninety-nine years,[82] or for nine hundred and ninety-nine years,[83] unless it is otherwise provided by statute.[84]

3. DETERMINABLE ESTATES — a. General Rule. The general rule is that if the estate of the husband be in its own nature an estate of inheritance, the fact that it has a determinable quality attached to it will not prevent the inception of a

76. Black *v.* Elkhorn Min. Co., 163 U. S. 445, 16 S. Ct. 1101, 41 L. ed. 221 [*affirming* 52 Fed. 859, 3 C. C. A. 312].

77. Lewis *v.* Moorman, 7 Port. (Ala.) 522; Shields *v.* Lyon, Minor (Ala.) 278; Johnson *v.* Parcels, 48 Mo. 549; Love *v.* Love, 8 Oreg. 23 (holding that, under section 4 of the United States Donation Law of 1856, providing that where a donee dies before making final proof his widow is entitled to dower in his portion of the claim, if such donee dies after four years' residence and cultivation, but before final proof is made, his widow is entitled to dower in the donee's interest); Ebey *v.* Ebey, 1 Wash. Terr. 185 (donation claim). Where a married man moved on certain public lands and entered the same under a land warrant it was held that the dowable interest of his wife attached, which could not be defeated except by conveyance or execution or judicial sale, and that the mere fact that a patent did not issue until after the husband alone had conveyed the land was immaterial. Purcell *v.* Lang, 108 Iowa 198, 78 N. W. 1005. See also *infra*, VI, B, 5, d, (I), note 15.

78. *Alabama.*— Edwards *v.* Bibb, 54 Ala. 475.

Kentucky.— Thompson *v.* Vance, 1 Metc. 669.

Massachusetts.—Trumbull *v.* Trumbull, 149 Mass. 200, 21 N. E. 366, 4 L. R. A. 117.

Mississippi.— Fisher *v.* Grimes, Sm. & M. Ch. 107.

Missouri.— Burris *v.* Page, 12 Mo. 358.

New York.— Harriot *v.* Harriot, 25 N. Y. App. Div. 245, 49 N. Y. Suppl. 447; Gillis *v.* Brown, 5 Cow. 388.

North Carolina.— Alexander *v.* Cunningham, 27 N. C. 430.

79. Johnson *v.* Jacob, 11 Bush (Ky.) 646; Jacob *v.* Jacob, 4 Bush (Ky.) 110. But where a will devised to the testator's son certain real property to be held by him for his use and benefit, and "then to be divided off and distributed amongst his children, as he may think proper. That is to say: my land to be used by him and the profits thereof to be to him; but the lands to be by him divided and distributed among his children, as he may think proper," it was held to create in the son an estate for life only in the lands, with the power to divide it, either in his lifetime or at his death, among his children, and it was held that the widow had no dower in such lands, notwithstanding the fact that the lands might descend under the power of appointment to the children. Alexander *v.* Cunningham, 27 N. C. 430.

80. Crecelius *v.* Horst, 11 Mo. App. 304. See also *infra*, VIII, D, 15, b, (IV).

81. Oliver *v.* Jones, 6 Ohio S. & C. Pl. Dec. 194, 3 Ohio N. P. 129.

82. Spangler *v.* Stanler, 1 Md. Ch. 36 (lease for ninety-nine years renewable forever); Ware *v.* Washington, 6 Sm. & M. (Miss.) 737; Abbott *v.* Bosworth, 7 Ohio Dec. (Reprint) 300, 2 Cinc. L. Bul. 92 [*affirmed* in 36 Ohio St. 605].

83. Whitmire *v.* Wright, 22 S. C. 446, 53 Am. Rep. 725. An estate in land for the term of nine hundred and ninety-nine years subject to the payment of an annual rent is personal property, and the widow of the tenant cannot claim dower out of it. Goodwin *v.* Goodwin, 33 Conn. 314.

84. In Arkansas where dower is given in personal property, it is held that a lease of whatever duration is but a chattel interest, and upon the death of the leaseholder his widow will take dower in it absolutely as in personal property, and not for life as in real estate. Lenow *v.* Fones, 48 Ark. 557, 4 S. W. 56.

In Missouri dower is assignable in leasehold estates, and the assignment thereof is

right of dower; but when that estate by reason of its determinable quality is avoided or defeated the right of dower falls with it.[85]

b. Estates Defeasible by Reëntry. Where the rightful owner of land is disseized by wrongful entry of the disseizor, the estate of the disseizor is terminated by the reëntry of the rightful owner, and the owner is restored to all his original rights. By such restoration therefore the right of dower of the disseizor's wife is defeated.[86]

c. Conditional Estates. If the husband's estate of inheritance is held upon condition, by the happening of which the estate will be terminated, the wife's dower will also be dependent upon the happening of such condition, so that if the estate is terminated upon the happening of the condition and entry therefor the right of dower which depends upon it is also terminated.[87]

d. Termination of Estate by Exercise of Power of Appointment. Where lands are granted to a person to such uses as such person shall by deed or will appoint, and in default of and until such appointment to the use of such person in fee the exercise of such power during his lifetime defeats his wife's right of dower;[88] but if he dies before exercising such power his wife will be entitled to dower.[89]

e. Executory Devise. The question as to whether the widow of one to whom by executory devise an estate is given in fee simple, then over to another if he should die without issue, is entitled to dower in such estate, is one which has given rise to great diversity of opinion and elicited much learned discussion.[90] The prevailing doctrine both in this country and in England is that the widow's dower is not thus defeated.[91]

4. Estates in Expectancy — a. In General. As we have seen since seizin of an estate of inheritance in real property at some time during the coverture is essential

governed by the same rules which prevail in the case of estates of inheritance. Rankin *v.* Oliphant, 9 Mo. 239.

85. 1 Scribner Dower 289.

86. Park Dower 141, 142; 1 Scribner Dower 290. And see Beardslee *v.* Beardslee, 5 Barb. (N. Y.) 324.

87. 4 Kent Comm. 49; 1 Scribner Dower 291; Beardslee *v.* Beardslee, 5 Barb. (N. Y.) 324; Rhode Island Hospital Trust Co. *v.* Harris, 20 R. I. 408, 39 Atl. 750.

Conditional devise.— Where a testator devised as follows: "I give to my son John, all my lands where I now dwell unto him, his heirs and assigns forever, though on this proviso, if he shall again become *compos mentis*, and of sound mind and understanding, and capable of taking care of a family, or should obtain lawful issue who shall be *compos mentis*; but for want of that, then my son Abraham shall have all the lands devised to my son John, to him the said Abraham and his heirs;" and J remained *non compos mentis* during his lifetime, and on the testator's decease A took possession of the premises and died seized, in the lifetime of J, it was held that A took such an inheritance under this devise as entitled his wife to dower in the premises. Jackson *v.* Kip, 8 N. J. L. 241.

88. Thompson *v.* Vance, 1 Metc. (Ky.) 669 (where a deed of gift, including realty, contained a special power in the nature of an appointment, which the grantee exercised by his last will according to the terms of the power, and it was held that his widow was not entitled to dower in the lands so disposed of); Ray *v.* Pung, 5 B. & Ald. 561, 7 E. C. L. 308; Wilde *v.* Fort, 4 Taunt. 334, 13 Rev. Rep. 616; Maundrell *v.* Maundrell, 10 Ves. Jr. 246, 32 Eng. Reprint 839; Cox *v.* Chamberlain, 4 Ves. Jr. 631, 4 Rev. Rep. 311, 31 Eng. Reprint 325.

89. Chinnubbee *v.* Nicks, 3 Port. (Ala.) 362, 366; Peay *v.* Peay, 2 Rich. Eq. (S. C.) 409 [*citing* Lovie's Case, 10 Coke 78; Maundrell *v.* Maundrell, 10 Ves. Jr. 246, 32 Eng. Reprint 839].

The devisee of land, subject to a power given to the executors to sell and convey, has a vested estate, of which on his death after the testator's death and before the exercise of the power of sale his widow is entitled to dower. Timpson's Estate, 15 Abb. Pr. N. S. (N. Y.) 230.

90. Butler Coke Litt. 241*a* note; Park Dower 177–179; 1 Scribner Dower 297.

91. Where a devised estate, defeasible by the death of the devisee without heirs, is so terminated, the wife of the devisee is entitled to dower in the estate.

Kentucky.— Northcut *v.* Whipp, 12 B. Mon. 65; Fry *v.* Scott, 11 S. W. 426, 10 Ky. L. Rep. 1013; Daniel *v.* McManama, 1 Bush 544.

Maryland.— Chew *v.* Chew, 1 Md. 163.

New Jersey.— Kennedy *v.* Kennedy, 29 N. J. L. 185.

North Carolina.— Pollard *v.* Slaughter, 92 N. C. 72, 53 Am. Rep. 402.

Ohio.— Where a husband dies seized of realty in fee, subject to a devise over in case of his dying before another, his wife on his so dying is entitled to dower. Myer *v.* Moore, 12 Cinc. L. Bul. 90.

to entitle the wife to the right of dower therein,[92] where a husband has a remainder or reversion expectant on an outstanding particular freehold estate the wife is not entitled to dower,[93] unless by a surrender or purchase of the outstanding particular estate to or by the husband, or by the death of the immediate freeholder or otherwise, the estate becomes entire during coverture,[94] or unless as in Pennsylvania the rule has been changed by statute.[95] Where the reversion is not after a

Pennsylvania.— Evans *v.* Evans, 9 Pa. St. 190; Lovett *v.* Lovett, 10 Phila. 537.

South Carolina.— Milledge *v.* Lamar, 4 Desauss. 617.

Virginia.— Medley *v.* Medley, 27 Gratt. 568; Jones *v.* Hughes, 27 Gratt. 560; Taliaferro *v.* Burwell, 4 Call 321. *Compare* Corr *v.* Porter, 33 Gratt. 278.

West Virginia.— Tomlinson *v.* Nickell, 24 W. Va. 148.

See 17 Cent. Dig. tit. "Dower," § 44.

Contra.— Edwards *v.* Bibb, 54 Ala. 475.

The leading case in England on this question is Buckworth *v.* Thirkell, 3 B. & P. 652 note, 4 Dougl. 323, 10 Moore C. P. 235 note, 28 Rev. Rep. 674, 26 E. C. L. 502, where the principle was declared that the determination of an estate by operation of an executory devise does not defeat the right of the husband to be tenant by the curtesy, nor the widow of her right of dower. This case was followed in Doe *v.* Timins, 1 B. & Ald. 530; Moody *v.* King, 2 Bing. 447, 10 Moore C. P. 233, 9 E. C. L. 654; Goodmorst *v.* Goodmorst, 3 Prest. Abs. 392.

The reason for the rule.— In Kentucky where there was a devise to A and his heirs, with a proviso that if he should die without heir, the estate should go to his sisters, it was held that A's widow was entitled to dower upon the ground that in all cases where the husband is seized of such an estate that the issue of the wife, if she had any, would inherit it, she is entitled to dower, although the estate is limited over, upon his dying without issue, and he does die without issue. Northcut *v.* Whipp, 12 B. Mon. 65.

Estate for life only.— Where there is an express estate for life to one, and a power to him to appoint the estate among certain persons, the first taker gets but an estate for life, and his widow is not entitled to dower; and where the estate is not given expressly for life, but indefinitely to a devisee, with power to appoint, at his discretion or as he pleases, among certain named persons, or to a certain class, the better opinion in England is that the devise should be construed to be a devise for life, with a power to appoint the inheritance, unless the words of the will clearly negative such a construction. Alexander *v.* Cunningham, 27 N. C. 430.

92. See *supra*, VI, B, 1, a.

93. *Delaware.*— Bush *v.* Bush, 5 Houst. 245.

Illinois.— Kirkpatrick *v.* Kirkpatrick, 197 Ill. 144, 64 N. E. 267; Kellett *v.* Shepard, 139 Ill. 433, 28 N. E. 751, 34 N. E. 254; Strawn *v.* Strawn, 50 Ill. 33.

Kentucky.—Young *v.* Morehead, 94 Ky. 608, 23 S. W. 511, 15 Ky. L. Rep. 383; Carter *v.* McDaniel, 94 Ky. 564, 23 S. W. 507, 15 Ky. L. Rep. 349; Butler *v.* Cheatham, 8 Bush 594; Northcut *v.* Whipp, 12 B. Mon. 65; Arnold *v.* Arnold, 8 B. Mon. 202.

Maine.— Durham *v.* Angier, 20 Me. 242; Fickett *v.* Dyer, 19 Me. 58.

Massachusetts.— Hill *v.* Pike, 174 Mass. 542, 55 N. E. 324; Baker *v.* Baker, 167 Mass. 575, 46 N. E. 391; Watson *v.* Watson, 150 Mass. 84, 22 N. E. 438; Wilmarth *v.* Bridges, 113 Mass. 407; Brooks *v.* Everett, 13 Allen 457; Blood *v.* Blood, 23 Pick. 80; Eldredge *v.* Forrestal, 7 Mass. 253.

Missouri.— Von Arb *v.* Thomas, 163 Mo. 33, 63 S. W. 94; Martin *v.* Trail, 142 Mo. 85, 43 S. W. 655; Payne *v.* Payne, 119 Mo. 174, 24 S. W. 781; Gentry *v.* Woodson, 10 Mo. 224; Warren *v.* Williams, 25 Mo. App. 22.

New Hampshire.— Otis *v.* Parshley, 10 N. H. 403; Moore *v.* Esty, 5 N. H. 479; Fisk *v.* Eastman, 5 N. H. 240.

New York.— House *v.* Jackson, 50 N. Y. 161; Durando *v.* Durando, 23 N. Y. 331 [*affirming* 32 Barb. 529]; Jackson *v.* Walters, 86 N. Y. App. Div. 470, 83 N. Y. Suppl. 696; Stewart *v.* Crysler, 52 N. Y. App. Div. 597, 65 N. Y. Suppl. 483; Leach *v.* Leach, 21 Hun 381; Green *v.* Putnam, 1 Barb. 500.

North Carolina.— Houston *v.* Smith, 88 N. C. 312; Royster *v.* Royster, 61 N. C. 226; Weir *v.* Tate, 39 N. C. 264.

Ohio.— Oliver *v.* Jones, 6 Ohio S. & C. Pl. Dec. 194, 3 Ohio N. P. 129; Wood *v.* Phillips, 2 Ohio Cir. Ct. 136.

Rhode Island.— Sammis *v.* Sammis, 23 R. I. 499, 51 Atl. 105; Rhode Island Hospital Trust Co. *v.* Harris, 20 R. I. 408, 39 Atl. 750; Kenyon *v.* Kenyon, 17 R. I. 539, 23 Atl. 101, 24 Atl. 787; Gardner *v.* Greene, 5 R. I. 104.

Tennessee.— Lunsford *v.* Jarrett, 11 Lea 192; Gass *v.* Hawkins, 1 Tenn. Cas. 167, Thomps. Cas. 238. And see Vanleer *v.* Vanleer, 3 Tenn. Ch. 23.

Virginia.— Cocke *v.* Philips, 12 Leigh 248; Blow *v.* Maynard, 2 Leigh 29.

Wisconsin.—Dudley *v.* Dudley, 76 Wis. 567, 45 N. W. 602, 8 L. R. A. 814.

United States.—Robison *v.* Codman, 20 Fed. Cas. No. 11,970, 1 Sumn. 121.

England.— Duncomb *v.* Duncomb, 3 Lev. 437.

Canada.— Leitch *v.* McLellan, 2 Ont. 587; Pulker *v.* Evans, 13 U. C. Q. B. 546; Cumming *v.* Alguire, 12 U. C. Q. B. 330.

See 17 Cent. Dig. tit. "Dower," §§ 63, 64.

94. Strawn *v.* Strawn, 50 Ill. 33. If the husband purchases the estate for life upon which his own remainder depends, he has such a seizin as will give his wife dower. House *v.* Jackson, 50 N. Y. 161. And see Powers *v.* Jackson, 57 N. Y. 654.

95. Cote's Appeal, 79 Pa. St. 235; Starr's Estate, 16 Phila. (Pa.) 206; Martin's Estate, 1 Chest. Co. Rep. (Pa.) 512. *Compare* Shoe-

freehold, but after a term for years only, the owner of the inheritance is seized and possessed of it for the purposes of dower.[96]

b. Dower Out of Dower — (i) *In General.* It is a maxim of the common law of ancient origin and of common application that "dower ought not to be sought for out of dower." [97] The maxim is closely related to the doctrine excluding the right of dower from reversionary estates. It only applies, however, when dower has been actually assigned.[98]

(ii) *Lands Descending Subject to Dower.* It is not a bar to an action of dower that the widow of an earlier proprietor has already been assigned or recovered dower against the tenant;[99] but where lands descend subject to dower, and the dower is assigned, and the heir dies during the continuance of the estate in dower, his widow is endowable only out of the remaining two thirds.[1] The estate of the heir in the lands so descending is an estate in reversion expectant upon the life-estate of the widow of the decedent, and under the rule applicable to reversionary estates the widow of the heir can have no dower therein, if the

maker *v.* Walker, 2 Serg. & R. (Pa.) 554 [*distinguished* in Cote's Appeal, *supra*], holding that there was no right to dower where the husband had alienated his estate in remainder during the coverture.

96. Boyd *v.* Hunter, 44 Ala. 705; Sykes *v.* Sykes, 49 Miss. 190; Weir *v.* Tate, 39 N. C. 264; Sheaf *v.* Cave, 24 Beav. 259; Bates *v.* Bates, 1 Ld. Raym. 326, 1 Salk. 254; Hitchins *v.* Hitchins, Freem. 241, 22 Eng. Reprint 1185, Prec. Ch. 133, 24 Eng. Reprint 64, 2 Vern. Ch. 403, 23 Eng. Reprint 861, devise to executors until payment of debts from rents and profits, with remainder over.

97. See Coke Litt. 31*a*; 1 Scribner Dower 324; and the following cases:

Illinois.— Stahl *v.* Stahl, 114 Ill. 375, 2 N. E. 160; Steele *v.* La Frambois, 68 Ill. 456.

Kentucky.— Carter *v.* McDaniel, 94 Ky. 564, 23 S. W. 507, 15 Ky. L. Rep. 349; Robinson *v.* Miller, 2 B. Mon. 284.

Maine.— Williams *v.* Williams, 78 Me. 82, 2 Atl. 884; McLeery *v.* McLeery, 65 Me. 172, 20 Am. Rep. 683; Manning *v.* Laboree, 33 Me. 343; Geer *v.* Hamblin, 1 Me. 54 note.

Massachusetts.— Leavitt *v.* Lamprey, 13 Pick. 382, 23 Am. Dec. 685.

Missouri.— Null *v.* Howell, 111 Mo. 273, 20 S. W. 24.

New York.— Elwood *v.* Klock, 13 Barb. 50; Safford *v.* Safford, 7 Paige 259, 32 Am. Dec. 633; Reynolds *v.* Reynolds, 5 Paige 161; Dunham *v.* Osborn, 1 Paige 634.

North Carolina.— Reitzel *v.* Eckard, 65 N. C. 673.

Rhode Island.—Peckham *v.* Hadwen, 8 R. I. 160.

See 17 Cent. Dig. tit. "Dower," § 65.

"Dos de dote peti non debit, is a maxim of the common law. The principle on which it rests is this: although by the descent, the seizure is cast upon the heir, yet when dower is assigned to the widow, her estate is an elongation of the estate of the husband, and her seizure relates back, so as wholly to defeat the seizure of the heir; and in respect to the part of which dower is assigned, the heir was not in contemplation of law, seized at any time during coverture." Reitzel *v.* Eckard, 65 N. C. 673, 674.

98. Robinson *v.* Miller, 2 B. Mon. (Ky.) 284; McLeery *v.* McLeery, 65 Me. 172, 20 Am. Rep. 683; Elwood *v.* Klock, 13 Barb. (N. Y.) 50; Aikman *v.* Harsell, 63 How. Pr. (N. Y.) 110. And see Null *v.* Howell, 111 Mo. 273, 20 S. W. 24.

The application of this maxim is illustrated by Lord Coke as follows: "If there be grandfather, father, and sonne, and the grandfather is seised of three acres of land in fee, and taketh wife, and dieth, this land descendeth to the father, who dieth either before or after entry, now is the wife of the father dowable. The father dieth, and the wife of the grandfather is endowed of one acre and dieth, the wife of the father shall be endowed onely of the two acres residue, for the dower of the grandmother is paramount the title of the wife of the father, and the seisin of the father which descended to him (be it in law or actuall) is defeated, and now upon the matter the father had but a reversion expectant upon a frechold, and in that case, *dos de dote peti non debit*: although the wife of the grandfather dieth living the father's wife." Coke Litt. 31*a*.

Assignment of dower to first widow after assignment to second.— Where A acquired title to land subject to the dower right of the complainant, and after his death dower was assigned to his widow in the same, and the court subsequently assigned the same land to the elder dowress that had been assigned to A's widow, it was held that this was a fatal error, and that the subsequent assignment of dower should have been such that a proportionate part only would have been taken from the dower first assigned, and the residue from the owners of the other parts of the premises. Steele *v.* La Frambois, 68 Ill. 456.

99. Manning *v.* Laboree, 33 Me. 343.

On the other hand it is no defense as against a demand of dower that dower has been assigned in the premises to a widow whose right was subsequent to that of the demandant. Young *v.* Tarbell, 37 Me. 509.

1. Manning *v.* Laboree, 33 Me. 343; Safford *v.* Safford, 7 Paige (N. Y.) 259, 32 Am. Dec. 633; Dunham *v.* Osborn, 1 Paige (N. Y.) 634.

heir dies prior to the death of the widow of the decedent.[2] If dower has not been assigned to the ancestor's widow, the seizin of the heir is not defeated and consequently his widow is entitled to dower in the entire premises.[3] But the assignment of such dower may be made at any time either before or after the death of the heir, and when so made precludes recovery of dower by the widow of the heir.[4]

(III) *LANDS ACQUIRED BY DEVISE.* The rule applies as well where the lands are acquired by devise as where they come by descent.[5]

(IV) *LANDS ACQUIRED BY PURCHASE.* Where lands subject to dower are conveyed by the owner, the purchaser becomes seized of the whole premises, and his wife is entitled to dower in two thirds thereof, and also in the remaining one third if she survive the wife of the grantor.[6]

5. EQUITABLE ESTATES — a. Rule at Common Law. At common law seizin of a legal estate is an essential requisite to the right of dower, and therefore the widow is not entitled to dower in lands to which her husband had only an equitable title.[7]

b. Statutory Rule. The right of dower in equitable estates, however, is now in nearly every jurisdiction regulated by statute. The principle has been usually adopted of giving to the widow her equitable dower, in the descendible equitable interests of her husband of which he died seized.[8]

c. Essentials in General. To entitle the wife to dower under the statutes the

2. Stahl *v.* Stahl, 114 Ill. 375, 2 N. E. 160; Williams *v.* Williams, 78 Me. 82, 2 Atl. 884; Leavitt *v.* Lamprey, 13 Pick. (Mass.) 382, 23 Am. Dec. 685. Where the decedent takes his estate by descent, subject to a right of dower, which is afterward assigned, and dies during the life of the dowress, his widow is not entitled to dower in that portion of the estate assigned to such prior dowress, even after the death of such dowress. Safford *v.* Safford, 7 Paige (N. Y.) 259, 32 Am. Dec. 633; Reitzel *v.* Eckard, 65 N. C. 673. See also McLeery *v.* McLeery, 65 Me. 172, 20 Am. Rep. 683.

3. McLeery *v.* McLeery, 65 Me. 172, 20 Am. Rep. 683; Elwood *v.* Klock, 13 Barb. (N. Y.) 50; Aikman *v.* Harsell, 63 How. Pr. (N. Y.) 110. And see Null *v.* Howard, 111 Mo. 273, 20 S. W. 24.

4. Carter *v.* McDaniel, 94 Ky. 564, 23 S. W. 507, 15 Ky. L. Rep. 349; Williams *v.* Williams, 78 Me. 82, 2 Atl. 884; Leavitt *v.* Lamprey, 13 Pick. (Mass.) 382, 23 Am. Dec. 685.

5. Robinson *v.* Miller, 2 B. Mon. (Ky.) 284; Durando *v.* Durando, 23 N. Y. 331; Beekman *v.* Hudson, 20 Wend. (N. Y.) 53.

6. Dunham *v.* Osborn, 1 Paige (N. Y.) 634. And see Coke Litt. 31*a*, 31*b*; Stahl *v.* Stahl, 114 Ill. 375, 2 N. E. 160; Durando *v.* Durando, 23 N. Y. 331; Reitzel *v.* Eckard, 65 N. C. 673.

7. *Alabama.*— Crabb *v.* Pratt, 15 Ala. 843.
Arkansas.— Blakeney *v.* Ferguson, 20 Ark. 547.
Illinois.— Rice *v.* Rice, 108 Ill. 199; Davenport *v.* Farr, 2 Ill. 314.
Maryland.— Bowie *v.* Berry, 1 Md. Ch. 452, where the husband transferred his equitable interest during coverture.
Michigan.— Beebe *v.* Lyle, 73 Mich. 114, 41 N. W. 944.
New Hampshire.— Hopkinson *v.* Dumas, 42 N. H. 296.
Oregon.— Whiteaker *v.* Vanschoiack, 5 Oreg. 113.
See 17 Cent. Dig. tit. "Dower," § 45 *et seq.*

8. *Alabama.*— Crabb *v.* Pratt, 15 Ala. 843; Gillespie *v.* Somerville, 3 Stew. & P. 447. And see King *v.* King, 61 Ala. 479.
Arkansas.—Kirby *v.* Vantrece, 26 Ark. 368.
Illinois.— Atkin *v.* Merrill, 39 Ill. 62; Owen *v.* Robbins, 19 Ill. 545; Davenport *v.* Farrar, 2 Ill. 314.
Indiana.—McMahan *v.* Kimball, 3 Blackf. 1.
Iowa.— Everitt *v.* Everitt, 71 Iowa 221, 32 N. W. 273; Barnes *v.* Gay, 7 Iowa 26.
Kentucky.— Robinson *v.* Miller, 1 B. Mon. 88; Lawson *v.* Morton, 6 Dana 471; Stevens *v.* Smith, 4 J. J. Marsh. 64, 20 Am. Dec. 205.
Maryland.— Miller *v.* Stump, 3 Gill 304; Hopkins *v.* Frey, 2 Gill 359; Bowie *v.* Berry, 1 Md. Ch. 452.
New Jersey.— Yeo *v.* Mercereau, 18 N. J. L. 387.
New York.— Hawley *v.* James, 5 Paige 318.
North Carolina.— Fortune *v.* Watkins, 94 N. C. 304; Thompson *v.* Thompson, 46 N. C. 430.
Ohio.— Abbott *v.* Bosworth, 36 Ohio St. 605 [*affirming* 7 Ohio Dec. (Reprint) 300, 2 Cinc. L. Bul. 92]; Rands *v.* Kendall, 15 Ohio 671; Miller *v.* Wilson, 15 Ohio 108; Smiley *v.* Wright, 2 Ohio 506.
Pennsylvania.— McClure *v.* Fairfield, 153 Pa. St. 411, 26 Atl. 446; Dubs *v.* Dubs, 31 Pa. St. 149; Pritts *v.* Ritchey, 29 Pa. St. 71; Shoemaker *v.* Walker, 2 Serg. & R. 554.
Tennessee.— Lewis *v.* James, 8 Humphr. 537.
Virginia.— James *v.* Upton, 96 Va. 296, 31 S. E. 255; Rowton *v.* Rowton, 1 Hen. & M. 92.
See 17 Cent. Dig. tit. "Dower," § 45 *et seq.*

husband's equity in the lands must be perfect and complete,[9] and of such a character that a court of equity would compel a conveyance of the legal title to him.[10] In most states the equitable estate of the husband must exist at the time of his death, in order to entitle his widow to dower; and therefore if the estate is alienated during his lifetime the wife's right is destroyed.[11] The statutes making equitable estates subject to dower refer to equitable estates of inheritance only.[12] Under some statutes a widow is not dowable out of an equitable estate of her husband except in intestate lands.[13]

d. Particular Equitable Estates — (1) *Lands Held by Husband Under Contract of Purchase.* Applying the rules above stated to the estate of a husband who is in possession of lands under a contract for the purchase thereof, it follows that if the purchase-price had been fully paid by the husband prior to his death and no conveyance had been made to him his widow is entitled to dower in the lands so purchased.[14] But if the husband has not complied with the terms of the

9. King *v.* King, 61 Ala. 479; Gillespie *v.* Somerville, 3 Stew. & P. (Ala.) 447; Herron *v.* Williamson, Litt. Sel. Cas. (Ky.) 250; Bowie *v.* Berry, 1 Md. Ch. 452; Pritts *v.* Ritchey, 29 Pa. St. 71.

The right subsists in virtue of the estate of the husband, and is subject to any infirmity or incident which the law attaches to that seizin, either at the time of the marriage or at the time the husband becomes seized. King *v.* King, 61 Ala. 479, fraudulent conveyance by husband.

10. *Alabama.*— Lipscomb *v.* De Lemos, 68 Ala. 592; Boyd *v.* Harrison, 36 Ala. 533; Harrison *v.* Boyd, 36 Ala. 203; Edmondson *v.* Montague, 14 Ala. 370.

Illinois.— Taylor *v.* Kearn, 68 Ill. 339; Stow *v.* Steel, 45 Ill. 328; Owen *v.* Robbins, 19 Ill. 545.

Kentucky.— Stevens *v.* Smith, 4 J. J. Marsh. 64, 20 Am. Dec. 205; Graham *v.* Graham, 6 T. B. Mon. 561, 17 Am. Dec. 166; Bailey *v.* Duncan, 4 T. B. Mon. 256; Pugh *v.* Bell, 2 T. B. Mon. 125, 15 Am. Dec. 142; Porter *v.* Robinson, 3 A. K. Marsh. 253, 13 Am. Dec. 153.

Massachusetts.— Reed *v.* Whitney, 7 Gray 533.

Missouri.— Worsham *v.* Callison, 49 Mo. 206.

See 17 Cent. Dig. tit. "Dower," § 46 *et seq.*

11. *Alabama.*— King *v.* King, 61 Ala. 479.

Arkansas.— Langley *v.* Langley, 45 Ark. 392.

Illinois.— Morse *v.* Thorsell, 78 Ill. 600; Taylor *v.* Kearn, 68 Ill. 339; Steele *v.* Magie, 48 Ill. 396; Woolley *v.* Magie, 26 Ill. 526; Owen *v.* Robbins, 19 Ill. 545; Clybourn *v.* Pittsburgh, etc., R. Co., 4 Ill. App. 463.

Indiana.— Butler *v.* Holtzman, 55 Ind. 125.

Iowa.— Langworthy *v.* Heeb, 46 Iowa 64; Davis *v.* O'Ferrall, 4 Greene 358.

Kentucky.— Smallridge *v.* Hazlett, 112 Ky. 841, 66 S. W. 1043, 23 Ky. L. Rep. 2228; Gully *v.* Ray, 18 B. Mon. 107; Heed *v.* Ford, 16 B. Mon. 114; Hamilton *v.* Hughes, 6 J. J. Marsh. 581; Herron *v.* Williamson, Litt. Sel. Cas. 250. And see Tisdale *v.* Rusk, 7 Bush 139.

Maine.— Foster *v.* Gordon, 49 Me. 54.

Maryland.— McRae *v.* McRae, 78 Md. 270, 27 Atl. 1038; Glenn *v.* Clark, 53 Md. 580; Bowie *v.* Berry, 1 Md. Ch. 452, 3 Md. Ch. 359.

Michigan.— Daily *v.* Lichfield, 10 Mich. 29.

Nebraska.— Crawl *v.* Harrington, 33 Nebr. 107, 49 N. W. 1118.

New York.— Hicks *v.* Stebbins, 3 Lans. 39; Sherwood *v.* Vandenburg, 2 Hill 303; Hawley *v.* James, 5 Paige 318.

Ohio.— Abbott *v.* Bosworth, 36 Ohio St. 605; Welch *v.* Buckins, 9 Ohio St. 331; Carter *v.* Goodin, 3 Ohio St. 75; Carter *v.* Walker, 2 Ohio St. 339; Rands *v.* Kendall, 15 Ohio 671; Miller *v.* Wilson, 15 Ohio 108.

Pennsylvania.— Junk *v.* Canon, 34 Pa. St. 286; Pritts *v.* Ritchey, 29 Pa. St. 71; Myer *v.* Philadelphia, 2 Leg. Rec. 39.

South Carolina.— Morgan *v.* Wright, 25 S. C. 601; Morgan *v.* Smith, 25 S. C. 337; Secrest *v.* McKenna, 6 Rich. Eq. 72.

United States.— *In re* Ransom, 17 Fed. 331.

See 17 Cent. Dig. tit. "Dower," § 46 *et seq.*; and *infra*, VI, B, 5 d, (I).

Contra.— James *v.* Upton, 96 Va. 296, 31 S. E. 255.

12. Davenport *v.* Farrar, 2 Ill. 314.

13. Cornog *v.* Cornog, 3 Del. Ch. 407.

14. *Alabama.*— Lipscomb *v.* De Lemos, 68 Ala. 592.

Illinois.— Taylor *v.* Kearn, 68 Ill. 339; Owen *v.* Robbins, 19 Ill. 545; Clybourn *v.* Pittsburg, etc., R. Co., 4 Ill. App. 463.

Kentucky.— Stevens *v.* Smith, 4 J. J. Marsh. 64, 20 Am. Dec. 205; Lane *v.* Farleigh, 5 Ky. L. Rep. 513.

Massachusetts.— Reed *v.* Whitney, 7 Gray 533.

Missouri.— Casteel *v.* Potter, 176 Mo. 76, 75 S. W. 597; Howell *v.* Jump, 140 Mo. 441, 41 S. W. 976.

New Jersey.— Young *v.* Young, 45 N. J. Eq. 27, 16 Atl. 921.

New York.— Bowery Nat. Bank *v.* Duncan, 12 Hun 405.

North Carolina.— Klutts *v.* Klutts, 58 N. C. 80; Thompson *v.* Thompson, 46 N. C. 430.

Virginia.— James *v.* Upton, 96 Va. 296, 31 S. E. 255.

See 17 Cent. Dig. tit. "Dower," § 54.

At common law an executory contract for the purchase of lands, even with possession delivered, does not constitute such a seizin

executory contract, or if for any reason he would not have been entitled to a specific performance during his lifetime, it is generally held that the right of dower will not attach.[15] In most states a widow is not entitled to dower out of lands held under contract of purchase where the husband's interest was alienated during coverture.[16]

(11) *Trust Estates Held by Husband.* The rule is that in equity the wife of a trustee is not dowable of the lands held by him in trust, although he holds the legal title.[17] This rule applies, although the wife had no knowledge of the

as will entitle the wife to dower. Pritts *v.* Ritchey, 29 Pa. St. 71; Claiborne *v.* Henderson, 3 Hen. & M. (Va.) 322.

15. *Alabama.*— Flinn *v.* Barber, 64 Ala. 193 (holding, however, that until the vendor's lien is enforced by a decree of a court of equity, the vendee's widow is entitled to dower in the lands, and to retain possession and take the rents and profits in her own right, although her husband had not during his lifetime completed the payment of the purchase-money); Mattox *v.* Feagan, 57 Ala. 274; Boyd *v.* Harrison, 36 Ala. 533; Harrison *v.* Boyd, 36 Ala. 203; Lewis *v.* Moorman, 7 Port. 522.

Georgia.— Latham *v.* McLean, 64 Ga. 320; Bowen *v.* Collins, 15 Ga. 100.

Illinois.— Walters *v.* Walters, 132 Ill. 467, 23 N. E. 1120; Morse *v.* Thorsell, 78 Ill. 600; Greenbaum *v.* Austrian, 70 Ill. 591; Taylor *v.* Kearn, 68 Ill. 339; Owen *v.* Robbins, 19 Ill. 545.

Indiana.— Smith *v.* Addleman, 5 Blackf. 406.

Kentucky.— Smallridge *v.* Hazlett, 112 Ky. 841, 66 S. W. 1043, 23 Ky. L. Rep. 2228; Pugh *v.* Bell, 2 T. B. Mon. 125, 15 Am. Dec. 142.

Massachusetts.— Lobdell *v.* Hayes, 4 Allen 187.

Michigan.— Stephens *v.* Leonard, 122 Mich. 125, 80 N. W. 1002.

Virginia.— Robinson *v.* Shackett, 29 Gratt. 99.

See 17 Cent. Dig. tit. "Dower," § 55.

Where a bond or other security is given by the vendee to secure the payments to be made under the contract, the vendee becomes beneficially seized for his own use of the title of the property, and the wife's dower attaches, and cannot be divested by a subsequent encumbrance, unless she concurs therein. Blair *v.* Thompson, 11 Gratt. (Va.) 441. And it has also been held that the wife of a purchaser who holds lands under a bond for title has a contingent right of dower to the extent of the payments made by her husband. Bunting *v.* Foye, 66 N. C. 193; Thompson *v.* Thompson, 46 N. C. 430. But if the land is reconveyed by the husband to the vendor to release a mortgage given for the purchase-price, the wife has no dower. Building, etc., Co. *v.* Fray, 96 Va. 559, 32 S. E. 58.

In Indiana the statute provides that if the husband shall have made a contract for the purchase of lands, and at the time of his death the consideration shall not have been paid, but after his death the consideration shall be paid out of his estate, his widow shall have one third of such lands in the same manner as if the legal estate had vested in the husband during the coverture. Horner St. Ind. § 2493. See Bowen *v.* Linge, 119 Ind. 560, 20 N. E. 534; Carver *v.* Grove, 68 Ind. 371.

Where a conveyance is made in consideration of a son's agreement to support his father during life, the widow is entitled to dower in the land conveyed, although the son did not support the father as agreed. Meigs *v.* Dimock, 6 Conn. 458.

Void contract.— A widow is not entitled to dower in lands held by her deceased husband under a void parol contract. Lane *v.* Courtney, 1 Heisk. (Tenn.) 331.

Public land grants.— If a grantee or claimant under a state or federal statute relating to the grant of public lands has fully complied with the conditions of the statute, so as to entitle him to a patent, he has such a title in the land as will entitle his widow to dower, although he died prior to the issue of the patent. McKay *v.* Freeman, 6 Oreg. 449. But there must be a full and complete compliance with all statutory requirements. Crittenden *v.* Woodruff, 14 Ark. 465; Woolley *v.* Magie, 26 Ill. 526; Clybourn *v.* Pittsburg, etc., R. Co., 4 Ill. App. 463. See also *supra*, VI, B, 2, a.

16. Owen *v.* Robbins, 19 Ill. 545; Clybourn *v.* Pittsburg, etc., R. Co., 4 Ill. App. 463; Smallridge *v.* Hazlett, 112 Ky. 841, 66 S. W. 1043, 23 Ky. L. Rep. 2228; Tisdale *v.* Rusk, 7 Bush (Ky.) 139; Hicks *v.* Stebbins, 3 Lans. (N. Y.) 39; Pritts *v.* Ritchey, 29 Pa. St. 71; and other cases cited *supra*, VI, B, 5, c, note 11. *Compare*, however, James *v.* Upton, 96 Va. 296, 31 S. E. 255.

17. *Alabama.*— Edmondson *v.* Welsh, 27 Ala. 578.

Connecticut.— Goddard *v.* Prentice, 17 Conn. 546.

Georgia.— Day *v.* Solomon, 40 Ga. 32; Aaron *v.* Bayne, 28 Ga. 107.

Illinois.— King *v.* Bushnell, 121 Ill. 656, 13 N. E. 245; Rice *v.* Rice, 108 Ill. 199; Bailey *v.* West, 41 Ill. 290; Dickerson *v.* Gritten, 103 Ill. App. 351 [*affirmed* in 202 Ill. 372, 66 N. E. 1090].

Kentucky.— Bartlett *v.* Gouge, 5 B. Mon. 152; Lawson *v.* Morton, 6 Dana 471; Dean *v.* Mitchell, 4 J. J. Marsh. 451; Stevens *v.* Smith, 4 J. J. Marsh. 64, 20 Am. Dec. 205; Herron *v.* Williamson, Litt. Sel. Cas. 250.

Maryland.— Cowman *v.* Hall, 3 Gill & J. 398.

Missouri.— Miller *v.* Miller, 148 Mo. 113,

trust.[18] But if there be coupled with the legal estate of the husband a substantial beneficial interest in the trust estate, it has been held that the wife's dower will attach to the extent of such beneficial interest, if it can be decreed to her without interfering with the trust estate, or defeating the purposes of the trust.[19] Where the husband as trustee acquires by purchase or otherwise the estate or interest of the beneficiary, the equitable estate is merged in the legal estate and the wife becomes entitled to dower.[20]

(III) *Trust Estates Held For Benefit of Husband* — (A) *In General.* The common law, limiting the right of dower to legal estates,[21] did not recognize a widow's claim of dower in an estate held by another in trust for her deceased husband.[22] The common-law rule remained in force in England until the passage of the Dower Act of 3 & 4 Wm. IV, c. 105. In many of the states the rule of the common law is either entirely abrogated or modified. In those states where the right of dower in equitable estates is declared the courts have invariably held that a wife is endowed with lands held in trust for the benefit of her husband,[23]

49 S. W. 852; White *v.* Drew, 42 Mo. 561; Ragsdale *v.* O'Day, 61 Mo. App. 230.

New Hampshire.— Hunkins *v.* Hunkins, 65 N. H. 95, 18 Atl. 655; Hopkinson *v.* Dumas, 42 N. H. 296.

New York.— Starbuck *v.* Starbuck, 62 N. Y. App. Div. 437, 71 N. Y. Suppl. 104; Kager *v.* Brenneman, 47 N. Y. App. Div. 63, 62 N. Y. Suppl. 339; Buffalo, etc., R. Co. *v.* Lampson, 47 Barb. 533; Gomez *v.* Tradesmen's Bank, 4 Sandf. 102; Germond *v.* Jones, 2 Hill 569; Coster *v.* Clarke, 3 Edw. 428.

Ohio.— Firestone *v.* Firestone, 2 Ohio St. 415; Derush *v.* Brown, 8 Ohio 412.

South Carolina.— Brown *v.* Cave, 23 S. C. 251; Thompson *v.* Perry, 2 Hill Eq. 204, 29 Am. Dec. 68; Davidson *v.* Graves, Bailey Eq. 268.

Tennessee.— Kaphan *v.* Toney, (Ch. App. 1899) 58 S. W. 909.

West Virginia.— Hardman *v.* Orr, 5 W. Va. 71.

See 17 Cent. Dig. tit. "Dower," § 48.

Where a husband in his lifetime entered into a contract for the sale of land and gave bond for title, and the purchase-money was due and unpaid at the time of his death, it was held that the legal title remained in the vendor, and that the purchaser held the land in subordination to the right of the vendor, who was in contemplation of law seized and possessed of the land at his death, so that his widow was entitled to her dower out of it. Day *v.* Solomon, 40 Ga. 32. See also Ragsdale *v.* O'Day, 61 Mo. App. 230. But where a husband had before marriage given an unconditional bond for conveyance of title to land and put the vendee in possession, it was held that the husband was to be considered as mere trustee or title-holder for use of his vendee, so that the wife of the vendee, and not the wife of the vendor, was entitled to dower. It was further held that no lien for purchase-money which the vendor might have could entitle his wife to dower. Stevens *v.* Smith, 4 J. J. Marsh. (Ky.) 64, 20 Am. Dec. 205. See also Chapman *v.* Chapman, 92 Va. 537, 24 S. E. 225, 53 Am. St. Rep. 823.

The widow of a guardian is not entitled to dower in land which her husband purchased in his own name with his ward's money. Gannaway *v.* Tarpley, 1 Coldw. (Tenn.) 572.

Widow of administrator.— Nor is a widow entitled to dower in lands of which her husband was possessed during coverture as the administrator of his son. Tillman *v.* Spann, 68 Ala. 102.

Where resulting trusts are abolished by statute as in Michigan, and land is bought by one person, but the title is taken in the name of another, the latter is treated as the complete owner, and his widow is entitled to dower. Newton *v.* Sly, 15 Mich. 391.

18. White *v.* Drew, 42 Mo. 561; Davidson *v.* Graves, Bailey Eq. (S. C.) 268.

19. Cockrill *v.* Armstrong, 31 Ark. 580. Dower does not attach to lands of which the husband is seized as trustee in behalf of others any further than he has a beneficial interest therein. Coster *v.* Clarke, 3 Edw. (N. Y.) 428.

20. Hopkinson *v.* Dumas, 42 N. H. 296; Coster *v.* Clarke, 3 Edw. (N. Y.) 428; Robison *v.* Codman, 20 Fed. Cas. No. 11,970, 1 Sumn. 121.

21. See *supra*, VI, B, 5, a.

22. 1 Scribner Dower 386–398. See also Stevens *v.* Smith, 4 J. J. Marsh. (Ky.) 64, 20 Am. Dec. 205; Chaplin *v.* Chaplin, 3 P. Wms. 299, 24 Eng. Reprint 1040; Banks *v.* Sutton, 2 P. Wms. 701, 24 Eng. Reprint 922.

23. *Alabama.*—Crabb *v.* Pratt, 15 Ala. 843.

Illinois.— Nicoll *v.* Miller, 37 Ill. 387; Nicoll *v.* Ogden, 29 Ill. 323, 81 Am. Dec. 311.

Indiana.— Stroup *v.* Stroup, 140 Ind. 179, 39 N. E. 864, 27 L. R. A. 523; McMahan *v.* Kimball, 3 Blackf. 1.

Kentucky.— Stevens *v.* Smith, 4 J. J. Marsh. 64, 20 Am. Dec. 205.

Mississippi.— Caillaret *v.* Bernard, 7 Sm. & M. 319.

Missouri.— Davis *v.* Green, 102 Mo. 170, 14 S. W. 876, 11 L. R. A. 90.

New Hampshire.— Towle *v.* Berry, 44 N. H. 569; Hopkinson *v.* Dumas, 42 N. H. 296.

In those states which have not otherwise provided by statute, the common-law rule is applied and dower is excluded from the estate of the *cestui que trust.*[24] Where a statute confers dower in all real estate whereof the husband or any other to his use was seized of an estate of inheritance, it should be construed as conferring the right of dower in estates held in trust for the benefit of the husband.[25] The nature and object of the trust will often control the widow's right to dower in lands devised by will or conveyed by deed.[26]

(B) *Lands Held by Executor, Administrator, or Guardian.* Lands under the control of an executor,[27] administrator,[28] or guardian are not subject to dower unless within the statute creating such estate.[29]

(IV) *LANDS PURCHASED BY HUSBAND FOR ANOTHER.* Where land is purchased by one person in his name for the benefit of another, with the latter's money, the wife of the former has no dower therein;[30] but if such lands are purchased with the purchaser's own money in his own name, although held by him subject to the performance of certain agreed conditions by another person, whereupon the lands are to be again conveyed, the right of dower of the purchaser's wife attaches.[31] Where lands purchased with the husband's money are taken in the name of another person, with the fraudulent purpose of depriving his wife of her dower therein, equity will commonly intervene to protect the wife,[32] although, as in other cases where it sought to attach estates held in trust

New Jersey.—Yeo *v.* Mercereau, 18 N. J. L. 387; Mershon *v.* Duer, 40 N. J. Eq. 333.

New York.— Clark *v.* Clark, 147 N. Y. 639, 42 N. E. 275 [*affirming* 84 Hun 362, 32 N. Y. Suppl. 325]; Hawley *v.* James, 5 Paige 318.

Pennsylvania.— Shoemaker *v.* Walker, 2 Serg. & R. 554.

Tennessee.— Martin *v.* Lincoln, 4 Lea 289.

See 17 Cent. Dig. tit. "Dower," § 49.

24. *Connecticut.*— Stewart *v.* Stewart, 5 Conn. 317.

Georgia.— Hill *v.* Hill, 81 Ga. 516, 8 S. E. 879.

Maine.— Hamlin *v.* Hamlin, 19 Me. 141.

New Hampshire.— Hopkinson *v.* Dumas, 42 N. H. 296.

United States.— Lenox *v.* Notrebe, 15 Fed. Cas. No. 8,246c, Hempst. 251; Williams *v.* Barrett, 29 Fed. Cas. No. 17,714, 2 Cranch C. C. 673.

See 17 Cent. Dig. tit. "Dower," § 49.

In Pennsylvania the common-law rule excluding a widow from dower in a trust estate does not prevail. By the usage and the law of that state a widow is dowable of such an estate, independent of any statutory provision relating thereto. Shoemaker *v.* Walker, 2 Serg. & R. 554.

25. Yeo *v.* Mercercau, 18 N. J. L. 387.

26. Where a trust is created by will in real property for the life of the *cestui que trust,* and by the same will he is given a vested remainder in fee, expectant upon the termination of the trustee's legal estate, the widow of the *cestui que trust* has been held not endowed of the property held in trust. Kenyon *v.* Kenyon, 17 R. I. 539, 23 Atl. 101, 24 Atl. 787. And where land is conveyed to be held in trust for the use of the grantor and upon his death to be distributed to his "heirs at law and next of kin . . . in the manner and proportions prescribed by the statutes of descent and distribution of this state, in cases of persons who die intestate," the widow of the grantor is not entitled to dower in such land. Knickerbacker *v.* Seymour, 46 Barb. (N. Y.) 198. Where several persons agreed to purchase lands to be held in the name of one of them, and to be sold for their joint benefit, the profits to be divided equally among them, it was held that the lands were to be treated in equity as personalty, and that upon the death of one of the *cestuis que trustent* his widow was not entitled to dower. Coster *v.* Clarke, 3 Edw. (N. Y.) 428.

27. Cockrill *v.* Armstrong, 31 Ark. 580.

28. Tate *v.* Jay, 31 Ark. 576.

29. Where a statute (Mo. Rev. St. (1879) § 2186) gives a widow dower in lands whereof her husband, or any other person to his use, was seized of an estate of inheritance, the widow of a lunatic is entitled to dower in lands purchased by his guardian with assets of his estate; and it is immaterial that the assets used arose from a sale of the lunatic's lands to pay debts, and the investment by the guardian was unauthorized. Rannells *v.* Isgrigg, 99 Mo. 19, 12 S. W. 343.

30. Porter *v.* Ewing, 24 Ill. 617.

Gift sustained.— Where land is purchased by a father for his son, the father's widow cannot have dower therein in the absence of evidence showing that the gift was made to deprive the widow of her dower rights. Patterson *v.* Patterson, 24 S. W. 880, 15 Ky. L. Rep. 755. And see Flanigan *v.* Waters, 57 Kan. 18, 45 Pac. 56.

31. Prescott *v.* Walker, 16 N. H. 340; Coster *v.* Clarke, 3 Edw. (N. Y.) 428.

32. Rabbitt *v.* Gaither, 67 Md. 94, 8 Atl. 744; Crecelius *v.* Horst, 11 Mo. App. 304 [*reversed* in 89 Mo. 356, 14 S. W. 510, on the ground that the proof did not show conclusively that the purchase was made with intent to deprive the wife of her dower].

for the benefit of the husband, sufficient statutory authority must be shown therefor.[33] Where lands are purchased by a husband and deeded to another in fraud of the husband's creditors, and the husband continues in possession under a life lease or other arrangement, the husband has no seizin and the wife's dower does not attach.[34]

e. Equity of Redemption — (i) *In General.* The right of redemption from mortgages being regarded as a mere equitable title, the common law did not recognize dower right of a widow in her husband's equity of redemption.[35] The rule which now prevails, however, in nearly all the states, either by virtue of express statutory enactment or by judicial declaration, gives to the widow her dower in an equity of redemption held by her husband, and this rule applies whether the mortgage be made before or after the marriage.[36] As will be hereafter

As to bar of dower see *infra*, VIII, D, 15.

33. Phelps *v.* Phelps, 143 N. Y. 197, 38 N. E. 280, 25 L. R. A. 625 [*reversing* 75 Hun 577, 27 N. Y. Suppl. 620]. In this case it was held that under the statute providing that a widow shall be endowed of the third part of land of which her husband was seized of an inheritance during coverture, such widow is not entitled to have dower declared in lands which the husband pays for, and has conveyed to a third person for the purpose of depriving her of dower, under an agreement by him that the husband shall receive all the benefits of and have full control over such lands. But in an earlier New York case it was held that where a husband paid the purchase-money, but had not obtained the legal title, or had paid the consideration for the purchase of lands conveyed to a third person, his widow was entitled to dower in such equitable interest, under the Revised Statutes, provided the husband continued seized to the time of his death. Hawley *v.* James, 5 Paige (N. Y.) 318.

34. Mann *v.* Edson, 39 Me. 25; Efland *v.* Efland, 96 N. C. 488, 1 S. E. 858 (but also holding that the widow is entitled to dower where her husband was seized and possessed of the land during coverture, although it was subsequently sold under an execution and purchased in his son's name for the purpose of defrauding the creditors of her husband); Grant *v.* Sutton, (Va. 1895) 22 S. E. 490.

35. 1 Scribner Dower 463. By the common law dower does not attach to an equity of redemption. The fee is vested in the mortgagee, and the wife is not dowable of an equitable seizin. Mayburry *v.* Brien, 15 Pet. (U. S.) 21, 10 L. ed. 646 [*citing* Stelle *v.* Carroll, 12 Pet. (U. S.) 205, 9 L. ed. 1056; Powell *v.* Monson, etc., Mfg. Co., 19 Fed. Cas. No. 11,357, 3 Mason 459; Dixon *v.* Saville, 1 Bro. Ch. 326, 28 Eng. Reprint 1160]. And see Burnet *v.* Burnet, 46 N. J. Eq. 144, 18 Atl. 374. It is the settled law in the District of Columbia that a widow is not dowable of an equity of redemption. *In re* Thompson, 6 Mackey (D. C.) 536.

36. *Alabama.*— Cheek *v.* Waldrum, 25 Ala. 152; Eslava *v.* Lepretre, 21 Ala. 504, 56 Am. Dec. 266.

Arkansas.— Cockrill *v.* Armstrong, 31 Ark. 580.

Connecticut.— Fish *v.* Fish, 1 Conn. 559.

Florida.— McMahon *v.* Russell, 17 Fla. 698.

Georgia.— Kinnebrew *v.* McWhorter, 61 Ga. 33; Hart *v.* McCollum, 28 Ga. 478.

Illinois.— Cox *v.* Garst, 105 Ill. 342; Burson *v.* Dow, 65 Ill. 146; Gold *v.* Ryan, 14 Ill. 53.

Indiana.—McMahan *v.* Kimball, 3 Blackf. 1.

Kentucky.— Harrow *v.* Johnson, 3 Metc. 578; Willet *v.* Beatty, 12 B. Mon. 172; Brewer *v.* Vanarsdale, 6 Dana 204.

Maine.— Moore *v.* Rollins, 45 Me. 493; Simonton *v.* Gray, 34 Me. 50; Manning *v.* Laboree, 33 Me. 343; Campbell *v.* Knights, 24 Me. 332.

Maryland.— Hopkins *v.* Frey, 2 Gill 359.

Massachusetts.— Newton *v.* Cook, 4 Gray 46; Gibson *v.* Crehore, 5 Pick. 146; Peabody *v.* Patten, 2 Pick. 517; Snow *v.* Stevens, 15 Mass. 278; Bolton *v.* Ballard, 13 Mass. 227.

Michigan.— Snyder *v.* Snyder, 6 Mich. 470. *Compare* Beebe *v.* Lyle, 73 Mich. 114. 40 N. W. 944, holding that ejectment will not lie to recover dower where the husband had a mere equitable interest.

Mississippi.— Pickett *v.* Buckner, 45 Miss. 226; Wooldridge *v.* Wilkins, 3 How. 360; Rutherford *v.* Munce, Walk. 370.

New Hampshire.— Hastings *v.* Stevens, 29 N. H. 564; Rossiter *v.* Cossit, 15 N. H. 38.

New Jersey.—Thompson *v.* Boyd, 22 N. J. L. 543; Montgomery *v.* Bruere, 5 N. J. L. 865; Burnet *v.* Burnet, 46 N. J. Eq. 144, 18 Atl. 374; Opdyke *v.* Bartles, 11 N. J. Eq. 133; Hinchman *v.* Stiles, 9 N. J. Eq. 361, 454.

New York.— Matthews *v.* Duryee, 45 Barb. 69; McGowan *v.* Smith, 44 Barb. 232; Denton *v.* Nanny, 8 Barb. 618; O'Dougherty *v.* Remington Paper Co., 1 N. Y. St. 523; Blydenburgh *v.* Northrop, 13 How. Pr. 289; Van Duyne *v.* Thayre, 14 Wend. 233; Coates *v.* Cheever, 1 Cow. 460; Collins *v.* Torry, 7 Johns. 278, 5 Am. Dec. 273; Titus *v.* Neilson, 5 Johns. Ch. 452; Smith *v.* Jackson, 2 Edw. 28; Hoogland *v.* Watt, 2 Sandf. Ch. 148.

Pennsylvania.— Dubs *v.* Dubs, 31 Pa. St. 149; Reed *v.* Morrison, 12 Serg. & R. 18.

Rhode Island.— Eddy *v.* Moulton, 13 R. I. 105; De Wolf *v.* Murphy, 11 R. I. 630; Peckham *v.* Hadwen, 8 R. I. 160.

noticed,[37] the widow's right of dower is subjected to the prior lien of the encumbrance; or in other words the dower attaches only to the equity of redemption and not to the property itself.[38] If the equity of redemption has been united by the lease or conveyance to the legal title of the mortgagee,[39] or if the equity did not exist in the husband at the time of his death, the widow is not entitled to dower in such equity.[40]

(11) *PURCHASE-MONEY MORTGAGE.* Although a purchaser of land immediately executes a mortgage upon the premises to secure the purchase-money, and so has only an instantaneous seizin,[41] the wife of the mortgagor may nevertheless be entitled to her dower in the equity of redemption.[42]

VII. PRIORITIES.

A. In General. A dower estate partakes of the nature of the estate of the husband, and will be subject to the same equities and encumbrances that may exist against the title of the husband at the time the right of dower attaches.[43]

South Carolina.— Stoppelbein *v.* Shulte, 1 Hill 200; Keith *v.* Trapier, Bailey Eq. 63.

Tennessee.— Gwynne *v.* Estes, 14 Lea 662; Perkins *v.* McDonald, 10 Lea 732; Hudson *v.* Conway, 9 Lea 410; Atwater *v.* Butler, 9 Baxt. 299; Turbeville *v.* Gibson, 5 Heisk. 565.

Virginia.— Heth *v.* Cocke, 1 Rand. 344.

United States.— Van Ness *v.* Hyatt, 13 Pet. 294, 10 L. ed. 168 [*affirming* 28 Fed. Cas. No. 16,867, 5 Cranch C. C. 127]; Powell *v.* Monson, etc., Mfg. Co., 19 Fed. Cas. No. 11,357, 3 Mason 459.

See 17 Cent. Dig. tit. "Dower," § 58.

The ground upon which the courts in this country have given dower of an equity of redemption is that the mortgagor is to be regarded as being legally as well as equitably seized in respect to all the world except the mortgagee and his assigns. 4 Kent Comm. 45; Woodhull *v.* Reid, 16 N. J. L. 128.

37. See *infra*, VII, C.

38. *Florida.*— McMahon *v.* Russell, 17 Fla. 698.

Georgia.— Kinnebrew *v.* McWhorter, 61 Ga. 33.

Illinois.— Burson *v.* Dow, 65 Ill. 146.

Kentucky.— Harrow *v.* Johnson, 3 Metc. 578.

Maine.— Moore *v.* Rollins, 45 Me. 493.

Massachusetts.— Newton *v.* Cook, 4 Gray 46.

New Hampshire.— Hastings *v.* Stevens, 29 N. H. 564; Rossiter *v.* Cossit, 15 N. H. 38.

New York.— Decker *v.* Hall, 1 Edm. Sel. Cas. 279.

Virginia.— Heth *v.* Cocke, 1 Rand. 344.

See 17 Cent. Dig. tit. "Dower," § 58; and *infra*, VII, C.

Where a wife is a party to a mortgage, or the mortgage is given prior to the coverture, she can only claim her dower subject to the mortgage. Eldridge *v.* Eldridge, 14 N. J. Eq. 195; Hartshorne *v.* Hartshorne, 2 N. J. Eq. 349. See *infra*, VII, F, 3; VIII, D, 15, a; VIII, D, 17.

39. Thompson *v.* Boyd, 22 N. J. L. 543; Woodhull *v.* Reid, 16 N. J. L. 128; Rands *v.* Kendall, 15 Ohio 671,

40. Jaquess *v.* Hamilton County, 1 Disn. (Ohio) 121, 12 Ohio Dec. (Reprint) 524, 2 Wkly. L. Gaz. 81. If the mortgagor's equity of redemption is conveyed to the mortgagee, directly or indirectly, the mortgagee becomes possessed of an absolute instead of a qualified title, so that the widow of the mortgagor will not be entitled to dower in the premises. Decker *v.* Hall, 1 Edm. Sel. Cas. (N. Y.) 279. A release to the mortgagee by the mortgagor of the equity of redemption has been held to merge the equity in the mortgagee. So where the wife of the mortgagor had not joined in such a release, which was executed during coverture, it was nevertheless held that she had no remedy at law against the mortgagee, who was in possession under his title, and that her only relief was in equity by a bill to redeem. Van Dyne *v.* Thayre, 19 Wend. (N. Y.) 162.

41. See *supra*, V, C, 8.

42. Nottingham *v.* Calvert, 1 Ind. 527; Smith *v.* Eustis, 7 Me. 41; Mills *v.* Van Voorhies, 20 N. Y. 412 [*affirming* 23 Barb. 125]; Kittle *v.* Van Dyck, 1 Sandf. Ch. 76; Wheatley *v.* Calhoun, 12 Leigh (Va.) 264, 37 Am. Dec. 654.

43. *Alabama.*— Cheek *v.* Waldrun, 25 Ala. 152.

Illinois.— Stribling *v.* Ross, 16 Ill. 121.

Kentucky.— Porter *v.* Robinson, 3 A. K. Marsh. 253, 13 Am. Dec. 153.

Maryland.— Lane *v.* Gover, 3 Harr. & M. 394.

Massachusetts.— Lanfair *v.* Lanfair, 18 Pick. 299.

New York.— Clark *v.* Clark, 84 Hun 362, 32 N. Y. Suppl. 325 [*affirmed* in 147 N. Y. 639, 42 N. E. 275].

Ohio.— Firestone *v.* Firestone, 2 Ohio St. 415.

South Carolina.— Mey *v.* Mey, Rich. Eq. Cas. 378.

Virginia.— Shirley *v.* Mutual Assur. Soc., 2 Rob. 705.

See 17 Cent. Dig. tit. "Dower," § 66.

Land subject to a charge for maintenance of parents.— Price *v.* Hobbs, 47 Md. 359; Lanfair *v.* Lanfair, 18 Pick. (Mass.) 299.

B. Lien of Vendor — 1. In General. Where land is sold under a contract by which the vendor retains the legal title as security for the unpaid purchase-money, or where he has an equitable lien, the lien of the vendor is paramount to the right of dower of the wife of the vendee in the lands so sold.[44]

2. Extinguishment of Lien — a. Acceptance of Other or Additional Security. If the contract of sale provides other security for the payment of the amount due, as by an indemnity bond,[45] the execution and delivery of promissory notes, secured by a mortgage on the premises sold or other lands,[46] or by any other arrangement whereby the vendee agrees to secure the performance on his part of the terms of the contract,[47] the vendor's lien is extinguished, and the wife of the vendee has her dower in the lands sold. The rule is that the acceptance of other or additional security by a vendor amounts to a waiver of his equitable lien.[48]

The lien of a wife, under the laws of Louisiana, on the future acquisitions of her husband, is superior to a second wife's right of dower in such acquisitions. Kendall *v.* Coons, 1 Bush (Ky.) 530.

Where defendant held under a lease, on foreclosure and sale under a mortgage the value of the dower of the widow is to be paid from the surplus proceeds before the lessee of the mortgagor recovers from such surplus for the breach of the covenants of his lease. Clarkson *v.* Skidmore, 46 N. Y. 297 [*reversing* 2 Lans. 238].

Subrogation of parties discharging lien see Subrogation.

44. *Alabama.*— Brooks *v.* Woods, 40 Ala. 538.

Arkansas.— Birnie *v.* Main, 29 Ark. 591; Thorn *v.* Ingram, 25 Ark. 52.

Indiana.— Nutter *v.* Fouch, 86 Ind. 451; Carver *v.* Grove, 68 Ind. 371; Fletcher *v.* Holmes, 32 Ind. 497; Talbott *v.* Armstrong, 14 Ind. 254; Fisher *v.* Johnson, 5 Ind. 492; Crane *v.* Palmer, 8 Blackf. 120.

Iowa.— Noyes *v.* Kramer, 54 Iowa 22, 6 N. W. 123; Thomas *v.* Hanson, 44 Iowa 651; Barnes *v.* Gay, 7 Iowa 26.

Kentucky.— Johnson *v.* Cantrill, 92 Ky. 59, 17 S. W. 206, 13 Ky. L. Rep. 497; Lee *v.* James, 81 Ky. 443; Harrison *v.* Griffith, 4 Bush 146; McClure *v.* Harris, 12 B. Mon. 261; Willet *v.* Beatty, 12 B. Mon. 172; Nazareth Literary, etc., Inst. *v.* Rowe, 1 B. Mon. 257; Helm *v.* Board, 70 S. W. 679, 24 Ky. L. Rep. 1037; Cass *v.* Smith, 4 Ky. L. Rep. 990; Carpenter *v.* Kearns, 4 Ky. L. Rep. 825. Ky. St. § 2135, provides that a wife shall not be endowed of land sold to satisfy a lien for purchase-money.

Maine.— Wing *v.* Ayer, 53 Me. 138.

Maryland.— Price *v.* Hobbs, 47 Md. 359; Rawlings *v.* Lowndes, 34 Md. 639; Miller *v.* Stump, 3 Gill 304; Ellicott *v.* Welch, 2 Bland 242; Steuart *v.* Beard, 4 Md. Ch. 319.

Mississippi.— Cocke *v.* Bailey, 42 Miss. 81; Walton *v.* Hargroves, 42 Miss. 18, 97 Am. Dec. 429; Bisland *v.* Hewett, 11 Sm. & M. 164.

Missouri.— Duke *v.* Brandt, 51 Mo. 221.

New York.— Williams *v.* Kierney, 6 N. Y. St. 560; Warner *v.* Van Alstyne, 3 Paige 513; Church *v.* Church, 3 Sandf. Ch. 434.

North Carolina.— Caroon *v.* Cooper, 63 N. C. 386; Kirby *v.* Dalton, 16 N. C. 195.

Ohio.— McArthur *v.* Porter, 1 Ohio 99.

Tennessee.— Boyd *v.* Martin, 9 Heisk. 382; Williams *v.* Woods, 1 Humphr. 408.

Virginia.— James *v.* Upton, 96 Va. 296, 31 S. E. 255.

West Virginia.— Martin *v.* Smith, 25 W. Va. 579.

Wisconsin.— Spear *v.* Evans, 51 Wis. 42, 82 N. W. 20.

See 17 Cent. Dig. tit. "Dower," § 67.

45. Blair *v.* Thompson, 11 Gratt. (Va.) 441.

46. McClure *v.* Harris, 12 B. Mon. (Ky.) 261; Gregg *v.* Jones, 5 Heisk. (Tenn.) 443.

47. Meigs *v.* Dimock, 6 Conn. 458.

The Georgia statute (Code, § 4694) provides that "no lien created by the husband in his life-time, though assented to by the wife, shall in any manner interfere with her right to dower," and under such statute it has been held that the widow's dower prevails as against a vendor's equitable lien. Clements *v.* Bostwick, 38 Ga. 1. The widow is entitled to dower in lands bargained by the husband in his lifetime to a third person, the purchase-money remaining unpaid, and the title to the land being retained by the husband in himself until his death. Slaughter *v.* Culpepper, 44 Ga. 319. See also Reese *v.* Burts, 39 Ga. 565.

48. McClure *v.* Harris, 12 B. Mon. (Ky.) 261; Hollis *v.* Hollis, 4 Baxt. (Tenn.) 524.

The vendor's lien exists as against the widow's dower only in those cases where the vendor's object is money, and where, having no other security, he relies on his lien for security. Meigs *v.* Dimock, 6 Conn. 458. So where a vendor absolutely conveys land, reserving no lien in the deed, and reciting the payment of the purchase-money, which was secured by a deed of trust on the same land executed by the vendee, the vendor has no lien, and the dower of the vendee's widow prevails. Gregg *v.* Jones, 5 Heisk. (Tenn.) 443.

Where a vendor waives his lien for the unpaid purchase-money to enable the vendee to raise money by a mortgage on the property, the widow of the vendee is entitled to dower in the premises. Carpenter *v.* Kearns, 4 Ky. L. Rep. 825.

b. Judgment For Recovery of Unpaid Purchase-Money. It has been held that if the vendor sues at law to recover the amount due upon the contract, and under a judgment recovered therein the land is sold by the sheriff after the vendee's death, the purchaser takes such land subject to the right of dower of the vendee's widow.[49]

3. Sale to Satisfy Lien. Where under the contract of sale the land is sold by the vendor to satisfy his lien, the purchaser takes free from the dower rights of the vendee's wife, whether such sale be made before or after the death of the vendee.[50] But if the sale to satisfy the vendor's lien be had subsequent to the vendee's death, his wife may have dower in the surplus, if any, remaining after the discharge of the lien.[51]

C. Rights of Mortgagees — 1. In General. The widow of a mortgagor who died seized of the mortgaged premises is entitled to dower as against all persons except the mortgagee and those claiming under him.[52]

2. Mortgages in Which Wife Did Not Join. A mortgage is a conveyance within the terms of statutes prescribing the manner in which an inchoate right of dower may be divested,[53] and therefore where a husband executes a mortgage upon lands owned by him in which his wife does not join, the wife does not thereby lose her right of dower, and upon his death she may enforce her claim against the mortgagee and those claiming under him.[54] The rights of the widow as against the mortgagee, however, are subject to control by statutory provision, and in some

49. McArthur *v.* Porter, 1 Ohio 99.

50. *Iowa.*— Barnes *v.* Gay, 7 Iowa 26.

Kentucky.— Nazareth Literary, etc., Inst. *v.* Lowe, 1 B. Mon. 257.

Mississippi.— Bisland *v.* Hewett, 11 Sm. & M. 164.

Missouri.— Riddick *v.* Walsh, 15 Mo. 519.

Tennessee.— Pillow *v.* Thomas, 1 Baxt. 120; Williams *v.* Woods, 1 Humphr. 408.

Virginia.— Wilson *v.* Davisson, 2 Rob. 384.

West Virginia.— Martin *v.* Smith, 25 W. Va. 579.

See 17 Cent. Dig. tit. "Dower," §§ 67, 145; and *infra*, VIII, D, 16.

51. Willet *v.* Beatty, 12 B. Mon. (Ky.) 172; Warner *v.* Van Alstyne, 3 Paige (N. Y.) 513; Thompson *v.* Thompson, 46 N. C. 430; Thompson *v.* Cochran, 7 Humphr. (Tenn.) 72, 46 Am. Dec. 68; Williams *v.* Woods, 1 Humphr. (Tenn.) 408; Martin *v.* Smith, 25 W. Va. 579. *Compare* Hart *v.* Logan, 49 Mo. 47.

If a subsequent encumbrancer or purchaser from a vendee is compelled to discharge the lien of the vendor he will be entitled to be substituted in the place of the vendor. Price *v.* Hobbs, 47 Md. 359.

Widow's right of dower in surplus proceeds arising from the sale of real estate to satisfy encumbrances see *supra*, VI, A, 8.

52. *Arkansas.*— Cockrill *v.* Armstrong, 31 Ark. 580.

Indiana.— Kissel *v.* Eaton, 64 Ind. 248.

Maine.— Campbell *v.* Knights, 24 Me. 332.

Massachusetts.— Toomey *v.* McLean, 105 Mass. 122; Henry's Case, 4 Cush. 257; Snow *v.* Stevens, 15 Mass. 278.

Mississippi.— Tucker *v.* Field, 51 Miss. 191; Ready *v.* Hamm, 46 Miss. 422; Pickett *v.* Buckner, 45 Miss. 226.

New Hampshire.— Bullard *v.* Bowers, 10 N. H. 500.

New Jersey.— Thompson *v.* Boyd, 21 N. J. L. 58, 22 N. J. L. 543.

New York.— Dougherty *v.* Remington Paper Co., 5 N. Y. St. 136; Collins *v.* Torry, 7 Johns. 278, 5 Am. Dec. 273.

North Carolina.— Williams *v.* Monroe, 67 N. C. 164.

South Carolina.— Sondley *v.* Caldwell, 28 S. C. 580, 6 S. E. 818.

Tennessee.— James *v.* Fields, 5 Heisk. 394.

See 17 Cent. Dig. tit. "Dower," § 68 *et seq.*

Right of wife of grantee of mortgagor is subordinate to mortgage. Cheek *v.* Waldron, 25 Ala. 152; Kermerer *v.* Bournes, 53 Iowa 172, 4 N. W. 921.

53. Conveyances by husband or husband and wife see *infra*, VIII, D, 15, 17.

54. *Georgia.*— Pirkle *v.* Equitable Mortg. Co., 99 Ga. 524, 28 S. E. 34.

Illinois.— Nicolls *v.* Miller, 37 Ill. 387; Gold *v.* Ryan, 14 Ill. 53.

Indiana.— Sutton *v.* Jervis, 31 Ind. 265, 99 Am. Dec. 631; Hamilton *v.* Johnson, 20 Ind. 392.

Maine.— Dockray *v.* Milliken, 76 Me. 517.

Maryland.— Price *v.* Hobbs, 47 Md. 359.

New Jersey.— Hayes *v.* Whitall, 13 N. J. Eq. 241.

New York.— Lawrence *v.* Miller, 1 Sandf. 516; Westfall *v.* Hintze, 7 Abb. N. Cas. 236; Collins *v.* Torry, 7 Johns. 278, 5 Am. Dec. 273; House *v.* House, 10 Paige 158; Paton *v.* Murray, 6 Paige 474.

South Carolina.— Miller *v.* Farmers' Bank, 49 S. C. 427, 27 S. E. 514, 61 Am. St. Rep. 821.

Tennessee.— Hudson *v.* Conway, 9 Lea 410; Turbeville *v.* Gibson, 5 Heisk. 565. *Compare* Greer *v.* Chester, 7 Humphr. 77.

United States.— Powell *v.* Monson, etc., Mfg. Co., 19 Fed. Cas. No. 11,357, 3 Mason 459.

of the states the widow's dower is subordinated to a mortgage executed by the husband in good faith for a valuable consideration.[55]

3. WIFE JOINING IN EXECUTION OF MORTGAGE. It is usually provided by statute that where a wife joins in the execution of a conveyance, she thereby releases her dower interest in the lands conveyed, so that where a wife joins with her husband in the execution of a mortgage upon lands owned by him, she thereby loses her right of dower as against the mortgagee and those claiming under him.[56] But if the mortgage, in the execution of which the wife joined, contains provisions limiting the extent of her release, she may still claim her dower in the lands mortgaged, except as therein specified.[57] Notwithstanding the fact of her joining in the execution of a mortgage, her dower rights are paramount as against all other persons than the mortgagees, and those legally substituted in their places.[58]

4. RULE AS TO PURCHASE-MONEY MORTGAGES. As already observed, where the husband purchases land and at the time of the purchase and as a part of the same transaction executes a mortgage to the grantor for the unpaid purchase-money, the husband is only instantaneously or transitorily seized with the absolute title of the land conveyed, which is not sufficient to create in the wife a right of dower in such lands.[59] The rule therefore is invariable that where a husband purchases land and at the same time executes to the grantor a mortgage for the unpaid purchase-money, such mortgage is superior to the wife's right of dower,[60] unless there

Improvements.— A mortgage by the husband alone does not preclude dower from attaching to improvements thereafter made. Powell *v.* Monson, etc., Mfg. Co., 19 Fed. Cas. No. 11,357, 3 Mason 459.

Void or fraudulent mortgages.— Since a deed of trust executed by the husband to secure the payment of a usurious debt is void, it does not divest the seizin of the husband, and therefore the widow's claim for dower accruing at his death is not defeated. Norwood *v.* Marrow, 20 N. C. 578. And where a husband without his wife's knowledge or consent falsely represents that he is unmarried, and thus obtains a loan on mortgage of lands owned by him, the wife's inchoate right of dower is superior to the mortgagee's equity. Westfall *v.* Hintze, 7 Abb. N. Cas. (N. Y.) 236. The wife's dower is not barred by a mortgage given by the husband for the sole purpose of defeating the wife's dower right. Killinger *v.* Reidenhauer, 6 Serg. & R. (Pa.) 531. See *infra*, VIII, D, 15.

Release by wife of dower by joining in conveyance see *infra*, VIII, D, 17.

55. Tucker *v.* Field, 51 Miss. 191; Pickett *v.* Buckner, 45 Miss. 226. See also Roach *v.* Dion, 39 Minn. 449, 40 N. W. 512.

56. *Indiana.*— Mark *v.* Murphy, 76 Ind. 534; Graves *v.* Braden, 62 Ind. 93; May *v.* Fletcher, 40 Ind. 575; Kemph *v.* Belknap, 15 Ind. App. 77, 43 N. E. 891.

Kentucky.— Morgan *v.* Wickliffe, 72 S. W. 1122, 24 Ky. L. Rep. 2104.

Maryland.—Johnson *v.* Hines, 61 Md. 122; Reiff *v.* Horst, 55 Md. 42.

Massachusetts.— Farwell *v.* Cotting, 8 Allen 211; Henry's Case, 4 Cush. 257.

Michigan.— Burrall *v.* Clark, 61 Mich. 624, 28 N. W. 739; Burrall *v.* Bender, 61 Mich. 608, 28 N. W. 731.

Mississippi.—McLean *v.* Ragsdale, 31 Miss. 701.

New Hampshire.— Dearbon *v.* Taylor, 18 N. H. 153.

New Jersey.— Eldridge *v.* Eldridge, 14 N. J. Eq. 195; Hartshorne *v.* Hartshorne, 2 N. J. Eq. 349.

New York.— Hinchliffe *v.* Shea, 34 Hun 365 [*affirmed* in 103 N. Y. 153, 8 N. E. 477].

South Carolina.— Miller *v.* Farmers' Bank, 49 S. C. 427, 27 S. E. 514, 61 Am. St. Rep. 821.

See 17 Cent. Dig. tit. "Dower," § 70.

Release by wife of her dower and the effect thereof see *infra*, VIII, D, 17.

Under Georgia statute.— Knox *v.* Higginbotham, 75 Ga. 699.

Effect of foreclosure on the right of dower see *infra*, VIII, D, 16, b.

57. Tirrel *v.* Kenney, 137 Mass. 30.

58. Barker *v.* Parker, 17 Mass. 564; Burrall *v.* Clark, 61 Mich. 624, 28 N. W. 739; Burrall *v.* Bender, 61 Mich. 608, 28 N. W. 731.

59. See *supra*, V, C, 8, b.

60. *Alabama.*— Boynton *v.* Sawyer, 35 Ala. 497; Eslava *v.* Lepretre, 21 Ala. 504, 56 Am. Dec. 266.

Indiana.— Butler *v.* Thornburgh, 131 Ind. 237, 30 N. E. 1073, 141 Ind. 152, 40 N. E. 514; Baker *v.* McCune, 82 Ind. 339; Nottingham *v.* Calvert, Smith 399.

Iowa.— Thomas *v.* Hansom, 44 Iowa 651.

Maine.— Wing *v.* Ayer, 53 Me. 138; Moore *v.* Rollins, 45 Me. 493; Young *v.* Tarbell, 37 Me. 509; Smith *v.* Eustis, 7 Me. 41.

Maryland.— Glenn *v.* Clark, 53 Md. 580; McCauley *v.* Grimes, 2 Gill & J. 318, 2 Am. Dec. 434.

Massachusetts.— King *v.* Stetson, 11 Allen 407; Walker *v.* Griswold, 6 Pick. 416.

Mississippi.— Whitehead *v.* Middleton, 2 How. 692.

is statutory provision to the contrary.[61] The conveyance to the husband and the mortgage from him must be in legal effect one and the same transaction, in order to preserve the superiority of the mortgage over the wife's dower right.[62] It has been held, and the holding seems to be supported by the weight of authority, that the rule is the same where, instead of the mortgage being executed directly to the grantor, it is executed to a third person who furnishes the purchase-money.[63]

5. Redemption and Contribution by Widow — a. Right of Redemption. The right of a widow to redeem lands belonging to her husband from all charges and encumbrances thereon, valid and effectual against her, follows as a necessary incident to the right of the widow to be endowed in the equity of redemption. It is practically the universal American doctrine that the widow may redeem the husband's lands from an existing encumbrance, and thus entitle herself to dower even as against the mortgagee.[64] It has also been held that the inchoate right of

Missouri.— Ragsdale *v.* O'Day, 61 Mo. App. 230.

New Jersey.— Boorum *v.* Tucker, 51 N. J. Eq. 135, 26 Atl. 456.

New York.— Sheldon *v.* Hoffnagle, 51 Hun 478, 4 N. Y. Suppl. 287; McGowan *v.* Smith, 44 Barb. 232; Mead *v.* Mead, 27 Misc. 459, 59 N. Y. Suppl. 444. See also Cunningham *v.* Knight, 1 Barb. 399; Stow *v.* Tifft, 15 Johns. 458, 8 Am. Dec. 266.

North Carolina.— Rhea *v.* Rawls, 131 N. C. 453, 42 S. E. 900; Bunting *v.* Jones, 78 N. C. 242.

Ohio.— Welch *v.* Buckins, 9 Ohio St. 331; Ruffner *v.* Evans, 2 Ohio Cir. Ct. 70.

Pennsylvania.— Reed *v.* Morrison, 12 Serg. & R. 18.

South Carolina.— Groce *v.* Ponder, 63 S. C. 162, 41 S. E. 83; Brown *v.* Duncan, 4 McCord 346; Crafts *v.* Crafts, 2 McCord 54.

Virginia.— Hurst *v.* Dulaney, 87 Va. 444, 12 S. E. 800; Coffman *v.* Coffman, 79 Va. 504.

West Virginia.—Roush *v.* Miller, 39 W. Va. 638, 20 S. E. 663; Reinhart *v.* Reinhart, 21 W. Va. 76; George *v.* Cooper, 15 W. Va. 666; Hunter *v.* Hunter, 10 W. Va. 321.

Wisconsin.— Jones *v.* Parker, 51 Wis. 218, 8 N. W. 124.

United States.—Mayburry *v.* Brien, 15 Pet. 21, 10 L. ed. 646.

See 17 Cent. Dig. tit. "Dower," § 71.

61. Wilson *v.* Peeples, 61 Ga. 218.

62. Wheatley *v.* Calhoun, 12 Leigh (Va.) 264, 37 Am. Dec. 654. See also Pendleton *v.* Pomeroy, 4 Allen (Mass.) 510; Webster *v.* Campbell, 1 Allen (Mass.) 313; Reed *v.* Morrison, 12 Serg. & R. (Pa.) 18; Mayburry *v.* Brien, 12 Pet. (U. S.) 21, 10 L. ed. 646.

63. Glenn *v.* Clark, 53 Md. 580; King *v.* Stetson, 11 Allen (Mass.) 407; Walker *v.* Griswold, 6 Pick. (Mass.) 416; Bunting *v.* Jones, 78 N. C. 242; Jones *v.* Parker, 51 Wis. 218, 8 N. W. 124.

Where money is borrowed of a third person, however, and invested in the purchase of lands, it has been held that it is not purchase-money within the meaning of the statute, and hence a mortgage given to secure the same is not superior to the widow's right of dower. Jeneson *v.* Garden, 29 Ill. 199, 81 Am. Dec. 306. Where a loan was made to discharge a homestead from the vendor's lien for purchase-money, and a mortgage was taken thereon from the borrower, in which the wife did not join, it was held that the mortgagee acquired no right superior to that of the widow. Pettus *v.* McKinney, 74 Ala. 108. And where the money borrowed was used partly in paying for the land and partly for improvements thereon the widow's claim is superior. Anderson *v.* Anderson, (Ky. 1899) 49 S. W. 786.

Where the owners of land encumbered by liens in excess of its value convey the land in consideration that the grantee pay the liens, and the grantee borrows from one of such lienholders money to pay all the liens but his own, and such lienholder takes a mortgage on the land from the grantee for the amount so advanced and the amount of his own lien, the mortgage is a purchase-money mortgage. Butler *v.* Thornhurgh, 141 Ind. 152, 40 N. E. 514.

64. *Alabama.*— Fry *v.* Merchants' Ins. Co., 15 Ala. 810.

Arkansas.— Salinger *v.* Black, 68 Ark. 449, 60 S. W. 229; Cockrill *v.* Armstrong, 31 Ark. 580.

Florida.— McMahon *v.* Russell, 17 Fla. 698.

Georgia.— Kinnebrew *v.* McWhorter, 61 Ga. 33.

Indiana.— Keith *v.* Hudson, 74 Ind. 333; Watson *v.* Clendenin, 6 Blackf. 477.

Kentucky.— Harrow *v.* Johnson, 3 Metc. 578.

Maine.—Wing *v.* Ayer, 53 Me. 138; Simonton *v.* Gray, 34 Me. 50; Gage *v.* Ward, 25 Me. 101; Campbell *v.* Knights, 24 Me. 332; Wilkins *v.* French, 20 Me. 111; Carll *v.* Butman, 7 Me. 102; Smith *v.* Eustis, 7 Me. 41.

Maryland.— Bank of Commerce *v.* Owens, 31 Md. 320, 1 Am. Rep. 60.

Massachusetts.— Sargeant *v.* Fuller, 105 Mass. 119; Davis *v.* Wetherill, 13 Allen 60, 90 Am. Dec. 177; McCabe *v.* Bellows, 7 Gray 148, 66 Am. Dec. 467; Draper *v.* Baker, 12 Cush. 288; Lund *v.* Woods, 11 Metc. 566; Van Vronker *v.* Eastman, 7 Metc. 157; Messiter *v.* Wright, 16 Pick. 151; Eaton *v.* Simonds, 14 Pick. 98; Walker *v.* Griswold, 6 Pick. 416; Gibson *v.* Crehore, 5 Pick. 146; Peabody *v.* Patten, 2 Pick. 517; Snow *v.* Stevens, 15 Mass. 278; Bolton *v.* Ballard, 13 Mass. 227.

dower of a wife is a sufficient interest to sustain an application by her to redeem the mortgage of her insolvent husband during his lifetime.[65] This principle has also been applied to purchase-money mortgages.[66]

b. Necessity of Redemption. Where under the rule as already stated a mortgage against a husband's lands is paramount to his widow's claim for dower, it will be necessary for the widow in order to assert her claim as against the mortgagee and those claiming under him to redeem such lands by paying the amount of the mortgage.[67] She must redeem the entire premises by paying the whole of the mortgage debt in order to entitle herself to dower as against the mortgagee.[68] A mortgagee cannot be compelled to accept payment of a part only of his debt, and surrender a proportionate interest in the mortgaged estate.[69]

c. Contribution by Widow — (i) *General Rule.* Where a person having the right to redeem has redeemed lands from a mortgage which was superior to the dower interest of the widow of the mortgagor, the widow must contribute her ratable proportion of the amount paid before she can be endowed of any portion of the mortgaged lands.[70]

New Hampshire.— Rossiter *v.* Cossit, 15 N. H. 38; Cass *v.* Martin, 6 N. H. 25.

New York.— Smith *v.* Gardner, 42 Barb. 356; Mills *v.* Van Voorhis, 23 Barb. 125; Denton *v.* Nanny, 8 Barb. 618; Van Duyne *v.* Thayre, 14 Wend. 233; Bell *v.* New York, 10 Paige 49.

North Carolina.— Campbell *v.* Murphy, 55 N. C. 357.

Ohio.— Ketchum *v.* Shaw, 28 Ohio St. 503.

Pennsylvania.— Reed *v.* Morrison, 12 Serg. & R. 18.

South Carolina.— Stoppelbein *v.* Shulte, 1 Hill 200; Henagan *v.* Harllee, 10 Rich. Eq. 285.

Vermont.— Danforth *v.* Smith, 23 Vt. 247.

Virginia.— Daniel *v.* Leitch, 13 Gratt. 195; Heth *v.* Cocke, 1 Rand. 344.

See 17 Cent. Dig. tit. "Dower," § 72 *et seq.*; and, generally, Mortgages.

In England at an early day courts of equity conferred upon a wife a right of redemption as to all charges and encumbrances upon the husband's land, which were valid and effectual against her, and which were in their nature redeemable. Hitchins *v.* Hitchins, Freem. 241, 22 Eng. Reprint 1185, Prec. Ch. 133, 24 Eng. Reprint 64, 2 Vern. Ch. 403, 23 Eng. Reprint 861; Banks *v.* Sutton, 2 P. Wms. 700, 24 Eng. Reprint 922; Hamilton *v.* Mohun, 1 P. Wms. 118, 24 Eng. Reprint 319.

65. Davis *v.* Wetherell, 13 Allen (Mass.) 60, 90 Am. Dec. 177.

Wife's right to redeem from a mortgage see Mortgages.

66. Mantz *v.* Buchanan, 1 Md. Ch. 202; Adams *v.* Hill, 29 N. H. 202; Bullard *v.* Bowers, 10 N. H. 500; Mills *v.* Van Voorhis, 23 Barb. (N. Y.) 125 [*affirmed* in 20 N. Y. 412]; Wheeler *v.* Morris, 2 Bosw. (N. Y.) 524; Bell *v.* New York, 10 Paige (N. Y.) 49. *Contra*, Nottingham *v.* Calvert, 1 Ind. 527; Cunningham *v.* Knight, 1 Barb. (N. Y.) 399.

67. *Arkansas.*— Cockrill *v.* Armstrong, 31 Ark. 580.

Florida.— McMahon *v.* Russell, 17 Fla. 698.

Georgia.—Kinnebrew *v.* McWhorter, 61 Ga. 33.

Illinois.— Virgin *v.* Virgin, 91 Ill. App. 188 [*affirmed* in 189 Ill. 144, 59 N. E. 586].

Indiana.— Keith *v.* Hudson, 74 Ind. 333; Watson *v.* Clendenin, 6 Blackf. 477.

Maine.— Wilkins *v.* French, 20 Me. 111.

Massachusetts.— Sargeant *v.* Fuller, 105 Mass. 119; Newton *v.* Cook, 4 Gray 46.

Mississippi.—Ready *v.* Hamm, 46 Miss. 422.

New Hampshire.— Hastings *v.* Stevens, 29 N. H. 564; Rossiter *v.* Cossit, 15 N. H. 38.

New York.— Westfall *v.* Westfall, 16 Hun 541; Mills *v.* Van Voorhis, 23 Barb. 125; Van Duyne *v.* Thayre, 14 Wend. 233.

South Carolina.— Crafts *v.* Crafts, 2 McCord 54.

Tennessee.— Thompson *v.* Cochran, 7 Humphr. 72, 46 Am. Dec. 68.

Compare Baldwin *v.* Jacks, 3 Ohio Dec. (Reprint) 545.

See 17 Cent. Dig. tit. "Dower," § 72.

68. Messiter *v.* Wright, 16 Pick. (Mass.) 151 (holding that a widow may redeem either by paying her proportion of the mortgage debt and obtaining a release of her third, or by paying the whole if the mortgagee requires it, holding the whole, as against others entitled, for her security); Gibson *v.* Crehore, 5 Pick. (Mass.) 146; Bell *v.* New York, 10 Paige (N. Y.) 49.

69. 4 Kent Comm. 163; 1 Scribner Dower 486.

70. *Illinois.*— Cox *v.* Garst, 105 Ill. 342; Selb *v.* Montague, 102 Ill. 446; Greenbaum *v.* Austrian, 70 Ill. 591; Zinn *v.* Hazlett, 67 Ill. App. 410; Noffts *v.* Koss, 29 Ill. App. 301; Selb *v.* Mabee, 14 Ill. App. 574.

Indiana.—Whitehead *v.* Cummins, 2 Ind. 58.

Iowa.— Conger *v.* Cook, 57 Iowa 49, 10 N. W. 314; Trowbridge *v.* Sypher, 55 Iowa 352, 7 N. W. 567.

Maine.— Barbour *v.* Barbour, 46 Me. 9; Richardson *v.* Skolfield, 45 Me. 386; Wilkins *v.* French, 20 Me. 111; Carll *v.* Butman, 7 Me. 102.

Maryland.— Bank of Commerce *v.* Owens, 31 Md. 320, 1 Am. Rep. 60.

(II) *Redemption Out of Estate of Husband.* If the mortgage be paid either by the husband during his lifetime,[71] or after his death by his administrators or executors out of the estate, the widow is entitled to dower without contribution.[72]

(III) *Effect of Purchase of Equity of Redemption.* Where a purchaser of the equity of redemption, under a mortgage in which the wife of the mortgagor joined, is not bound to pay the mortgage debt, but does in fact pay it, in aid of his own title and estate, whereby the mortgage is discharged, the wife's claim of dower is subject in equity to a just contribution.[73]

(IV) *Extent of Contribution.* To preserve her dower the widow must contribute an amount sufficient to keep down the interest on one third of the amount paid in satisfaction of the mortgage.[74] In other words she must pay a part of the sum paid upon the mortgage, proportionate to the value of her dower, which will be the interest on one third of the mortgage debt for her life or a gross sum equivalent thereto.[75]

(V) *Reimbursement of Widow.* If the widow, in the exercise of her right to redeem, pays the whole of the mortgage debt, she may take and hold possession of the mortgaged premises as against all those whose duty it is to contribute, until she has been reimbursed to the extent of the proportionate shares properly chargeable against the other parties in interest.[76]

Massachusetts.—McCabe *v.* Bellows, 7 Gray 148, 66 Am. Dec. 467; Pynchon *v.* Lester, 6 Gray 314; Newton *v.* Cook, 4 Gray 46; Niles *v.* Nye, 13 Metc. 135; Van Vronker *v.* Eastman, 7 Metc. 157.

Michigan.— Hodges *v.* Phinney, 106 Mich. 537, 64 N. W. 477.

Missouri.— Hart *v.* Logan, 49 Mo. 47; Atkinson *v.* Stewart, 46 Mo. 510.

New Hampshire.— Norris *v.* Morrison, 45 N. H. 490; Hinds *v.* Ballou, 44 N. H. 619; Woods *v.* Wallace, 30 N. H. 384; Hastings *v.* Stevens, 29 N. H. 564; Adams *v.* Hill, 29 N. H. 202; Clough *v.* Elliott, 23 N. H. 182; Rossiter *v.* Cossit, 15 N. H. 38; Cass *v.* Martin, 6 N. H. 25.

New York.— Everson *v.* McMullen, 113 N. Y. 293, 21 N. E. 52, 10 Am. St. Rep. 445, 4 L. R. A. 118; Graham *v.* Linden, 50 N. Y. 547; House *v.* House, 10 Paige 158; Bell *v.* New York, 10 Paige 49; Russell *v.* Austin, 1 Paige 192; Evertson *v.* Tappen, 5 Johns. Ch. 497; Swaine *v.* Perine, 5 Johns. Ch. 482, 9 Am. Dec. 318.

Ohio.— Fox *v.* Pratt, 27 Ohio St. 512; McArthur *v.* Franklin, 16 Ohio St. 193.

Oregon.— Fowle *v.* House, 29 Oreg. 114, 44 Pac. 692.

Rhode Island.— Kenyon *v.* Segar, 14 R. I. 490.

Vermont.— Danforth *v.* Smith, 23 Vt. 247.

Virginia.—Harper *v.* Vaughan, 87 Va. 426, 12 S. E. 785.

See 17 Cent. Dig. tit. "Dower," § 73.

71. Walsh *v.* Wilson, 130 Mass. 124; Snow *v.* Stevens, 15 Mass. 278; Bolton *v.* Ballard, 13 Mass. 227; Bullard *v.* Bowers, 10 N. H. 500; Collins *v.* Torry, 7 Johns. (N. Y.) 278, 5 Am. Dec. 273; Hitchcock *v.* Harrington, 6 Johns. (N. Y.) 290, 5 Am. Dec. 229.

72. Hatch *v.* Palmer, 58 Me. 271; Atkinson *v.* Stewart, 46 Mo. 510; Hastings *v.* Stevens, 29 N. H. 564; Rossiter *v.* Cossit, 15 N. H. 38.

73. Everson *v.* McMullen, 113 N. Y. 293, 21 N. E. 52, 10 Am. St. Rep. 445, 4 L. R. A. 118.

Acquisition of equity of redemption.— Thompson *v.* Boyd, 22 N. J. L. 543; Van Duyne *v.* Thayre, 19 Wend. (N. Y.) 162. See also Campbell *v.* Knights, 24 Me. 332; McCabe *v.* Bellows, 7 Gray (Mass.) 148, 66 Am. Dec. 467; Van Vronker *v.* Eastman, 7 Metc. (Mass.) 157; Woods *v.* Wallace, 30 N. H. 384.

Under the Michigan statute.— Snyder *v.* Snyder, 6 Mich. 470.

74. *Massachusetts.*— Gibson *v.* Crehore, 5 Pick. 146.

New Hampshire.— Woods *v.* Wallace, 30 N. H. 384; Rossiter *v.* Cossit, 15 N. H. 38; Cass *v.* Martin, 6 N. H. 25.

New Jersey.— Hartshorne *v.* Hartshorne, 2 N. J. Eq. 349.

New York.— Graham *v.* Linden, 50 N. Y. 547; House *v.* House, 10 Paige 158; Bell *v.* New York, 10 Paige 49; Russell *v.* Austin, 1 Paige 192; Swaine *v.* Perine, 5 Johns. Ch. 482, 9 Am. Dec. 318.

Ohio.— McArthur *v.* Franklin, 16 Ohio St. 193.

See 17 Cent. Dig. tit. "Dower," § 73.

75. Van Vronker *v.* Eastman, 7 Metc. (Mass.) 157; Graham *v.* Linden, 50 N. Y. 547; Swaine *v.* Perine, 5 Johns. Ch. (N. Y.) 482, 9 Am. Dec. 318; Fowle *v.* House, 29 Oreg. 114, 44 Pac. 692.

Payment of gross sum.— House *v.* House, 10 Paige (N. Y.) 158; Bell *v.* New York, 10 Paige (N. Y.) 49; McArthur *v.* Franklin, 16 Ohio St. 193.

Agreement as to apportionment.— It is competent for the dowress, the mortgagee, and the one who purchases the equity of redemption subject to the encumbrance and dower, to agree upon a mode of apportionment. Danforth *v.* Smith, 23 Vt. 247.

76. Gage *v.* Ward, 25 Me. 101; Wilkins *v.* French, 20 Me. 111; Carll *v.* Butman, 7 Me. 102; Gibson *v.* Crehore, 5 Pick. (Mass.) 146; Woods *v.* Wallace, 30 N. H. 384; Bell *v.* New

d. Mortgage Satisfied Out of Husband's Estate — (I) *ENGLISH DOCTRINE.* In England the doctrine has been declared that a dowress, like an heir or devisee, has a right to have the personal estate of her husband applied so far as it will go in discharge of mortgages and other debts contracted by the husband, which are charges upon the land which she holds in dower.[77]

(II) *AMERICAN RULE.* The English doctrine, however, has not been universally accepted in the United States. The weight of authority, independent of statutory enactment, is against the right of a widow to have mortgages and other encumbrances satisfied from the personal estate of the husband in order to preserve her right of dower in her husband's lands.[78] The question is controlled to a certain extent by the statutes in the several states.[79]

D. Mechanics' Liens. In most jurisdictions a widow's dower is not affected by the statutory mechanic's lien for labor performed or materials furnished in the improvement of her husband's lands.[80]

E. Partnership Claims. As has already been shown, the doctrine as applied in most of the states gives to the widow of a deceased partner her right of dower in the partnership real estate after the satisfaction of the partnership debts and the

York, 10 Paige (N. Y.) 49; Swaine *v.* Perine, 5 Johns. Ch. (N. Y.) 482, 9 Am. Dec. 318.

77. Park Dower 351, 352.

78. *Arkansas.*— Salinger *v.* Black, 68 Ark. 449, 60 S. W. 229; Hewitt *v.* Cox, 55 Ark. 225, 15 S. W. 1026, 17 S. W. 873.

Connecticut.—Platt's Appeal, 56 Conn. 572, 16 Atl. 669.

Indiana.— Whitehead *v.* Cummins, 2 Ind. 58.

Iowa.— Trowbridge *v.* Sypher, 55 Iowa 352, 7 N. W. 567.

Maine.— Young *v.* Tarbell, 37 Me. 509.

Massachusetts.— Gibson *v.* Crehore, 3 Pick. 475; Scott *v.* Hancock, 13 Mass. 162; Bird *v.* Gardner, 10 Mass. 364, 6 Am. Dec. 137.

New Hampshire.— Hastings *v.* Stevens, 29 N. H. 564; Rossiter *v.* Cossit, 15 N. H. 38.

New Jersey.— Burnet *v.* Burnet, 46 N. J. Eq. 144, 18 Atl. 374; Campbell *v.* Campbell, 30 N. J. Eq. 415; Hinchman *v.* Stiles, 9 N. J. Eq. 454.

New York.— Durnherr *v.* Rau, 135 N. Y. 219, 32 N. E. 49; Hawley *v.* Bradford, 9 Paige 200, 37 Am. Dec. 390; Titus *v.* Neilson, 5 Johns. Ch. 452; Tahele *v.* Tabele, 1 Johns. Ch. 45.

Ohio.— State Bank *v.* Hinton, 21 Ohio St. 509.

Virginia.— Daniel *v.* Leitch, 13 Gratt. 195.

See 17 Cent. Dig. tit. "Dower," § 74.

Contra.— *Alabama.*— Boynton *v.* Sawyer, 35 Ala. 497.

Kentucky.— Harrow *v.* Johnson, 3 Metc. 578.

Maryland.— Mantz *v.* Buchanan, 1 Md. Ch. 202.

North Carolina.— Gore *v.* Townsend, 105 N. C. 228, 11 S. E. 160, 8 L. R. A. 443; Gwathmey *v.* Pearce, 74 N. C. 398; Ruffin *v.* Cox, 71 N. C. 253; Creecy *v.* Pierce, 69 N. C. 67; Smith *v.* Gilmer, 64 N. C. 546; Caroon *v.* Cooper, 63 N. C. 386; Klutts *v.* Klutts, 58 N. C. 80; Campbell *v.* Murphy, 55 N. C. 357.

Rhode Island.— Peckham *v.* Hadwen, 8 R. I. 160; Mathewson *v.* Smith, 1 R. I. 22.

South Carolina.— Henagan *v.* Harllee, 10 Rich. Eq. 285; Wilson *v.* McConnell, 9 Rich. Eq. 500.

See 17 Cent. Dig. tit. "Dower," § 74.

79. Under the Indiana statute granting to the widow one third of the husband's real estate in fee simple, free from all demands of creditors, it has been universally held that it is the duty of the administrator or executor in settling the husband's estate to apply all the personal assets in his hands, if necessary, to pay liens on the land, even to the exclusion of all general creditors; not only is this his duty, but he is likewise bound to apply the proceeds of the sale of two thirds of the deceased husband's lands, if necessary, to that purpose. Bowen *v.* Ringle, 119 Ind. 560, 20 N. E. 534; McCord *v.* Wright, 97 Ind. 34; Sparrow *v.* Kelso, 92 Ind. 514; Main *v.* Ginthert, 92 Ind. 180; Hardy *v.* Miller, 89 Ind. 440; Grave *v.* Bunch, 83 Ind. 4; Morgan *v.* Sackett, 57 Ind. 580; Hunsucker *v.* Smith, 49 Ind. 114; Kemph *v.* Belknap, 15 Ind. App. 77, 43 N. E. 891.

Wife not a surety for husband.— Hawley *v.* Bradford, 9 Paige (N. Y.) 200, 37 Am. Dec. 390; Durnherr *v.* Rau, 135 N. Y. 219, 32 N. E. 49. And see Burnet *v.* Burnet, 46 N. J. Eq. 144, 18 Atl. 374.

80. *Illinois.*— Gove *v.* Cather, 23 Ill. 634, 76 Am. Dec. 711; Shaeffer *v.* Weed, 8 Ill. 511.

Indiana.— Mark *v.* Murphy, 76 Ind. 534; Bishop *v.* Boyle, 9 Ind. 169, 68 Am. Dec. 615; Pifer *v.* Ward, 8 Blackf. 252. *Compare* Buser *v.* Shepard, 107 Ind. 417, 8 N. E. 280.

Massachusetts.— Van Vronker *v.* Eastman, 7 Metc. 157.

Nebraska.— Butler *v.* Fitzgerald, 43 Nebr. 192, 61 N. W. 640, 47 Am. St. Rep. 741, 27 L. R. A. 252.

New York.—Johnston *v.* Dahlgren, 14 Misc. 623, 36 N. Y. Suppl. 806.

Ohio.— Choteau *v.* Thompson. 2 Ohio St. 114.

Virginia.— Iaege *v.* Bossieux, 15 Gratt. 83, 76 Am. Dec. 189.

Contra, Nazareth Literary, etc., Inst. *v.* Lowe, 1 B. Mon. (Ky.) 257.

See 17 Cent. Dig. tit. "Dower," § 75.

satisfaction of the claims of the other partners in respect to such estate.[81] The dower of a deceased partner's widow in her husband's interest in partnership real estate is subordinate therefore to the claims of the partnership creditors,[82] and can only be enforced against the interest remaining after the settlement of the partnership affairs.[83]

F. Liens and Encumbrances Created Before Marriage — 1. In General. The general rule is that while a wife takes dower in land of which her husband was seized at the time of their marriage,[84] she takes it subject to all subsisting liens lawfully created by her husband prior to the marriage;[85] and this is true

81. Right to dower in partnership property see *supra*, VI, B, 1, f.

82. *Alabama.*— Brewer *v.* Browne, 68 Ala. 210; Andrews *v.* Brown, 21 Ala. 437, 56 Am. Dec. 252.

Arkansas.— Lenow *v.* Fones, 48 Ark. 557, 4 S. W. 56; Drewry *v.* Montgomery, 28 Ark. 256.

Florida.— Price *v.* Hicks, 14 Fla. 565; Loubat *v.* Nourse, 5 Fla. 350.

Illinois.— Trowbridge *v.* Cross, 117 Ill. 109, 7 N. E. 347; Simpson *v.* Leech, 86 Ill. 286; Bopp *v.* Fox, 63 Ill. 540.

Indiana.— Grissom *v.* Moore, 106 Ind. 296, 6 N. E. 629, 55 Am. Rep. 742; Cobble *v.* Tomlinson, 50 Ind. 550; Huston *v.* Neil, 41 Ind. 504; Hale *v.* Plummer, 6 Ind. 121; Matlock *v.* Matlock, 5 Ind. 403.

Iowa.— Paige *v.* Paige, 71 Iowa 318, 32 N. W. 360, 60 Am. Rep. 799.

Kentucky.— Hill *v.* Cornwall, 95 Ky. 512, 26 S. W. 540, 16 Ky. L. Rep. 97; Galbraith *v.* Gedge, 16 B. Mon. 631; Bowler *v.* Blair, 6 Ky. L. Rep. 665.

Maryland.— Goodburn *v.* Stevens, 5 Gill 1; Goodburn *v.* Stevens, 1 Md. Ch. 420.

Massachusetts.— Shearer *v.* Shearer, 98 Mass. 107; Wilcox *v.* Wilcox, 13 Allen 252; Howard *v.* Priest, 5 Metc. 582; Dyer *v.* Clark, 5 Metc. 562, 39 Am. Dec. 697; Burnside *v.* Merrick, 4 Metc. 537.

Michigan.— Free *v.* Beatley, 95 Mich. 426, 54 N. W. 910.

Minnesota.—Woodward-Holmes Co. *v.* Nudd, 58 Minn. 236, 59 N. W. 1010, 49 Am. St. Rep. 503, 27 L. R. A. 340.

Mississippi.— Robertshaw *v.* Hanway, 52 Miss. 713; Sykes *v.* Sykes, 49 Miss. 190.

Missouri.—Young *v.* Thrasher, 115 Mo. 222, 21 S. W. 1104; Julian *v.* Wrightsman, 73 Mo. 569; Willet *v.* Brown, 65 Mo. 138, 27 Am. Rep. 265; Duhring *v.* Duhring, 20 Mo. 174.

New Hampshire.— Cilley *v.* Huse, 40 N. H. 358.

New Jersey.— Campbell *v.* Campbell, 30 N. J. Eq. 415; Uhler *v.* Semple, 20 N. J. Eq. 288.

New York.— Greenwood *v.* Marvin, 111 N. Y. 423, 19 N. E. 228; Sage *v.* Sherman, 2 N. Y. 417; Riddell *v.* Riddell, 85 Hun 482, 33 N. Y. Suppl. 99; Dawson *v.* Parsons, 10 Misc. 428, 31 N. Y. Suppl. 78; Greenwood *v.* Marvin, 11 N. Y. St. 235; Smith *v.* Jackson, 2 Edw. 28.

North Carolina.— Stroud *v.* Stroud, 61 N. C. 525.

Ohio.— Greene *v.* Greene, 1 Ohio 535, 13 Am. Dec. 642.

Rhode Island.— Mowry *v.* Bradley, 11 R. I. 370.

Tennessee.— Lyon *v.* Lyon, 1 Tenn. Ch. 225.

West Virginia.— Martin *v.* Smith, 25 W. Va. 579.

United States.— Clay *v.* Freeman, 118 U. S. 97, 6 S. Ct. 964, 30 L. ed. 104; Holton *v.* Guinn, 65 Fed. 450.

See 17 Cent. Dig. tit. "Dower," § 76; and cases cited *supra*, VI, B, 1, f.

83. Price *v.* Hicks, 14 Fla. 565; Loubat *v.* Nourse, 5 Fla. 350; Bopp *v.* Fox, 63 Ill. 540; Huston *v.* Neil, 41 Ind. 504; Hale *v.* Plummer, 6 Ind. 121; Goodburn *v.* Stevens, 5 Gill (Md.) 1; and other cases cited in the note preceding.

The inchoate right of dower of the wife of a partner in the real estate of her husband only attaches to such of the real estate as remains in specie after the partnership is terminated and its affairs are ended. Woodward-Holmes Co. *v.* Nudd, 58 Minn. 236, 59 N. W. 1010, 49 Am. St. Rep. 503, 27 L. R. A. 340. Where by a partnership agreement and deeds executed pursuant thereto, in which the wives of the partners joined, the entire real estate of the partners became firm property, it was held that after the payment of the firm debts the wife of each became entitled to dower in the whole land. Free *v.* Beatley, 95 Mich. 426, 54 N. W. 910.

Improvements on individual lands for partnership purposes.— Grissom *v.* Moore, 106 Ind. 296, 6 N. E. 629, 55 Am. Rep. 742.

84. See *supra*, V, C, 1.

85. *Alabama.*— Irvine *v.* Armistead, 46 Ala. 363.

Georgia.— Green *v.* Causey, 10 Ga. 435.

Indiana.— Godfrey *v.* Craycraft, 81 Ind. 476; Eiceman *v.* Finch, 79 Ind. 511; Robbins *v.* Robbins, 8 Blackf. 174.

Maryland.— Mantz *v.* Buchanan, 1 Md. Ch. 202.

Mississippi.— Ready *v.* Hamm, 46 Miss. 422.

South Carolina.— Miller *v.* Farmers' Bank, 49 S. C. 427, 27 S. E. 514, 61 Am. St. Rep. 821; Jones *v.* Miller, 17 S. C. 380; Davidson *v.* Graves, Bailey Eq. 268.

See 17 Cent. Dig. tit. "Dower," § 77.

Agreement to devise.— A widow is not entitled to dower in land which her husband had agreed to devise to another before his marriage. Burdine *v.* Burdine, 98 Va. 515, 36 S. E. 992, 81 Am. St. Rep. 741.

notwithstanding the fact that she had neither constructive nor actual notice of their existence at the time of the marriage.[86]

2. JUDGMENTS. Judgments recovered against a husband before marriage are ordinarily held to constitute a lien prior to the widow's dower interest in his real estate;[87] but subject to the liens of such judgments she is entitled to dower therein,[88] unless such lands are sold under the judgment, in which case her dower attaches to the surplus remaining after the satisfaction of the judgment.[89]

3. MORTGAGES. A mortgage executed by the husband prior to the marriage is a superior lien to the wife's dower interest,[90] unless it affirmatively appears that it was executed with the fraudulent purpose of defeating the wife's dower rights.[91] It is usually held that in respect to such a mortgage the wife is dowable of the equity of redemption;[92] and if upon foreclosure or sale under the mort-

Subrogation of parties discharging superior lien see SUBROGATION.

86. Godfrey *v.* Craycraft, 81 Ind. 476.

87. *Alabama.*— Irvine *v.* Armistead, 46 Ala. 363.

Indiana.— Eiceman *v.* Finch, 79 Ind. 511; Whitehead *v.* Cummins, 2 Ind. 58; Robbins *v.* Robbins, 8 Blackf. 174.

Maine.— Brown *v.* Williams, 31 Me. 403.

Maryland.— Queen Anne's County *v.* Pratt, 10 Md. 5.

New York.— Sandford *v.* McLean, 3 Paige 117, 23 Am. Dec. 773.

South Carolina.— Jones *v.* Miller, 17 S. C. 380.

See 17 Cent. Dig. tit. "Dower," § 77.

In Georgia it has been held that where judgments had been obtained against the husband prior to the marriage with his wife, and his estate is insolvent, on the death of the husband the wife is entitled to dower in his lands which have not been sold under the judgment; that, although the judgments created a lien upon his lands, his seizin thereof was not divested until levy and sale under the execution, in the manner pointed out by law. Green *v.* Causey, 10 Ga. 435. And see Simmons *v.* Latimer, 37 Ga. 490.

Where lands are taken in attachment before marriage, but there is no judgment until after the marriage, the wife of the judgment debtor has no dower as against a purchaser of the lands at a subsequent sale of the lands under the judgment and in virtue of the proceedings in attachment. Brown *v.* Williams, 31 Me. 403.

88. Robbins *v.* Robbins, 8 Blackf. (Ind.) 174.

89. Dower in surplus proceeds of land sales see *supra*, VI, A, 8.

90. *Illinois.*— Shope *v.* Schaffner, 140 Ill. 470, 30 N. E. 872; Walker *v.* Doane, 131 Ill. 27, 22 N. E. 1006.

Maine.— Carll *v.* Butman, 7 Me. 102.

Maryland.— Miller *v.* Stump, 3 Gill 304.

Michigan.— Burrall *v.* Clark, 61 Mich. 624, 28 N. W. 739; Burrall *v.* Bender, 61 Mich. 608, 28 N. W. 731.

New Jersey.— Montgomery *v.* Bruere, 4 N. J. L. 300; Hartshorne *v.* Hartshorne, 2 N. J. Eq. 349.

New York.— Cunningham *v.* Knight, 1 Barb. 399; Ulrich *v.* Ulrich, 1 N. Y. Suppl. 777.

Ohio.— Rands *v.* Kendall, 15 Ohio 671; Phillips *v.* Keels, 4 Ohio Cir. Ct. 316.

South Carolina.— Verree *v.* Verree, 2 Brev. 211.

Tennessee.— Boyer *v.* Boyer, 1 Coldw. 12.

Virginia.— Heth *v.* Cocke, 1 Rand. 344.

See 17 Cent. Dig. tit. "Dower," § 18.

When a woman marries after the execution of a mortgage on land by her husband, a court of equity, while making the security available to the mortgagee, will take care that the interest of the widow is not affected more than is necessary to secure the payment of the debt. Fry *v.* Merchants' Ins. Co., 15 Ala. 810.

Where a grantee of the husband takes land subject to a mortgage executed prior to the husband's marriage, and as a part of the purchase-price assumes the payment of the mortgage and cancels it, he cannot subsequently set up such mortgage as against the dower rights of the widow of the mortgagor. Bartlett *v.* Musliner, 28 Hun (N. Y.) 235.

91. Kelly *v.* McGrath, 70 Ala. 75, 45 Am. Rep. 75.

Fraudulent conveyances of lands for the purpose of defeating dower rights see *infra*, VIII, D, 15, a, (III).

92. Coles *v.* Coles, 15 Johns. (N. Y.) 319; Heth *v.* Cocke, 1 Rand. (Va.) 344.

In Illinois it is held that where the husband executes a mortgage before his marriage his widow is not entitled to be endowed in the equity of redemption at common law as against the mortgagee or those claiming under him; but if the heir redeems she may obtain dower by contributing ratably toward the redemption. Virgin *v.* Virgin, 91 Ill. App. 188 [*affirmed* in 189 Ill. 144, 59 N. E. 586]. See also Burson *v.* Dow, 65 Ill. 146.

Release of equity of redemption.— Where land is mortgaged by the husband, and the condition is broken before marriage, and the equity of redemption is released by him during the coverture, his widow is not entitled to dower. Rands *v.* Kendall, 15 Ohio 671.

Only those claiming through the mortgage can defeat the wife's contingent right of dower in lands of the husband which were mortgaged before her marriage. Sprague *v.* Law, 8 Ohio Cir. Dec. 428.

gage after the marriage a surplus remains after satisfying the mortgage debt the wife may claim dower therein.[93]

G. Rights of Husband's Creditors. The rights of the husband's general creditors are as a general rule subordinate to his widow's claim for dower,[94] unless such debts are specially charged upon the land before coverture,[95] or at the time of the acquisition of such lands and as a part of the same transaction.[96] The insolvency of the husband's estate does not affect the widow's right of dower,[97] unless otherwise provided by statute.[98] Where dower has been actually assigned to a widow her interests cannot be sold in proceedings brought for the sale of the decedent's real property to provide means for the payment of his debts.[99]

H. Interests of Heirs, Devisees, or Legatees. As in the case of the claims of creditors, the claims of heirs, devisees, or legatees, and of their creditors, are subordinate to the widow's right of dower.[1]

VIII. INCHOATE RIGHT OF DOWER.

A. Nature and Incidents — 1. In General. An inchoate dower right is not an estate;[2] nor is it an interest in real estate.[3] It is, however, a substantial right,

93. Virgin *v.* Virgin, 189 Ill. 144, 59 N. E. 586; Hartshorne *v.* Hartshorne, 2 N. J. Eq. 349; Miller *v.* Farmers' Bank, 49 S. C. 427, 27 S. E. 514, 61 Am. St. Rep. 821.

Dower in surplus proceeds remaining after the foreclosure and sale of mortgaged lands see *supra*, VI, A, 8, d.

94. *Alabama.*— Allen *v.* Allen, 4 Ala. 556.

Arkansas.— Livingston *v.* Cochran, 33 Ark. 294; Tate *v.* Jay, 31 Ark. 576; Hill *v.* Mitchell, 5 Ark. 608.

Connecticut.— Crocker *v.* Fox, 1 Root 227.

Georgia.— Hargrove *v.* Lilly, 69 Ga. 326; Adams *v.* Adams, 46 Ga. 630; Simmons *v.* Latimer, 37 Ga. 490.

Illinois.— Sisk *v.* Smith, 6 Ill. 503.

Indiana.— Bryan *v.* Uland, 101 Ind. 477, 1 N. E. 52; Barnard *v.* Cox, 25 Ind. 251; Johnson *v.* Johnson, 9 Ind. 28.

Iowa.— Thomas *v.* Thomas, 73 Iowa 657, 35 N. W. 693; Kendall *v.* Kendall, 42 Iowa 464; Mock *v.* Watson, 41 Iowa 241.

New York.— Matthews *v.* Duryee, 45 Barb. 69; Church *v.* Church, 3 Sandf. Ch. 434.

North Carolina.— Creecy *v.* Pearce, 69 N. C. 67.

Ohio.— McDonald *v.* Aten, 1 Ohio St. 293.

Oregon.— House *v.* Fowle, 22 Oreg. 303, 29 Pac. 890.

South Carolina.— Hall *v.* Hall, 45 S. C. 166, 22 S. E. 818.

Tennessee.— Williams *v.* Dawson, 3 Sneed 316; Combs *v.* Young, 4 Yerg. 218, 26 Am. Dec. 225.

Virginia.— Gaw *v.* Huffman, 12 Gratt. 628.

See 17 Cent. Dig. tit. "Dower," § 79.

95. **Liens and encumbrances created before marriage** see *supra*, VII, F, 1.

96. **Priority of a purchase-money mortgage over widow's right** see *supra*, VII, C, 4.

97. Allen *v.* Allen, 4 Ala. 556; Matthews *v.* Duryee, 45 Barb. (N. Y.) 69.

98. See Outlaw *v.* Yell, 8 Ark. 345; Bridgeforth *v.* Maxwell, 42 Miss. 743; Walker *v.* Deaver, 79 Mo. 664, covenant of warranty not a debt.

99. Lawrence *v.* Brown, 5 N. Y. 394; Lawrence *v.* Miller, 2 N. Y. 245.

Dower regularly allotted to a widow after her husband's death or a jointure in lieu of dower legally settled on the wife before marriage is not liable for the payment of his debts. Chambers *v.* Davis, 15 B. Mon. (Ky.) 522. See also Harrow *v.* Johnson, 3 Metc. (Ky.) 578.

Where a life-estate in land given to the widow in lieu of dower is of less value than her dower would have been, such life-estate is not chargeable for the payment of any of the debts of the deceased husband. Gaw *v.* Huffman, 12 Gratt. (Va.) 628.

In Pennsylvania where the lands of a decedent are considered as chattels for the payment of debts, the husband's lands may be levied on and sold, and the wife loses her dower. Killinger *v.* Reidenhauer, 6 Serg. & R. 531. But in this state the widow's right of dower cannot be extinguished except by a judicial sale for the payment of her husband's debts. Eberle *v.* Fisher, 13 Pa. St. 526. A sale on a judgment, a mortgage, or an order of the orphans' court for the payment of debts passes the land freed from dower. Helfrich *v.* Obermyer, 15 Pa. St. 113. See also Directors of the Poor *v.* Royer, 43 Pa. St. 146; Reed *v.* Morrison, 12 Serg. & R. 18; Graff *v.* Smith, 1 Dall. 481, 1 L. ed. 232. If the sale is not made until after the husband's death, then, as the right of dower has become consummate, although it may be divested from the lands by forced sale, it will notwithstanding attach upon the surplus, if any. Scott *v.* Crosdale, 2 Dall. 127, 1 L. ed. 317.

1. Steele *v.* Steele, 64 Ala. 438, 38 Am. Rep. 15; Calder *v.* Bull, 2 Root (Conn.) 50; Crocker *v.* Fox, 1 Root (Conn.) 227; Harrison *v.* Peck, 56 Barb. (N. Y.) 251; Kling *v.* Ballentine, 40 Ohio St. 391.

2. Cravens *v.* Winzenberger, 97 Ill. App. 335; Magee *v.* Young, 40 Miss. 164, 90 Am. Dec. 322; Jewett *v.* Feldheiser, 68 Ohio St. 523, 67 N. E. 1072; Atwood *v.* Arnold, 23 R. I. 609, 51 Atl. 216.

3. Moore *v.* New York, 8 N. Y. 110, 59 Am. Dec. 473.

possessing in contemplation of law many of the incidents of property to be estimated and valued as such.[4]

2. MODIFICATION BY STATUTE. As we have seen, before the death of the husband and while the right of dower is in the inchoate stage, it is subject to legislative control, and may be enlarged, diminished, or altered.[5]

3. ACCRUAL OF RIGHT. Marriage and seizin are essential to the existence of an inchoate right of dower, as has already been noticed in respect to a widow's dower right.[6]

4. DETERMINATION OF VALUE OF RIGHT. When it becomes necessary to determine the value of the wife's inchoate dower interest in her husband's lands it is competent to show the age, health, and habits of both the husband and the wife,[7] and also to consult mortality tables of recognized authority.[8]

B. Preservation of Right — 1. IN GENERAL. An inchoate right of dower is a subject of judicial protection.[9] It has been held therefore that the wife may sue in her own name to set aside a deed or other instrument made by her husband in fraud of her dower.[10] On the other hand, however, it has been held that a wife's inchoate interest in her husband's lands cannot be the subject of a suit by her to quiet title.[11]

2. IN PROCEEDS OF SALE OF HUSBAND'S LANDS. The cases are not entirely uniform as to the right of a wife to have set apart for her a proportionate interest in the surplus remaining after the sale of her husband's lands and the disposition of the proceeds thereof to satisfy mortgages or other encumbrances upon such lands superior to her dower right. The better reasoning and perhaps the weight of

4. *Iowa.*— Buzick *v.* Buzick, 44 Iowa 259, 24 Am. Rep. 740.

Nebraska.— David Adler, etc., Clothing Co. *v.* Hellman, 55 Nebr. 266, 75 N. W. 877.

New York.— Simar *v.* Canaday, 53 N. Y. 298, 13 Am. Rep. 523.

North Carolina.— Gore *v.* Townsend, 105 N. C. 228, 11 S. E. 160, 8 L. R. A. 443.

Ohio.—Mandel *v.* McClave, 46 Ohio St. 407, 22 N. E. 290, 15 Am. St. Rep. 627, 5 L. R. A. 519; Smith *v.* Rothschild, 4 Ohio Cir. Ct. 544.

Rhode Island.— Atwood *v.* Arnold, 23 R. I. 609, 51 Atl. 216.

Release of inchoate dower as a valuable consideration see *infra*, VIII, D, 17, a, note 91.

Existence of right as affecting covenants by husband see COVENANTS, 11 Cyc. 1112, 1120, 1123.

5. Virgin *v.* Virgin, 91 Ill. App. 188 [*affirmed* in 189 Ill. 144, 59 N. E. 586]; Hatch *v.* Small, 61 Kan. 242, 59 Pac. 262; Guerin *v.* Moore, 25 Minn. 462. See *supra*, III, B, 2, d.

Effect as to rights of creditors— A statute which attempts to convert a wife's inchoate right into a vested one upon a sale under a mortgage executed before its passage is unconstitutional, as impairing the creditor's contract right to all the land, subject only to the wife's inchoate interest. Helphenstine *v.* Meredith, 84 Ind. 1.

A statute relative to inchoate dower right does not apply where the marriage occurred and the lands vested in possession in the husband before the passage of the act. *In re* Alexander, 53 N. J. Eq. 96, 30 Atl. 817.

6. Price *v.* Hobbs, 47 Md. 359; Scott *v.* Howard, 3 Barb. (N. Y.) 319.

Marriage as an essential of the existence of dower see *supra*, V, B.

Necessity of seizin and what constitutes seizin in the husband see *supra*, V, C.

7. Sedgwick *v.* Tucker, 90 Ind. 271.

8. Unger *v.* Leiter, 32 Ohio St. 210. And see Mandel *v.* McClave, 46 Ohio St. 407, 22 N. E. 290, 15 Am. St. Rep. 627, 5 L. R. A. 519.

Rule of computation.— It has been held that where the husband and wife are both living, the rule for computing the present value of the wife's inchoate right of dower is to calculate the expectation of life of the wife, and the probability of the joint lives of the husband and wife, and from the present value of an annuity payable while the wife lives deduct the present value of an annuity payable while both are living. Strayer *v.* Long, 86 Va. 557, 10 S. E. 574. But it has been held on the other hand that there is no standard or schedule by which the present worth of the wife's inchoate dower may be ascertained during the life of her husband. Reiff *v.* Horst, 55 Md. 42.

9. Buzick *v.* Buzick, 44 Iowa 259, 24 Am. Rep. 740; Atwood *v.* Arnold, 23 R. I. 609, 51 Atl. 216.

10. Buzick *v.* Buzick, 44 Iowa 259, 24 Am. Rep. 740; Clifford *v.* Kampfe, 147 N. Y. 383, 42 N. E. 1 (where the wife was permitted to sue in her own name to set aside a deed executed by her husband and one personating the wife); Simar *v.* Canaday, 53 N. Y. 298, 13 Am. Rep. 523 (holding that the inchoate right of dower is a subsisting and valuable interest to protect and preserve which the wife has a right of action); McClurg *v.* Schwartz, 87 Pa. St. 521.

11. Paulus *v.* Latta, 93 Ind. 34.

authority is in favor of protecting the wife's inchoate dower right to this extent.[12] This subject is controlled by statute in some of the states.[13]

3. In Condemnation Proceedings. According to the better view, where proceedings are instituted to condemn real estate for a public use, and an award of damages is made, the inchoate right of dower of the owner's wife will be protected, and her interest in the award will be preserved to her.[14]

4. As Against Husband's Creditors. It has also been held that where lands are sold on foreclosure and a surplus remains after satisfying the mortgage debt the wife's portion thereof may be invested for her benefit free from the claims of creditors, judgment or otherwise, the income thereof to be paid to the husband during their joint lives, and to her during her own life if she survive her husband.[15] If a wife receives real estate or other property in consideration of her release of dower, she holds the same free from the claims of her husband's creditors to the extent of the value of the right released by her.[16]

C. Right Absolute During Life of Husband — 1. Judicial Sale of Husband's Lands. In Indiana it is provided by statute that the wife's inchoate interest in her husband's lands, unless directed by the court to be sold or barred by the court's judgment, becomes absolute in all cases of judicial sale, in the same manner and to the same extent as such inchoate interest becomes absolute on the death

12. *New Jersey.*— Vreeland *v.* Jacobus, 19 N. J. Eq. 231.

New York.— Vartie *v.* Underwood, 18 Barb. 561; Denton *v.* Nanny, 8 Barb. 618; Citizens' Sav. Bank *v.* Mooney, 26 Misc. 67, 56 N. Y. Suppl. 548; Jackson *v.* Edwards, 7 Paige 386.

Ohio.— Mandel *v.* McClave, 46 Ohio St. 407, 22 N. E. 290, 15 Am. St. Rep. 627, 5 L. R. A. 519; Unger *v.* Leiter, 32 Ohio St. 210.

Rhode Island.— De Wolf *v.* Murphy, 11 R. I. 630.

Virginia.— Robinson *v.* Shacklett, 29 Gratt. 99.

See 17 Cent. Dig. tit. "Dower," § 85.

Contra.—Kauffman *v.* Peacock, 115 Ill. 212, 3 N. E. 749; Beck *v.* Beck, 64 Iowa 155, 19 N. W. 876 (holding that where a husband invests the proceeds of the sale of land in which the wife joined in other real estate, taking the title in the name of a third person, the wife has no cause of action to have the title decreed to be in her husband so that she may have dower); Newhall *v.* Lynn Five Cents Sav. Bank, 101 Mass. 428, 3 Am. Rep. 387 (holding that the husband's estate sold under a power of sale in a mortgage deed was thus converted into personalty, and the wife, having failed to bring her suit to redeem before the sale, is barred of her inchoate right of dower in such proceeds); Grube *v.* Lilienthal, 51 S. C. 442, 29 S. E. 230.

There should be an investment of one third of the surplus for the wife's benefit after the husband's death, the interest to be paid to the husband during his lifetime. Emigrant Industrial Sav. Bank *v.* Regan, 41 N. Y. App. Div. 523, 58 N. Y. Suppl. 693. The wife is not entitled to receive a gross sum representing the value of her inchoate right, nor to have one third of the income from the surplus devoted to her use. Citizens' Sav. Bank *v.* Mooney, 26 Misc. (N. Y.) 67, 56 N. Y. Suppl. 548. While this is the rule in New York, in Rhode Island it has been held that the present value of her chance of surviving her husband may be calculated and paid to her at once. De Wolf *v.* Murphy, 11 R. I. 630.

Dower in proceeds of sale of husband's lands see *supra*, VI, A, 8.

Dower in proceeds of mortgage sale see *supra*, VI, A, 8, d.

13. See Fichtner *v.* Fichtner, 88 Ky. 355, 11 S. W. 85, 10 Ky. L. Rep. 924; Strayer *v.* Long, 86 Va. 557, 10 S. E. 574.

14. Matter of New York, etc., Bridge, 75 Hun (N. Y.) 558, 27 N. Y. Suppl. 597; Wheeler *v.* Kirtland, 27 N. J. Eq. 534. See also *In re* Alexander, 53 N. J. Eq. 96, 30 Atl. 817; and *supra*, VI, A, 8, c; *infra*, VIII, D, 8, b.

15. Mark *v.* Murphy, 76 Ind. 534; Unger *v.* Price, 9 Md. 552; Vartie *v.* Underwood, 18 Barb. (N. Y.) 561; Denton *v.* Nanny, 8 Barb. (N. Y.) 618. See also *supra*, VI, A, 8; *infra*, VIII, D, 16.

A release in a mortgage of the wife's contingent right of dower does not inure to the benefit of the husband's subsequent judgment creditors. Mandel *v.* McClave, 46 Ohio St. 407, 22 N. E. 290, 15 Am. St. Rep. 627, 5 L. R. A. 519.

16. Johnston *v.* Gill, 27 Gratt. (Va.) 587. See also Fraudulent Conveyances.

The proceeds of a married woman's sale of her inchoate dower interest in her husband's land, although invested in other land, are a part of her separate estate, and not subject to execution for her husband's debts. Beals *v.* Storm, 26 N. J. Eq. 372.

Husband's note for release of dower.— Nims *v.* Bigelow, 45 N. H. 343. And see Ward *v.* Crotty, 4 Metc. (Ky.) 59.

Money paid for release.— Potter *v.* Skiles, 71 S. W. 627, 24 Ky. L. Rep. 1457; Doty *v.* Baker, 11 Hun (N. Y.) 222.

In partition, where the present value of an inchoate right of dower is ascertained under a decree pursuant to a statute, such value

of the husband.[17] The statute applies to lands conveyed to an assignee in bankruptcy, such a conveyance being in legal effect a judicial sale.[18] The absolute interest thus conferred is free from the demands of her husband's general creditors, but not from prior conveyances by way of mortgage.[19] The interest of the wife becomes vested and absolute on the day of the sale.[20] Such a statute is not retroactive in effect and does not apply where the encumbrance under which the sale was had was created prior to its enactment.[21]

2. DIVORCE FOR HUSBAND'S MISCONDUCT. The statutes in some of the states provide that in case the wife procures a divorce from her husband on account of his misconduct her inchoate interest shall become absolute, and she is entitled to dower in his land in the same manner as if he were dead.[22] Such statutes have no retroactive effect, and consequently as to all lands conveyed by the husband before they were enacted a claim for dower must be postponed until his actual decease.[23] The divorce to render the wife's interest in her husband's real property absolute must be granted for the misconduct of the husband alone.[24] The wife under such statutes is entitled to have dower set off to her at the time the divorce is granted.[25]

3. IMPRISONMENT OF HUSBAND. Under the statutes in some of the states it is

represents the present worth of the wife's dower right in the premises, and the sum paid or reserved in respect of the same is her absolute property, without condition or contingency. Bartlett *v.* Van Zandt, 4 Sandf. Ch. (N. Y.) 396.

17. Horner Annot. St. Ind. (1901) § 2508.

18. Whitney *v.* Marshall, 138 Ind. 472, 37 N. E. 964; Keck *v.* Noble, 86 Ind. 1; Wright *v.* Gelvin, 85 Ind. 128; Lawson *v.* De Bolt, 78 Ind. 563; Ketchum *v.* Schicketanz, 73 Ind. 137; Roberts *v.* Shroyer, 68 Ind. 64; Warford *v.* Noble, 2 Fed. 202, 9 Biss. 320.

A voluntary assignment by a husband of his land for the benefit of his creditors is not a judicial sale thereof within the meaning of the statute. Hall *v.* Harrell, 92 Ind. 408.

Where the wife of an assignor for the benefit of creditors does not join in the deed of assignment, her inchoate interest in the real estate assigned does not become perfect until a sale by the assignee, who is entitled to actual possession until such sale. Taylor *v.* Bruner, 130 Ind. 482, 30 N. E. 635.

19. Elder *v.* Robbins, 122 Ind. 203, 23 N. E. 713; Jackman *v.* Nowling, 69 Ind. 188.

Judgment lien.—Where a husband and wife convey the husband's land, subject to the lien of a judgment against the husband, under which judgment execution is levied and sale made, the wife has no interest to become absolute under the statute. Hudson *v.* Evans, 81 Ind. 596. But where the lands are sold under a judgment against the husband alone the wife's inchoate interest immediately becomes absolute. Caywood *v.* Medsker, 84 Ind. 520. And see McClamrock *v.* Ferguson, 88 Ind. 208; Kocher *v.* Christian, 88 Ind. 81.

Specific performance of a husband's contract for the sale of land enforced by the execution of a deed by a commissioner appointed for that purpose is not a judicial sale converting the wife's inchoate interest into a vested estate. Straughan *v.* White, 88 Ind. 242.

The foreclosure of a purchase-money mortgage upon the husband's land does not vest any interest in the wife under such statute. Baker *v.* McCune, 82 Ind. 339.

Secret trust.— The wife's relation to her interest upon it becoming absolute under the statute is equivalent to that of a purchaser for value without notice, and her right is therefore paramount to that of one claiming under a secret trust. Richardson *v.* Schultz, 98 Ind. 429.

Land conveyed by husband.— The statute does not apply to land which a husband had conveyed prior to the judicial sale. Pattison *v.* Wert, 153 Ind. 453, 55 N. E. 227.

20. Summit *v.* Ellett, 88 Ind. 227; Riley *v.* Davis, 83 Ind. 1; Elliott *v.* Cale, 80 Ind. 285. But see Shelton *v.* Shelton, 94 Ind. 113, holding that where lands in which a husband had an equitable interest were conveyed by a sheriff's deed under judicial sale the wife's interest therein vested on the execution of the deed.

21. Vermillion *v.* Nelson, 87 Ind. 194; Ferris *v.* Reed, 87 Ind. 123; Voltz *v.* Rawles, 85 Ind. 198; Lease *v.* Owen Lodge No. 146, I. O. O. F., 83 Ind. 498; Parkham *v.* Vandeventer, 82 Ind. 544; Westerfield *v.* Kimmer, 82 Ind. 365; McGlothlin *v.* Pollard, 81 Ind. 228.

The statute does not apply to land sold under foreclosure of a tax lien which attached before the act was passed. Pattison *v.* Wert, 153 Ind. 453, 55 N. E. 227.

22. Cunningham *v.* Cunningham, 2 Ind. 233; Tatro *v.* Tatro, 18 Nebr. 395, 25 N. W. 571, 53 Am. Rep. 820.

Bar of dower by divorce see *infra*, VIII, D, 11.

23. Comly *v.* Strader, 1 Ind. 134; McCafferty *v.* McCafferty, 8 Blackf. (Ind.) 218; Curtis *v.* Hobart, 41 Me. 230; Given *v.* Marr, 27 Me. 212.

24. Cunningham *v.* Cunningham, 2 Ind. 233.

25. Tatro *v.* Tatro, 18 Nebr. 395, 25 N. W. 571, 53 Am. Rep. 820.

provided that when a marriage is dissolved by the husband being sentenced to imprisonment for life, the wife shall be entitled to her dower in his lands in the same manner as if he were dead.[26]

D. Bar, Release, or Forfeiture — 1. IN GENERAL. In the absence of statutory provision to the contrary, when the wife's inchoate dower right has once attached it cannot be divested except by some act of her own, done according to the forms and in the manner prescribed by statute.[27] Any subsisting claim or encumbrance existing before the inception of the wife's interest, which would have defeated the husband's seizin, will be a bar to her dower; but the wife's right remains unaffected by any act of the husband subsequent to the marriage.[28]

2. ALIENAGE OF HUSBAND OR WIFE. At common law, alienage on the part of the husband or wife was a disability preventing the attachment of dower to the husband's lands, but this disability is removed by statute in most of the states.[29]

3. ATTAINDER OF HUSBAND. The common law precluded the attachment of dower to the real property of a man convicted of treason or felony,[30] but this principle has never been introduced into the law of this country.[31]

4. BAR OF JUDGMENT IN ACTION AGAINST WIFE — a. In General. If in an action to which the wife is a party facts are alleged as a bar to the wife's right of dower, the judgment therein based upon such facts precludes a subsequent assertion of her rights;[32] but it is otherwise if the wife's right of dower is not in issue in the action;[33] and as a rule she will not be precluded by judgments in actions to which she is not a party.[34]

b. Partition Proceedings. An inchoate right of dower may be determined in a partition suit to which the wife is made a party,[35] but if the wife is not made a party she will not be bound by the decree,[36] although she may be precluded by an actual partition.[37] The effect of a decree of sale in a partition suit as against the wife's dower right will be hereafter considered.[38]

5. EFFECT OF SEPARATE ESTATE. In Alabama it is provided that if a wife have a separate estate which, exclusive of the rents, income, and profits, is equal to or greater in value than her dower interest in her husband's estate, she shall not be entitled to dower therein; and if her estate be less in value than her dower she is only entitled to such share of her husband's property as will with her separate estate be equal to her dower interest in case she had no separate estate.[39] There

26. See *supra*, V, D.

27. Gove *v.* Cather, 23 Ill. 634, 76 Am. Dec. 711. And see Boardman's Appeal, 40 Conn. 169.

Under the Georgia statute.— Hart *v.* McCollum, 28 Ga. 478.

28. Scott *v.* Howard, 3 Barb. (N. Y.) 319. Priorities see *supra*, VII.

29. See ALIENS, 2 Cyc. 96 *et seq.*

30. 2 Blackstone Comm. 131. And see CONVICTS, 9 Cyc. 870.

31. Palmer *v.* Horton, 1 Johns. Cas. (N. Y.) 27; 1 Washburn Real Prop. (6th ed.) § 418; Williams Real Prop. 103 note. See CONVICTS, 9 Cyc. 872.

Revolutionary confiscation acts.— An inquisition found and judgment thereon entered under the Revolutionary confiscation acts did not bar the dower of the widow. Cozens *v.* Long, 3 N. J. L. 764. See also Sewall *v.* Lee, 9 Mass. 363; Wells *v.* Martin, 2 Bay (S. C.) 20; Mongin *v.* Baker, 1 Bay (S. C.) 73.

32. Jordan *v.* Van Epps, 58 How. Pr. (N. Y.) 338 [*affirmed* in 85 N. Y. 427]; Foster *v.* Hickox, 38 Wis. 408. And see Tanguey *v.* O'Connell, 132 Ind. 62, 31 N. E. 469 [*overruling* Curren *v.* Driver, 33 Ind. 480].

33. Humes *v.* Scruggs, 64 Ala. 40, where a decree in favor of the assignee in bankruptcy of the husband, in an action by him against the wife to set aside as fraudulent a conveyance to her by the husband, was held not to bar her subsequent claim to dower in such lands.

34. See Herrington *v.* Coburn, 108 Ill. 613; Wilkinson *v.* Parish, 3 Paige (N. Y.) 653; Foster *v.* Hickox, 38 Wis. 408. And see Greiner *v.* Klein, 28 Mich. 11.

35. Jordan *v.* Van Epps, 58 How. Pr. (N. Y.) 338 [*affirmed* in 85 N. Y. 427].

36. Herrington *v.* Coburn, 108 Ill. 613; Verry *v.* Robinson, 25 Ind. 14, 87 Am. Dec. 346; Rank *v.* Hanna, 6 Ind. 20; Wilkinson *v.* Parish, 3 Paige (N. Y.) 653. And see Greiner *v.* Klein, 28 Mich. 11.

37. Wilkinson *v.* Parish, 3 Paige (N. Y.) 653.

38. See *infra*, VIII, D, 16, d.

39. Ala. Code (1896), §§ 1506, 1507. The sections apply, although the separate estate consists exclusively of a vested estate in re-

is a somewhat similar provision in Mississippi under which the ownership of a separate estate will diminish or defeat the dower right.[40]

6. Unrecorded Deeds. The rights of a widow to dower in lands held by her husband under an unrecorded deed will largely depend upon the effect accorded to unrecorded conveyances by the recording acts of the several states.[41] But ordinarily the failure or neglect of a husband to record a deed will not deprive his widow of her dower rights as against subsequent purchasers with notice that the deed was not recorded,[42] nor as against a purchaser of the land at a sheriff's sale, under execution against the husband.[43]

7. Adverse Possession. Loss of title to lands of which the husband was seized during coverture by adverse possession does not affect his widow's right to dower therein.[44] The statute of limitations applicable to realty actions cannot be applied so as to prejudice the wife's claim by the laches of her husband.[45] Nor is a wife's dower barred by adverse possession and payment of taxes after a transfer of a husband's lands by means of a tax deed during his lifetime.[46]

8. Dedication or Appropriation to Public Use — a. Dedication by Owner. Where land is dedicated by the owner to a public use, as for a street, highway, or market-place, such dedication divests the wife's right of dower.[47] And where a quasi-public corporation, such as a railroad company, having authority to acquire lands for a public use and hold the same in fee, takes lands by grant from the

mainder. Zachry *v.* Lockard, 98 Ala. 371, 13 So. 514. The estate must be held by her as a statutory estate, as distinguished from one that is equitable. Lee *v.* Lee, 77 Ala. 412. The statute does not apply to an estate made separate by contract of the parties as property held by the wife under a deed or gift. Smith *v.* Smith, 30 Ala. 642. The wife will be barred of dower where she receives from an insurance policy taken out in her name an amount in excess of her dower interest. Wadsworth *v.* Miller, 103 Ala. 130, 15 So. 520; Williams *v.* Williams, 68 Ala. 405. See also the following cases relating generally to the application and interpretation of these sections: Jackson *v.* Isbell, 109 Ala. 100, 19 So. 447; Gordon *v.* Tweedy, 74 Ala. 232, 49 Am. Rep. 813; Wiggins *v.* Newberry, 72 Ala. 240; Billingslea *v.* Glenn, 45 Ala. 540; Glenn *v.* Glenn, 41 Ala. 571; Dubose *v.* Dubose, 38 Ala. 238.

See 17 Cent. Dig. tit. "Dower," § 93.

40. Miss. Annot. Code (1892), § 4499; Whitley *v.* Stephenson, 38 Miss. 113. And see Osburn *v.* Sims, 62 Miss. 429; Magee *v.* Young, 40 Miss. 164, 90 Am. Dec. 322.

41. Building, etc., Co. *v.* Fray, 96 Va. 559, 32 S. E. 58. And see, generally, Deeds.

42. Brannon *v.* May, 42 Ind. 92.

Destruction of a deed by the husband's consent.— Johnson *v.* Miller, 47 Ind. 376, 17 Am. Rep. 699.

The surrender of an unrecorded deed by the husband to his grantor, who subsequently reconveys to an innocent third person, extinguishes the interest of the wife in such land. Alexander *v.* Herbert, 60 Ind. 184.

43. Pickett *v.* Lyles, 5 S. C. 275.

44. *Georgia.*— Hart *v.* McCollum, 28 Ga. 478.

Illinois.— Steele *v.* Gellatly, 41 Ill. 39.

Iowa.— Lucas *v.* Whitacre, 121 Iowa 251, 96 N. W. 776; Boling *v.* Clark, 83 Iowa 481, 50 N. W. 57.

Kentucky.— Williams *v.* Williams, 89 Ky. 381, 12 S. W. 760, 11 Ky. L. Rep. 608, 6 L. R. A. 637.

Maine.— Durham *v.* Angier, 20 Me. 242.

New Hampshire.— Moore *v.* Frost, 3 N. H. 126.

New York.— McIntyre *v.* Costello, 47 Hun 289.

Ohio.— Ward *v.* McIntosh, 12 Ohio St. 231.

Pennsylvania.— Winters *v.* De Turk, 133 Pa. St. 359, 19 Atl. 354, 7 L. R. A. 658.

Wisconsin.—Cowan *v.* Lindsay, 30 Wis. 586.

See 17 Cent. Dig. tit. "Dower," § 97.

Contra.— Keys *v.* Keys, 11 Heisk. (Tenn.) 425.

A release will not be presumed from an adverse possession during the life of the husband. Durham *v.* Angier, 20 Me. 242.

45. Williams *v.* Williams, 89 Ky. 381, 385, 12 S. W. 760, 11 Ky. L. Rep. 608, 6 L. R. A. 637.

Statute of limitations applicable to action by widow to recover dower see *infra*, XI, D.

46. Taylor *v.* Lawrence, 148 Ill. 388, 36 N. E. 74; Miller *v.* Pence, 132 Ill. 149, 23 N. E. 1030.

Bar of dower by sale of lands for unpaid taxes see *infra*, VIII, D, 16, e.

47. *Indiana.*— Duncan *v.* Terre Haute, 85 Ind. 104, land given to city for street.

Minnesota.— Mankato *v.* Meagher, 17 Minn. 265.

Missouri.— Venable *v.* Wabash Western R. Co., 112 Mo. 103, 20 S. W. 493, 18 L. R. A. 68.

New York.— Moore *v.* New York, 8 N. Y. 110, 59 Am. Dec. 473 [*affirming* 4 Sandf. 456].

Ohio.— Gwynne *v.* Cincinnati, 3 Ohio 24, 17 Am. Dec. 576 (land given for market-house); Steel *v.* Board of Education, 31 Cinc. L. Bul. 84 (land given for school purposes).

Texas.— Orrick *v.* Ft. Worth, (Civ. App. 1895) 32 S. W. 443.

See 17 Cent. Dig. tit. "Dower," § 96.

owner for a right of way or other public purpose, the wife's right of dower is effectually barred.[48]

b. Condemnation. So, by the weight of authority, where lands are lawfully taken by virtue of the right of eminent domain, in pursuance of proceedings provided by statute, by a municipal, railroad, or other corporation for a public use, the corporation, upon payment of the appraisal value to the owner of the fee, acquires an absolute title to such lands, divested of any inchoate right of dower existing in the owner's wife.[49]

9. Estoppel of Wife — a. In General. As a general rule acts of the wife during coverture to operate as a bar of dower by way of estoppel must in effect amount to one of the modes pointed out by the common law or recognized by statute as constituting a bar.[50] It has been held, however, that acts and conduct sufficient to constitute an equitable estoppel will bar the right.[51]

b. Acquiescence or Silence of Wife. If a wife during coverture merely acquiesces in an adverse possession of lands alleged to belong to her husband,[52] or remains silent when lands in which she claims dower are sold or advertised for sale,[53] she is not precluded thereby from asserting her dower rights. But it is otherwise where she knowingly permits the purchaser to pay for lands to which her dower has attached and accepts and enjoys her portion of the purchase-money,[54] or fraudulently misrepresents or conceals facts for the purpose of induc-

48. French *v.* Lord, 69 Me. 537; Baker *v.* Atchison, etc., R. Co., 122 Mo. 396, 30 S. W. 301; Chouteau *v.* Missouri Pac. R. Co., 122 Mo. 375, 22 S. W. 458, 30 S. W. 299; Venable *v.* Wabash Western R. Co., 112 Mo. 103, 20 S. W. 493, 18 L. R. A. 68; Chicago, etc., R. Co. *v.* Titterington, 84 Tex. 218, 19 S. W. 472, 31 Am. St. Rep. 39; Randall *v.* Texas Cent. R. Co., 63 Tex. 586.

Lands not used for right of way. — It has been held that the statutory purchase by a railroad corporation of land without the limits of its road, necessary for depot and station purposes, does not extinguish an existing inchoate right of dower therein, notwithstanding the fact that the land could have been taken against the will of the grantor and held for an easement. Nye *v.* Taunton Branch R. Co., 113 Mass. 277. But see Venable *v.* Wabash Western R. Co., 112 Mo. 103, 20 S. W. 493, 18 L. R. A. 68.

49. *Indiana.* — Duncan *v.* Terre Haute, 85 Ind. 104.

Maine. — French *v.* Lord, 69 Me. 537.

Massachusetts. — Flynn *v.* Flynn, 171 Mass. 312, 50 N. E. 650, 68 Am. St. Rep. 427, 42 L. R. A. 98.

New York. — Moore *v.* New York, 8 N. Y. 110, 59 Am. Dec. 473 [*affirming* 4 Sandf. 456].

Ohio. — Little Miami R. Co. *v.* Jones, 3 Ohio Dec. (Reprint) 219, 5 Wkly. L. Gaz. 5.

See 17 Cent. Dig. tit. "Dower," § 96.

Contra. — York *v.* Welsh, 117 Pa. St. 174, 11 Atl. 390.

Right to dower in proceeds of condemnation see *supra*, VIII, B, 3.

50. Adams *v.* Storey, 135 Ill. 448, 26 N. E. 582, 25 Am. St. Rep. 392, 11 L. R. A. 700; Foley *v.* Boulware, 86 Mo. App. 674. Dower, being an institution of positive law, can only be defeated or barred by some of the modes pointed out by the law. Martin *v.* Martin, 22 Ala. 86. Estoppel cannot operate to defeat dower unless within the meaning and intent of the statute. McCreery *v.* Davis, 44 S. C. 195, 22 S. E. 178, 51 Am. St. Rep. 794, 28 L. R. A. 655.

51. Adams *v.* Storey, 135 Ill. 448, 26 N. E. 582, 25 Am. St. Rep. 392, 11 L. R. A. 700; Allen *v.* Allen, 112 Ill. 323; Collins *v.* Woods, 63 Ill. 285.

52. Rockwell *v.* Rockwell, 81 Mich. 493, 46 N. W. 8; Hunt *v.* Reilly, 24 R. I. 68, 52 Atl. 681, 96 Am. St. Rep. 707, 59 L. R. A. 206.

Adverse possession during coverture see *supra*, VIII, D, 7.

53. Foley *v.* Boulware, 86 Mo. App. 674; Motley *v.* Motley, 53 Nebr. 375, 73 N. W. 738, 68 Am. St. Rep. 608; Matthews *v.* Duryee, 3 Abb. Dec. (N. Y.) 220, 4 Keyes (N. Y.) 525; Smith *v.* Paysenger, 2 Mill (S. C.) 59. *Compare* Schweitzer *v.* Wagner, 94 Ky. 458, 22 S. W. 883, 15 Ky. L. Rep. 229. And see Owen *v.* Slatter, 26 Ala. 547, 62 Am. Dec. 745; Lawrence *v.* Brown, 5 N. Y. 394; Jefferies *v.* Allen, 34 S. C. 189, 13 S. E. 365.

54. Ellis *v.* Diddy, 1 Ind. 561; Wood *v.* Seely, 32 N. Y. 105; Reed *v.* Morrison, 12 Serg. & R. (Pa.) 18.

Acceptance by wife of lands sold under execution under a trust deed conveying it to a trustee for her separate use, and her entry into possession of such lands under such deed, does not constitute an acceptance of an estate inconsistent with her inchoate dower right, since the purchaser at the execution sale takes only the judgment debtor's interest in the land, which is subject to his wife's inchoate right of dower, and can convey nothing more to the trustee. Davis *v.* Townsend, 32 S. C. 112, 10 S. E. 837.

Acceptance of an equivalent in other lands or in money. — Jones *v.* Powell, 6 Johns. Ch. (N. Y.) 194. But see Higgins Oil, etc., Co. *v.* Snow, 113 Fed. 433, 51 C. C. A. 267.

ing the purchaser to buy.[55] And where as administratrix of her husband's estate she sold land by order of a court, and in her deed covenanted to warrant the title, she was held to have thereby barred herself of dower.[56]

c. Express Waiver of Dower at Sale. A public oral announcement by the wife at a judicial sale of her husband's lands that she will not claim dower therein against a purchaser at such sale estops her from asserting dower against one purchasing in reliance on such announcement.[57] Any unequivocal act or declaration on her part, inducing the purchaser to act upon the belief that she had no claim for dower, will be sufficient.[58]

d. Agreements Between Husband and Wife. An indenture or an agreement made by a wife with her husband, either before or after marriage, to release her dower in his lands is not effectual as an estoppel of her claim for dower, unless ratified by her subsequent to the husband's death.[59]

e. Failure to Assert Marital Rights. It has been held that a wife will not be estopped in a court of law from asserting her claim for dower by a recognition on her part, after a voluntary separation from her husband, of his right to marry another woman, or of the validity of his supposed subsequent marriage;[60] but this doctrine is not universally sustained.[61]

10. Misconduct of Wife — a. Elopement and Adultery — (i) *In General.* In the absence of a statute mere adultery of the wife cannot be set up as a bar of dower, either at common law or in equity,[62] even though she elope with the adulterer.[63] And where adultery of the wife proved in an action for divorce is a statutory bar of dower it will not be sufficient to prove such adultery in any other action.[64]

55. Foley *v.* Boulware, 86 Mo. App. 674.

56. Usher *v.* Richardson, 49 Me. 415; Magee *v.* Mellon, 23 Miss. 585.

57. Connolly *v.* Branstler, 3 Bush (Ky.) 702, 96 Am. Dec. 278; Hart *v.* Giles, 67 Mo. 175; Sweaney *v.* Mallory, 62 Mo. 485; Smiley *v.* Wright, 2 Ohio 506. But see Kelso's Appeal, 102 Pa. St. 7.

Fraud upon purchaser.— O'Brien *v.* Elliot, 15 Me. 125, 32 Am. Dec. 137. See also Dougrey *v.* Topping, 4 Paige (N. Y.) 94.

58. Wright *v.* De Groff, 14 Mich. 164.

59. Gibson *v.* Gibson, 15 Mass. 106, 8 Am. Dec. 94; Guidet *v.* Brown, 3 Abb. N. Cas. (N. Y.) 295; Gelzer *v.* Gelzer, Bailey Eq. (S. C.) 387, 23 Am. Dec. 180. *Compare* Tallinger *v.* Mandeville, 113 N. Y. 427, 21 N. E. 125. See *infra*, VIII, D, 17, h, (II).

But a consent decree in a divorce suit granting an annuity for life to a wife and making it a lien and charge upon her husband's real estate bars her claim for dower upon the death of the husband. Adams *v.* Storey, 135 Ill. 448, 26 N. E. 582, 25 Am. St. Rep. 392, 11 L. R. A. 790; Owen *v.* Yale, 75 Mich. 256, 42 N. W. 817.

60. Martin *v.* Martin, 22 Ala. 86. And see Dunn *v.* Portsmouth Sav. Bank, 103 Iowa 538, 72 N. W. 687; Cazier *v.* Hinckey, 143 Mo. 203, 44 S. W. 1052; Reel *v.* Elder, 62 Pa. St. 308, 1 Am. Rep. 414.

The voluntary separation of husband and wife will not estop the wife on the death of her husband to claim her rights in his lands as against a purchaser from him to whom he represented that he had been divorced. Cruize *v.* Billmire, 69 Iowa 397, 28 N. W. 657. But see Brown *v.* Kerns, 9 Ohio S. & C. Pl. Dec. 112, 6 Ohio N. P. 68.

61. Gilbert *v.* Reynolds, 51 Ill. 513; De France *v.* Johnson, 26 Fed. 891. And see Hoig *v.* Gordon, 17 Grant Ch. (U. C.) 599. *Compare* Rosenthal *v.* Mayhugh, 33 Ohio St. 155.

62. 2 Blackstone Comm. 130; Coke Litt. 32*a*; 4 Kent Comm. 52, 54; and the following cases:

Massachusetts.—Lakin *v.* Lakin, 2 Allen 45.

New Hampshire.— Cogswell *v.* Tibbets, 3 N. H. 41.

New York.— Rundle *v.* Van Inwegan, 9 N. Y. Civ. Proc. 328; Reynolds *v.* Reynolds, 24 Wend. 193.

Pennsylvania.— Ondis *v.* Banto, 7 Kulp 309.

Rhode Island.— Bryan *v.* Batcheller, 6 R. I. 543, 78 Am. Dec. 454.

England.—Hetherington *v.* Graham, 6 Bing. 135, 7 L. J. C. P. O. S. 253, 3 M. & P. 399, 31 Rev. Rep. 361, 19 E. C. L. 69; Seagrave *v.* Seagrave, 13 Ves. Jr. 439, 33 Eng. Reprint 358.

See 17 Cent. Dig. tit. "Dower," § 100.

The adultery of the wife does not bar her claim to dower where she continues to live with the husband. Sergent *v.* North Cumberland Mfg. Co., 112 Ky. 888, 66 S. W. 1036, 23 Ky. L. Rep. 2226.

63. Cogswell *v.* Tibbets, 3 N. H. 41.

64. Pitts *v.* Pitts, 52 N. Y. 593 [*affirming* 64 Barb. 482, 13 Abb. Pr. N. S. 272]; Schiffer *v.* Pruden, 39 N. Y. Super. Ct. 167 [*affirmed* in 64 N. Y. 47] (in which case it was held that there must be a dissolution of the marriage on the ground of the wife's adultery in order to bar her dower); Rundle *v.* Van Inwegan, 9 N. Y. Civ. Proc. 328; Cooper *v.* Whitney, 3 Hill (N. Y.) 95.

(II) *Statutory Provisions.* The English statute, 13 Edw. I, c. 34, commonly called the Statute of Westminster Second, provided that if a wife elope from her husband and continue with an adulterer, she shall be barred of her dower, unless her husband willingly, and without coercion of the church, reconcile her, and suffer her to dwell with him. A number of the states have expressly reënacted this provision of law, either in substance or effect,[65] while in other states it is impliedly recognized as a part of the American common law without such reënactment.[66] In some of the states, however, notably Massachusetts[67] and Rhode Island,[68] the courts have refused to give it effect and have held that the statutory law controlling the subject of dower has superseded or is inconsistent with it.[69] Under the statute of Westminster and like statutes in the United States, mere adultery without desertion or elopement or cohabitation with the coadulterer does not bar dower.[70]

(III) *Elopement Must Be Voluntary.* It will be noticed that the statutes of the states which have adopted adulterous elopement as a bar provide that the departure of the wife must be voluntary on her part, so that, where the wife's desertion was caused by the husband's cruelty or neglect, her subsequent adultery will not constitute a bar.[71]

(IV) *Continued Adultery.* Under such statutes it is not necessary that the adulterous cohabitation be continuous with one man, but it is sufficient if the wife has sexual intercourse with any man or men periodically or when convenient.[72]

b. Desertion, Abandonment, or Murder of Husband. Except as otherwise provided by statute, mere desertion by the wife of the husband does not bar her dower,

65. See Owen *v.* Owen, 57 Ind. 291; Goodwin *v.* Owen, 55 Ind. 243; Shaffer *v.* Richardson, 27 Ind. 122; Payne *v.* Dotson, 81 Mo. 145, 51 Am. Rep. 225; McAlister *v.* Novenger, 54 Mo. 251; Lyons *v.* Lyons, 101 Mo. App. 494, 74 S. W. 467.

66. 4 Kent Comm. 53. And see Cogswell *v.* Tibbetts, 3 N. H. 41; Heslop *v.* Heslop, 82 Pa. St. 537; Reel *v.* Elder, 62 Pa. St. 308, 1 Am. Rep. 414; Lewis *v.* Parrott, 37 Wkly. Notes Cas. (Pa.) 330; Bell *v.* Nealy, 1 Bailey (S. C.) 312, 19 Am. Dec. 686.

67. Lakin *v.* Lakin, 2 Allen (Mass.) 45.

68. Bryan *v.* Batcheller, 6 R. I. 543, 78 Am. Dec. 454.

69. In Iowa (Smith *v.* Woolworth, 22 Fed. Cas. No. 13,130, 4 Dill. 584), Maine (Littlefield *v.* Paul, 69 Me. 527), and New York (Pitts *v.* Pitts, 52 N. Y. 593; Rundle *v.* Van Inwegan, 9 N. Y. Civ. Proc. 328) the courts have held that the English statute making adulterous elopement a bar to divorce does not apply because inconsistent with state legislation.

70. Cogswell *v.* Tibbetts, 3 N. H. 41; Ondis *v.* Banto, 7 Kulp (Pa.) 309.

71. *Delaware.*— Rawlins *v.* Buttel, 1 Houst. 224.

North Carolina.— Walters *v.* Jordan, 35 N. C. 361, 57 Am. Dec. 558.

Pennsylvania.— Heslop *v.* Heslop, 82 Pa. St. 557.

United States.— Stegall *v.* Stegall, 22 Fed. Cas. No. 13,351, 2 Brock. 256, Virginia statute.

Canada.— Woolsey *v.* Finch, 20 U. C. C. P. 132; Graham *v.* Law, 6 U. C. C. P. 310.

See 17 Cent. Dig. tit. "Dower," § 100.

If the husband and wife voluntarily separate, and the wife lives in adultery with another man, it is sufficient under the statute to bar her dower. McAlister *v.* Novenger, 54 Mo. 251. See also Wilson *v.* Craig, 175 Mo. 362, 75 S. W. 419; Norton *v.* Tufts, 19 Utah 470, 57 Pac. 409.

After divorce or desertion by husband.— The wife's adultery after a divorce procured by her for her husband's desertion does not bar her dower. Gordon *v.* Dickison, 131 Ill. 141, 23 N. E. 439. Nor does it operate as a bar where it was committed after the husband's desertion and her repeated unsuccessful efforts to win him back. Beaty *v.* Richardson, 56 S. C. 173, 34 S. E. 73, 46 L. R. A. 517.

A wife who commits adultery and is not living with her husband at the time of his death is deprived of her dower rights by the express provisions of the North Carolina statute (Code, § 2102), although the husband first abandoned her and commenced to live with another woman. Phillips *v.* Wiseman, 131 N. C. 402, 42 S. E. 861.

72. McGrenra *v.* McGrenra, 7 Del. Ch. 432, 44 Atl. 816; Goss *v.* Froman, 89 Ky. 318, 12 S. W. 387, 11 Ky. L. Rep. 631, 8 L. R. A. 102; Walters *v.* Jordan, 35 N. C. 361, 57 Am. Dec. 558. The wife incurs the forfeiture by an open state of adultery whether she reside in the same house with the adulterer or in another house, or whether with or without the ceremony of marriage. Stegall *v.* Stegall, 22 Fed. Cas. No. 13,351, 2 Brock. 256, Virginia statute. And she is guilty of living in adultery under the Kentucky statute by residing with her paramour in the husband's home during his enforced absence. McQuinn *v.* McQuinn, 110 Ky. 321, 61 S. W. 358, 22 Ky. L. Rep. 1770.

for the widow's estate does not depend upon the existence of the family relation at the death of the husband.[73] In some of the states, however, it is expressly required by statute that the wife shall be living with her husband at the time of his death, unless absent with his consent or by his default, in order to entitle her to dower.[74] It has been held that a widow who has murdered her husband is not thereby barred of her dower.[75]

11. DIVORCE — a. General Rule. A divorce dissolving absolutely the bonds of matrimony deprives the wife of her right of dower,[76] whether procured by the husband for the misconduct of the wife,[77] or by the wife for the misconduct of the husband,[78] unless it is otherwise provided by the *lex rei sitæ*.[79] A divorce *a mensa et thoro* does not dissolve the marriage contract, or affect the rights and obligations of the parties except as prescribed by statute,[80] and therefore it can-

73. Potier *v.* Barclay, 15 Ala. 439; Wiseman *v.* Wiseman, 73 Ind. 112, 38 Am. Rep. 115; Nye's Apeal, 126 Pa. St. 341, 17 Atl. 618, 12 Am. St. Rep. 873; Holbrook's Estate, 3 Pa. Co. Ct. 265, 20 Wkly. Notes Cas. (Pa.) 79; Thayer *v.* Thayer, 14 Vt. 107, 39 Am. Dec. 211.

74. See Thornburg *v.* Thornburg, 18 W. Va. 522. Where the husband becomes a habitual drunkard his wife is justified in leaving him and she is not thereby barred of her dower. Stuart *v.* Neely, 50 W. Va. 508, 40 S. E. 441.

75. Owens *v.* Owens, 100 N. C. 240, 6 S. E. 794. *Compare*, however, DESCENT AND DISTRIBUTION, 14 Cyc. 61.

76. *Arkansas.*— Wood *v.* Wood, 59 Ark. 441, 27 S. W. 641, 43 Am. St. Rep. 42, 28 L. R. A. 157.

Illinois.— Kent *v.* McCann, 52 Ill. App. 305. As to the rule by statute see *infra*, VIII, D, 11, b.

Indiana.— Chenowith *v.* Chenowith, 14 Ind. 2.

Iowa.— Winch *v.* Bolton, 94 Iowa 573, 63 N. W. 330; Boyles *v.* Latham, 61 Iowa 174, 16 N. W. 68; Marvin *v.* Marvin, 59 Iowa 699, 13 N. W. 851; McCraney *v.* McCraney, 5 Iowa 231, 68 Am. Dec. 702; Levins *v.* Sleator, 2 Greene 604.

Kentucky.— Under Ky. St. (1903) § 2144, divorce from the bonds of matrimony bars all claim of either husband or wife to the property, real or personal, of the other after his or her decease. See Carr *v.* Carr, 92 Ky. 552, 18 S. W. 453, 13 Ky. L. Rep. 756, 36 Am. St. Rep. 614; McKean *v.* Brown, 83 Ky. 208, 7 Ky. L. Rep. 183; Cabell *v.* Cabell, 1 Metc. 319; Bourne *v.* Simpson, 9 B. Mon. 454.

Maine.— Moulton *v.* Moulton, 76 Me. 85; Stilphen *v.* Houdlette, 60 Me. 447.

New Hampshire.— Gleason *v.* Emerson, 51 N. H. 405.

New Jersey.— Pullen *v.* Pullen, 52 N. J. Eq. 9, 28 Atl. 719; Calame *v.* Calame, 24 N. J. Eq. 440; Ludlow *v.* Ludlow, 10 N. J. L. J. 337.

New York.— Price *v.* Price, 124 N. Y. 589, 27 N. E. 383, 12 L. R. A. 359; Reynolds *v.* Reynolds, 24 Wend. 193. And see *In re* Ensign, 103 N. Y. 284, 8 N. E. 544, 57 Am. Rep. 717.

Pennsylvania.— Miltimore *v.* Miltimore, 40 Pa. St. 151.

Wisconsin.— Burdick *v.* Briggs, 11 Wis. 126.

United States.— Barrett *v.* Failing, 111 U. S. 523, 4 S. Ct. 598, 28 L. ed. 505.

England.—Frampton *v.* Stephens, 21 Ch. D. 164, 51 L. J. Ch. 562, 46 L. T. Rep. N. S. 617, 30 Wkly. Rep. 726.

See 17 Cent. Dig. tit. "Dower," § 102.

Legislative divorce.— A legislative divorce, if valid, has the same effect in this respect as a judicial decree of divorce. Levins *v.* Sleator, 2 Greene (Iowa) 604.

77. Lash *v.* Lash, 58 Ind. 526; McCraney *v.* McCraney, 5 Iowa 232, 68 Am. Dec. 702; Moulton *v.* Moulton, 76 Me. 85; Stilphen *v.* Houdlette, 60 Me. 447 (holding that an absolute divorce obtained by the husband deprives the wife of right of dower, although she subsequently obtains a divorce for the fault of her husband); Cheely *v.* Clayton, 110 U. S. 701, 4 S. Ct. 328, 28 L. ed. 298.

78. Fletcher *v.* Monroe, 145 Ind. 56, 43 N. E. 1053 [*citing* Musselman *v.* Musselman, 44 Ind. 106; Hyatt *v.* Hyatt, 33 Ind. 309; Conner *v.* Conner, 29 Ind. 48; Coon *v.* Coon, 26 Ind. 189; Cox *v.* Cox, 25 Ind. 303; Chandler *v.* Chandler, 13 Ind. 492; Hart *v.* Hart, 11 Ind. 384; Stafford *v.* Stafford, 9 Ind. 162; Rourke *v.* Rourke, 8 Ind. 427; Rice *v.* Rice, 6 Ind. 100]; Calame *v.* Calame, 24 N. J. Eq. 440; Day *v.* West, 2 Edw. (N. Y.) 592; Burdick *v.* Briggs, 11 Wis. 126. *Compare*, however, Wait *v.* Wait, 4 N. Y. 95; Forrest *v.* Forrest, 6 Duer (N. Y.) 102, 3 Abb. Pr. (N. Y.) 144; Kade *v.* Lauber, 48 How. Pr. (N. Y.) 382.

Where a marriage has been annulled by judicial decree upon the ground that when it was contracted the husband had a former wife living, who had absented herself for more than five successive years immediately preceding the second marriage, without being known by him to be living, the wife is not entitled to dower in real estate owned by the husband at the date of the decree. Price *v.* Price, 124 N. Y. 589, 27 N. E. 383, 12 L. R. A. 359.

79. Barrett *v.* Failing, 111 U. S. 523, 4 S. Ct. 598, 28 L. ed. 505.

Foreign divorce see *infra*, VIII, D, 11, e.

80. See, generally, DIVORCE.

not operate as a bar to the right of dower.[81] Of course dower is not barred by a decree of divorce which is void for want of jurisdiction or otherwise,[82] or which is set aside because fraudulently obtained by the husband in his lifetime;[83] but this does not apply where the decree is merely voidable and has not been set aside.[84]

b. Statutory Provisions. It is sometimes provided by statute that a wife who procures a divorce for the misconduct of her husband shall be protected in her dower rights,[85] and also provided, or left as in the absence of any statute, that a divorce procured by the husband for the wife's misconduct bars absolutely her claim for dower.[86] In some states divorce *a vinculo matrimonii* for the misconduct of either party bars dower,[87] but provision is made by statute for an immediate disposition of the husband's property by way of alimony in lieu of dower.[88] Statutes prescribing or changing the dower rights of a woman in case of divorce do not operate retrospectively.[89]

c. Dower in Lands Acquired After Divorce. A wife can have no dower in lands acquired by her husband subsequent to the termination of the marriage relation by a divorce.[90]

81. *Kentucky.*— Rich *v.* Rich, 7 Bush 53; Lively *v.* Lively, 7 Ky. L. Rep. 838.

Maryland.— Hokamp *v.* Hagaman, 36 Md. 511.

New York.—Crain *v.* Cavana, 62 Barb. 109; Day *v.* West, 2 Edw. 592.

North Carolina.—Taylor *v.* Taylor, 93 N. C. 418, 53 Am. Rep. 460.

Tennessee.— Howell *v.* Thompson, 95 Tenn. 396, 32 S. W. 309; Jarnigan *v.* Jarnigan, 80 Tenn. 292.

See 17 Cent. Dig. tit. "Dower," § 102.

Contra by statute.—Gallagher *v.* Gallagher, 101 Wis. 202, 77 N. W. 145.

82. Cheely *v.* Clayton, 110 U. S. 701, 4 S. Ct. 328, 28 L. ed. 298. And see Carr *v.* Carr, 92 Ky. 552, 18 S. W. 453, 13 Ky. L. Rep. 756, 36 Am. St. Rep. 614.

83. Wright *v.* Wright, 8 N. J. Eq. 143.

84. Miltimore *v.* Miltimore, 40 Pa. St. 151. And see Carr *v.* Carr, 92 Ky. 552, 18 S. W. 453, 13 Ky. L. Rep. 756, 36 Am. St. Rep. 614.

85. See Stilson *v.* Stilson, 46 Conn. 15; Kirkpatrick *v.* Kirkpatrick, 197 Ill. 144, 64 N. E. 267; Adams *v.* Storey, 135 Ill. 448, 26 N. E. 582, 25 Am. St. Rep. 392, 11 L. R. A. 790; Gordon *v.* Dickison, 131 Ill. 141, 23 N. E. 439; Kent *v.* McCann, 52 Ill. App. 305; Scales *v.* Scales, 65 Mo. App. 292; Tatro *v.* Tatro, 18 Nebr. 395, 25 N. W. 571, 53 Am. Rep. 820.

86. *Arkansas.*— Wood *v.* Wood, 59 Ark. 441, 27 S. W. 641, 43 Am. St. Rep. 42, 28 L. R. A. 157.

Illinois.—Rendleman *v.* Rendleman, 118 Ill. 257, 8 N. E. 773; Jordan *v.* Clark, 81 Ill. 465.

Maine.— Moulton *v.* Moulton, 76 Me. 85; Stilphen *v.* Houdlette, 60 Me. 447.

New York.— The word "misconduct" as used in the New York statute refers only to that kind of misconduct recognized by law as a sufficient ground for divorce. Price *v.* Price, 124 N. Y. 589, 27 N. E. 383, 12 L. R. A. 359; Van Cleaf *v.* Burns, 118 N. Y. 549, 23 N. E. 881, 16 Am. St. Rep. 782; Schiffer *v.* Pruden, 64 N. Y. 47.

Ohio.— The provision in this state only applies to divorces granted under the statute of the state. Mansfield *v.* McIntyre, 10 Ohio 27.

Where a divorce is first granted the husband for the fault of the wife the judgment bars the wife's dower, although the wife is subsequently granted a divorce for the fault of the husband. Stilphen *v.* Houdlette, 60 Me. 447. This is true in the case of cross libels, where they are heard together, and the court first grants the husband a divorce on his libel, and then on the next day grants the wife a divorce on her libel. Moulton *v.* Moulton, 76 Me. 85.

Where by the terms of an antenuptial contract a certain sum is provided for the wife, to be paid out of the personal estate of the husband, as a substitute or equivalent for dower in case she survives him, a divorce granted to the husband for the fault or misconduct of the wife will bar any claim against his estate under such contract. Jordan *v.* Clark, 81 Ill. 465. *Contra*, under an antenuptial contract not so conditioned. Saunders *v.* Saunders, 144 Mo. 482, 46 S. W. 428.

87. See *supra*, VIII, D, 11, a.

88. Stewart *v.* Stewart, 43 Ga. 294; McKean *v.* Ferguson, 51 Ohio St. 207, 42 N. E. 254; King *v.* King, 9 Ohio Cir. Ct. 191, 4 Ohio Cir. Dec. 1; Foote *v.* Worthington, 4 Ohio Dec. (Reprint) 500, 2 Clev. L. Rep. 274; Gallagher *v.* Gallagher, 101 Wis. 202, 77 N. W. 145, divorce *a mensa et thoro*. The wife must consent to a decree substituting alimony. King *v.* King, *supra*; Foote *v.* Worthington, *supra*. A husband's agreement to make provision for child is not an assignment of any part of his estate to his wife within the meaning of a statute. Stilson *v.* Stilson, 46 Conn. 15.

Disposition of real estate upon divorce see DIVORCE.

Right of dower absolute on divorce see *supra*, VIII, C, 2.

89. Whitsell *v.* Mills, 6 Ind. 229; Curtis *v.* Hobart, 41 Me. 230.

90. Nichols *v.* Park, 78 N. Y. App. Div. 95, 79 N. Y. Suppl. 547.

d. Effect of Remarriage. If under the statute a divorced wife is entitled to dower in her former husband's real estate, such right will be protected notwithstanding the remarriage of the husband, the dower rights of the second wife being subject to the encumbrance of the first wife's prior rights.[91] Unless the divorce bars dower, the wife's subsequent remarriage does not preclude recovery of dower in the estate of her former husband.[92]

e. Effect of Foreign Divorce. Whether a statute of one state, securing or denying the right of dower in case of divorce, extends to a divorce obtained in a court of another state, having jurisdiction of the cause and of the parties, depends very much upon the terms of the statute, and upon its interpretation by the courts of the state by the legislature of which it is passed, and in which the land is situated.[93] The authorities are therefore more or less conflicting, but they seem to favor the proposition that unless otherwise provided by statute a decree of divorce granted in one state, effectual as determining the status of the parties, cannot operate extraterritorially to deprive a wife of dower in her husband's lands situated in another state.[94]

f. Bar by Agreement or Estoppel. Although by statute the wife may be entitled to dower after obtaining a divorce for her husband's misconduct, her right to dower may be barred where, by agreement or by a consent decree in the divorce proceeding, she accepts alimony or other provision in lieu of dower.[95]

12. JOINTURES — a. Definition and Effect in General. Dower may be barred by settling upon the wife previous to marriage a provision to be accepted by her in lieu of dower. This is commonly called a jointure, although strictly speaking the term signifies a joint estate, limited to both husband and wife.[96] There are two kinds of jointure, legal and equitable.

Entry of decree.—The wife's right of dower attaches to the lands of which he was seized at the time of the entry of the decree. Kirkpatrick *v.* Kirkpatrick, 197 Ill. 144, 64 N. E. 267.

91. Stahl *v.* Stahl, 114 Ill. 375, 2 N. E. 160; Starbuck *v.* Starbuck, 62 N. Y. App. Div. 437, 71 N. Y. Suppl. 104; King *v.* King, 9 Ohio Cir. Ct. 191, 4 Ohio Cir. Dec. 1.

Contra under a statute providing that a divorce for adultery of the wife bars her dower. Hinson *v.* Bush, 84 Ala. 368, 4 So. 410 [*overruling* Williams *v.* Hale, 71 Ala. 83].

92. McGill *v.* Deming, 44 Ohio St. 645, 11 N. E. 118; Lamkin *v.* Knapp, 20 Ohio St. 454. *Compare* Rice *v.* Lumley, 10 Ohio St. 596, holding that under a statute allowing dower to a widow who was the wife of the decedent at the time of his death a wife who had married again after a divorce for the husband's fault is the wife of her second husband and could not take dower as the widow of the first.

93. Barrett *v.* Failing, 111 U. S. 523, 4 S. Ct. 598, 28 L. ed. 505.

A foreign judgment of divorce for cause other than adultery, which has the effect to deprive the wife of dower in the state where it is rendered, will not have such effect in New York, the New York statute providing that the wife shall have no dower where the divorce was obtained by her husband for her adultery. Van Cleaf *v.* Burns, 133 N. Y. 540, 30 N. E. 661, 15 L. R. A. 542. And see Van Cleaf *v.* Burns, 118 N. Y. 549, 23 N. E. 881, 16 Am. St. Rep. 782.

Under the Ohio statute providing that when a divorce is granted by reason of the aggression of the husband, the wife, if she survive her husband, shall also be entitled to dower, it was held that a wife divorced in California for her husband's intemperance and cruelty was entitled to dower in her husband's lands in Ohio. McGill *v.* Deming, 44 Ohio St. 645, 11 N. E. 118. *Compare* Harding *v.* Alden, 9 Me. 140, 23 Am. Dec. 549.

94. Hawkins *v.* Ragsdale, 80 Ky. 353, 44 Am. Rep. 483; Van Cleaf *v.* Burns, 133 N. Y. 540, 30 N. E. 661, 15 L. R. A. 542; Van Cleaf *v.* Burns, 118 N. Y. 549, 23 N. E. 881, 16 Am. St. Rep. 782; Starbuck *v.* Starbuck, 62 N. Y. App. Div. 437, 71 N. Y. Suppl. 104; Todd *v.* Kerr, 42 Barb. (N. Y.) 317; Mansfield *v.* McIntyre, 10 Ohio 27; Rogers *v.* Taylor, 8 Ohio Dec. (Reprint) 666, 9 Cinc. L. Bul. 159; Colvin *v.* Reed, 55 Pa. St. 375. *Contra*, Chapman *v.* Chapman, 48 Kan. 636, 29 Pac. 1071; Gould *v.* Crow, 57 Mo. 200; Smith *v.* Woodworth, 44 Barb. (N. Y.) 198; Thomas *v.* King, 95 Tenn. 60, 31 S. W. 983.

See 17 Cent. Dig. tit. "Dower," § 106.

95. Adams *v.* Storey, 135 Ill. 448, 26 N. E. 582, 25 Am. St. Rep. 392, 11 L. R. A. 790; Marvin *v.* Collins, 48 Ill. 156; Bourne *v.* Simpson, 9 B. Mon. (Ky.) 454; Tatro *v.* Tatro, 18 Nebr. 395, 25 N. W. 571, 53 Am. Rep. 820. *Compare* Stilson *v.* Stilson, 46 Conn. 15.

Contra in case of divorce a mensa et thoro only.— Hokamp *v.* Hagaman, 36 Md. 511; Crain *v.* Cavana, 62 Barb. (N. Y.) 109; Day *v.* West, 2 Edw. (N. Y.) 592; Taylor *v.* Taylor, 93 N. C. 418, 53 Am. Rep. 460.

96. 2 Blackstone Comm. 137; 1 Washburn Real Prop. (6th ed.) 490. And see the following cases:

b. Legal Jointure — (I) *STATUTE OF USES.* The statute of uses in effect fastened the legal estate to the use and attempted to combine both the legal and equitable estates in the person in whose favor the use had been declared. To avoid an endowment of the wife of all the husband's estate, leaving her also her separate provision, the statute provided that if lands were conveyed for the benefit of a wife before marriage as her jointure she could not claim dower unless evicted from her jointure lands.[97] The provisions of this act have been substantially adopted as a part of the statute law of nearly all the states, with conditions and requirements conforming to a greater or less extent with those of the original statute of uses.[98]

(II) *REQUISITES OF LEGAL JOINTURE.* Four requisites are prescribed by the original statute, and are either expressly enacted as a part of the statutes of the several states upon the subject or are declared by the courts to be the law in this country, as follows: (1) The jointure must take effect immediately upon the death of the husband;[99] (2) it must be for her own life at least, and not for the life of another, or for any term of years, or other smaller estate;[1] (3) it must be made

Alabama.— Green *v.* Green, 7 Port. 19.

Arkansas.— Bryan *v.* Bryan, 62 Ark. 79, 34 S. W. 260.

Connecticut.—Andrews *v.* Andrews, 8 Conn. 79. And see Carter's Appeal, 59 Conn. 576, 22 Atl. 320.

Illinois.— McGee *v.* McGee, 91 Ill. 548.

Kentucky.— Pepper *v.* Thomas, 85 Ky. 539, 4 S. W. 297, 9 Ky. L. Rep. 122; Tevis *v.* McCreary, 3 Metc. 151; Yancy *v.* Smith, 2 Metc. 408.

Maine.— Vance *v.* Vance, 21 Me. 364.

Massachusetts.— Hastings *v.* Dickinson, 7 Mass. 153, 5 Am. Dec. 34.

Mississippi.— Whitehead *v.* Middleton, 2 How. 692.

Missouri.— Martien *v.* Norris, 91 Mo. 465, 3 S. W. 849; Perry *v.* Perryman, 19 Mo. 469; Logan *v.* Phillipps, 18 Mo. 22.

Nebraska.— Fellers *v.* Fellers, 54 Nebr. 694, 74 N. W. 1077.

New York.— Graham *v.* Graham, 67 Hun 329, 22 N. Y. Suppl. 299 [*affirmed* in 143 N. Y. 573, 38 N. E. 722].

Ohio.— Grogan *v.* Garrison, 27 Ohio St. 50 [*affirming* 1 Cinc. Super. Ct. 302].

South Carolina.— Shelton *v.* Shelton, 20 S. C. 560.

Tennessee.— Woodward *v.* Woodward, 5 Sneed 49.

Virginia.— Craig *v.* Walthall, 14 Gratt. 518; Ball *v.* Ball, 3 Munf. 279.

England.— Walker *v.* Walker, 1 Ves. 54, 27 Eng. Reprint 887.

See 17 Cent. Dig. tit. "Dower," § 111 *et seq.*

Definition.— Jointure is defined by Lord Coke as "a competent livelihood of freehold for the wife of lands and tenements; to take effect, in profit or possession, presently after the death of the husband, for the life of the wife at least." 1 Inst. 36. The term "jointure" as used in the Revised Statutes of Kentucky has been held to denote any species of estate, in real or personal property, created by conveyance or devise, intended to be in lieu or satisfaction of dower. Tevis *v.* McCreary, 3 Metc. (Ky.) 151. It means such an estate as may be conveyed or devised to the wife in lieu of dower. Pepper *v.* Thomas, 85 Ky. 539, 4 S. W. 297, 9 Ky. L. Rep. 122. The term in the Maine statute has been held to be used in its well-known and established legal sense. Vance *v.* Vance, 21 Me. 364. As used in the Nebraska statute the term signifies an estate or property settled on a woman in consideration of marriage and to be enjoyed by her after her husband's decease. Fellers *v.* Fellers, 54 Nebr. 694, 74 N. W. 1077. When a marriage contract does not amount to more than a reservation of the right to dispose of the individual property at death, and no disposition is made by the parties, it is not a jointure which will bar the wife's claim to dower. Whitehead *v.* Middleton, 2 How. (Miss.) 692.

Whether divorce defeats jointure see *supra*, note 86.

97. 27 Hen. VIII, c. 10, § 6; 2 Blackstone Comm. 137.

98. See the statutes of the several states and the cases cited *supra*, note 96, and *infra*, note 99 *et seq.*

99. Vance *v.* Vance, 21 Me. 364; Hastings *v.* Dickinson, 7 Mass. 153, 5 Am. Dec. 34; Crain *v.* Cavana, 36 Barb. (N. Y.) 410; McCartee *v.* Teller, 2 Paige (N. Y.) 511; Gelzer *v.* Gelzer, Bailey Eq. (S. C.) 387, 23 Am. Dec. 180. And see *In re* Pulling, 93 Mich. 274, 52 N. W. 1116.

The mere possibility of the jointure taking effect upon the death of the husband is insufficient. Caruthers *v.* Caruthers, 4 Bro. Ch. 500, 29 Eng. Reprint 1010.

It must be such an estate as to certainty and kind that the wife on the death of the husband may take possession thereof, and hold it in severalty and not in common with others (Grogan *v.* Garrison, 27 Ohio St. 50); and where the jointure is not absolutely and completely settled on the wife by deed, but rests on the articles or on her husband's covenant, she may at her election disregard it and claim dower (Woodward *v.* Woodward, 5 Sneed (Tenn.) 49).

1. Vance *v.* Vance, 21 Me. 364; Hastings *v.* Dickinson, 7 Mass. 153, 5 Am. Dec. 34;

to herself and not to another in trust for her;[2] and (4) it must be made in satisfaction of the whole dower and not of any portion of it, and should so appear in the deed.[3]

(III) *MADE AFTER MARRIAGE.* Jointure to be a complete bar to dower must have been made before marriage.[4] If it be made after marriage the widow has her election either to accept it or to take her dower at common law.[5]

e. Equitable Jointures. As a rule an equitable jointure to bar dower must be a provision to take effect in possession or profit immediately upon the death of the husband, and to continue during the life of the widow;[6] although if the intended wife be of age, and expressly consent to accept a less advantageous provision in lieu of dower, either as to the time when the jointure is to take effect,[7] or as to the period for which it is to continue,[8] she will be barred of a recovery of her dower. In any event the provision to constitute an equitable jointure must be a reasonable and competent livelihood for the wife, having reference to the circumstances and situation in life of the parties, the value of the husband's estate, and the value of the property received by the husband from or through his wife.[9] In many of the states the distinction between legal and equitable jointures is abolished by statute.[10]

d. Eviction or Deprivation of Jointure. If a wife is evicted of her jointure, she will be entitled to dower as if no jointure had been made.[11] In Kentucky,

In re Pulling, 93 Mich. 274, 52 N. W. 1116; Vernon's Case, 4 Coke 1.

An estate for the widowhood of the wife, where the wife is a minor, is not sufficient as a jointure to bar dower. McCartee *v.* Teller, 2 Paige (N. Y.) 511.

Under the Missouri statute see Moran *v.* Stewart, 173 Mo. 207, 73 S. W. 177; Farris *v.* Coleman, 103 Mo. 352, 15 S. W. 767; Mowser *v.* Mowser, 87 Mo. 437.

2. Coke Litt. 36*b*.

3. 2 Blackstone Comm. 138; Vernon's Case, 4 Coke 1; Tracy's Case, 1 Leon. 311.

Satisfaction of dower.— An antenuptial contract reciting a conveyance to the intended wife "as jointure and in full satisfaction of her whole dower" in the husband's estate precludes the wife from claiming dower. Bryan *v.* Bryan, 62 Ark. 79, 34 S. W. 260. The jointure must be in satisfaction of dower and must be so intended to operate by the husband. Pepper *v.* Thomas, 85 Ky. 539, 4 S. W. 297, 9 Ky. L. Rep. 122; Tevis *v.* McCreary, 3 Metc. (Ky.) 151; Yancy *v.* Smith, 2 Metc. (Ky.) 408. A settlement, whether contemplated or post-nuptial, does not operate as a jointure, unless expressed to be in lieu of dower. Perry *v.* Perryman, 19 Mo. 469.

Evidence of intention.— Swaine *v.* Perine, 5 Johns. Ch. (N. Y.) 482, 9 Am. Dec. 318; Tinney *v.* Tinney, 3 Atk. 8, 26 Eng. Reprint 807; Charles *v.* Andrews, 9 Mod. 151. And see Tevis *v.* McCreary, 3 Metc. (Ky.) 151; Worsley *v.* Worsley, 16 B. Mon. (Ky.) 455.

4. 27 Hen. VIII, c. 10, § 9.

5. 2 Blackstone Comm. 138; Coke Litt. 36*b*; McCartee *v.* Teller, 2 Paige (N. Y.) 511; Bottomby *v.* Spencer, 36 Fed. 732.

6. Crain *v.* Cavana, 36 Barb. (N. Y.) 410; McCartee *v.* Teller, 2 Paige (N. Y.) 511.

Whether jointure in lieu of dower is defeated by divorce see *supra*, VIII, D, 11, b, note 86.

7. Caruthers *v.* Caruthers, 4 Bro. Ch. 500, 29 Eng. Reprint 1010; 2 Scribner Dower (2d ed.) 408.

8. As where she accepts an estate for years (Charles *v.* Andrews, 9 Mod. 151; Rose *v.* Reynolds, 1 Swanst. 446, 36 Eng. Reprint 459) or an annuity (Garrard *v.* Garrard, 7 Bush (Ky.) 436; Vizod *v.* Londen, W. Kel. 17, 25 Eng. Reprint 473, 13 Eng. L. & Eq. 408 note).

9. McCartee *v.* Teller, 2 Paige (N. Y.) 511. It is not essential to the validity of the agreement that it should give the wife as much as the law would give her, although where the interest given is less than one third of the husband's lands the agreement does not *prima facie* operate as a good equitable jointure. Grogan *v.* Garrison, 27 Ohio St. 50 [*affirming* 1 Cinc. Super. Ct. 302].

Any reasonable provision which an adult person before marriage agrees to accept in lieu of dower will amount to an equitable jointure, and will bar dower, although it may be wanting in some of the requisites of a legal jointure. McGee *v.* McGee, 91 Ill. 548. And see Andrews *v.* Andrews, 8 Conn. 79; Barth *v.* Lines, 118 Ill. 374, 7 N. E. 679, 59 Am. Rep. 374; Logan *v.* Phillipps, 18 Mo. 22. See also *infra*, VIII, D, 13.

10. See McCartee *v.* Teller, 2 Paige (N. Y.) 511. A widow is not required to renounce a contract for jointure by which she relinquished her dower right in lands then owned by the husband, in order that she may have the right to claim dower in other lands which the husband had previously sold and conveyed. Halferty *v.* Scearce, 135 Mo. 428, 37 S. W. 113, 255.

11. Hastings *v.* Dickinson, 7 Mass. 153, 5 Am. Dec. 34; Ward *v.* Wilson, 1 Desauss. (S. C.) 401; Ambler *v.* Norton, 4 Hen. & M. (Va.) 23, holding that it is not essential to the validity of a jointure that it should be exempt from encumbrance, as the widow,

by statute, if she is lawfully deprived of any part of her jointure, without any act of her own, she is entitled to indemnity out of her husband's estate;[12] but this does not entitle her to be indemnified for such loss by way of dower out of lands conveyed to third persons by the husband.[13]

13. ANTENUPTIAL SETTLEMENTS OR AGREEMENTS[14]— a. In General. It has been held that at common law the right of dower could not be waived or lost by an agreement in lieu of dower made before marriage,[15] upon the ground that the intended wife could not alien or dispose of her dower right in consequence of two maxims of the common law: (1) That no right can be barred before it accrues; and (2) that no right or title to an estate of freehold can be barred by a collateral satisfaction.[16] But other cases are to the effect that a *feme sole* of full age and competent to contract may bar her dower by antenuptial contract, the consideration of marriage, or of the settlement upon the wife of a portion of her intended husband's estate in lieu of dower, being deemed sufficient.[17] And in equity the general rule is that any reasonable and *bona fide* agreement made before marriage between parties competent to contract, whereby the wife is secured in the enjoyment of a portion of her husband's estate, either during coverture or after his death, in lieu of her dower, will be enforced.[18] To be effectual as a bar the provision must be clearly shown in the instrument itself to have been made

if evicted of her jointure, has still a right to claim her dower.

12. Grider *v.* Eubanks, 12 Bush (Ky.) 510; Tevis *v.* McCreary, 3 Metc. (Ky.) 151.

13. Grider *v.* Eubanks, 12 Bush (Ky.) 510.

14. Antenuptial contracts see, generally, HUSBAND AND WIFE.

Jointure see *supra*, VIII, D, 12.

15. Blackmon *v.* Blackmon, 16 Ala. 633; Gould *v.* Womack, 2 Ala. 63; Gibson *v.* Gibson, 15 Mass. 106, 8 Am. Dec. 94; Hastings *v.* Dickinson, 7 Mass. 153, 5 Am. Dec. 34 (holding that a marriage settlement, whereby a husband covenanted that his wife should have an annuity out of his estate, in consideration whereof she covenanted not to demand dower in his estate, did not bar her dower); Fellers *v.* Fellers, 54 Nebr. 694, 74 N. W. 1077 (holding that the manner in which dower may be barred by an antenuptial agreement is regulated by statute; and in the absence of any contravening equitable considerations the method prescribed by statute is exclusive); Hinkle *v.* Hinkle, 34 W. Va. 142, 11 S. E. 993. And see *In re* Pulling, 93 Mich. 274, 52 N. W. 1116.

16. Blackmon *v.* Blackmon, 16 Ala. 633; Gould *v.* Womack, 2 Ala. 83; Logan *v.* Phillipps, 18 Mo. 22. And see *In re* Pulling, 93 Mich. 274, 52 N. W. 1116.

17. Culberson *v.* Culberson, 37 Ga. 296; Forwood *v.* Forwood, 86 Ky. 114, 5 S. W. 361, 9 Ky. L. Rep. 415; Naill *v.* Maurer, 25 Md. 532.

18. *Alabama.*—Webb *v.* Webb, 29 Ala. 588.

Connecticut.— Selleck *v.* Selleck, 8 Conn. 85 note; Andrews *v.* Andrews, 8 Conn. 79.

Delaware.— Farrow *v.* Farrow, 1 Del. Ch. 457.

Illinois.— Worrell *v.* Forsyth, 141 Ill. 22, 30 N. E. 673; Spencer *v.* Boardman, 118 Ill. 553, 9 N. E. 330; Barth *v.* Lines, 118 Ill. 374, 7 N. E. 679, 59 Am. Rep. 374; McMahill *v.* McMahill, 105 Ill. 596, 44 Am. Rep. 819; McGee *v.* McGee, 91 Ill. 548; Jordan *v.* Clark, 81 Ill. 465; Phelps *v.* Phelps, 72 Ill. 545, 22 Am. Rep. 149.

Indiana.— Shaffer *v.* Shaffer, 90 Ind. 472.

Iowa.— Jacobs *v.* Jacobs, 42 Iowa 600. And see Ditson *v.* Ditson, 85 Iowa 276, 52 N. W. 203.

Maine.— Wentworth *v.* Wentworth, 69 Me. 247.

Maryland.— Naill *v.* Maurer, 25 Md. 532; Levering *v.* Heighe, 2 Md. Ch. 81.

Massachusetts.— Freeland *v.* Freeland, 128 Mass. 509; Butman *v.* Porter, 100 Mass. 337; Tarbell *v.* Tarbell, 10 Allen 278; Sullings *v.* Sullings, 9 Allen 234.

Minnesota.— Desnoyer *v.* Jordan, 27 Minn. 295, 7 N. W. 140.

Missouri.— Logan *v.* Phillipps, 18 Mo. 22.

New Hampshire.— *In re* Heald, 22 N. H. 265.

New York.— Pierce *v.* Pierce, 71 N. Y. 154, 27 Am. Rep. 22; Carpenter *v.* Carpenter, 40 Hun 263.

North Carolina.— Brooks *v.* Austin, 95 N. C. 474; Cauley *v.* Lawson, 58 N. C. 132.

Ohio.—Mintier *v.* Mintier, 28 Ohio St. 307; Grogan *v.* Garrison, 27 Ohio St. 50; Stilley *v.* Folger, 14 Ohio 610.

Pennsylvania.— Shoch *v.* Shoch, 19 Pa. St. 252; Ellmaker *v.* Ellmaker, 4 Watts 89.

Rhode Island.— Law *v.* Smith, 2 R. I. 244.

South Carolina.— Cunningham *v.* Shannon, 4 Rich. Eq. 135; Gelzer *v.* Gelzer, Bailey Eq. 387, 23 Am. Dec. 180.

Virginia.— Findley *v.* Findley, 11 Gratt. 434; Charles *v.* Charles, 8 Gratt. 486, 56 Am. Dec. 155; Faulkner *v.* Faulkner, 3 Leigh 255, 23 Am. Dec. 264.

West Virginia.— Hinkle *v.* Hinkle, 34 W. Va. 142, 11 S. E. 993.

Wisconsin.— West *v.* Walker, 77 Wis. 557, 46 N. W. 819.

See 17 Cent. Dig. tit. "Dower," § 114 *et seq.*

in lieu or in satisfaction of dower.[19] The provisions of a statute that a jointure is a bar of dower do not ordinarily deprive an intended wife of the power to bar her dower by any other form of antenuptial contract.[20]

b. Statutory Provisions. It is provided by statute in many states that any pecuniary provision, made for the benefit of an intended wife and in lieu of dower, if assented to by her as prescribed therein, bars her right or claim of dower in all the lands of her husband.[21]

c. Fairness and Reasonableness of Provision. An antenuptial agreement making provision for the wife in lieu of dower must be reasonable in itself and founded on adequate consideration,[22] and must be made fairly, without fraud or imposition, and with a full understanding of its force and effect on the part of the wife.[23] Such agreements will be regarded with the most rigid scrutiny and will not be enforced against the wife where the circumstances show that she has

Equitable jointure see *supra*, VIII, D, 12, c.

Failure of husband to support wife.—Spiva *v.* Jeter, 9 Rich. Eq. (S. C.) 434.

Effect of subsequent legislation abolishing dower.— Desnoyer *v.* Jordan, 27 Minn. 295, 7 N. W. 140.

19. Rice *v.* Waddill, 168 Mo. 99, 67 S. W. 605; Dudley *v.* Davenport, 85 Mo. 462; Perry *v.* Perryman, 19 Mo. 469; Swaine *v.* Perine, 5 Johns. Ch. (N. Y.) 482, 9 Am. Dec. 318; Hinkle *v.* Hinkle, 34 W. Va. 142, 11 S. E. 993; Gilkison *v.* Elliott, 27 U. C. Q. B. 95.

20. Barth *v.* Lines, 118 Ill. 374, 7 N. E. 679, 59 Am. Rep. 374; Naill *v.* Maurer, 25 Md. 532; Logan *v.* Phillipps, 18 Mo. 22. *Compare* Fellers *v.* Fellers, 54 Nebr. 694, 74 N. W. 1077.

Effect of partial bar of dower.— Taft *v.* Taft, 163 Mass. 467, 40 N. E. 860.

21. See the statutes of the several states. And see Wentworth *v.* Wentworth, 69 Me. 247; Dudley *v.* Davenport, 85 Mo. 462; Graham *v.* Graham, 67 Hun (N. Y.) 329, 22 N. Y. Suppl. 299 [*affirmed* in 143 N. Y. 573, 38 N. E. 722].

22. *Alabama.*— Gould *v.* Womack, 2 Ala. 83.

Illinois.— Taylor *v.* Taylor, 144 Ill. 436, 33 N. E. 532.

Iowa.— Peet *v.* Peet, 81 Iowa 172, 46 N. W. 1051.

Michigan.— *In re* Pulling, 93 Mich. 274, 52 N. W. 1116.

New York.— Graham *v.* Graham, 143 N. Y. 573, 38 N. E. 722 [*affirming* 67 Hun 329, 22 N. Y. Suppl. 299].

Ohio.— Johnson *v.* Johnson, 1 Ohio Cir. Ct. 521, 1 Ohio Cir. Dec. 291. *Compare* Ross *v.* Ross, 2 Ohio Dec. (Reprint) 181, 2 West. L. Month. 17.

Pennsylvania.— Shea's Appeal, 121 Pa. St. 302, 15 Atl. 629, 1 L. R. A. 422.

See 17 Cent. Dig. tit. "Dower," § 119.

Nature of consideration.— An antenuptial agreement founded upon consideration that the wife should have all her property to her sole and separate use, and should be entitled to the avails of her personal labor during coverture, which should be in full satisfaction of her right of dower was sustained, it appearing that both parties were of advanced age and each possessed of a large estate. Andrews *v.* Andrews, 8 Conn. 79. So also of an agreement that neither of the parties should have any interest, present or future, in the estate of the other, where it appeared that the agreement was made in settlement of a suit brought by the wife for seduction under promise of marriage, the wife being a young woman of twenty-one years and the husband an elderly man with three adult children. Davis *v.* Wood, 10 N. Y. Suppl. 460.

Public policy demands that the wife be not left without suitable provision in lieu of dower for her support after her husband's death. Farris *v.* Coleman, 103 Mo. 352, 15 S. W. 767; Mowser *v.* Mowser, 87 Mo. 437; Brandon *v.* Dawson, 51 Mo. App. 237; Curry *v.* Curry, 10 Hun (N. Y.) 366.

23. *Alabama.*— Webb *v.* Webb, 29 Ala. 588 (sustaining a provision, although the wife's interest thereunder was not as valuable as her dower, where there was no mistake, surprise, or fraud, and no great difference in such values); Gould *v.* Womack, 2 Ala. 83.

Delaware.— Farrow *v.* Farrow, 1 Del. Ch. 457.

Illinois.— Taylor *v.* Taylor, 144 Ill. 436, 33 N. E. 532.

Iowa.— Fisher *v.* Koontz, 110 Iowa 498, 80 N. W. 551.

Maryland.— Levering *v.* Heighe, 2 Md. Ch. 81.

Massachusetts.— Butman *v.* Porter, 100 Mass. 337; Tarbell *v.* Tarbell, 10 Allen 278.

New York.—Graham *v.* Graham, 143 N. Y. 573, 38 N. E. 722 [*affirming* 67 Hun 329, 22 N. Y. Suppl. 299]; Pierce *v.* Pierce, 71 N. Y. 154, 27 Am. Rep. 22.

North Carolina.— Taylor *v.* Rickman, 45 N. C. 278.

Ohio.— Stilley *v.* Folger, 14 Ohio 610; Ross *v.* Ross, 2 Ohio Dec. (Reprint) 181, 2 West. L. Month. 17.

Pennsylvania.— Shea's Appeal, 121 Pa. St. 302, 15 Atl. 629, 1 L. R. A. 422; Kline *v.* Kline, 57 Pa. St. 120, 98 Am. Dec. 206. And see Kline's Estate, 64 Pa. St. 122.

West Virginia.— Hinkle *v.* Hinkle, 34 W. Va. 142, 11 S. E. 993.

England.— Cobbett *v.* Brock, 20 Beav. 524; Page *v.* Horne, 11 Beav. 227, 12 Jur. 340, 17 L. J. Ch. 200.

See 17 Cent. Dig. tit. "Dower," § 119.

been overreached and deceived.[24] Owing to the confidential relations of the parties[25] and the nature of the transaction, such an agreement is considered sufficiently suspicious to cast the burden of proof upon him who seeks to support it to show that he has taken no advantage of his influence or knowledge, and that the arrangement is fair and conscientious.[26]

d. Performance of Agreement by Husband. An antenuptial agreement will not operate as a bar of dower unless its terms are fully executed by the husband.[27]

14. Post-Nuptial Settlements or Agreements — a. In General. At common law a wife cannot bar her right of dower by an agreement with her husband entered into during coverture, for she is not at common law competent to bind herself by such an agreement.[28] It has been held, however, that equity will

A wife cannot ratify, during coverture, an antenuptial contract to bar her dower executed on false representations of her husband, nor can her acts during coverture be admitted in evidence to explain her acts after her husband's death. Peaslee *v.* Peaslee, 147 Mass. 171, 17 N. E. 506.

24. Hinkle *v.* Hinkle, 34 W. Va. 142, 11 S. E. 993, and other cases cited in the note preceding.

Fairness of antenuptial contracts see, generally, Husband and Wife.

Void in part, inoperative in toto.— Zachman *v.* Zachman, 201 Ill. 380, 66 N. E. 256, 94 Am. St. Rep. 180.

25. Pierce *v.* Pierce, 71 N. Y. 154, 27 Am. Rep. 22; Shea's Appeal, 121 Pa. St. 302, 15 Atl. 629, 1 L. R. A. 422. And see Graham *v.* Graham, 143 N. Y. 573, 38 N. E. 722 [*affirming* 67 Hun 329, 22 N. Y. Suppl. 299]; Kline *v.* Kline, 57 Pa. St. 120, 98 Am. Dec. 206.

26. Achilles *v.* Achilles, 151 Ill. 136, 37 N. E. 693; Fisher *v.* Koontz, 110 Iowa 498, 80 N. W. 551; Bierer's Appeal, 92 Pa. St. 265; Russell's Appeal, 75 Pa. St. 269; Spurlock *v.* Brown, 91 Tenn. 241, 18 S. W. 868. The burden of proof is upon the husband, or those who represent him, to show absolute fairness on the part of the husband, especially when it is apparent that the provision made for the wife is inequitable, unjust, and unreasonably disproportionate to the means of the husband. Pierce *v.* Pierce, 71 N. Y. 154, 27 Am. Rep. 22. See also Taylor *v.* Rickman, 45 N. C. 278; Page *v.* Horne, 11 Beav. 227, 12 Jur. 340, 17 L. J. Ch. 200.

27. *Illinois.*— Brenner *v.* Gauch, 85 Ill. 368.

Kentucky.— Garrard *v.* Garrard, 7 Bush 436.

Maine.— Sargent *v.* Roberts, 34 Me. 135.

Missouri.— Johnson *v.* Johnson, 23 Mo. 561, 30 Mo. 72, 77 Am. Dec. 598.

Ohio.—Finch *v.* Finch, 10 Ohio St. 501.

Vermont.— Little *v.* Dwinell, 57 Vt. 301.

See 17 Cent. Dig. tit. "Dower," § 117.

Sufficient performance.— The execution of a conveyance in trust to a trustee to convey certain lands to a wife after the husband's death is sufficient performance of an antenuptial agreement whereby the wife agreed to take such lands after the husband's death in lieu of dower. Worrell *v.* Forsyth, 141 Ill. 22, 30 N. E. 673. And where the contract provided that the parties should retain their respective estates, and that in case of the husband's death the wife surviving a certain sum should be paid her, and she covenanted to release all claims against his estate except the payment of such sum, it was held that upon the death of the husband without assets the wife was nevertheless barred of dower. Freeland *v.* Freeland, 128 Mass. 509.

Rescission of the agreement by the husband according to his original intention and the understanding between the parties, with the knowledge and assent of the wife, operates as a cancellation thereof, and throws the widow back upon her dower rights. *In re* Gangwere, 14 Pa. St. 417, 53 Am. Dec. 554. A will whereby a husband gives his executor unlimited power of sale and investment does not authorize the widow to rescind an antenuptial agreement providing that the wife should be paid an annuity in lieu of dower. Bannan's Appeal, 1 Walk. (Pa.) 1. Nor will an additional post-nuptial provision for a wife authorize the wife to disregard a valid antenuptial contract and elect to take dower in lieu of the provision made by the additional contract. West *v.* Walker, 77 Wis. 557, 46 N. W. 819.

28. *Alabama.*— Martin *v.* Martin, 22 Ala. 86.

Arkansas.— Pillow *v.* Wade, 31 Ark. 678; Countz *v.* Markling, 30 Ark. 17.

Connecticut.— Stilson *v.* Stilson, 46 Conn. 15.

Delaware.— McCaulley *v.* McCaulley, 7 Houst. 102, 30 Atl. 735.

Georgia.— Butts *v.* Trice, 69 Ga. 74, holding that a deed to a wife in lieu of dower, accepted by the wife, will not bar dower unless ratified by her after his death.

Kentucky.— Newby *v.* Cox, 81 Ky. 58.

Maine.—Rowe *v.* Hamilton, 3 Me. 63. And see Pinkham *v.* Pinkham, 95 Me. 71, 49 Atl. 48, 85 Am. St. Rep. 392; French *v.* Peters, 33 Me. 396; Usher *v.* Richardson, 29 Me. 415; Shaw *v.* Russ, 14 Me. 432.

New Jersey.— Emery *v.* Neighbour, 7 N. J. L. 142; Ireland *v.* Ireland, 43 N. J. Eq. 311, 12 Atl. 184.

New York.— Crain *v.* Cavana, 36 Barb. 410; Townsend *v.* Townsend, 2 Sandf. 711; Armstrong *v.* Armstrong, 1 N. Y. St. 529; Guidet *v.* Brown, 3 Abb. N. Cas. 295, 54 How. Pr. 409; Carson *v.* Murray, 3 Paige 483.

enforce such an agreement and exclude her from dower unless she relinquishes or accounts for the pecuniary benefits received by her as a consideration therefor,[29] provided it specifically appear that the settlement or provision was made and accepted in lieu of dower,[30] and provided it is shown that the agreement was made with full knowledge on her part of the value of the interests she was receiving and giving up, and that there was no inequality.[31] An acceptance and enjoyment of such benefits by the wife may be deemed an election to waive dower and take under the agreement.[32]

b. Statutory Provisions. In some states power to bar dower by post-nuptial agreement has been held to be impliedly conferred by the married women's acts of the several states, permitting married women to dispose of their interests and to make contracts as if they were single,[33] while in other states such acts have been construed as not conferring this power.[34] In some jurisdictions the validity and effect of such agreements is regulated and determined by special statutory

Pennsylvania.— Kreiser's Appeal, 69 Pa. St. 194.

Tennessee.—Parham *v.* Parham, 6 Humphr. 287, holding that a post-nuptial settlement made in lieu of dower is voidable at the election of the wife.

See 17 Cent. Dig. tit. "Dower," § 124; *infra*, VIII, D, 17, h. (II); and, generally, HUSBAND AND WIFE.

A release of dower by a wife direct to her husband will not enable him by his sole deed to convey the land free of her dower right, since, if the release is at all effectual, the husband becomes vested with a fee simple, and the dower right immediately reattaches by operation of law. Wightman *v.* Schleifer, 18 N. Y. Suppl. 551.

Not a bar by equitable jointure.— Bottomly *v.* Spencer, 36 Fed. 732.

Agreement to accept provisions of will.— Kreiser's Appeal, 69 Pa. St. 194. See, generally, WILLS.

29. Lively *v.* Paschal, 35 Ga. 218, 89 Am. Dec. 282 (holding that where a wife, for fair and adequate consideration, relinquishes her right of dower, she will not be permitted to repudiate her contract after her husband's death, without restoring the consideration received by her, together with interest from the time of its receipt); Kreiser's Appeal, 69 Pa. St. 194; Chaney *v.* Bryan, 15 Lea (Tenn.) 589; Parham *v.* Parham, 6 Humphr. (Tenn.) 287. See also Stilson *v.* Stilson, 46 Conn. 15; Roberts *v.* Walker, 82 Mo. 200; Garbut *v.* Bowling, 81 Mo. 214; Wood *v.* Seely, 32 N. Y. 105; Lee *v.* Timken, 10 N. Y. App. Div. 213, 41 N. Y. Suppl. 979; Doremus *v.* Doremus, 66 Hun (N. Y.) 111, 21 N. Y. Suppl. 13.

Agreement to accept provisions of will.— Kreiser's Appeal, 69 Pa. St. 194; Sumerel *v.* Sumerel, 34 S. C. 85, 12 S. E. 932. See, generally, WILLS.

30. *Alabama.*—Mitchell *v.* Mitchell, 8 Ala. 414.

Connecticut.— Stilson *v.* Stilson, 46 Conn. 15, holding that an agreement by a wife pending a divorce suit to make no claim for alimony does not bar her right to dower. See also Seeley's Appeal, 56 Conn. 202, 14 Atl. 291.

Georgia.— Mitchell *v.* Word, 60 Ga. 525.

Maine.— Bubier *v.* Roberts, 49 Me. 460.

New York.— Swaine *v.* Perine, 5 Johns. Ch. 482, 9 Am. Dec. 318.

South Carolina.— Shelton *v.* Shelton, 20 S. C. 560.

See 17 Cent. Dig. tit. "Dower," § 125.

31. Kreiser's Appeal, 69 Pa. St. 194. See, generally, HUSBAND AND WIFE.

32. Carter's Appeal, 59 Conn. 576, 22 Atl. 320; Loud *v.* Loud, 4 Bush (Ky.) 453 (holding that where both parties continue to act upon the agreement until the death of the husband, the wife cannot thereafter repudiate the provision made for her therein, and demand her dower); Roberts *v.* Walker, 82 Mo. 200 (where it was held that a demand for and receipt of the property referred to in the agreement after the husband's death from his administrator constituted an acceptance); Garbut *v.* Bowling, 81 Mo. 214.

33. Chittock *v.* Chittock, 101 Mich. 367, 59 N. W. 655; Dakin *v.* Dakin, 97 Mich. 284, 56 N. W. 562; Wright *v.* Wright, 79 Mich. 527, 44 N. W. 944; Rhoades *v.* Davis, 51 Mich. 306, 16 N. W. 659 (holding that a married woman's release to her husband of her dower right if made for a good consideration and without fraud or improper dealing is binding in view of the married women's act permitting wives to dispose of their interests as if single); Randall *v.* Randall, 37 Mich. 563; Jones *v.* Fleming, 104 N. Y. 418, 10 N. E. 693 (holding that an agreement whereby a wife received a sum of money in consideration for her release of dower was one whereby she received a separate estate, and related thereto, and was therefore binding upon her under the married women's acts).

Allowing a wife to retain her own estate to her separate use has been held to be a good settlement in exclusion of dower. Ross *v.* Ross, 2 Ohio Dec. (Reprint) 181, 2 West. L. Month. 17.

34. Pinkham *v.* Pinkham, 95 Me. 71, 49 Atl. 48, 85 Am. St. Rep. 392; Haggett *v.* Hurley, 91 Me. 542, 40 Atl. 561, 41 L. R. A. 362; Land *v.* Shipp, 98 Va. 284, 36 S. E. 391, 50 L. R. A. 560. And see, generally, HUSBAND AND WIFE.

provision.[35] In many of the states by express statutory provision an acceptance by a married woman of a pecuniary provision in lieu of dower bars recovery of dower in her husband's lands.[36]

c. Separation Agreements. The authorities are not in harmony as to whether a wife may exclude herself from all rights of dower by a provision contained in a separation agreement. Some of them uphold such a provision if it be duly executed as provided by statute, and be free of fraud, deception, or oppression,[37] while others emphatically repudiate the validity of such an agreement as a bar to dower on the ground of public policy.[38]

15. Conveyance or Alienation by Husband — a. Before Marriage — (i) *In General.* Ordinarily conveyances made in good faith by a husband before

35. **In Iowa** an agreement between husband and wife by which she releases her dower rights is void. Garner *v.* Fry, 104 Iowa 515, 73 N. W. 1079; Shane *v.* McNeill, 76 Iowa 459, 41 N. W. 166; Linton *v.* Crosby, 54 Iowa 478, 6 N. W. 726.

In New Jersey the statute leaves the ability of husband and wife to contract as it was at common law. Ireland *v.* Ireland, 43 N. J. Eq. 311, 12 Atl. 184.

In Ohio the conveyance of an estate or interest in real property to a person in lieu of dower, to take effect on the death of the grantor, if accepted by the grantee, bars her right of dower in the real property of the grantor; but if the conveyance is made during marriage, she may waive title thereunder and claim dower. She cannot claim both. Spangler *v.* Dukes, 39 Ohio St. 642.

In Oregon a conveyance or release to the husband by the wife of her inchoate right of dower in his lands is void. House *v.* Fowle, 20 Oreg. 163, 25 Pac. 376, 22 Oreg. 303, 29 Pac. 890.

36. **In Indiana** a post-nuptial agreement making a pecuniary provision for the wife in lieu of her rights on the real estate of her husband must to be valid be evidenced by a deed or other written instrument, with an acknowledgment indorsed or attached of her assent to receive the same in lieu of her rights. Randles *v.* Randles, 63 Ind. 93.

In Maine before dower was abolished the widow's right of dower could be barred by a pecuniary provision made for her benefit and consented to by her, or if she should not within six months after her husband's death make her election to waive such provision and file the same in writing in the probate court. The statute now applies to her right and interest in her husband's estate by descent. See Woods *v.* Woods, 77 Me. 434, 1 Atl. 193; Bubier *v.* Roberts, 49 Me. 460. See also Pinkham *v.* Pinkham, 95 Me. 71, 49 Atl. 48, 85 Am. St. Rep. 392; Woods *v.* Woods, 77 Me. 434, 1 Atl. 193; Davis *v.* Davis, 61 Me. 395.

In Missouri where a post-nuptial contract makes provision for the wife in lieu of dower she may accept the same and be barred of dower or renounce the same and claim dower, but she cannot have both. Roberts *v.* Walker, 82 Mo. 200; Garbut *v.* Bowling, 81 Mo. 214. Parol evidence is not admissible to vary conveyance and release. Halferty *v.* Scearce, 135 Mo. 428, 37 S. W. 113, 255.

In New York if pecuniary provision is made for a wife after marriage in lieu of dower, she must make her election whether she will take such provision or be endowed, but she is not entitled to both. See Jones *v.* Fleming, 104 N. Y. 418, 10 N. E. 693 [*reversing* 37 Hun 227]; Crain *v.* Cavana, 36 Barb. 410. The provision to bar dower must be a provision to take effect in possession or profit immediately on the death of the husband. Crain *v.* Cavana, 36 Barb. 410. To put the wife to an election the pecuniary provision must in some way be tendered to her at the death of her husband. Guidet *v.* Brown, 3 Abb. N. Cas. 295, 54 How. Pr. 409. See also Dworsky *v.* Arndstein, 29 N. Y. App. Div. 274, 51 N. Y. Suppl. 597.

37. *Iowa.*— Robertson *v.* Robertson, 25 Iowa 350.

Michigan.— Owen *v.* Yale, 75 Mich. 256, 42 N. W. 817. And see Randall *v.* Randall, 37 Mich. 563.

New Jersey.— Ireland *v.* Ireland, 43 N. J. Eq. 311, 12 Atl. 184.

Pennsylvania.— Hitner's Appeal, 54 Pa. St. 110 (holding that the agreement to be valid must have for its object an actual and immediate and not a contingent or future separation); Dillinger's Appeal, 35 Pa. St. 357; Walsh *v.* Kelly, 34 Pa. St. 84 (refusing to enforce such an agreement, however, because not properly accepted and acknowledged); Kaiser's Estate, 14 Pa. Super. Ct. 155; *In re* Moore, 30 Pittsb. Leg. J. N. S. 394.

Canada.— Eves *v.* Booth, 30 Ont. 689.

See 17 Cent. Dig. tit. "Dower," § 127.

38. *Arkansas.*— Bowers *v.* Hutchinson, 67 Ark. 15, 53 S. W. 399.

Connecticut.— Stilson *v.* Stilson, 46 Conn. 15.

Georgia.— Birch *v.* Anthony, 109 Ga. 349, 34 S. E. 561, 77 Am. St. Rep. 379.

Illinois.— Hamilton *v.* Hamilton, 89 Ill. 349.

South Carolina.— Moon *v.* Bruce, 63 S. C. 126, 40 S. E. 1030; Shelton *v.* Shelton, 20 S. C. 560.

Tennessee.— Watkins *v.* Watkins, 7 Yerg. 283.

Virginia.— Land *v.* Shipp, 98 Va. 284, 36 S. E. 391, 50 L. R. A. 560.

See 17 Cent. Dig. tit. "Dower," § 127.

Validity of separation agreements see, generally, CONTRACTS, 9 Cyc. 520; HUSBAND AND WIFE.

marriage are made free of the claim of dower,[39] even if according to some authorities such conveyances had not been recorded.[40] And although a deed executed before marriage is not delivered until after marriage, if it is devoid of fraudulent intent as against the wife, the grantee will take the land unincumbered by the dower right.[41]

(II) *Contracts For Sale of Land.* Where a contract for the sale of land is executed by the owner before marriage, but the land is conveyed subsequent thereto, the conveyance constitutes an equitable bar of the wife's right of dower,[42] if the contract, not being in writing, has been in part performed by the purchaser.[43]

(III) *Conveyance Fraudulent as to Wife.* Such contracts and conveyances to preclude recovery of dower by the wife must be free from fraud as against her, the general rule being that conveyances of real estate made by a man, without the knowledge of his intended wife, and for the purpose of defeating the interest which she would acquire in his estate by the marriage, are void as to the wife.[44] Voluntary conveyances by a father to his children made just before his

39. *Florida.*— Rain *v.* Roper, 15 Fla. 121.
Illinois.—Daniher *v.* Daniher, 201 Ill. 489, 66 N. E. 239.
Kentucky.—Fennessey *v.* Fennessey, 84 Ky. 519, 2 S. W. 158, 8 Ky. L. Rep. 477, 4 Am. St. Rep. 410; Gaines *v.* Gaines, 9 B. Mon. 295, 48 Am. Dec. 425; Moody *v.* Moody, 3 Ky. L. Rep. 472.
Michigan.—Beckwith *v.* Beckwith, 61 Mich. 315, 28 N. W. 116.
New York.—Oakley *v.* Oakley, 69 Hun 121, 23 N. Y. Suppl. 267.
Ohio.— Firestone *v.* Firestone, 2 Ohio St. 415.
See 17 Cent. Dig. tit. "Dower," § 14.
Conveyance subject to condition subsequent see *supra*, V, C, 4.

40. Richardson *v.* Skolfield, 45 Me. 386; Blood *v.* Blood, 23 Pick. (Mass.) 80. See also *supra*, V, C, 4.

41. Smiley *v.* Smiley, 114 Ind. 258, 16 N. E. 585; Black *v.* Hoyt, 33 Ohio St. 203; Vorheis *v.* Kitch, 8 Phila. (Pa.) 554.
But a secret deed of gift made by a man two days before marriage to his children by a former wife, where it is not delivered at its date nor during the grantor's life, and where the premises continue in his possession, cannot prejudice the dower rights of the wife. Brown *v.* Bronson, 35 Mich. 415.

42. *Illinois.*— Chesnut *v.* Chesnut, 15 Ill. App. 442.
Kentucky.—Gully *v.* Ray, 18 B. Mon. 107; Oldham *v.* Sale, 1 B. Mon. 76; Dean *v.* Mitchell, 4 J. J. Marsh. 451; Stevens *v.* Smith, 4 J. J. Marsh. 64, 20 Am. Dec. 205; Eubank *v.* Eubank, 7 Ky. L. Rep. 291.
Maryland.— Rawlings *v.* Adams, 7 Md. 26; Cowman *v.* Hall, 3 Gill & J. 398. And see Dimond *v.* Billingslea, 2 Harr. & G. 264.
Michigan.— *In re* Pulling, 97 Mich. 375, 56 N. W. 765.
Ohio.— Firestone *v.* Firestone, 2 Ohio St. 415.
Virginia.— Chapman *v.* Chapman, 92 Va. 537, 24 S. E. 225, 53 Am. St. Rep. 823.
See 17 Cent. Dig. tit. "Dower," § 14.

43. Madigan *v.* Walsh, 22 Wis. 501.

44. *Delaware.*—Chandler *v.* Hollingsworth, 3 Del. Ch. 99.
Illinois.— Daniher *v.* Daniher, 201 Ill. 489, 66 N. E. 239; Clark *v.* Clark, 183 Ill. 448, 56 N. E. 82, 75 Am. St. Rep. 115; Freeman *v.* Hartman, 45 Ill. 57, 92 Am. Dec. 193.
Indiana.— Stroup *v.* Stroup, 140 Ind. 179, 39 N. E. 864, 27 L. R. A. 523; Dearmond *v.* Dearmond, 10 Ind. 191.
Iowa.— Hamilton *v.* Smith, 57 Iowa 15, 10 N. W. 276, 42 Am. Rep. 39.
Kansas.— Butler *v.* Butler, 21 Kan. 521, 30 Am. Rep. 441.
Kentucky.— Fennessey *v.* Fennessey, 84 Ky. 519, 2 S. W. 158, 8 Ky. L. Rep. 477, 4 Am. St. Rep. 210; Leach *v.* Duvall, 8 Bush 201; Petty *v.* Petty, 4 B. Mon. 215, 39 Am. Dec. 501.
Michigan.— Brown *v.* Bronson, 35 Mich. 415; Cranson *v.* Cranson, 4 Mich. 230, 66 Am. Dec. 534.
Missouri.— Rice *v.* Waddill, 168 Mo. 99, 67 S. W. 605; Hach *v.* Rollins, 158 Mo. 182, 59 S. W. 232.
New Jersey.— Smith *v.* Smith, 6 N. J. Eq. 515.
New York.— Youngs *v.* Carter, 10 Hun 194; Pomeroy *v.* Pomeroy, 54 How. Pr. 228; Babcock *v.* Babcock, 53 How. Pr. 97; Baker *v.* Chase, 6 Hill 482; Swaine *v.* Perine, 5 Johns. Ch. 482, 9 Am. Dec. 318.
North Carolina.— Littleton *v.* Littleton, 18 N. C. 327.
North Dakota.— Arnegaard *v.* Arnegaard, 7 N. D. 475, 75 N. W. 797, 41 L. R. A. 258.
Ohio.— Ward *v.* Ward, 63 Ohio St. 125, 57 N. E. 1095, 81 Am. St. Rep. 621, 51 L. R. A. 858.
South Carolina.— Brooks *v.* McMeekin, 37 S. C. 285, 15 S. E. 1019.
Vermont.— Thayer *v.* Thayer, 14 Vt. 107, 39 Am. Dec. 211.
Virginia.— Gregory *v.* Winston, 23 Gratt. 102.
Wisconsin.— Jones *v.* Jones, 71 Wis. 513, 38 N. W. 88; Jones *v.* Jones, 64 Wis. 301, 25 N. W. 218.

marriage have been sustained, where the intention is to reasonably provide for the children, and not to defraud the wife, but it is otherwise where there is concealment or fraud as against the wife.[45]

(IV) *Conveyance Fraudulent as to Creditors.* A conveyance of lands by a husband before marriage in fraud of his creditors effectually bars his widow's dower therein, for the conveyance is binding on him, and she can claim only through his title.[46] This has been held, although such conveyance was subsequently set aside by the husband's creditors.[47]

b. After Marriage — (I) *In General.* At common law the wife's inchoate dower right attaches on the marriage and seizin of the husband during coverture,[48] and after it has thus attached the general rule is that no act of the husband alone in the nature of an alienation, conveyance, or other charge will defeat it.[49]

(II) *Statutory Modification of Rule.* In many jurisdictions the common-law rule has been modified by statutory provision that the widow's dower attaches only to the lands of which the husband died seized, and in effect providing that the husband's alienation of his lands during coverture deprives the wife of her dower.[50] Under such a statute a wife is not entitled to dower in land con-

45. *Illinois.*— Daniher *v.* Daniher, 201 Ill. 489, 66 N. E. 239; Clark *v.* Clark, 183 Ill. 448, 56 N. E. 82, 75 Am. St. Rep. 115; Chesnut *v.* Chesnut, 15 Ill. App. 442.

Kentucky.—Fennessey *v.* Fennessey, 84 Ky. 519, 2 S. W. 158, 8 Ky. L. Rep. 477, 4 Am. St. Rep. 210.

New York.—Oakley *v.* Oakley, 69 Hun 121, 23 N. Y. Suppl. 267.

North Carolina.— Tate *v.* Tate, 21 N. C. 22.

Rhode Island.— Champlin *v.* Champlin, 16 R. I. 314, 15 Atl. 85.

But concealment of the fact that such a conveyance has been made until after the marriage has been held sufficient to impute the purpose to deceive and defraud the prospective wife, although no actual fraud was intended. Arnegaard *v.* Arnegaard, 7 N. D. 475, 75 N. W. 797, 41 L. R. A. 258; Ward *v.* Ward, 63 Ohio St. 125, 57 N. E. 1095, 81 Am. St. Rep. 621, 51 L. R. A. 858.

46. King *v.* King, 61 Ala. 479; Whitehed *v.* Mallory, 4 Cush. (Mass.) 138; Adkins *v.* Adkins, (Tenn. Ch. App. 1899) 52 S. W. 728.

47. Gross *v.* Lange, 70 Mo. 45.

Restoration of dower right by setting aside fraudulent conveyance see *infra*, VIII, E, 2.

48. See *supra*, VIII, A, 3.

49. *Connecticut.*— Stewart *v.* Stewart, 5 Conn. 317.

Florida.— Godwin *v.* King, 31 Fla. 525, 13 So. 108.

Georgia.— Royston *v.* Royston, 21 Ga. 161.

Illinois.—Sutherland *v.* Sutherland, 69 Ill. 481; Steele *v.* Gellatly, 41 Ill. 39.

Indiana.—Grissom *v.* Moore, 106 Ind. 296, 6 N. E. 629, 55 Am. Rep. 742; May *v.* Fletcher, 40 Ind. 575; Sims *v.* Rickets, 35 Ind. 181, 9 Am. Rep. 679; Rank *v.* Hanna, 6 Ind. 20.

Michigan.— Wallace *v.* Harris, 32 Mich. 380.

Missouri.—Grady *v.* McCorkle, 57 Mo. 172, 17 Am. Dec. 676; Thomas *v.* Hesse, 34 Mo. 13, 84 Am. Dec. 66.

New York.— House *v.* Jackson, 50 N. Y. 161; Smith *v.* Smith, 6 Lans. 313.

Ohio.— Fast *v.* Umbaugh, 22 Ohio Cir. Ct. 409, 12 Ohio Cir. Dec. 434; Kampmann *v.* Schaaf, 8 Ohio Dec. (Reprint) 351, 7 Cinc. L. Bul. 159.

Pennsylvania.— Gannon *v.* Widman, 3 Pa. Dist. 835. See Thompson *v.* Morrow, 5 Serg. & R. (Pa.) 288, 9 Am. Dec. 358.

South Carolina.— Avant *v.* Robertson, 2 McMull. 215.

Tennessee.— Williams *v.* Dawson, 3 Sneed 316.

See 17 Cent. Dig. tit. "Dower," § 130 *et seq.*

Alienation on day of marriage.— A deed executed by a husband on the day of his marriage aliening his lands does not deprive the wife of dower therein. Stewart *v.* Stewart, 3 J. J. Marsh. (Ky.) 48.

Conveyance as against non-resident wife see *supra*, IV, C.

Estoppel of wife see *supra*, VIII, D, 9, b, c.

50. *Connecticut.*— Stewart *v.* Stewart, 5 Conn. 317.

Georgia.— Flowers *v.* Flowers, 89 Ga. 632, 15 S. E. 834, 18 L. R. A. 75.

Mississippi.— To defeat dower the conveyance must be made in good faith and for a valuable consideration. Sykes *v.* Sykes, 49 Miss. 190. And see Gibbons *v.* Brittenum, 56 Miss. 232; Hinds *v.* Pugh, 48 Miss. 268; Jiggitts *v.* Jiggitts, 40 Miss. 725.

North Carolina.—Sutton *v.* Askew, 66 N. C. 172, 8 Am. Rep. 500; Norwood *v.* Marrow, 20 N. C. 442.

Tennessee.— Hopkins *v.* Bryant, 85 Tenn. 520, 3 S. W. 827; Bond *v.* Bond, 16 Lea 306. And see Lunsford *v.* Jarrett, 11 Lea 192; Rose *v.* Rose, 6 Heisk. 533.

Vermont.— Ladd *v.* Ladd, 14 Vt. 185. See also Jenny *v.* Jenny, 24 Vt. 324; Gorham *v.* Daniels, 23 Vt. 600; Thayer *v.* Thayer, 14 Vt. 107, 39 Am. Dec. 211.

England.— Lacey *v.* Hill, L. R. 19 Eq. 346; Rowland *v.* Cuthbertson, L. R. 8 Eq. 466.

See 17 Cent. Dig. tit. "Dower," § 130.

veyed by the husband with intent to defraud his creditors, although the conveyance is set aside after his death at the suit of creditors.[51] In Kentucky the husband is authorized to convey his lands after marriage, free from dower, to satisfy a lien created by a deed in which she joined, or to satisfy a lien for purchase-money.[52]

(III) *Conveyances of a Special Character.* In those jurisdictions in which dower does not attach to lands held in joint tenancy, the conveyance by a joint tenant of his interest in such lands deprives his wife of her dower;[53] but where dower attaches to such lands there cannot be a valid conveyance by one joint tenant alone to preclude his wife's dower.[54] Where an equal and fair division is made of the lands held in common among the tenants, the right of dower of the wife of either of them will only attach to the part assigned to her husband.[55] A conveyance of partnership lands required for the payment of partnership debts and for the purpose of winding up the affairs of the partnership deprives the wives of the partners of their dower interests in such lands.[56] And a reconveyance of lands to satisfy an encumbrance created by a prior conveyance,[57] or a lien for the purchase-money,[58] terminates the wife's inchoate right of dower, although she did not join therein.

(IV) *Conveyances to Children or Heirs.* Conveyances to children or heirs made by a husband after marriage are subject to the same rules as conveyances to strangers, and unless otherwise provided by statute do not affect the dower right of the wife.[59]

(V) *Conveyances With Intent to Bar Dower.* It has been held in jurisdictions in which the widow's dower depends upon the seizin or possession of the husband at the time of his death, that any conveyance made in fraud of the wife's dower is void as to her.[60]

What law governs the right to dower see *supra*, IV, D.

Void and voidable deeds.— Norwood *v.* Marrow, 20 N. C. 442.

Unrecorded deed.— Blood *v.* Blood, 23 Pick. (Mass.) 80; Norwood *v.* Marrow, 20 N. C. 442; Chester *v.* Greer, 5 Humphr. (Tenn.) 25; and *supra*, V, C, 5.

Conveyance as against non-resident wife see *supra*, IV, C.

51. Hopkins *v.* Bryant, 85 Tenn. 520, 3 S. W. 827.

52. Under this statute a mortgage is held to be a deed, so that a wife is not entitled to dower in land sold to satisfy a lien created by a mortgage in which she joined. Schweitzer *v.* Wagner, 94 Ky. 458, 15 Ky. L. Rep. 229, 22 S. W. 883. Nor is she entitled to dower in lands sold to pay the purchase-price, although more was sold than was necessary (Johnson *v.* Cantrill, 92 Ky. 59, 13 Ky. L. Rep. 497, 17 S. W. 206; Melone *v.* Armstrong, 79 Ky. 248); and this is true whether the sale is made directly by the husband or under a judgment (Ratcliffe *v.* Mason, 92 Ky. 190, 17 S. W. 438, 13 Ky. L. Rep. 551). See also Lee *v.* James, 81 Ky. 443.

53. Cockrill *v.* Armstrong, 31 Ark. 580; Mayburry *v.* Brien, 15 Pet. (U. S.) 21, 10 L. ed. 646. See *supra*, VI, B, 1, d.

54. Rank *v.* Hanna, 6 Ind. 20; Blossom *v.* Blossom, 9 Allen (Mass.) 254; Lloyd *v.* Conover, 25 N. J. L. 47.

55. Mosher *v.* Mosher, 32 Me. 412; Potter *v.* Wheeler, 13 Mass. 504; Huntington *v.* Huntington, 9 N. Y. Civ. Proc. 182; Dolf *v.* Basset, 15 Johns. (N. Y.) 21; Wilkinson *v.* Parish, 3 Paige (N. Y.) 653; Totten *v.* Stuyvesant, 3 Edw. (N. Y.) 500; Gaffney *v.* Jefferies, 59 S. C. 565, 38 S. E. 216, 82 Am. St. Rep. 860, 53 L. R. A. 918.

56. Willet *v.* Brown, 65 Mo. 138, 27 Am. Rep. 265; Duhring *v.* Duhring, 20 Mo. 174.

Dower in partnership lands see *supra*, VI, B, 1, f.

Unless the conveyance is required for winding up the affairs of the partnership dower is not barred. Young *v.* Thrasher, 115 Mo. 222, 21 S. W. 1104.

57. Greene *v.* Reynolds, 72 Hun (N. Y.) 565, 25 N. Y. Suppl. 625.

58. Hugunin *v.* Cochrane, 51 Ill. 302, 2 Am. Rep. 303. *Compare* Jefferies *v.* Fort, 43 S. C. 48, 20 S. E. 755.

59. Stookey *v.* Stookey, 89 Ill. 40; Graves *v.* Fligor, 140 Ind. 25, 38 N. E. 853; Slack *v.* Thacker, 84 Ind. 418; Shea's Appeal, 121 Pa. St. 302, 15 Atl. 629, 1 L. R. A. 422.

60. Jiggitts *v.* Jiggitts, 40 Miss. 718; Tucker *v.* Tucker, 32 Mo. 464; Martin *v.* Martin, 1 Heisk. (Tenn.) 644; Reynolds *v.* Vance, 1 Heisk. (Tenn.) 344 (holding that an intentional failure to record a conveyance until after the husband's death, the husband meanwhile remaining in possession, is evidence of fraud sufficient to render the conveyance void as to the wife); Rowland *v.* Rowland, 2 Sneed (Tenn.) 543; Brewer *v.* Connell, 11 Humphr. (Tenn.) 500 (holding a deed void as to the wife, although for a valuable consideration, where the grantee knew of the intention to deprive the wife of her dower); McIntosh *v.* Ladd, 1 Humphr.

(vi) *Assignment For Benefit of Creditors.* An assignment by a husband for the benefit of his creditors does not at common law impair the wife's right of dower.[61] Nor is her dower barred by a subsequent sale by the assignee of the lands assigned.[62]

16. Judicial Sale or Decree — a. In General. The inchoate right of dower attaches at common law to all lands acquired by the husband during coverture and cannot be divested either by the voluntary act of the husband,[63] or by a decree or judgment rendered in a proceeding instituted by creditors for the payment of the husband's debts, or a sale thereunder, unless there is a statutory provision to the contrary.[64] This rule does not apply, however, under statutes

(Tenn.) 459 (sustaining a voluntary conveyance to children as against the wife's right of dower, where there was no proof of a specific intent to defeat her dower); Jenny *v.* Jenny, 24 Vt. 324. See Bear *v.* Stahl, 61 Mich. 203, 28 N. W. 69.

Presumption of intent.— McGee *v.* McGee, 26 N. C. 105.

61. *Arkansas.*— Crittenden *v.* Johnson, 11 Ark. 94.

Connecticut.— St. John *v.* Dann, 66 Conn. 401, 34 Atl. 110.

Illinois.— Lombard *v.* Kinzie, 73 Ill. 446.

Indiana.— Chase *v.* Van Meter, 140 Ind. 321, 39 N. E. 455; Mattill *v.* Baas, 89 Ind. 220.

Kentucky.— Lane *v.* Judy, 5 Ky. L. Rep. 513.

Ohio.— Dwyer *v.* Garlough, 31 Ohio St. 158; Baldwin *v.* Jacks, 3 Ohio Dec. (Reprint) 545.

Pennsylvania.— Lazear *v.* Porter, 87 Pa. St. 513, 30 Am. Rep. 380; Helfrich *v.* Obermyer, 15 Pa. St. 113; Eberle *v.* Fisher, 13 Pa. St. 526; Keller *v.* Michael, 2 Yeates 300; Gannon *v.* Widman, 3 Pa. Dist. 835, 15 Pa. Co. Ct. 474; Blackman's Estate, 6 Phila. 160.

United States.—Porter *v.* Lazear, 109 U. S. 84, 3 S. Ct. 58, 27 L. ed. 865; *In re* Schaeffer, 104 Fed. 973; *In re* Forbes, 7 Am. Bankr. Rep. 42.

See 17 Cent. Dig. tit. "Dower," § 144.

In an assignment for creditors the assignor passes to the assignee only such estate or property as he himself could sell or dispose of, and in case of real estate only such interest in it as he if married could convey without his wife joining in the deed. Mills *v.* Ritter, 197 Pa. St. 353, 47 Atl. 194.

Where dower only attaches to lands of which the husband dies seized, under a statute providing therefor, an assignment for the benefit of creditors would bar the wife's dower as against the assignee and those claiming under him. Baird *v.* Winstead, 123 N. C. 181, 31 S. E. 390; Perkins *v.* McDonald, 10 Lea (Tenn.) 732; Bostick *v.* Jordan, 7 Heisk. (Tenn.) 370; Hill *v.* Bowers, 4 Heisk. (Tenn.) 272. But a widow of the grantor in a trust deed is entitled to dower in the land therein conveyed for the benefit of his creditors, where he dies before any sale under the deed. Perkins *v.* McDonald, 3 Baxt. (Tenn.) 343; Macaulay *v.* Dismal Swamp Land Co., 2 Rob. (Va.) 507.

In Minnesota see Merrill *v.* Security Trust Co., 71 Minn. 61, 63, 73 N. W. 640, 70 Am. St. Rep. 312.

62. *Arkansas.*—Crittenden *v.* Woodruff, 11 Ark. 82.

Illinois.— Lombard *v.* Kinzie, 73 Ill. 446.

Indiana.— Ragsdale *v.* Mitchell, 97 Ind. 458.

Pennsylvania.—Mills *v.* Ritter, 197 Pa. St. 353, 47 Atl. 194; Kelso's Appeal, 102 Pa. St. 7; Lazear *v.* Porter, 87 Pa. St. 513, 30 Am. Rep. 380; Worcester *v.* Clark, 2 Grant 84.

South Carolina.— Speake *v.* Kinard, 4 S. C. 54.

See 17 Cent. Dig. tit. "Dower," § 144.

Sale by assignee in bankruptcy see Bankruptcy, 5 Cyc. 384.

63. See *supra*, VIII, D, 15, b, (I).

64. *Alabama.*— Nance *v.* Hooper, 11 Ala. 552.

Illinois.— Sutherland *v.* Sutherland, 69 Ill. 481.

Maryland.— Mitchell *v.* Farrish, 69 Md. 235, 14 Atl. 712.

New York.— Lowry *v.* Smith, 9 Hun 514; Hyatt *v.* Dusenbury, 12 N. Y. Civ. Proc. 152.

Ohio.— Jewett *v.* Feldheiser, 68 Ohio St. 523, 67 N. E. 1072.

Oregon.— House *v.* Fowle, 22 Oreg. 303, 29 Pac. 890.

South Carolina.— Horde *v.* Landrum, 5 S. C. 213.

See 17 Cent. Dig. tit. "Dower," § 145 *et seq.*

Contra under a statute giving dower in lands not sold under execution or other judicial sale, although the statute is enacted after the sale, if before the husband's death. Sturdevant *v.* Norris, 30 Iowa 65. See *supra*, IV, D, 1.

Right of dower absolute on judicial sale see *supra*, VIII, C, 1.

Estoppel of wife by conduct at sale see *supra*, VIII, D, 9, b, c.

Sale and conveyance by administrator see Carey *v.* West, 139 Mo. 146, 40 S. W. 661.

A sale by an assignee in bankruptcy does not generally bar dower (see Bankruptcy, 5 Cyc. 384), but it is otherwise under a statute rendering a judicial sale a bar (Taylor *v.* Highberger, 65 Iowa 134, 21 N. W. 487; Stidger *v.* Evans, 64 Iowa 91, 19 N. W. 850).

Sale in action for admeasurement of dower — Dower of wife of heir.— See Jourdan *v.* Haran, 56 N. Y. Super. Ct. 185, 3 N. Y. Suppl. 541.

giving the wife dower of those lands only of which the husband dies seized and possessed.[65] And a sale under a judgment or decree to satisfy a lien which existed upon land at the time of the owner's marriage, or at the time he acquired the land, will defeat his wife's right to dower,[66] except out of the surplus proceeds after satisfaction of the debt.[67] Where by statute, as in some jurisdictions, there is no right of dower in land held by the husband by executory contract or other equitable title unless he had such title at the time of his death,[68] a judicial sale during marriage of land so held bars dower.[69] Where land is sold under a decree of court for purchase-money, the purchaser takes it discharged of the widow's right of dower.[70]

b. Under Mortgage Foreclosure Proceedings — (I) *In General.* Except as already noted mortgages executed by the husband alone on his lands during coverture cannot impair the wife's right of dower,[71] and it necessarily follows that where, under the rules as already stated, the wife's right of dower is paramount to the mortgage, a decree in foreclosure directing a sale of the mortgaged premises and an application of the proceeds to the payment of the mortgage debt will not divest the wife of her interest.[72] It is otherwise where the mortgage existed at the time of the marriage, or where by statute it is paramount to the wife's dower right.[73] If the wife joins with her husband in the mortgage, how-

65. Tisdale *v.* Risk, 7 Bush (Ky.) 139; Davidson *v.* Frew, 14 N. C. 3, 22 Am. Dec. 708; Rose *v.* Rose, 6 Heisk. (Tenn.) 533 [*overruling* Harrell *v.* Harrell, 4 Coldw. (Tenn.) 377]. See also Hopkins *v.* Bryant, 85 Tenn. 520, 3 S. W. 827; Lundford *v.* Jurrett, 11 Lea (Tenn.) 192. See *supra*, VIII, D, 15, b, (II).

66. *Alabama.*—Cheek *v.* Waldrum, 25 Ala. 152, sale under mortgage defeats dower right of widow of grantee of mortgagor.

Indiana.— Armstrong *v.* McLaughlin, 49 Ind. 370; Kintner *v.* McRae, 2 Ind. 453 (vendor's lien); Robbins *v.* Robbins, 8 Blackf. 174; McMahan *v.* Kimball, 3 Blackf. 1 (decree existing at time of marriage).

Maine.—Brown *v.* Williams, 31 Me. 403.

Missouri.— Gross *v.* Lange, 70 Mo. 45.

South Carolina.— Shiell *v.* Sloan, 22 S. C. 151.

But see under a special statute Holden *v.* Boggess, 20 W. Va. 62.

See 17 Cent. Dig. tit. "Dower," § 145 *et seq.*; and *supra*, VII; *infra*, VIII, D, 16, b, c.

67. See *supra*, VI, A, 8.

68. See *supra*, VI, B, 5, c.

69. Tisdale *v.* Risk, 7 Bush (Ky.) 139. See also Hall *v.* Campbell, 5 Ky. L. Rep. 246.

70. Williams *v.* Woods, 1 Humphr. (Tenn.) 408; Wilson *v.* Davisson, 2 Rob. (Va.) 384. See also *supra*, VII, B. But see under a special statute Holden *v.* Boggess, 20 W. Va. 62.

71. See *supra*, VII, C.

72. *Arkansas.*— McWhirter *v.* Roberts, 40 Ark. 283.

Illinois.— Dillman *v.* Will County Nat. Bank, 138 Ill. 282, 27 N. E. 1090.

Iowa.— Moomey *v.* Maas, 22 Iowa 380, 92 Am. Dec. 395.

Maryland.— Mitchell *v.* Farrish, 69 Md. 235, 14 Atl. 712, mortgage on interest of tenant in common.

Massachusetts.— Walsh *v.* Wilson, 130 Mass. 124.

Michigan.— Clapp *v.* Galloway, 56 Mich. 272, 22 N. W. 869.

New York.— Merchants' Bank *v.* Thomson, 55 N. Y. 7; Lewis *v.* Smith, 9 N. Y. 502, 61 Am. Dec. 706; Munroe *v.* Crouse, 59 Hun 248, 12 N. Y. Suppl. 815; People *v.* Knickerbocker L. Ins. Co., 66 How. Pr. 115. And see Denton *v.* Nanny, 8 Barb. 618.

Ohio.— Parmenter *v.* Binkley, 28 Ohio St. 32.

Tennessee.— Gregg *v.* Jones, 5 Heisk. 443 (holding that, under the Tennessee statute basing the dower right upon the seizin of the husband at his death, the widow is entitled to dower in lands conveyed by a deed in trust which had not been foreclosed during the lifetime of the husband); Tarpley *v.* Gannaway, 2 Coldw. 246.

See 17 Cent. Dig. tit. "Dower," §§ 147, 148; and *supra*, VII, C.

Dower abolished after mortgage.— Hoskins *v.* Hutchins, 37 Ind. 324. See also *supra*, IV, D, 1.

73. See Kemerer *v.* Bournes, 53 Iowa 172, 4 N. W. 921; Sturdevant *v.* Norris, 30 Iowa 65 (where statute rendering judicial sale a bar to dower was enacted after foreclosure), Jacquess *v.* Hamilton County, 1 Disn. 121, 12 Ohio Dec. (Reprint) 524; McClurg *v.* Schwartz, 87 Pa. St. 521; Scott *v.* Crosdale, 2 Dall. (Pa.) 127, 1 L. ed. 317, 1 Yeates 75; Shiell *v.* Sloan, 22 S. C. 151.

Wife not joining in mortgage — Effect of subsequent joining in deed to third person.— Boorum *v.* Tucker, 51 N. J. Eq. 135, 26 Atl. 456; Carter *v.* Walker, 2 Ohio St. 339.

In Tennessee, in order to exclude the widow's right of dower in mortgaged lands under the Code (1896), § 4140, giving dower in mortgaged land where the husband dies before foreclosure of the mortgage, it is not necessary that her husband's title shall have been divested and vested formally by a decree of court. A joint sale by him and the trustee is sufficient. Pillow *v.* Thomas, 1 Baxt. 120.

ever, she is bound by its terms and her dower interest may be divested by a foreclosure sale.[74]

(II) *PURCHASE-MONEY MORTGAGE.* A purchase-money mortgage executed by the husband alone is generally held to be a superior encumbrance to the wife's right of dower,[75] so that a decree of sale in proceedings for the foreclosure of such a mortgage and a sale thereunder bar the right of dower of the mortgagor.[76]

(III) *WIFE AS A PARTY.* Where a wife did not join in a mortgage she cannot be divested of her right of dower by being made a party to the proceedings to foreclose the mortgage unless her right is put in issue.[77] In some jurisdictions it is held that the right of dower of a widow is not assertable in a suit for foreclosure of a mortgage,[78] and that, although a party to such a suit, she is not estopped by the decree from establishing her right of dower in an action at law.[79] A wife's inchoate right of dower in premises conveyed to her husband will not be barred by a decree in a suit to foreclose a mortgage in existence at the time of the conveyance unless she is made a party thereto.[80]

Where a mortgagor conveys the mortgaged lands by an absolute conveyance, the estate of the purchaser is liable to be divested by a sale under the mortgage, and if the lands are subsequently sold under the mortgage his widow is not entitled to dower in them. Cheek *v.* Waldrum, 25 Ala. 152.

74. *Florida.*—Roan *v.* Holmes, 32 Fla. 295, 13 So. 339, 21 L. R. A. 180.

Illinois.— Virgin *v.* Virgin, 189 Ill. 144, 59 N. E. 586; Shope *v.* Schaffner, 140 Ill. 470, 30 N. E. 872.

Kentucky.— Schweitzer *v.* Wagner, 94 Ky. 458, 22 S. W. 883, 15 Ky. L. Rep. 229.

Maryland.— Mantz *v.* Buchanan, 1 Md. Ch. 202.

Missouri.— Riddick *v.* Walsh, 15 Mo. 519.

Ohio.— Baldwin *v.* Jacks, 3 Ohio Dec. (Reprint) 545.

South Carolina.— Miller *v.* Farmers' Bank, 49 S. C. 427, 27 N. E. 514, 61 Am. St. Rep. 821; Genobles *v.* West, 23 S. C. 154.

But see under a special statute Holden *v.* Boggess, 20 W. Va. 62.

See 17 Cent. Dig. tit. "Dower," §§ 147, 148; and *infra*, VIII, D, 17, a.

No title at time of mortgage.— Where a wife joined in a mortgage by her husband without warranty when he had no title to the land, and he afterward acquired the title, and the mortgage was subsequently foreclosed, it was held that the sale did not defeat the wife's rights in the land. Curran *v.* Driver, 33 Ind. 480.

75. See *supra*, V, C, 8, b.

76. *Indiana.*— Baker *v.* McCune, 82 Ind. 585.

Kentucky.— Ratcliffe *v.* Mason, 92 Ky. 190, 17 S. W. 438, 13 Ky. L. Rep. 551 [*modifying* (1890) 14 S. W. 960].

New York.— Brackett *v.* Baum, 50 N. Y. 8, holding the wife barred of dower in lands by a statutory foreclosure and sale under a power of sale contained in a purchase-money mortgage.

Ohio.— Folsom *v.* Rhodes, 22 Ohio St. 435.

South Carolina.— Seibert *v.* Todd, 31 S. C. 206, 9 S. E. 822, 4 L. R. A. 606.

Tennessee.—Williams *v.* Woods, 1 Humphr. 408.

See 17 Cent. Dig. tit. "Dower," §§ 145, 147, 148.

77. *Arkansas.*— McWhirter *v.* Roberts, 40 Ark. 283.

Iowa.— Sherod *v.* Ewell, 104 Iowa 253, 73 N. W. 493; Moomey *v.* Maas, 22 Iowa 380, 92 Am. Dec. 395.

Nebraska.— Miller *v.* Boehme, 17 Nebr. 377, 22 N. W. 797.

New Jersey.— Wade *v.* Miller, 32 N. J. L. 296.

New York.— Merchants' Bank *v.* Thomson, 55 N. Y. 7; Lewis *v.* Smith, 9 N. Y. 502, 61 Am. Dec. 706; Matthews *v.* Duryee, 45 Barb. 69.

South Carolina.— Davis *v.* Townsend, 32 S. C. 112, 10 S. E. 837.

See 17 Cent. Dig. tit. "Dower," § 148.

78. Wade *v.* Miller, 32 N. J. L. 296; Merchants' Bank *v.* Thomson, 55 N. Y. 7.

A widow claiming dower by title paramount to the mortgage cannot be brought into court in such an action to contest the validity of her dower. Payn *v.* Grant, 23 Hun (N. Y.) 134; Lee *v.* Parker, 43 Barb. (N. Y.) 611.

79. Wade *v.* Miller, 32 N. J. L. 296. *Contra*, Miller *v.* Boehme, 17 Nebr. 377, 22 N. W. 797.

80. Kursheedt *v.* Union Dime Sav. Inst., 118 N. Y. 358, 23 N. E. 473, 7 L. R. A. 229; Ross *v.* Boardman, 22 Hun (N. Y.) 527; Raynor *v.* Raynor, 21 Hun (N. Y.) 36; Northrup *v.* Wheeler, 43 How. Pr. (N. Y.) 122. And see Denton *v.* Nanny, 8 Barb. (N. Y.) 618.

The wife's equity of redemption is not barred by a foreclosure during the lifetime of the husband, by suit in chancery to which the wife is not a party. McArthur *v.* Franklin, 15 Ohio St. 485.

Interest of wife in purchase-money mortgage.— Where upon the sale of land a mortgage is given for the purchase-money, the wife of the mortgagor may in case she survive her husband come in and redeem the mortgage, and this interest cannot be barred by a suit for foreclosure, or a sale on such suit, unless she was a party to it. Mills *v.* Van Voorhis, 23 Barb. (N. Y.) 125 [*affirmed* in 20 N. Y. 412]. After her hus-

c. Sale Under Execution — (1) *In General.* Where the lien of the execution under which the lands of a husband were levied upon and sold antedated the marriage, the wife's dower right is thereby divested;[81] but if the wife's dower had attached at the time the lien arose, her right to dower is not impaired thereby,[82] and the purchaser at the execution sale acquires no greater or better title, so far as such right is concerned, than could have been vested in him by the

band's death she may enforce her rights regardless of the judgment to which she was not a party. White *v.* Coulter, 1 Hun (N. Y.) 357.

81. *Indiana.*— Eiceman *v.* Finch, 79 Ind. 511; Armstrong *v.* McLaughlin, 49 Ind. 370 (holding that the interest of the widow does not attach to lands sold to satisfy a judgment obtained against the husband prior to the marriage, although the original judgment was revived by the administrator of the deceased judgment creditor after the marriage, and the real estate was sold after such judgment was revived); Robbins *v.* Robbins, 8 Blackf. 174; McMahan *v.* Kimball, 3 Blackf. 1.

Maine.— Brown *v.* Williams, 31 Me. 403.

Maryland.— Queen Anne's County *v.* Pratt, 10 Md. 5.

Missouri.— Gross *v.* Lange, 70 Mo. 45.

New York.— Sandford *v.* McLean, 3 Paige 117, 23 Am. Dec. 773.

North Carolina.— Davidson *v.* Frew, 14 N. C. 3, 22 Am. Dec. 708.

Pennsylvania.— Elliott *v.* Pearsall, 4 Pa. L. J. Rep. 157, 7 Pa. L. J. 192.

See 17 Cent. Dig. tit. "Dower," § 149; and *supra*, VII.

Judgment entered on day of marriage.— Ingram *v.* Morris, 4 Harr. (Del.) 111.

82. *Alabama.*— Callahan *v.* Nelson, 128 Ala. 671, 29 So. 555; Wood *v.* Morgan, 56 Ala. 397; Nance *v.* Hooper, 11 Ala. 552, holding that a sale of the husband's interest in lands under a fieri facias does not affect the widow's right of dower in the same lands.

Delaware.—Ingram *v.* Morris, 4 Harr. 111; Griffin *v.* Reece, 1 Harr. 508.

Florida.— Roan *v.* Holmes, 32 Fla. 295, 13 So. 339, 21 L. R. A. 180.

Illinois.— Summers *v.* Babb, 13 Ill. 483; Blain *v.* Harrison, 11 Ill. 384. See also Sisk *v.* Smith, 6 Ill. 503.

Indiana.— Nutter *v.* Fouch, 86 Ind. 451; Hendrix *v.* Sampson, 70 Ind. 350.

Iowa.— Sherod *v.* Ewell, 104 Iowa 253, 73 N. W. 493; Pense *v.* Hixon, 8 Iowa 402.

Kentucky.— Robinson *v.* Robinson, 11 Bush 174; Kincaid *v.* Wilson, 49 S. W. 333, 20 Ky. L. Rep. 1364; Vinson *v.* Gentry, 21 S. W. 578, 14 Ky. L. Rep. 804, in which case the judgment was secured by the state against a surety on a sheriff's bond, and it was held that a sale of the surety's land under an execution did not deprive the wife of her right to dower therein.

Maine.— O'Brien *v.* Elliot, 15 Me. 125, 32 Am. Dec. 137.

Massachusetts.— McMahon *v.* Gray, 150 Mass. 289, 22 N. E. 923, 15 Am. St. Rep. 202, 5 L. R. A. 748; Ayer *v.* Spring, 10 Mass. 80.

Minnesota.— Dayton *v.* Corser, 51 Minn. 406, 53 N. W. 717, 18 L. R. A. 80.

Mississippi.— Gould *v.* Luckett, 47 Miss. 96; Fleeson *v.* Nicholson, Walk. 247.

Missouri.— Roberts *v.* Nelson, 86 Mo. 21; McClanahan *v.* Porter, 10 Mo. 746. And see Davis *v.* Green, 102 Mo. 170, 14 S. W. 876, 11 L. R. A. 90.

Montana.— Lynde *v.* Wakefield, 19 Mont. 23, 47 Pac. 5.

Nebraska.— Motley *v.* Motley, 53 Nebr. 375, 73 N. W. 738, 68 Am. St. Rep. 608; Butler *v.* Fitzgerald, 43 Nebr. 192, 61 N. W. 640, 47 Am. St. Rep. 741, 27 L. R. A. 252.

New Hampshire.— Drew *v.* Munsey, Smith 317.

New Jersey.— Lloyd *v.* Conover, 25 N. J. L. 47; Harrison *v.* Eldridge, 7 N. J. L. 392.

New York.— House *v.* Jackson, 50 N. Y. 161; Moore *v.* New York, 8 N. Y. 110, 59 Am. Dec. 473.

Ohio.— Jewett *v.* Feldheiser, 68 Ohio St. 523, 67 N. E. 1072; Dingman *v.* Dingman, 39 Ohio St. 172; Kitzmiller *v.* Van Rensselaer, 10 Ohio St. 63; Taylor *v.* Fowler, 18 Ohio 567, 51 Am. Dec. 469; Fast *v.* Umbaugh, 22 Ohio Cir. Ct. 409, 12 Ohio Cir. Dec. 434; Smith *v.* Rothschild, 4 Ohio Cir. Ct. 544, 2 Ohio Cir. Dec. 698.

Oregon.— House *v.* Fowle, 22 Oreg. 303, 29 Pac. 890.

South Carolina.— Horde *v.* Landrum, 5 S. C. 213.

Canada.— Walker *v.* Powers, (Mich. T.) 4 Vict.

See 17 Cent. Dig. tit. "Dower," §§ 145, 149.

Contra where the common-law rule has been modified by limiting the widow's dower to the lands of which her husband died seized. Davidson *v.* Frew, 14 N. C. 3, 22 Am. Dec. 708; Rose *v.* Rose, 6 Heisk. (Tenn.) 533 [*overruling* Harrell *v.* Harrell, 4 Coldw. (Tenn.) 377]. But the widow is dowable of lands of her husband which are levied on before his death but not sold. Rutherford *v.* Read, 6 Humphr. (Tenn.) 423. And see Frost *v.* Etheridge, 12 N. C. 30. *Compare* Hodges *v.* McCabe, 10 N. C. 78. If the judgment creditor delay his levy until after the husband's death then the widow's right of dower vests and the lien of the judgment is postponed until her dower is assigned. Simmons *v.* Latimer, 37 Ga. 490.

Contra in Pennsylvania where the right of dower does not attach to the husband's estate for the purpose of enjoyment until all his debts are paid. Mitchell *v.* Mitchell, 8 Pa. St. 126. See Directors of Poor *v.* Royer, 43 Pa. St. 146; Zeigler's Appeal, 35 Pa. St. 173; Ticknor *v.* Bessigue, 2 C. Pl. 96; Warner *v.* Macknett, 3 Phila. 325. *Compare* Shurtz *v.* Thomas, 8 Pa. St. 359.

voluntary conveyance of the husband at the date of the inception of the lien.[83] But if the lands are sold under an execution for the enforcement of a lien paramount to the wife's right of dower, such sale effectually bars such right.[84]

(11) *Law Governing Right of Dower.* Where lands are sold upon execution during the lifetime of the husband, the law in force at the time of the death of the husband will control the right of dower of the widow as against the purchaser at such sale.[85]

d. Sale or Division in Partition. As has already been noticed the seizin of a husband who acquires title to land as a tenant in common is subject to the paramount right of his cotenants to demand partition;[86] and therefore his wife's right of dower in such land is subject to be defeated by a sale of such land in proceedings instituted by one of the cotenants for a partition, although the wife be not a party. This is the rule laid down by a majority of the cases, and seems based upon the better reasoning and generally accepted as the true doctrine.[87]

e. Tax-Sale. The effect of a sale of lands for unpaid taxes upon the inchoate right of dower of the owner's wife will depend upon the character of the title secured by the purchaser under the statute authorizing the sale. If the purchaser is vested under the statute with an absolute title to the lands, regardless of the condition of title at the time of the sale, the wife's dower is barred in the same manner and to the same extent as are the rights of other parties in interest.[88] But if the statute only authorizes a sale for unpaid taxes of the right, title, and inter-

Sale after husband's death.— A widow is dowable in lands sold after the death of the husband under a fieri facias tested before his death. Frost *v.* Etheridge, 12 N. C. 30. *Compare* Hodges *v.* McCabe, 10 N. C. 78.

83. Roan *v.* Holmes, 32 Fla. 295, 13 So. 339, 21 L. R. A. 180; Davis *v.* Green, 102 Mo. 170, 14 S. W. 876, 11 L. R. A. 90, and other cases cited in the preceding notes.

The rule of caveat emptor applies.— Butler *v.* Fitzgerald, 43 Nebr. 192, 61 N. W. 640, 47 Am. St. Rep. 741, 27 L. R. A. 252; House *v.* Fowle, 22 Oreg. 303, 29 Pac. 890.

84. Schaefer *v.* Purviance, 160 Ind. 63, 66 N. E. 154; Poor *v.* Leavell, 5 Ky. L. Rep. 769; Worsham *v.* Callison, 49 Mo. 206; Carter *v.* Walker, 2 Ohio St. 339.

85. Taylor *v.* Sample, 51 Ind. 423; Cunningham *v.* Wilde, 56 Iowa 369, 9 N. W. 304; Parker *v.* Small, 55 Iowa 732, 8 N. W. 662; Sturdevant *v.* Norris, 30 Iowa 65; Lucas *v.* Sawyer, 17 Iowa 517; Bates *v.* McDowell, 58 Miss. 815; Kennerly *v.* Missouri Ins. Co., 11 Mo. 204. See also Griffin *v.* Reece, 1 Harr. (Del.) 508; Carr *v.* Brady, 64 Ind. 28; Thacher *v.* Devol, 50 Ind. 30; Felton *v.* Elliott, 66 N. C. 195.

See 17 Cent. Dig. tit. "Dower," § 146.

86. See *supra*, VI, B, 1, d.

87. *Alabama.*— Chaney *v.* Chaney, 38 Ala. 35.

Illinois.— Davis *v.* Lang, 153 Ill. 175, 38 N. E. 635.

Indiana.— Haggerty *v.* Wagner, 148 Ind. 625, 48 N. E. 366, 39 L. R. A. 384; Verry *v.* Robinson, 25 Ind. 14, 87 Am. Dec. 346; Wagner *v.* Carskadon, 28 Ind. App. 573, 60 N. E. 731, 61 N. E. 976.

Iowa.— Williams *v.* Westcott, 77 Iowa 332, 42 N. W. 314, 14 Am. St. Rep. 287.

Maryland.— Mitchell *v.* Farrish, 69 Md. 235, 14 Atl. 712; Rowland *v.* Prather, 53 Md. 232; Warren *v.* Twilley, 10 Md. 39.

Missouri.— Hinds *v.* Stevens, 45 Mo. 209; Lee *v.* Lindell, 22 Mo. 202, 64 Am. Dec. 262.

New York.— Syracuse Chilled Plow Co. *v.* Wing, 85 N. Y. 421; Jordan *v.* Van Epps, 19 Hun 526 [*affirmed* in 85 N. Y. 427]; Huntington *v.* Huntington, 9 N. Y. Civ. Proc. 182. And see Jackson *v.* Edwards, 22 Wend. 498, 7 Paige 386.

Ohio.— Weaver *v.* Gregg, 6 Ohio St. 547, 67 Am. Dec. 355.

South Carolina.— Holley *v.* Glover, 36 S. C. 404, 15 S. E. 605, 31 Am. St. Rep. 883, 16 L. R. A. 776.

See 17 Cent. Dig. tit. "Dower," § 151; and *supra*, VIII, D, 4, b.

Contra.— Greiner *v.* Klein, 28 Mich. 12; Schick *v.* Whitcomb, (Nebr. 1903) 94 N. W. 1023; Matthews *v.* Matthews, 1 Edw. (N. Y.) 565. And see Van Gelder *v.* Post, 2 Edw. (N. Y.) 577.

In foreclosure of a mortgage on the undivided interest of a tenant in common, where his cotenant to avoid a sacrifice consented to a decree for the sale of the tract as an entirety, it was held that it was no bar to the dower of the cotenant's widow, not being partition between cotenants, under Md. Code, art. 16, § 99. Mitchell *v.* Farrish, 69 Md. 235, 14 Atl. 712.

88. McWhirter *v.* Roberts, 40 Ark. 283; Robbins *v.* Barron, 32 Mich. 36; Jones *v.* Devore, 8 Ohio St. 430; Tullis *v.* Pierano, 9 Ohio Cir. Ct. 647, 9 Ohio Cir. Dec. 103; Tomlinson *v.* Hill, 5 Grant Ch. (U. C.) 231. *Compare* Clason *v.* Ward, 1 Ohio N. P. 218.

Proceedings in rem.— Jones *v.* Devore, 8 Ohio St. 430.

est of the owner of the lands, his wife's inchoate right of dower will not be impaired.[89]

f. Sale by Guardian. A sale by a husband's guardian by order of court to pay the balance of the unpaid purchase-price and other debts will not bar the wife's dower where she was not a party to the proceeding had to procure the order.[90]

17. Release by Wife[91]— a. In General. The power of a wife to release her inchoate right of dower by her own voluntary act has always been recognized. As may be inferred from references already made it is as a general rule only by her own act in person that this right may be relinquished.[92] But a wife's inchoate right of dower cannot be the subject of grant or assignment,[93] and a grantee or mortgagee, claiming under an instrument in which a married woman has released her dower, acquires no title to or interest in her dower when the estate becomes absolute.[94] A valid release operates only as an extinguishment of the dower right, and the grantee and all those claiming under him take the land freed from the encumbrance of such right.[95]

89. Thompson *v.* McCorkle, 136 Ind. 484, 34 N. E. 813, 36 N. E. 211, 43 Am. St. Rep. 334; Blevins *v.* Smith, 104 Mo. 583, 16 S. W. 213, 13 L. R. A. 441.

90. Davis *v.* Hutton, 127 Ind. 481, 26 N. E. 187, 1006.

The Missouri statute authorizing a husband's guardian to sell his real estate was held not to confer authority on such guardian to dispose of the wife's dower. Williams *v.* Courtney, 77 Mo. 587.

91. **Release of inchoate right of dower as consideration.**— Hale *v.* Plummer, 6 Ind. 121. For contracts and conveyances generally between husband and wife see Husband and Wife. For conveyances as against creditors of husband see Fraudulent Conveyances. For note see Commercial Paper, 7 Cyc. 707, note 83.

92. Eslava *v.* Lepretre, 21 Ala. 504, 56 Am. Dec. 266; Royston *v.* Royston, 21 Ga. 161; Atkin *v.* Merrell, 39 Ill. 62; Nicoll *v.* Ogden, 29 Ill. 323, 81 Am. Dec. 311; *Ex p.* McElwain, 29 Ill. 442 (in which case it was held that a court of equity will not interfere to deprive a woman of her dower on the ground of her insanity); Francisco *v.* Hendricks, 28 Ill. 64; Gove *v.* Cather, 23 Ill. 634, 76 Am. Dec. 711.

93. *Maryland.*— Reiff *v.* Horst, 55 Md. 42.

Massachusetts.—Mason *v.* Mason, 140 Mass. 63, 3 N. E. 19.

Missouri.— Durrett *v.* Piper, 58 Mo. 551.

New York.— Witthaus *v.* Schack, 105 N. Y. 332, 11 N. E. 649 [*reversing* 38 Hun 560]; Hinchliffe *v.* Shea, 103 N. Y. 153, 8 N. E. 477 [*reversing* 34 Hun 365]; Marvin *v.* Smith, 46 N. Y. 571; Moore *v.* New York, 8 N. Y. 110, 59 Am. Dec. 473; Jones *v.* Fleming, 37 Hun 227; Savage *v.* Crill, 19 Hun 4; Clowes *v.* Dickenson, 5 Johns. Ch. 235.

Ohio.— Douglass *v.* McCoy, 5 Ohio 522.

See 17 Cent. Dig. tit. "Dower," §§ 154, 155.

94. Marvin *v.* Smith, 46 N. Y. 571; Douglass *v.* McCoy, 5 Ohio 522; Corr *v.* Porter, 33 Gratt. (Va.) 278.

95. Smallwood *v.* Bilderback, 16 N. J. L. 497; Witthaus *v.* Schack, 105 N. Y. 332, 11 N. E. 649; Elmendorf *v.* Lockwood, 4 Lans. (N. Y.) 393 [*affirmed* in 57 N. Y. 322].

Effect of release.— Adams *v.* Adams, 79 Ill. 517; Chicago Dock Co. *v.* Kinzie, 49 Ill. 289; White *v.* Graves, 107 Mass. 325, 9 Am. Rep. 38; Hinchliffe *v.* Shea, 103 N. Y. 153, 8 N. E. 477; Miller *v.* Farmers' Bank, 49 S. C. 427, 27 S. E. 514, 61 Am. St. Rep. 821.

Execution of mortgage.— A wife's dower is barred as against the mortgagee so far as is necessary for the payment of the mortgage debt, where she joined with her husband in the mortgage. McCabe *v.* Bellows, 7 Gray (Mass.) 148, 66 Am. Dec. 467; St. Clair *v.* Morris, 9 Ohio 15, 34 Am. Dec. 415; Miller *v.* Farmers' Bank, 49 S. C. 427, 27 S. E. 514, 61 Am. St. Rep. 821. Such mortgage releases the wife's inchoate right of dower in the property, whether the mortgage be delivered at the time of its execution, or subsequently upon consent of the husband. Grand Rapids Fifth Nat. Bank *v.* Pierce, 117 Mich. 376, 75 N. W. 1058. Upon foreclosure of the mortgage she only has dower in the surplus, although the sale thereunder occurred after the husband's death. Hoy *v.* Varner, 100 Va. 600, 42 S. E. 690. Where a wife joins in a mortgage of her husband's estate as a security only to the mortgagee, she parts with her dower so far only as may be necessary for that purpose. Forrest *v.* Laycock, 18 Grant Ch. (U. C.) 611.

Conveyance to trustee with power to convey.— Where a husband and wife joined in a conveyance to a trustee, under which the trustee is bound to convey the land in fee to any person whom the husband may designate in writing, a conveyance by the trustee during the husband's life on his request extinguishes the husband's equitable estate of inheritance in the land, and as an incident thereto his widow's right to dower therein. Goodheart *v.* Goodheart, 63 N. J. Eq. 746, 53 Atl. 135.

A wife joining in a purchase-money mortgage on land purchased in the husband's name is not possessed on foreclosure of a

b. Methods Employed — (I) *Joining With Husband in Execution of Deed* — (A) *In General.* The usual way of barring dower in this country by the voluntary act of the wife has always been by her joining with her husband in a properly executed and acknowledged deed of conveyance of the land.[96] This mode is either authorized by statutory enactment variously expressed in the several states, or is inferentially recognized by provisions pertaining to the power of a husband to divest his wife of her dower right.[97] Where the statute points out the mode of release by joining with the husband in the deed of conveyance, there must be a substantial compliance therewith.[98]

(B) *Sufficiency of Deed.* If the deed in the execution of which the wife joined is insufficient to pass title,[99] or was undelivered at the husband's death,[1] or the husband had no title in the lands attempted to be conveyed,[2] the relinquishment of dower therein contained becomes inoperative.[3]

(C) *Sufficiency of Release by Wife.* To determine the sufficiency of the release expressed in a deed in the execution of which the wife has joined, recourse must be had to the statute under which the release was executed. The release is as a rule required to be executed with the same formality as any other instrument conveying an interest in real property, and there must be a formal acknowledgment in the manner required by statute for the acknowledgment of instruments conveying interests in real property by married women.[4] Where

dower right in the property, but only of a right to redeem from the sale. McMichael *v.* Russell, 68 N. Y. App. Div. 104, 74 N. Y. Suppl. 212.

96. *Arkansas.*— Stull *v.* Graham, 60 Ark. 461, 31 S. W. 46; Meyer *v.* Gossett, 38 Ark. 377.

Delaware.— Grant *v.* Jackson, etc., Co., 5 Del. Ch. 404.

Georgia.— Davis *v.* McDonald, 42 Ga. 205.

Illinois.— Taylor *v.* Lawrence, 148 Ill. 388, 36 N. E. 74; Scanlan *v.* Scanlan, 134 Ill. 630, 25 N. E. 652 [*affirming* 33 Ill. App. 202]; Nicoll *v.* Ogden, 29 Ill. 323, 81 Am. Dec. 311; Gove *v.* Cather, 23 Ill. 634, 76 Am. Dec. 711.

Indiana.— Youst *v.* Hayes, 90 Ind. 413; Dunn *v.* Tousey, 80 Ind. 288.

Kentucky.— Cantrill *v.* Risk, 7 Bush 158; Jacobs *v.* Wurtz, 1 Ky. L. Rep. 343.

Minnesota.— Ortman *v.* Chute, 57 Minn. 452, 59 N. W. 533.

Mississippi.— Sykes *v.* Sykes, 49 Miss. 190.

New Jersey.— Goodheart *v.* Goodheart, 63 N. J. Eq. 746, 53 Atl. 135.

New York.— Hinchliffe *v.* Shea, 103 N. Y. 153, 8 N. E. 477; Elmendorf *v.* Lockwood, 57 N. Y. 322; Hoogland *v.* Watt, 2 Sandf. Ch. 148. And see Witthaus *v.* Schack, 105 N. Y. 332, 11 N. E. 649.

Ohio.— Symmes *v.* White, 1 Ohio Dec. (Reprint) 219, 4 West. L. J. 528.

Pennsylvania.— Warner *v.* Macknett, 3 Phila. 325; Ticknor *v.* Bessigue, 2 C. Pl. 96.

United States.— Bottomly *v.* Spencer, 36 Fed. 732.

See 17 Cent. Dig. tit. "Dower," § 154 *et seq.*; and other cases in the notes following.

97. See Elmendorf *v.* Lockwood, 57 N. Y. 322.

98. *Arkansas.*— Meyer *v.* Gossett, 38 Ark. 377.

Georgia.— Davis *v.* McDonald, 42 Ga. 205.

Illinois.— Atkin *v.* Merrell, 39 Ill. 62; Nicoll *v.* Ogden, 29 Ill. 323, 81 Am. Dec. 311; Gove *v.* Cather, 23 Ill. 634, 76 Am. Dec. 711.

Iowa.— O'Ferrall *v.* Simplot, 4 Iowa 381.

New Jersey.— Sheppard *v.* Wardell, 1 N. J. L. 452.

Ohio.— Carney *v.* Hopple, 17 Ohio St. 39.

United States.— Bottomly *v.* Spencer, 36 Fed. 732; Raverty *v.* Fridge, 20 Fed. Cas. No. 11,586, 3 McLean 230.

See 17 Cent. Dig. tit. "Dower," § 157 *et seq.*

Cure by statute of defect in release see Constitutional Law, 8 Cyc. 1026 note 99.

99. Smith *v.* Howell, 53 Ark. 279, 13 S. W. 929.

1. Duncklee *v.* Butler, 25 Misc. (N. Y.) 680, 56 N. Y. Suppl. 329 [*modified* in other respects in 38 N. Y. App. Div. 99, 56 N. Y. Suppl. 491].

2. McCormick *v.* Hunter, 50 Ind. 186; Stinson *v.* Sumner, 9 Mass. 143, 6 Am. Dec. 49; Marvin *v.* Smith, 46 N. Y. 571. *Compare* McDaniel *v.* Large, 55 Iowa 312, 7 N. W. 632.

3. Conveyance by bargain and sale.— Dower is not forfeited by a conveyance by bargain and sale by the dowress and her husband, since such conveyance passes nothing but what the grantor may lawfully convey. Robinson *v.* Miller, 1 B. Mon. (Ky.) 88.

4. *Illinois.*— Owen *v.* Robbins, 19 Ill. 545.

Iowa.— Westfall *v.* Lee, 7 Iowa 12.

Maryland.— Grove *v.* Todd, 41 Md. 633, 20 Am. Rep. 76.

Michigan.— Maynard *v.* Davis, 127 Mich. 571, 86 N. W. 1051.

New Jersey.— Sheppard *v.* Wardell, 1 N. J. L. 452.

Oregon.— Moore *v.* Thomas, 1 Oreg. 201.

Pennsylvania.— Kirk *v.* Dean, 2 Binn. 341. And see Thompson *v.* Morrow, 5 Serg. & R. 288, 9 Am. Dec. 358, private examination of wife must appear.

the statute provides only for the release of dower by a deed of conveyance, such release must be under seal, if instruments conveying real property are required to be under seal.[5] A deed purporting to relinquish the wife's dower interest must not only be jointly executed by both husband and wife, but it is usually necessary under the statute to insert words sufficient to constitute a release of her interest,[6] in the absence of which the deed will not operate as a relinquishment of her dower.[7]

(D) *Wife's Name in Body of Deed.* It has been held that where a wife does not join in the body of a deed by her husband, but merely joins in its execution

West Virginia.— Jarrell *v.* French, 43 W. Va. 456, 27 S. E. 263.

United States.— Bottomly *v.* Spencer, 36 Fed. 732, Illinois statute.

Acknowledgments by married women see, generally, ACKNOWLEDGMENTS, 1 Cyc. 521 *et seq.*

The invalidity of the husband's acknowledgment will not affect the execution of the deed so far as it pertains to the wife's release of dower contained therein, if her own acknowledgment was valid. Genoway *v.* Maize, 163 Mo. 224, 63 S. W. 698.

Where a statute requires the contents of deeds executed by married women to be made known to them, a wife is not barred of dower unless the magistrate's certificate shows that the requirements were complied with, for a wife can only be divested during coverture of her interest in her husband's estate in the manner prescribed by the statute. Silliman *v.* Cummins, 13 Ohio 116. And see Owen *v.* Robbins, 19 Ill. 545.

In Canada under the Dower Act (32 Vict. c. 7, § 23), the absence of or any informality in the acknowledgment of a release of dower is immaterial. See Heward *v.* Scott, 3 Ch. Chamb. (U. C.) 274; Bogart *v.* Patterson, 14 Grant Ch. (U. C.) 624; Buck *v.* McCallum, 13 U. C. C. P. 163; McNally *v.* Church, 27 U. C. Q. B. 103; Hill *v.* Greenwood, 23 U. C. Q. B. 404.

Cure of defect by statute see CONSTITUTIONAL LAW, 8 Cyc. 1026, note 99.

5. *Maine.*—Sargent *v.* Roberts, 34 Me. 135; Manning *v.* Laboree, 33 Me. 343.

Massachusetts.— Giles *v.* Moore, 4 Gray 600; Tasker *v.* Bartlett, 5 Cush. 359.

Pennsylvania.— Walsh *v.* Kelly, 34 Pa. St. 84.

West Virginia.— Jarrell *v.* French, 43 W. Va. 456, 27 S. E. 263.

Canada.— Sarsfield *v.* Sarsfield, 22 U. C. Q. B. 59.

6. *Indiana.*— Davis *v.* Bartholomew, 3 Ind. 485.

Kentucky.— Hatcher *v.* Andrews, 5 Bush 561.

Maine.— Lothrop *v.* Foster, 51 Me. 367; Usher *v.* Richardson, 29 Me. 415; Stevens *v.* Owen, 25 Me. 94; Frost *v.* Deering, 21 Me. 156.

Massachusetts.— Bartlett *v.* Bartlett, 4 Allen 440; Learned *v.* Cutler, 18 Pick. 9; Leavitt *v.* Lamprey, 13 Pick. 382, 23 Am. Dec. 685; Lufkin *v.* Curtis, 13 Mass. 223; Catlin *v.* Ware, 9 Mass. 218, 6 Am. Dec. 56.

Ohio.— Carter *v.* Goodin, 3 Ohio St. 75; McFarland *v.* Febiger, 7 Ohio 194, 28 Am. Dec. 632; Brown *v.* Farran, 3 Ohio 140. *Compare* Smith *v.* Handy, 16 Ohio 191.

Tennessee.— Daly *v.* Willis, 5 Lea 100; Atwater *v.* Butler, 9 Baxt. 299.

United States.— Dundas *v.* Hitchcock, 12 How. 256, 13 L. ed. 978; Mississippi Agricultural Bank *v.* Rice, 4 How. 225, 11 L. ed. 949; Hall *v.* Savage, 11 Fed. Cas. No. 5,944, 4 Mason 273; Powell *v.* Monson, etc., Mfg. Co., 19 Fed. Cas. No. 11,356, 3 Mason 347.

Canada.—Lawson *v.* Montgomery, 10 U. C. Q. B. 528; Thompson *v.* Thompson, 2 Ch. Chamb. (U. C.) 211; McDearmid *v.* McDearmid, 15 Can. L. J. 112.

See 17 Cent. Dig. tit. "Dower," § 158 *et seq.*

Contra.— *Arkansas.*— Dutton *v.* Stuart, 41 Ark. 101. *Compare* Meyer *v.* Gossett, 38 Ark. 377.

Illinois.— Johnson *v.* Montgomery, 51 Ill. 185.

New Hampshire.— Dustin *v.* Steele, 27 N. H. 431; Burge *v.* Smith, 27 N. H. 332.

New Jersey.— Goodheart *v.* Goodheart, 63 N. J. Eq. 746, 53 Atl. 135; Boorum *v.* Tucker, 51 N. J. Eq. 135, 26 Atl. 456; Frey *v.* Boylan, 23 N. J. Eq. 90.

New York.— Gillilan *v.* Swift, 14 Hun 574.

See 17 Cent. Dig. tit. "Dower," § 158 *et seq.*

A deed in which the wife joins in the granting clause and covenant conveys all her interest in the property, including her right of dower. Jones *v.* Des Moines, 43 Iowa 209; Edwards *v.* Sullivan, 20 Iowa 502; Stone *v.* Stubblefield, 6 Ky. L. Rep. 443; Gregory *v.* Gregory, 16 Ohio St. 560; Smith *v.* Handy, 16 Ohio 191; Tuite *v.* Miller, 1 Ohio Dec. (Reprint) 247, 5 West. L. J. 413. See also Gillilan *v.* Swift, 14 Hun (N. Y.) 574.

A covenant not to assert her right to dower in any portion of her husband's estate must be entirely free from doubt, clear, positive, and express in its terms. Shelton *v.* Shelton, 20 S. C. 560.

7. **The mere signing and sealing of the** deed by the wife is ineffectual to divest her dower right. Davis *v.* Bartholomew, 3 Ind. 485; Cox *v.* Wells, 7 Blackf. (Ind.) 410, 43 Am. Dec. 98; Lothrop *v.* Foster, 51 Me. 367; Lufkin *v.* Curtis, 13 Mass. 223; Catlin *v.* Ware, 9 Mass. 218, 26 Am. Dec. 56; McFarland *v.* Febiger, 7 Ohio 194, 28 Am. Dec. 632. But *compare* the cases to the contrary cited *supra*, note 6.

by signing and acknowledging it, her dower is not barred;[8] but there are decisions holding to the contrary.[9] Although the wife's name does not appear in the body of the deed as grantor, the express release of her dower in the premises granted by appropriate words at the end of the deed will effectually bar her dower.[10]

(II) *Release by Sole Deed of Wife.* A release or conveyance executed by the wife during coverture in which the husband did not join is ineffectual to bar her dower, unless otherwise provided by statute.[11]

(III) *Release by Attorney.* At common law a married woman could not appoint an attorney in fact to convey lands,[12] and therefore she could not release her right of dower by attorney.[13] Statutes, however, have been enacted in many states, under which married women have the power to convey lands by attorney, and under such a statute it has been held that a wife may appoint an attorney to release her dower,[14] or may join with her husband in the execution of such an instrument for such purpose.[15] Such conveyance must be made in conformity with the power,[16] and must be executed in the name of the wife as well as of the

8. *Indiana.*— Travellers' Ins. Co. *v.* Noland, 97 Ind. 217; Cox *v.* Wells, 7 Blackf. 410, 43 Am. Dec. 98.

Kentucky.— Buford *v.* Guthrie, 14 Bush 690; Prather *v.* McDowell, 8 Bush 46; Beverly *v.* Waller, 74 S. W. 264, 24 Ky. L. Rep. 2505; Measels *v.* Martin, (1890) 13 S. W. 359.

Massachusetts.— Catlin *v.* Ware, 9 Mass. 218, 6 Am. Dec. 56.

Ohio.— Carter *v.* Goodin, 3 Ohio St. 75; McFarland *v.* Febiger, 7 Ohio 194, 28 Am. Dec. 632.

West Virginia.— Laughlin *v.* Fream, 14 W. Va. 322.

See 17 Cent. Dig. tit. "Dower," § 159.

9. Johnson *v.* Montgomery, 51 Ill. 185; Schaffner *v.* Grutzmacher, 6 Iowa 137; Burge *v.* Smith, 27 N. H. 332; Bonter *v.* Northcote, 20 U. C. C. P. 76.

10. Stearns *v.* Swift, 8 Pick. (Mass.) 532; Atkinson *v.* Taylor, 34 Mo. App. 442; Foster *v.* Dennison, 9 Ohio 121.

11. *Arkansas.*— Meyer *v.* Gossett, 38 Ark. 377; Stidham *v.* Matthews, 29 Ark. 650; Witter *v.* Biscoe, 13 Ark. 422.

Illinois.— Knox *v.* Brady, 74 Ill. 476; Osborn *v.* Horine, 19 Ill. 124.

Kentucky.— Moore *v.* Tisdale, 5 B. Mon. 352; Brown *v.* Starke, 3 Dana 316; Kay *v.* Jones, 7 J. J. Marsh. 38.

Maine.— French *v.* Peters, 33 Me. 396; Shaw *v.* Russ, 14 Me. 432.

Massachusetts.—Page *v.* Page, 6 Cush. 196.

Missouri.— Brown *v.* Brown, 47 Mo. 130, 4 Am. Rep. 320.

New Jersey.— Dodge *v.* Aycrigg, 12 N. J. Eq. 82.

New York.— Armstrong *v.* Armstrong, 1 N. Y. St. 529; Carson *v.* Murray, 3 Paige 483.

Pennsylvania.— Ulp *v.* Campbell, 19 Pa. St. 361; Willing *v.* Peters, 7 Pa. St. 287.

United States.— Powell *v.* Monson, etc., Mfg. Co., 19 Fed. Cas. No. 11,356, 3 Mason 347.

See 17 Cent. Dig. tit. "Dower," §§ 156, 161.

Subsequent release of dower.— A release of dower executed by the wife alone long after the conveyance of the land by the husband, and for a new consideration, was formerly held in Massachusetts not to be an extinguishment of dower (Page *v.* Page, 6 Cush. (Mass.) 196; Powell *v.* Monson, etc., Mfg. Co., 19 Fed. Cas. No. 11,356, 3 Mason 347); but it is now provided by statute that a wife may release her dower in lands already conveyed, "by a subsequent deed executed separately or jointly with her husband" (Mass. Rev. L. (1902) c. 132, § 5). The former Massachusetts rule was followed in Maine (French *v.* Peters, 33 Me. 396; Shaw *v.* Russ, 14 Me. 432); but under the existing law in Maine a wife may bar her interest in her husband's estate by her sole deed (Rev. St. (1903) c. 77, § 9). But the Maine act was held not to authorize the wife to divest by her sole deed a right of dower existing prior to the taking effect of that act. Dela *v.* Stanwood, 61 Me. 51. In New Hampshire a separate deed by a wife releasing dower, executed after the conveyance by the husband, has been sustained. Shepherd *v.* Howard, 2 N. H. 507.

Relinquishment of dower prior to conveyance by husband has been held effectual. Nelson *v.* Holly, 50 Ala. 3.

12. See HUSBAND AND WIFE.

13. Lewis *v.* Coxe, 5 Harr. (Del.) 401; Dawson *v.* Shirley, 6 Blackf. (Ind.) 531; Sumner *v.* Conant, 10 Vt. 9; Shanks *v.* Lancaster, 5 Gratt. (Va.) 110, 50 Am. Dec. 108.

14. Wronkow *v.* Oakley, 133 N. Y. 505, 31 N. E. 521, 28 Am. St. Rep. 661, 16 L. R. A. 209 [*reversing* 64 Hun (N. Y.) 217, 19 N. Y. Suppl. 51].

15. Hull *v.* Glover, 126 Ill. 122, 18 N. E. 198; De Bar *v.* Priest, 6 Mo. App. 531; Reed *v.* Morrison, 12 Serg. & R. (Pa.) 18; Dalzell *v.* Crawford, 1 Pa. L. J. Rep. 155, 2 Pa. L. J. 16; Bertschey *v.* Sheboygan Bank, 89 Wis. 473, 61 N. W. 1115.

16. Corriell *v.* Ham, 2 Iowa 552.

A power to sell, mortgage, or otherwise dispose of lands given by a non-resident married woman, who is given by statute the authority to convey real estate by power of attorney, is broad enough to include her

husband.[17] A wife, acting under such a statute, may appoint her husband as such attorney with full power to release her dower.[18]

(iv) *Joining With Husband's Representative.* A wife of a lunatic cannot bar her dower by joining with her husband's guardian in the execution of a deed.[19] But a release may be made by the wife joining in a deed with a representative of her husband acting under a duly executed power of attorney.[20]

c. Release by Infant Wife. In the absence of a statute to the contrary a release of dower by an infant married woman is ineffectual to divest her rights, because of her incapacity to bind herself.[21]

d. Release Where Wife Is Insane. Except as authorized by statute the dower of an insane wife cannot be divested by the guardian of such wife or by an order of the court.[22] But provision is made by statute in many jurisdictions for the release of an insane wife's dower by judicial proceedings, or by act of the wife's guardian under the court's control.[23]

e. Fraudulent Representations. False representations as to the character of the deed,[24] the lands conveyed thereby,[25] or the consideration received for the lands conveyed[26] will invalidate the wife's release, except as against a *bona fide* purchaser for value without notice of the fraud.[27]

f. Consideration. The wife's release of dower is valid and effectual without consideration inuring solely to herself, if supported by an adequate consideration moving to the husband,[28] although the wife may demand the payment of a named consideration before consenting to the execution of such release.[29]

g. Extent of Release. The wife's release of her dower by joining with her husband in the execution of a conveyance will only operate as an extinguishment

dower right without express mention of it. Parker *v.* Baker, 12 N. Y. St. 598. And see Platt *v.* Finck, 60 N. Y. App. Div. 312, 70 N. Y. Suppl. 74.

17. Wilkinson *v.* Getty, 13 Iowa 157, 81 Am. Dec. 428. *Compare* Holladay *v.* Daily, 19 Wall. (U. S.) 606, 22 L. ed. 187.

18. Wronkow *v.* Oakley, 133 N. Y. 505, 31 N. E. 521, 28 Am. St. Rep. 661, 16 L. R. A. 209 [*reversing* 64 Hun 217, 19 N. Y. Suppl. 51].

19. Rannells *v.* Isgrigg, 99 Mo. 19, 12 S. W. 343; Rannells *v.* Gerner, 80 Mo. 474.

20. Glenn *v.* U. S. Bank, 8 Ohio 72, 31 Am. Dec. 429.

21. *Arkansas.*—Watson *v.* Billings, 38 Ark. 278, 42 Am. Rep. 1.

Kentucky.— Oldham *v.* Sale, 1 B. Mon. 76; Jones *v.* Todd, 2 J. J. Marsh. 359.

Mississippi.—Markham *v.* Merrett, 7 How. 437, 40 Am. Dec. 76.

New York.— McIntyre *v.* Costello, 47 Hun 289; Cunningham *v.* Knight, 1 Barb. 399; Sherman *v.* Garfield, 1 Den. 329; Priest *v.* Cummings, 20 Wend. 388; Sandford *v.* McLean, 3 Paige 117, 23 Am. Dec. 773.

Ohio.— Hughes *v.* Watson, 10 Ohio 127.

Pennsylvania.— Schrader *v.* Decker, 9 Pa. St. 14, 49 Am. Dec. 538; Shaw *v.* Boyd, 5 Serg. & R. 309, 9 Am. Dec. 368.

Virginia.— Thomas *v.* Gammel, 6 Leigh 9. See, generally, Infants.

Statutes have modified this common-law rule in some of the states so that a release of dower may be executed by a married woman of any age. See Me. Rev. St. (1903) c. 77, § 9.

22. Eslava *v.* Lepretre, 21 Ala. 504, 56 Am. Dec. 266; *Ex p.* McElwain, 29 Ill. 442; Matter of Dunn, 64 Hun (N. Y.) 18, 18 N. Y. Suppl. 723. See, generally, Insane Persons.

23. See the statutes in the several states.

24. Hatcher *v.* Day, 53 Iowa 671, 6 N. W. 24.

25. Witthaus *v.* Schack, 24 Hun (N. Y.) 328, 62 How. Pr. (N. Y.) 167; Conover *v.* Porter, 14 Ohio St. 450.

26. Pumphrey *v.* Pumphrey, 2 Ohio Dec. (Reprint) 574, 4 West. L. Month. 40. See Bear *v.* Stahl, 61 Mich. 203, 28 N. W. 69.

27. White *v.* Graves, 107 Mass. 325, 9 Am. Rep. 38; Pumphrey *v.* Pumphrey, 2 Ohio Dec. (Reprint) 574, 4 West. L. Month. 40.

28. *Alabama.*— Bailey *v.* Litten, 52 Ala. 282.

Illinois.— Scanlan *v.* Scanlan, 33 Ill. App. 202 [*affirmed* in 134 Ill. 630, 25 N. E. 652].

New York.— Manhattan Co. *v.* Everston, 6 Paige 457.

Ohio.— Mussey *v.* Budd, 11 Ohio Cir. Ct. 550, 5 Ohio Cir. Dec. 231.

West Virginia.— Henderson *v.* Alderson, 7 W. Va. 217.

See 17 Cent. Dig. tit. "Dower," § 167.

A seal imports a sufficient consideration to support a release by a widow of her dower in an action at law. Saunders *v.* Blythe, 112 Mo. 1, 20 S. W. 319.

29. Bailey *v.* Litten, 52 Ala. 282.

Promise of compensation not implied.—An agreement that a *feme covert* is to be compensated for a release of her inchoate right of dower is not to be implied. Hiscock *v.* Jaycox, 12 Fed. Cas. No. 6,531.

of her dower in the lands or interests in lands actually granted by the husband;[30] and if she executes a release for a specific purpose, it will only operate to the extent required to accomplish such purpose.[31] The acknowledgment by a wife under the statute of a lease for years by her husband does not bar her dower after the lapse of the term.[32]

h. To Whom Made — (I) *To Stranger to Title.* A release of dower to a person not the owner of the fee, or not in privity with the fee, or who has no title or interest in the lands to which the dower has attached, is inoperative as a bar.[33]

(II) *To Husband.* At common law a married woman could not bar her

30. *Illinois.*— Fletcher *v.* Shepherd, 174 Ill. 262, 51 N. E. 212; Coburn *v.* Herrington, 114 Ill. 104, 29 N. E. 478; Blain *v.* Harrison, 11 Ill. 384; Virgin *v.* Virgin, 31 Ill. App. 188 [*affirmed* in 189 Ill. 144, 59 N. E. 586].

Kentucky.— Mahoney *v.* Young, 3 Dana 588, 28 Am. Dec. 114.

Maine.— French *v.* Lord, 69 Me. 537.

Pennsylvania.—*In re* McFarland, 30 Pittsb. Leg. J. 430.

Tennessee.— McRoberts *v.* Copeland, 85 Tenn. 211, 2 S. W. 33.

See 17 Cent. Dig. tit. "Dower," § 169.

31. Martin *v.* Wurtz, 1 Ky. L. Rep. 406 (in which case a married woman on a petition for the resale of land sold by order of court released her dower in order that the land might bring a larger sum, and it was held that such relinquishment did not affect her dower as to a portion of the land that was not resold under the order); Case *v.* Hewitt, 21 Ohio Cir. Ct. 730, 11 Ohio Cir. Dec. 823.

A quitclaim deed by one having unassigned dower in a certain tract of all her interest therein to one owning an undivided one third of the tract releases the dower only in the undivided one-third interest. Fletcher *v.* Shepherd, 174 Ill. 262, 51 N. E. 212. A quitclaim deed from a wife to her husband's grantee, conveying that part of the land which has been assigned to him in partition proceedings, does not release her right of dower in the other part of the land. Coburn *v.* Herrington, 114 Ill. 104, 29 N. E. 478.

32. Chase's Case, 1 Bland (Md.) 206, 17 Am. Dec. 277.

33. *Alabama.*— Johnston *v.* Smith, 70 Ala. 108.

Florida.— McMahon *v.* Russell, 17 Fla. 698.

Illinois.— Fletcher *v.* Shepherd, 174 Ill. 262, 51 N. E. 212; Heisen *v.* Heisen, 145 Ill. 658, 34 N. E. 597, 21 L. R. A. 434; Hart *v.* Burch, 130 Ill. 426, 22 N. E. 831, 6 L. R. A. 371; Hull *v.* Glover, 126 Ill. 122, 18 N. E. 198; Best *v.* Jenks, 123 Ill. 447, 15 N. E. 173; Chicago Dock Co. *v.* Kinzie, 49 Ill. 289; Robbins *v.* Kinzie, 45 Ill. 354; Gove *v.* Cather, 23 Ill. 634, 76 Am. Dec. 711; Summers *v.* Babb, 13 Ill. 483; Blain *v.* Harrison, 11 Ill. 384.

Maine.— French *v.* Lord, 69 Me. 537; French *v.* Crosby, 61 Me. 502; Harriman *v.* Gray, 49 Me. 537; Littlefield *v.* Crocker, 30 Me. 192. And see Smith *v.* Eustis, 7 Me. 41.

Massachusetts.— Flynn *v.* Flynn, 171 Mass. 312, 50 N. E. 650, 68 Am. St. Rep. 427, 42 L. R. A. 98; Robinson *v.* Bates, 3 Metc. 40; Pixley *v.* Bennett, 11 Mass. 298.

Mississippi.— Pinson *v.* Williams, 23 Miss. 64.

Missouri.— Saunders *v.* Blythe, 112 Mo. 1, 20 S. W. 319.

New Jersey.— White *v.* White, 16 N. J. L. 202, 31 Am. Dec. 232; Frey *v.* Boylan, 23 N. J. Eq. 90.

New York.— Elmendorf *v.* Lockwood, 57 N. Y. 322; Merchants' Bank *v.* Thomson, 55 N. Y. 7; Malloney *v.* Horan, 49 N. Y. 111, 10 Am. Rep. 335; Marvin *v.* Smith, 46 N. Y. 571; Dworsky *v.* Arndtstein, 29 N. Y. App. Div. 274, 51 N. Y. Suppl. 597; Marvin *v.* Smith, 56 Barb. 600; Armstrong *v.* Armstrong, 1 N. Y. St. 529.

Ohio.— Ridgway *v.* Masting, 23 Ohio St. 294, 13 Am. Rep. 251; Kitzmiller *v.* Van Rensselaer, 10 Ohio St. 63; Woodworth *v.* Paige, 5 Ohio St. 70; Taylor *v.* Fowler, 18 Ohio 567, 51 Am. Dec. 469; Smith *v.* Flickinger, 10 Ohio Dec. (Reprint) 625, 22 Cinc. L. Bul. 254.

South Carolina.— Mobley *v.* Mobley, 14 Rich. Eq. 280.

Virginia.— Davison *v.* Waite, 2 Munf. 527.

West Virginia.— Nickell *v.* Tomlinson, 27 W. Va. 697.

See 17 Cent. Dig. tit. "Dower," §§ 171, 172.

To whom interest can be relinquished after death of husband and before assignment see *infra*, IX, E, 4.

Who are in privity with the fee.— A warrantor in the claim of title may receive the release in discharge of his covenant of warranty (Hull *v.* Glover, 126 Ill. 122, 18 N. E. 198; La Framboise *v.* Grow, 56 Ill. 197; Chicago Dock Co. *v.* Kinzie, 49 Ill. 289; Robbins *v.* Kinzie, 45 Ill. 354); but a release to a person who has parted with his title by quitclaim deed without covenants of warranty does not inure in favor of his grantee (Harriman *v.* Gray, 49 Me. 537). A release to one tenant in common is not effectual as a release in favor of the other tenants. Fletcher *v.* Shepherd, 174 Ill. 262, 51 N. E. 212; White *v.* White, 16 N. J. L. 202, 31 Am. Dec. 282. One who holds under an attachment issued prior to the execution of a deed of release is not entitled to protection from the wife's dower (French *v.* Crosby, 61 Me. 502); nor will a release contained in a mortgage or deed of the husband's lands be available in behalf of a purchaser of such lands at a sale under a judgment against the husband (Kitzmiller

dower by a release to her husband,[34] nor could the result be accomplished indirectly by an agreement made between the husband, the wife, and a trustee of the latter.[35] The married women's acts, however, have by removing the common-law disabilities as to the power of married women to contract with respect to their separate estates materially modified this rule, and in many jurisdictions it is now held that a married woman may release to her husband her right of dower in his lands.[36] In other jurisdictions, however, such power is denied unless the enabling act contains language reasonably interpreted as including the wife's right of dower in the estate made subject to her control.[37] After a wife has procured an absolute divorce from her husband, she may make to him a valid release of her dower rights.[38]

i. Compelling Release. The wife's right of dower being subject to release by her own voluntary act only,[39] she cannot be compelled by a court to execute such a release,[40] unless she has by consent placed herself under its jurisdiction,[41] or unless she has by voluntary contract bound herself so to do.[42]

E. Restoration of Right — 1. In General. The deed or conveyance in which the wife joins is operative as a release of her dower only to the extent of the validity of the grant of her husband's lands therein made, and therefore if for any reason such deed or conveyance fails her right of dower remains

v. Van Rensselaer, 10 Ohio St. 63; Taylor *v.* Fowler, 18 Ohio 567, 51 Am. Dec. 469). A person in possession under authority of a deed executed by the husband alone may avail himself of a release (Saunders *v.* Blythe, 112 Mo. 1, 20 S. W. 319), but if he has no title a release cannot be made to him (Mobley *v.* Mobley, 14 Rich. Eq. (S. C.) 280). A son of the husband has such a privity in the estate of his father after his death as would entitle him to the benefit of a release of dower executed by the widow. Gray *v.* McCune, 23 Pa. St. 447. A release of dower may be made to a tenant for life, remainderman, or other owner of less than the fee. Elmendorf *v.* Lockwood, 57 N. Y. 322.

See 17 Cent. Dig. tit. "Dower," §§ 171, 172.

34. *Alabama.*— Martin *v.* Martin, 22 Ala. 86.

Arkansas.— Pillow *v.* Wade, 31 Ark. 678; Countz *v.* Markling, 30 Ark. 17.

Maine.— Rowe *v.* Hamilton, 3 Me. 63.

Maryland.— Gebb *v.* Rose, 40 Md. 387.

Mississippi.— Stephenson *v.* Osborne, 41 Miss. 119, 90 Am. Dec. 358.

New York.— Crain *v.* Cavana, 36 Barb. 410; Graham *v.* Van Wyck, 14 Barb. 531; Townsend *v.* Townsend, 2 Sandf. 711; New York L. Ins. Co. *v.* Mayer, 14 Daly 318 [*affirmed* in 108 N. Y. 655, 15 N. E. 444]; Wightman *v.* Schleifer, 18 N. Y. Suppl. 551; Guidet *v.* Brown, 3 Abb. N. Cas. 295, 54 How. Pr. 409; Carson *v.* Murray, 3 Paige 483.

Ohio.— Tate *v.* Tate, 19 Ohio Cir. Ct. 532, 10 Ohio Cir. Dec. 321.

Oregon.— House *v.* Fowle, 20 Oreg. 163, 25 Pac. 376, 22 Oreg. 303, 29 Pac. 890.

Pennsylvania.— Walsh *v.* Kelly, 34 Pa. St. 84.

Virginia.— Land *v.* Shipp, 98 Va. 284, 36 S. E. 391, 50 L. R. A. 560.

See 17 Cent. Dig. tit. "Dower," § 124; and *supra*, VIII, D, 9, d.

Post-nuptial agreements see *supra*, VIII, D, 14.

35. Townsend *v.* Townsend, 2 Sandf. (N. Y.) 711; Guidet *v.* Brown, 3 Abb. N. Cas. (N. Y.) 295, 54 How. Pr. (N. Y.) 409.

36. Fisher *v.* Koontz, 110 Iowa 498, 80 N. W. 551; Rhoades *v.* Davis, 51 Mich. 306, 16 N. W. 659.

37. Flynn *v.* Flynn, 171 Mass. 312, 50 N. E. 650, 68 Am. St. Rep. 427, 42 L. R. A. 98; Graham *v.* Van Wyck, 14 Barb. (N. Y.) 531; Land *v.* Shipp, 98 Va. 284, 36 S. E. 391, 50 L. R. A. 560. See also *supra*, VIII, D, 14, b.

A statute providing that when property is owned by either husband or wife, the other has no interest therein which can be made the subject of contract between them, includes the wife's dower in the husband's lands, and therefore a release thereof to the husband by the wife is a nullity. Miller *v.* Miller, 104 Iowa 186, 73 N. W. 484; Linton *v.* Crosby, 54 Iowa 478, 6 N. W. 726; House *v.* Fowle, 20 Oreg. 163, 25 Pac. 376.

38. Savage *v.* Crill, 19 Hun (N. Y.) 4.

39. See *supra*, VIII, D, 17, a.

40. *Georgia.*— Royston *v.* Royston, 21 Ga. 161.

Illinois.— Sloan *v.* Williams, 138 Ill. 43, 27 N. E. 531, 12 L. R. A. 496.

Kentucky.— Coleman *v.* Woolley, 3 Dana 486.

Maine.— Wyman *v.* Fox, 59 Me. 100.

Michigan.— Richmond *v.* Robinson, 12 Mich. 193.

New Jersey.— Young *v.* Paul, 10 N. J. Eq. 401, 64 Am. Dec. 456.

New York.— Wiswall *v.* Hall, 3 Paige 313; Matter of Lane, 1 Edw. 349.

See 17 Cent. Dig. tit. "Dower," § 175.

41. Matter of Hunter, 1 Edw. (N. Y.) 1.

42. Sloan *v.* Williams, 138 Ill. 43, 27 N. E. 531, 12 L. R. A. 496.

unaffected,[43] subject to the possible exception where an indefeasible title is conveyed, and such title is subsequently lost solely by the fault and neglect of the grantee.[44] If the conveyance becomes inoperative by reason of an outstanding superior title, the right to dower will remain barred.[45]

2. SETTING ASIDE FRAUDULENT CONVEYANCE. It is in recognition of the principle above stated that where a conveyance or deed executed by a husband or wife is set aside as fraudulent as to the husband's creditors the wife's dower in the land is restored.[46] This rule does not apply, however, where creditors do not impeach the conveyance, since it is valid as between the parties.[47] Nor does the rule apply where the conveyance is not set aside at the instance of creditors until after the husband's death, if the statute only gives dower in land of which the husband dies seized.[48]

3. DISCHARGE OR ASSIGNMENT OF ENCUMBRANCE. Where a mortgage or other lien is absolutely discharged and no longer subsists as an encumbrance upon a husband's lands, the wife's right of dower is restored notwithstanding the priority of such lien or mortgage,[49] whether such discharge be effected by the husband direct

43. *Arkansas.*— Smith *v.* Howell, 53 Ark. 279, 13 S. W. 929; Goodman *v.* Moore, 22 Ark. 191, in which case the land was surrendered to the grantor's administrator for nonpayment of the purchase-money and it was held that the widow was entitled to dower.

Illinois.— Stowe *v.* Steele, 114 Ill. 382, 2 N. E. 169; Morton *v.* Noble, 57 Ill. 176, 11 Am. Rep. 7; Gove *v.* Cather, 23 Ill. 634, 76 Am. Dec. 711; Stribling *v.* Ross, 16 Ill. 122; Summers *v.* Babb, 13 Ill. 483; Blain *v.* Harrison, 11 Ill. 384.

Indiana.— Crawford *v.* Hazelrigg, 117 Ind. 63, 18 N. E. 603, 2 L. R. A. 139.

Massachusetts.— Walker *v.* Walker, 101 Mass. 169; Robinson *v.* Bates, 3 Metc. 40; Stinson *v.* Sumner, 9 Mass. 143, 6 Am. Dec. 49.

New York.—Witthaus *v.* Schack, 105 N. Y. 332, 11 N. E. 649; Hinchliffe *v.* Shea, 103 N. Y. 153, 8 N. E. 477; Malloney *v.* Horan, 49 N. Y. 111, 10 Am. Rep. 335.

Ohio.— Woodworth *v.* Paige, 5 Ohio St. 70; Dubois *v.* Ebersole, 10 Ohio Dec. (Reprint) 355, 20 Cinc. L. Bul. 401.

South Carolina.— Rickard *v.* Talbird, Rice Eq. 158; Keckley *v.* Keckley, 2 Hill Eq. 250.

Virginia.— Davis *v.* Davis, 25 Gratt. 587.

See 17 Cent. Dig. tit. "Dower," § 108 *et seq.*

Extension of the time of payment of a note, for the security of which the wife joined her husband in a mortgage, does not of itself discharge her inchoate right in the lands mortgaged, where she was not a party to the note. Crawford *v.* Hazelrigg, 117 Ind. 63, 18 N. E. 603, 2 L. R. A. 139. Nor will the taking of a new note and mortgage on the same lands discharge the lien of the first mortgage so as to let in the right of a wife to dower. Walters *v.* Walters, 73 Ind. 425.

44. Morton *v.* Noble, 57 Ill. 176, 11 Am. Rep. 7.

45. Thompson *v.* Boyd, 21 N. J. L. 58; Frey *v.* Boylan, 23 N. J. Eq. 90.

46. *Alabama.*— Humes *v.* Scruggs, 64 Ala. 40.

Illinois.— Frederick *v.* Emig, 186 Ill. 319, 57 N. E. 883, 78 Am. St. Rep. 283; Summers *v.* Babb, 13 Ill. 483.

Indiana.— See Kitts *v.* Wilson, 130 Ind. 492, 29 N. E. 401.

Kentucky.— Dugan *v.* Massey, 6 Bush 81; Lowry *v.* Fisher, 2 Bush 70, 92 Am. Dec. 475.

Maine.— Richardson *v.* Wyman, 62 Me. 280, 16 Am. Rep. 459; Wyman *v.* Fox, 59 Me. 100.

Massachusetts.— Robinson *v.* Bates, 3 Metc. 40.

Missouri.— Wells *v.* Estes, 154 Mo. 291, 55 S. W. 255; Bohannon *v.* Combs, 97 Mo. 446, 11 S. W. 232, 10 Am. St. Rep. 328.

New York.— Wilkinson *v.* Paddock, 125 N. Y. 748, 27 N. E. 407 [*affirming* 57 Hun 191, 11 N. Y. Suppl. 442]; Malloney *v.* Horan, 49 N. Y. 111, 10 Am. Rep. 335 [*reversing* 53 Barb. 29, 36 How. Pr. 260, and *overruling* Meyer *v.* Mohr, 24 N. Y. Super. Ct. 333]; Lowry *v.* Smith, 9 Hun 514; Hyatt *v.* Dusenbury, 12 N. Y. Civ. Proc. 152.

Ohio.— Ridgway *v.* Masting, 23 Ohio St. 294, 13 Am. Rep. 251.

Virginia.— Blow *v.* Maynard, 2 Leigh 29; Quarles *v.* Lacy, 4 Munf. 251.

Wisconsin.— Munger *v.* Perkins, 62 Wis. 499, 22 N. W. 511.

United States.— Cox *v.* Wilder, 6 Fed. Cas. No. 3,308, 2 Dill. 45.

See 17 Cent. Dig. tit. "Dower," § 109.

Fraudulent conveyance by husband before marriage see *supra*, VIII, D, 15, a, (IV).

47. Stewart *v.* Johnson, 18 N. J. L. 87.

48. Bond *v.* Bond, 16 Lea (Tenn.) 306. And see Hopkins *v.* Bryant, 85 Tenn. 520, 3 S. W. 827. It is otherwise if the husband's conveyance was intended, not only to defraud creditors, but also to defraud the widow of her dower. Hughes *v.* Shaw, Mart. & Y. (Tenn.) 323.

49. *Maine.*— Mayo *v.* Hamlin, 73 Me. 182.

Massachusetts.— McCabe *v.* Swap, 14 Allen 188; Wedge *v.* Moore, 6 Cush. 8; Eaton *v.* Simonds, 14 Pick. 98; Hildreth *v.* Jones, 13 Mass. 525; Bolton *v.* Ballard, 13 Mass. 227.

Missouri.— Atkinson *v.* Angert, 46 Mo.

or by his legal representatives after his death,[50] by payment from the proceeds of a judicial or other sale of the husband's property for the payment of his debts,[51] or by payment and the entry of satisfaction by the husband's grantee or the purchaser of an equity of redemption.[52] But the acquisition of the fee of an estate by the owner of an encumbrance thereon does not necessarily extinguish the encumbrance or preclude such owner from asserting its priority as against the dower of the wife of his grantor; he may take the estate subject to such encumbrance and keep up the same for his own benefit.[53] Where the grantee of mortgaged premises pays the mortgage and takes an assignment thereof, the mortgage is not discharged, and the grantor's wife is not restored to her dower right in such premises.[54]

IX. DOWER CONSUMMATE BEFORE ASSIGNMENT.

A. Nature and Essentials of Estate — 1. In General. Upon the death of the husband the widow's right of dower in her husband's realty becomes consummate and perfect. From that time her right is no longer merely inchoate or contingent, but attaches absolutely to the dowable lands of the husband subject to assignment or admeasurement by the requisite judicial proceedings.[55]

2. Not a Freehold Estate. Prior to the assignment of her dower the widow has no vested freehold estate under the common law.[56] She is not seized of

515; Jones *v.* Bragg, 33 Mo. 337, 84 Am. Dec. 49.

New Hampshire.— Hastings *v.* Stevens, 29 N. H. 564; Bullard *v.* Bowers, 10 N. H. 500.

New York.— Runyan *v.* Stewart, 12 Barb. 537; Coates *v.* Cheever, 1 Cow. 460.

Ohio.— Ketchum *v.* Shaw, 28 Ohio St. 503; Fox *v.* Pratt, 27 Ohio St. 512; Carter *v.* Goodin, 3 Ohio St. 75; McArthur *v.* Porter, 1 Ohio 99; Baldwin *v.* Jacks, 3 Ohio Dec. (Reprint) 545. And see Mandel *v.* McClave, 46 Ohio St. 407, 22 S. E. 290, 15 Am. St. Rep. 627, 5 L. R. A. 519.

Rhode Island.— Peckham *v.* Hadwen, 8 R. I. 160; Mathewson *v.* Smith, 1 R. I. 22.

South Carolina.— Keckley *v.* Keckley, 2 Hill Eq. 250.

See 17 Cent. Dig. tit. "Dower," § 110.

50. Young *v.* Tarbell, 37 Me. 509; Hastings *v.* Stevens, 29 N. H. 564; Mathewson *v.* Smith, 1 R. I. 22.

51. Hatch *v.* Palmer, 58 Me. 271; Atkinson *v.* Stewart, 46 Mo. 510; Ketchum *v.* Shaw, 28 Ohio St. 503; Baldwin *v.* Jacks, 3 Ohio Dec. (Reprint) 545; Peckham *v.* Hadwen, 8 R. I. 160. And see Mandel *v.* McClave, 46 Ohio St. 407, 22 N. E. 290, 15 Am. St. Rep. 627, 5 L. R. A. 519.

52. Atkinson *v.* Angert, 46 Mo. 515.

53. Lee *v.* James, 81 Ky. 443; Bryar's Appeal, 111 Pa. St. 81, 2 Atl. 344.

54. *Massachusetts.*— Strong *v.* Converse, 8 Allen 557, 85 Am. Dec. 732; Gibson *v.* Crehore, 3 Pick. 475.

Michigan.— Lake *v.* Nolan, 81 Mich. 112, 45 N. W. 376.

New Jersey.— Thompson *v.* Boyd, 21 N. J. L. 58.

New York.— De Lisle *v.* Herbs, 25 Hun 485.

Ohio.— Jacquess *v.* Hamilton County Comm'rs, 1 Disn. 121, 12 Ohio Dec. (Reprint) 524.

See 17 Cent. Dig. tit. "Dower," § 110.

Although a mortgage has been canceled of record upon its purchase by the owner of the fee, equity will intervene in a proper case to protect the encumbrance of such mortgage against the wife's dower. Chiswell *v.* Morris, 14 N. J. Eq. 101.

Where the wife pays and takes an assignment of mortgages of her husband's lands, after a conveyance thereof by the husband subject to her dower, she is not entitled to dower in the entire lands, but only in the husband's equity of redemption. Bonfoey *v.* Bonfoey, 100 Mich. 82, 58 N. W. 620. A tender of money to her husband's assignee as an indemnity against a mortgage does not discharge the mortgage so as to restore her dower. Bullard *v.* Bowers, 10 N. H. 500.

The purchaser of an equity of redemption in lands, who discharges a mortgage thereon, although under no personal liability to do so, is entitled to subrogation to the rights of such mortgagee as against a claim to dower by the widow of the original mortgagor who united in the mortgage for the purpose of barring her inchoate dower, but whose dower in the equity of redemption has never been cut off. Everson *v.* McMullen, 113 N. Y. 293, 21 N. E. 52, 4 L. R. A. 118, 10 Am. St. Rep. 445. See also Hartshorne *v.* Hartshorne, 2 N. J. Eq. 349; Duval *v.* Febiger, 1 Cinc. (Ohio) 268.

55. Austell *v.* Swann, 74 Ga. 278; Potter *v.* Worley, 57 Iowa 66, 7 N. W. 685, 10 N. W. 298; Tenbrook *v.* Jessup, 60 N. J. Eq. 234, 46 Atl. 516; Dummerston *v.* Newfane, 37 Vt. 9.

56. Park Dower 334; and the following cases:

Alabama.— Saltmarsh *v.* Smith, 32 Ala. 404; Weaver *v.* Crenshaw, 6 Ala. 873.

Illinois.— Union Brewing Co. *v.* Meier, 163 Ill. 424, 45 N. E. 264; Reynolds *v.* McCurry, 100 Ill. 356.

Iowa.—Hook *v.* Garfield Coal Co., 112 Iowa

any part of her deceased husband's lands,[57] but her right is for most purposes nothing more than a mere right of action.[58]

3. Tenancy in Common and Joint Tenancy. In some jurisdictions the widow upon the death of her husband and before an assignment of dower is a tenant in common with her husband's heirs,[59] but at common law she is neither a tenant in common nor a joint tenant with them.[60]

B. Rights and Liabilities of Widow — 1. Rights in General. Since the right of dower before assignment is not an estate, but a mere right of action,[61] the widow cannot maintain an action for partition against her husband's cotenant.[62] Nor can she maintain an action to compel the purchase by a railroad company of her alleged dower right in a right of way granted by her husband.[63] The rule is that until dower is assigned she has no right which she can lawfully exercise over the land.[64] But she has such an interest in the lands before assignment of dower

210, 83 N. W. 963; Stewart *v.* Chadwick, 8 Iowa 463.

Kentucky.—Shields *v.* Batts, 5 J. J. Marsh. 12.

Maine.— Johnson *v.* Shields, 32 Me. 424.

Massachusetts.— Sears *v.* Sears, 121 Mass. 267; Lobdell *v.* Hayes, 12 Gray 236.

Michigan.— Rayner *v.* Lee, 20 Mich. 384. Until dower is legally assigned the person entitled to the fee may bring ejectment against one wrongfully in possession. King *v.* Merritt, 67 Mich. 194, 34 N. W. 689.

Mississippi.— Torrey *v.* Minor, Sm. & M. Ch. 489.

New Jersey.— Wade *v.* Miller, 32 N. J. L. 296; Tenbrook *v.* Jessup, 60 N. J. Eq. 234, 46 Atl. 516; Bleeker *v.* Hennion, 23 N. J. Eq. 133.

New York.— Aikmann *v.* Harsell, 98 N. Y. 186; Moore *v.* New York, 8 N. Y. 110, 59 Am. Dec. 473; Lawrence *v.* Miller, 2 N. Y. 245; Green *v.* Putnam, 1 Barb. 500; Sayles *v.* Naylor, 5 N. Y. St. 816; Van Name *v.* Van Name, 23 How. Pr. 247; Yates *v.* Paddock, 10 Wend. 528; Cox *v.* Jagger, 2 Cow. 638, 14 Am. Dec. 522; Tompkins *v.* Fonda, 4 Paige 448.

North Carolina.— Norwood *v.* Marrow, 20 N. C. 442.

Pennsylvania.— Jones *v.* Hollopeter, 10 Serg. & R. 326.

Rhode Island.— Maxon *v.* Gray, 14 R. I. 641; Weaver *v.* Sturtevant, 12 R. I. 537; Hoxsie *v.* Ellis, 4 R. I. 123.

Wisconsin.— Farnsworth *v.* Cole, 42 Wis. 403.

Canada.— Torrens *v.* Currie, 22 N. Brunsw. 342.

See 17 Cent. Dig. tit. "Dower," § 176 *et seq.*

57. 4 Kent Comm. 61; 2 Scribner Dower 27; McMahon *v.* Gray, 150 Mass. 289, 22 N. E. 923, 15 Am. St. Rep. 202, 5 L. R. A. 748; Van Name *v.* Van Name, 23 How. Pr. (N. Y.) 247, and other cases in the note preceding and the note following.

58. *Alabama.*—Saltmarsh *v.* Smith, 32 Ala. 404; Weaver *v.* Crenshaw, 6 Ala. 873.

Arkansas.— Carnall *v.* Wilson, 21 Ark. 62, 76 Am. Dec. 351.

Illinois.— Newman *v.* Willets, 48 Ill. 534.

Maine.— Nason *v.* Allen, 5 Me. 479.

Massachusetts.— McMahon *v.* Grey, 150 Mass. 289, 22 N. E. 923, 15 Am. St. Rep. 202, 5 L. R. A. 748.

Michigan.— Rayner *v.* Lee, 20 Mich. 384. And see King *v.* Merritt, 67 Mich. 194, 34 N. W. 689.

Mississippi.— Torrey *v.* Minor, Sm. & M. Ch. 489.

Missouri.— Carey *v.* West, 139 Mo. 146, 40 S. W. 661.

New Jersey.— Tenbrook *v.* Jessup, 60 N. J. Eq. 234, 46 Atl. 516; Wade *v.* Miller, 32 N. J. L. 296.

New York.— Aikman *v.* Harsell, 98 N. Y. 186; Sayles *v.* Naylor, 5 N. Y. St. 816; Van Name *v.* Van Name, 23 How. Pr. 247; Tompkins *v.* Fonda, 4 Paige 448; Wood *v.* Clute, 1 Sandf. Ch. 199.

Rhode Island.— Maxon *v.* Grey, 14 R. I. 641; Hoxsie *v.* Ellis, 4 R. I. 123.

See 17 Cent. Dig. tit. "Dower," § 176 *et seq.*; and cases in the notes preceding.

59. Wooster *v.* Hunts Lyman Iron Co., 38 Conn. 256; Stedman *v.* Fortune, 5 Conn. 462; Dummerston *v.* Newfane, 37 Vt. 9; Gorham *v.* Daniels, 23 Vt. 600.

60. Foster *v.* Foster, 2 Stew. (Ala.) 356; Walker *v.* Doane, 131 Ill. 27, 22 N. E. 1006; Grubbs *v.* Leyendecker, 153 Ind. 348, 53 N. E. 940; Grossman *v.* Lauber, 29 Ind. 618; Torrens *v.* Currie, 22 N. Brunsw. 342; and cases cited *supra*, IX, A, 2.

61. See *supra*, IX, A, 2.

62. Reynolds *v.* McCurry, 100 Ill. 356; Coles *v.* Coles, 15 Johns. (N. Y.) 319; Brown *v.* Adams, 2 Whart. (Pa.) 188.

63. Tuttle *v.* Burlington, etc., R. Co., 49 Iowa 134.

64. Ash *v.* Cook, 3 Abb. Pr. (N. Y.) 389; Webb *v.* Boyle, 63 N. C. 271. And see cases cited *supra*, IX, A, 2. She has no authority to lease her dower interest before it has been assigned to her. Lewis *v.* King, 180 Ill. 259, 54 N. E. 330; Union Brewing Co. *v.* Meier, 163 Ill. 424, 45 N. E. 264; Natlock *v.* Lee, 9 Ind. 298. Nor can she authorize the cutting of timber on her husband's lands except for her fuel. Louisville, etc., R. Co. *v.* Hill, 115 Ala. 334, 22 So. 163. Nor has she such an interest in the lands as to authorize her to convey mining rights therein. Hook *v.* Garfield Coal Co., 112 Iowa 210, 83 N. W. 963.

Assignment, conveyance, or release see *infra*, IX, E.

as will entitle her to maintain a suit for an injunction against trespass, waste, or other injuries thereto.[65]

2. Right of Entry or Possession. Until the assignment of dower a widow has no right under her claim of dower to enter and occupy any portion of her husband's estate, unless such right is given by statute.[66] She has, however, the right of quarantine, which at common law is the right to remain in the mansion-house for forty days after the husband's death, during which dower is to be assigned to her,[67] and in some jurisdictions it is provided by statute that the widow may remain in possession of certain portions of her deceased husband's estate until the assignment of dower.[68] Under such a statute the widow's possession is a valid defense to an action of ejectment brought by her husband's heirs.[69]

3. Liability For Taxes and Repairs. Taxes accruing against the husband's estate subsequent to his death and prior to an assignment of dower are not as a general rule chargeable to the widow.[70] Nor is the widow bound to pay for repairs necessary to keep the buildings on her husband's lands in a tenantable condition.[71]

C. Bar or Forfeiture — 1. In General. The widow's right to dower after her husband's death and before assignment is as to many of its features similar to the inchoate right of dower of a wife. Where the lands of a deceased husband

65. Rogers *v.* Potter, 32 N. J. L. 78; Harker *v.* Christy, 5 N. J. L. 717 (holding that a rule to stay waste on land in which dower is claimed will be granted where divers persons are cutting down and carrying off wood); Shepard *v.* Manhattan R. Co., 57 N. Y. Super. Ct. 5, 5 N. Y. Suppl. 189 [*affirmed* in 117 N. Y. 442, 23 N. E. 30]. *Compare* Carey *v.* Buntain, 4 Bibb (Ky.) 217. See also Case, Action on, 6 Cyc. 693 note 37.

66. *Colorado.*— Tierney *v.* Whitney, 2 Colo. 620.

Delaware.—Sharpley *v.* Jones, 5 Harr. 373.

Illinois.— Trask *v.* Baxter, 48 Ill. 406; Hoots *v.* Graham, 23 Ill. 81.

Iowa.— Cavender *v.* Smith, 8 Iowa 360.

Maine.—Wyman *v.* Richardson, 62 Me. 293.

Maryland.— Hilleary *v.* Hilleary, 26 Md. 274.

Massachusetts.— Hildreth *v.* Thompson, 16 Mass. 191; Sheafe *v.* O'Neil, 9 Mass. 9; Windham *v.* Portland, 4 Mass. 384.

Missouri.— Collins *v.* Warren, 29 Mo. 236.

New Jersey.— Smallwood *v.* Bilderback, 16 N. J. L. 497; Halsey *v.* Dodd, 6 N. J. L. 367; Laird *v.* Wilson, 2 N. J. L. 281.

New York.— Jackson *v.* O'Donaghy, 7 Johns. 247.

North Carolina.— Williamson *v.* Cox, 3 N. C. 4.

South Carolina.— McCully *v.* Smith, 2 Bailey 103.

Virginia.— Moore *v.* Gilliam, 5 Munf. 346; Chapman *v.* Armistead, 4 Munf. 382.

See 17 Cent. Dig. tit. "Dower," § 198.

67. Right of quarantine see Executors and Administrators.

68. Robinson *v.* Miller, 1 B. Mon. (Ky.) 88; Cass *v.* Smith, 4 Ky. L. Rep. 990, 7 Ky. L. Rep. 291; Caillaret *v.* Bernard, 7 Sm. & M. (Miss.) 319; Roberts *v.* Nelson, 86 Mo. 21.

69. Halsey *v.* Dodd, 6 N. J. L. 367; Gourley *v.* Kinley, 66 Pa. St. 270.

70. *Missouri.*— Graves *v.* Cochran, 68 Mo. 74.

New Jersey.— Spinning *v.* Spinning, 41 N. J. Eq. 427, 5 Atl. 278 [*affirmed* in 43 N. J. Eq. 215, 10 Atl. 270] (holding as stated in the text in respect to general taxes, but holding that water rates, being in the nature of personal charges, are to be paid by the widow); Jonas *v.* Hunt, 40 N. J. Eq. 660, 5 Atl. 148.

North Carolina.— Branson *v.* Yancy, 16 N. C. 77.

Virginia.— Simmons *v.* Lyle, 32 Gratt. 752.

United States.— Blodget *v.* Brent, 3 Fed. Cas. No. 1,553, 3 Cranch C. C. 394.

See 17 Cent. Dig. tit. "Dower," § 197.

A widow who occupies lands before assignment of dower without paying rent therefor should not be permitted to charge against the heirs an amount paid by her for taxes and improvements where the rental value exceeds the amount so paid (Wheeler *v.* Dawson, 63 Ill. 54); and if during her occupancy prior to assignment of dower she receives rents from her husband's lands the payment of taxes should be offset against the amount so received (Strawn *v.* Strawn, 50 Ill. 256).

71. Hayden *v.* Wesser, 1 Mackey (D. C.) 457; Walsh *v.* Wilson, 131 Mass. 535; Spinning *v.* Spinning, 41 N. J. Eq. 427, 5 Atl. 278 [*affirmed* in 43 N. J. Eq. 215, 10 Atl. 270].

If the widow make improvements before assignment of dower on lands subsequently apportioned to her, she cannot charge the cost of such improvements against the heirs (Turner *v.* Bennett, 70 Ill. 263); nor is she entitled to repayment where she is ousted before assignment in a suit brought by her husband's creditors (Simmons *v.* Lyle, 32 Gratt. (Va.) 752).

are sold by his legal representative[72] or by order of a probate court for the payment of his debts the widow's right of dower in most states remains unimpaired.[73] It has been held, however, that where the wife prior to the husband's death joined him in a mortgage, a sale of the mortgaged lands by his administrator for the payment of his debts extinguishes the right of dower.[74] A tax-sale made after the death of the husband but before assignment of dower will not preclude recovery of dower by the widow.[75] And where land is sold after the death of a husband under a judgment rendered against his administrator, the wife's right of dower is unimpaired.[76] Nor is such right divested by a sale under a judgment of foreclosure of a mortgage in which the wife did not join.[77]

2. Estoppel or Waiver. A widow may be precluded from asserting her right of dower by acquiescence in arrangements for the disposition of her husband's estate,[78] or by an acceptance of the benefits of such an arrangement, when entered into with full knowledge of the condition of her husband's estate.[79] But she will not be estopped from claiming dower by receiving under leases executed by her in conjunction with the trustees of the heirs a certain portion of the rents for a number of years.[80] The failure of a widow to announce at a sale conducted by her as administratrix that the land was sold subject to her dower does not estop her from asserting her claim;[81] nor will she be estopped if not present at the sale by a statement made by an administrator without her authority that the sale of the land was free of her claim.[82] Her mere presence at a public sale of lands in which she claims dower will not estop her,[83] although it is otherwise where she concurs in a representation that the purchaser will acquire a clear title, and receives a portion of the purchase-money.[84]

72. Stein *v.* Stein, 80 Md. 306, 30 Atl. 703; Covert *v.* Hertzog, 4 Pa. St. 145; Rodney *v.* Washington, 16 Wkly. Notes Cas. (Pa.) 226; Speake *v.* Kinard, 4 S. C. 54.

73. *Arkansas.*— Webb *v.* Smith, 40 Ark. 17; Livingston *v.* Cochran, 33 Ark. 294.

Iowa.— Garvin *v.* Hatcher, 39 Iowa 685.

Maryland.— Gardiner *v.* Miles, 5 Gill 94; Waring *v.* Waring, 2 Bland 673.

Massachusetts.— Hale *v.* Munn, 4 Gray 132.

Oregon.— Whiteaker *v.* Belt, 25 Oreg. 490, 36 Pac. 534; House *v.* Fowle, 22 Oreg. 303, 29 Pac. 890.

See 17 Cent. Dig. tit. "Dower," §§ 199, 200.

In Pennsylvania, however, dower is in all respects subordinate to the rights of creditors, so a sale under an order of the orphans' court for the payment of debts bars the widow's dower, whether the party from whom the lands descended died testate or intestate (Mitchell *v.* Mitchell, 8 Pa. St. 126); and a sale under a power to sell for the payment of a mortgage divests the widow's dower (Scott *v.* Crosdale, 2 Dall. 127, 1 L. ed. 317).

74. St. Clair *v.* Morris, 9 Ohio 15, 34 Am. Dec. 415.

75. Stow *v.* Steele, 114 Ill. 382, 2 N. E. 169; Blodget *v.* Brent, 6 Fed. Cas. No. 1,553, 3 Cranch C. C. 394.

76. Gooch *v.* Atkins, 14 Mass. 378; McArthur *v.* Porter, 1 Ohio 99; Phinney *v.* Johnson, 13 S. C. 25. *Compare* Woodruff *v.* Cook, 2 Edw. (N. Y.) 259.

77. Lewis *v.* Smith, 11 Barb. (N. Y.) 152 [*affirmed* in 9 N. Y. 502, 61 Am. Dec. 706]; Hill *v.* Gray, 45 S. C. 91, 22 S. E. 802.

78. Gilmore *v.* Gilmore, 109 Ill. 277.

79. Wilson *v.* Woodward, 41 S. C. 363, 19 S. E. 685.

80. Aikman *v.* Harsell, 63 How. Pr. (N. Y.) 110 [*affirmed* in 98 N. Y. 186].

The receipt of rents by a widow after her husband's death from lands held in trust under an antenuptial contract executed for the purpose of barring her dower will not preclude her from avoiding such contract upon the ground of fraud, where she was in ignorance of her rights. Peaslee *v.* Peaslee, 147 Mass. 171, 17 N. E. 506.

81. Owen *v.* Slatter, 26 Ala. 547, 62 Am. Dec. 745; Wright *v.* De Groff, 14 Mich. 164; Martien *v.* Norris, 91 Mo. 465, 3 S. W. 849; Sip *v.* Lawback, 17 N. J. L. 442.

82. Cox *v.* Garst, 105 Ill. 342.

A widow will be precluded by a statement made by an administrator at the sale that the lands sold are to be free of encumbrances and by the further statement made by her that such lands will be sold free of her claim of dower (Sweaney *v.* Mallory, 62 Mo. 485); and where she authorized a statement at a public sale that the lands would be sold free of dower she is estopped from claiming dower as against a purchaser paying full value for the land on the faith of such announcement (Hart *v.* Giles, 67 Mo. 175). See also Wiseman *v.* Macy, 20 Ind. 239, 83 Am. Dec. 316.

83. Fern *v.* Osterhout, 11 N. Y. App. Div. 319, 42 N. Y. Suppl. 450.

84. Allen *v.* Allen, 112 Ill. 323; Ellis *v.* Diddy, 1 Ind. 561; Dougrey *v.* Topping, 4 Paige (N. Y.) 94; Smiley *v.* Wright, 2 Ohio 506. See also Wood *v.* Seely, 32 N. Y. 105; Simpson's Appeal, 8 Pa. St. 199. *Compare,* however, Whiteaker *v.* Belt, 25 Oreg. 490, 36 Pac. 534.

D. Election by Widow Between Dower and Other Provision — 1. Between Dower and Jointure or Settlement. We have already considered the effect of a jointure or a settlement upon a wife in lieu of dower.[85] If such jointure or settlement is made during coverture the widow is, under the statute in most jurisdictions, given a certain time to elect whether she will take under the jointure or settlement, or under her right of dower, on condition that she return the property received by her from her husband,[86] for she cannot have both the benefits of the jointure or settlement and her dower.[87]

2. Between Dower and Pecuniary Provision. Where a pecuniary provision is made by a husband for his wife in lieu of dower during coverture, it is usually provided by statute that the widow may elect either to take the provision or her dower.[88] The rules applicable in the case of an election between a devise under a will and dower are also applicable to an election by the widow between dower and a pecuniary provision made by her husband for her benefit during coverture.[89] An acceptance of pecuniary provisions and a retention for an unreasonable length of time after the husband's death without offering to return them will bar the widow's right to elect.[90] Where the widow elects to receive money in lieu of dower under an impression that her husband's estate is solvent, it has been held that she may upon discovering the insolvency of such estate recall her election and have her dower assigned.[91] But the mere fact that the property taken in lieu of dower turns out of less value than dower is not sufficient in itself to set aside her election.[92]

E. Assignment, Conveyance, or Release — 1. Assignability of Interest — a. Rule at Law. Prior to the assignment of dower the widow's right is not an estate in the lands but is a mere right of action,[93] and is not at law assignable to a person not vested with the fee.[94]

b. Rule in Equity. Although even courts of equity recognize the rule that at law the widow's right of dower before assignment cannot be aliened in any of the ordinary methods of conveying freehold estates so as to vest a legal interest in the grantee,[95] she can make such contracts in reference thereto as will in equity under certain circumstances be enforced;[96] and thus it is held that such an interest is subject to an equitable assignment.[97]

85. See *supra*, VIII, D, 12–14.

86. Heiser *v.* Sutter, 195 Ill. 378, 63 N. E. 269; Bubier *v.* Roberts, 49 Me. 460; McCartee *v.* Teller, 8 Wend. (N. Y.) 267; Spangler *v.* Dukes, 39 Ohio St. 642. See *supra*, VIII, D, 12–14.

87. Camden Mut. Ins. Assoc. *v.* Jones, 23 N. J. Eq. 171.

88. See *supra*, VIII, D, 12–14.

89. See Wills.

90. Heiser *v.* Sutter, 195 Ill. 378, 63 N. E. 269; Mannan *v.* Mannan, 154 Ind. 9, 55 N. E. 855; Jones *v.* Fleming, 104 N. Y. 418, 10 N. E. 693; Doremus *v.* Doremus, 66 Hun (N. Y.) 111, 21 N. Y. Suppl. 13; Eves *v.* Booth, 27 Ont. App. 420.

91. Dabney *v.* Bailey, 42 Ga. 521.

92. Lee *v.* Tower, 124 N. Y. 370, 26 N. E. 943; Brown *v.* Knapp, 79 N. Y. 136.

93. See *supra*, IX, A, 2.

94. *Alabama.*— Wilkinson *v.* Brandon, 92 Ala. 530, 9 So. 187; Barber *v.* Williams, 74 Ala. 331; Wallace *v.* Hall, 19 Ala. 367.

Arkansas.— Weaver *v.* Rush, 62 Ark. 51, 34 S. W. 256; Jacks *v.* Dyer, 31 Ark. 334.

Illinois.— Campbell *v.* Wilson, 195 Ill. 284, 63 N. E. 103; Lewis *v.* King, 180 Ill. 259, 54 N. E. 330; Anderson *v.* Smith, 159 Ill. 93, 42 N. E. 306; Best *v.* Jenks, 123 Ill. 447, 15 N. E. 173; Bailey *v.* West, 41 Ill. 290; Blain *v.* Harrison, 11 Ill. 384; Petefish *v.* Buck, 56 Ill. App. 149.

Kentucky.— Shields *v.* Batts, 5 J. J. Marsh. 12.

Maine.— Johnson *v.* Shields, 32 Me. 424.

Massachusetts.— Giles *v.* Moore, 4 Gray 600.

Missouri.— Carey *v.* West, 139 Mo. 661, 40 S. W. 661; Pidcock *v.* Buffam, 61 Mo. 370.

New York.— Scott *v.* Howard, 3 Barb. 319; Greene *v.* Putnam, 1 Barb. 500; Ritchie *v.* Putnam, 13 Wend. 524; Siglar *v.* Van Riper, 10 Wend. 414; Williams *v.* Kierney, 6 N. Y. St. 560; Jackson *v.* Aspell, 20 Johns. 411.

North Carolina.— Parton *v.* Allison, 109 N. C. 674, 14 S. E. 107.

Ohio.— Miller *v.* Woodman, 14 Ohio 518; Douglas *v.* McCoy, 5 Ohio 522.

Rhode Island.— Ritt *v.* Dodge, 20 R. I. 133, 37 Atl. 810.

South Carolina.— Jeffries *v.* Allen, 29 S. C. 501, 7 S. E. 828.

United States.— Pacific Bank *v.* Hannah, 90 Fed. 72, 32 C. C. A. 522.

See 17 Cent. Dig. tit. "Dower." § 209.

95. Tompkins *v.* Fonda, 4 Paige (N. Y.) 448.

96. Potter *v.* Everitt, 42 N. C. 152.

97. *Alabama.*— Reeves *v.* Brooks, 80 Ala. 26.

c. Rights of Assignee. While it is a generally recognized doctrine that a widow's right of dower cannot be assigned before admeasurement so as to enable the grantee to bring an action in his own name,[98] yet equity will protect his rights and sustain an action in the widow's name for his benefit.[99] A purchase of the widow's dower interest before assignment and possession of the lands by the purchaser is no defense to an action of ejectment brought against him by the heirs.[1]

2. Consideration. An agreement by a widow to relinquish her unadmeasured interest in her late husband's estate will not be binding upon her if without consideration,[2] but a nominal consideration will be sufficient to sustain a conveyance to the owner of the fee;[3] and where a widow as administratrix conveys her husband's lands, her release of dower to the grantee has been sustained, although without pecuniary consideration.[4]

3. Conveyance or Mortgage. Although, as has been stated,[5] a widow's dower cannot at law be assigned before assignment, yet equity will intervene to sustain such conveyances as against a subsequent suit for an allotment of dower.[6] A conveyance by a widow as executrix and individually of her husband's lands, including all her own right and interest therein, is effectual to preclude her from a recovery of dower.[7] If a widow join with the heir and owner of the fee in

Indiana.— Strong *v.* Clem, 12 Ind. 37, 74 Am. Dec. 200.

Minnesota.— Dobberstein *v.* Murphy, 64 Minn. 127, 66 N. W. 204.

New York.— Bostwick *v.* Beach, 103 N. Y. 414, 9 N. E. 41; Payne *v.* Becker, 87 N. Y. 153; Sayles *v.* Naylor, 5 N. Y. St. 816.

Ohio.— Bausch *v.* McCunnell, 5 Ohio S. & C. Pl. Dec. 162, 7 Ohio N. P. 387.

Tennessee.— Tucker *v.* Tucker, 100 Tenn. 310, 45 S. W. 344.

See 17 Cent. Dig. tit. "Dower," § 209.

Equity will recognize and enforce a sale and conveyance of the dower interest before the dower has been assigned or admeasured, and will accordingly recognize and enforce the rights which a purchaser of the dower interest of the wife acquires at a foreclosure sale under a mortgage in which both the husband and wife joined. Huston *v.* Seeley, 27 Iowa 183.

98. *Kentucky.*— Shields *v.* Batts, 5 J. J. Marsh. 13.

Michigan.— Galbraith *v.* Fleming, 60 Mich. 408, 27 N. W. 583.

New York.— Cox *v.* Jagger, 2 Cow. 638, 14 Am. Dec. 522; Sutliff *v.* Forgey, 1 Cow. 89; Jackson *v.* Vanderheyden, 17 Johns. 167, 8 Am. Dec. 378.

North Carolina.— Parton *v.* Allison, 111 N. C. 429, 16 S. E. 415.

Pennsylvania.— Jones *v.* Hollopeter, 10 Serg. & R. 326.

South Carolina.— Lamar *v.* Scott, 4 Rich. 516.

See 17 Cent. Dig. tit. "Dower," §§ 209, 211.

Contra.— Strong *v.* Clem, 12 Ind. 37, 74 Am. Dec. 200; Bostwick *v.* Beach, 103 N. Y. 414, 9 N. E. 41; Payne *v.* Becker, 87 N. Y. 153, in which case it was held that the rule at common law was modified by the New York code of civil procedure so that the dower interest of a widow in her husband's lands, although unadmeasured, was assignable as a right of action and could be enforced in the name of the assignee.

99. Powell *v.* Powell, 10 Ala. 900; McMahon *v.* Gray, 150 Mass. 289, 22 N. E. 923, 15 Am. St. Rep. 202, 5 L. R. A. 748; Lamar *v.* Scott, 4 Rich. (S. C.) 516.

Power of attorney.— If a widow sell her right of dower before assignment, the purchaser, having a power of attorney from her for that purpose, may maintain a writ of dower in her name. Robie *v.* Flanders, 33 N. H. 524.

1. Turnipseed *v.* Fitzpatrick, 75 Ala. 297; Barnet *v.* Meacham, 62 Ark. 313, 35 S. W. 533; Jacoway *v.* McGarrah, 21 Ark. 347; Carnall *v.* Wilson, 21 Ark. 62, 76 Am. Dec. 351; Pidcock *v.* Buffan, 61 Mo. 370; Howe *v.* McGivern, 25 Wis. 525.

2. Switzer *v.* Hauk, 89 Ind. 73; Pinson *v.* Williams, 23 Miss. 64, failure of consideration.

3. Harrow *v.* Johnson, 3 Metc. (Ky.) 578; Thatcher *v.* Howland, 2 Metc. (Mass.) 41.

4. Dougrey *v.* Topping, 4 Paige (N. Y.) 94.

5. See *supra*, IX, E, 1, a.

6. Wilkinson *v.* Brandon, 92 Ala. 530, 9 So. 187; Moore *v.* Harris, 91 Mo. 616, 4 S. W. 439; Putnam *v.* Ritchie, 6 Paige (N. Y.) 390.

Conveyance of right of dower in land held adversely see Champerty and Maintenance, 6 Cyc. 877.

7. Churchill *v.* Bee, 66 Ga. 621; Thomas *v.* Harris, 43 Pa. St. 231.

A widow who unites with her daughters in a conveyance of their joint property thereby relinquishes her dower right in favor of the purchaser. French *v.* McAndrew, 61 Miss. 187.

A quitclaim deed of the land to which the widow's dower, although unadmeasured, had attached, constitutes an assignment of the dower. Fletcher *v.* Shepherd, 174 Ill. 262, 51 N. E. 212; Dobbestein *v.* Murphy, 64

executing a trust deed, such deed operates as a release of her dower.[8] Although under the rule at law a widow cannot mortgage her dower prior to assignment,[9] such a mortgage will be sustained in equity,[10] or under a statute duly authorizing it.[11]

4. To Whom Relinquished. The widow's dower before assignment can only be assigned, conveyed, or released by way of extinguishment to the owner of the fee,[12] or to a party in possession or in privity of the estate from which it accrued.[13] This is the general rule subject only to the exceptions above indicated as to the assignability of such dower.[14]

F. Right of Creditors to Reach and Subject Interest. The common-law rule is that the dower right of a widow before assignment is not such an interest in her husband's lands as can be levied upon under an execution issued against her. This rule obtains in nearly all the states,[15] but has in some states been subjected

Minn. 127, 66 N. W. 204; Grant *v.* Parham, 15 Vt. 649.

8. Campbell *v.* Wilson, 195 Ill. 284, 63 N. E. 103; Bray *v.* Conrad, 101 Mo. 331, 13 S. W. 957.

9. Salem Nat. Bank *v.* White, 159 Ill. 136, 42 N. E. 312; Strong *v.* Bragg, 7 Blackf. (Ind.) 62. See *supra*, IX, E, 1, a.

10. Herr *v.* Herr, 90 Iowa 538, 58 N. W. 897.

Under the New York rule the widow's right of dower, although unassigned, constitutes property which is capable in equity of being sold, transferred, and mortgaged by the dowress. Mutual L. Ins. Co. *v.* Shipman, 119 N. Y. 324, 24 N. E. 177; Bostwick *v.* Beach, 103 N. Y. 414, 9 N. E. 41; Pope *v.* Mead, 99 N. Y. 201, 1 N. E. 671; Payne *v.* Becker, 87 N. Y. 153; Simar *v.* Canaday, 53 N. Y. 298, 13 Am. Rep. 523; Tompkins *v.* Fonda, 4 Paige 448. Such being the case dower is in equity subject to a mortgage executed by the widow prior to its assignment. Mutual L. Ins. Co. *v.* Shipman, 119 N. Y. 324, 24 N. E. 177.

A mortgage executed by two of five heirs and by the widow, to whom another of the heirs had conveyed his one fifth, is effective to bar the widow's dower right in the one-fifth interest of each of the two heirs who joined with her in executing the mortgage, although her dower interest had not been admeasured. Freiot *v.* La Fountaine, 16 Misc. (N. Y.) 153, 38 N. Y. Suppl. 832.

11. Phillips *v.* Presson, 172 Mo. 24, 72 S. W. 501; Ferry *v.* Burnell, 14 Fed. 807, 5 McCrary 1.

12. *Alabama.*— Wilkinson *v.* Brandon, 92 Ala. 530, 9 So. 187; Reeves *v.* Brooks, 80 Ala. 26; Saltmarsh *v.* Smith, 32 Ala. 404.

Arkansas.— Reed *v.* Ash, 30 Ark. 775; Jacoway *v.* McGarrah, 21 Ark. 347; Carnall *v.* Wilson, 21 Ark. 62, 76 Am. Dec. 351.

Illinois.— Sloniger *v.* Sloniger, 161 Ill. 270, 43 N. E. 1111; Hart *v.* Burch, 130 Ill. 426, 22 N. E. 831, 6 L. R. A. 371; Hoots *v.* Graham, 23 Ill. 81; Summers *v.* Babb, 13 Ill. 483; Blain *v.* Harrison, 11 Ill. 384.

Maine.— Plummer *v.* Doughty, 78 Me. 341, 5 Atl. 526.

North Carolina.— Harrison *v.* Wood, 21 N. C. 437.

Ohio.— Miller *v.* Woodman, 14 Ohio 518.

Rhode Island.— Weaver *v.* Sturtevant, 12 R. I. 537.

See 17 Cent. Dig. tit. "Dower," § 214.

A former owner of land in fee who has conveyed with warranty of title may purchase a right of dower for the benefit of his grantee, so as to prevent a breach of covenant, before the dower has been assigned. La Framboise *v.* Grow, 56 Ill. 197.

13. Matlock *v.* Lee, 9 Ind. 298; Johnson *v.* Shields, 32 Me. 424.

14. Weyer *v.* Sager, 21 Ohio Cir. Ct. 710, 12 Ohio Cir. Dec. 193.

When equity will sustain alienation to stranger.—Wilkinson *v.* Brandon, 92 Ala. 530, 9 So. 187.

15. *Arkansas.*—Pennington *v.* Yell, 11 Ark. 212, 52 Am. Dec. 262.

Delaware.— Graham *v.* Moore, 5 Harr. 318. And see Hagan *v.* Chapman, 1 Pennew. 445, 41 Atl. 974.

District of Columbia.— Hayden *v.* Weser, 1 Mackey 457.

Illinois.— Newman *v.* Willetts, 48 Ill. 534; Hoots *v.* Graham, 23 Ill. 81; Summers *v.* Babb, 13 Ill. 483; Blain *v.* Harrison, 11 Ill. 384; Petefish *v.* Buck, 56 Ill. App. 149.

Iowa.— Rausch *v.* Moore, 48 Iowa 611, 30 Am. Rep. 412.

Kentucky.— Petty *v.* Malier, 15 B. Mon. 591 (holding that a widow having no interest in her husband's lands before assignment which was liable to execution, her subsequent husband had none in her right that could be sold under an execution against him); Shields *v.* Batts, 5 J. J. Marsh. 12.

Maine.— Nason *v.* Allen, 5 Me. 479.

Maryland.— Harper *v.* Clayton, 84 Md. 346, 35 Atl. 1083, 57 Am. St. Rep. 407, 35 L. R. A. 211.

Massachusetts.— McMahon *v.* Gray, 150 Mass. 289, 22 N. E. 923, 15 Am. St. Rep. 202, 5 L. R. A. 748; Gooch *v.* Atkins, 14 Mass. 378.

Mississippi.—Falkner *v.* Thurmond, (1898) 23 So. 584; Ligon *v.* Spencer, 58 Miss. 37; Wallis *v.* Doe, 2 Sm. & M. 220; Torrey *v.* Minor, Sm. & M. Ch. 489.

Missouri.— Waller *v.* Mardus, 29 Mo. 25.

New York.— Aikman *v.* Harsell, 98 N. Y. 186; Lawrence *v.* Miller, 2 N. Y. 245; Sayles *v.* Naylor, 5 N. Y. St. 816; Ritchie *v.* Putnam, 13 Wend. 524; Tompkins *v.* Fonda, 4 Paige 448.

to statutory modifications,[16] or materially departed from by the courts.[17] In many jurisdictions it is held that an unassigned right of dower may be reached by a judgment creditor in equity by means of a creditor's bill or other suitable remedy,[18] but it is there usually provided by statute that courts of equity may decree satisfaction of a judgment at law out of a thing of action, whenever execution has been issued against other property and returned unsatisfied.[19] As a person may stand upon his legal rights without violating any rule of equity, a mere neglect or refusal of the widow to have her dower assigned is not such a fraud against her creditors as to confer jurisdiction upon a court of equity to subject it before assignment to the payment of her debts.[20]

G. Damages For Detention of Dower — 1. In General. At common law damages could not be recovered by a widow for the detention of her dower,[21] the widow only being entitled to the profits of her third part of the land from the time of the recovery of judgment.[22] This rule, however, was at an early date modified by the so-called statute of Merton, which authorized the recovery of damages by the widow for the detention of her dower from the time of the death of her husband to the time of the judgment setting off her dower.[23] The pro-

Oregon.— Baer *v.* Ballingall, 37 Oreg. 416, 61 Pac. 852.

Rhode Island.— Maxon *v.* Gray, 14 R. I. 641.

See 17 Cent. Dig. tit. "Dower," § 218.

Attachment.— The unassigned dower interest of a widow in the real estate of her deceased husband is not subject to an attachment in an action at law. Rausch *v.* Moore, 48 Iowa 611, 30 Am. Rep. 412. See Attachment, 4 Cyc. 562.

16. Baer *v.* Ballingall, 37 Oreg. 416, 61 Pac. 852.

In Missouri it has been decided that a statute permitting a widow to transfer her unassigned dower (Rev. St. (1899) § 2934) does not subject such dower to sale under execution, "as many reasons exist why a voluntary alienation should be permissible, and an involuntary alienation should be prohibited." Young *v.* Thrasher, 61 Mo. App. 413.

17. Greathead's Appeal, 42 Conn. 374; Funk *v.* Walter, 6 Ky. L. Rep. 293; Weyer *v.* Sager, 21 Ohio Cir. Ct. 710, 12 Ohio Cir. Dec. 193.

18. Petefish *v.* Buck, 56 Ill. App. 149; Stewart *v.* McMartin, 5 Barb. (N. Y.) 438; Williams *v.* Kierney, 6 N. Y. St. 560; Sayles *v.* Naylor, 5 N. Y. St. 816; Tompkins *v.* Fonda, 4 Paige (N. Y.) 448; Stoltz *v.* Boltz, 8 Ohio Dec. (Reprint) 61, 5 Cinc. L. Bul. 410. See also Creditors' Suits, 12 Cyc. 26.

A bill in equity may be maintained by a judgment creditor to obtain the appointment of a receiver and the institution of measures whereby an unassigned right of dower may be changed into property, sold, and the proceeds applied in payment of the judgment. Thompson *v.* Marsh, 61 Ill. App. 269; Tenbrook *v.* Jessup, 60 N. J. Eq. 234, 46 Atl. 516; Payne *v.* Becker, 87 N. Y. 153 [*reversing* 22 Hun 28]. Such right may be subjected to the payment of the widow's debts by a proceeding in equity by which a receiver may be appointed with authority to proceed in her name to have such dower assigned to her, and to receive the rents and profits thereof. McMahon *v.* Gray, 150 Mass. 289, 22 N. E. 923, 15 Am. St. Rep. 202, 5 L. R. A. 748; Tenbrook *v.* Jessup, 60 N. J. Eq. 234, 46 Atl. 516.

19. Harper *v.* Clayton, 84 Md. 346, 35 Atl. 1083, 57 Am. St. Rep. 407, 35 L. R. A. 211. Statutory provisions authorizing courts of chancery to decree satisfaction of a judgment at law out of any money, property, or thing of action belonging to the defendant whenever an execution against his property shall have been returned unsatisfied in whole or in part, are sufficient to authorize a sale of a widow's unassigned dower right for the payment of her debts. McMahon *v.* Gray, 150 Mass. 289, 22 N. E. 923, 15 Am. St. Rep. 202, 5 L. R. A. 748; Tenbrook *v.* Jessup, 60 N. J. Eq. 234, 46 Atl. 516; Payne *v.* Becker, 87 N. Y. 153; Stewart *v.* McMartin, 5 Barb. (N. Y.) 438; Tompkins *v.* Fonda, 4 Paige (N. Y.) 448; Bolz *v.* Stolz, 41 Ohio St. 540.

20. Buford *v.* Buford, 1 Bibb (Ky.) 305; Harper *v.* Clayton, 84 Md. 346, 35 Atl. 1083, 57 Am. St. Rep. 407, 35 L. R. A. 211; Maxon *v.* Gray, 14 R. I. 641.

21. Park Dower 301; 1 Roper Husb. & W. 437; 2 Scribner Dower 699; Price *v.* Hobbs, 47 Md. 359; Hammond *v.* Higgins, 2 Harr. & J. (Md.) 443; U. S. Bank *v.* Dunseth, 10 Ohio 18; Wright *v.* Jennings, 1 Bailey (S. C.) 277.

22. Price *v.* Hobbs, 47 Md. 259.

23. **The statute of Merton** (20 Hen. III, c. 1) provides that where widows after the death of their husbands are deforced of their dowers, "and cannot have their Dowers or Quarantine without Plea, whosoever deforce them of their Dowers or Quarantine of the Lands, whereof their Husbands died seised, and that the same Widows after shall recover by Plea, they that be convict of such wrongful Deforcement shall yield Damages to the same Widows; that is to say, the Value of the whole Dower to them belonging, from the time of the Death of their Husbands unto the Day that the said Widows, by Judg-

visions of this statute have been substantially incorporated in the dower acts of most of the states.[24] In other states the statute has been applied, although not expressly adopted by legislative enactment.[25] In other jurisdictions the courts in the absence of statutory authority have denied the right of the widow to recover damages at law, but have afforded a remedy in equity by holding the person in possession of the lands liable to the widow as trustee for damages to be measured by the rents and profits received during the period of detention.[26]

2. Recovery of Damages. The statutes permitting the recovery of damages for a detention of dower usually authorize the assessment of such damages upon a petition for the assignment of dower, or in an action for dower,[27] and if she fail to pursue the remedy thus provided, she cannot subsequently by a separate proceeding, either at law or in equity, procure an assessment of such damages,[28] unless a separate action is authorized by statute.[29] The petition for the assignment of dower should allege facts sufficient to sustain a recovery of damages, if damages are sought,[30] although, if both parties introduce evidence without objection upon the question of damages, they may be allowed notwithstanding the petition does not ask for them.[31]

3. Abatement by Death of Widow. Where an action for dower is abated by the death of the widow there can be no recovery at law of damages for detention;[32] but in such cases the value of the dower for the time it was wrongfully detained may be recovered in equity.[33]

4. Husband Must Die Seized. Under the statute in most jurisdictions damages cannot be recovered for detention of dower where the husband did not die seized.[34] Usually under such a statute damages cannot be recovered against a grantee of lands conveyed by a husband during coverture,[35] although in many

ment of our Court, have recovered Seisin of their Dower."

24. See the statutes of the several states.

25. Layton *v.* Butler, 4 Harr. (Del.) 507; Ebey *v.* Ebey, 1 Wash. Terr. 185.

26. Wood *v.* Morgan, 56 Ala. 397; Snodgrass *v.* Clark, 44 Ala. 198; Waters *v.* Williams, 38 Ala. 680; Smith *v.* Johnson, 37 Ala. 633; McAllister *v.* McAllister, 37 Ala. 484; Perrine *v.* Perrine, 35 Ala. 644; Slatter *v.* Meek, 35 Ala. 528; Thrasher *v.* Pinckard, 23 Ala. 616; Baney *v.* Frowner, 9 Ala. 901; Price *v.* Hobbs, 47 Md. 359; Sellman *v.* Bowers, 8 Gill & J. (Md.) 50, 29 Am. Dec. 524; Kiddall *v.* Trimble, 1 Md. Ch. 143; Harper *v.* Archer, 28 Miss. 212; Shields *v.* Hunt, 39 N. J. Eq. 485; McLaughlin *v.* McLaughlin, 20 N. J. Eq. 190.

See 17 Cent. Dig. tit. "Dower," § 189 *et seq.*

27. *Illinois.*— Simpson *v.* Ham, 78 Ill. 203.

Iowa.— O'Ferrall *v.* Simplot, 4 Iowa 381.

Maine.— Purrington *v.* Pierce, 41 Me. 529.

Missouri.— Collier *v.* Wheldon, 1 Mo. 1.

New York.— Van Name *v.* Van Name, 23 How. Pr. 247.

North Carolina.— Whithead *v.* Clinch, 5 N. C. 128.

Rhode Island.— McAleer *v.* Kavanch, (1900) 46 Atl. 1043.

See 17 Cent. Dig. tit. "Dower," § 190.

28. Simpson *v.* Ham, 78 Ill. 203; Purrington *v.* Pierce, 41 Me. 529; Kyle *v.* Kyle, 67 N. Y. 400.

29. Rackliff *v.* Look, 69 Me. 516.

30. Taylor *v.* Broderick, 1 Dana (Ky.) 345.

31. Shoot *v.* Galbreath, 128 Ill. 214, 21 N. E. 217.

32. Park Dower 310; Coke Litt. 33*a*; Rowe *v.* Johnson, 19 Me. 146; Johnson *v.* Thomas, 2 Paige (N. Y.) 377; Curtis *v.* Curtis, 2 Bro. Ch. 620.

Abatement of action for dower generally see *infra*, XI, L.

33. Park Dower 332; McLaughlin *v.* McLaughlin, 20 N. J. Eq. 190; Johnson *v.* Thomas, 2 Paige (N. Y.) 377; Dormer *v.* Fortescue, 3 Atk. 124, 26 Eng. Reprint 875; Curtis *v.* Curtis, 2 Bro. Ch. 620, 29 Eng. Reprint 342; Mohun *v.* Hamilton, 2 Bro. P. C. 239, 1 Eng. Reprint 916, 1 P. Wms. 118, 1 Salk. 158, 2 Vern. 652, 23 Eng. Reprint 1025.

34. *Kentucky.*— Marshall *v.* Anderson, 1 B. Mon. 198; Golden *v.* Maupin, 2 J. J. Marsh. 236; Kendall *v.* Honey, 5 T. B. Mon. 282.

Maryland.— Price *v.* Hobbs, 47 Md. 359.

New Jersey.— Sheppard *v.* Wardell, 1 N. J. L. 452; Fisher *v.* Morgan, 1 N. J. L. 125.

Pennsylvania.— Ganuon *v.* Widman, 3 Pa. Dist. 835, 15 Pa. Co. Ct. 474.

Virginia.— Thomas *v.* Gammel, 6 Leigh 9.

United States.— Alexander *v.* Selden, 1 Fed. Cas. No. 173, 4 Cranch C. C. 96.

See 17 Cent. Dig. tit. "Dower," § 189 *et seq.*

35. Marshall *v.* Anderson, 1 B. Mon. (Ky.) 198; Golden *v.* Maupin, 2 J. J. Marsh. (Ky.) 236; Kendall *v.* Honey, 5 T. B. Mon. (Ky.) 282; Gannon *v.* Widman, 3 Pa. Dist. 835, 15 Pa. Co. Ct. 474.

jurisdictions damages may be recovered against the husband's grantee, from the time of a demand and refusal to assign dower.[36]

5. Measure of Damages. The determination of damages for the detention of dower will depend upon the statutory rule existing in the jurisdiction where the recovery is sought. The amount of damages will depend upon the rental or yearly value of the lands to which the widow's dower has attached, the widow being allowed her proportionate interest therein.[37] In assessing such damages the widow's proportion of the taxes assessed on the lands for the period of detention should be deducted.[38]

6. Period For Which Allowed — a. Under the Statute of Merton. Under the statute of Merton damages are given from the death of the husband to the day on which the widow recovers seizin by judgment,[39] and this provision has been adopted in a number of the states.[40]

b. Other Statutory Provisions. Where recovery is sought from the heir computation is made under the statutes in many of the states from the death of the husband;[41] but as against the alienee of the husband damages can only be awarded from the time of making a demand for dower.[42] The commencement of a suit may be regarded as a demand.[43] Under the statutes in some jurisdic-

36. *Delaware.*— Layton *v.* Butler, 4 Harr. 507.

Illinois.— Nicoll *v.* Ogden, 29 Ill. 323, 81 Am. Dec. 311.

Iowa.—O'Ferrall *v.* Simplot, 4 Iowa 381.

Missouri.— McClanahan *v.* Porter, 10 Mo. 746.

New Jersey.—Hopper *v.* Hopper, 22 N. J. L. 715; Woodruff *v.* Brown, 17 N. J. L. 246; Chiswell *v.* Morris, 14 N. J. Eq. 101.

See 17 Cent. Dig. tit. "Dower," § 194. And see *infra*, IX, G, 6, b.

37. *Alabama.*—McAllister *v.* McAllister, 37 Ala. 484.

Illinois.— Strawn *v.* Strawn, 50 Ill. 256; Walsh *v.* Reis, 50 Ill. 477; Peyton *v.* Jeffries, 50 Ill. 143; Bonner *v.* Peterson, 44 Ill. 253.

Indiana.— Galbreath *v.* Gray, 20 Ind. 290.

Iowa.— O'Ferrall *v.* Simplot, 4 Iowa 381.

Kentucky.— McElroy *v.* Wathen, 3 B. Mon. 135.

Massachusetts.—Perry *v.* Goodwin, 6 Mass. 498.

Missouri.— Rannels *v.* Washington University, 96 Mo. 226, 9 S. W. 569; Griffin *v.* Regan, 79 Mo. 73; O'Flaherty *v.* Sutton, 49 Mo. 583; Thomas *v.* Mallinckrodt, 43 Mo. 58; McClanahan *v.* Porter, 10 Mo. 746.

North Carolina.— Brown *v.* Morrisey, 126 N. C. 772, 36 S. E. 284; Pinner *v.* Pinner, 44 N. C. 475; Spencer *v.* Weston, 18 N. C. 213; Frost *v.* Wetheredge, 12 N. C. 30.

Pennsylvania.— Winder *v.* Little, 1 Yeates 152.

Rhode Island.— Ellis *v.* Ellis, 4 R. I. 110.

See 17 Cent. Dig. tit. "Dower," § 193.

38. Walsh *v.* Reis, 50 Ill. 447; Strawn *v.* Strawn, 50 Ill. 256; Peyton *v.* Jeffries, 50 Ill. 143; Rannels *v.* Washington University, 96 Mo. 226, 9 S. W. 569; Griffin *v.* Reagan, 79 Mo. 73; O'Flaherty *v.* Sutton, 49 Mo. 583; Thomas *v.* Mallinckrodt, 43 Mo. 58; Brown *v.* Brown, 4 Rob. (N. Y.) 688, in which case, however, it was held, under the New York statute providing as a statute of limitations that the inquiry as to the damages should be limited to six years preceding the commencement of the action, that taxes paid by defendant prior to such six years cannot be deducted.

39. Statute of Merton see *supra*, IX, G, 1, note 23.

40. Layton *v.* Butler, 4 Harr. (Del.) 507; Jackson *v.* O'Donaghy, 7 Johns. (N. Y.) 247; Seaton *v.* Jamison, 7 Watts (Pa.) 533.

41. Beavers *v.* Smith, 11 Ala. 20; McClanahan *v.* Porter, 10 Mo. 746; Price *v.* Price, 54 Hun (N. Y.) 349, 7 N. Y. Suppl. 474.

42. *Alabama.*— Beavers *v.* Smith, 11 Ala. 20.

Delaware.— Green *v.* Tennant, 2 Harr. 336.

Illinois.— Bonner *v.* Peterson, 44 Ill. 253; Atkin *v.* Merrell, 39 Ill. 62; Rawson *v.* Corbett, 43 Ill. App. 127.

Iowa.— O'Ferrall *v.* Simplot, 4 Iowa 381.

Maryland.— Steiger *v.* Hillen, 5 Gill & J. 121.

Massachusetts.— Whitaker *v.* Greer, 129 Mass. 417; Harrington *v.* Conolly, 116 Mass. 69; Leavitt *v.* Lamprey, 13 Pick. 382, 23 Am. Dec. 685.

Missouri.— Rannels *v.* Washington University, 96 Mo. 226, 9 S. W. 569; McClanahan *v.* Porter, 10 Mo. 746.

New York.— Gorden *v.* Gorden, 80 N. Y. App. Div. 258, 80 N. Y. Suppl. 241; Price *v.* Price, 54 Hun 349, 7 N. Y. Suppl. 474; Hitchcock *v.* Harrington, 6 Johns. 290, 5 Am. Dec. 229.

North Carolina.— Brown *v.* Morisey, 126 N. C. 772, 36 S. E. 284; Spencer *v.* Weston, 18 N. C. 213.

Pennsylvania.— Winder *v.* Little, 1 Yeates 152.

Wisconsin.— Munger *v.* Perkins, 62 Wis. 499, 22 N. W. 511; Cowan *v.* Lindsay, 30 Wis. 586.

United States.— Nutt *v.* Mechanics' Bank, 18 Fed. Cas. No. 10,382, 4 Cranch C. C. 102.

See 17 Cent. Dig. tit. "Dower," § 194. And see *supra*, IX, G, 4.

43. Bonner *v.* Peterson, 44 Ill. 253; Atkin *v.* Merrell, 39 Ill. 62.

tions damages are recoverable against a purchaser who acquires title subsequent to such demand only from the time of his purchase, and a separate action may be maintained against the prior tenant to recover damages from the time of the demand to the time of his conveyance.[44] As against an alienee of an heir of the husband it is provided by statute in some states that the damages are to be computed from the time of the alienation, the heir being liable for the damages from the time of the husband's death until the alienation.[45]

c. Plea of Tout Temps Prist. Under the statute of Merton the husband's heir could plead *tout temps prist*, that is, allege that he was at all times ready to render dower if it had been demanded, and thus preclude the recovery of damages for detention from the time of the husband's death to the time of the commencement of the suit.[46] But the alienee of the heir could not plead such plea, because he had not the land from the time of the death of the husband and could not truthfully say that he had always been ready to assign the widow her dower.[47]

H. Rents, Mesne Profits, and Arrears — 1. In General. The principles already enunciated in respect to damages for detention of dower are to a certain extent applicable to the right of a widow to her proportionate share in the rents and mesne profits of her husband's estate after his death and before the assignment of her dower.[48]

2. Statutory Provisions. In many of the states the damages awarded to the wife are based upon the annual value of the mesne profits,[49] so that the right to damages for detention of dower and the right of the widow to her share of the rents and profits are both the subject of statutory regulation and controlled by the same provisions. And there are statutes in many jurisdictions expressly allowing to the widow her interest in the rents and profits of her husband's estate prior to the assignment of her dower.[50]

3. Jurisdiction of Courts. Irrespective of statutory provisions equity will intervene to secure to the widow her proportion of the mesne profits for the use and occupation of her husband's lands by the heir or terre-tenant,[51] although at common law there was no such remedy.[52] But in some jurisdictions it has been held that where dower has been assigned on a petition at law equity will not entertain a bill for mesne profits unless there exists some equitable circumstance

Failure to make a demand before commencing suit relieves defendant from liability to pay damages for detention up to the time the action was commenced. Cowan *v.* Lindsay, 30 Wis. 586.

44. Green *v.* Tennant, 2 Harr. (Del.) 336; Newbold *v.* Ridgeway, 1 Harr. (Del.) 55; Whitaker *v.* Greer, 129 Mass. 417.

45. See N. Y. Code Civ. Proc. § 1603. If the action is against the heirs as beneficiaries under a trust the damages are computed from the time of demand rather than the time of the husband's death. Gorden *v.* Gorden, 80 N. Y. App. Div. 258, 80 N. Y. Suppl. 241.

46. Coke Litt 32*b*; 4 Kent Comm. 464.

47. Coke Litt. 33*a*; Park Dower 305; 1 Roper Husb. & W. 445; Rankin *v.* Oliphant, 9 Mo. 239; Woodruff *v.* Brown, 17 N. J. L. 246; Sandback *v.* Quigley, 8 Watts (Pa.) 460.

48. See Waters *v.* Williams, 38 Ala. 680; Golden *v.* Maupin, 2 J. J. Marsh. (Ky.) 236, and other cases cited under the sections following.

49. See N. Y. Code Civ. Proc. § 1600.

50. See the statutes of the several states and the cases in the notes following.

51. *Alabama.*— Brooks *v.* Woods, 40 Ala. 538; Waters *v.* Williams, 38 Ala. 680; Slatter *v.* Meel, 35 Ala. 528. And see Boyd *v.* Hunter, 44 Ala. 705.

Maryland.— Marshall *v.* McPherson, 8 Gill & J. 333; Sellamn *v.* Bowen, 8 Gill & J. 50, 29 Am. Dec. 524.

Mississippi.— Harper *v.* Archer, 28 Miss. 212.

New York.— Johnson *v.* Thomas, 2 Paige 377.

North Carolina.— Campbell *v.* Murphy, 55 N. C. 357.

Pennsylvania.— Kelso's Appeal, 102 Pa. St. 7.

South Carolina.— Keith *v.* Trapier, Bailey Eq. 63.

Tennessee.— Thompson *v.* Stacy, 10 Yerg. 493.

England.— Curtis *v.* Curtis, 2 Bro. Ch. 620. See 17 Cent. Dig. tit. "Dower," § 180 *et seq.*

52. Waters *v.* Williams, 38 Ala. 680; Slatter *v.* Meek, 35 Ala. 528; Johnson *v.* Thomas, 2 Paige (N. Y.) 377; Curtis *v.* Curtis, 2 Bro. Ch. 620.

A dowress cannot maintain an action of assumpsit for use and occupation against a tenant from year to year for rents which accrued after the death of her husband, and before the assignment of her dower, although

calling for equitable relief,[53] although under a statute giving the widow absolutely one third of the rents and profits of her husband's dowable real estate from his death until dower is assigned, it has been held that such rents and profits may be recovered in an independent proceeding commenced a number of years after an allotment of dower.[54]

4. Right to Rents and Mesne Profits. The widow's right to her proportionate share of the rents and mesne profits of her husband's estate from his death until dower is assigned is not impaired by the existence of a vendor's lien.[55] The alienation of her right of dower pending suit for rents and profits is a bar to recovery;[56] but a judgment of a probate court allotting her lands in addition to dower cannot be pleaded in bar to such a suit as to the rents and profits accruing prior to the confirmation of such judgment.[57] And the fact that a widow has been put to her election between dower and a devise under her husband's will does not affect her right to an account of the mesne profits.[58]

5. Seizin at Death of Husband. Courts of equity, following the analogy as to damages under the statute of Merton,[59] will not entertain a bill for mesne profits where the husband did not die seized.[60] This rule has been modified in effect by statutes in many states so that such profits are recoverable as damages, although the lands in which dower is claimed had been aliened by the husband prior to his death.[61]

6. Period For Which Recoverable. In equity the rule seems to have been generally applied that the widow may recover of the heir or devisee mesne profits from the death of her husband until dower is assigned, although no demand was made previous to the commencement of the suit.[62] But where the husband had aliened his lands during coverture mesne profits can only be recovered by the widow against the alienee from the time of her demand for her

no damages were given to her when the dower was assigned. Andrews *v.* Andrews, 14 N. J. L. 141; Sutton *v.* Burrows, 6 N. C. 79; Thompson *v.* Stacy, 10 Yerg. (Tenn.) 493. *Compare* Marshall *v.* McPherson, 8 Gill & J. (Md.) 333.

53. Waters *v.* Williams, 38 Ala. 680; Whitehead *v.* Clinch, 3 N. C. 278; Thompson *v.* Stacy, 10 Yerg. (Tenn.) 493. *Contra*, Sellman *v.* Bowen, 8 Gill & J. (Md.) 50, 29 Am. Dec. 524; Bullock *v.* Griffin, 1 Strobh. Eq. (S. C.) 60. A plaintiff, having failed to recover the rents and profits of her estate in dower at law, is precluded from maintaining a bill in equity for them, the judgment at law having foreclosed plaintiff (Kiddall *v.* Trimble, 1 Md. Ch. 143); and where she consents to take dower without receiving her proportion of the rents and profits, she can never afterward recover them (Kiddall *v.* Trimble, 8 Gill (Md.) 207).

54. Magruder *v.* Smith, 79 Ky. 512.

55. Wilson *v.* Ewing, 79 Ky. 549.

56. Kiddall *v.* Trimble, 1 Md. Ch. 143.

57. Dyer *v.* Dyer, 17 R. I. 547, 23 Atl. 910.

58. Woodward *v.* Woodward, 2 Rich. Eq. (S. C.) 23.

59. See *supra*, IX, G, 1.

60. Park Dower 332; Hill *v.* Golden, 16 B. Mon. (Ky.) 551; Garton *v.* Bates, 4 B. Mon. (Ky.) 366; Johnson *v.* Thomas, 2 Paige (N. Y.) 377; Shirtz *v.* Shirtz, 5 Watts (Pa.) 255.

Recovery against alienee of husband.— At law the widow cannot recover mesne profits as damages; but in equity the established doctrine is to allow the widow mesne profits as against a purchaser from her husband during coverture; and this not by analogy to the allowance of damages under the statute of Merton, but on the ground of title. Beavers *v.* Smith, 11 Ala. 20, 32 [*citing* Curtis *v.* Curtis, 2 Bro. Ch. 620, 29 Eng. Reprint 342]. A daughter entitled under a covenant to stand seized for love and affection is not such a purchaser. Slatter *v.* Meek, 35 Ala. 523.

In Maryland mesne profits can be recovered from an alienee of the husband from the time of demand of dower. Price *v.* Hobbs, 47 Md. 359; Sellman *v.* Bowen, 8 Gill & J. 50, 29 Am. Dec. 524; Steiger *v.* Hillen, 5 Gill & J. 121.

61. Johnson *v.* Thomas, 2 Paige (N. Y.) 277. See *supra*, IX, G, 6, b.

In Kentucky the widow is entitled to rents against a purchaser from the husband from the time she commences her action. Ky. Gen. St. (1903) § 2139. See Yancy *v.* Smith, 2 Metc. 408.

62. *Alabama.*— Tillman *v.* Spann, 68 Ala. 102; Slatter *v.* Meek, 35 Ala. 528.

Maryland.— Chase's Case, 1 Bland 206, 17 Am. Dec. 277.

New York.— Johnson *v.* Thomas, 2 Paige 377; Russell *v.* Austin, 1 Paige 192; Hazen *v.* Thurber, 4 Johns. Ch. 604.

North Carolina.— Campbell *v.* Murphy, 55 N. C. 357.

South Carolina.— Stewart *v.* Pearson, 4 Rich. 4; Clark *v.* Tompkins, 1 Rich. 119; Woodward *v.* Woodward, 2 Rich. Eq. 23;

dower,[63] or from the time she commences her suit to recover dower.[64] There are also authorities to the effect that a widow can recover mesne profits against a purchaser from the heirs only from the time of his purchase.[65]

7. Portion Recoverable. The widow's proportionate share of the rents and profits of the dowable estate of her husband will be based upon the actual annual rental value of such estate for the period for which she is entitled thereto, and will not necessarily depend upon the amount received as rents.[66] The portion recoverable is in most jurisdictions expressly fixed by statute, in some instances being one third of the rents and profits accruing during the period prior to assignment,[67] or the rents and profits arising from one undivided third part of her husband's dowable estate.[68]

8. Right to Growing Crops. Before dower has been assigned the right to growing crops does not attach in favor of the widow,[69] except as otherwise expressly provided by statute.[70] If before assignment the widow receive the crops growing on her husband's lands at the time of his decease, she cannot retain one third on account of her right of dower in the lands, but is liable to the heir for their full value.[71]

9. Interest on Arrears. As a general rule interest will not be allowed on arrears of dower;[72] but circumstances may exist where interest may properly be

Mey *v.* Mey, Rich. Eq. Cas. 378; Keith *v.* Trapier, Bailey Eq. 63.

See 17 Cent. Dig. tit. "Dower," § 184.

63. *Alabama.*— Steele *v.* Brown, 70 Ala. 235; Irvine *v.* Armistead, 46 Ala. 363.

Florida.— Roan *v.* Holmes, 32 Fla. 295, 13 So. 339, 21 L. R. A. 180; May *v.* May, 7 Fla. 207, 68 Am. Dec. 431.

Illinois.— Kyle *v.* Wills, 166 Ill. 501, 46 N. E. 1121; Cravens *v.* Winzenberger, 97 Ill. App. 335.

Maine.— Sargent *v.* Roberts, 34 Me. 135.

Maryland.— Darnall *v.* Hill, 12 Gill & J. 388; Sellman *v.* Bowen, 8 Gill & J. 50, 29 Am. Dec. 524; Steiger *v.* Hillen, 5 Gill & J. 121; Goodburn *v.* Stevens, 1 Md. Ch. 420.

Virginia.— Tod *v.* Baylor, 4 Leigh 498.

Wisconsin.— Thrasher *v.* Tyack, 15 Wis. 256.

See 17 Cent. Dig. tit. "Dower," § 184.

64. Yancy *v.* Smitb, 2 Metc. (Ky.) 408; Tod *v.* Baylor, 4 Leigh (Va.) 498; Holmes *v.* Hopkins, 5 Ky. L. Rep. 242.

65. Newbold *v.* Ridgeway, 1 Harr. (Del.) 55; Dick *v.* Doughten, 1 Del. Ch. 320; Russell *v.* Austin, 1 Paige (N. Y.) 192.

66. Henderson *v.* Chaires, 35 Fla. 423, 17 So. 574; Darnall *v.* Hill, 12 Gill & J. (Md.) 388; Chase's Case, 1 Bland (Md.) 206, 17 Am. Dec. 277; Hazen *v.* Thurber, 4 Johns. Ch. (N. Y.) 604.

The determination of the rents and profits for arrears in dower rests on the same ground as the decreeing of an account for the rents and profits of real estate. Henderson *v.* Chaires, 35 Fla. 423, 17 So. 574; Keith *v.* Trapier, 1 Bailey Eq. (S. C.) 63.

Determination of rental value.— As a vendee of land subject to dower cannot substantially defeat the dower right by leasing the lands for a long term of years at a low rent, so, if he obtains a rent much beyond the real value of the land, the widow has no right to one third of this rent. Stoddart *v.* Marshall, 1 Disn. (Ohio) 527, 12 Ohio Dec. (Reprint) 775, 2 Wkly. L. Gaz. 27.

Mining royalty.— The widow is entitled to her proportionate share under the statute of royalties paid under mining leases executed by her husband from the time of his death. Hendrix *v.* McBeth, 61 Ind. 473, 28 Am. Rep. 680.

67. *Arkansas.*— Stull *v.* Graham, 60 Ark. 461, 31 S. W. 46.

Kentucky.— Lee *v.* Campbell, 1 S. W. 873, 8 Ky. L. Rep. 421; Willet *v.* Beatty, 12 B. Mon. 172; Hyzer *v.* Stoker, 3 B. Mon. 117. The widow is entitled to one-third the gross rents without any deduction for taxes, insurance, or repairs. Morton *v.* Morton, 66 S. W. 641, 23 Ky. L. Rep. 2079.

Ohio.— Ames *v.* Ames, 1 Cinc. Super. Ct. 559.

South Carolina.— Rickard *v.* Talbird, Rice Eq. 158.

Virginia.— Grayson *v.* Moncure, 1 Leigh 449.

Wisconsin.— Farnsworth *v.* Cole, 42 Wis. 403.

See 17 Cent. Dig. tit. "Dower," § 187.

68. Hazen *v.* Thurber, 4 Johns. Ch. (N. Y.) 604.

69. Cravens *v.* Winzenberger, 97 Ill. App. 335; Budd *v.* Hiler, 27 N. J. L. 43; Kain *v.* Fisher, 6 N. Y. 597.

70. Singleton *v.* Singleton, 5 Dana (Ky.) 87; *In re* Merchant, 39 N. J. Eq. 506; Engle *v.* Engle, 3 W. Va. 246.

71. Kain *v.* Fisher, 6 N. Y. 597.

72. Golden *v.* Maupin, 2 J. J. Marsh. (Ky.) 236; Grove *v.* Todd, 45 Md. 252; Goodburn *v.* Stevens, 1 Md. Ch. 420; Newman *v.* Auling, 3 Atk. 579, 26 Eng. Reprint 1134; Robinson *v.* Cumming, 2 Atk. 409, 26 Eng. Reprint 646; Lindsay *v.* Gibbon [*cited* in Tew *v.* Winterton, 3 Bro. C. C. 489, 495, 29 Eng. Reprint 660]; Wakefield *v.* Childs, 1 Fonbl. 22; Batten *v.* Earnley, 2 P. Wms. 163, 24 Eng. Reprint 683.

allowed as a substitute for mesne profits, as where the lands to which dower has attached are sold and the widow is given a gross sum in lieu of her dower.[73]

X. ASSIGNMENT OF DOWER.

A. Necessity and Effect of Assignment — 1. In General. As has already been noted a widow is entitled to have dower allotted to her immediately upon the death of her husband, and until such allotment is made she is not vested with an absolute title to any specific part of her husband's estate, nor can she enter upon or occupy any part of it.[74]

2. Necessity of Assignment. Before a deceased husband's lands are decreed to be sold for the payment of his debts his widow's dower in such lands should be assigned to her,[75] and partition should not be decreed in proceedings brought in behalf of the husband's heirs before an assignment,[76] unless the widow assents thereto.[77]

3. Effect of Assignment. Where dower has been in fact assigned to a widow by a party competent to assign it, such assignment is conclusive as against him and all claiming under him,[78] and against the widow herself, in the absence of fraud and undue influence;[79] and even if such assignment be made without due authority long acquiescence in it will bind the parties to it and their alienees,[80] including the widow, if she occupy the portion of the lands allotted to her, and there is no evidence of fraudulent imposition.[81] But an assignment of dower by judicial proceedings is not conclusive upon the widow if she be evicted by one having a better title.[82] If the assignment be voluntarily made by a competent person, and is duly accepted by the widow, she cannot have a new assignment because of eviction by paramount title. This is the doctrine of the English common law and has been recognized in this country.[83]

B. Assignment by Agreement of Parties — 1. Authority in General. On the widow's right to dower becoming fixed upon the death of the husband, the person whose duty it is to make the assignment may at once proceed to set apart to the widow her proportion of the estate without legal proceedings being instituted by either party.[84] The common law recognizes such an assign-

73. Johnson *v.* Moon, 82 Ga. 247, 10 S. E. 193 (holding that, although interest may be allowed, it will not be added where the decree computing the value of the widow's life-estate in one third of the proceeds realized by the sale of the husband's realty is silent as to interest); O'Ferrall *v.* Davis, 1 Iowa 560; Alexander *v.* Bradley, 3 Bush (Ky.) 667; Phinney *v.* Johnson, 15 S. C. 158; Clark *v.* Tompkins, 1 S. C. 119; Gordon *v.* Stevens, 2 Hill Eq. (S. C.) 429.

74. See *supra*, IX, B, 2.

75. Kilbreth *v.* Root, 33 W. Va. 600, 11 S. E. 21; Underwood *v.* Underwood, 22 W. Va. 303; Laidley *v.* Kline, 8 W. Va. 218.

76. Reynolds *v.* McCurry, 100 Ill. 356; Bonham *v.* Badgley, 7 Ill. 622; Phelps *v.* Stewart, 17 Md. 231.

77. Phelps *v.* Stewart, 17 Md. 231.

Where lands were held by the husband as tenant in common partition need not precede the setting aside of dower in such lands; the legal right of the widow to her dower therein being established, she may maintain proceedings in partition to have the lands divided so as to obtain her one-third part thereof, according to valuation. Ross *v.* Wilson, 58 Ga. 249.

78. Meserve *v.* Meserve, 19 N. H. 240.

79. Campbell *v.* Moore, 15 Ill. App. 129; McCormick *v.* Taylor, 2 Ind. 336; Jones *v.* Brewer, 1 Pick. (Mass.) 314.

80. Robinson *v.* Miller, 1 B. Mon. (Ky.) 88, 2 B. Mon. (Ky.) 284.

81. Johnson *v.* Neil, 4 Ala. 166.

Acquiescence in incomplete assignment.— Hickman *v.* Irvine, 3 Dana (Ky.) 121.

82. *Kentucky.*— Singleton *v.* Singleton, 5 Dana 87.

Maine.— French *v.* Peters, 33 Me. 396.

Maryland.— Mantz *v.* Buchanan, 1 Md. Ch. 202.

Massachusetts.— Scott *v.* Hancock, 13 Mass. 162.

Mississippi.— Holloman *v.* Holloman, 5 Sm. & M. 559.

See 17 Cent. Dig. tit. "Dower," § 224.

83. Coke Litt. 35*a*; French *v.* Pratt, 27 Me. 381; Jones *v.* Brewer, 1 Pick. (Mass.) 314.

Subsequent discovery of dowable lands.— Milton *v.* Milton, 14 Fla. 369; Fuller *v.* Rust, 153 Mass. 46, 26 N. E. 410.

84. *Arkansas.*— Hill *v.* Mitchell, 5 Ark. 608.

Connecticut.— Crocker *v.* Fox, 1 Root 227.

Illinois.— Lenfers *v.* Henke, 73 Ill. 405, 24 Am. Rep. 263.

ment,[85] and it is expressly authorized by statute in many of the states.[86] In many jurisdictions it is provided by statute that an assignment by the tenant is not binding upon the widow unless it is accepted by her, and in New Hampshire this rule is applied by the courts.[87]

2. Assignment by Parol. Dower may be assigned by parol,[88] since as the widow is entitled of common right nothing is required but to ascertain her dower, and when this is done and she has entered the freehold vests in her without livery of seizin or writing.[89]

3. Who May Make Assignment — a. Tenant of Freehold. The general rule is that no one is legally competent to assign dower unless he has an estate of freehold,[90] such as an heir, devisee, or grantee of the husband, or one who is in privity of title with him;[91] although we find this rule modified by statute, authorizing an assignment by a tenant in possession under a lease for a term of years,[92] or permitting an agreement by the widow with her husband's creditors to accept a portion of her husband's real estate to be assigned to her for her life or of his personal estate to be hers absolutely in lieu of dower.[93] But it is not essential that the tenant's title be valid. If one in wrongful possession as tenant of the freehold makes the assignment, as the rightful tenant ought to have done, it will be good and binding upon such tenant,[94] in the absence of fraud or collusion with the widow.[95]

b. Guardian. At common law an assignment of dower by a guardian in socage was invalid,[96] but it has been frequently held in this country that a guardian may make an assignment which will be binding upon his ward.[97]

Indiana.— Boyers *v.* Newbanks, 2 Ind. 388; McCormick *v.* Taylor, 2 Ind. 336.

Kentucky.— Robinson *v.* Miller, 2 B. Mon. 284; Mitchell *v.* Miller, 6 Dana 79; Stevens *v.* Stevens, 3 Dana 371.

Maine.— Chase *v.* Alley, 82 Me. 234, 19 Atl. 397; Austin *v.* Austin, 50 Me. 74, 79 Am. Dec. 597; Young *v.* Tarbell, 37 Me. 509; Baker *v.* Baker, 4 Me. 67.

Massachusetts.— Shattuck *v.* Gragg, 23 Pick. 88; Jones *v.* Brewer, 1 Pick. 314.

Missouri.— Orrick *v.* Robbins, 34 Mo. 226.

New Hampshire.— Clark *v.* Muzzey, 43 N. H. 59; Meserve *v.* Meserve, 19 N. H. 240; Pinkham *v.* Gear, 3 N. H. 163.

New Jersey.— Den *v.* Miller, 4 N. J. L. 321; McLaughlin *v.* McLaughlin, 20 N. J. Eq. 190.

New York.— Aikman *v.* Harsell, 98 N. Y. 186; Gibbs *v.* Esty, 22 Hun 266; Rutherford *v.* Graham, 4 Hun 796.

See 17 Cent. Dig. tit. "Dower," § 236 *et seq.*

85. 4 Kent Comm. 63; Park Dower 265, 266.

86. See the statutes in the several states, and the cases under the sections following.

87. Clark *v.* Muzzey, 43 N. H. 59; Johnson *v.* Morse, 2 N. H. 48.

88. *Alabama.*— Johnson *v.* Neil, 4 Ala. 166.

Illinois.— Lenfers *v.* Henke, 73 Ill. 405, 24 Am. Rep. 263.

Indiana.— Boyers *v.* Newbanks, 2 Ind. 388.

Maine.— Austin *v.* Austin, 50 Me. 74, 79 Am. Dec. 597; Curtis *v.* Hobart, 41 Me. 230; Luce *v.* Stubbs, 35 Me. 92.

Massachusetts.— Shattuck *v.* Gragg, 23 Pick. 88; Blood *v.* Blood, 23 Pick. 80; Jones *v.* Brewer, 1 Pick. 314; Conant *v.* Little, 1 Pick. 189.

Missouri.— Johns *v.* Fenton, 88 Mo. 64.

New Hampshire.— Meserve *v.* Meserve, 19 N. H. 240; Pinkham *v.* Gear, 3 N. H. 163; Johnson *v.* Morse, 2 N. H. 48.

New York.— Gibbs *v.* Esty, 22 Hun 266; Squire *v.* Harder, 1 Paige 494, 19 Am. Dec. 446.

See 17 Cent. Dig. tit. "Dower," § 237.

89. 2 Crabb Real Prop. § 1144; Lenfers *v.* Henke, 73 Ill. 405, 24 Am. Rep. 263; Boyers *v.* Newbanks, 2 Ind. 388.

90. 2 Scribner Dower 75; Park Dower 265. "The propositions are indeed conversible, that against whomsoever a writ of Dower will lie, that person is competent to make a valid assignment, or in other words, whoever is compellable by writ to assign Dower may do it without writ." Park Dower 265; Coke Litt. 34*b*, 35*a*.

91. Pearce *v.* Pearce, 184 Ill. 289, 56 N. E. 311; Lenfers *v.* Henke, 73 Ill. 405, 24 Am. Rep. 263; Hopper *v.* Hopper, 22 N. J. L. 715; Den *v.* Miller, 4 N. J. L. 321; Rutherford *v.* Graham, 4 Hun (N. Y.) 796; Little Miami R. Co. *v.* Jones, 2 Ohio Dec. (Reprint) 219, 5 Wkly. L. Gaz. 5.

92. See R. I. Gen. Laws (1896), c. 264, § 5.

93. See Vt. St. (1894) § 2539.

94. Tooker's Case, 2 Coke 66*b*; Coke Litt. 35*a*; Park Dower 266; 1 Roper Husb. & W. 389, 390.

95. Coke Litt. 35*a*.

96. Coke Litt. 35*a*; Park Dower 266; Perkins, § 404.

97. Boyers *v.* Newbanks, 2 Ind. 388; Robinson *v.* Miller, 1 B. Mon. (Ky.) 88, 2 B. Mon. (Ky.) 284; Young *v.* Tarbell, 37 Me. 509; Jones *v.* Brewer, 1 Pick. (Mass.) 314. *Contra*, Bonner *v.* Peterson, 44 Ill. 253; *In re* Guernsey, 21 Ill. 443.

c. Infant. An infant can assign dower at common law and the assignment will be held good, subject to be corrected, if excessive, by writ of admeasurement of dower.[98]

C. Assignment in Probate Courts Upon Administration — 1. In General. In many states concurrent jurisdiction in matters pertaining to the assignment of dower is conferred by statute on probate courts so that such assignment may be summarily made in connection with and as an incident of the administration of the deceased husband's estate.[99] A probate court may consider and pass upon a question of dower, where it becomes necessary in the adjustment or settlement of an executor's account.[1]

2. Jurisdiction — a. Control by Statute. The extent of the jurisdiction of a probate or other like court to admeasure and assign dower will be governed by the statute conferring such jurisdiction, and will consequently differ in the several states. It becomes difficult therefore to enunciate rules and principles of uniform application.[2] It may be stated, however, that no relief can be afforded or action taken which is not within the statute,[3] and the proceedings instituted must be in strict conformity therewith.[4]

98. 1 Greenleaf Cruise 195; McCormick *v.* Taylor, 2 Ind. 336; Young *v.* Tarbell, 37 Me. 509; Jones *v.* Brewer, 1 Pick. (Mass.) 314. *Contra*, Bonner *v.* Peterson, 44 Ill. 253.

Where some of the heirs are minors, and although there has been a partition, those who are of age may assign dower by deed, setting out metes and bounds. Den *v.* Miller, 4 N. J. L. 321.

99. See *infra*, X, C, 2.

1. Matter of Gorden, 68 N. Y. App. Div. 388, 74 N. Y. Suppl. 259 [*modified* in 172 N. Y. 25, 64 N. E. 753, 92 Am. St. Rep. 689].

2. As to the jurisdiction in the several states see the following cases:

Alabama.— Morgan *v.* Hendren, 102 Ala. 245, 14 So. 540; Humes *v.* Scruggs, 64 Ala. 40; Benagh *v.* Turrentine, 60 Ala. 557; Carswell *v.* Spencer, 44 Ala. 204; Snodgrass *v.* Clark, 44 Ala. 198; Thrasher *v.* Pinckard, 23 Ala. 616; Martin *v.* Martin, 22 Ala. 86; Nance *v.* Hooper, 11 Ala. 552; Barney *v.* Frowner, 9 Ala. 901; McLeod *v.* McDonnel, 6 Ala. 236.

Arkansas.— *Ex p.* Hilliard, 50 Ark. 34, 6 S. W. 326; Goodman *v.* Moore, 22 Ark. 191; Crabtree *v.* Crabtree, 5 Ark. 638.

Connecticut.— Hall *v.* Pierson, 63 Conn. 332, 28 Atl. 544; Hewitt's Appeal, 53 Conn. 24, 1 Atl. 815; Way *v.* Way, 42 Conn. 52.

Delaware.— Layton *v.* Butler, 4 Harr. 507; Farrow *v.* Farrow, 1 Del. Ch. 457.

Florida.— Milton *v.* Milton, 14 Fla. 369.

Indiana.—Spinning *v.* Rowland, 7 Blackf. 7.

Iowa.— Shawhan *v.* Loffer, 24 Iowa 217.

Kentucky.— Garris *v.* Garris, 7 B. Mon. 461; Murphey *v.* Murphey, 7 B. Mon. 232; Robinson *v.* Miller, 1 B. Mon. 88; Craig *v.* Barker, 4 Dana 600; Stevens *v.* Stevens, 3 Dana 371; Williams *v.* Williams, 1 J. J. Marsh. 105; Hawkins *v.* Page, 4 T. B. Mon. 136; Rintch *v.* Cunningham, 4 Bibb 462; Plummer *v.* Shannon, Ky. Dec. 241.

Maine.— Poor *v.* Larrabee, 58 Me. 543; Barton *v.* Hinds, 46 Me. 121; French *v.* Crosby, 23 Me. 276.

Massachusetts.— Draper *v.* Baker, 12 Cush. 288; Raynham *v.* Wilmarth, 13 Metc. 414; Tilson *v.* Thompson, 10 Pick. 359; Sheafe *v.* O'Neil, 9 Mass. 9.

Mississippi.— Jiggitts *v.* Jiggitts, 40 Miss. 718; Jiggitts *v.* Bennett, 31 Miss. 610; Bisland *v.* Hewett, 11 Sm. & M. 164; Ware *v.* Washington, 6 Sm. & M. 737; James *v.* Rowan, 6 Sm. & M. 393; Holloman *v.* Holloman, 5 Sm. & M. 559; Farmers', etc., Bank *v.* Tappan, 5 Sm. & M. 112; Randolph *v.* Doss, 3 How. 205.

Missouri.—Woerther *v.* Miller, 13 Mo. App. 567.

Nebraska.— Serry *v.* Curry, 26 Nebr. 353, 42 N. W. 97; Guthman *v.* Guthman, 18 Nebr. 98, 24 N. W. 435.

New Hampshire.— Fisk *v.* Eastman, 5 N. H. 240; Pinkham *v.* Gear, 3 N. H. 163.

New York.— Wood *v.* Seely, 32 N. Y. 105; Board *v.* Board, 4 Abb. Pr. 295; Parks *v.* Hardey, 4 Bradf. Surr. 15.

North Carolina.— Vance *v.* Vance, 118 N. C. 864, 24 S. E. 768; Parton *v.* Allison, 109 N. C. 674, 14 S. E. 107.

Pennsylvania.— Brown's Appeal, 84 Pa. St. 457; Neeld's Appeal, 70 Pa. St. 113; Shaffer *v.* Shaffer, 50 Pa. St. 394; Bradford *v.* Kent, 43 Pa. St. 474; Karstein *v.* Bauer, 4 Pennyp. 366; Evans *v.* Evans, 4 Pa. L. J. Rep. 478, 3 Pa. L. J. 231; Stilson *v.* Fought, 3 Luz. Leg. Obs. 118.

Rhode Island.— Eddy *v.* Moulton, 13 R. I. 105; Sayres *v.* Ormsbee, 11 R. I. 504; Gardner *v.* Gardner, 10 R. I. 211.

South Carolina.— Witte *v.* Clarke, 17 S. C. 313; Tibbetts *v.* Langley Mfg. Co., 12 S. C. 465; Stewart *v.* Blease, 4 S. C. 37.

Tennessee.— Rhea *v.* Meridith, 6 Lea 605; Spain *v.* Adams, 3 Tenn. Ch. 319.

Vermont.— Hathaway *v.* Hathaway, 46 Vt. 234; Danforth *v.* Smith, 23 Vt. 247; Kendrick *v.* Harris, 1 Aik. 273.

Virginia.— Fitzhugh *v.* Foote, 3 Call 13.

See 17 Cent. Dig. tit. "Dower," § 239 *et seq.*

3. Milton *v.* Milton, 14 Fla. 369, and other cases cited in the note preceding.

4. Thrasher *v.* Pinckard, 23 Ala. 616; Martin *v.* Martin, 22 Ala. 86; Goodman *v.* Moore,

b. Contested Assignment. Whether or not a probate court has jurisdiction to determine the right of a widow to dower when that right is contested by a stranger to the administration of the deceased husband's estate must depend upon the wording of the statute. Generally speaking such questions are not within the jurisdiction of the court.[5] And the court cannot entertain equitable defenses against an assignment of dower,[6] nor can a counter-claim against the widow be set up in proceedings brought therein for such assignment.[7]

c. Seizin of Husband. In such courts the seizin of the husband at the time of his death is generally held under the statute to be a requisite to the exercise of jurisdiction.[8] And where lands were mortgaged by the widow's husband, it has been held that the seizin of the husband was not such as to confer jurisdiction.[9]

3. Application. Under statutes authorizing an admeasurement of dower by a court of probate in connection with the administration of a decedent's estate, application for such admeasurement is usually required to be made by the widow or heirs, or someone having a legal interest in the lands.[10]

4. Necessity of Notice. The statutes authorizing the assignment of dower in connection with the administration of a decedent's estate as a rule provide for the giving of due notice to the persons interested in the decedent's estate. A compliance with this statutory requirement is essential to the validity of an assignment of dower by such courts.[11]

22 Ark. 191, and other cases cited in the second note preceding.

5. French *v.* Crosby, 23 Me. 276; Sheafe *v.* O'Neil, 9 Mass. 9; Jiggitts *v.* Jiggitts, 40 Miss. 718; Jiggitts *v.* Bennett, 31 Miss. 610; Ware *v.* Washington, 6 Sm. & M. (Miss.) 737; Holloman *v.* Holloman, 5 Sm. & M. (Miss.) 559. *Contra,* Randolph *v.* Doss, 3 How. (Miss.) 205. See also Barton *v.* Hinds, 46 Me. 121; Serry *v.* Curry, 26 Nebr. 353, 42 N. W. 97.

6. Gardner *v.* Gardner, 10 R. I. 211. See also Martin *v.* Martin, 22 Ala. 86.

7. Vance *v.* Vance, 118 N. C. 864, 24 S. E. 768.

8. *Alabama.*— Morgan *v.* Hendren, 102 Ala. 245, 14 So. 540; Benagh *v.* Turrentine, 60 Ala. 557; Snodgrass *v.* Clark, 44 Ala. 198; Thrasher *v.* Pinckard, 23 Ala. 616; Nance *v.* Hooper, 11 Ala. 552.

Maine.— French *v.* Crosby, 23 Me. 276.

Massachusetts.— Raynham *v.* Wilmarth, 13 Metc. 414; Sheafe *v.* O'Neil, 9 Mass. 9.

Mississippi.— Jiggitts *v.* Bennett, 31 Miss. 610; Bisland *v.* Hewett, 11 Sm. & M. 164; James *v.* Rowan, 6 Sm. & M. 393; Holloman *v.* Holloman, 5 Sm. & M. 559; Farmers', etc., Bank *v.* Tappan, 5 Sm. & M. 112.

New Hampshire.— Fisk *v.* Eastman, 5 N. H. 240; Pinkham *v.* Gear, 3 N. H. 163.

New York.— Wood *v.* Seely, 32 N. Y. 105; Parks *v.* Hardey, 4 Bradf. Surr. 15.

Rhode Island.— Eddy *v.* Moulton, 13 R. I. 105.

See 17 Cent. Dig. tit. "Dower," § 239 *et seq.*

9. Raynham *v.* Wilmarth, 13 Metc. (Mass.) 414; Pinkham *v.* Gear, 3 N. H. 163; Eddy *v.* Moulton, 13 R. I. 105.

In Pennsylvania provision is made by statute for the partition of descendants' estates by orphans' courts and such courts are authorized to allot dower therein. Pepper & L. Dig. 1682 (Act April 20, 1869). Under this statute the jurisdiction of the orphans' court is exclusive where the decedent died actually and solely seized of the lands out of which the widow claims dower. Stilson *v.* Fought, 3 Luz. Leg. Obs. 118. See also as to the jurisdiction of this court Brown's Appeal, 84 Pa. St. 457; Neeld's Appeal, 70 Pa. St. 113; Gourley *v.* Kinley, 66 Pa. St. 270; Shaffer *v.* Shaffer, 50 Pa. St. 394; Bradford *v.* Kent, 43 Pa. St. 479, holding that the orphans' court has no power to assign to a widow common-law dower in any case, jurisdiction over such actions belongs exclusively to the common-law courts.

10. Shelton *v.* Carrol, 16 Ala. 148; Greathead's Appeal, 42 Conn. 374; Stevens *v.* Stevens, 2 Dana (Ky.) 428; Shield *v.* Batts, 5 J. J. Marsh. (Ky.) 12, holding that administrators have no authority to apply for the assignment of dower.

11. *Alabama.*— Green *v.* Green, 7 Port. 19.

Georgia.— Langford *v.* Langford, 82 Ga. 202, 8 S. E. 76; Rogers *v.* Hoskins, 14 Ga. 166.

Michigan.— King *v.* Merritt, 67 Mich. 194, 34 N. W. 689.

Mississippi.— Muirhead *v.* Muirhead, 23 Miss. 97; Farmers', etc., Bank *v.* Tappan, 5 Sm. & M. 112.

Nebraska.— Serry *v.* Curry, 26 Nebr. 353, 42 N. W. 97.

New Jersey.— Hess *v.* Cole, 23 N. J. L. 116; Pierson *v.* Hitchner, 25 N. J. Eq. 129.

New York.— Board *v.* Board, 4 Abb. Pr. 295; Ward *v.* Kilts, 12 Wend. 137; *In re* Cooper, 15 Johns. 533; *In re* Watkins, 9 Johns. 245; Rathbun *v.* Miller, 6 Johns. 281.

Tennessee.— Rutherford *v.* Richardson, 1 Sneed 609.

See 17 Cent. Dig. tit. "Dower," § 245.

To whom notice should be given.— Notice should be given to each of the executors (Green *v.* Green, 7 Port. (Ala.) 19; Rogers *v.* Hoskins, 14 Ga. 166); but it need not be

5. Effect of Decree. An order or decree assigning dower is conclusive of the existence of the statutory requisites of dower,[12] and will bind all parties who were duly notified of the proceedings and who did not object thereto or appeal therefrom.[13]

XI. Recovery of Dower.

A. Demand For Assignment — 1. Necessity. At common law both in England and in this country a demand of dower is not necessary to the maintenance of an action for its recovery,[14] although the failure to make such demand prevents recovery of damages for the detention of dower, upon a plea of *tout temps prist*.[15] The rule, however, that demand is not necessary has been modified by statute in some jurisdictions, so that a demand of a tenant of the freehold is a condition precedent to the maintenance of an action against him.[16]

2. Sufficiency. Where a demand for dower is required by statute, but no particular form is required, the form thereof is generally immaterial. It may be either in writing or by parol,[17] and in any form sufficient to apprise the tenant with reasonable certainty of the claim that is made upon him.[18] It is not defective, unless otherwise required by statute, because it fails to correctly state the legal measure of the dower to be assigned.[19] The demand, however, should

given to a temporary administrator having no authority over the real property (Langford *v.* Langford, 82 Ga. 202, 8 S. E. 76). Where the statute requires notice to the "person or persons interested" the husband of the dowress is a person interested. Hess *v.* Cole, 23 N. J. L. 116. Notice should be given to the minor children individually in case no guardian has been appointed. Pierson *v.* Hitchner, 25 N. J. Eq. 129; Rutherford *v.* Richardson, 1 Sneed (Tenn.) 609. Where a statute requires notice to the owners claiming a freehold estate in the land, a tenant for years would not be entitled to such notice. Ward *v.* Kilts, 12 Wend. (N. Y.) 137.

Sufficiency of service.— The assignment is not affected by a failure to record in the proceedings the fact that notice was individually given to the heirs, if such service be shown to have been in effect made. Shawhan *v.* Loffer, 24 Iowa 217. The probate judge may determine as to the sufficiency of the notice under a statute providing that the notice may be given "in such manner as the judge of probate shall direct." Serry *v.* Curry, 26 Nebr. 353, 42 N. W. 97. Where all the persons interested in the estate reside in the state, notice by publication is a nullity. Pierson *v.* Hitchner, 25 N. J. Eq. 129. The admission of service by the general guardian of minor heirs will bind such heirs. Board *v.* Board, 4 Abb. Pr. (N. Y.) 295.

12. Hall *v.* Pierson, 63 Conn. 332, 28 Atl. 544.

13. Robinson *v.* Miller, 1 B. Mon. (Ky.) 88; Poor *v.* Larrabee, 58 Me. 543; Bent *v.* Weeks, 44 Me. 45; Draper *v.* Baker, 12 Cush. (Mass.) 288.

A record in the probate court of an assignment of dower, in the absence of positive proof, is presumptive evidence that the assignment was made upon the application and with the assent of the widow. Tilson *v.* Thompson, 10 Pick. (Mass.) 359.

14. Hopper *v.* Hopper, 22 N. J. L. 715; Chiswell *v.* Morris, 14 N. J. Eq. 101; Ellicott *v.* Mosier, 7 N. Y. 201; Jackson *v.* Churchill, 7 Cow. (N. Y.) 287, 17 Am. Dec. 514; Hitchcock *v.* Harrington, 6 Johns. (N. Y.) 290, 5 Am. Dec. 229; Cowan *v.* Lindsay, 30 Wis. 586.

15. Hopper *v.* Hopper, 22 N. J. L. 715; Chiswell *v.* Morris, 14 N. J. Eq. 101; Cowan *v.* Lindsay, 30 Wis. 586. See *supra*, IX, G, 6, c.

16. Merrill *v.* Shattuck, 55 Me. 370; Ford *v.* Erskine, 45 Me. 484; Luce *v.* Stubbs, 35 Me. 92; Page *v.* Page, 6 Cush. (Mass.) 196; Davis *v.* Walker, 42 N. H. 482; Haynes *v.* Powers, 22 N. H. 590.

Infants.— Demand for dower upon infants was held to be unnecessary under the Indiana statute of 1847. McCormick *v.* Taylor, 2 Ind. 336.

17. Strawn *v.* Strawn, 50 Ill. 256; Lothrop *v.* Foster, 51 Me. 367; Curtis *v.* Hobart, 41 Me. 230; Luce *v.* Stubbs, 35 Me. 92; Baker *v.* Baker, 4 Me. 67; Page *v.* Page, 6 Cush. (Mass.) 196; Watson *v.* Watson, 10 C. B. 3, 20 L. J. C. P. 25, 70 E. C. L. 2.

18. Davis *v.* Walker, 42 N. H. 482. A general demand of dower is sufficient to support the action. Luce *v.* Stubbs, 35 Me. 95; Newton *v.* Cook, 4 Gray (Mass.) 46. It is not sufficient, however, to show that negotiations have been entered into and conducted by the parties on the subject of dower, so long as such negotiations did not reach a conclusion. Merrill *v.* Shattuck, 55 Me. 370. Where a statute does not require that the dower be set off within a certain period of time, it is not a fatal defect for the demand to specify a certain time within which it shall be set off, as the requirement may be treated as surplusage. Stevens *v.* Reed, 37 N. H. 49.

19. Davis *v.* Walker, 42 N. H. 482; Matthews *v.* Duryee, 3 Abb. Dec. (N. Y.) 220, 4 Keyes (N. Y.) 525. A demandant in dower

designate the premises in which dower is claimed with reasonable certainty, so as to give notice as to the lands which are to be affected.[20]

3. By Whom and on Whom. A demand of dower may be made by an agent authorized thereto by parol.[21] It must be made according to the statute in some jurisdictions upon the person seized of the freehold, if within the state, otherwise on the tenant in possession.[22] Usually where land is held by a foreign corporation a demand upon the tenant in possession is sufficient.[23] It has been held that where there is more than one person seized of the freehold, a personal demand must be made on each of them.[24] A demand of dower made upon two persons who own in severalty the land described, and which embraces the entire tract, will not support an action against either for dower in his part of the land.[25] A demand of dower in land owned by minor children, made of them and of their guardian, is held sufficient in some jurisdictions,[26] but not in others.[27]

4. At What Place. Unless otherwise provided by statute, the demand of dower on the person seized of the freehold or on the tenant in possession need not be made on the land.[28]

B. Form and Nature of Remedies — 1. In General. If a valid and effectual assignment of dower has not been made voluntarily by the heir or tenant of the dowable estate,[29] or the widow has not been allotted her dower in the probate court upon the administration of her husband's estate,[30] she may proceed at law or in equity to recover her dower.[31]

2. Forms of Remedy — a. In General. In addition to the assignment by summary process in a court of probate as an incident of the administration of the husband's estate, dower in some jurisdictions may be recovered by the common-law action of dower, while in others there is substituted for the common-law writ an action of ejectment against the tenant of the lands in which dower is claimed, and in still others courts of equity possess to a certain extent concurrent or auxiliary jurisdiction with courts of law as to dower.[32]

b. Common-Law Action of Dower. At common law if dower be not assigned within the period of quarantine by the heir or devisee or other person seized of the lands subject to dower, the widow had her action at law by writ of dower *unde nihil habet* or by writ of right of dower against the tenant of the freehold,[33] upon which, if the demandant obtained judgment, dower was assigned by the sheriff, and she then proceeded to recover possession by ejectment.[34] The writ of dower *unde nihil habet* is the writ uniformly adopted where the common-law action of dower is in use,[35] and is available in every case except where the widow

is entitled to recover according to her title, although in her demand on the tenant to have dower assigned she claimed dower in the whole premises, when entitled to dower in a moiety only. Hamblin *v.* Bank of Cumberland, 19 Me. 66.

20. Baker *v.* Baker, 4 Me. 67; Sloan *v.* Whitman, 5 Cush. (Mass.) 532; Atwood *v.* Atwood, 22 Pick. (Mass.) 283; Haynes *v.* Powers, 22 N. H. 590; Fulton *v.* Fulton, 19 N. H. 168.

Reference to deed.— Ford *v.* Erskine, 45 Me. 484.

21. Lothrop *v.* Foster, 51 Me. 367; Luce *v.* Stubbs, 35 Me. 92; Baker *v.* Baker, 4 Me. 67.

22. Hunt *v.* Hotchkiss, 64 Me. 241; Luce *v.* Stubbs, 35 Me. 92. See Barker *v.* Blake, 36 Me. 433; Parker *v.* Murphy, 12 Mass. 485; Ellis *v.* Ellis, 4 R. I. 110.

23. Stevens *v.* Rollingsford Sav. Bank, 70 Me. 180.

24. Burbank *v.* Day, 12 Metc. (Mass.) 557.

Compare, however, Williams *v.* Williams, 78 Me. 82, 2 Atl. 884.

25. Pond *v.* Johnson, 9 Gray (Mass.) 193.

26. Young *v.* Tarbell, 37 Me. 509.

27. Strawn *v.* Strawn, 50 Ill. 256; Bonner *v.* Peterson, 44 Ill. 253. Under an Indiana statute demand of dower upon infants was held unnecessary. McCormick *v.* Taylor, 2 Ind. 336.

28. Luce *v.* Stubbs, 35 Me. 92; Baker *v.* Baker, 4 Me. 67.

Demand left at dwelling-house of tenant.— Luce *v.* Stubbs, 35 Me. 92; Burbank *v.* Day, 12 Metc. (Mass.) 557.

29. See *supra*, X, B.

30. See *supra*, X, C.

31. Brooks *v.* Woods, 40 Ala. 538; Palmer *v.* Casperson, 17 N. J. Eq. 204, and other cases in the notes following.

32. See *infra*, XI, B, 2, b *et seq.*

33. 4 Kent Comm. 63.

34. Park Dower 283.

35. 4 Kent Comm. 63; Park Dower 283.

has received part of her dower of the tenant of the lands sought to be charged.[36] These common-law writs of dower have been abolished in England,[37] and although the substance of the common-law action is found in the statutes of many of the states in this country, its form has been materially modified, and in many of them an entirely different proceeding has been substituted.[38]

c. Action of Ejectment. Ordinarily ejectment will only lie on behalf of the widow where her dower has been assigned;[39] but in some jurisdictions provision is expressly made for the recovery of dower by an action of ejectment.[40]

d. Partition Proceedings. As a general rule dower cannot be assigned in partition proceedings;[41] but under the Pennsylvania statute the orphans' courts of the several counties of the state are authorized to entertain proceedings for the partition of a deceased husband's estate and to decree therein the allotment of dower.[42] It is also provided by statute in other states that dower may be assigned in partition proceedings.[43]

e. Statutory Action For Recovery of Real Property. Statutes authorizing actions for the recovery of real property sometimes expressly recognize the right to recover unassigned dower. Such remedy is in addition to other remedies at law and in equity.[44] For the purpose of determining the nature of the action a widow's unassigned dower is deemed real property.[45]

f. Proceedings in Equity. Courts of equity and courts of law exercise a concurrent jurisdiction in the assignment of dower. This doctrine generally prevails in England, and is recognized in many jurisdictions in this country.[46] And where

36. Coke Litt. § 36; Park Dower 283.

37. Com. L. Proc. Act (1860), § 26. Since the English Judicature Act claims for dower are brought by action in the high court of justice in the ordinary form. Williams Real Prop. (17th Am. ed.) 372.

38. See *infra*, XI, B, 3.

39. Borst *v.* Griffin, 9 Wend. (N. Y.) 307; Davis *v.* Brown, 2 Ohio Dec. (Reprint) 644, 4 West. L. Month. 272; Gourley *v.* Kinley, 66 Pa. St. 270; Thomas *v.* Simpson, 3 Pa. St. 60; Bratton *v.* Mitchell, 7 Watts (Pa.) 113; Galbraith *v.* Green, 13 Serg. & R. (Pa.) 85; Pringle *v.* Gaw, 5 Serg. & R. (Pa.) 536.

40. *Michigan.*— Galbraith *v.* Fleming, 60 Mich. 408, 27 N. W. 583; Proctor *v.* Bigelow, 38 Mich. 282. And see Bemis *v.* Conley, 49 Mich. 393, 13 N. W. 789; Gustin *v.* Burnham, 34 Mich. 511.

Mississippi.— Pickens *v.* Wilson, 13 Sm. & M. 691.

New York.— Ellicott *v.* Mosier, 11 Barb. 574 [*affirmed* in 7 N. Y. 201]; Shaver *v.* McGraw, 12 Wend. 558; Yates *v.* Paddock, 10 Wend. 528; Borst *v.* Griffin, 9 Wend. 307.

Ohio.— Davis *v.* Brown, 2 Ohio Dec. (Reprint) 644, 4 West. L. Month. 272.

Pennsylvania.— Gourley *v.* Kinley, 66 Pa. St. 270; Bratton *v.* Mitchell, 7 Watts 113.

See 17 Cent. Dig. tit. "Dower," § 248; and, generally, EJECTMENT.

41. Liederkranz Soc. *v.* Beck, 8 Bush (Ky.) 597; Tanner *v.* Niles, 1 Barb. (N. Y.) 560; Coles *v.* Coles, 15 Johns. (N. Y.) 319. But where under a statute the widow of an intestate is seized of an undivided half of his real estate for life as tenant in common with his heirs, she may bring a petition for partition. Sears *v.* Sears, 121 Mass. 267.

42. See Rodney *v.* Washington, 16 Wkly. Notes Cas. (Pa.) 226. *Compare* prior to this statute Brown *v.* Adams, 2 Whart. (Pa.) 188.

43. Under the Missouri statute partition is a proper proceeding in which to assign dower, and the rights of all parties in interest can be adjusted therein. Weatherford *v.* King, 119 Mo. 51, 24 S. W. 772; Colvin *v.* Hanenstein, 110 Mo. 575, 19 S. W. 948. See, generally, PARTITION.

44. Rice *v.* Nelson, 27 Iowa 148; O'Ferrall *v.* Simplot, 4 Iowa 381.

45. Anderson *v.* Sterritt, 79 Ky. 499, 3 Ky. L. Rep. 277.

46. *Alabama.*— Wood *v.* Morgan, 56 Ala. 397; Brooks *v.* Woods, 40 Ala. 538; Owen *v.* Slatter, 26 Ala. 547, 62 Am. Dec. 745; Shelton *v.* Carrol, 16 Ala. 148; Gillespie *v.* Somerville, 3 Stew. & P. 447.

Arkansas.— *Ex p.* Hilliard, 50 Ark. 34, 6 S. W. 326; Jones *v.* Jones, 28 Ark. 19; Menifee *v.* Menifee, 8 Ark. 9.

Illinois.— Blain *v.* Harrison, 11 Ill. 384.

Iowa.— Rice *v.* Nelson, 27 Iowa 148; Phares *v.* Walters, 6 Iowa 106; Gano *v.* Gilruth, 4 Greene 453.

Maryland.— Price *v.* Hobbs, 47 Md. 359; Naill *v.* Maurer, 25 Md. 532; Wells *v.* Beall, 2 Gill & J. 468; Kiddall *v.* Trimble, 1 Md. Ch. 143.

Missouri.— Devorse *v.* Snider, 60 Mo. 235.

New Jersey.—Palmer *v.* Casperson, 17 N. J. Eq. 204; Hartshorne *v.* Hartshorne, 2 N. J. Eq. 349.

New York.— Badgley *v.* Bruce, 4 Paige 98; Swaine *v.* Perine, 5 Johns. Ch. 482, 9 Am. Dec. 318; Hazen *v.* Thurber, 4 Johns. Ch. 604.

North Carolina.—Efland *v.* Efland, 96 N. C. 488, 1 S. E. 858; Campbell *v.* Murphy, 55 N. C. 357.

Oregon.— Baer *v.* Ballingall, 37 Oreg. 422, 61 Pac. 852.

the jurisdiction of a court of equity has once attached, and a decree has been entered assigning dower, a probate court cannot order the lands assigned to be sold with the other lands of the deceased husband for the payment of his debts.[47] If the estate in which dower is claimed is one recognized in equity alone, the assignment of dower therein is within the exclusive jurisdiction of equity.[48] Equity in exercising its jurisdiction as to the assignment of dower will treat it as a strictly legal right, and will be governed by the same rules as are courts of law.[49]

3. SPECIAL STATUTORY PROVISIONS. The statutes of the several states contain varying provisions prescribing the forms of actions and proceedings available for the assignment of a widow's dower.[50] These statutes do not generally deprive courts of equity of their long established jurisdiction in assigning dower.[51]

C. Defenses — 1. PURCHASE IN GOOD FAITH. If the widow's title to dower in land is established such title cannot be impaired by the fact that defendant purchased such land without notice of the claim for a valuable consideration.[52] This rule is now well established in this country, although doubt has been expressed as to whether equity ought not to interfere in favor of such purchaser, especially where the widow seeks equitable relief in asserting her claim.[53]

2. EQUITABLE DEFENSES. Where a widow's claim for dower is not founded upon a legal right, cognizant in a court of law, and she applies for equitable relief, the general rule is that defendant may avail himself of an equitable defense existing in his favor.[54]

3. DENIAL OF EXISTENCE OF DOWER RIGHT — a. In General. If one's lands are purchased subject to an inchoate right of dower in the grantor's wife a purchaser cannot deny the existence of such dower right, especially where he has paid less than its fair value by reason of such claim.[55] The fact that a partition suit has

Vermont.— Danforth *v.* Smith, 23 Vt. 247.
Virginia.— Blunt *v.* Gee, 5 Call 481.
United States.— Herbert *v.* Wren, 7 Cranch 370, 3 L. ed. 374.
See 17 Cent. Dig. tit. "Dower," § 258.

47. Lawrence *v.* Brown, 5 N. Y. 394.

48. *Alabama.*— Sheppard *v.* Sheppard, 87 Ala. 560, 6 So. 275.
Kentucky.— Hawkins *v.* Page, 4 T. B. Mon. 136.
Maine.— Lovejoy *v.* Vose, 73 Me. 46, holding that when one is entitled to dower in an equity of redemption, and the mortgage has not been redeemed, the remedy to enforce the claim of dower is in equity only.
Massachusetts.— Gibson *v.* Crehore, 3 Pick. 475.
New York.—Van Dyne *v.* Thayre, 19 Wend. 162.
See 17 Cent. Dig. tit. "Dower," §§ 258, 259.

49. Blaine *v.* Harrison, 11 Ill. 384; O'Brien *v.* Elliot, 15 Me. 125, 32 Am. Dec. 137; Mayburry *v.* Brien, 15 Pet. (U. S.) 21, 10 L. ed. 646.

50. See the statutes in the several states, and the following cases:
Alabama.— Martin *v.* Martin, 22 Ala. 86.
Florida.— Henderson *v.* Chaires, 25 Fla. 26, 6 So. 164.
Iowa.— Rice *v.* Nelson, 27 Iowa 148.
North Carolina.— Tate *v.* Powe, 64 N. C. 644.
Oregon.— Baer *v.* Ballingall, 37 Oreg. 422, 61 Pac. 852.
Pennsylvania.— Diefenderfer *v.* Eshleman, 113 Pa. St. 305, 6 Atl. 568.
And see the cases cited *supra*, X, C, 2.

51. *Alabama.*— Wood *v.* Morgan, 56 Ala. 397; Owen *v.* Slatter, 26 Ala. 547, 62 Am. Dec. 745; Gillespie *v.* Somerville, 3 Stew. & P. 447.
Arkansas.— Jones *v.* Jones, 28 Ark. 19; Menifee *v.* Menifee, 8 Ark. 9.
Iowa.— Thomas *v.* Thomas, 73 Iowa 657, 35 N. W. 693.
North Carolina.—Efland *v.* Efland, 96 N. C. 488, 1 S. E. 858; Campbell *v.* Murphy, 55 N. C. 357.
Oregon.— Baer *v.* Ballingall, 37 Oreg. 422, 61 Pac. 852.
See 17 Cent. Dig. tit. "Dower," § 258; and the cases cited *supra*, XI, B, 2, f.

52. *Delaware.*— Ridgeway *v.* Newbold, 1 Harr. 385.
Georgia.— Chapman *v.* Schroeder, 10 Ga. 321.
Indiana.— Law *v.* Long, 41 Ind. 586.
Iowa.— Cruize *v.* Billmire, 69 Iowa 397, 28 N. W. 657; Gano *v.* Gilruth, 4 Greene 453.
Maryland.— Mitchell *v.* Farrish, 69 Md. 235, 14 Atl. 712.
North Carolina.— Campbell *v.* Murphy, 55 N. C. 357.
South Carolina.— Sondley *v.* Caldwell, 28 S. C. 580, 6 S. E. 818.
See 17 Cent. Dig. tit. "Dower," § 253.

53. Blain *v.* Harrison, 11 Ill. 384; Snelgrove *v.* Snelgrove, 4 Desauss. (S. C.) 274.

54. Larrowe *v.* Beam, 10 Ohio 498; Snelgrove *v.* Snelgrove, 4 Desauss. (S. C.) 274; Bullock *v.* Griffin, 1 Strobh. Eq. (S. C.) 60. See *supra*, XI, C, 1, note 53.

55. Pepper *v.* Thomas, 85 Ky. 539, 4 S. W. 297, 9 Ky. L. Rep. 122.

been commenced for the partition of the land in which dower is claimed, to which suit the widow is a party, is no defense;[56] nor is an outstanding title purchased after the commencement of the action,[57] or a release of dower by the widow to a stranger.[58] The sufficiency of the husband's estate to satisfy the widow's claim is not a defense to an action against her husband's grantee.[59]

b. Denial of Seizin or Title. According to the weight of authority the heirs or devisees of the deceased husband or those claiming under them cannot set up want of seizin of the husband as a defense to a widow's claim of dower.[60] It is also a well established doctrine in most states that a tenant in possession of the lands in which dower is claimed under a title by conveyance from the husband is estopped from denying the validity of the husband's title.[61] But it has been held that this rule does not apply where the husband's grantee is in possession under a different and paramount title; so that where the tenant holds under a quitclaim deed from the husband obtained by him to protect a superior title under which he already holds, he is not precluded from showing that the husband was not seized of such an estate as to entitle his widow to dower.[62] A grantee acquiring a leasehold rather than a freehold estate by conveyance from the widow's husband may set up the nature of such estate to preclude her recovery of dower therein.[63]

4. Set-Off and Counter-Claim. The owner of lands in which dower is claimed cannot set up by way of counter-claim the payment of encumbrances subject to which the lands were sold to him by the husband;[64] nor can the rents and profits received by the widow subsequent to the husband's death be set off against the widow's claim;[65] nor can an administrator set off against arrearages of dower due

56. *In re* Sipperly, 44 Barb. (N. Y.) 370; Egan *v.* Walsh, 43 N. Y. Super. Ct. 402; Bradshaw *v.* Callaghan, 5 Johns. (N. Y.) 80.

57. Manning *v.* Laborre, 33 Me. 343.

58. Pixley *v.* Bennet, 11 Mass. 298.

Release of dower to a stranger to the title see *supra*, VIII, D, 17, h, (1).

59. Richardson *v.* Harms, 11 Misc. (N. Y.) 254, 32 N. Y. Suppl. 808.

Personal estate greater than the value of the dower.— It is no objection to a claim of dower that the claimant has sold or removed the whole of the personal estate of her husband of greater amount than the value of the dower. A remedy for such wrongful act cannot be thus obtained by the administrator or by the creditors. Caruthers *v.* Wilson, 1 Sm. & M. (Miss.) 527.

60. Griffith *v.* Griffith, 5 Harr. (Del.) 5; Brown *v.* Pitney, 39 Ill. 468; Montgomery *v.* Bruere, 4 N. J. L. 260; Hitchcock *v.* Carpenter, 9 Johns. (N. Y.) 444; Collins *v.* Torry, 7 Johns. (N. Y.) 278, 5 Am. Dec. 273; Hitchcock *v.* Harrington, 6 Johns. (N. Y.) 290, 5 Am. Dec. 229.

See 17 Cent. Dig. tit. "Dower," § 254; and, generally, Estoppel.

61. *Alabama.*— Edmondson *v.* Montague, 14 Ala. 370.

Georgia.— Carter *v.* Hallahan, 61 Ga. 314.

Kentucky.— Fannessey *v.* Fannessey, 1 Ky. L. Rep. 328.

Maine.— Lewis *v.* Meserve, 61 Me. 374; Gammon *v.* Freeman, 31 Me. 243; Haines *v.* Gardner, 10 Me. 383; Nason *v.* Allen, 6 Me. 243.

Michigan.— May *v.* Tillman, 1 Mich. 262.

Mississippi.— Randolph *v.* Doss, 3 How. 205.

New Jersey.— Hyatt *v.* Ackerson, 14 N. J. L. 564; English *v.* Wright, 1 N. J. L. 437.

New York.— Osterhout *v.* Shoemaker, 3 Hill 513; Hitchcock *v.* Carpenter, 9 Johns. 344; Collins *v.* Torry, 7 Johns. 278, 5 Am. Dec. 273.

North Carolina.— Norwood *v.* Marrow, 20 N. C. 578.

Ohio.— Ward *v.* McIntosh, 12 Ohio St. 231.

Pennsylvania.— Evans *v.* Evans, 29 Pa. St. 277.

South Carolina.— Gayle *v.* Price, 5 Rich. 525.

See 17 Cent. Dig. tit. "Dower," § 254; and, generally, Estoppel.

Contra.— Crittenden *v.* Woodruff, 11 Ark. 82; Sparrow *v.* Kingman, 1 N. Y. 242; Coakley *v.* Perry, 3 Ohio St. 344; Gardner *v.* Greene, 5 R. I. 104.

62. Cobb *v.* Oldfield, 151 Ill. 540, 38 N. E. 142, 42 Am. St. Rep. 263; Owen *v.* Robbins, 19 Ill. 545; Sparrow *v.* Kingman, 1 N. Y. 242. *Compare* Gully *v.* Ray, 18 B. Mon. (Ky.) 107; Gammon *v.* Freeman, 31 Me. 243; Ward *v.* McIntosh, 12 Ohio St. 231.

63. Sparrow *v.* Kingman, 1 N. Y. 242; Finn *v.* Sleight, 8 Barb. (N. Y.) 401; Whitmire *v.* Wright, 22 S. C. 446, 53 Am. Rep. 725; Gaunt *v.* Wainman, 3 Bing. N. Cas. 69, 2 Hodges 186, 5 L. J. C. P. 344, 3 Scott 413, 32 E. C. L. 41.

64. Blakely *v.* Boruff, 71 Ind. 93.

65. Bogardus *v.* Parker, 7 How. Pr. (N. Y.) 303.

The widow's dower right in surplus moneys realized on foreclosure cannot be reduced by an equitable claim against her, although, if she elect to take a gross sum equal to the

the widow the amount of overpayments made by him on account of her distributive share in decedent's estate, if the period of limitations had run after the making of such payments.[66]

D. Statutes of Limitations and Laches — 1. In General. There is considerable difference of opinion as to the application of general statutes of limitations to actions for dower. There seems to be a weight of authority, however, in favor of the doctrine that such statutes are applicable.[67] Statutes of limitation are not applied to suits in equity,[68] but courts of equity will if called upon to administer a right strictly legal follow such statutes, so that in those jurisdictions where general statutes of limitation are held to apply to suits to recover dower, if such suits are brought in equity the widow will be barred unless they are brought within the prescribed time.[69]

2. Special Statutes of Limitation — a. In General. In a number of the states statutes are in force prescribing the time within which an action to recover dower or a proceeding for the admeasurement of dower must be instituted.[70]

b. Application. A statute prescribing the time within which a suit or proceeding for dower may be commenced has been held not to apply where the cause of action arose prior to the passage of the act.[71]

c. Statutes Relating to Real Actions. In most jurisdictions it is held that in the absence of special statutes expressly prescribing the time within which actions for dower may be brought, such actions are to be treated as actions for the recovery of real property and must be brought within the time prescribed in statutes of limitations applicable to such actions.[72] But if the statute by its terms begins

value of her dower in the surplus, a surrogate may recognize such counter-claims against her. Taylor *v.* Bentley, 3 Redf. Surr. (N. Y.) 34.

66. Montgomery's Appeal, 92 Pa. St. 202, 37 Am. Rep. 670.

Claim against husband for use of premises. Darnall's Appeal, 12 Gill & J. (Md.) 388.

Invalidity of conveyance to husband.— Randolph *v.* Randolph, 107 N. C. 506, 12 S. E. 374 [*distinguishing* Giles *v.* Hunter, 103 N. C. 194, 9 S. E. 549].

67. *Iowa.*— Felch *v.* Finch, 52 Iowa 563, 3 N. W. 570; Sully *v.* Nebergall, 30 Iowa 339; Rice *v.* Nelson, 27 Iowa 148; Phares *v.* Walters, 6 Iowa 106.

Kentucky.— Kinsolving *v.* Pierce, 18 B. Mon. 782.

Maine.— Durham *v.* Angier, 20 Me. 242.

Mississippi.— Westbrook *v.* Hawkins, 59 Miss. 499; Moody *v.* Harper, 38 Miss. 599; Torrey *v.* Minor, Sm. & M. Ch. 489.

New Jersey.— Berrien *v.* Conover, 16 N. J. L. 107; Conover *v.* Wright, 6 N. J. Eq. 613, 47 Am. Dec. 213.

New York.— Jones *v.* Powell, 6 Johns. Ch. 194.

Ohio.— Tuttle *v.* Willson, 10 Ohio 24.

Pennsylvania.— Care *v.* Keller, 77 Pa. St. 487.

South Carolina.— Mitchell *v.* Poyas, 1 Nott & M. 85; Ramsay *v.* Dozier, 1 Treadw. 112; Lide *v.* Reynolds, 1 Brev. 76; Caston *v.* Caston, 2 Rich. Eq. 1; Wilson *v.* McLenaghan, McMull. Eq. 35.

See 17 Cent. Dig. tit. "Dower," § 260.

Contra.— *Alabama.*— Owen *v.* Campbell, 32 Ala. 521.

Delaware.— Bordly *v.* Clayton, 5 Harr. 154.

Georgia.— Chapman *v.* Schroeder, 10 Ga. 321.

Maryland.— Sellman *v.* Bowen, 8 Gill & J. 50, 29 Am. Dec. 524; Wells *v.* Beall, 2 Gill & J. 468; Kiddall *v.* Trimble, 1 Md. Ch. 143.

Michigan.— May *v.* Rumney, 1 Mich. 1.

Missouri.— Johns *v.* Fenton, 88 Mo. 64; Littleton *v.* Patterson, 32 Mo. 357.

See 17 Cent. Dig. tit. "Dower," § 260.

68. See, generally, Limitations of Actions.

69. Shawhan *v.* Smith, 4 Ky. L. Rep. 440; Larrowe *v.* Beam, 10 Ohio 498. But see Starry *v.* Starry, 21 Iowa 254; Johns *v.* Fenton, 88 Mo. 64.

70. See the statutes of the several states.

71. Martin *v.* Martin, 35 Ala. 560; Tooke *v.* Hardeman, 7 Ga. 20; Stewart *v.* Smith, 14 Abb. Pr. (N. Y.) 75. *Contra*, Brewster *v.* Brewster, 32 Barb. (N. Y.) 428.

72. *Illinois.*— Owen *v.* Peacock, 38 Ill. 33.

Kentucky.— Williams *v.* Williams, 89 Ky. 381, 12 S. W. 760, 11 Ky. L. Rep. 608, 6 L. R. A. 637; Anderson *v.* Sterritt, 79 Ky. 499; Winchester *v.* Keith, 70 S. W. 664, 24 Ky. L. Rep. 1033.

Michigan.— Moross *v.* Moross, (1903) 93 N. W. 247.

Missouri.— Long *v.* Kansas City Stock-Yards Co., 107 Mo. 298, 17 S. W. 656, 28 Am. St. Rep. 413; Robinson *v.* Ware, 94 Mo. 678, 8 S. W. 153.

Nebraska.— Beall *v.* McMenemy, 63 Nebr. 70, 88 N. W. 134, 93 Am. St. Rep. 427.

New Jersey.— Conover *v.* Wright, 6 N. J. Eq. 613.

Ohio.— Tuttle *v.* Willson, 10 Ohio 24.

West Virginia.— Morris *v.* Roseberry, 46 W. Va. 24, 32 S. E. 1019; Smith *v.* Wehrle, 41 W. Va. 270, 23 S. E. 712.

to run from the time when the right to enter upon the lands involved in the suit first accrued, it can have no application to an action for the recovery of dower, because the widow has no right of entry until dower is assigned.[73]

d. Statutes Relating to Actions Not Specified. It has been held that a statute requiring actions not provided for to be brought within a prescribed time does not apply to actions for the assignment of dower.[74]

3. When Statute Begins to Run — a. Death of Husband. A widow's right of action for dower in lands not in her possession accrues at the time of her husband's death, and according to the weight of authority the statute of limitations commences to run against her from that time;[75] and the rule has been held to apply, although title by adverse possession had fully ripened as against the husband before his decease.[76]

b. Demand of Dower. Where a demand upon the tenant for possession of the land is a prerequisite to the commencement of a suit for the recovery of dower therein,[77] it has been held that the statute begins to run from the date of the demand rather than the date of the death of the husband.[78]

4. Length of Time. In determining whether an action for dower is barred under a statute prescribing the time within which an action for dower should be brought the time during which the widow is under disabilities should be deducted.[79] The tenant's possession of the land must be open, notorious, undisputed, and continuous for the required time,[80] and must be adverse as against the widow.[81]

5. Laches. Even in the absence of any statute of limitations the lapse of an

United States.— Choteau *v.* Harvey, 36 Fed. 541.

Contra, Burt *v.* C. W. Cook Sheep Co., 10 Mont. 571, 27 Pac. 399.

See 17 Cent. Dig. tit. "Dower," § 262.

73. *Georgia.*— Wakeman *v.* Roache, Dudley 123.

Massachusetts.— Parker *v.* Obear, 7 Metc. 24.

New Hampshire.— Barnard *v.* Edwards, 4 N. H. 107, 17 Am. Dec. 403.

New Jersey.— Wright *v.* Conover, 6 N. J. Eq. 482, 47 Am. Dec. 213.

New York.— Hogle *v.* Stewart, 8 Johns. 104.

See 17 Cent. Dig. tit. "Dower," § 262.

74. Lynde *v.* Wakefield, 19 Mont. 23, 47 Pac. 5; Burt *v.* C. W. Cook Sheep Co., 10 Mont. 571, 27 Pac. 399.

75. *Arkansas.*— Stidham *v.* Matthews, 29 Ark. 650.

Illinois.— Whiting *v.* Nicholl, 46 Ill. 230, 92 Am. Dec. 248; Steele *v.* Gellatly, 41 Ill. 39

Indiana.— Thompson *v.* McCorkle, 136 Ind. 484, 34 N. E. 813, 36 N. E. 211, 43 Am. St. Rep. 334; Wright *v.* Tichenor, 104 Ind. 185, 3 N. E. 853.

Iowa.— Lucas *v.* White, 120 Iowa 735, 95 N. W. 209.

Kentucky.— Winchester *v.* Keith, 70 S. W. 664, 24 Ky. L. Rep. 1033; Smith *v.* Myers, 7 Ky. L. Rep. 433.

Maine.— Durham *v.* Angier, 20 Me. 242.

Massachusetts.— Hastings *v.* Mace, 157 Mass. 499, 32 N. E. 668.

New Hampshire.— Moore *v.* Frost, 3 N. H. 126.

Pennsylvania.— Winters *v.* De Turk, 133 Pa. St. 359, 19 Atl. 354, 7 L. R. A. 658; Care *v.* Keller, 77 Pa. St. 487; Culler *v.* Motzer, 13 Serg. & R. 356, 15 Am. Dec. 604.

South Carolina.— Rickard *v.* Talbird, Rice Eq. 158.

West Virginia.— Morris *v.* Roseberry, 46 W. Va. 24, 32 S. E. 1019; Smith *v.* Wehrle, 41 W. Va. 270, 23 S. E. 712.

See 17 Cent. Dig. tit. "Dower," § 263.

Contra.— Webb *v.* Smith, 40 Ark. 17; Johns *v.* Fenton, 88 Mo. 64; Spencer *v.* Weston, 18 N. C. 213.

Presumption of death of husband.—Whiting *v.* Nicholl, 46 Ill. 230, 92 Am. Dec. 248.

76. Taylor *v.* Lawrence, 148 Ill. 388, 36 N. E. 74; Steele *v.* Gellatly, 41 Ill. 39; Williams *v.* Williams, 89 Ky. 381, 12 S. W. 760, 11 Ky. L. Rep. 608, 6 L. R. A. 637; Durham *v.* Angier, 20 Me. 242. *Compare* Long *v.* Kansas City Stock-Yards Co., 107 Mo. 298, 17 S. W. 656, 28 Am. St. Rep. 413.

77. See *supra*, XI, A, 1.

78. Chase *v.* Alley, 82 Me. 234, 19 Atl. 397; Robie *v.* Flanders, 33 N. H. 524.

79. Epps *v.* Flowers, 101 N. C. 158, 7 S. E. 680. See, generally, Limitations of Actions.

80. Elyton Land Co. *v.* Denny, 108 Ala. 553, 18 So. 561; Hart *v.* Randolph, 142 Ill. 521, 32 N. E. 517; Stowe *v.* Steele, 114 Ill. 382, 2 N. E. 169; Collins *v.* Laucier, 45 Iowa 702; Berry *v.* Furhman, 30 Iowa 462; Starry *v.* Starry, 21 Iowa 254; King *v.* Merritt, 67 Mich. 194, 34 N. W. 689; Null *v.* Howell, 111 Mo. 273, 20 S. W. 24.

81. Berry *v.* Furhman, 30 Iowa 462; West brook *v.* Hawkins, 59 Miss. 499; Null *v.* Howell, 111 Mo. 273, 20 S. W. 24; Winters *v.* De Turk, 133 Pa. St. 359, 19 Atl. 354, 7 L. R. A. 658. Adverse possession for the statutory period, under a contract of sale made

unreasonable length of time before commencing the action will raise the presumption that the widow's dower has been relinquished or otherwise barred or cut off, or will constitute such laches as to bar relief in a court of equity.[82]

E. Parties — 1. In General. The statutes of the several states prescribing the procedure for the recovery or assignment of dower authorize the instituting of proceedings either by the widow or by the heirs, devisees, or other persons interested in the lands to which dower has attached, and also usually provide the parties against whom such proceedings may be brought.[83]

2. Plaintiffs — a. At Common Law. The writ of dower *unde nihil habet* can only be issued in behalf of the widow.[84] The widow's right to dower after the death of the husband and before assignment being at common law non-transferable, the common-law action of dower cannot be maintained by the widow's assignee.[85]

b. In Equity. The widow may institute proceedings in equity for the assignment of her dower,[86] and where the widow before assignment has transferred her right, it has been held that equity will entertain a suit instituted by the transferee for the allotment of the widow's dower;[87] and in equity the husband's heir or devisee or any other person having an interest in the lands to which dower has attached may for the purpose of quieting title institute proceedings for the admeasurement of dower.[88] In those jurisdictions in which a widow's right to have dower assigned is held subject to execution by her creditors,[89] a court of equity may at the instance of such creditors cause the widow's dower to be assigned.[90] Where a widow marries during the pendency of a suit in equity for her dower it is not erroneous to make her husband a co-complainant.[91]

3. Defendants — a. Tenants of Freehold. In those jurisdictions where the common-law action of dower is retained, the action must be brought against the tenant of the freehold at the time of the commencement of the action;[92] but it may be brought against a tenant holding under color of title, although wrongfully

by the husband, does not bar the wife's dower (Boling *v.* Clark, 83 Iowa 481, 50 N. W. 57); but possession by a purchaser is adverse to the widow of the vendor (Anderson *v.* Sterritt, 79 Ky. 499). Possession under sheriff's deed which conveys a mere interest which the judgment debtor had on a certain day is not adverse to the dower right of one who was the debtor's wife before that day. Cowen *v.* Lindsay, 30 Wis. 586.

82. Elyton Land Co. *v.* Denny, 108 Ala. 553, 18 S. W. 561; Graves Co. *v.* McDade, 108 Ala. 420, 19 So. 86; Barksdale *v.* Garrett, 64 Ala. 277, 38 Am. Rep. 6; Owen *v.* Campbell, 32 Ala. 521; Ridgway *v.* McAlpine, 31 Ala. 458; Danley *v.* Danley, 22 Ark. 263; Steiger *v.* Hillen, 5 Gill & J. (Md.) 121. See also Ross *v.* Clore, 3 Dana (Ky.) 189; Ralls *v.* Hughes, 1 Dana (Ky.) 407; Jones *v.* Powell, 6 Johns. Ch. (N. Y.) 194. See also *infra*, XI, G, 1, c.

83. See the statutes of the several states and the cases cited under the following sections.

84. Park Dower 283.

85. Jackson *v.* Aspell, 20 Johns. (N. Y.) 411. And see *supra*, IX, E, 1.

86. See *supra*, XI, B, 2, f.

87. Strong *v.* Clem, 12 Ind. 37, 74 Am. Dec. 200; New York Mut. L. Ins. Co. *v.* Shipman, 119 N. Y. 324, 24 N. E. 177; Parton *v.* Allison, 111 N. C. 429, 16 S. E. 415; Morgan *v.* Blatchley, 33 W. Va. 155, 10 S. E. 282. See also *supra*, IX, E, 1, b; XI, B, 2, f.

88. Shelton *v.* Carrol, 16 Ala. 148 (alienee of husband); Clark *v.* Burnside, 15 Ill. 62 (holding that it is the duty of the guardian of infant heirs to institute proceedings for the assignment of dower so that his wards might obtain their share of the rents and profits of the estate); Allsmiller *v.* Freutchenicht, 86 Ky. 198, 5 S. W. 746, 9 Ky. L. Rep. 509. An outstanding right of dower, whether perfect or inchoate, is an encumbrance upon a title which renders it defective, and a vendee who has contracted for a "good and lawful title" may go into equity to have compensation for such dower claim out of the unpaid purchase-money. Thrasher *v.* Pinckard, 23 Ala. 616.

89. See *supra*, IX, F.

90. *District of Columbia.*—Davison *v.* Whittlesey, 1 MacArthur 163.

Iowa.— Getchell *v.* McGuire, 70 Iowa 71, 30 N. W. 7.

Massachusetts.— McMahon *v.* Gray, 150 Mass. 289, 22 N. E. 923, 15 Am. St. Rep. 202, 5 L. R. A. 748.

New York.—Payne *v.* Becker, 87 N. Y. 153; Tompkins *v.* Fonda, 4 Paige 448.

Ohio.— Boltz *v.* Stolz, 41 Ohio St. 540.

Contra, Maxon *v.* Gray, 14 R. I. 641.

See also *supra*, IX, F.

91. Potier *v.* Barclay, 15 Ala. 439.

92. Parker *v.* Murphy, 12 Mass. 485; Hurd *v.* Grant, 3 Wend. (N. Y.) 340; Galbraith *v.* Green, 13 Serg. & R. (Pa.) 85; Seaton *v.* Jamison, 7 Watts (Pa.) 533; Miller *v.* Beverly, 1 Hen. & M. (Va.) 368.

in possession.[93] A vendor in possession under a contract of sale has such a legal seizin in the land as constitutes him a tenant of the freehold, and he is a proper party defendant.[94] But the writ cannot be maintained against a tenant for years,[95] unless by statute.[96]

b. Persons in Possession. In equity and under the statutes in many jurisdictions all persons actually occupying any portion of the lands in which dower is claimed are proper defendants.[97]

c. Purchasers or Owners. Where there are no adverse interests in the land, the owner at the time the action is commenced is the proper and the only necessary party defendant.[98]

d. Heirs or Devisees. Where the husband's heirs or devisees are in possession of the lands they are necessary parties to the widow's action of dower;[99] but where the lands have been conveyed by the husband in his lifetime[1] or have been sold at an administrator's sale the deceedent's heirs are not necessary parties.[2]

e. Persons Adversely Interested in the Lands. In equity and under the statutes in many of the states all parties interested in the lands in which the widow seeks dower are properly made parties defendant.[3] So where suit is brought against a married woman to recover dower in lands owned by her, her husband, having an interest therein by the curtesy, should be made a defendant.[4] Administrators and executors of the husband have not such an interest in the husband's lands as will entitle them to be made parties;[5] and the husband's creditors, whose claims are not secured by an encumbrance upon the lands, are not necessary parties,[6] although they may be made parties if they so desire.[7] If at the time of the husband's death the lands were held by a trustee for the benefit of creditors,[8] or if lands are devised in trust by the decedent,[9] or are held in trust under an agreement between the husband and wife for her benefit,[10] the trustee is a necessary party defendant in the action brought by the widow for her dower.

93. Otis *v.* Warren, 16 Mass. 53.

94. Jones *v.* Patterson, 12 Pa. St. 149.

95. Galbraith *v.* Green, 13 Serg. & R. (Pa.) 85; Miller *v.* Beverly, 1 Hen. & M. (Va.) 368. A writ of dower will not lie against a person holding a mere chattel interest in the land, or having an estate of less duration than the life of the dowress. Drost *v.* Hall, 52 N. J. Eq. 68, 28 Atl. 81.

96. Ellis *v.* Ellis, 4 R. I. 110.

97. Ellicott *v.* Mosier, 7 N. Y. 201; Kyle *v.* Kyle, 3 Hun (N. Y.) 458; Galbraith *v.* Green, 13 Serg. & R. (Pa.) 85; Ellis *v.* Ellis, 4 R. I. 110; Kennedy *v.* McAliley, 9 Rich. (S. C.) 395; Plantt *v.* Payne, 2 Bailey (S. C.) 319.

98. *Georgia.*— Chapman *v.* Schroeder, 10 Ga. 321.

New Jersey.— Drost *v.* Hall, 52 N. J. Eq. 68, 28 Atl. 81.

Oregon.— McKay *v.* Freeman, 6 Oreg. 449.

Virginia.— Blair *v.* Thompson, 11 Gratt. 441; Boyden *v.* Lancaster, 2 Patt. & H. (Va.) 198.

West Virginia.— Morgan *v.* Blatchley, 33 W. Va. 155, 10 S. E. 282.

See 17 Cent. Dig. tit. "Dower," § 268.

A purchaser from the administrator of the land in which dower is sought cannot on his own motion come into court and cause himself to be made a party, and deny the widow's right to have dower assigned; she having given notice to the administrator of her deceased husband. Findley *v.* Lawless, 30 Ga. 88. See also Goodman *v.* Moore, 22 Ark. 191.

After partition has been decreed and part of the land sold, a widow who has a dower interest in the land, and who, although not a party to the partition suit, consents to the decree and sale, and elects to take her dower interest in money, may establish her rights by cross bill, without making the purchasers at the partition sale parties thereto. Hart *v.* Burch, 130 Ill. 426, 22 N. E. 831, 6 L. R. A. 371.

99. Lawson *v.* Morton, 6 Dana (Ky.) 471; Van Name *v.* Van Name, 23 How. Pr. (N. Y.) 247; Parton *v.* Allison, 111 N. C. 429, 16 S. E. 415; Shelton *v.* Shelton, 20 S. C. 560.

1. Boyden *v.* Lancaster, 2 Patt. & H. (Va.) 198.

2. Webb *v.* Smith, 40 Ark. 17.

3. Badgley *v.* Bruce, 4 Paige (N. Y.) 98.

4. Morse *v.* Thorsell, 78 Ill. 600.

5. Campbell *v.* Murphy, 55 N. C. 357; Drum *v.* Wartman, 6 Phila. (Pa.) 45; Kenyon *v.* Kenyon, 17 R. I. 539, 23 Atl. 101, 24 Atl. 787.

6. Matthews *v.* Duryee, 45 Barb. (N. Y.) 69; Ramsour *v.* Ramsour, 63 N. C. 231. And see Runnels *v.* Runnels, 27 Tex. 515.

7. Welfare *v.* Welfare, 108 N. C. 272, 12 S. E. 1025; *Ex p.* Avery, 64 N. C. 113; *Ex p.* Moore, 64 N. C. 90.

8. Matthews *v.* Duryee, 45 Barb. (N. Y.) 69; Perkins *v.* McDonald, 3 Baxt. (Tenn.) 343.

9. Droste *v.* Hall, (N. J. Ch. 1894) 29 Atl. 437.

10. Watkins *v.* Watkins, 7 Yerg. (Tenn.) 283.

4. Joinder of Parties. In some jurisdictions dower cannot be claimed in one action against several alienees of the husband, each holding a separate tract or parcel of land.[11] In other jurisdictions the widow is permitted to join as defendants in one suit the tenants of each of the parcels of land in which she claims dower.[12] Marriage of the widow during the pendency of her suit has been held not to render it necessary to unite her husband in the proceeding, although it is not error to do so.[13] If the lands in which dower is claimed are held in joint tenancy, the joint tenants should be joined as defendants.[14]

F. Pleadings — 1. Declaration, Petition, Complaint, or Bill — a. In General. The form and sufficiency of a petition or complaint in a proceeding for the admeasurement or recovery of dower will depend upon the statutory requirements, if any, in the jurisdiction where the proceeding is brought, or the nature of the proceeding by which the remedy is sought.[15]

b. Requisites and Sufficiency — (I) *In General.* The declaration, complaint, petition, or bill must set forth with reasonable certainty and precision all the essential facts and circumstances on which the claim for dower rests, or which are required by statute to be set forth.[16] If the suit be brought in equity it is proper to insert a general allegation as to existing impediments to a recovery at law.[17] All the facts essential to the existence of dower, such as the marriage,[18] the seizin of the husband during coverture or at his death, according to the statute,[19] and the husband's death,[20] should be clearly set forth in precise terms.[21] It is not necessary that the complainant should negative in her bill all or any of the facts by which her dower might be avoided.[22] Where the action is in ejectment

11. Barney *v.* Frowner, 9 Ala. 901; Fosdick *v.* Gooding, 1 Me. 30, 10 Am. Dec. 25; Droste *v.* Hall, (N. J. Ch. 1894) 29 Atl. 437; Allen *v.* McCoy, 8 Ohio 418.

12. Galbreath *v.* Gray, 20 Ind. 290; Marshall *v.* Anderson, 1 B. Mon. (Ky.) 198; Taylor *v.* Brodrick, 1 Dana (Ky.) 345.

Widow may elect.— Coburn *v.* Herrington, 114 Ill. 104, 29 N. E. 478; Boyden *v.* Lancaster, 2 Patt. & H. (Va.) 198.

Where lands are sold on execution as one tract during the husband's life, the bill may properly join all persons claiming interest therein, although they claim different parts thereof in severalty. Sanders *v.* Wallace, 114 Ala. 259, 21 So. 947.

13. Potier *v.* Barclay, 15 Ala. 439. The fact that the petition was filed in the name of the widow alone, when she was married to a second husband, does not render the assignment absolutely void, so that it can be taken advantage of in a collateral proceeding. Turner *v.* Morris, 27 Miss. 733. An objection to the non-joinder of the husband comes too late when interposed upon scire facias, founded on the judgment. Walker *v.* Gilman, 45 Me. 28.

14. Menifee *v.* Menifee, 8 Ark. 9. A non-joinder of one of the tenants of the freehold as defendant is good cause of abatement in an action of dower brought against the tenant of the freehold as such tenant only. Ellis *v.* Ellis, 4 R. I. 110.

15. See the statutes in the several states and the cases cited in the notes following.

16. *Alabama.*— Jackson *v.* Rowell, 87 Ala. 685, 6 So. 95, 4 L. R. A. 637; Green *v.* Green, 7 Port. 19.

Arkansas.— Fellows *v.* Bunn, (1889) 11 S. W. 480.

Kentucky.— Wall *v.* Hill, 7 Dana 172.

New York.— Connolly *v.* Newton, 85 Hun 552, 33 N. Y. Suppl. 102; Peart *v.* Peart, 50 Hun 600, 2 N. Y. Suppl. 322; Draper *v.* Draper, 11 Hun 616.

Ohio.— Little Miami R. Co. *v.* Jones, 3 Ohio Dec. (Reprint) 219, 5 Wkly. L. Gaz. 5.

Tennessee.— Vanleer *v.* Vanleer, 3 Tenn. Ch. 23.

See 17 Cent. Dig. tit. "Dower," § 277.

Bill alleging fraudulent divorce.— Wright *v.* Wright, 8 N. J. Eq. 143.

Names of heirs at law.— Forrester *v.* Forrester, 38 Ala. 119; Martin *v.* Martin, 22 Ala. 86.

Form of petition see Serry *v.* Curry, 26 Nebr. 353, 42 N. W. 97.

17. Park Dower 327; 2 Scribner Dower 156.

18. See *supra*, V, B; *infra*, XI, F, 1, b, (III).

19. See *supra*, V, C; *infra*, XI, F, 1, b, (IV).

20. See *supra*, V, D.

21. **Statement of cause of action in general.**— The petition for dower must allege the marriage, the seizin of the husband during coverture, and his death, and must contain a description of the lands in which dower is claimed, and aver that they lie in the county where the petition is filed, and must also show whether the deceased died testate or intestate, who are his heirs, who his personal representatives, if any, and who the tenants of the freehold. Martin *v.* Martin, 22 Ala. 86.

Rents and profits.— Turner *v.* Morris, 27 Miss. 733.

22. Garton *v.* Bates, 4 B. Mon. (Ky.) 366; Wall *v.* Hill, 7 Dana (Ky.) 172; Foxworth *v.* White, 5 Strobh. (S. C.) 113. And see Draper *v.* Draper, 11 Hun (N. Y.) 616.

against the occupant of the premises or one exercising acts of ownership therein, the complaint must allege facts sufficient to show that defendant either occupies or exercises acts of ownership in respect to the lands in controversy.[23]

(II) *JOINDER OF CAUSES.* A declaration in a writ of dower is not bad because it sets out and claims dower in several separate and distinct parcels of land.[24]

(III) *MARRIAGE.* The widow should allege her marriage, with the facts and circumstances as to time and place.[25] It has been held insufficient for the demandant to simply allege that she is the widow of the decedent.[26]

(IV) *SEIZIN OR TITLE OF HUSBAND.* The petition, complaint, or bill must allege seizin in the husband during coverture or at the time of his death, according to the statute in the particular jurisdiction, of an estate of which the wife is dowable.[27]

(V) *DESCRIPTION OF PREMISES.* It is sometimes provided by statute that the complaint or bill shall describe the property claimed with certainty and accuracy, so that it may be delivered if plaintiff is entitled thereto,[28] and independently of statutory provision the lands in which dower is claimed should be sufficiently definite to permit a delivery of the premises without reference to any description outside of the writ;[29] but it is not necessary that they be described by metes and bounds, where they can be sufficiently distinguished by any other description.[30]

(VI) *DEMAND FOR ASSIGNMENT.* In those jurisdictions where a demand upon the tenant or other person who may be compelled to assign dower is a prerequisite to the commencement of an action for dower,[31] the demandant must

A bill to recover dower need not negative the idea that complainant has accepted a testamentary provision in lieu thereof. Sanders *v.* Wallace, 114 Ala. 259, 21 So. 947.

23. Connolly *v.* Newton, 85 Hun (N. Y.) 552, 33 N. Y. Suppl. 102. *Compare* Graham *v.* Dunnigan, 4 Abb. Pr. (N. Y.) 426.

Allegation of possession.— A declaration which failed to allege the deforcement of the demandant and the possession of the land by defendant was held sufficient. Foxworth *v.* White, 5 Strobh. (S. C.) 113.

24. Hutchins *v.* Burrill, 72 Me. 311; Boyden *v.* Lancaster, 2 Patt. & H. (Va.) 198; Dennis *v.* Dennis, 2 Saund. 328.

Causes of action for dower in distinct parcels of land, occupied by different tenants, are separate, and should be separately stated and numbered in the complaint. Peart *v.* Peart, 50 Hun (N. Y.) 600, 2 N. Y. Suppl. 322.

25. Holmes *v.* Holmes, 12 Fed. Cas. No. 6,638, 1 Abb. 525, 1 Sawy. 99. But it has been held not a fatal defect to fail to allege the date of the widow's marriage with the decedent. Draper *v.* Draper, 11 Hun (N. Y.) 616; Parton *v.* Allison, 111 N. C. 429, 16 S. E. 415.

Bill of particulars.— Govin *v.* De Miranda, 87 Hun (N. Y.) 227, 33 N. Y. Suppl. 753; Clark *v.* St. James' Church Soc., 21 Hun (N. Y.) 95; Halstead *v.* Halstead, 2 Misc. (N. Y.) 501, 22 N. Y. Suppl. 384.

26. Martin *v.* Martin, 22 Ala. 86; Yancy *v.* Smith, 2 Metc. (Ky.) 408. *Compare* Draper *v.* Draper, 11 Hun (N. Y.) 616. And see Fritz *v.* Tudor, 2 Duv. (Ky.) 173.

27. *Illinois.*— Morse *v.* Thorsell, 78 Ill. 600; Davenport *v.* Farrar, 2 Ill. 314.

Kentucky.— Garton *v.* Bates, 4 B. Mon. 366; Waters *v.* Gooch, 6 J. J. Marsh. 586, 22 Am. Dec. 108.

Maine.— Hutchins *v.* Burrill, 72 Me. 311; Freeman *v.* Freeman, 39 Me. 426.

Maryland.— Knighton *v.* Young, 22 Md. 359.

Missouri.— Garrison *v.* Young, 135 Mo. 203, 36 S. W. 662.

North Carolina.— McGee *v.* McGee, 26 N. C. 105.

Rhode Island.— Kenyon *v.* Kenyon, 17 R. I. 539, 23 Atl. 101, 24 Atl. 787.

See 17 Cent. Dig. tit. "Dower," § 280.

Contra.— Foxworth *v.* White, 5 Strobh. (S. C.) 113.

Sufficiency of allegation as to seizin.— Davenport *v.* Farrar, 2 Ill. 314; Waters *v.* Gooch, 6 J. J. Marsh. (Ky.) 586, 22 Am. Dec. 108; Hutchins *v.* Burrill, 72 Me. 311; Freeman *v.* Freeman, 39 Me. 426; Kenyon *v.* Kenyon, 17 R. I. 539, 23 Atl. 101, 24 Atl. 787. See also Lecompte *v.* Wash, 9 Mo. 551; Collier *v.* Wheldon, 1 Mo. 1; McGee *v.* McGee, 26 N. C. 105.

28. See Ill. Rev. St. c. 41, § 22 (providing that the petition shall particularly specify the premises in which dower is claimed); Mich. Comp. Laws (1897), § 10954; N. Y. Code Civ. Proc. §§ 1511, 1606.

29. Atwood *v.* Atwood, 22 Pick. (Mass.) 283.

30. Atwood *v.* Atwood, 22 Pick. (Mass.) 283; Ayer *v.* Spring, 10 Mass. 80; Bostick *v.* Barnes, 59 S. C. 22, 37 N. E. 24.

Where the description of the lands is imperfect, it is not a ground for demurrer; but the remedy is by motion to make more definite and certain. Rank *v.* Levinus, 5 N. Y. Civ. Proc. 368; Bostick *v.* Barnes, 59 S. C. 22, 37 S. E. 24.

31. See *supra*, XI, A.

show that such demand has been made.[32] Except as thus required by statute a demand, being unnecessary, need not be alleged,[33] although it may be desirable because of its effect upon the claim for damages for withholding the dower.[34]

2. Plea or Answer — a. In General. Where the common-law action by writ of dower *unde nihil habet* is retained defendant may plead in abatement or in bar, as in other actions. For instance, where a previous demand is necessary, defendant may plead in abatement that no such demand was made.[35] If the suit be in equity, or under statutes providing special forms of action, defendant's pleading must conform to the requirements of the practice in the court where the suit is brought.[36]

b. Requisites and Sufficiency — (i) *In General.* The plea or answer should be responsive to the allegations of the declaration, complaint, or bill.[37]

(ii) *Release or Relinquishment, Bar, and Assignment.* A release of dower by the wife must be pleaded, and cannot otherwise be given in evidence;[38] and if the statutes require any particular formality upon the part of the wife to constitute a valid release, conformity with such requirements must be alleged.[39] A plea that dower has been assigned by the tenant is insufficient if it is not alleged that the widow entered and agreed to the assignment, that she accepted it, or that it was made to her satisfaction;[40] but it is not necessary to allege that the assignment was in writing, since a parol assignment is valid.[41] That demandant received compensation for the annual value of her dower during the heir's possession is not pleadable, but should be given in evidence in mitigation of damages on the writ of inquiry.[42] An answer which admits that the lands were owned by the husband, but does not aver that the widow had conveyed her interest therein, or that it had been sold away from her by legal process, is insufficient on demurrer.[43]

(iii) *Non-Tenure.* By the common law of England non-tenure could only be pleaded in abatement,[44] but in this country such plea may be also made in bar,[45] unless, as in Maine, it is provided by statute that it can only be pleaded in abatement.[46]

(iv) *Marriage.* The tenant may in his plea controvert the validity of the demandant's marriage with the person of whose lands she claims dower;[47] but if the plea conclude to the country it will be adjudged bad on demurrer.[48]

32. Law *v.* Long, 41 Ind. 586; Wells *v.* Sprague, 10 Ind. 305; Boyers *v.* Newbanks, 2 Ind. 388; Dunn *v.* Loder, 5 Blackf. (Ind.) 446; Freeman *v.* Freeman, 39 Me. 426.

33. Darnall *v.* Hill, 12 Gill & J. (Md.) 388.

34. See *supra*, IX, G, 6.

35. Necessity of demand see *supra*, XI, A, 1.

36. See Equity; Pleading.

37. Edmondson *v.* Montague, 14 Ala. 370; Whitehead *v.* Clinch, 3 N. C. 278. A simple denial of the right of the petitioner to dower is insufficient, because amounting to a kind of general issue, which is not allowable under the code or in chancery. Finch *v.* Finch, 10 Ohio St. 501. A plea by infant heirs, by their guardian *ad litem*, that as to the matters contained in the petition they neither admitted nor denied them, was held insufficient. Adkins *v.* Holmes, 2 Ind. 197.

If the matter set up in bar is insufficient, idle, and frivolous, the court in its discretion may strike it out without putting the adverse party to the inconvenience or delay of a demurrer. Cox *v.* Higbee, 11 N. J. L. 395.

38. Hitchcock *v.* Carpenter, 9 Johns. (N. Y.) 344.

39. White *v.* White, 16 N. J. L. 202, 31 Am. Dec. 232 (holding that a plea alleging that plaintiff released her dower, without alleging that the release was by deed, is bad on demurrer); Tuthill *v.* Townley, 1 N. J. L. 242.

40. Clark *v.* Muzzey, 43 N. H. 59.

41. See *supra*, X, B, 2.

42. Woodruff *v.* Brown, 17 N. J. L. 246.

43. Blakely *v.* Boruff, 71 Ind. 93. See also Scott *v.* Crawford, 11 Gill & J. (Md.) 365.

44. Fosdick *v.* Gooding, 1 Me. 30, 10 Am. Dec. 25; Comyns Dig. tit. "Abatement"; 6 Jacob Dict. 68.

45. Otis *v.* Warren, 14 Mass. 239; Merrill *v.* Russell, 1 Mass. 469; Casporus *v.* Jones, 7 Pa. St. 120.

46. Lewis *v.* Meserve, 61 Me. 374; Manning *v.* Laboree, 33 Me. 343.

47. Adkins *v.* Holmes, 2 Ind. 197; Freeman *v.* Freeman, 39 Me. 426.

A plea that the marriage was unlawful which traverses no other material allegation must be construed as an admission of all the material allegations in the petition except the one traversed. Fitzgerald *v.* Garvin, T. U. P. Charlt. (Ga.) 281.

48. Robins *v.* Crutchley, 2 Wils. C. P. 127.

(v) *Tout Temps Prist.* At common law, if the widow has made no demand of dower prior to the commencement of her action, the heir may plead *tout temps prist*, and if such plea be sustained be thereby relieved from damages for the detention of her dower.[49]

(vi) *Jointure or Other Provision For Wife.* A jointure or a fair and reasonable antenuptial contract or other agreement whereby pecuniary provision is made for the wife in lieu of her dower[50] may, if in conformity with statutory requirements or otherwise legally binding upon the parties, be pleaded by way of equitable defense to an action for dower.[51] In pleading such contracts or agreements the pleader must state the facts upon which their validity depends.[52]

(vii) *Title or Seizin of Husband.* Under the common law the plea of *ne unques seisie* puts in issue only the seizin of the husband during coverture.[53] A tenant cannot allege in defense that the demandant's husband under whom he claims was only colorably seized of the lands held by him.[54] Except as otherwise provided by statute a plea that the husband did not die seized of the land is no bar to the action.[55]

(viii) *Statute of Limitations.* Where the statute does not run against a widow in continuous possession of the lands, a mere averment that more than the period specified in the statute has elapsed since the death of the husband is insufficient.[56] Under the South Carolina statute a plea that "the defendant has been five years in quiet and peaceful possession of the premises," without stating it to have been an actual and adverse possession, was held bad.[57]

3. Replication or Reply. As in other cases plaintiff should controvert by her reply all material new matter in the answer.[58] Where equitable defenses are set up in an answer in a special proceeding for the admeasurement of dower, it has been held that there is no necessity for filing a reply.[59]

4. Cross Bill. Under a statute authorizing an equitable allotment of dower to be made in one or more parcels of the husband's lands in lieu of the whole, defendants owning the lands conveyed by the husband under a general warranty may prosecute a cross bill against the husband's heirs to compel the latter to indemnify them for an allotment of dower out of the lands so conveyed to them.[60]

5. Issues, Proof, and Variance — a. Issues Raised. Unless the seizin of the husband is alleged by the widow there can be no inquiry as to damages upon defendant's default,[61] but under an averment that the husband was "seized and

49. Hopper *v.* Hopper, 21 N. J. L. 543; Woodruff *v.* Brown, 17 N. J. L. 246; Hitchcock *v.* Harrington, 6 Johns. (N. Y.) 290, 5 Am. Dec. 229; Humphrey *v.* Phinney, 2 Johns. (N. Y.) 484.

Where the husband dies seized, the widow is entitled to be endowed of one third of his realty at the time dower is assigned, as well against a purchaser under the sale by order of court as against the heir and, as no demand is necessary to entitle her to damages, such purchaser cannot plead *tout temps prist* to the petition of the widow for her dower. Rankin *v.* Oliphant, 9 Mo. 239; Hopper *v.* Hopper, 22 N. J. L. 715.

50. See *supra*, VIII, D, 12, 13, 14.

51. Murphy *v.* Murphy, 12 Ohio St. 407; Ambler *v.* Norton, 4 Hen. & M. (Va.) 23.

52. Grogan *v.* Garrison, 27 Ohio St. 50. See Murphy *v.* Murphy, 12 Ohio St. 407; Ambler *v.* Norton, 4 Hen. & M. (Va.) 23.

Defect in answer should be reached by motion and not by demurrer. Bowers *v.* Hutchinson, 67 Ark. 15, 53 S. W. 399.

53. Sheppard *v.* Wardell, 1 N. J. L. 452.

54. Kimball *v.* Kimball, 2 Me. 226.

Non-performance of condition of devise.— Where land is devised upon a condition subsequent, the non-performance of the condition authorizes the heirs of the devisor to enter upon the lands; and where the widow of the devisee petitions for the assignment of dower in the lands devised, a plea setting forth as a defense the non-performance of such condition which does not show that defendant is an heir of the devisor is bad. Throp *v.* Johnson, 3 Ind. 343.

55. Taylor *v.* Brodrick, 1 Dana (Ky.) 345.

56. O'Bryen *v.* Langley, 59 S. W. 523, 22 Ky. L. Rep. 1030.

57. Mitchell *v.* Poyas, 1 Nott & M. (S. C.) 85.

58. McCarthy *v.* Roberts, 8 Ind. 150; and, generally, Pleading.

59. Vance *v.* Vance, 118 N. C. 864, 24 S. E. 768.

60. Richmond *v.* Harris, 102 Ky. 389, 43 S. W. 703, 19 Ky. L. Rep. 1443. See also Moore *v.* Moore, 5 Dana (Ky.) 464.

61. Waters *v.* Gooch, 6 J. J. Marsh. (Ky.) 586, 22 Am. Dec. 108.

possessed" of the lands described, evidence is admissible to show that the seizin was in fee.[62] The service upon a widow in mortgage foreclosure proceedings of a bill setting forth that she among others has or claims to have some interest in the premises, but making no mention of the widow's right of dower, does not present to the court the dower issue.[63]

b. Variance. As in other cases a variance will not be held fatal unless it is of matters legally essential to the issue or claim, so as to materially and injuriously affect the substantial rights of the parties, or unless it is misleading and prejudicial in character.[64] So an allegation in an answer that the dower has been released will be sustained, although varying from the evidence, if the main allegation is proved;[65] and the rule applies where the proof as to the lands in which dower is claimed varies from the description or designation contained in the pleading.[66]

G. Evidence — 1. Presumptions and Burden of Proof — a. In General. All the elements essential to establish the widow's right of dower, such as the marriage of the wife to the alleged husband, the seizin of the land by the husband, and the death of the husband must be affirmatively proved by the widow.[67] When the widow shows such facts she is entitled to her dower unless defendant can show affirmatively something which defeats her claim.[68] And where issue is taken on the demandant's marriage and her husband's seizin, and an allegation of demand in her writ was not controverted, she is not held to a proof of such demand.[69] If it be sought to bar the widow's dower by an alleged pecuniary provision in lieu of dower taking effect on the husband's death, the burden of proving its fairness is upon the husband's executor.[70] If the widow's dower depends upon the value of the lands at the time of alienation, the presumption is that the value at such time was substantially the same as at the time of bringing the action.[71]

b. Marriage. Proof of an actual marriage with the deceased husband, either under statutory forms and solemnities, or as prescribed by the common law, must be made by the widow in her action to recover dower,[72] unless the plea is of such a nature as to admit the fact;[73] and the burden of proof is not shifted by her establishment of a *prima facie* case.[74]

c. Title or Seizin of Husband. A widow cannot recover either at law or in equity unless it be affirmatively shown that her husband was seized of the lands in which dower is claimed at some time during coverture, or under some statutes at the time of his death;[75] although she will not be held to strict proof of her

62. Sheppard *v.* Sheppard, 87 Ala. 560, 6 So. 275. See Smith *v.* Paysenger, 2 Mill (S. C.) 59.

63. Lewis *v.* Smith, 11 Barb. (N. Y.) 152 [*affirmed* in 9 N. Y. 502, 61 Am. Dec. 706].

64. See, generally, Pleading.

65. Chicago Dock Co. *v.* Kinzie, 49 Ill. 289.

66. Gilman *v.* Sheets, 78 Iowa 499, 43 N. W. 299.

That title proved on the trial varies from that set up in the declaration is no objection to a recovery. Bear *v.* Snyder, 11 Wend. (N. Y.) 592. See also Oothout *v.* Ledings, 15 Wend. (N. Y.) 410.

67. Chapman *v.* Schroeder, 10 Ga. 321.

Proof of seizin of the husband and his subsequent death makes a *prima facie* case in favor of the widow. Reich *v.* Berdel, 120 Ill. 499, 11 N. E. 912.

68. Jones *v.* Miller, 17 S. C. 380.

69. Ayer *v.* Spring, 10 Mass. 80.

70. Warner *v.* Warner, 18 Abb. N. Cas. (N. Y.) 151.

Where rent has been assigned to the widow with her consent and accepted by her, in order to bar her dower, it must appear that the rent will endure for her life. Ellicott *v.* Mosier, 11 Barb. (N. Y.) 574 [*affirmed* in 7 N. Y. 201].

71. Marble *v.* Lewis, 53 Barb. (N. Y.) 432.

72. Jones *v.* Jones, 28 Ark. 19; Nichols *v.* Munsel, 115 Mass. 567; Roberts *v.* Roberts, 1 Ohio Dec. (Reprint) 368, 8 West. L. J. 372.

Presumption of the death of former husband.— Chapman *v.* Cooper, 5 Rich. (S. C.) 452.

Presumption as to divorce.— Goodwin *v.* Goodwin, 113 Iowa 319, 85 N. W. 31; Casley *v.* Mitchell, 121 Iowa 96, 96 N. W. 725.

73. Sheppard *v.* Wardell, 1 N. J. L. 452, to the effect that a plea *ne unques seisie* admits all the other facts alleged in demandant's declaration and relieves her from proof of marriage.

74. Nichols *v.* Munsel, 115 Mass. 567.

75. *Alabama.*— Steele *v.* Browne, 70 Ala. 235.

Arkansas.— Crittenden *v.* Johnson, 14 Ark. 447.

Indiana.— Dennis *v.* Dennis, 7 Blackf. 572.

husband's title to make out a *prima facie* case,[76] particularly where defendant is in possession under a conveyance from the husband.[77] A constructive seizin or a right to seizin of the husband during coverture if shown will be sufficient.[78] If defendant alleges that the husband's seizin was instantaneous or transitory, by deed and mortgage back,[79] it is for him to show that the deed and mortgage constituted one and the same transaction.[80] Where the husband conveyed the lands upon the same day that they were granted to him, the widow is not required to prove actual possession by him, where no adverse possession is shown.[81] Possession by the husband during coverture of the lands in controversy raises a presumption of seizin, and if uncontroverted will of itself be sufficient to establish the husband's title.[82]

d. Death of Husband. If the death of the husband is denied, the burden generally rests upon the widow to show it by proof;[83] but under a plea of *ne unques seisie*, the husband's death is admitted and need not be proved;[84] and the presumption of death arising from long continued absence without being heard from is available to the widow in seeking to recover her dower.[85]

e. Release or Bar. Where a pecuniary or other provision in lieu of dower is unreasonably disproportionate to the husband's means, the presumption is against its validity, and the burden is upon those asserting it as a bar to establish its validity.[86] A presumption may arise against the widow's claim of dower by a failure to assert it for an unreasonably long period of time.[87]

f. Misconduct of Wife. A defendant interposing the wife's elopement and continued adultery as a bar of dower must prove all the essential facts constituting the offense.[88]

2. Admissibility — a. In General. Where a demand is essential it may be proved by admissions of the party of whom it is made, by positive and direct or

Maine.— Mann *v.* Edson, 39 Me. 25.

Maryland.— Spangler *v.* Stanler, 1 Md. Ch. 36.

Mississippi.— Ware *v.* Washington, 6 Sm. & M. 737.

Missouri.— Gentry *v.* Woodson, 10 Mo. 224.

New Jersey.— Sheppard *v.* Wardell, 1 N. J. L. 452.

New York.— Poor *v.* Horton, 15 Barb. 485; Hurd *v.* Grant, 3 Wend. 340.

See 17 Cent. Dig. tit. "Dower," § 297; and *supra*, V, C.

76. Gentry *v.* Woodson, 10 Mo. 224.

77. Steele *v.* Brown, 70 Ala. 235; Shane *v.* McNeill, 76 Iowa 459, 41 N. W. 166; Wall *v.* Hill, 7 Dana (Ky.) 172; Smith *v.* Myers, 7 Ky. L. Rep. 443.

Where a paramount title to that of the husband is not shown by defendant, proof that he claimed through the husband is unnecessary. Reich *v.* Berdel, 120 Ill. 499, 11 N. E. 912.

78. Mann *v.* Edson, 39 Me. 25; Ware *v.* Washington, 6 Sm. & M. (Miss.) 737. See *supra*, V, C; VI, B, 5.

79. See *supra*, V, C, 8, b.

80. Grant *v.* Dodge, 43 Me. 489.

81. McIntyre *v.* Costello, 47 Hun (N. Y.) 289.

82. Where the administrator of the husband denies the widow's right of dower in a particular tract of land, and sets up title in himself adversely to the intestate, it is sufficient, in order to cast the burden of proving title on the administrator, for the widow to show that she is the widow, and that her husband died in possession of the premises. McCullers *v.* Haines, 39 Ga. 195.

Sufficiency of evidence to show husband's title or seizin see *infra*, XI, G, 3, c.

83. The general rule is that the existence of a person being once shown he is presumed to continue in life and the onus rests upon the party asserting his death. 1 Greenleaf Ev. § 41; Stevens *v.* McNamara, 36 Me. 176, 58 Am. Dec. 740; Battin *v.* Bigelow, 2 Fed. Cas. No. 1,108, Pet. C. C. 452. See DEATH, 13 Cyc. 295 *et seq.*

84. Sheppard *v.* Wardell, 1 N. J. L. 452.

85. *Illinois.*— Whitney *v.* Nicholl, 46 Ill. 230, 92 Am. Dec. 248.

Iowa.— Sherod *v.* Ewell, 104 Iowa 253, 73 N. W. 493.

Kentucky.— Foulks *v.* Rhea, 7 Bush 568.

New Jersey.— Wambaugh *v.* Schenck, 2 N. J. L. 229.

Canada.— Giles *v.* Morrow, 1 Ont. 527.

Presumption of death see DEATH, 13 Cyc. 297.

86. Pierce *v.* Pierce, 71 N. Y. 154, 27 Am. Rep. 22; Shea's Appeal, 121 Pa. St. 302, 15 Atl. 629, 1 L. R. A. 422.

A release of dower will be presumed from a wife's receiving a separate maintenance under articles of separation during her husband's life and for eight years after his death. Evans *v.* Evans, 3 Yeates (Pa.) 507.

87. Robert Graves Co. *v.* McDade, 108 Ala. 420, 19 So. 86; Barnard *v.* Edwards, 4 N. H. 321. See *supra*, XI, D, 5.

88. Henderson *v.* Chaires, 25 Fla. 26, 37, 6 So. 164. Where the tenant pleads demandant's adultery in bar, and it appears that

by circumstantial evidence.[89] Recitals in the deed by which defendant holds the lands recognizing the widow's right of dower can only be resorted to in the case of loss of primary evidence.[90] The statute of limitations is inadmissible unless it be pleaded.[91] Duly recognized mortality tables showing the probabilities of life are admissible to prove the value of dower rights.[92]

b. Marriage. In an action for dower cohabitation, reputation, and reception by the family as husband and wife are all evidence of marriage,[93] the rule in this respect not differing from that applicable in other civil actions.[94]

c. Title or Seizin of Husband. Office copies of deeds are admissible to prove the title and seizin of the husband,[95] without proof of the loss of the original, since a wife has no right to the custody of her husband's deeds.[96] Where the tenant claims to hold under a deed antedating the widow's marriage it is competent for her to show the date of the delivery of the deed.[97] The recitals in a mortgage in which the wife did not join are inadmissible to affect her right of dower in the lands mortgaged.[98] The tenant cannot show that the widow's husband, under whom he claims, was only colorably seized by virtue of a deed made to defraud the creditors of his grantor.[99] And the oral declarations of the husband after seizin are not competent for the purpose of showing that he held the lands in trust, although they are admissible for some purposes.[1] Parol evidence

the demandant was again married, the tenant, in order to show the second marriage adulterous, must show affirmatively that the former husband is living. Cochrane *v.* Libby, 18 Me. 39.

89. Luce *v.* Stubbs, 35 Me. 92.

90. Jewell *v.* Harrington, 19 Wend. (N. Y.) 471.

91. Hitchcock *v.* Harrington, 6 Johns. (N. Y.) 290, 5 Am. Dec. 229. See, generally, LIMITATIONS OF ACTIONS; and *supra*, XI, F, 2, b, (VIII).

92. McHenry *v.* Yokum, 27 Ill. 160.

93. *Alabama.*— Martin *v.* Martin, 22 Ala. 86; Ford *v.* Ford, 4 Ala. 142.

Connecticut.— Hammick *v.* Bronson, 5 Day 290.

Kentucky.— Chiles *v.* Drake, 2 Metc. 146, 74 Am. Dec. 406; Donnelly *v.* Donnelly, 8 B. Mon. 113; Stover *v.* Boswell, 3 Dana 232.

Maine.— Carter *v.* Parker, 28 Me. 509.

New Hampshire.— Stevens *v.* Reed, 37 N. H. 49.

New York.— Jackson *v.* Claw, 18 Johns. 346.

Pennsylvania.— Chambers *v.* Dickson, 2 Serg. & R. 475.

United States.— Blodget *v.* Thornton, 3 Fed. Cas. No. 1,554, 3 Cranch C. C. 176.

Validity of marriage.— The issue being as to whether plaintiff, claiming dower as the wife of a decedent, was married to him, evidence that plaintiff had knowledge of her husband's reputed marriage with another is admissible only so far as it affects the *bona fides* and intent of her previous cohabitation with decedent. Smith *v.* Smith, 52 N. J. L. 207, 19 Atl. 255. A decree of divorce rendered subsequent to the marriage of plaintiff with the man in whose estate she claims dower does not preclude her from showing that she was never legally married to the man who was defendant in the divorce suit, because of the fact that at the time the marriage was contracted he had a wife living. Williams *v.* Williams, 63 Wis. 58, 23 N. W. 110, 53 Am. Rep. 253.

94. **Evidence of marriage** see, generally, MARRIAGE.

95. Kidder *v.* Blaisdell, 45 Me. 461, so holding under a supreme court rule permitting the introduction of such deeds in actions affecting realty. *Compare* Sellars *v.* Carpenter, 27 Me. 497.

96. Stevens *v.* Reed, 37 N. H. 49; Smith *v.* Puysenger, 2 Mill (S. C.) 59. Contents of a deed by which the land was conveyed to the husband may be shown by the widow without such full proof of loss as is required in actions to try title. Pickett *v.* Lyles, 5 S. C. 275. And a copy of a deed by a marshal conveying the land in which she claimed dower under an execution sale against her husband is admissible, although she gave no notice of her intention to offer such copy, nor notice to defendant to produce the original. Stewart *v.* Blease, 4 S. C. 37.

97. Keator *v.* Dimmick, 46 Barb. (N. Y.) 158.

98. Tibbetts *v.* Langley Mfg. Co., 12 S. C. 465.

99. Kimball *v.* Kimball, 2 Me. 226. *Compare*, however, Farnum *v.* Loomis, 2 Oreg. 29, where it was held that defendant was not estopped from showing that the husband from whom he derives title was never "seized of an estate of inheritance" in the land.

1. Pruitt *v.* Pruitt, 57 S. C. 155, 35 S. E. 485. The oral declarations of the husband are admissible to show the extent of his possession (Forrest *v.* Trammell, 1 Bailey (S. C.) 77); but his declarations as to his equitable title are inadmissible (Mann *v.* Edson, 39 Me. 25); and it has been held that his declarations made at the time of his purchase of the lands indicating his interests therein are competent, but declarations made subsequently to the purchase are incompetent (Derush *v.* Brown, 8 Ohio 412).

is admissible to prove that the land granted to the husband of the demandant is the land as to which she claims dower.[2]

d. Death of Husband. The general rules governing the admissibility of evidence to prove death may be applied in determining the admissibility of evidence to establish the death of the husband in an action for dower.[3] The demandant's own testimony as to her husband's death is admissible;[4] and reputation in the family as to the death of the husband is competent to show *prima facie* that fact.[5] As a general rule in most jurisdictions the records of a court of probate showing the probate of the will of the husband or the administration of his estate are competent evidence to prove his death;[6] but it has been held that in an action for the admeasurement of dower such records are only evidence in proceedings arising out of the will or connected with the estate, except in cases where from lapse of time they are competent under the rule for the admission of ancient records.[7]

e. Release or Bar of Dower. Where an antenuptial contract or a pecuniary provision in lieu of dower is relied upon as a bar, parol or other evidence outside the instrument is admissible as tending to show the circumstances of the parties and the intention of the husband.[8] Where a husband has a right to defeat dower by a *bona fide* conveyance, the motive of the husband may be shown by evidence of family disturbances between the husband and wife;[9] and where it is alleged that the husband conveyed his lands in fraud of plaintiff's dower right, to the knowledge of the grantees, the husband's letters to the wife containing evidence that he was clandestinely conveying his property are admissible in her behalf.[10]

f. Misconduct of Wife. Where a wife living in adultery is barred of dower, proof of adultery may be given in an action at law for dower;[11] but where by statute, as in New York, a wife can be barred of dower only by a conviction of adultery in an action for divorce, the forfeiture of dower cannot be established by proof of adultery in any other action.[12]

3. Weight and Sufficiency — a. In General. Proof of service of summons upon defendants and their default will not alone sustain a judgment in an action for dower, but the material allegations of the petition must be proved.[13] Proof that the husband died in the exclusive possession of the lands makes out a *prima facie* case for dower therein.[14] Where a demand for dower is a prerequisite to the commencement of an action proof that a paper addressed to the tenant and subscribed by the widow demanding dower was seasonably left at his dwelling-house, where it was read by some of the inmates, taken in connection with his admission that the dower had been demanded of him, will authorize the inference that the paper was duly received and its contents understood by him.[15]

2. Keefer *v.* Young, 2 Harr. & J. (Md.) 53.

3. See Death, 13 Cyc. 305 *et seq.*

4. Flynn *v.* Coffee, 12 Allen (Mass.) 133.

5. Cochrane *v.* Libby, 18 Me. 39. See Death, 13 Cyc. 306.

6. See Death, 13 Cyc. 306.

7. Carroll *v.* Carroll, 60 N. Y. 121, 19 Am. Rep. 144.

The letters of administration are not admissible as evidence in an action of ejectment to recover dower, as against a stranger, to prove the death of the husband. Weiskoph *v.* Dibble, 18 Fla. 24.

8. Ambler *v.* Norton, 4 Hen. & M. (Va.) 23.

Where want of sufficient consideration is alleged for the purpose of showing the invalidity of a release of dower, the value of the estate is legal and material evidence. Parks *v.* Dunkle, 3 Watts & S. (Pa.) 291.

9. Flowers *v.* Flowers, 89 Ga. 632, 15 S. E. 834, 18 L. R. A. 75, holding also that the husband's will executed subsequent to a conveyance, in which he made no provision whatever for his wife, is not relevant for the purpose of showing that the conveyance was not in good faith.

10. Rice *v.* Waddill, 168 Mo. 99, 67 S. W. 605, but also holding self serving statements by the husband inadmissible.

11. Bell *v.* Nealy, 1 Bailey (S. C.) 312, 19 Am. Dec. 686. See *supra*, VIII, D, 11.

12. Pitts *v.* Pitts, 52 N. Y. 593 [*affirming* 13 Abb. Pr. N. S. 272, 44 How. Pr. 64]. See *supra*, VIII, D, 10, a.

13. Dwyer *v.* Dwyer, 13 Abb. Pr. N. S. (N. Y.) 269.

14. Barton *v.* Hinds, 46 Me. 121.

15. Luce *v.* Stubbs, 35 Me. 92.

Necessity and sufficiency of demand see *supra*, XI, A.

b. Marriage. The rules controlling the sufficiency of evidence to establish marriage in ordinary civil actions involving property rights may be applied in actions for the recovery of dower.[16] As in other actions general reputation, cohabitation, and acknowledgment are sufficient to establish the marriage.[17] But an allegation that the widow had been divorced cannot be established by reputation or by the statements of the parties.[18]

c. Title or Seizin of Husband — (i) *In General.* The widow is not required to make strict proof of her husband's title or seizin by a production of the deeds, but it will be sufficient if she produces such evidence as raises a fair presumption thereof.[19] Deeds are admissible, however, and a deed from a person having previous possession of the lands, conveying the lands to the husband in fee simple, and a possession by the husband under such deed is sufficient *prima facie* evidence of seizin to entitle the widow to dower, in the absence of proof to the contrary.[20] But it has been held that a conveyance to the husband without evidence that he entered into possession is insufficient.[21] The seizin of the husband is established as against the tenant by proof of the husband's possession of the lands, and a subsequent sale thereof under an execution levied by one of his creditors, and the holding of title by the tenant under such sale.[22] Instantaneous seizin only[23] is sufficiently proved to defeat dower as against a purchase-money mortgagee by showing that the deed to the husband and the purchase-money mortgage were executed, acknowledged, and recorded on the same day, although the deed was dated several days before acknowledgment.[24]

(ii) *Possession During Coverture.* Possession of land by the husband during coverture under a claim of title is sufficient *prima facie* evidence of

16. **Sufficiency of proof of marriage** see, generally, MARRIAGE.

17. *Indiana.*— Fleming *v.* Fleming, 8 Blackf. 234.

Kentucky.— Powell *v.* Calvert, 5 Ky. L. Rep. 768.

Maryland.— Sellman *v.* Bowen, 8 Gill & J. 50, 29 Am. Dec. 524.

New Hampshire.— Young *v.* Foster, 14 N. H. 114.

Ohio.— Roberts *v.* Roberts, 1 Ohio Dec. (Reprint) 368, 8 West. L. J. 372.

See 17 Cent. Dig. tit. "Dower," § 304; and, generally, MARRIAGE.

Presumption of marriage see *supra*, XI, G, 1, b.

An actual solemnization of marriage between the widow and the deceased owner of the estate need not be proved, but circumstances from which the marriage may be inferred will be sufficient. Van Gelder *v.* Post, 2 Edw. (N. Y.) 577.

Former wife living at time of marriage.— Where a widow's claim was resisted on the ground that at the time of her marriage her husband had another wife living, and it was proved that four years before the marriage he was living with another woman, whom he treated as his wife, and that he said after his marriage and in the presence of the petitioner that his first wife was living in Georgia, it was held that this was not sufficient to prove that the husband had another wife living at the time of the marriage. Hull *v.* Rawls, 27 Miss. 471.

18. Cruize *v.* Billmire, 69 Iowa 397, 28 N. W. 657.

19. Becker *v.* Quigg, 54 Ill. 390; Stark *v.* Hopson, 22 S. C. 42.

20. Wall *v.* Hill, 7 Dana (Ky.) 172; Augustus *v.* Holt, 15 S. W. 1064, 12 Ky. L. Rep. 8; Thorndike *v.* Spear, 31 Me. 91; Griggs *v.* Smith, 12 N. J. L. 22.

Proof that a person bearing the husband's name acquired title to the land, which he subsequently conveyed, is a sufficient showing of identity to establish her husband's title to the land, in the absence of any attempt to show that there were two persons having the same name. Gilman *v.* Sheets, 78 Iowa 499, 43 N. W. 299.

21. Steele *v.* Brown, 70 Ala. 235; Holmes *v.* Spinning, 7 Ohio Dec. (Reprint) 451, 3 Cinc. L. Bul. 297. *Compare* Evans *v.* Evans, 29 Pa. St. 277, holding that plaintiff in an action of dower makes out a *prima facie* title in her deceased husband by showing a conveyance in fee to him from defendant.

Proof of conveyance to the husband and a conveyance by him to another during coverture is sufficient, in the absence of evidence to the contrary, to prove the seizin of the husband. Carter *v.* Parker, 28 Me. 509; Ward *v.* Fuller, 15 Pick (Mass.) 185. In the absence of other evidence the deed of the husband conveying real estate is sufficient *prima facie* evidence of seizin. Bolster *v.* Cushman, 34 Me. 428.

22. Cochrane *v.* Libby, 18 Me. 39.

23. **Instantaneous seizin** see *supra*, V, C, 8.

24. Pendleton *v.* Pomeroy, 4 Allen (Mass.) 510. Proof of instanteous seizin must be made by showing that the deed and mortgage were parts of the same transaction, and this is not done where it is shown that the husband on the day that land was conveyed to him by his grantor executed a mortgage thereon to secure a note given

seizin, and unless impeached or explained is conclusive against the tenant and will entitle the widow to dower.[25]

d. Death of Husband. The death of the husband in an action to recover dower may be proved as in other actions.[26] Reputation in the family is *prima facie* evidence of the fact,[27] and a long continued absence without being heard from will as in other cases authorize a presumption of death sufficiently establishing that fact in an action by the wife to recover dower.[28]

H. Trial — 1. In General. The trial of the issues in an action or proceeding for the recovery of dower will be conducted in accordance with the practice followed in the court where it is brought. If the action is in ejectment the practice will conform to that prescribed for such actions.[29] In any event the conduct of the trial will be governed by special statutory provisions made therefor, if any there be, and if none, by the provisions of codes and practice acts applicable thereto. If the action be at law and the practice is not controlled by statute, the practice at common law will prevail. The dilatory proceedings by *essoin*, allowed in real actions at common law, are not permitted in the practice in actions for dower in this country, and have been expressly abolished by statute in some jurisdictions.[30] The common law does not give defendant in an action of dower a right to view as a matter of course,[31] and it will not be granted unless sufficient cause be shown by affidavit to satisfy the court that it is necessary.[32] Issues of fact should be tried at the bar of the court, even if the clerk of the court is given by statute jurisdiction to assign dower.[33]

2. Questions of Law and Fact. The rule as to the determination of questions of law by the court and questions of fact by the jury applies to actions for dower.[34] The jury is not to determine the amount to be awarded as dower; it is for them to determine as to the facts in issue required to be established to sustain the widow's claim.[35] The practice, however, in some jurisdictions authorizes the assessment of the value of dower by a jury.[36] It is for the jury to decide whether from the facts and circumstances of the case the widow intended to release or waive her right of dower.[37]

to another person as security for money borrowed to pay for the land. Smith *v.* McCarty, 119 Mass. 519.

25. *Illinois.*— Gordon *v.* Dickison, 131 Ill. 141, 23 N. E. 439.

Kentucky.— Wall *v.* Hill, 7 Dana 172; Dashiel *v.* Collier, 4 J. J. Marsh. 601.

Maine.— Mann *v.* Edson, 39 Me. 25; Knight *v.* Mains, 12 Me. 41.

New Hampshire.— Stevens *v.* Reed, 37 N. H. 49.

New York.— Carpenter *v.* Weeks, 2 Hill 341; Jackson *v.* Waltermire, 5 Cow. 299, 7 Cow. 353; Embree *v.* Ellis, 2 Johns. 119.

Ohio.— Ward *v.* McIntosh, 12 Ohio St. 231.

South Carolina.— Stark *v.* Hopson, 30 S. C. 370, 9 S. E. 345; Stark *v.* Watson, 24 S. C. 215; Reid *v.* Stevenson, 3 Rich. 66; Forrest *v.* Trammell, 1 Bailey 77.

See 17 Cent. Dig. tit. "Dower," § 306.

26. Sufficiency of evidence of death see, generally, Death, 13 Cyc. 307.

27. Cochrane *v.* Libby, 18 Me. 39.

28. Whiting *v.* Nicoll, 46 Ill. 230, 92 Am. Dec. 248; Wambough *v.* Schank, 2 N. J. L. 229. See *supra*, XI, G, 1, d.

29. See Mich. Comp. Laws, § 10948 *et seq.*

30. Waters *v.* Gooch, 6 J. J. Marsh. (Ky.) 586, 22 Am. Dec. 108.

31. Jackson *v.* Guager, 6 Cow. (N. Y.) 578; Vischer *v.* Conant, 4 Cow. (N. Y.) 396; Ostrander *v.* Kneeland, 20 Johns. (N. Y.) 276.

32. Ostrander *v.* Kneeland, 20 Johns. (N. Y.) 276.

33. Brittain *v.* Mull, 91 N. C. 498.

In a suit in equity to recover dower and for rents and profits, where the husband's seizin is denied, the court will direct a trial of the legal issue at law and retain the bill for further proceedings. Sellman *v.* Bowen, 8 Gill & J. (Md.) 50, 29 Am. Dec. 524.

34. Questions of law and fact see, generally, Trial.

35. Peay *v.* Picket, 1 Nott & M. (S. C.) 16, holding that the only questions before the jury were whether the applicant was married and her husband seized.

36. N. Y. Code Civ. Proc. § 1618. See Scammon *v.* Campbell, 75 Ill. 223, holding that the age of the widow and how long she may live are not matters proper to be considered by the jury in assessing the value of her dower.

37. Deshler *v.* Beery, 4 Dall. (Pa.) 300, 1 L. ed. 842.

The presumption of a release of dower arising from the lapse of time should not be submitted to the jury, when the counter

3. VERDICT AND FINDINGS. As in other cases the verdict should conform to the pleadings, and find as to all the material points in issue between the parties.[38] If damages for detention of dower are sought and the jury find that the husband died seized, they should also find the time when he died, the nature of his estate, and the annual value of the land.[39] It has been held that where a husband did not die seized of the lands the jury has nothing to do with the value thereof at any time, so that a finding among others as to the value of the premises will be considered as surplusage,[40] but will not invalidate the verdict.[41] The verdict of a jury as to the yearly value of lands, which have been reported as not susceptible of division by commissioners appointed for the allotment of dower, is like the finding of a fact at law, and is binding on all parties until set aside by the court.[42] A verdict in favor of one of several defendants on his separate plea will not avail another who has suffered a default.[43] The verdict may be for a part of the premises, either as to quantity of interest or the extent of the premises, but in such case it should specify the part affected.[44]

I. Interlocutory Judgment or Decree. If it appear by the verdict or decision that the widow is entitled to dower in the lands described in her petition or complaint, an interlocutory judgment, order, or decree is usually rendered directing that her dower be admeasured by a referee, master, or commissioners appointed for the purpose.[45] The form and requisites of such judgment or order will necessarily vary in the several states. The decree declaring the widow entitled to dower and directing its admeasurement is in no sense a final decree, but remains under the control of the court until the admeasurement is made and duly confirmed.[46] The judgment or decree should conform to the statutory requirements, although an immaterial variance will not impair its validity.[47] An order for the maintenance of the widow *pendente lite* cannot be made in an action for dower,[48] although where dower is claimed in a trust estate, it has been held proper to direct payment of one third of the income to the widow pending the litigation.[49]

J. Admeasurement, Allotment, or Assignment — 1. IN GENERAL. The methods employed in the several jurisdictions to assign or allot a widow's dower are various and generally expressly prescribed by statute.[50] At common law after a judgment in favor of the widow, she might have a writ of habere facias seisinam, directed to the sheriff, commanding him to cause her dower to be set out and seizin thereof delivered to her.[51] In some jurisdictions it is provided that the

evidence is so overwhelming that a verdict for him would be set aside. Chase *v.* Alley, 82 Me. 234, 19 Atl. 397.

38. See, generally, TRIAL.

Where the issues permit of a general or a special verdict a verdict which is neither should be set aside. Vadney *v.* Thompson, 44 Hun (N. Y.) 1.

39. Martin *v.* Martin, 14 N. J. L. 125.

40. Shirtz *v.* Shirtz, 5 Watts (Pa.) 255; Leinweaver *v.* Stoever, 17 Serg. & R. (Pa.) 297.

41. Leinweaver *v.* Stoever, 17 Serg. & R. (Pa.) 297.

42. Walker *v.* Walker, 2 Ill. App. 418. A verdict finding that the yearly value of a widow's dower in land covered by an encumbrance the validity of which is questioned is a certain sum if such encumbrance is invalid, but that her dower is worthless if such encumbrance is valid, is insufficient, and a decree based thereon is erroneous. Walker *v.* Walker, 2 Ill. App. 418.

43. Lecompte *v.* Wash, 9 Mo. 551.

44. Bear *v.* Snyder, 11 Wend. (N. Y.) 592.

45. Under the New York statute (Code Civ. Proc. § 1607) providing that if plaintiff's right to dower is not disputed by the answer an interlocutory judgment must be rendered, the widow is entitled to the judgment nowithstanding an allegation by a tenant in common that the rental value of the lands could not be accurately ascertained, that a charge upon the lands would be detrimental to his interests, and that a partition suit had been commenced for the sale of the lands. Rice *v.* Thompson, 16 N. Y. Suppl. 911.

46. *Ex p.* Crittenden, 10 Ark. 333.

47. Aikin *v.* Merrell, 39 Ill. 62.

A judgment directing an allotment according to the value of the land at the time when it was conveyed by the husband is erroneous, where the date of the conveyance is not stated in the judgment. Taylor *v.* Brodrick, 1 Dana (Ky.) 345.

48. Rockwell *v.* Morgan, 13 N. J. Eq. 119.

49. Sharp's Estate, 6 Phila. (Pa.) 389.

50. See the statutes in the several states and the cases in the notes following.

51. Washburn Real Prop. (6th ed.) § 471.

writ shall direct the sheriff to cause the dower to be set out by commissioners,[52] but in nearly all the states the common-law practice has been departed from to a greater extent, and the admeasurement is made by either referees or commissioners, who are required to report their action to the court for its approval.[53]

2. APPOINTMENT AND QUALIFICATIONS OF COMMISSIONERS OR REFEREES. The usual statutory method is for the court in which the action or proceeding for the recovery of dower was commenced to designate a referee or commissioners to make the admeasurement. The commissioners are usually required to be freeholders and residents of the county where the lands to be admeasured are situated,[54] and it is sometimes provided that they shall not be connected by affinity or consanguinity with those interested in the estate.[55] And even if not required by statute it would seem that in analogy to the requirements as to the qualifications of referees and jurors they should be ineligible for such cause.[56] They should be sworn, and a statement of that fact and the oaths taken by them should accompany their report.[57] Vacancies can be filled by the court or officer making the original appointment, even if not expressly authorized by statute.[58] Less than the statutory number may act with full force and effect, especially where notice is given to the interested parties and there are no objections.[59] If the widow's right to dower is uncontested and there has been no trial, notice of the widow's application for the appointment of commissioners is required under the statutes in some states to be given to persons interested.[60] Objection to the appointment or the qualifications of the commissioners should be made at the time of their appointment, and cannot be made by a party who intervened by permission of the court after the commissioners had reported.[61] In a probate court objections to such appointment amounting to an equitable bar which the widow denies will not be considered.[62]

52. As to sufficiency of writ of seizin under Maine statute see Skolfield *v.* Skolfield, 90 Me. 371, 38 Atl. 530.

53. See the cases in the notes following.

54. A statute directing the appointment of freeholders of the same county refers to the county where the lands lie, and not the county where the husband dwelt at the time of his death. Miller *v.* Miller, 12 Mass. 454.

Appointment of referees.— In an action to recover dower, the court may appoint a referee to admeasure plaintiff's dower and assess her damages by loss of rents and profits, instead of the three freeholders formerly required. Brown *v.* Brown, 4 Rob. (N. Y.) 688, 31 How. Pr. (N. Y.) 481.

55. James *v.* Fields, 5 Heisk. (Tenn.) 394, holding that where such requirement is prescribed the order of appointment should show affirmatively that they comply therewith. But the failure to state in the order of appointment that the commissioners were unconnected by affinity or consanguinity with any of the parties is not fatal if in fact they were so unconnected. Cooley *v.* Cooley, (Tenn. Ch. App. 1896) 37 S. W. 1028.

56. See, generally, JURIES; REFERENCES.

57. Adams *v.* Barron, 13 Ala. 205; Loyd *v.* Malone, 23 Ill. 43, 74 Am. Dec. 179; Hawkins *v.* Craig, 6 T. B. Mon. (Ky.) 254, holding, however, that the acts of commissioners who are not sworn until after they have acted are erroneous but not void.

58. McCormick *v.* Taylor, 5 Ind. 436; Lenox *v.* Livingston, 47 Mo. 256 (to the effect that vacancies can be filled without reappointing the other commissioners); Gale *v.* Edsall, 8 Wend. (N. Y.) 460 (holding that a vacancy should be filled by the surrogate for the time being, although the original appointment was made by his predecessor).

59. Williamson *v.* McLeod, 64 Ga. 761.

Under the Iowa statute providing for an assignment of the widow's share by "referees," if only one participates in the appraisement, the assignment may be set aside upon a slighter showing of prejudice than if it had been made by all. Jones *v.* Jones, 47 Iowa 337.

60. Weathers *v.* Weathers, 5 Ind. 272; Holderman *v.* Holderman, 5 B. Mon. (Ky.) 384.

An ex parte order appointing commissioners to lay off and assign a widow's dower in the lands of her deceased husband is not binding on the heirs, although the commissioners report an assignment of dower, and it is confirmed by the court. Raper *v.* Sanders, 21 Gratt. (Va.) 60.

The appointment of commissioners to assign dower is prima facie evidence of a lawful application for the appointment of such commissioners. Williams *v.* Morgan, 1 Litt. (Ky.) 167.

61. McKibbon *v.* Folds, 38 Ga. 235.

62. *In re* Fritts, 32 N. J. Eq. 293.

In proceedings in probate courts for the appointment of commissioners there can be no inquiry as to whether a pecuniary provision by the husband in lieu of dower is a bar. All defenses to the widow's claim of dower must be set up when she brings her action for the recovery of the part assigned to her. Hyde *v.* Hyde, 4 Wend. (N. Y.) 630.

The order or decree appointing commissioners should show upon whose application it was made,[63] and may contain general rules for the guidance of the commissioners not interfering with the exercise of a proper discretion.[64] Notice of the time that the commissioners propose to act in the performance of their duties is not generally required.[65]

3. Valuation of Property For Assignment — a. In General. In determining the proportion of the lands which should be assigned to the widow for her dower, the quantity and quality thereof should both be considered. This was the rule at common law and is expressly declared by statute in many jurisdictions.[66] The allotment should be made according to the value of the lands as determined by the rents and profits thereof, such part being set off to the widow as will yield her one third of such income.[67] If the widow under the statute elects to take a gross sum in lieu of dower the value of the land may be determined by the price obtained at a sale conducted by an administrator in the manner prescribed by law, or under an agreement of the parties interested therein.[68] In determining the annual value of the widow's interest her age and health are not to be taken into consideration.[69] When the value of the lands has been once adjudged it cannot be modified by the increase or decrease of the rental value.[70]

b. Extent of Interest. Generally speaking the widow is entitled to one third in value of all the lands of which her husband was seized during coverture,[71] without regard to advancements made to her by the husband,[72] or encumbrances which are not paramount to her right.[73] Where the husband was seized of an undivided portion of a tract of land which had not been partitioned during his lifetime, his widow is entitled to dower in one third of his undivided interest.[74]

c. Time of Valuation — (i) *As Against Heirs.* As against the husband's heirs the widow is entitled to have her dower assigned to her according to the

63. Smith *v.* Maxwell, 3 Litt. (Ky.) 471.

64. Clift *v.* Clift, (Tenn. Sup. 1888) 9 S. W. 198.

An instruction to commissioners to assign dower by metes and bounds will be presumed to be right when the record does not contain the evidence (Throp *v.* Johnson, 3 Ind. 343); but it is error for the court to so frame its order as to deprive the commissioners of their powers and to prevent the performance of their whole duty (Jeffries *v.* Allen, 33 S. C. 268, 11 S. E. 764).

It is not necessary that the writ of seizin should contain specific directions to the commissioners. Their duties are prescribed by law, and it would be inconvenient or impossible to incorporate them all in the writ of seizin. Skolfield *v.* Skolfield, 90 Me. 571, 38 Atl. 530.

65. Cooley *v.* Cooley, (Tenn. Ch. App. 1896) 37 S. W. 1028. Notice to a defendant in possession of the execution of a commission to lay off dower need not be given. Ridgeway *v.* Newbold, 1 Harr. (Del.) 385; *In re* Watkins, 9 Johns. (N. Y.) 245.

66. *Indiana.*— Russell *v.* Russell, 48 Ind. 456.

Kentucky.—Taylor *v.* Lusk, 7 J. J. Marsh. 636.

Maine.— Carter *v.* Parker, 28 Me. 509.

Massachusetts.— Conner *v.* Shepherd, 15 Mass. 164; Leonard *v.* Leonard, 4 Mass. 533.

Missouri.— Strickler *v.* Tracy, 66 Mo. 465; O'Flaherty *v.* Sutton, 49 Mo. 583.

New York.— *In re* Watkins, 9 Johns. 245.

See 17 Cent. Dig. tit. "Dower," § 322.

67. *Maine.*— Simonton *v.* Gray, 34 Me. 50; Carter *v.* Parker, 28 Me. 509.

Massachusetts.— Conner *v.* Shepherd, 15 Mass. 164; Miller *v.* Miller, 12 Mass. 454; Leonard *v.* Leonard, 4 Mass. 533.

New Jersey.—Macknet *v.* Macknet, 24 N. J. Eq. 449.

North Carolina.— McDaniel *v.* McDaniel, 25 N. C. 61.

Pennsylvania.— Heller's Appeal, 116 Pa. St. 534, 8 Atl. 790.

Virginia.— Devaughn *v.* Devaughn, 19 Gratt. 556.

See 17 Cent. Dig. tit. "Dower," § 322 *et seq.*

68. Smith *v.* Smith, 39 Ga. 226; Lanier *v.* Griffin, 11 S. C. 565; Clift *v.* Clift, 87 Tenn. 17, 9 S. W. 360; Scott *v.* Ashlin, 86 Va. 581, 10 S. E. 751.

69. Walker *v.* Deaver, 79 Mo. 664.

70. Carter *v.* Stookey, 89 Ill. 279.

71. See *supra*, IV, B.

72. Grattan *v.* Grattan, 18 Ill. 167, 65 Am. Dec. 726.

73. Platt's Appeal, 56 Conn. 572, 16 Atl. 669; Davis *v.* Hutton, 127 Ind. 481, 26 N. E. 187, 1006; Wells *v.* Wells, 57 Iowa 410, 10 N. W. 824.

74. Dashiel *v.* Collier, 4 J. J. Marsh. (Ky.) 601 (in which case a conveyance was made to the grantor of defendant by three persons, the wife of one of whom did not join therein, and it was held that she was entitled to dower in a third part only of the land conveyed); Loyd *v.* Conover, 25 N. J. L. 47. *Compare supra*, V, C, 9.

value of the land at the time of the assignment, and not at the time of her husband's death, unless the delay of assignment was due to her own fault.[75]

(II) *As Against Husband's Alienees.* But, as a general rule, where the lands were aliened by the husband, the widow is entitled to dower according to their value at the date of alienation.[76] This rule has direct application to the determination of the value of lands which have been improved by the labor and money of the alienee,[77] but is subject to the exception hereafter noted in respect to the appreciation of the value of such lands by natural causes.[78] If the husband mortgaged the lands, remaining in possession, but afterward released the equity of redemption, the date of the release will be deemed the date of alienation.[79] Where an assignment of lands is made for the benefit of creditors, the wife reserving her dower, and the lands are subsequently sold by the assignee, the value of the lands at the time of the assignment will determine the value of her right.[80] For most purposes the time when the husband was deprived of his title will be deemed the time of alienation.[81]

d. Appreciation or Depreciation of Value — (I) *As Against Heirs.* Since the widow is entitled to her dower as against the heirs according to the value of the premises at the time of the assignment,[82] she has the advantage of the natural appreciation of value while such lands are in the possession of the heirs and must bear her proportion of the unavoidable diminution of such value during such period.[83]

(II) *As Against Husband's Alienees.* If the value of the lands in which the widow is entitled to dower has increased since the date of alienation by the deceased husband because of circumstances not connected with the expenditure of labor or money by the alienee, the widow may have her dower in such lands according to their value at the time of the assignment rather than at the time of

75. Price *v.* Hobbs, 47 Md. 359; McGehee *v.* McGehee, 42 Miss. 747; Larrowe *v.* Beam, 10 Ohio 498; Stewart *v.* Pearson, 4 S. C. 4, in which case it was held that if the husband was seized at the time of his death of the land in which dower is claimed, the sum to be assessed in lieu of dower is ascertained by the value of the land at the time of the assignment.

If the delay of assignment was caused by the widow's own fault, as where, being executrix, she sold the husband's real estate under an agreement with the heirs to retain her dower out of the proceeds, the value of her dower may be computed according to its value at the time of her husband's death. Everts*on v.* Tappen, 5 Johns. Ch. (N. Y.) 497. See also Sidway *v.* Sidway, 52 Hun (N. Y.) 222, 4 N. Y. Suppl. 920.

76. *Alabama.*— Linn *v.* Robinson, 21 Ala. 547.

Indiana.— Wilson *v.* Oatman, 2 Blackf. 223.

Iowa.— Corriel *v.* Bronson, 6 Iowa 471.

Kentucky.— Pepper *v.* Thomas, 85 Ky. 539, 4 S. W. 297, 9 Ky. L. Rep. 122; Lancaster *v.* Lancaster, 78 Ky. 198; Anderson *v.* Hall, 35 S. W. 904, 18 Ky. L. Rep. 191; Vinson *v.* Gentry, 21 S. W. 578, 14 Ky. L. Rep. 804.

Massachusetts.— Stearns *v.* Swift, 8 Pick. 532; Catlin *v.* Ware, 9 Mass. 218, 6 Am. Dec. 56.

New Jersey.—Van Doren *v.* Van Doren, 3 N. J. L. 697, 4 Am. Dec. 408.

New York.— Sidway *v.* Sidway, 52 Hun 222, 4 N. Y. Suppl. 920; Raynor *v.* Raynor, 21 Hun 36; Walker *v.* Schuyler, 10 Wend. 480; Allan *v.* Smith, 1 Cow. 180; Dolf *v.* Basset, 15 Johns. 21; Shaw *v.* White, 13 Johns. 179; Dorchester *v.* Coventry, 11 Johns. 510; Humphrey *v.* Phinney, 2 Johns. 484; Hale *v.* James, 6 Johns. Ch. 258, 10 Am. Dec. 328; Van Gelder *v.* Post, 2 Edw. 577; Parks *v.* Hardey, 4 Bradf. Surr. 15.

Pennsylvania.— Shirtz *v.* Shirtz, 5 Watts 255; Thompson *v.* Morrow, 5 Serg. & R. 289, 9 Am. Dec. 358.

South Carolina.— Brown *v.* Duncan, 4 McCord 346; Russell *v.* Gee, 2 Mill 254.

Virginia.— Tod *v.* Baylor, 4 Leigh 498.

See 17 Cent. Dig. tit. "Dower," § 325.

77. Bowie *v.* Berry, 1 Md. Ch. 452. See *infra*, XI, J, 3, e, (II).

78. See *infra*, XI, J, 3, d, (II).

79. Hale *v.* James, 6 Johns. Ch. (N. Y.) 258, 10 Am. Dec. 328.

80. Lancaster *v.* Lancaster, 78 Ky. 198.

81. Vinson *v.* Gentry, 21 S. W. 578, 14 Ky. L. Rep. 804.

82. See *supra*, XI, J, 3, c, (I).

83. Coke Litt. 32*a*; 2 Scribner Dower 598. In an action of dower against the heir the increased value of the land, independent of the labor and expenditures of the tenant, is subject to the demandant's claim. Manning *v.* Laboree, 33 Me. 343.

Proceeds of insurance.— Where buildings subject to dower had been insured, and after the death of the husband they were destroyed by fire, it was held that the widow was entitled to a share of the insurance money, to be estimated according to the proportion of

alienation.[84] This rule is subject to modification in those jurisdictions in which it is provided by statute that the dower interest as against the husband's alienee is to be determined according to the value of the lands at the time of alienation.[85] Since the widow under the rule stated profits by an increase in the value of the lands from natural or extrinsic causes, she is also held to her proportion of the loss occasioned by a depreciation in value, either from natural causes or from mere negligence of the alienee in keeping the property in repair.[86]

e. Value Enhanced by Improvements — (i) *As Against Heirs.* The rule is well settled both in England[87] and in the United States, unless modified by statute,[88] that if the heirs after the husband's death enhance the value of the estate the widow will be entitled to her dower in such estate without allowance to the heirs for the value of such improvement.[89] A devisee under the husband's will[90] and a purchaser at an administrator's sale[91] have been held to be subject to the same rule. The reason for the rule is that the title and seizin of the soil, upon recovery

her interest in the estate. Campbell *v.* Murphy, 55 N. C. 357.

84. *Delaware.*— Green *v.* Tennant, 2 Harr. 336.

Illinois.— Summers *v.* Babb, 13 Ill. 483.

Indiana.— Throp *v.* Johnson, 3 Ind. 343; Smith *v.* Addleman, 5 Blackf. 406; Wilson *v.* Oatman, 2 Blackf. 223.

Kentucky.— Fritz *v.* Tudor, 1 Bush 28.

Maine.— Boyd *v.* Carlton, 69 Me. 200, 31 Am. Rep. 268; Manning *v.* Laboree, 33 Me. 343; Mosher *v.* Mosher, 15 Me. 371.

Maryland.— Price *v.* Hobbs, 47 Md. 359; Bowie *v.* Barry, 1 Md. Ch. 452.

Missouri.— McClanahan *v.* Porter, 10 Mo. 746.

Ohio.— Dunseth *v.* U. S. Bank, 6 Ohio 76.

United States.— Thornburn *v.* Doscher, 32 Fed. 810, 13 Sawy. 60; Johnston *v.* Vandyke, 13 Fed. Cas. No. 7,426, 6 McLean 422; Powell *v.* Monson, etc., Mfg. Co., 19 Fed. Cas. No. 11,356, 3 Mason 347.

See 17 Cent. Dig. tit. "Dower," § 327.

85. The words "enhanced in value after alienation" as used in these statutes have been construed as being limited in its meaning to appreciation in the value of real estate by reason of improvements put thereon by the alienee; and it has been held that in estimating the value of real estate aliened by the husband, for the purpose of assigning his widow's dower therein, the value of the real estate is to be estimated as of the time of the assignment of dower, excluding therefrom the increase in value resulting from improvements made thereon subsequent to the date of alienation. Butler *v.* Fitzgerald, 43 Nebr. 192, 61 N. W. 640, 47 Am. St. Rep. 741, 27 L. R. A. 252; Thornburn *v.* Doscher, 32 Fed. 810, 13 Sawy. 60, under Oregon statute. But see Guerin *v.* Moore, 25 Minn. 462.

86. Sanders *v.* McMillian, 98 Ala. 144, 11 So. 750, 39 Am. St. Rep. 19, 18 L. R. A. 425; Butler *v.* Fitzgerald, 43 Nebr. 192, 61 N. W. 640, 47 Am. St. Rep. 741, 27 L. R. A. 252; Thompson *v.* Morrow, 5 Serg. & R. (Pa.) 289, 9 Am. Dec. 358 (holding that the widow runs the risk of any deterioration of the estate which may arise either from public misfortune or the negligence, or even the voluntary act, of the alienee); Westcott *v.* Campbell, 11 R. I. 278. The fact that the depreciation in value is due to the acts or omissions of the alienee does not make him responsible therefor to the widow or change the rule that her dower must be assessed according to the depreciated value (McClanahan *v.* Porter, 10 Mo. 746); nor is such depreciation a sufficient cause for assigning compensation according to the value at the time of alienation, instead of setting off the dower by metes and bounds (Sanders *v.* McMillian, 98 Ala. 144, 11 So. 750, 39 Am. St. Rep. 19, 18 L. R. A. 425).

87. Coke Litt. 32*a*; Park Dower 257; Doe *v.* Gwinnell, 1 Q. B. 682, 41 E. C. L. 728.

88. See N. Y. Code Civ. Proc. § 1609. Under the South Carolina statute providing that on all assessments of dower in lands of which the husband died seized the value at the death of the husband, with interest from the accrual of the right of dower, shall be taken and received by the courts as the true value on which to assess said dower, the value of the lands at the time of the husband's death will be ascertained without reference to any subsequent improvements. Jefferies *v.* Allen, 34 S. C. 189, 13 S. E. 365.

89. *Connecticut.*— Way *v.* Way, 42 Conn. 52; Husted's Appeal, 34 Conn. 488.

Massachusetts.— Walsh *v.* Wilson, , 131 Mass. 535; Catlin *v.* Ware, 9 Mass. 218, 6 Am. Dec. 56.

Mississippi.— McGehee *v.* McGehee, 42 Miss. 747.

Missouri.— McClanahan *v.* Porter, 10 Mo. 746.

New York.— Humphrey *v.* Phinney, 2 Johns. 484; Hale *v.* James, 6 Johns. Ch. 258, 10 Am. Dec. 328.

Ohio.— Larrowe *v.* Beam, 10 Ohio 498; Biggs *v.* Annim, 1 Ohio Dec. (Reprint) 221, 4 West. L. J. 540.

Pennsylvania.— Thompson *v.* Morrow, 5 Serg. & R. 289, 9 Am. Dec. 358.

South Carolina.— Phinney *v.* Johnson, 15 S. C. 158.

United States.— Powell *v.* Monson, etc., Mfg. Co., 19 Fed. Cas. No. 11,356, 3 Mason 347.

See 17 Cent. Dig. tit. "Dower," § 328.

90. Allsmiller *v.* Freutchenicht, 86 Ky. 198, 5 S. W. 746, 9 Ky. L. Rep. 909.

91. Ball *v.* Schaffer, 14 Ill. App. 302.

by the common law, carry everything annexed to the freehold as an incident; the tenant in dower therefore like any other tenant of the freehold takes upon a recovery whatever is then annexed to the freehold, whether it be so annexed by folly, mistake, or the purest innocence.[92]

(II) *As Against Husband's Alienees.* An entirely different rule has been declared or provided by statute in this country in respect to improvements made upon lands aliened by the husband in his lifetime. In such a case the widow's dower must be admeasured or assigned according to the value of the lands exclusive of such improvements;[93] the policy of the law being that the purchaser of land from a married man should not be discouraged from enhancing its value.[94] It has been held that only special improvements, such as buildings and orchards,[95] and not those necessary to keep the lands in ordinary repair, should be excluded.[96]

4. Actual Admeasurement or Allotment — a. In General. The law contemplates the allotment of dower in distinct and separate parcels by metes and

92. Powell *v.* Monson, etc., Mfg. Co., 19 Fed. Cas. No. 11,356, 3 Mason 347.

Another reason for the rule is stated to be that it being the heir's duty to assign the widow her dower, he should be held accountable for his folly in making improvements before an assignment. Catlin *v.* Ware, 9 Mass. 218, 6 Am. Dec. 56; Hale *v.* James, 6 Johns. Ch. (N. Y.) 258, 10 Am. Dec. 328; Thompson *v.* Morrow, 5 Serg. & R. (Pa.) 289, 9 Am. Dec. 358.

93. *Alabama.*— Sanders *v.* McMillian, 98 Ala. 144, 11 So. 750, 39 Am. St. Rep. 19, 18 L. R. A. 425; Wood *v.* Morgan, 56 Ala. 397; Ware *v.* Owens, 42 Ala. 212, 94 Am. Dec. 672; Francis *v.* Garrard, 18 Ala. 794; Springle *v.* Shields, 17 Ala. 295; Beavers *v.* Smith, 11 Ala. 20; Barney *v.* Frowner, 9 Ala. 901.

Delaware.— Rawlins *v.* Buttel, 1 Houst. 224; Green *v.* Tennant, 2 Harr. 336.

District of Columbia.— Baden *v.* McKenny, 18 D. C. 268.

Illinois.— Stookey *v.* Stookey, 89 Ill. 40; Scammon *v.* Campbell, 75 Ill. 223; Summers *v.* Babb, 13 Ill. 483.

Indiana.— Davis *v.* Hutton, 127 Ind. 481, 26 N. E. 187, 1006; Quick *v.* Brenner, 101 Ind. 230; Throp *v.* Johnson, 3 Ind. 343; Wilson *v.* Oatman, 2 Blackf. 223. See Alleman *v.* Hawley, 117 Ind. 532, 20 N. E. 441.

Iowa.— Felch *v.* Finch, 52 Iowa 563, 3 N. W. 570; Corriell *v.* Bronson, 6 Iowa 471.

Kentucky.— Pepper *v.* Thomas, 85 Ky. 539, 4 S. W. 297, 9 Ky. L. Rep. 122; Fritz *v.* Tudor, 1 Bush 28; Dashiel *v.* Collier, 4 J. J. Marsh. 601; Anderson *v.* Hall, 35 S. W. 904, 18 Ky. L. Rep. 191; Horn *v.* Mize, 1 Ky. L. Rep. 350.

Maine.— Dockray *v.* Milliken, 76 Me. 517; French *v.* Lord, 69 Me. 537; Boyd *v.* Carlton, 69 Me. 200, 31 Am. Rep. 268; Manning *v.* Laboree, 33 Me. 343; Carter *v.* Parker, 28 Me. 509; Hobbs *v.* Harvey, 16 Me. 80; Mosher *v.* Mosher, 15 Me. 371.

Maryland.— Price *v.* Hobbs, 47 Md. 359; Bowie *v.* Berry, 3 Md. Ch. 359.

Massachusetts.— Stearns *v.* Swift, 8 Pick. 532; Webb *v.* Townsend, 1 Pick. 21, 11 Am. Dec. 132; Ayer *v.* Spring, 10 Mass. 80; Gore *v.* Brazier, 3 Mass. 523, 3 Am. Dec. 182.

Mississippi.— Wooldridge *v.* Wilkins, 3 How. 360.

Missouri.— Young *v.* Thrasher, 115 Mo. 222, 21 S. W. 1104; Rannels *v.* Washington University, 96 Mo. 226, 9 S. W. 569.

Nebraska.— Butler *v.* Fitzgerald, 43 Nebr. 192, 61 N. W. 640, 47 Am. St. Rep. 741, 27 L. R. A. 252.

New Hampshire.— Johnson *v.* Perley, 2 N. H. 56, 9 Am. Dec. 35.

New Jersey.— Coxe *v.* Higbee, 11 N. J. L. 395; Van Doren *v.* Van Doren, 3 N. J. L. 697, 4 Am. Dec. 408; Barnett *v.* Griffith, 27 N. J. Eq. 201.

New York.— Brown *v.* Brown, 4 Rob. 688; Bell *v.* New York, 10 Paige 49.

North Carolina.— Campbell *v.* Murphy, 55 N. C. 357.

Ohio.— Stoddart *v.* Marshall, 1 Disn. 527, 12 Ohio Dec. (Reprint) 775, 2 Wkly. L. Gaz. 27; Biggs *v.* Annim, 1 Ohio Dec. (Reprint) 221, 4 West. L. J. 540.

Pennsylvania.— Shirtz *v.* Shirtz, 5 Watts 255; Warner *v.* Macknett, 3 Phila. 325; Ticknor *v.* Bessigue, 2 C. Pl. 96.

Rhode Island.— Westcott *v.* Campbell, 11 R. I. 378.

South Carolina.— Phinney *v.* Johnson, 15 S. C. 158; Alexander *v.* Hamilton, 12 S. C. 39; Brown *v.* Duncan, 4 McCord 346.

Tennessee.— Puryear *v.* Puryear, 5 Baxt. 640; Vincent *v.* Vincent, 1 Heisk. 333; Lewis *v.* James, 8 Humphr. 537.

Virginia.— Braxton *v.* Coleman, 5 Call 433, 2 Am. Dec. 592.

United States.— Peirce *v.* O'Brien, 29 Fed. 402; Powell *v.* Monson, etc., Mfg. Co., 19 Fed. Cas. No. 11,356, 3 Mason 347.

See 17 Cent. Dig. tit. "Dower," § 328.

Voluntary conveyance.—Stookey *v.* Stookey, 89 Ill. 40.

Land taken on execution against husband. —Ayer *v.* Spring, 9 Mass. 8.

94. Sanders *v.* McMillian, 98 Ala. 144, 11 So. 750, 39 Am. St. Rep. 19, 18 L. R. A. 425; Westcott *v.* Campbell, 11 R. I. 378; Powell *v.* Monson, etc., Mfg. Co., 19 Fed. Cas. No. 11,356, 3 Mason 347.

95. Horn *v.* Mize, 1 Ky. L. Rep. 350.

96. Anderson *v.* Hall, 35 S. W. 904, 18 Ky. L. Rep. 191.

bounds, where the qualities and condition of the lands and the nature of the husband's estate therein will admit of it.[97] The allotment should be made with equal justice to all interested parties, regard being had not only to the value of the estate, but also to the annual productiveness of the several parcels,[98] so that the annual income of the portion assigned shall equal at least one third of the annual income of the whole property.[99] The interests of the heirs and devisees should be considered and should be as little affected by the allotment as is possible;[1] and where the widow's dower attaches to lands of which the husband died seized, such lands should be assigned as her dower instead of lands conveyed by her husband to one who paid the purchase-price in full.[2]

b. Easements. Easements in the nature of a right of way, the right to use water-pipes,[3] or the privilege of cutting firewood or of pasturage[4] on lands not set off for dower should not be assigned to the widow.[5]

c. Lands Held in Common. Lands held in common by the husband should be set out so that the widow may hold as a tenant in common during her life.[6] She is not entitled to an assignment of any particular part of the lands so held.[7]

d. Allotment in Separate Tracts — (i) *Rule at Common Law.* Where the husband died seized of several distinct tracts of land, or where he divided his lands during his lifetime into several tracts and aliened them to different purchasers, the allotment must be from each separate tract, and of such portion of each as will produce one third of the net income of the whole.[8]

97. Coke Litt. 36; 4 Kent Comm. 63; Schnebly *v.* Schnebly, 26 Ill. 116.

98. Smith *v.* Smith, 5 Dana (Ky.) 179.

99. Schnebly *v.* Schnebly, 26 Ill. 116.

An allotment should be set aside, where there are uncorroborated affidavits of two citizens that the portion allotted to the widow is worth six thousand dollars, and that the portion allotted to each of her two children is worth only six hundred dollars, although the report states that the division is equitable and fair. Brokaw *v.* McDougall, 20 Fla. 212.

1. Hall *v.* Smith, 59 N. H. 315; *In re* Garrison, 15 N. J. Eq. 393. Where a husband had an equity in lands during his life, which he might have specifically enforced, it was held that his widow was entitled to one third thereof as dower, to be laid off if practicable in such convenient form as to bear equally on the shares of the other heirs, otherwise to be assigned in such form as to be again divided after the widow's death. Graham *v.* Graham, 6 T. B. Mon. (Ky.) 561, 17 Am. Dec. 166.

2. Stimson *v.* Thorn, 25 Gratt. (Va.) 278.

As against creditors of her husband by lien created since her marriage, a widow is entitled to have her dower in his real estate assigned in kind, if it can be done, without regard to its effect on the interest of his creditors (Simmons *v.* Lyles, 27 Gratt. (Va.) 922); but she cannot refuse to receive an equivalent of her dower in a gross sum or an annuity, under a statute authorizing a purchaser at a judgment sale under an execution against her husband to discharge the lands from her dower by the payment of such sum or annuity (Verlander *v.* Harvey, 36 W. Va. 374, 15 S. E. 54).

3. Price *v.* Price, 54 Hun (N. Y.) 349, 7 N. Y. Suppl. 474.

4. Jones *v.* Jones, 44 N. C. 177.

5. See, generally, EASEMENTS.

6. French *v.* Lord, 69 Me. 537; Osborn *v.* Rogers, 19 N. J. Eq. 429; Gregory *v.* Gregory, 69 N. C. 522; Parrish *v.* Parrish, 88 Va. 529, 14 S. E. 325.

7. Gregory *v.* Gregory, 69 N. C. 522.

8. *Arkansas.*— Pike *v.* Underhill, 24 Ark. 124; Morrill *v.* Menifee, 5 Ark. 629; Hill *v.* Mitchell, 5 Ark. 608.

Delaware.—Coulter *v.* Holland, 2 Harr. 330.

Illinois.— Walsh *v.* Reis, 50 Ill. 477; Peyton *v.* Jeffries, 50 Ill. 143 (holding that the mere fact that the widow is occupying one of the tracts as a homestead will not authorize an allotment of her entire dower out of that tract); Schnebly *v.* Schnebly, 26 Ill. 116.

Indiana.— Compton *v.* Pruitt, 88 Ind. 171.

Iowa.— O'Ferrall *v.* Simplot, 4 Iowa 381.

Kentucky.— Wood *v.* Lee, 5 T. B. Mon. 50.

Maine.— Skolfield *v.* Skolfield, 88 Me. 258, 34 Atl. 27; Blanchard *v.* Blanchard, 48 Me. 174; French *v.* Peters, 33 Me. 396; French *v.* Pratt, 27 Me. 381; Fosdick *v.* Gooding, 1 Me. 30, 10 Am. Dec. 25.

Massachusetts.— Jones *v.* Brewer, 1 Pick. 314.

Mississippi.— Cook *v.* Fisk, Walk. 423.

Missouri.— Thomas *v.* Hesse, 34 Mo. 13, 84 Am. Dec. 66.

New Jersey.— Hardin *v.* Lawrence, 40 N. J. Eq. 154; Droste *v.* Hall, (Ch. 1894) 29 Atl. 437; Sip *v.* Lawback, 17 N. J. L. 442.

New York.— Ellicott *v.* Mosier, 11 Barb. 574.

Ohio.— Stoddart *v.* Marshall, 1 Disn. 527, 12 Ohio Dec. (Reprint) 775, 2 Wkly. L. Gaz. 27.

South Carolina.— Witherspoon *v.* Matts, 18 S. C. 396; Scott *v.* Scott, 1 Bay 504, 1 Am. Dec. 625.

Virginia.— Fuller *v.* Conrad, 94 Va. 233, 26 S. E. 575.

See 17 Cent. Dig. tit. "Dower," § 332.

(II) *Consent of Parties Interested.* The application of this rule may be waived by the consent of the widow, and an allotment may be made to her in a single tract, or in such other parcels as may be agreed upon by the parties interested.[9]

(III) *Statutory Modification.* The effect of this rule has been modified by statute so that in many jurisdictions a distinct parcel may be allotted as dower, where this is practicable and for the best interests of all the parties concerned.[10]

e. Allotment by Metes and Bounds. Dower according to common right is required by the common law to be set out in the lands of which the widow is dowable by metes and bounds, where practicable.[11] This is the rule in equity where resort is had thereto,[12] and is declared by statute in most jurisdictions.[13] The interest of the widow alone is not to determine the question whether an assignment by metes or bounds would be unjust;[14] but the interests of the whole estate and all parties interested should be considered.[15] That lands were sold under an execution against the husband, and the purchaser made valuable improvements, is a sufficient reason against assignment by metes and bounds.[16]

f. Allotment of Portion of Building. Particular rooms in a dwelling-house on lands in which the widow is entitled to dower may be assigned to her, with the use of hall, passageways, and doors, so as to secure to her a proper enjoyment of such rooms, in a case where there are no other lands in which the dower may be assigned,[17] and when she consents thereto.[18]

Where several parcels are held by the same person it is proper to assign dower out of only one of the parcels. Cazier *v.* Hinchey, 143 Mo. 203, 44 S. W. 1052. This rule is recognized by statute in some states. See R. I. Gen. L. (1896) c. 264, § 3.

Dower in an estate which has been taken under execution in several parcels should not be assigned wholly on one of the tracts to the discharge of the others. U. S. Bank *v.* Delorac, Wright (Ohio) 285.

Sale of portion of a tract.— Where the decedent sold a part of a tract of land in his lifetime and died possessed of the rest, dower should if practicable be taken from the part unsold, saving the necessity of a suit by the vendee for indemnity (Lawson *v.* Morton, 6 Dana (Ky.) 471; Wood *v.* Keyes, 6 Paige (N. Y.) 478); and where one in possession of lands in which another has an unassigned right of dower sells a portion of them, the dower when it has been ascertained should be charged upon the unsold lands, if they are sufficient to satisfy it (Raynor *v.* Raynor, 21 Hun (N. Y.) 36).

9. Milton *v.* Milton, 14 Fla. 369; Compton *v.* Pruitt, 88 Ind. 171; O'Ferrall *v.* Simplot, 4 Iowa 381.

Where dower is assigned in a body to the widow and she accepts the same, the heirs cannot complain if the several tracts could thus be sold to a better advantage. Rowand *v.* Carroll, 81 Ill. 224.

10. *Delaware.*— Eliason *v.* Eliason, 3 Del. Ch. 260.

Illinois.— Longshore *v.* Longshore, 200 Ill. 470, 65 N. E. 1081; Rowand *v.* Carroll, 81 Ill. 224.

Iowa.— Montgomery *v.* Horn, 46 Iowa 285.

New York.— Price *v.* Price, 41 Hun 486, 11 N. Y. Civ. Proc. 359.

North Carolina.—Askew *v.* Askew, 103 N. C. 285, 9 S. E. 646.

West Virginia.—Alderson *v.* Henderson, 5 W. Va. 182.

See 17 Cent. Dig. tit. "Dower," § 332.

11. Coke Litt. 34*b*; Pierce *v.* Williams, 3 N. J. L. 281; James *v.* Fields, 5 Heisk. (Tenn.) 394; Spain *v.* Adams, 3 Tenn. Ch 319; Leggett *v.* Steele, 15 Fed. Cas. No. 8,211, 4 Wash. 305.

12. Leggett *v.* Steele, 15 Fed. Cas. No. 8,211, 4 Wash. 305. And see Steele *v.* Brown, 70 Ala. 235.

13. *Alabama.*— Sanders *v.* McMillian, 98 Ala. 144, 11 So. 750, 39 Am. St. Rep. 19, 18 L. R. A. 425; Steele *v.* Brown, 70 Ala. 235; Humes *v.* Scruggs, 64 Ala. 40; Adams *v.* Barron, 13 Ala. 205; Barney *v.* Frowner, 9 Ala. 901.

Illinois.— Moore *v.* Dick, 134 Ill. 43, 24 N. E. 768.

Kentucky.—Allsmiller *v.* Freutchenicht, 86 Ky. 198, 5 S. W. 746, 5 Ky. L. Rep. 509.

Pennsylvania.— Gourley *v.* Kinley, 66 Pa. St. 270; Giebler's Estate, 7 Leg. Gaz. 58.

Tennessee.—Vincent *v.* Vincent, 1 Heisk. 333.

United States.— Leggett *v.* Steele, 15 Fed. Cas. No. 8,211, 4 Wash. 305.

See 17 Cent. Dig. tit. "Dower," § 334.

14. Sanders *v.* McMillian, 98 Ala. 144, 11 So. 750, 39 Am. St. Rep. 19, 18 L. R. A. 425; Moore *v.* Dick, 134 Ill. 43, 24 N. E. 768.

15. Gourley *v.* Kinley, 66 Pa. St. 270.

16. Steele *v.* Brown, 70 Ala. 235.

17. Symmes *v.* Drew, 21 Pick. (Mass.) 278; White *v.* Story, 2 Hill (N. Y.) 543; Parks *v.* Hardey, 4 Bradf. Surr. (N. Y.) 15; Jones *v.* Jones, 44 N. C. 177; Stiner *v.* Cawthorn, 20 N. C. 640; Parrish *v.* Parrish, 88 Va. 529, 14 S. E. 325. *Compare* Stewart *v.* Smith, 4 Abb. Dec. (N. Y.) 306, 1 Keyes (N. Y.) 59.

18. Stewart *v.* Smith, 39 Barb. (N. Y.) 167.

g. Allotment of Homestead or Dwelling. The widow is not entitled as of right to have the mansion-house or dwelling included in the dower assigned to her,[19] unless it is allowed by statute.[20]

h. Effect of Homestead Exemption. A widow who is entitled to both dower and homestead should be assigned her dower out of the whole of her deceased husband's estate, without excluding the homestead, already allotted to her,[21] unless the statute is to be construed as providing that the homestead should be first allotted to her, and then her dower in the residue.[22]

i. Sufficiency of Allotment. The allotment should be definite and state with certainty and precision the portion awarded to the widow. A description of the tracts allotted by their number as designated at a land-office has been held sufficient,[23] but the measurements and boundaries should be set forth where it is possible.[24]

5. Assignment Where Lands Are Incapable of Division — a. In General. The common law recognized the rule that where the property in which the widow is entitled to dower was incapable of division her dower might be assigned by giving her a share in the rents, issues, and profits in common with the other owners, or an alternate occupation, or in such other manner as will best serve the purposes of the law.[25] The statutes in nearly all the states, however, provide methods for the assignment of dower in such cases, either by a division of the rents and profits, an allowance of an annuity based upon the annual value of the lands, the acceptance of a gross sum, or a sale of the lands and an allotment to the widow of her share in the proceeds.[26]

b. Division of Rents and Profits — (i) *In General.* A common method of providing for the dower of the widow where the lands are incapable of division is to secure to her the payment of a third part of the rents, issues, and profits of such lands.[27] Where the property is rented for a fixed sum she is entitled to one third thereof for her dower.[28] If the property be a mill[29] or a ferry a third of the profits would be a proper assignment of dower.[30] A report by the commissioners that the property cannot be set off consistently with the interests of the estate has been held not a condition precedent to an award of dower out of the rents.[31] Deductions for reasonable repairs and taxes should be made from the gross rents;[32] and where the rental value has been increased by permanent improvements by a purchaser from her husband there should be deducted from the net rental value the proportion which the cost of such improvements bears to the value of the lands.[33]

19. Taylor *v.* Lusk, 7 J. J. Marsh. (Ky.) 636; Dungan *v.* Bryant, 20 S. W. 1100, 14 Ky. L. Rep. 675; Devaughn *v.* Devaughn, 19 Gratt. (Va.) 556.

20. See Gregory *v.* Ellis, 86 N. C. 579; Latta *v.* Brown, 96 Tenn. 343, 34 S. W. 417, 31 L. R. A. 840.

21. *Illinois.*— Jones *v.* Gilbert, 135 Ill. 27, 25 N. E. 566; Knapp *v.* Gass, 63 Ill. 492.

Kentucky.— Gasaway *v.* Woods, 9 Bush 72.

Massachusetts.— Cowdrey *v.* Cowdrey, 131 Mass. 186.

Michigan.— Robinson *v.* Baker, 47 Mich. 619, 11 N. W. 410.

Ohio.— Wanzer *v.* Smith, 2 Ohio Dec. (Reprint) 323, 2 West. L. Month. 426.

Compare Glover *v.* Hill, 57 Miss. 240.

See 17 Cent. Dig. tit. "Dower," § 336.

22. Cassity *v.* Pound, 167 Mo. 605, 67 S. W. 283; Graves *v.* Cochran, 68 Mo. 74; Seek *v.* Haynes, 68 Mo. 13.

23. Adams *v.* Barron, 13 Ala. 205.

24. Stevens *v.* Stevens, 3 Dana (Ky.) 371 (holding that a return by commissioners that they had allotted "four acres around the house" was too indefinite); Skolfield *v.* Skolfield, 88 Me. 258, 34 Atl. 27; Pierce *v.* Williams, 3 N. J. L. 281. *Compare* Patch *v.* Keeler, 27 Vt. 252.

25. Washburn Real Prop. (6th ed.) § 473. If the property be indivisible the widow may at her election enjoy it every third year or receive one third of the future rents. Hyzer *v.* Stoker, 3 B. Mon. (Ky.) 117.

26. See statutes in the several states and cases in the notes following.

27. Chase's Case, 1 Bland (Md.) 206, 17 Am. Dec. 277; Van Gelder *v.* Post, 2 Edw. (N. Y.) 577.

28. Scammon *v.* Campbell, 75 Ill. 223; Lindsey *v.* Stevens, 5 Dana (Ky.) 104; Weir *v.* Tate, 39 N. C. 264; Peyton *v.* Smith, 22 N. C. 325.

29. 1 Bright Husb. & W. 372; Coke Litt. 32*a*; 2 Crabb Real Prop. 148; Park Dower 252.

30. Stevens *v.* Stevens, 3 Dana (Ky.) 371.

31. Heisen *v.* Heisen, 145 Ill. 658, 34 N. E. 597, 21 L. R. A. 434.

32. Hillgartner *v.* Gebhart, 25 Ohio St. 557.

33. Bartlett *v.* Ball, 92 Mo. App. 57.

(II) *Mines and Quarries.* The rule in respect to the assignment of dower in open mines as laid down at an early date in England [34] and as adopted to a certain extent in this country is that the sheriff or commissioners in setting off the dower shall estimate the annual value of such mines as a part of the estate of which the widow is dowable and award the widow her portion of such mines by metes and bounds if practicable, and if not, allot to her a proportion of the profits, or a separate alternate enjoyment of the whole for short proportionate periods.[35]

c. Payments in the Nature of Annuities — (I) *In General.* In some jurisdictions statutes provide that where the lands are incapable of division the court may in its judgment direct that a sum equal to one third of the annual or rental value of the lands be paid to the widow, annually or oftener, during the widow's life, for her dower therein.[36]

(II) *Determination of Amount.* The amount in some jurisdictions is to be determined by ascertaining the value of the lands at the time of alienation, if aliened during the husband's lifetime, or at the time of his death if he died seized, and awarding the widow one third of the legal interest on such value.[37] In other jurisdictions it has been held that the amount to be paid the widow should be based upon the yearly value of such lands as ascertained by the gross annual product thereof after deducting all proper charges, such as taxes and repairs.[38] But there it has also been held that it is not error to base an assignment of dower upon the actual rather than the rental value of the lands.[39]

(III) *Security For Payment.* The amount directed to be paid should be secured in some form; if necessary, by a lien on the lands.[40] Where the widow

34. Stoughton *v.* Leigh, 1 Taunt. 402, 11 Rev. Rep. 810.

35. *Illinois.*— Priddy *v.* Griffith, 150 Ill. 560, 37 N. E. 999, 41 Am. St. Rep. 397; Lenfers *v.* Henke, 73 Ill. 405, 24 Am. Rep. 263.

Indiana.— Hendrix *v.* McBeth, 61 Ind. 473, 28 Am. Rep. 680.

Maine.— Moore *v.* Rollins, 45 Me. 493.

Massachusetts.— Billings *v.* Taylor, 10 Pick. 60, 20 Am. Dec. 533.

New Jersey.— Rockwell *v.* Morgan, 13 N. J. Eq. 384.

New York.— Coates *v.* Cheever, 1 Cow. 460.

Pennsylvania.— McGowan *v.* Bailey, 179 Pa. St. 470, 36 Atl. 325.

See 17 Cent. Dig. tit. "Dower," §§ 23, 351.

36. See the statutes in the several states and Potier *v.* Barclay, 15 Ala. 439; Johnson *v.* Elliott, 12 Ala. 112; Beavers *v.* Smith, 11 Ala. 20; Atkin *v.* Merrell, 39 Ill. 62.

37. *Alabama.*— Wood *v.* Morgan, 56 Ala. 397; Francis *v.* Garrard, 18 Ala. 794; Beavers *v.* Smith, 11 Ala. 20.

Delaware.— Russell *v.* Bennett, 5 Houst. 497.

Massachusetts.— Jennison *v.* Hapgood, 14 Pick. 345.

New York.— Higbie *v.* Westlake, 14 N. Y. 281; Van Gelder *v.* Post, 2 Edw. 577; Hale *v.* James, 6 Johns. Ch. 258, 10 Am. Dec. 328.

Ohio.— Miller *v.* Peters, 25 Ohio St. 270; U. S. Bank *v.* Dunseth, 10 Ohio 18.

Pennsylvania.— Gannon *v.* Widman, 3 Pa. Dist. 835; Mansell's Estate, 1 Pars. Eq. Cas. 367; Reigle *v.* Seiger, 2 Penr. & W. 340; Syckle *v.* Pennsylvania Co., 5 Leg. & Ins. Rep. 107.

South Carolina.— McCreary *v.* Cloud, 2 Bailey 343.

Virginia.— Dickenson *v.* Gray, 100 Va. 526, 42 S. E. 298; Harrison *v.* Payne, 32 Gratt. 387.

See 17 Cent. Dig. tit. "Dower," § 337 *et seq.*

38. *Illinois.*— Francisco *v.* Hendricks, 28 Ill. 64; Gove *v.* Cather, 23 Ill. 634, 76 Am. Dec. 711, holding that an allowance of a yearly sum may be changed upon it appearing that the income of the property is materially enhanced or lessened.

Maryland.— Williams' Case, 3 Bland 242.

Missouri.— Strickler *v.* Tracy, 66 Mo. 465; Reily *v.* Bates, 40 Mo. 468; Riley *v.* Clamorgan, 15 Mo. 331.

New Jersey.— Haulenbeck *v.* Cronkright, 23 N. J. Eq. 407.

North Carolina.— Atkins *v.* Kron, 43 N. C. 1.

See 17 Cent. Dig. tit. "Dower," § 337 *et seq.*

A fair management of the land on which dower is chargeable, so as to make it reasonably productive, does not impose a duty on the owners to let it for a term so protracted as to convert the lot itself into a mere rent-paying agency. Carlin *v.* Mullery, 83 Mo. App. 30.

Where a husband leased land before his marriage, it was held that his widow was entitled on endowment to a proportionate part of the rent under such lease. Boyd *v.* Hunter, 44 Ala. 705.

39. Cassity *v.* Pound, 167 Mo. 605, 67 S. W. 283.

40. Wood *v.* Morgan, 56 Ala. 397; Miller *v.* Peters, 25 Ohio St. 270; Gannon *v.* Widman, 3 Pa. Dist. 835.

On failure to pay the interest or allowance as directed by the court after an election by the widow to receive such payment in lieu of

has her one-third of the interest of the money on the valuation of her deceased husband's real estate decreed to her, it is in the nature of a rent charge.[41]

(IV) *Time of Payment.* It is for the court to determine the number of instalments in which the annual allowance may be paid.[42] The date of payment should be fixed in the decree or judgment,[43] but should not be made payable in advance.[44] Where the statute requires the payment of interest upon a fixed sum, it has been held that the interest begins to run from the time of the commencement of the suit.[45] If the annual allowance is not paid when due, interest upon the amount unpaid may be allowed from the date of payment.[46]

d. Award of Gross Sum — (I) *In General.* Without express statutory provision a sum certain cannot be awarded the widow in lieu of dower, except with her consent.[47]

(II) *Statutory Provisions.* The statutes in the several states, however, have materially modified this rule, either by authorizing the widow at her option to take a gross sum in satisfaction of her dower,[48] or by permitting it to be done by the consent of all parties interested.[49] In some states the award of a gross sum in lieu of dower seems to be left to the discretion of the court.[50] Even without special statutory authority there seems no doubt that the parties may agree among themselves for the allowance and acceptance of a gross sum.[51]

(III) *Computation of Amount.* Where the lands have been sold for the payment of the deceased husband's debts, for the settlement of his estate, or for any other purpose sanctioned by law, it is proper to assign to the widow a gross sum based upon the legal interest upon her portion of the proceeds of the sale,

dower, she is entitled to have her dower assigned as if she had never made such an election. Dickenson *v.* Gray, 100 Va. 526, 42 S. E. 298.

41. Mansell's Estate, 1 Pars. Eq. Cas. (Pa.) 367.

42. Francisco *v.* Hendricks, 28 Ill. 64. Payment may be required quarterly, but if made payable annually it should not be required before the expiration of the year. Carter *v.* Stookey, 89 Ill. 279; Scammon *v.* Campbell, 75 Ill. 223.

43. Meyer *v.* Pfeiffer, 50 Ill. 485

44. Young *v.* Thrasher, 115 Mo. 222, 21 S. W. 1104.

45. Dickenson *v.* Gray, 100 Va. 526, 42 S. E. 298. But see Ware *v.* Owens, 42 Ala. 212, 94 Am. Dec. 672.

46. Turrentine *v.* Perkins, 46 Ala. 631; Seitzinger's Estate, 170 Pa. St. 531, 32 Atl. 1101; Syckle *v.* Pennsylvania Co., 5 Leg. & Ins. Rep. (Pa.) 107.

47. Martin *v.* Wharton, 38 Ala. 637; Potier *v.* Barclay, 15 Ala. 439; Johnson *v.* Elliott, 12 Ala. 112; Beavers *v.* Smith, 11 Ala. 20; Wilson *v.* Branch, 77 Va. 65, 46 Am. Rep. 709; Blair *v.* Thompson, 11 Gratt. (Va.) 441; Herbert *v.* Wren, 7 Cranch (U. S.) 370, 3 L. ed. 374. Courts cannot compel a widow, unless expressly authorized by statute, to accept a certain sum of money in lieu of her dower. Freeman Cotenancy, § 476 [*cited* in *Ex p.* Winstead, 92 N. C. 703]. The allowance of a gross sum in lieu of dower is purely statutory. Bonner *v.* Peterson, 44 Ill. 253. The widow cannot be compelled on behalf of creditors to accept in lieu of dower in specie a sum in gross out of the proceeds of the property. Summers *v.* Donnell, 7 Heisk. (Tenn.) 565.

Under the Illinois statute a decree for a gross sum as a charge upon all the land is erroneous; the court should under the statute ascertain the yearly value of her dower in each tract and render a decree charging it with the sum thus found. Atkin *v.* Merrell, 39 Ill. 62.

48. See Hogg *v.* Hensley, 100 Ky. 719, 39 S. W. 247, 19 Ky. L. Rep. 44.

49. See Johnson *v.* Gordon, 102 Ga. 350, 30 S. E. 507; Jarrell *v.* French, 43 W. Va. 456, 27 S. E. 263; Herbert *v.* Wren, 7 Cranch (U. S.) 370, 3 L. ed. 374. It is error to commute the dower against the wishes and election of the husband's alienee, where he denies the widow's right to a sum in gross, and alleges that he is willing that one-third interest in the land be allotted to her. Verlander *v.* Harvey, 36 W. Va. 374, 15 S. E. 54.

When lands are sold in the husband's lifetime to satisfy a judgment against him, it is in the sound discretion of the chancellor, in a suit by the widow against the purchaser for the value of her dower, to allow her a gross sum in lieu of dower, where the lands are not susceptible of advantageous division. Hogg *v.* Hensley, 100 Ky. 719, 39 S. W. 247, 19 Ky. L. Rep. 44.

50. See Brown *v.* Bronson, 35 Mich. 415; Nye *v.* Patterson, 35 Mich. 413.

51. Elverson *v.* Elverson, 10 N. J. L. J. 251. And see Larison *v.* Wolff, 60 Ill. App. 47 [*affirmed* in 163 Ill. 552, 45 N. E. 112]. Where the heirs do not resist a recovery against them for the then present value of the widow's dower in the property, the court may adjudge the recovery of money in lieu of dower. Rich *v.* Rich, 7 Bush (Ky.) 53. And see Gray *v.* Sparrow, 3 B. Mon. (Ky.) 110; Brewer *v.* Vanarsdale, 6 Dana (Ky.) 204.

for the period of her expectancy of life.[52] Where the lands have not been so sold it becomes necessary to estimate their value, using as a basis either the rental or actual value, according to the method employed in the particular jurisdiction,[53] and to award the widow a gross sum equivalent to her portion of such value for the period of her expectancy, to be determined in many jurisdictions by legally recognized annuity tables.[54] The estimate should be made upon the basis of her age at the time of her husband's death,[55] without deduction for any supposed charges which have since accrued.[56] It has been held that the amount to be paid according to the annuity tables is subject to be varied on account of unusual vigor or frailty of the constitution and health of the widow,[57] or other circumstances affecting the application of such tables.[58]

e. Sale of Land For Purpose of Assignment — (i) *In General.* It is not competent for a court of equity in the exercise of its equity jurisdiction to decree the sale of land in which a widow is entitled to dower, and provide for her a gross sum in lieu of dower, without her consent, however much it may be for the interests of the heirs.[59] Nor can a widow, merely on her right to dower, maintain a bill to sell the heirs' fee simple and get money from its sale in lieu of dower in kind. A decree of sale in such case is not merely erroneous but void, and confers no title.[60]

(ii) *Statutory Provisions.* But it is provided by statute in New York and other states that by the consent of the widow and upon the application of a party interested in the land, the whole or a portion thereof may be sold and the proceeds distributed according to the respective interests of the parties, where it

52. *Kentucky.*— O'Donnell *v.* O'Donnell, 3 Bush 216.

Maryland.— Wells *v.* Roloson, 1 Bland 456 note.

New Jersey.— Mulford *v.* Hiers, 13 N. J. Eq. 13.

New York.— Banks *v.* Banks, 2 Thomps. & C. 483; Eagle's Case, 3 Abb. Pr. 218.

Canada.— *Re* Pettit, 4 Ont. L. Rep. 506.

53. See *supra*, XI, J, 5, c, (II).

54. *Georgia.*— Johnson *v.* Gordon, 102 Ga. 350, 30 S. E. 507.

Illinois.— Merritt *v.* Merritt, 97 Ill. 243.

Kentucky.— Alexander *v.* Bradley, 3 Bush 667; O'Donnell *v.* O'Donnell, 3 Bush 216.

Maine.— Simonton *v.* Gray, 34 Me. 50.

Massachusetts.— Estabrook *v.* Hapgood, 10 Mass. 313.

Michigan.— Brown *v.* Bronson, 35 Mich. 415.

New Jersey.— Cronkright *v.* Haulenbeck, 25 N. J. Eq. 513; Mulford *v.* Hiers, 13 N. J. Eq. 13.

New York.— Banks *v.* Banks, 2 Thomps. & C. 483; Eagle's Case, 3 Abb. Pr. 218.

North Carolina.— *Ex p.* Winstead, 92 N. C. 703.

Canada.— *Re* Pettit, 4 Ont. L. Rep. 506.

See 17 Cent. Dig. tit. "Dower," § 323.

In Alabama it has been held that one ninth of the proceeds of the land sold in which dower is claimed is not too small a compensation for her interest, the widow being thirty-seven years old, although she may be very healthy. Sherard *v.* Sherard, 33 Ala. 488.

In Maryland the amount which the widow shall receive in lieu of dower from a sale, with her consent, of lands in which she has a dower interest, is fixed by statute (Code, art. 16, § 43), at a sum not exceeding one seventh and not less than one tenth of the net proceeds, and cannot be altered by the courts. Stein *v.* Stein, 80 Md. 306, 30 Atl. 703.

In South Carolina it is the rule, except in extreme cases of youth or age, to assess one sixth of the value of the entire fee as equivalent to the widow's estate for life in one third of the land (Stewart *v.* Pearson, 4 S. C. 4; Douglass *v.* McDill, 1 Speers 139; Wright *v.* Jennings, 1 Bailey 277); and where the lands have been sold on foreclosure the widow may be allotted absolutely a gross sum of one sixth of the surplus proceeds for her dower (Geiger *v.* Geiger, 57 S. C. 521, 35 S. E. 1031). An assessment of one third of the value of the fee simple is excessive. Heyward *v.* Cuthbert, 3 Brev. 482.

55. Johnson *v.* Gordon, 102 Ga. 350, 30 S. E. 507.

56. O'Donnell *v.* O'Donnell, 3 Bush (Ky.) 216; Campbell *v.* Erving, 43 How. Pr. (N. Y.) 258.

But the amount of encumbrances should be deducted from the fee-simple value, where the husband died seized of land subject to a mortgage, and the money assessment should be based on the balance. Stoppelbein *v.* Shulte, 1 Hill (S. C.) 200.

57. Alexander *v.* Bradley, 3 Bush (Ky.) 667; Abercrombie *v.* Riddle, 3 Md. Ch. 320. *Compare* Brown *v.* Bronson, 35 Mich. 415.

58. Cronkright *v.* Haulenbeck, 25 N. J. Eq. 513.

59. Jenks *v.* Terrell, 73 Ala. 238; Wilson *v.* Branch, 77 Va. 65, 46 Am. Rep. 709; White *v.* White, 16 Gratt. (Va.) 264, 80 Am. Dec. 706; Hull *v.* Hull, 26 W. Va. 1.

60. Hoback *v.* Miller, 44 W. Va. 635, 29 S. E. 1014.

appears that the land cannot be divided without injuring the interests of the parties.[61]

K. Return or Report as to Assignment — 1. Requisites and Sufficiency. The sheriff, commissioners, or other officers designated to make an assignment or admeasurement are required to make a return or report of their proceedings to the court,[62] or file the same with the clerk of the court[63] at the time required by the statute, or by the order, judgment, or decree directing the assignment or admeasurement to be made.[64] The report or return should show on its face that all statutory requirements have been complied with, as that the commissioners before entering upon the performance of their duties took the oath prescribed by law.[65] It should properly be signed by all the commissioners, but a majority may act, and if signed by a majority the report is valid.[66] There should be included a particular description of the land admeasured and laid off to the widow,[67] although errors in description, as a mistake in lot or section number, will not be fatal.[68] If a gross sum is awarded in lieu of dower the report should specify the entire value of the land as well as the sum awarded.[69] When it is confirmed and no appeal is taken it cannot be afterward questioned.[70]

2. Effect of Return or Report. The return or report unless objected to by the parties in interest will be conclusive upon them.[71]

3. Confirmation or Vacation — a. Objections. Objections should be raised if at all when the return or report is made to the court.[72] They may be raised by the husband's heirs at law,[73] by devisees occupying the lands assigned as dower,[74] by executors or administrators,[75] or by creditors.[76]

b. Confirmation — (i) *In General.* No title can be vested in the widow

61. See Post *v.* Post, 65 Barb. (N. Y.) 192. It is insufficient to show that only one of the parties interested would be injured by a partition. O'Dougherty *v.* Remington Paper Co., 42 Hun (N. Y.) 192. Where dower is claimed in the undivided interest in land owned by plaintiff's husband as tenant in common the court cannot direct a sale of the undivided interest of the surviving cotenant. Card *v.* Pudney, 42 N. Y. App. Div. 405, 59 N. Y. Suppl. 278.

62. Austin *v.* Austin, 50 Me. 74, 79 Am. Dec. 597.

Forms and proceedings on return see Fuller *v.* Rust, 153 Mass. 46, 26 N. E. 410; Serry *v.* Curry, 26 Nebr. 353, 42 N. W. 97.

63. See N. Y. Code Civ. Proc. § 1610.

64. Osborn *v.* Rogers, 19 N. J. Eq. 429.

The filing of the report before the day named for the report to be made in the order of appointment is not an irregularity avoiding subsequent proceedings, where no proceedings are had on the report prior to the day named for it to be made. Board *v.* Board, 4 Abb. Pr. (N. Y.) 295.

65. Durham *v.* Mulkey, 59 Ill. 91. See *supra*, XI, J, 2. A statement that the commissioners were duly sworn before proceeding to execute their duty is sufficient evidence of the fact that they were sworn as required by law (Williams *v.* Morgan, 1 Litt. (Ky.) 167); and a recital that "after being qualified" the commissioners made a thorough examination and survey of the premises shows that they were sworn before entering on the performance of their duties (Christopher *v.* Christopher, 92 Tenn. 408, 21 S. W. 890).

66. Burnham *v.* Porter, 24 N. H. 570; Irwin *v.* Brooks, 19 S. C. 96. See *supra*, XI, J, 2.

67. **Sufficiency of allotment** see *supra*, XI, J, 4, i.

68. Burns *v.* Miller, 110 Ill. 242.

69. McCreary *v.* Cloud, 2 Bailey (S. C.) 343. But failure to recite the value of a homestead set off to the widow with her dower is not fatal. Christopher *v.* Christopher, 92 Tenn. 408, 21 S. W. 890.

70. Asbill *v.* Asbill, 24 S. C. 355. See *infra*, XI, J, 2.

71. Gist *v.* Tongue, 1 Nott & M. (S. C.) 110. And see Asbill *v.* Asbill, 24 S. C. 355.

A void assignment of dower made by commissioners duly appointed by the court may become valid and obligatory upon the heirs, by the widow's entry upon the lands assigned, and by the heirs' subsequent adoption and ratification of the commissioners' proceedings. Fowler *v.* Griffin, 3 Sandf. (N. Y.) 385. See also Robinson *v.* Miller, 1 B. Mon. (Ky.) 88; Mitchell *v.* Miller, 6 Dana (Ky.) 79; Hickman *v.* Irvine, 3 Dana (Ky.) 121; Austin *v.* Austin, 50 Me. 74, 79 Am. Dec. 597; Fitzhugh *v.* Foote, 3 Call (Va.) 13.

72. Chapman *v.* Schroeder, 10 Ga. 321.

73. Laney *v.* Stewart, 35 Ga. 251.

74. *In re* Garrison, 15 N. J. Eq. 393.

75. Atwell *v.* Holliman, 39 Ga. 670, in which case it was held that this right was not affected by the fact that an executor had sold the lands subject to dower, where the terms of sale had not been complied with and no title had passed.

76. Carter *v.* Davis, 40 Ga. 300.

Traverse of return see McKibbon *v.* Folds, 38 Ga. 235.

until the allotment of the commissioners has been confirmed by the court.[77] Where the commissioners have been guilty of no misbehavior and have proceeded in conformity with correct principles, their return will ordinarily be confirmed by the court, although the sum awarded may appear excessive.[78]

(II) *NOTICE.* Where the order appointing the commissioners designates the day when the report shall be made, it has been held to operate as an adjournment or continuance of the proceedings, and confirmation may be had on motion of either party without notice to the other.[79]

c. Vacating Return — (I) *IN GENERAL.* The return remains under the control of the court. It is intended to satisfy its judicial discretion and conscience, and on *ex parte* affidavits showing error or injustice the court may refuse to confirm it, and may order a reference to a master for further evidence,[80] or may set it aside and appoint a new commission to proceed as in the first instance.[81] A return or report may be set aside where by mistake it sets apart lands not embraced in the bill[82] or where the allowance to the widow is unreasonably large,[83] but not where the excess is trifling.[84] After a return has been received, confirmed, and ordered to be recorded it cannot be set aside.[85] If in the opinion of the court injustice will result from a confirmation of the report it may be set aside, although the grounds are not such as would have entitled the parties in interest to such relief as a matter of right.[86]

(II) *PROCEEDINGS.* Courts of chancery have power to set aside excessive assignments of dower.[87] Affidavits both for and against vacating a report may be heard.[88] Under the practice in some jurisdictions copies of such affidavits must be served upon the opposite parties.[89]

L. Abatement and Revival. Except as modified by statute an action for dower abates on the death of the demandant, and at common law, although in some jurisdictions not in equity, it cannot be prosecuted for the recovery of mesne rents and profits as damages for the detention of dower, since damages in such an action are incident to the principal right and fall with it on the death of the widow.[90] But if the proceedings had passed to such a stage before her death as to vest in her an absolute right to the money representing the value of her estate in the land, the right passes to her personal representative.[91]

M. Final Judgment or Decree — 1. IN GENERAL. The judgment in an action at law for the recovery of dower is for an award to the widow during her natural life of the distinct parcel set off for her dower, or for the payment to her, annually or otherwise, of a specified sum equal to her proportion of the rental value of the lands during such period, together with the damages awarded to her for withholding her dower.[92] The award of lands by metes and bounds being founded on the common law, and an award of damages on the statute of Merton,

77. Austin *v.* Willis, 90 Ala. 421, 8 So. 94; Turbeville *v.* Flowers, 27 S. C. 331, 3 S. E. 542.

78. Lesesne *v.* Russell, 1 Bay (S. C.) 459.

79. Henderson *v.* Chaires, 25 Fla. 26, 6 So. 164; White *v.* Story, 2 Hill (N. Y.) 543.

Want of notice is no ground to oppose the confirmation of the return. Beaty *v.* Hearst, 1 McMull. (S. C.) 31.

80. Gibson *v.* Marshall, 5 Rich. Eq. (S. C.) 254.

81. See N. Y. Code Civ. Proc. § 1611.

After the appointment of new commissioners a report made by the former commissioners is void and cannot be rendered valid by any order of the court. Smith *v.* Maxwell, 3 Litt. (Ky.) 471.

82. Brokaw *v.* McDougall, 20 Fla. 212.

83. Boyer *v.* Boyer, 21 Ill. App. 534; Hawkins *v.* Hall, 2 Bay (S. C.) 449.

84. McKibbon *v.* Folds, 38 Ga. 235.

85. Holderman *v.* Holderman, 3 B. Mon. (Ky.) 532. The acceptance of a return by a probate court and its subsequent entry upon the records are equivalent to a confirmation. Serry *v.* Curry, 26 Nebr. 353, 42 N. W. 97.

86. Irwin *v.* Brooks, 19 S. C. 96.

87. Pierson *v.* Hitchner, 25 N. J. Eq. 129.

88. Welfare *v.* Welfare, 108 N. C. 272, 12 S. E. 1025; Stewart *v.* Blease, 5 S. C. 433; Beaty *v.* Hearst, 1 McMull. (S. C.) 31.

89. *In re* Shaw, 1 Cow. (N. Y.) 176.

90. See ABATEMENT AND REVIVAL, 1 Cyc. 65.

91. Robinson *v.* Govers, 138 N. Y. 425, 34 N. E. 209; Fulton *v.* Fulton, 8 Abb. N. Cas. (N. Y.) 210.

92. See N. Y. Code Civ. Proc. § 1613.

they are separate and distinct parts of the same judgment; and it has been held that the award of land may be affirmed and that of damages reversed.[93]

2. Sufficiency and Requisites. The judgment should be based upon the return or report of the commissioners,[94] but should not include matters not in issue in the proceedings.[95] A description of the lands set off with no specification of quantity is insufficient.[96] If the decree award damages it should state the amount to be paid by each defendant;[97] and if the yearly value of the dower in indivisible city lots is assessed the amount should be apportioned ratably among defendants and a separate decree entered against each for his share.[98]

3. Amendment. Errors in entering up a judgment may be cured by amendment;[99] and a judgment in the widow's favor may be amended by setting off against the costs awarded her the costs of a reference in which her claim for damages was disallowed.[1] But after final judgment the court cannot alter it as to the sum directed to be paid the widow.[2]

4. Execution of Writ. Where the judgment or decree directs that lands be set off to the use of the widow for her natural life, a writ may issue to the sheriff directing that the widow be placed in possession of such lands.[3] Where the judgment or decree awards damages for the withholding of dower, execution may be had thereon as in other cases.[4]

N. Costs and Fees — 1. In General. The rule in England[5] and in some states in this country, except as modified by statute, is that a widow must pay her own costs if she obtains judgment for dower alone, without damages for its detention.[6] In other jurisdictions costs are allowed to follow the judgment as in other cases.[7] In equity the allowance of costs is in the discretion of the court, and may be apportioned among all the parties according to their interests,[8] or may be taxed

93. Layton *v.* Butler, 4 Harr. (Del.) 507; Hammond *v.* Higgins, 2 Harr. & J. (Md.) 443; Shirtz *v.* Shirtz, 5 Watts (Pa.) 255.

94. McIntyre *v.* Clark, 43 Hun (N. Y.) 352.

95. Falls *v.* Wright, 55 Ark. 562, 18 S. W. 1044, 29 Am. St. Rep. 74.

96. Meyer *v.* Pfeiffer, 50 Ill. 485.

97. Reeves *v.* Reeves, 54 Ill. 332.

98. Scammon *v.* Campbell, 75 Ill. 223.

99. Dowery *v.* Teneyck, 3 N. J. L. 1023.

1. Swift *v.* Swift, 88 Hun (N. Y.) 551, 34 N. Y. Suppl. 852.

2. McIntyre *v.* Clark, 43 Hun (N. Y.) 352.

Where a surviving tenant in common has been made a party to an action for dower by his cotenant's widow, and the complaint does not show that his interest will be affected, his failure to appear until after judgment is not ground for a refusal to modify a judgment for the sale of his interest. Card *v.* Pudney, 42 N. Y. App. Div. 405, 59 N. Y. Suppl. 278.

3. Agnew *v.* Fults, 119 Ill. 296, 10 N. E. 667.

Where the common-law practice prevails the writ of seizin issues upon the determination of the right of the widow to her dower, and the sheriff or commissioners are required to set off the lands by metes and bounds and deliver possession thereof to the widow. Gannon *v.* Widman, 3 Pa. Dist. 835; Benner *v.* Evans, 3 Penr. & W. (Pa.) 454.

Scire facias lies to obtain a writ of seizin of dower, where judgment has been rendered and the time for issuing such writ has expired. Walker *v.* Gilman, 45 Me. 28; Shaw *v.* Boyd, 12 Pa. St. 215.

The return of a sheriff that dower has been set forth on a writ of seizin of dower by three disinterested freeholders as required by law is conclusive. Estabrook *v.* Hepgood, 10 Mass. 313.

After the death of the tenant in an action of dower after judgment has been rendered for the demandant, a writ of seizin of dower cannot be sued out and served by the sheriff. Hildreth *v.* Thompson, 16 Mass. 191.

Distress for rent due dowress see Murphy *v.* Borland, 92 Pa. St. 86.

4. See, generally, Execution.

5. Park Dower 310.

6. Beavers *v.* Smith, 11 Ala. 20; Waters *v.* Gooch, 6 J. J. Marsh. (Ky.) 586, 22 Am. Dec. 108; Hillyer *v.* Larzelere, 10 Johns. (N. Y.) 216.

In New Jersey and Pennsylvania it has been held that the widow could not have costs where the husband did not die seized of the lands in controversy. Sheppard *v.* Wardell, 1 N. J. L. 516; Fisher *v.* Morgan, 1 N. J. L. 147; Sharp *v.* Pettit, 4 Dall. (Pa.) 212, 1 L. ed. 805; Benner *v.* Evans, 3 Penr. & W. (Pa.) 454.

Where judgment is confessed for the dower claimed and a writ of habere facias seisinam is issued, and dower is laid off, it is error on return of the writ to enter judgment in favor of the demandant and against defendant for nominal damages and costs. Hammond *v.* Higgins, 2 Harr. & J. (Md.) 443.

Where there is no opposition on the part of the heirs, the widow is not entitled to costs. Hazen *v.* Thurber, 4 Johns. Ch. (N. Y.) 604.

7. Vance *v.* Becknall, 1 Bailey (S. C.) 140.

8. Marshall *v.* Anderson, 1 B. Mon. (Ky.) 198; Tabele *v.* Tabele, 1 Johns. Ch. (N. Y.)

in favor of or against any of them, according to their conduct and the circumstances of the case.[9]

2. Statutory Provisions. In nearly all the states special provisions are made by statute for awarding costs either for or against the widow, and providing for the payment of the expenses of the admeasurement of dower. The statutes differ in subject-matter and effect, some providing that the costs and expenses be paid by the parties according to their respective interests,[10] while others provide that they be paid by the person claiming the property or in possession of the land.[11] An action for dower is an action to recover real property within the meaning of a statute respecting the taxation of costs in such an action.[12]

3. Attorney's Fees. Unless authorized by statute,[13] the court cannot allow the widow any sum for the payment of an attorney's fees. A statute directing the payment of all the costs in an action for dower in case of resistance by defendant, if dower is recovered, does not include attorney's fees.[14]

O. Appeal and Error — 1. In General. The general rules of practice pertaining to appeals and writs of error in civil cases are applicable to actions or proceedings for the recovery of dower.[15] An appeal or writ of error, according to the practice in the particular jurisdiction, will lie from the court's erroneous refusal to assess damages for an unlawful detention of dower,[16] from a judgment setting aside an antenuptial contract relinquishing the wife's dower,[17] from a decree dismissing the widow's cross bill in a suit to enforce a vendor's lien,[18] or from any other judgment or decree which finally determines and declares the rights of the parties to the suit.[19] An order confirming the report of commissioners assigning

45. See, generally, Costs. In the absence of a statute costs in an action for the admeasurement of dower are in the discretion of the court (Aikman *v.* Harsell, 5 N. Y. Civ. Proc. 93); and unless authorized by statute the court cannot decree that the costs in an action against the husband's executor be paid out of the assets of the estate (Wilcox's Estate, 11 N. Y. Civ. Proc. 115).

Where a widow assured the purchaser of her husband's lands that she would not claim dower therein, and after her husband's death brought suit to recover her dower, a decree assigning such dower and imposing one half of the costs on her was held proper. Kelso's Appeal, 102 Pa. St. 7.

9. Grove *v.* Todd, 45 Md. 252; Church *v.* Church, 3 Sandf. Ch. (N. Y.) 434.

The widow is not entitled to costs where no obstacle has been thrown in her way in the recovery of dower (Beavers *v.* Smith, 11 Ala. 20; Curtis *v.* Curtis, 2 Bro. Ch. 620, 29 Eng. Reprint 342), where dower had not been refused (Hale *v.* James, 6 Johns. Ch. (N. Y.) 258, 10 Am. Dec. 328), where she did not demand her dower, and claimed in her bill more than she was entitled to (Russell *v.* Austin, 1 Paige (N. Y.) 192), or where she set up pretensions that were not well founded (Swaine *v.* Perine, 5 Johns. Ch. (N. Y.) 482, 9 Am. Dec. 318).

10. Houston *v.* Houston, 2 Marv. (Del.) 270, 43 Atl. 95; U. S. Bank *v.* Dunseth, 10 Ohio 18; Watson *v.* Watson, 21 Ohio Cir. Ct. 249, 11 Ohio Cir. Dec. 463.

11. Fooshe *v.* Merriwether, 20 S. C. 337; Irwin *v.* Brooks, 19 S. C. 96; Harshaw *v.* Davis, 1 Strobh. (S. C.) 74.

12. Everson *v.* McMullen, 45 Hun (N. Y.) 578; Jones *v.* Emery, 1 N. Y. Civ. Proc. 338; Walker *v.* Schuyler, 10 Wend. (N. Y.) 480.

13. La Framboise *v.* Grow, 56 Ill. 197. In Illinois, when no defense is set up, in a suit for the assignment of dower, the court may order the payment of a reasonable attorney's fee. Reynolds *v.* McMillan, 63 Ill. 46; Lilly *v.* Shaw, 59 Ill. 72; Strawn *v.* Strawn, 46 Ill. 412.

14. Watson *v.* Watson, 21 Ohio Cir. Ct. 249, 11 Ohio Cir. Dec. 463.

15. See, generally, Appeal and Error.

From territorial court.— Parish *v.* Ellis, 16 Pet. (U. S.) 451, 10 L. ed. 1028.

Persons entitled to review.—Stow *v.* Steele, 83 Ill. 422; Barton *v.* Hinds, 46 Me. 121; Hemmenway *v.* Corey, 16 Vt. 225.

Rights and remedies of heirs not in possession are not suspended or lost by an appeal from an order appointing commissioners for the partition of land in which a widow has a dower interest, and for the assignment of such interest. Stockwell *v.* Sargent, 37 Vt. 16.

16. Simpson *v.* Ham, 78 Ill. 203.

17. Forwood *v.* Forwood, 86 Ky. 114, 5 S. W. 361, 9 Ky. L. Rep. 415.

18. Brooks *v.* Woods, 40 Ala. 538.

19. *Ex p.* Elyton Land Co., 104 Ala. 88, 15 So. 939 (holding that a decree declaring that the widow was entitled to the relief prayed, was final, although a reference was thereby ordered for an accounting between the parties); Collier *v.* Wheldon, 1 Mo. 1. An appeal will lie from a judgment of the circuit court reversing, on the ground that demandant has made out a *prima facie* case, a decree of the probate court dismissing a petition demanding dower on the ground that the demandant had failed to show seizin in the husband during coverture. Stark *v.* Hopson, 30 S. C. 370, 9 S. E. 345. A proceeding for the assignment of dower

dower, but leaving the damages undetermined, is not final and has been held not to be appealable.[20]

2. Scope and Extent of Review. It must be clearly shown that the action of the trial court in confirming the report of commissioners was an abuse of discretion before an appellate court will disturb it.[21] The determination of questions of fact by the court or jury in awarding dower[22] or by the commission in assigning it[23] will not ordinarily be disturbed on appeal, unless it be without testimony to support it or against the manifest weight of testimony.[24] On a review of proceedings in a probate court for the admeasurement of dower only the regularity and fairness of such proceeding can be examined.[25] The objection that the statute did not authorize the appointment of commissioners at the instance of the person who made application therefor cannot be raised for the first time on appeal;[26] and it is too late to question for the first time on appeal the propriety of a decree assigning dower because of a want of formal pleadings between defendants or because of defects in the pleadings.[27]

is a civil action, and a judgment or final order therein is appealable, within a statute providing that an appeal may be taken from a judgment or final order in a civil action. Corry *v.* Lamb, 43 Ohio St. 390, 2 N. E. 851. See Smith *v.* Smith, 6 Lans. (N. Y.) 313.

20. Rannels *v.* Washington University, 96 Mo. 226, 9 S. W. 569. See also Strickler *v.* Tracy, 66 Mo. 465. *Compare*, however, Brown *v.* Bronson, 35 Mich. 415, where a decree was held appealable which declared complainant entitled to dower, but directed a further inquiry as to damages for dower withheld. An appeal will not lie from an order of the court of chancery directing a bill for dower to be retained, with liberty to complainant to sue at law to try her right to dower. Scott *v.* Crawford, 10 Gill & J. (Md.) 379, 11 Gill & J. (Md.) 365.

A remand by the circuit court of a case of petition for assignment of dower is not a final judgment to which a writ of error will lie. Crabtree *v.* Crabtree, 5 Ark. 638.

21. Rannels *v.* Washington University, 96 Mo. 226, 9 S. W. 569; State *v.* Featherstone, 118 N. C. 840, 24 S. E. 714. A decree will not be reversed for error in allowing a claim of dower on a small parcel of land, where the value of the land was not equal to the cost of surveying it, as it would be prejudicial to both parties. Bailey *v.* Duncan, 2 T. B. Mon. (Ky.) 20. A judgment on default will be sustained where the declaration in dower contained nothing to entitle demandant to damages, and a writ of inquiry was erroneously taken, but the verdict was for dower only. Taylor *v.* Brodrick, 1 Dana (Ky.) 345.

Where the record does not show what evidence the county court acted upon in quashing a report of an allotment of dower, the court of appeals cannot say that there was error. Smith *v.* Smith, 5 Dana (Ky.) 179.

Dismissal of appeal by widow from an order making a notice filed by the widow accepting the provisions of decedent's will a part of the record. *In re* Slauson, 82 Iowa 366, 48 N. W. 87.

Amendment in supreme court.—Where the claim for dower on the record is for one third of the land, error in allowing a recovery of one half cannot be cured by amendment in the supreme court. Evans *v.* Evans, 29 Pa. St. 277.

Failure to require refunding bond.— Clift *v.* Clift, 87 Tenn. 17, 9 S. W. 360.

22. Roberts *v.* Walker, 101 Mo. 597, 14 S. W. 631; Brooks *v.* McMeekin, 37 S. C. 285, 15 S. E. 1019.

23. Doughty *v.* Little, 61 N. H. 365 [*overruling* Morrill *v.* Morrill, 5 N. H. 329].

An exception to the finding of the amount of dower interest due to the widow in the surplus after foreclosure of a mortgage on her husband's estate, without indicating in what respect the same was erroneous, presents no legal proposition to the court of appeals for review. Mathews *v.* Duryee, 3 Abb. Dec. (N. Y.) 220, 4 Keyes (N. Y.) 525.

24. See, generally, Appeal and Error.

Errors which may be corrected in court below.— It is not reversible error in assigning dower to a widow to order that the proper proportion of the rents be set off to her from the date of the decree instead of the date of filing the bill, as the order may be corrected in the court below in finally adjusting the accounts of the parties. Lennahan *v.* O'Keefe, 107 Ill. 620.

Where issues of law as well as of fact were decided in an action for dower and the tenant brings a review of the judgment against him all the issues may be retried. Perry *v.* Goodwin, 6 Mass. 498.

Where land encumbered by liens was sold in an equitable action to which the owner's widow was a party, only one of which liens was paramount to her dower, which the court denied because of the validity of that lien, and the issues on the liens were appealed, and the widow gave no bond, it was held that the appeal carried up the question as to her dower. Brown *v.* Kuhn, 40 Ohio St. 468.

25. Hyde *v.* Hyde, 4 Wend. (N. Y.) 630.

26. Parrish *v.* Parrish, 88 Va. 529, 14 S. E. 325. And see Kendrick *v.* Harris, 1 Aik. (Vt.) 273; Stiner *v.* Cawthorn, 20 N. C. 640.

27. Harrison *v.* Campbell, 6 Dana (Ky.) 263; Little Miami R. Co. *v.* Jones, 3 Ohio Dec. (Reprint) 219, 5 Wkly. L. Gaz. 5.

XII. TENANCY IN DOWER.

A. Nature of Estate — 1. In General. After assignment of dower in particular lands by metes and bounds and entry thereon,[28] the widow is seized of an immediate freehold,[29] and is vested with a life-estate therein.[30] The estate becomes absolute and she cannot be compelled to commute or sell it,[31] but it may be leased, sold, or assigned by her as any other life-estate.[32] Her estate is not dependent on her continued occupancy or possession of the lands.[33] As soon as it is assigned she may sue for the specific lands awarded.[34] If the widow is awarded a sum payable annually in lieu of dower, based upon the annual value of her dower, and charged as a lien upon the lands, it has been held that such sum may be recovered by distress or otherwise as rents are recoverable from the person in possession of the lands.[35] Where a fund equivalent to the widow's dower interest is set aside for her use, she must treat the fund as real estate and will not be permitted to encroach on the principal.[36]

Presumptions.— Campbell *v.* Gullatt, 43 Ala. 57 (that lands set out in a decree assigning dower are the lands described in an amended petition); Osborne *v.* Horine, 17 Ill. 92 (presumption, where no evidence is shown in the record, that the decree refusing to assign dower was erroneous, where the answer to the petition admits the right); Lawrence *v.* Miller, 1 Sandf. (N. Y.) 516 (presumption that a sale will not be ordered or confirmed by the probate court unless the circumstances under which it is authorized shall exist).

28. Williams *v.* Morgan, 1 Litt. (Ky.) 167, to the effect that after assignment of dower the widow is invested with the right of entry in the lands assigned.

29. Park Dower 339; Gilbert Dower 271, 397.

30. *Illinois.*— Rowley *v.* Poppenhager, 203 Ill. 434, 67 N. E. 975; Blake *v.* Ashbrook, 91 Ill. App. 45; Petefish *v.* Buck, 56 Ill. App. 149.

Iowa.— Clark *v.* Richardson, 32 Iowa 399.

Maine.— Haugh *v.* Peirce, 97 Me. 281, 54 Atl. 727.

Missouri.— Sell *v.* McAnaw, 158 Mo. 466, 59 S. W. 1003.

Pennsylvania.— Kunselman *v.* Stine, 183 Pa. St. 1, 38 Atl. 414.

West Virginia.— Haskell *v.* Sutton, 53 W. Va. 206, 44 S. E. 533.

Canada.— Allan *v.* Rever, 4 Ont. L. Rep. 309.

Lien.— Dower is an interest in lands and not a lien. Schall's Appeal, 40 Pa. St. 170; Zeigler's Appeal, 1 Chest. Co. Rep. (Pa.) 515. Where a sum of money is assessed in lieu of dower it does not constitute a specific lien on the land. Williamson *v.* Gasque, 24 S. C. 100.

Where a yearly rent charge is fixed upon each parcel of land in which the widow is entitled to dower, for her dower therein, such charge is a lien on the lands and not an estate therein. Whittemore *v.* Sloat, 9 How. Pr. (N. Y.) 317.

Such a charge must be recovered in an action thereon, and not by an *ex parte* proceeding. *In re* Hybarts, 129 N. C. 130, 39 S. E. 779. *Compare* Tuite *v.* Miller, 1 Ohio Dec. Reprint 247, 5 West. L. J. 413.

31. Haugh *v.* Peirce, 97 Me. 281, 54 Atl. 727; Lawrence *v.* Brown, 5 N. Y. 394.

Partition sale.—Lands assigned to a widow as dower are not subject to partition or sale in action by the heirs for that purpose. Clark *v.* Richardson, 32 Iowa 399.

32. Blake *v.* Ashbrook, 91 Ill. App. 45; Petefish *v.* Buck, 56 Ill. App. 149; Eakins *v.* Eakins, 65 S. W. 811, 23 Ky. L. Rep. 1637; Serry *v.* Curry, 26 Nebr. 353, 42 N. W. 97.

33. Rowley *v.* Poppenhager, 203 Ill. 434, 67 N. E. 975.

34. Ward *v.* Kilts, 12 Wend. (N. Y.) 137; Allan *v.* Rever, 4 Ont. L. Rep. 309.

35. Baker *v.* Leibert, 125 Pa. St. 106, 17 Atl. 236; Evans *v.* Ross, 107 Pa. St. 231; Hageman *v.* Esterly, 1 Pa. Dist. 704, 11 Pa. Co. Ct. 609; Everard *v.* Hess, 4 Kulp (Pa.) 242; Rodney *v.* Washington, 16 Wkly. Notes Cas. (Pa.) 226; Borland *v.* Murphy, 4 Wkly. Notes Cas. (Pa.) 472.

Where land charged with a dower interest is sold after the widow's death, under an order of the orphans' court for the payment of the debts of a terre-tenant, the lien of such unpaid dower interest is discharged. Grove's Appeal, 103 Pa. St. 562; Sheaffer's Estate, 6 Pa. Co. Ct. 147. But the lien of accruing interest not due at the time of the sheriff's sale is not discharged thereby. Tospon *v.* Sipe, 116 Pa. St. 588, 11 Atl. 873; Luther *v.* Wagner, 107 Pa. St. 343.

Dower assigned in a fixed sum payable out of net rents continues to be a freehold estate, and the owners of the property in which such dower estate exists are personally liable for its payment. Avery *v.* Nieman, 9 Ohio S. & C. Pl. Dec. 650, 7 Ohio N. P. 46. The widow has a vested right to the annuity to be paid to her out of the rents of the lands, and she cannot be compelled to accept a gross sum, based upon the present value of such annuity, out of the proceeds of a sale of the lands. Haugh *v.* Peirce, 97 Me. 281, 54 Atl. 727.

36. Wolfe *v.* Larison, 163 Ill. 552, 45 N. E. 112. And see Curtis *v.* Zutavern, (Nebr. 1903) 93 N. W. 400.

2. CONTINUANCE OF HUSBAND'S SEIZIN. The widow takes her estate from her husband, and not from the heirs or from the person assigning, and her seizin is deemed a continuance of the seizin of her husband,[37] relating back either to the date of coverture or the acquisition of the husband's seizin during coverture,[38] the seizin of the heir being defeated *ab initio* by the assignment of dower.[39] All the rights, appurtenances, and easements pertinent to the lands assigned pass to the widow, even though they are not mentioned in the assignment.[40]

B. Encumbrances. The estate assigned to the widow is subject to all liens and encumbrances which are paramount to her dower,[41] and it is her duty to pay her proportion of the interest accruing thereon,[42] and contribute according to the proportionate value of her interest, in case it is necessary during her possession of the estate to discharge such liens and encumbrances.[43]

C. Rights and Liabilities of Widow — 1. RIGHT TO CROPS.[44] Crops growing on the lands at the time of the assignment will pass to the widow and be considered a part of her dower estate.[45]

2. LIABILITY FOR WASTE — a. In General. The widow, like any other tenant for life, is liable to the reversioner for waste committed upon the lands assigned, and an action will lie against her therefor.[46] It has been held that the widow is

37. Park Dower 340. See also the following cases:

Kentucky.— Stevens *v.* Stevens, 3 Dana 371.

Maine.— Baker *v.* Baker, 4 Me. 67.

Maryland.— Childs *v.* Smith, 1 Md. Ch. 483.

Massachusetts.— Conant *v.* Little, 1 Pick. 189.

New York.— Lawrence *v.* Brown, 5 N. Y. 394; Lawrence *v.* Miller, 2 N. Y. 245; Fowler *v.* Griffin, 3 Sandf. 385.

North Carolina.— Norwood *v.* Marrow, 20 N. C. 578.

West Virginia.— Engle *v.* Engle, 3 W. Va. 246.

United States.— Powell *v.* Monson, etc., Mfg. Co., 19 Fed. Cas. No. 11,356, 3 Mason 347.

38. See *supra*, V, C.

39. Lawrence *v.* Brown, 5 N. Y. 394; Lawrence *v.* Miller, 2 N. Y. 245; Norwood *v.* Marrow, 20 N. C. 578; Powell *v.* Monson, etc., Mfg. Co., 19 Fed. Cas. No. 11,356, 3 Mason 347.

40. Morrison *v.* King, 62 Ill. 30.

An easement belonging to the land assigned as dower cannot be abandoned by the widow. Dyer *v.* Sanford, 9 Metc. (Mass.) 395, 43 Am. Dec. 399.

41. Priorities of liens and encumbrances see *supra*, VII.

A mortgagee has no lien upon the rents and profits of the portion of the mortgaged estate assigned to the widow before foreclosure of the mortgage. Ogdensburgh Bank *v.* Arnold, 5 Paige (N. Y.) 38.

42. 2 Crabb Real Prop. 154; Hodges *v.* Phinney, 106 Mich. 537, 64 N. W. 477; House *v.* House, 10 Paige (N. Y.) 158.

43. *Illinois.*— Zinn *v.* Hazlett, 67 Ill. App. 410.

Iowa.— Trego *v.* Studley, 106 Iowa 742, 75 N. W. 179.

Michigan.— Hodges *v.* Phinney, 106 Mich. 537, 64 N. W. 477.

Missouri.— Smith *v.* Stephens, 164 Mo. 415, 64 S. W. 260.

New York.— Swaine *v.* Perrine, 5 Johns. Ch. 482, 9 Am. Dec. 318.

A widow who has paid off an encumbrance created by her husband on land in which she claims both dower and homestead is not entitled to a lien on the estate for the entire amount of the encumbrance, since her estate should be required to contribute its proportion of the encumbrance. Jones *v.* Gilbert, 135 Ill. 27, 25 N. E. 566.

44. Right to crops before assignment see *supra*, IX, H, 8.

45. 2 Inst. 81; Dyer 316, pl. 2; Ralston *v.* Ralston, 3 Greene (Iowa) 533; Parker *v.* Parker, 17 Pick. (Mass.) 236; Kain *v.* Fisher, 6 N. Y. 597; Clark *v.* Battorf, 1 Thomps. & C. (N. Y.) 58. But see Davis *v.* Brown, 2 Ohio Dec. (Reprint) 644, 4 West. L. Month. 272.

46. *Alabama.*— Alexander *v.* Fisher, 7 Ala. 514.

Connecticut.— Crocker *v.* Fox, 1 Root 323.

Georgia.— Parker *v.* Chambliss, 12 Ga. 235.

Kentucky.— Calvert *v.* Rice, 91 Ky. 533, 16 S. W. 351, 13 Ky. L. Rep. 107, 34 Am. St. Rep. 240.

Maine.— Stetson *v.* Day, 51 Me. 434.

Massachusetts.— Noyes *v.* Stone, 163 Mass. 490, 40 N. E. 856; Cook *v.* Cook, 11 Gray 123; White *v.* Cutler, 17 Pick. 248; Fay *v.* Brewer, 3 Pick. 203.

Missouri.— Van Hoozer *v.* Van Hoozer, 18 Mo. App. 19.

New Hampshire.—Fuller *v.* Wason, 7 N. H. 341.

North Carolina.— King *v.* Miller, 99 N. C. 583, 6 S. E. 660; Joyner *v.* Speed, 68 N. C. 236; Lambeth *v.* Warner, 55 N. C. 165; Dalton *v.* Dalton, 42 N. C. 197; Carr *v.* Carr, 20 N. C. 317.

Tennessee.— Lunn *v.* Oslin, 96 Tenn. 28, 33 S. W. 561; Vincent *v.* Vincent, 1 Heisk. 333.

Vermont.— Willey *v.* Laraway, 64 Vt. 559, 25 Atl. 436.

not liable for waste committed by her assignee,[47] or by third persons without her permission.[48] And where the reversioner takes possession under a lease from the widow he waives all claim of forfeiture because of waste.[49]

b. Statutory Provisions. The statute of Gloucester,[50] adopted at an early day in England, provided that the tenant in dower in case of waste forfeited her estate and was liable for treble damages. It has been held that this statute never became a part of the common law in this country,[51] but it has been substantially reenacted in a number of states.[52]

c. What Constitutes Waste. The rules applying to waste committed by a tenant for life apply generally to waste committed by a widow holding under her dower right.[53] The widow may cut and take from the dower estate wood and timber necessary for firewood and for repairs to buildings and fences,[54] but she cannot take it for sale,[55] unless by statute,[56] or for use on another estate.[57] Where the lands assigned consist chiefly of wood-lands, a portion thereof may be cleared and the timber removed, where it is necessary for the proper enjoyment of the dower estate;[58] and it has been held that if the whole estate is not injured by the cutting of timber it is not waste.[59]

d. Permissive Waste. A negligent and unreasonable failure to repair buildings and to keep up the lands may constitute actionable waste;[60] but the tenant in dower will not be held liable for permitting buildings and lands to become out of order where the inheritance is not permanently injured thereby.[61]

3. Right to Work Mines. A widow may work mines upon the dower estate opened in the husband's lifetime and receive and enjoy their products.[62] She

Virginia.— Crouch *v.* Puryea, 1 Rand. 258, 10 Am. Dec. 528.

See 17 Cent. Dig. tit. "Dower," § 370; and, generally, ESTATES; WASTE.

47. Foot *v.* Dickinson, 2 Metc. (Mass.) 611.

48. Willey *v.* Laraway, 64 Vt. 559, 25 Atl. 436.

49. Hickman *v.* Irvine, 3 Dana (Ky.) 121.

50. 6 Edw. 1, c. 5.

51. Parker *v.* Chambliss, 12 Ga. 235; Smith *v.* Follansbee, 13 Me. 273.

52. See Stetson *v.* Day, 51 Me. 434; and, generally, ESTATES; WASTE.

53. **Waste by life-tenant** see ESTATES.

54. Alexander *v.* Fisher, 7 Ala. 514; White *v.* Cutler, 17 Pick. (Mass.) 248; Gardiner *v.* Derring, 1 Paige (N. Y.) 573; Dalton *v.* Dalton, 42 N. C. 197.

Fallen and dead trees may properly be used by the widow or sold for firewood. King *v.* Miller, 99 N. C. 583, 6 S. E. 660.

Firewood cannot be taken by a tenant in dower unless there be a house on the land when it is assigned to her as dower. Fuller *v.* Wasson, 7 N. H. 341.

Repairs.— It is the duty of the tenant in dower to keep the fences and buildings in repair, and she may use the timber on the estate for this purpose, although it is very scarce. Calvert *v.* Rice, 91 Ky. 533, 16 S. W. 351, 13 Ky. L. Rep. 107, 34 Am. St. Rep. 240; Padelford *v.* Padelford, 7 Pick. (Mass.) 152; Owen *v.* Hyde, 6 Yerg. (Tenn.) 334, 27 Am. Dec. 467.

55. Noyes *v.* Stone, 163 Mass. 490, 40 N. E. 856.

56. One third of the timber on a woodland lot assigned to a widow as her dower may be cut and sold by her under the Rhode Island statute. Brayton *v.* Jordan, 24 R. I. 6, 51 Atl. 1047.

57. Cook *v.* Cook, 11 Gray (Mass.) 123; White *v.* Cutler, 17 Pick. (Mass.) 248.

Where commissioners divided an estate into eight parts, and assigned a third of each division to the widow as her dower, and one lot consisted almost entirely of wood, and the others of arable lands, it was held that the widow was not bound to use each parcel as if her husband had died seized only of the one lot to which such parcel belonged, but might take from the wood lot fuel and timber for the use of the cultivated lands. Childs *v.* Smith, 1 Md. Ch. 483.

58. *Missouri.*— Van Hoozer *v.* Van Hoozer, 18 Mo. App. 19.

North Carolina.— King *v.* Miller, 99 N. C. 583, 6 S. E. 660; Joyner *v.* Speed, 68 N. C. 236; Lambeth *v.* Warner, 55 N. C. 165; Ward *v.* Sheppard, 3 N. C. 461, 2 Am. Dec. 625.

Ohio.—Crockett *v.* Crockett, 2 Ohio St. 180.

Pennsylvania.— Hastings *v.* Cruncleton, 3 Yeates 261.

Tennessee.— Owen *v.* Hyde, 6 Yerg. 334, 27 Am. Dec. 467.

See 17 Cent. Dig. tit. "Dower," § 370.

59. Lunn *v.* Oslin, 96 Tenn. 28, 33 S. W. 561; Owen *v.* Hyde, 6 Yerg. (Tenn.) 334, 27 Am. Dec. 467.

60. See, generally, ESTATES; WASTE.

61. Sherrill *v.* Connor, 107 N. C. 630, 12 S. E. 588; Harvey *v.* Harvey, 41 Vt. 373.

62. Whittaker *v.* Lindley, 3 S. W. 9, 8 Ky. L. Rep. 690; Seager *v.* McCabe, 92 Mich. 186, 52 N. W. 299, 16 L. R. A. 247.

Right of dower in mines or quarries see *supra*, VI, A, 6.

The life-estate given to the widow by the civil law from which the land and marital

may penetrate to a new seam in an opened coal mine,[63] and may cut and take timber for use in mining.[64]

4. Liability For Taxes and Other Charges. The widow in possession of her dower is liable for the taxes assessed thereon[65] after the final judgment confirming the report of commissioners assigning the dower[66] The widow should not be required to pay taxes assessed after her husband's death and before assignment of her dower,[67] unless she is in possession during such time,[68] or unless it is otherwise provided by statute.[69] In respect to taxes and other charges on the property arising during the husband's lifetime, the tenancy in dower does not differ from other freehold estates, and the widow standing in the place of her husband must necessarily be subject, as to such estate, to the charges, duties, and services to which it is liable.[70]

5. Rights of Creditors. Dower after assignment being a vested estate for life in the widow is like other life-estates[71] subject to levy and sale under execution issued on a judgment for her debts;[72] although it has been held otherwise as to a dower interest in an equitable estate.[73]

D. Termination of Estate. The widow's dower estate is terminated by her death;[74] and therefore a lease of her estate becomes inoperative at that time.[75]

DOWN. In the direction of gravity or toward the centre of the earth; toward or in a lower place or position; — the opposite of "up."[1] (See, generally, Boundaries.)

DOWNCAST. In mining, the ventilating shaft down which the air passes in circulating through a mine.[2] (See, generally, Mines and Minerals.)

DOWRY or DOTE. That which the wife gives the husband on account of marriage, and is a sort of donation made with a view to his maintenance and to the support of the marriage.[3] (See Husband and Wife.)

laws of Texas are largely derived is broader than the common-law dower, it being one which under the civil law could not be impeached for waste, and which carried with it the right to open and work every kind of mine. Higgins Oil, etc., Co. *v.* Snow, 113 Fed. 433, 51 C. C. A. 267.

63. Crouch *v.* Puryear, 1 Rand. (Va.) 258, 10 Am. Dec. 528.

64. Neel *v.* Neel, 19 Pa. St. 323.

65. Austel *v.* Swann, 74 Ga. 278; Linden *v.* Graham, 34 Barb. (N. Y.) 316.

66. Kearns *v.* Cunniff, 138 Mass. 434, holding that the judgment does not relate back to the date of the assignment by the commissioners so as to make the widow liable for taxes assessed thereafter and before final judgment.

67. *Iowa.*— Felch *v.* Finch, 52 Iowa 563, 3 N. W. 570.

Missouri.— Graves *v.* Cochran, 68 Mo. 74; Moore *v.* White, 61 Mo. 441.

New York.— Harrison *v.* Peck, 56 Barb. 251; Bidwell *v.* Greenshield, 2 Abb. N. Cas. 427.

North Carolina.— Branson *v.* Yancy, 16 N. C. 77.

Virginia.— Simmons *v.* Lyles, 32 Gratt. 752.

68. Wheeler *v.* Dawson, 63 Ill. 54; Peyton *v.* Jeffries, 50 Ill. 143.

69. Jonas *v.* Hunt, 40 N. J. Eq. 660, 5 Atl. 148; Graham *v.* Dunnigan, 2 Bosw. (N. Y.) 516, 6 Duer (N. Y.) 629.

70. Peyton *v.* Jeffries, 50 Ill. 143; Whyte *v.* Nashville, 2 Swan (Tenn.) 364.

71. See, generally, Estates; Execution.

72. Petefish *v.* Buck, 56 Ill. App. 149; Kunselman *v.* Stine, 183 Pa. St. 1, 38 Atl. 414; Shaupe *v.* Shaupe, 12 Serg. & R. (Pa.) 9; Hughes *v.* Harvey, 75 Va. 200. And see Peebles *v.* Bunting, 103 Iowa 489, 73 N. W. 882, as to the judgment lien of a widow's creditors against her interest in her husband's real estate.

Mortgage creditors of a widow may proceed in chancery to have her dower assigned her, and then to appropriate it to their demands. McKenzie *v.* Donald, 61 Miss. 452.

73. Garretson *v.* Brien, 3 Heisk. (Tenn.) 534.

74. Holmes *v.* McGee, 12 Sm. & M. (Miss.) 411; Com. *v.* Snyder, 1 Del. Co. (Pa.) 404.

75. Stockwell *v.* Sargent, 37 Vt. 16.

1. Webster Int. Dict.

Down a creek, river, slough, strait, or bay, under statutory definition, means the middle of the main channel thereof, unless otherwise expressed. Ariz. Rev. St. (1901), par. 930; Cal. Pol. Code (1903), § 3906; Mont. Pol. Code (1895), § 4106. See also Slade *v.* Etheridge, 35 N. C. 353, 355, 57 Am. Dec. 557; French *v.* Bankhead, 11 Gratt. (Va.) 136, 155 [*citing* McCullock *v.* Aten, 2 Ohio 307, 310]. And see 12 Cyc. 66 note 3.

"Down to twelve inches [in diameter] at the smallest end of the log" as used in a contract relative to timber see Dexter *v.* Lathrop, 136 Pa. St. 565, 580, 20 Atl. 545.

2. Century Dict. See also Coal Run Coal Co. *v.* Jones, 19 Ill. App. 365.

3. Cutter *v.* Waddingham, 22 Mo. 206, 254.

DOZEN. A collection of twelve objects.[4]

DR. An abbreviation, when used in bookkeeping, meaning to enter upon the debit side of the account.[5]

DRAFF. Waste matter, sweepings, refuse, lees, or dregs.[6] In weighing commodities, a term meaning dust and dirt, and not what is generally meant by "draught" or "draft."[7]

DRAFT.[8] In general, a drawing, DELINEATION (*q. v.*), sketch.[9] As applied to commercial paper, a bill of exchange;[10] a check;[11] an order for money.[12] In commerce, a small allowance in weighable goods, made by the king to the importer;[13] an allowance made for waste in goods sold by weight, or the allowance made by the custom-house on excisable goods;[14] an allowance or deduction from the gross weight of goods; an allowance on weighable goods;[15] an allowance to the merchant when the duty is ascertained by weight, to insure good weight to him.[16] In military law, the involuntary conscription[17] of citizens into the service of the state as soldiers or sailors.[18] As a verb, to prepare in writing.[19] (See, generally, ARMY AND NAVY; BANKS AND BANKING; COMMERCIAL PAPER; FORGERY.)

4. Webster Int. Dict.

It may be shown by custom that a dozen under certain circumstances means "thirteen." Coquard *v.* Kansas City Bank, 12 Mo. App. 261, 265. See, generally, CUSTOMS AND USAGES.

5. Jaqua *v.* Shewalter, 10 Ind. App. 234, 36 N. E. 173, 37 N. E. 1072, 1073, where it is said: "When a statement of account is made out, using the term 'Dr.,' without more, it simply indicates that the person owes the various items."

6. Seeberger *v.* Wright, etc., Oil, etc., Mfg. Co., 157 U. S. 183, 184, 15 S. Ct. 583, 39 L. ed. 665.

7. Marriott *v.* Brune, 9 How. (U. S.) 619, 632, 13 L. ed. 282 [*cited* in Seeberger *v.* Wright, etc., Oil., etc., Mfg. Co., 157 U. S. 183, 185, 15 S. Ct. 563, 39 L. ed. 665, where the definition given in the text is referred to as a "*dictum*," the court observing that "the case . . . did not call for a definition of the word"].

8. **"The word draft is nomen generalissimum."** Wildes *v.* Savage, 29 Fed. Cas. No. 17,653, 1 Story 22, 30.

9. Anderson L. Dict.

Draft also signifies a tentative, provisional, or preparatory writing out of any document (as a will, contract, lease, etc.) for purposes of discussion and correction, and which is afterwards to be copied out in its final shape. Black L. Dict.

10. Allen *v.* Williamsburg Sav. Bank, 69 N. Y. 314, 317; Hinnemann *v.* Rosenback, 39 N. Y. 98, 101; Cole *v.* Dalton, 6 Daly (N. Y.) 484, 485; Cudahy Packing Co. *v.* Sioux Falls Nat. Bank, 75 Fed. 473, 477, 21 C. C. A. 428; Worcester Dict [*quoted* in State *v.* Warner, 60 Kan. 94, 97, 55 Pac. 342].

11. Culter *v.* Reynolds, 64 Ill. 321, 324; Cudahy Packing Co. *v.* Sioux Falls Nat. Bank, 75 Fed. 473, 477, 21 C. C. A. 428; Worcester Dict. [*quoted* in State *v.* Warner, 60 Kan. 94, 97, 55 Pac. 342].

12. State *v.* Warner, 60 Kan. 94, 97, 55 Pac. 342; Allen *v.* Williamsburg Sav. Bank, 69 N. Y. 314, 317.

Distinguished from "order" in Hinnemann *v.* Rosenback, 39 N. Y. 98, 100 [*citing* Bouvier L. Dict.].

Distinguished from promissory note in Cruger *v.* Armstrong, 3 Johns. Cas. (N. Y.) 5, 7, 2 Am. Dec. 126.

13. Napier *v.* Barney, 17 Fed. Cas. No. 10,009, 5 Blatchf. 191, 192.

Distinguished from "draff" see Seeberger *v.* Wright, etc., Oil, etc., Mfg. Co., 157 U. S. 183, 184, 15 S. Ct. 583, 39 L. ed. 665.

Distinguished from "tare" in Napier *v.* Barney, 17 Fed. Cas. No. 10,009, 5 Blatchf. 191, 192 [*quoted* in Seeberger *v.* Wright, etc., Oil., etc., Mfg. Co., 157 U. S. 183, 184, 15 S. Ct. 583, 39 L. ed. 665].

"The two words ['draught' and 'draft'] are in reality different spellings of the same word." Seeberger *v.* Wright, etc., Oil, etc., Mfg. Co., 157 U. S. 183, 185, 15 S. Ct. 583, 39 L. ed. 665.

14. Seeberger *v.* Wright, etc., Oil, etc., Mfg. Co., 157 U. S. 183, 185, 15 S. Ct. 583, 39 L. ed. 665 [*citing* Century Dict.; Imperial Dict.], where it is also defined as "an arbitrary deduction from gross weight made by custom, to assure the buyer or importer, as the case may be, that there is no discrimination against him from difference in scales."

15. Webster Dict. [*quoted* in Seeberger *v.* Wright, etc., Oil, etc., Mfg. Co., 157 U. S. 183, 185, 15 S. Ct. 583, 39 L. ed. 665].

16. Napier *v.* Barney, 17 Fed. Cas. No. 10,009, 5 Blatchf. 191, 192 [*quoted* in Seeberger *v.* Wright, etc., Oil, etc., Mfg. Co., 157 U. S. 183, 185, 15 S. Ct. 583, 39 L. ed. 665], where it is also said: "It is to compensate for any loss that may occur from the handling of the scales, in the weighing, so that, when weighed the second time, the article will hold out good weight."

17. **Conscription defined** see 8 Cyc. 582.

18. Kneedler *v.* Lane, 45 Pa. St. 238, 264; Lanahan *v.* Birge, 30 Conn. 438, 443; Johnson *v.* Dodd, 56 N. Y. 76, 81; *In re* Wehlitz, 16 Wis. 443, 448, 84 Am. Dec. 700; *In re* Irons, 13 Fed. Cas. No. 7,066, 5 Blatchf. 166, 168, 3 Cyc. 839.

19. Anderson L. Dict.

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By Frank W. Jones*

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CROSS-REFERENCES

For Matters Relating to:
Ditch:
As Boundary, see BOUNDARIES.
For Irrigation, see WATERS.
Drainage:
Natural, see WATERS.
Of Highway, see STREETS AND HIGHWAYS.
Of Public Land, see PUBLIC LANDS.
Private, see WATERS.
Drain in City, see MUNICIPAL CORPORATIONS.
Levee, see LEVEES.
Surface Water, see WATERS.

I. DEFINITION.

A drain is an artificial channel or trench through which water or sewage is caused to flow from one point to another;[1] a ditch,[2] or as sometimes defined by statute, an open ditch.[3] In a more restricted sense, as applied to houses, the term "drain" is sometimes applicable to a conduit used for the drainage of one building only.[4] To drain land is to rid it of its superfluous moisture.[5] Hence drain-

1. Valparaiso *v.* Parker, 148 Ind. 379, 381, 47 N. E. 330.

Other definitions are: "A hollow space in the ground, natural or artificial, where water is collected or passes off." Goldthwait *v.* East Bridgewater, 5 Gray (Mass.) 61, 64 [*quoted* in Fiske *v.* Wetmore, 15 R. I. 354, 359, 5 Atl. 375, 10 Atl. 627, 629].

"A water course." Valparaiso *v.* Parker, 148 Ind. 379, 381, 47 N. E. 330; Webster Dict. [*quoted* in Fiske *v.* Wetmore, 15 R. I. 354, 359, 5 Atl. 375, 10 Atl. 627, 629].

"A trench; a sink." Valparaiso *v.* Parker, 148 Ind. 379, 381, 47 N. E. 330.

"A sewer." Charleston *v.* Johnston, 170 Ill. 336, 341, 48 N. E. 985; Valparaiso *v.* Parker, 148 Ind. 379, 381, 47 N. E. 330; Webster Dict. [*quoted* in Fiske *v.* Wetmore, 15 R. I. 354, 359, 5 Atl. 375, 10 Atl. 627, 629]. See Acton Local Bd. *v.* Batten, L. R. 28 Ch. 283, 286, 49 J. P. 357, 54 L. J. P. 251, 52 L. T. Rep. N. S. 17. In Reg. *v.* Godmanchester Local Bd. of Health, 5 B. & S. 886, 900, 11 Jur. N. S. 63, 34 L. J. Q. B. 13, 13 Wkly. Rep. 155, 117 E. C. L. 886 [*quoted* in Fiske *v.* Wetmore, 15 R. I. 354, 359, 5 Atl. 375, 10 Atl. 627, 629], a distinction is made between a drain and a sewer, but the distinction is based upon a statute.

2. Goldthwait *v.* East Bridgewater, 5 Gray (Mass.) 61, 64 [*quoted* in Fiske *v.* Wetmore, 15 R. I. 354, 359, 5 Atl. 375, 10 Atl. 627, 629]; Byrne *v.* Keokuk, etc., R. Co., 47 Mo. App. 383, 389. See also DITCH.

"**In order to constitute** either, [a "ditch" or a "drain"] there must be a well-defined channel or receptacle for the drainage of water. A mere depression in the surface of the earth, or a swale, with no channel or banks, cannot be called either a ditch or drain." Byrne *v.* Keokuk, etc., R. Co., 47 Mo. App. 383, 389.

3. Mo. Rev. St. (1899) § 6972.

4. Acton Local Bd. *v.* Batten, L. R. 28 Ch. 283, 286, 49 J. P. 357, 54 L. J. Ch. 251, 52 L. T. Rep. N. S. 17 (where it is said: "'Drain' [within a statutory definition] means any drain of and used for the drainage of one building only"); Hedley *v.* Webb, [1901] 2 Ch. 126, 130, 65 J. P. 425, 70 L. J. Ch. 663, 84 L. T. Rep. N. S. 526 (where, quoting a statutory definition of the word "drain," it is said: "Turning back to the definition of 'drain,' 'drain' means any drain of and used for the drainage of one building only, or premises within the same curtilage, and made merely for the purpose of communicating therefrom with a cesspool or other like receptacle for drainage, or with a sewer into which the drainage of two or more buildings or premises occupied by different persons is conveyed").

"**Sink-conductors**" **an adjunct of "drainage."**—"It is new to me to be told that what are called here [in a statute] 'sink-conductors'—that is to say, pipes by which the drainage is brought into the drains of the house—are not part of 'the drainage system.'" Glasgow *v.* McOmish, [1898] A. C. 432, 440.

5. This is generally done by deepening, straightening, or embanking the natural

age[6] as applied to land ordinarily contemplates the removal of water therefrom by means of an artificial channel or trench.[7]

II. ESTABLISHMENT AND MAINTENANCE.

A. Power of Legislature to Establish — 1. In General. It is within the power of a state to require local improvements to be made which are essential to the health and prosperity of any community within its borders. To this end it may provide for the construction of canals or drains for draining marshy and malarious districts, and of levees to prevent inundations.[8]

watercourses which run through it, and by supplementing them when necessary by artificial ditches and canals. People *v.* Parks, 58 Cal. 624. See also Fiske *v.* Wetmore, 15 R. I. 354, 5 Atl. 375, 10 Atl. 627, 629.

6. "Kent speaks of the right of drainage, 3 Comm. 436, as a 'right to convey water in pipes through or over the estate of another.'" Fiske *v.* Wetmore, 15 R. I. 354, 359, 5 Atl. 375, 10 Atl. 627, 629.

7. Royse *v.* Evansville, etc., R. Co., 160 Ind. 592, 594, 67 N. E. 446 [*citing* Valparaiso *v.* Parker, 148 Ind. 379, 47 N. E. 330, distinguishing "drainage" from "levee"].

Other definitions are: "Rainfall, surface and subsoil water only." Mass. Rev. L. (1902) c. 75, § 117.

"That district of country that drains into a river or stream; [a watershed] as the drainage of the valley of the river Thames." Maxwell Land Grant Co. *v.* Dawson, 7 N. M. 133, 143, 34 Pac. 191.

May embrace "sewerage." Valparaiso *v.* Parker, 148 Ind. 379, 381, 47 N. E. 330; Fiske *v.* Wetmore, 15 R. I. 354, 359, 5 Atl. 375, 10 Atl. 627, 629.

The "petition for any drainage district, [in an act for the construction of drains, ditches and levees] shall be held to mean and include any side lateral spur or branch ditch drain open, covered or tiled, or any natural water-course into which such drains or ditches may enter for the purpose of outlet, whether such water-course is situated in or outside of the district." Briar *v.* Job's Creek Drainage Dist., 185 Ill. 257, 260, 56 N. E. 1042.

8. *California.*— Hagar *v.* Yolo County, 47 Cal. 222.

Indiana.— Pittsburgh, etc., R. Co. *v.* Machler, 158 Ind. 159, 63 N. E. 210; Baltimore, etc., R. Co. *v.* Ketring, 122 Ind. 5, 23 N. E. 527.

Kansas.— Griffith *v.* Pence, 9 Kan. App. 253, 59 Pac. 677.

Michigan.— Smith *v.* Carlow, 114 Mich. 67, 72 N. W. 22.

New York.— *In re* Ryers, 72 N. Y. 1, 28 Am. Rep. 88; Matter of Penfield, 3 N. Y. App. Div. 30, 37 N. Y. Suppl. 1056.

Oregon.— Seely *v.* Sebastian, 4 Oreg. 25.

Washington.— State *v.* Henry, 28 Wash. 38, 68 Pac. 368, holding that the drainage act of 1895, providing for the construction of ditches by a county for agricultural, sanitary, and domestic purposes, is not unconstitutional in that it directs that school lands benefited shall be considered in apportioning the costs of the improvements.

Wisconsin.— Priewe *v.* Wisconsin State Land, etc., Co., 93 Wis. 534, 67 N. W. 918, 33 L. R. A. 645.

United States.— Hagar *v.* Reclamation Dist. No. 108, 111 U. S. 701, 4 S. Ct. 663, 28 L. ed. 569.

See 17 Cent. Dig. tit. "Drains," § 1 *et seq.*; and, generally, Constitutional Law.

Mr. Justice Peckham, in speaking of the power of a legislature to authorize the reclamation of swamp lands, in Fallbrook Irr. Dist. *v.* Bradley, 164 U. S. 112, 163, 17 S. Ct. 56, 41 L. ed. 369, said: "The power does not rest simply upon the ground that the reclamation must be necessary for the public health. That indeed is one ground for interposition by the state, but not the only one. Statutes authorizing drainage of swamp lands have frequently been upheld independently of any effect upon the public health, as reasonable regulations for the general advantage of those who are treated for this purpose as owners of a common property. Head *v.* Amoskeag Mfg. Co., 113 U. S. 9, 5 St. Ct. 441, 28 L. ed. 889; Wurtz *v.* Hoagland, 114 U. S. 606, 5 S. Ct. 1086, 29 L. ed. 299; Cooley Taxation. (2d ed.) 617. If it be essential or material for the prosperity of the community, and if the improvement be one in which all the landowners have to a certain extent a common interest, and the improvement cannot be accomplished without the concurrence of all or nearly all of such owners by reason of the peculiar natural condition of the tract sought to be reclaimed, then such reclamation may be made and the land rendered useful to all and at their joint expense. In such case the absolute right of each individual owner of land must yield to a certain extent or be modified by corresponding rights on the part of other owners for what is declared upon the whole to be for the public benefit." See also Matter of Tuthill, 36 N. Y. App. Div. 492, 55 N. Y. Suppl. 657.

Act held unconstitutional.—Where the act authorizing the formation of a drainage district did not require that the proposed drainage should benefit the public health, or otherwise be of public utility, and did not even require that the lands within the proposed district should be swamp or wet lands, it was held to be unconstitutional. Gifford Drainage Dist. *v.* Shroer, 145 Ind. 572, 44 N. E. 636.

2. Source of Power. The legislative authority to enact this class of laws is derived from the police power, the right of eminent domain, or the taxing power of the state.[9]

3. Test as to Validity. The test as to the validity of such laws is found in the object and purposes thereof.[10]

4. Upon Whom Conferred. The power to construct drains is in no proper sense a part of the usual powers belonging to town and county governments; but is a special authority given for a particular purpose, which may be conferred upon any person or body upon which the legislature may see fit to confer it.[11]

B. Purposes Justifying Establishment — 1. Public Benefit or Utility. Under the various constitutional provisions and acts conferring power upon local authorities to establish drains, it must be shown that such drain is necessary and conducive to public health, convenience, or welfare, or of public benefit or utility.[12]

9. *Kentucky.*— Duke *v.* O'Bryan, 100 Ky. 710, 39 S. W. 444, 824, 19 Ky. L. Rep. 81. See Scoffletown Fence Co. *v.* McAllister, 12 Bush 312.

Minnesota.— Lien *v.* Norman County, 80 Minn. 58, 82 N. W. 1094.

New Jersey.— *In re* Drainage Application, etc., 35 N. J. L. 497.

Ohio.— Sessions *v.* Crunkilton, 20 Ohio St. 349.

Wisconsin.— Bryant *v.* Robbins, 70 Wis. 258, 35 N. W. 545; Donnelly *v.* Decker, 58 Wis. 461, 17 N. W. 389, 46 Am. Rep. 637.

United States.— See Wurts *v.* Hoagland, 114 U. S. 606, 5 S. Ct. 1086, 29 L. ed. 229.

See 17 Cent. Dig. tit. "Drains," § 1 *et seq.*

Eminent domain generally see Eminent Domain.

Police power.— It has been held in Indiana that the reclamation of wet lands and the drainage of ponds and marshes is of public utility, and is for the benefit of the public health and welfare, and that it is by virtue of the police power that the authority of the state is exercised to enact drainage laws. Gifford Drainage Dist. *v.* Shroer, 145 Ind. 572, 44 N. E. 636; Zigler *v.* Menges, 121 Ind. 99, 22 N. E. 782, 16 Am. St. Rep. 357.

Taxation generally see Taxation.

10. When for a purely private purpose, they are invalid and unenforceable. The legislature has no power to exercise the right of eminent domain, the police power, or the power of taxation for private purposes; and unless the act under consideration has for its objects the furtherance of public interests it cannot be sustained. Anderson *v.* Kerns Draining Co., 14 Ind. 199, 77 Am. Dec. 63; Lien *v.* Norman County, 80 Minn. 58, 82 N. W. 1094; Coster *v.* Tide Water Co., 18 N. J. Eq. 54. See also State *v.* Polk County, 87 Minn. 325, 92 N. W. 216, 60 L. R. A. 161; Matter of Tuthill, 36 N. Y. App. Div. 492, 55 N. Y. Suppl. 657 [*reversing* 50 N. Y. Suppl. 410, and *affirmed* in 163 N. Y. 133, 57 N. E. 303, 79 Am. St. Rep. 574, 49 L. R. A. 781].

The public use required need not be the use or benefit of the whole public or state, or any large portion of it. Coster *v.* Tide Water Co., 18 N. J. Eq. 54; Fallbrook Irr. Dist. *v.* Bradley, 164 U. S. 112, 156, 17 S. Ct. 56, 41 L. ed. 369.

If the public purpose be kept in view, it is no objection to the validity and enforcement of an act that private interests are also subserved. Duke *v.* O'Bryan, 100 Ky. 710, 39 S. W. 444, 824, 19 Ky. L. Rep. 81.

11. New Iberia *v.* New Iberia, etc., Drainage Dist., 106 La. 651, 31 So. 305; Bryant *v.* Robbins, 70 Wis. 258, 35 N. W. 545. See also People *v.* Reclamation Dist. No. 551, 117 Cal. 114, 48 Pac. 1016, holding that a statute creating reclamation districts and providing that those who are interested in the land and who must pay for the improvements shall determine by an election whether the improvements shall be made does not constitute an exercise of the election franchise so as to render it void because requiring a property qualification.

12. *Indiana.*— Anderson *v.* Baker, 98 Ind. 587; Neff *v.* Reed, 98 Ind. 341; Wishmier *v.* State, 97 Ind. 160; Ross *v.* Davis, 97 Ind. 79; Deisner *v.* Simpson, 72 Ind. 435; Chambers *v.* Kyle, 67 Ind. 206; Bate *v.* Sheets, 64 Ind. 209; Tillman *v.* Kircher, 64 Ind. 104; McKinsey *v.* Bowman, 58 Ind. 88. See also Royse *v.* Evansville, etc., R. Co., 160 Ind. 592, 67 N. E. 446.

Michigan.— Brady *v.* Hayward, 114 Mich. 326, 72 N. W. 233.

New York.— Matter of Penfield, 3 N. Y. App. Div. 30, 37 N. Y. Suppl. 1056.

Ohio.— McQuillen *v.* Hatton, 42 Ohio St. 202; Chesbrough *v.* Putnam, etc., County, 37 Ohio St. 508; Thompson *v.* Wood County, 11 Ohio St. 678; Reeves *v.* Wood County, 8 Ohio St. 333; Miller *v.* Weber, 1 Ohio Cir. Ct. 130.

Oregon.— Seely *v.* Sebastian, 4 Oreg. 25.

Wisconsin.— Priewe *v.* Wisconsin State Land, etc., Co., 93 Wis. 534, 67 N. W. 918, 33 L. R. A. 645.

See 17 Cent. Dig. tit. "Drains," § 2.

Under the Indiana statute it has been held that it is not necessary that a drain shall be of public utility, benefit highways, and promote public health, in order to authorize a special assessment. It is sufficient if it accomplishes any one of these things. Perkins *v.* Hayward, 124 Ind. 445, 24 N. E. 1033.

Purposes held sufficient.— Where the con-

2. Benefit to Community or Neighborhood. It is not necessary, in order that the use may be regarded as public, that the whole community or any large portion of it may participate in it.[13]

C. Drainage Companies or Reclamation Districts — 1. Legislative Power to Create. As the legislature has power to drain and reclaim swamp and overflowed lands directly or by its own agents,[14] so it has the power to do so through the intervention of companies or drainage districts created for that purpose,[15] and these companies or districts are held to be quasi-public corporations.[16]

2. Articles of Association. In some states the articles of association of a company organized to reclaim wet or overflowed lands must distinctly state the purposes intended to be accomplished, the mode and manner of draining, and contain a plain description of the commencement, the line, and the termination of the drain.[17]

struction of a county ditch would afford needed drainage to a considerable body of low lands, to several public highways, and to certain public school grounds, and the existing drainage was inadequate for such purpose, such facts were sufficient to sustain a finding that the ditch would be conducive to the public health, convenience, and welfare. Lake Erie, etc., R. Co. *v.* Hancock County, 63 Ohio St. 23, 57 N. E. 1009.

Benefit of public health only.— Under the old New York Drainage Act the object for which drainage might be had by its provisions was solely the benefit of the public health. *In re* Ryers, 72 N. Y. 1, 28 Am. Rep. 88; Matter of Penfield, 3 N. Y. App. Div. 30, 37 N. Y. Suppl. 1056.

Private drains.— A tax cannot be levied upon any portion of the public, for the construction of a drain in which the public are not concerned. Even the owner of the land benefited cannot be taxed to improve it, unless public considerations are involved. People *v.* Saginaw County, 26 Mich. 22; Anderson *v.* Kerns Draining Co., 14 Ind. 199, 202, 77 Am. Dec. 63.

Enforcing a servitude.—The authority given to police juries to open up or remove obstructions from ancient natural drains does not give them the power to institute suit to enforce a servitude by a servient estate, or to have embankments leveled, in matters of a private nature, and not included in their powers. Concordia Parish *v.* Natchez, etc., R. Co., 44 La. Ann. 613, 10 So. 809.

13. If the drain be of public benefit, the fact that some individuals may be specially benefited above others affected by it will not deprive it of its public character. Ross *v.* Davis, 97 Ind. 79; Lake Erie, etc., R. Co. *v.* Hancock County, 63 Ohio St. 23, 57 N. E. 1009.

Under an Ohio statute authorizing the construction of a ditch if "conducive to the public health, convenience, or welfare," it has been held that the public health, etc., "of the neighborhood" is meant. Chesbrough *v.* Putnam, etc., County, 37 Ohio St. 508.

Public highway.— It has been held in Indiana that the gravel road of an incorporated turnpike company is a public highway within the meaning of the drainage law; hence a ditch, beneficial to such road, will benefit a public highway as required by statute. Neff *v.* Reed, 98 Ind. 341.

14. See *supra*, II, A.

15. *California.*— People *v.* La Rue, 67 Cal. 526, 8 Pac. 84; People *v.* Williams, 56 Cal. 647; People *v.* Reclamation Dist. No. 108, 53 Cal. 346.

Illinois.— Klinger *v.* People, 130 Ill. 509, 22 N. E. 600; People *v.* O'Hair, 29 Ill. App. 239; Doyle *v.* Baughman, 24 Ill. App. 614.

Louisiana.— Richard *v.* Cypremort Drainage Dist., 107 La. 657, 32 So. 27 (holding the police jury has the power to divide a parish into drainage districts); New Iberia *v.* New Iberia, etc., Drainage Dist., 106 La. 651, 31 So. 305; *In re* New Orleans Drainage Co., 11 La. Ann. 338.

Missouri.— Mound City Land, etc., Co. *v.* Miller, 170 Mo. 240, 70 S. W. 721, 60 L. R. A. 190.

North Dakota.— Martin *v.* Tyler, 4 N. D. 278, 60 N. W. 392, 25 L. R. A. 838.

Ohio.— Miller *v.* Weber, 1 Ohio Cir. Ct. 130.

Wisconsin.— State *v.* Stewart, 74 Wis. 620, 43 N. W. 947, 6 L. R. A. 394.

See 17 Cent. Dig. tit. "Drains," § 4 *et seq.*

May be established by implication arising from the passage of acts recognizing its existence, and requiring a corporation for the performance of the duties and powers enjoined or conferred by such acts of the legislature, however defective the original organization may have been. People *v.* Reclamation Dist. No. 108, 53 Cal. 346.

16. People *v.* La Rue, 67 Cal. 526, 8 Pac. 84; People *v.* Williams, 56 Cal. 647; People *v.* Reclamation Dist. No. 108, 53 Cal. 346; Dean *v.* Davis, 51 Cal. 406.

17. So that all persons whose lands are liable to be affected by the work may be apprised of the fact, and to form with reasonable certainty an opinion as to their personal interest in the corporation. Smith *v.* Duck Pond Ditching Assoc., 54 Ind. 235; Crawford *v.* Prairie Creek Ditching Assoc., 44 Ind. 361; Newton County Draining Co. *v.* Nofsinger, 43 Ind. 566; Skelton Creek Draining Co. *v.* Mauck, 43 Ind. 300; Seyberger *v.* Calumet Draining Co., 33 Ind. 330, 331; O'Reiley *v.* Kankakee Valley Draining Co., 32 Ind. 169; West *v.* Bullskin Prairie Ditching Co., 32 Ind. 138.

3. Officers and Commissioners — a. Legislative Authority to Appoint. The legislature having authority to provide for the organization of drainage districts, in the absence of constitutional provision to the contrary, this general power carries with it by necessary implication all other powers necessary to make the general authority effective, and to accomplish the results intended. Hence the legislature may designate the officers and the mode of their selection to construct and maintain drains and levees.[18]

b. Reduction of Number and Removal. Some of the statutes provide for the substitution of one commissioner for the board of commissioners.[19] The legislature may likewise provide for the removal of one set of officers and the appointment of others in a different mode.[20]

c. Eligibility. Drainage commissioners are not disqualified to act as such by the mere fact of their ownership of lands lying in such drainage district, on the ground that they are an interested tribunal.[21]

d. Authority — (I) *Over Drain Situated in Different Counties.* Where a petition was filed for the construction of a drain in three different counties and dismissed as to a portion of one county because beyond the jurisdiction, a joint session by the commissioners of the remaining counties without the commissioners from the county as to which the dismissal was had was a proper joint session.[22]

(II) *To Divide State Into Drainage Districts.* A statute delegating to a board of executive officers called drainage commissioners the power to divide up the state into drainage districts, according to their own discretion, has been held to be unconstitutional.[23]

(III) *Ultra Vires* — (A) *Creating Indebtedness in Advance.* Commissioners

Later Indiana doctrine.— It has, however, been held in Indiana, under the act of March 10, 1873, that the survey provided for in this act, which the board of directors must cause to be made after the corporation is organized, entirely supersedes and renders unnecessary that extreme particularity and accuracy in the description of the proposed work in the articles of association which were held to be indispensable under former legislation to the validity of the proposed corporation; and the description of the proposed drain need only be reasonably certain. Milligan *v.* State, 60 Ind. 206.

18. Hertle *v.* Ball, (Ida. 1903) 72 Pac. 953; Huston *v.* Clark, 112 Ill. 344; Kilgour *v.* Drainage Com'rs, 111 Ill. 342; New Iberia *v.* New Iberia, etc., Drainage Dist., 106 La. 651, 31 So. 305. See also 8 Cyc. 829 note 83. It has been held that the Illinois constitutional amendment of 1878 imposes no limitations or restrictions upon the legislature as to the agencies to be used in the creation of a drainage district, and that the legislature may declare who shall constitute the corporate authorities of such districts. Land Owners *v.* People, 113 Ill. 296.

A legislative act directing certain county or township officers to act as drainage commissioners does not violate a constitutional clause prohibiting the legislature from appointing or electing any person to an office, since it simply imposes additional duties upon officers already elected by the people. Land Owners *v.* People, 113 Ill. 296; Kilgour *v.* Drainage Com'rs, 111 Ill. 342.

19. This may be done in Illinois upon a petition signed by a majority of the landowners, representing a majority of the acreage embraced in the district, where the drains and levees for the construction of which the district was organized have been fully completed, and the court may order such appointment. Lagow *v.* Robeson, 69 Ill. App. 176.

20. Smith *v.* People, 140 Ill. 355, 29 N. E. 676 [*affirming* 39 Ill. App. 238]. See also 8 Cyc. 829 note 83.

Election contests.— It has been held under the Idaho election law (Laws (1899), p. 61) that jurisdiction to try and determine the election of district officers for irrigation districts is lodged in the district court. Hertle *v.* Ball, (Ida. 1903) 72 Pac. 953. See, generally, Elections.

21. Scott *v.* People, 120 Ill. 129, 11 N. E. 408. And see People *v.* Cooper, 139 Ill. 461, 29 N. E. 872.

Under a Michigan statute which gave the county board of supervisors supervision over the action of the drainage commissioners and power of removal for cause, it was held that a member of such board was not eligible for the office of drain commissioner, since one of the objects of their power of review would be defeated if they could appoint one of their own number as member of such board. Kinyon *v.* Duchene, 21 Mich. 498.

22. Bondurant *v.* Arney, 152 Ind. 244, 53 N. E. 169.

23. Since such a division is exclusively a legislative duty, and cannot be delegated by it to any other department of the government or to any agency of its appointment. People *v.* Parks, 58 Cal. 624. But see State *v.* Stewart, 74 Wis. 620, 43 N. W. 947, 6 L. R. A. 394.

or officers of a drainage district have no power to create an indebtedness in advance, and then levy an assessment for the purpose of meeting it.[24]

(B) *Employment of Special Attorneys.* It has been held that the board of supervisors[25] are not the general agents of a drainage district, and that they are not empowered to bind the district by the employment of a special attorney to enforce the collection of an assessment.[26]

e. Official Bonds. Most of the statutes providing for the organization of drainage districts require the officers appointed under such acts to give bond with good and sufficient surety.[27]

f. Liability For Trespass. Where drainage commissioners usurp powers not given them under the statute, they may become trespassers, and may be restrained as other trespassers, if they are about to inflict irreparable injury.[28]

4. Drain Warrants or Orders — a. Out of What Fund Payable. Drain orders or warrants issued to pay for the construction of a public drain can only be paid out of the particular assessment on the credit of which they were drawn, and which constitute a separate fund.[29]

b. By Whom Approved. In several of the states the statutes require that drain warrants shall be drawn by the land trustees and approved by the board of supervisors.[30]

c. Presumption as to Validity. Under statutes authorizing drain commissioners to draw orders or warrants on the county treasurer they are *prima facie* valid.[31]

24. For landowners have a right to be heard as to any acts of the officers materially affecting the character or extent of purposed improvements. Sterling First Nat. Bank *v.* Drew, 191 Ill. 186, 60 N. E. 856 [*affirming* 93 Ill. App. 630]; Winkelmann *v.* Moredock, etc., Landing Drainage Dist., 170 Ill. 37, 48 N. E. 715.

25. See, generally, Counties.

26. Drainage Dist. No. 1 *v.* Daudt, 74 Mo. App. 579.

27. This bond is usually conditioned for the faithful performance of their duties, and for a proper and just accounting for all moneys coming into their hands as such officers. Smith *v.* State, 117 Ind. 167, 19 N. E. 744; Thompson *v.* State, 37 Miss. 518. See also Oconto County *v.* Hall, 47 Wis. 208, 2 N. W. 291.

Set-off.— In an action upon a commissioner's official bond for conversion of drainage assessments collected, he is entitled to a credit for all moneys expended for work done under the contract in constructing the drain, and for costs and expenses of the action. Harris *v.* State, 123 Ind. 272, 24 N. E. 241.

Where the drainage commissioners deviate from the plans and specifications approved for the construction of a drain, without proper authority to do so, and damages result therefrom, they are liable on their official bonds for such damages. The proper measure of damages in such case would be the amount required to complete the work in the manner originally approved and ordered, for those who pay the assessments have the right to insist upon the construction of the work as established by the report of the commissioners and the approval of the court, or other proper reviewing tribunal. Smith *v.* State, 117 Ind. 167, 19 N. E. 744.

28. Woodruff *v.* Fisher, 17 Barb. (N. Y.) 224. See also Matter of Lent, 47 N. Y. App. Div. 349, 62 N. Y. Suppl. 227. It has been held that a drainage commissioner is personally liable in trespass for constructing a drain across a turnpike, under an order or judgment to which the turnpike company was not a party. Cottingham *v.* Fortville, etc., Turnpike Co., 112 Ind. 522, 14 N. E. 479.

29. They cannot be paid out of the general county funds. People *v.* Merritt Tp., 38 Mich. 243; State *v.* Seamen, 23 Ohio St. 389. See Dyer *v.* Middle Kittitas Irr. Dist., 24 Wash. 80, 64 Pac. 1009, holding that the board of directors of an irrigation district had authority to consent to the cessation of work on a drain, where the contractor was to be paid from a sale of bonds and sufficient funds had not been raised by such sales to meet payments due.

30. And where in such a case the drainage district includes more than one county, then each board of supervisors has the discretion as to approval of warrants drawn upon their respective counties. Cosner *v.* Colusa County, 58 Cal. 274.

31. And in an action on such orders plaintiff is not compelled to prove the regularity of the proceedings for the assessment and collection of the tax. Drainage Com'rs *v.* Loveless, 67 Ill. App. 405; Aylesworth *v.* Gratiot County, 43 Fed. 350.

Invalid warrants.— It was held in Badger *v.* Inlet Drainage Dist., 141 Ill. 540, 31 N. E. 170, that drainage commissioners had no authority to contract for the removal of a dam built by private parties, and to issue warrants for the payment of the same, without notice to the landowners, and that the fact that the commissioners had availed themselves of the removal of such dam did not

5. Drainage Bonds. Some statutes provide that the drainage commissioners or other proper officers may postpone the payment of drainage taxes, borrow money for the construction of drains, and issue bonds or notes therefor, secured by them on such unpaid taxes.[32]

6. Liability of Members For Corporate Debts. In some of the states it is provided by statute that each member of a drainage company shall be individually liable for all debts contracted by, and all damages assessed and accrued against, the company during his membership.[33]

7. Collateral Attack on Organization. The legality of the organization of a drainage district cannot be attacked collaterally, as in an action by it to enforce assessments.[34]

D. Proceedings For Establishment — 1. Jurisdiction — a. In General. In some states a petition signed and filed by the requisite number of landowners[35] is the foundation of the jurisdiction of the board of supervisors or commissioners, in proceedings for the construction of drains or levees, and in the absence of a showing by record there is no presumption of such jurisdictional fact.[36]

estop them or the district from denying the validity of the warrants.

32. People *v.* Swigert, 130 Ill. 608, 22 N. E. 787; Richard *v.* Cypremort Drainage Dist., 107 La. 657, 32 So. 27.

Bonds for subdistricts.— But it has been held under such a statute that the commissioners of a drainage district have no right to issue bonds binding the whole district for work done in and for the benefit of a single subdistrict and to be paid for by a tax on such subdistrict. People *v.* Swigert, 130 Ill. 608, 22 N. E. 787.

Bonds issued without petition.— An Illinois act provided in certain sections that drainage commissioners might upon petition asking therefor issue bonds to the full amount of an assessment, and in another section that the commissioners might issue bonds not to exceed ninety per cent of an assessment, such bonds to bear six per cent interest and not to run more than one year after the maturity of the assessment. It was held that a bond might be issued under the latter section without any petition therefor. People *v.* Jones, 137 Ill. 35, 27 N. E. 294.

33. Trippe *v.* Huncheon, 82 Ind. 307; Todhunter *v.* Randall, 29 Ind. 275.

Liability joint.—The members of a ditching company are jointly liable to one of their number for labor done by him for the company. Polk *v.* Reynolds, 54 Ind. 449.

Liability primary.— It has been held that the liability of members of a drainage company for debts of the company is primary and that it is no defense to an action against them for such debt that the uncollected assessments upon lands for benefits accruing thereto by the construction of the work are sufficient to pay the indebtedness. Shafer *v.* Cravens, 46 Ind. 171; Shafer *v.* Moriarty, 46 Ind. 9.

Under a former Indiana statute it was held that members of a drainage company were individually liable for the amounts respectively assessed on their several tracts of land, but no further, for payment of the company's debts. Shaw *v.* Boylan, 16 Ind. 384.

34. Only by direct proceedings in the nature of quo warranto can this question be raised. Swamp-Land Dist. No. 150 *v.* Silver, 98 Cal. 51, 32 Pac. 866; Reclamation Dist. No. 124 *v.* Gray, 95 Cal. 601, 30 Pac. 779; People *v.* Jones, 137 Ill. 35, 27 N. E. 294; Samuels *v.* Drainage Com'rs, 125 Ill. 536, 17 N. E. 829; Evans *v.* Lewis, 121 Ill. 478, 13 N. E. 246; Keigwin *v.* Drainage Com'rs, 115 Ill. 347, 5 N. E. 575; Blake *v.* People, 109 Ill. 504; Osborn *v.* People, 103 Ill. 224; Allman *v.* Lumsden, 55 Ill. App. 21; Calkins *v.* Spraker, 26 Ill. App. 159. See also Griffith *v.* Pence, 9 Kan. App. 253, 59 Pac. 677; Zabel *v.* Harshman, (Mich. 1889) 42 N. W. 44; State *v.* Dolan, (N. J. Sup. 1901) 50 Atl. 453. And see, generally, Quo Warranto.

On application for judgment for delinquent special assessments levied by a drainage district, the regularity of the organization of the district cannot be questioned. Tucker *v.* People, 156 Ill. 108, 40 N. E. 451.

Contesting de facto organization.— Where plaintiff instituted quo warranto proceedings against a reclamation district, claiming it included land embraced in an earlier district, but failed to show that the latter had a *de jure* existence, and then relied on a *de facto* organization, it was held that defendant was not precluded from controverting the *de facto* organization by the rule prohibiting collateral attacks. People *v.* Reclamation Dist. No. 556, 130 Cal. 607, 63 Pac. 27.

35. Where such a petition is signed by the requisite number of landowners or voters, and such petition is necessary in order to confer jurisdiction on the commissioners or board of supervisors, such jurisdiction is acquired on the filing of the petition, and cannot be impaired by the withdrawal of some of the signatures to the petition on the hearing before the board. Seibert *v.* Lovell, 92 Iowa 507, 61 N. W. 197.

36. Bishop *v.* People, 200 Ill. 33, 65 N. E. 421; Payson *v.* People, 175 Ill. 267, 51 N. E. 588; Siebert *v.* Lovell, 92 Iowa 507, 61 N. W. 197; Richman *v.* Muscatine County, 70 Iowa 627, 26 N. W. 24; State *v.* Weimer, 64 Iowa 243, 20 N. W. 171; State *v.* Berry, 12 Iowa 58; Morrow *v.* Weed, 4 Iowa 77, 66 Am. Dec. 122; State *v.* Polk County, 87 Minn.

b. Over Drains Located in Two Counties or in Two Townships. The court of the county in which the petitioner resides and the proceeding is commenced has jurisdiction and authority to establish a drain extending into another county.[37] In the absence, however, of a statute conferring jurisdiction, joint action by different townships in the construction of drains through them, such action extending over more than one township, is illegal, and a tax assessed for works done thereunder cannot be enforced.[38]

2. Parties. In proceedings to establish a drain all persons interested have a right to be heard.[39]

3. Petition — a. Form and Sufficiency — (i) *Description of Land.* The petition for the organization of a drainage district must contain among other things a description of the lands to be included in the proposed district by legal subdivisions or other boundaries;[40] and in one jurisdiction the statute requires

325, 92 N. W. 216, 60 L. R. A. 161. See also Richman *v.* Muscatine County, 77 Iowa 513, 42 N. W. 422, 14 Am. St. Rep. 308, 4 L. R. A. 445.

Under a North Carolina statute proceedings must be commenced by summons returnable to a regular term of the superior court, in order to confer jurisdiction. Bunting *v.* Stancill, 79 N. C. 180.

37. Updegraff *v.* Palmer, 107 Ind. 181, 6 N. E. 353; Meranda *v.* Spurlin, 100 Ind. 380; Buchanan *v.* Rader, 97 Ind. 605; Crist *v.* State, 97 Ind. 389; Shaw *v.* State, 97 Ind. 23.

Under an Indiana statute it has been held that on petition of residents of one county for the establishment of a drain extending into another county, the circuit court of the former county has jurisdiction to establish the drain, and to make and confirm assessments therefor upon lands in the latter county. Hudson *v.* Punch, 116 Ind. 63, 18 N. E. 390.

In Ohio it has been held that the legislature has authority to provide for the location of a ditch in two counties by a majority of the commissioners of each county in joint session; that such a provision is not unconstitutional as conferring jurisdiction on the county commissioners beyond the limits of their counties. Chesbrough *v.* Putnam, etc., Counties, 37 Ohio St. 508.

38. Hubbell *v.* Robertson, 65 Mich. 538, 32 N. W. 811; Alger *v.* Slaght, 64 Mich. 589, 31 N. W. 531; Robertson *v.* Baxter, 57 Mich. 127, 23 N. W. 711.

39. The persons upon whose land the ditch is to be constructed must be before the tribunal conducting such proceedings, either by notice or by appearance, and unless they are no valid order concerning them can be made. Wright *v.* Wilson, 95 Ind. 408.

Landowners omitted from petition.— Any one not named in the petition who appears before the board and claims that his lands will be affected by the proposed drain may upon the determination of that fact in his favor be made a party to the proceedings. Zumbro *v.* Parnin, 141 Ind. 430, 40 N. E. 1085.

Persons included in assessment.— Where an assessment is made against land and names the owner of such land, he thereby becomes a party to the proceedings, although not named in the petition for the construction of the drain, and is entitled to an appeal from such proceedings. Houk *v.* Barthold, 73 Ind. 21.

Persons who have no title of record need not be made defendants to a drainage petition, but if they have an interest in land affected by the proposed drain they may come in and defend after the filing of the petition. Bell *v.* Cox, 122 Ind. 153, 23 N. E. 705.

40. People *v.* Reclamation Dist. No. 556, 130 Cal. 607, 63 Pac. 27; Ralston *v.* Sacramento County, 51 Cal. 592; Pleasant Civil Tp. *v.* Cook, 160 Ind. 533, 67 N. E. 262. See also Ferran *v.* Yolo County, 51 Cal. 307; Butts *v.* Monona County, 100 Iowa 74, 69 N. W. 284; Kinnie *v.* Bare, 68 Mich. 625, 36 N. W. 672. See Craig *v.* People, 188 Ill. 416, 58 N. E. 1000, holding that it is not necessary to the validity of the petition for combined drainage, under section 11 of the Illinois act of 1885, that it should contain a description of the different tracts of land severally belonging to the petitioners.

Accurate description is not required. Spahr *v.* Schofield, 66 Ind. 168.

Slight error in the description is immaterial. People *v.* Barnes, 193 Ill. 620, 62 N. E. 207.

Description copied from tax duplicate.— Where the descriptions of the tracts of land involved in the proceedings are copied as the statute requires from the tax duplicate, such descriptions will *prima facie* at least sustain an assessment for benefits accruing from the construction of the ditch. Sample *v.* Carroll, 132 Ind. 496, 32 N. E. 220.

Description of different tracts.—It has been held in Illinois that it is not necessary to the validity of the petition that it should contain the description of the different tracts of land severally belonging to the petitioners. Craig *v.* People, 188 Ill. 416, 58 N. E. 1000.

Agricultural drainage.— It has been held under Mo. Rev. St. (1899) § 6968, that in proceedings before a justice of the peace to ditch land for agricultural drainage, no statement or petition is required to be filed with the justice, but a rough sketch or plat of the land to be drained and of the lands across which the drain is to be constructed

minutes of the survey of the land affected by the proposed drain to accompany the petition.[41]

(II) *NAMES OF LANDOWNERS.* Some statutes provide that the petition shall contain the names of the owners of the several tracts of land intended to be included therein, with their post-office addresses, so far as known.[42]

(III) *LOCATION OF DRAIN.* The statutes usually require that the petition shall contain a general description of the beginning, the route, and the terminus of the proposed drain.[43]

(IV) *NECESSITY OF DRAIN.* Under some statutes it is necessary for the petition to allege that the proposed drain will be conducive to the public health, convenience, or welfare, or that the same will be of public benefit or utility;[44] but

is sufficient. Lile *v.* Gibson, 91 Mo. App. 480.

41. Hackett *v.* Brown, 128 Mich. 141, 87 N. W. 102.

42. Craig *v.* People, 188 Ill. 416, 58 N. E. 1000 (holding that in giving the names and post-office addresses of the persons who are owners of the lands in the district, a description of the lands so owned by such persons is not necessary to be given); Sanner *v.* Union Drainage Dist., 175 Ill. 575, 51 N. E. 857; Troyar *v.* Dyar, 102 Ind. 396, 1 N. E. 728; Young *v.* Wells, 97 Ind. 410. See also Wright *v.* Wilson, 95 Ind. 408; Matter of Beehler, 3 N. Y. St. 486. And *compare* People *v.* Barnes, 193 Ill. 620, 62 N. E. 207.

Provision is directory not mandatory. Huston *v.* Clark, 112 Ill. 344.

Names on tax duplicate.— It has been held in Indiana that it is sufficient to give the names of landowners as they appear on the tax duplicate. Carr *v.* State, 103 Ind. 548, 3 N. E. 375.

Schedule annexed.— It has been held sufficient if the names and post-office addresses so far as known of the landowners are included in a list or schedule annexed to the petition and referred to in the petition as part of it. Craig *v.* People, 188 Ill. 416, 58 N. E. 1000.

Allegation of ownership.—Under Burn Rev. St. Ind. (1894) § 5656, that the sufficiency of a petition is not affected by the failure of the petitioner to allege that he was the owner of land liable to be assessed, since the qualification might as well be affixed to his signature as expressed in the body of the petition. Shoemaker *v.* Williamson, 156 Ind. 384, 59 N. E. 1051. It was held under a former Indiana act that the petition need not contain the names of the owners of the land affected by the proposed drain, it being sufficient to give them in the notice of the petition. Vizzard *v.* Taylor, 97 Ind. 90; Watkins *v.* Pickering, 92 Ind. 332.

43. Rogers *v.* Venis, 137 Ind. 221, 36 N. E. 841; Metty *v.* Marsh, 124 Ind. 18, 23 N. E. 702; Wright *v.* Wilson, 95 Ind. 408; Coolman *v.* Fleming, 82 Ind. 117; Corey *v.* Swagger, 74 Ind. 211; Hauser *v.* Burbank, 117 Mich. 463, 76 N. W. 109; Frost *v.* Leatherman, 55 Mich. 33, 20 N. W. 705; Grose *v.* Zierle, 52 Mich. 542, 18 N. W. 349; Null *v.* Zierle, 52 Mich. 540, 18 N. W. 348; Clark *v.* Drain Com'r, 50 Mich. 618, 16 N. W. 167; State *v.* Polk County, 87 Minn. 325, 92 N. W. 216, 60 L. R. A. 161. See also Coomes *v.* Burt, 22 Pick. (Mass.) 422; Gillett *v.* McLaughlin, 69 Mich. 547, 37 N. W. 551; Kroop *v.* Forman, 31 Mich. 144.

Description held sufficient.— See Brady *v.* Hayward, 114 Mich. 326, 72 N. W. 233. See also Dodge County *v.* Acom, 61 Nebr. 376, 85 N. W. 292. In Kinnie *v.* Bare, 68 Mich. 625, 36 N. W. 672, in speaking of this provision of the Michigan statute, the court said: "What it contemplates is that the termini and route be approximately described for the information of the commissioner, and it is left for him to ascertain and determine the practical route and termini."

Drainage of lakes.— Where the petition for a drain, for which remonstrant as a benefited landowner was to be assessed, did not ask for the drainage of the lakes, it was held that the mere fact that the proposed route ran through several small water basins or courses did not invalidate the proceedings as being for the drainage of lakes. Goodrich *v.* Stangland, 155 Ind. 279, 58 N. E. 148.

Width of drain.— Where the application in proceedings to condemn land for the establishment of a drain gave only the line of the drain, without stating its proposed width, it was held that such proceedings were void. Mathias *v.* Drain Com'rs, 49 Mich. 465, 13 N. W. 818.

Under the New York statute (3 Rev. St. § 2448) it is not required that the petition state where the proposed drain shall start or where it shall terminate, or that it shall specify the number or kinds of drains contemplated. Matter of Beehler, 3 N. Y. St. 486.

44. Pleasant Civil Tp. *v.* Cook, 160 Ind. 533, 67 N. E. 262; Collins *v.* Rupe, 109 Ind. 340, 10 N. E. 91; Watkins *v.* Pickering, 92 Ind. 332; Deisner *v.* Simpson, 72 Ind. 435; Chambers *v.* Kyle, 67 Ind. 206; Bate *v.* Sheets, 64 Ind. 209; Tillman *v.* Kircher, 64 Ind. 104; McKinsey *v.* Bowman, 58 Ind. 88.

Demonstration of benefit unnecessary.— It is sufficient to allege in the petition that the drain will benefit the public health or be of public utility; it is not necessary to show how either of these objects will be attained. Indianapolis, etc., Gravel Road Co. *v.* Christian, 93 Ind. 360.

"Necessity" defined.— In Corey *v.* Swagger, 74 Ind. 211, it was held that where the

under other statutes it has been held that it is not essential for the petition to state that the drain is necessary for the public health or highways, or that it is a public necessity.[45]

(v) *Method to Be Adopted.* Again some statutes require the petition to state generally the method by which it is believed the contemplated drainage can be accomplished in the cheapest and best manner.[46]

(vi) *Signatures and Verification.* The petition must also be signed by the requisite number of landowners or voters,[47] in order to give the court or board of supervisors jurisdiction. And the statutes usually direct that the petition shall be verified by the affidavit of one of the petitioners.[48]

petition stated that the construction of the ditch would be "conducive to the public health, convenience and welfare," and would be "of public benefit and utility," the necessity might be fairly inferred; that as used in the statute, the word "necessity" did not mean that which is "absolutely" requisite, but that which is "essentially" requisite. Under the Indiana act of March 9, 1875, a petition which states that the ditch would be of public utility need not further state that it would benefit the public health. Coolman *v.* Fleming, 82 Ind. 117.

Public health.— In New York the statute (3 Rev. St. § 2448) requires the petition to set forth that the drain sought to be established is necessary for the public health. Matter of Beehler, 3 N. Y. St. 486.

Allegation of particular necessity not essential.— Where a statute authorized the court on petition to lay out a drain through a city when it could not be otherwise "accomplished without extraordinary labor and expense," it was held that the petition need not allege the particular circumstances making it necessary to construct the drain through the city to avoid extraordinary labor and expense. Sauntman *v.* Maxwell, 154 Ind. 114, 54 N. E. 397.

45. Kinnie *v.* Bare, 80 Mich. 345, 45 N. W. 345; Gillett *v.* McLaughlin, 69 Mich. 547, 37 N. W. 551.

Under the Wisconsin statute it has been held that the petition need not state that the town as a whole will be benefited by the drain nor specify the nature of the benefits. Muskego *v.* Drainage Com'rs, 78 Wis. 40, 47 N. W. 11.

46. Heick *v.* Voight, 110 Ind. 279, 11 N. E. 306.

Use of dredging machine.— A petition need not allege that a dredging machine will be used in the construction, to justify the use of such machine and the temporary removal of such bridges as are too low to let the machine pass underneath. Lake Erie, etc., R. Co. *v.* Cluggish, 143 Ind. 347, 42 N. E. 743.

47. Sanner *v.* Union Drainage Dist., 175 Ill. 575, 51 N. E. 857; Payson *v.* People, 175 Ill. 267, 51 N. E. 588; Watkins *v.* Pickering, 92 Ind. 332.

In California the petition must be signed by owners of one-half the acreage in the district. Yolo County Reclamation Dist. No. 537 *v.* Burger, 122 Cal. 442, 55 Pac. 156.

In Iowa the statute requires the petition to be signed by one hundred legal voters of the county in which the proposed drain or drains are to be located. Butts *v.* Monona County, 100 Iowa 74, 69 N. W. 284; Seibert *v.* Lovell, 92 Iowa 507, 61 N. W. 197.

In Michigan.— Where the statute provided that the petition should be signed by five freeholders of the town or townships in which such drain or the lands to be drained thereby may be situated, one or more of whom should be owners of lands liable to be assessed for the benefits, it was held that the signature of five freeholders of each township, where the drain traversed more than one township, was not required. Brady *v.* Hayward, 114 Mich. 326, 72 N. W. 233. In Michigan the statute requires, in addition to the signatures of five freeholders, a statement in the body of the petition that the petitioners are such freeholders and the omission of such statement will render all proceedings thereunder void. Frost *v.* Leatherman, 55 Mich. 33, 20 N. W. 705; Whiteford Tp. *v.* Monroe County, 53 Mich. 130, 18 N. W. 593. See also Harbaugh *v.* Martin, 30 Mich. 234.

Names signed by proxy.— The fact that the names of some landowners were signed by other parties does not invalidate the petition, if they were signed by the authority of such landowners. People *v.* Reclamation Dist. No. 136, 121 Cal. 522, 50 Pac. 1068, 53 Pac. 1085.

"Adjacent owners."— Under a former Iowa statute requiring a petition for a drain to be signed by "a majority of persons resident in the county, owning land adjacent to such improvement," it was held that "adjacent owners" are the owners of the land abutting on the improvement, and not the owners of all the land within the congressional subdivisions through which it runs. Wormley *v.* Wright County, 108 Iowa 232, 78 N. W. 824.

Signature of christian names by initials to a petition for the establishment of a drain has been held not to invalidate proceedings thereunder. Sample *v.* Carroll, 132 Ind. 496, 32 N. E. 220.

Residence not essential.— Under the Michigan act it is not necessary that the petitioners should be residents of the township where the proposed drain is to be located; it is sufficient if they are freeholders thereof. Kinnie *v.* Bare, 68 Mich. 625, 36 N. W. 672.

48. Rogers *v.* Venis, 137 Ind. 221, 36 N. E. 841; Updegraff *v.* Palmer, 107 Ind. 181, 6 N. E. 353; Carr *v.* State, 103 Ind. 548, 3 N. E. 375; Shields *v.* McMahan, 101 Ind. 591.

(VII) *SURPLUSAGE.* Where the petition states all the material facts required by the statute, the inclusion of some fact not jurisdictional or material will be treated as mere surplusage and will not invalidate the proceedings.[49]

(VIII) *AMENDMENT.* It has been held that the petition may be amended by leave of the board, even as to jurisdictional facts;[50] and upon appeal from the board, it is in the discretion of the circuit court to permit an amendment of the petition.[51]

b. Petition in Duplicate. Statutes providing for the establishment of a drainage system embracing two townships sometimes require that the petition for such drain, signed by the requisite number of landowners, shall be drawn in duplicate.[52]

c. Supplemental Petition and New Proceedings. Some of the statutes provide that any one interested in drainage proceedings may file a supplemental petition;[53] but a petition which has once been acted on by the board, proceedings under which have been declared void, cannot be used to commence new proceedings for the establishment of such drain,[54] the original petition having performed its function.

4. BOND. One or more of the petitioners is required to file a bond with the petition, with good and sufficient sureties, payable to the state, to be approved by a designated officer, conditioned to pay all expenses in case the board or court shall fail to establish the proposed drain or ditch.[55]

5. NOTICE OF HEARING — a. General Rule. In all legislative enactments on the subject of drainage, notice of the proposed proceedings for the establishment of drains is required to be given by the petitioners to all parties whose lands will be affected thereby.[56]

49. Craig *v.* People, 188 Ill. 416, 58 N. E. 1000; Smith *v.* Carlow, 114 Mich. 67, 72 N. W. 22.

50. Coolman *v.* Fleming, 82 Ind. 117.

51. Metty *v.* Marsh, 124 Ind. 18, 23 N. E. 702; Williams *v.* Stevenson, 103 Ind. 243, 2 N. E. 728.

Objections to the amendment of a petition to be available, on appeal, must be filed at the time the amendment is allowed. Williams *v.* Stevenson, 103 Ind. 243, 2 N. E. 728.

52. State *v.* Graffam, 74 Wis. 643, 43 N. W. 727, a failure to do so rendering the proceedings under the petition void.

53. As for example, to show that lands not mentioned in the original report or order are affected by such drainage, and that the proceedings had thereon are the same as if it were an original petition. Osborn *v.* Maxinbuckee Lake Ice Co., 154 Ind. 101, 56 N. E. 33.

54. State *v.* Graffam, 74 Wis. 643, 43 N. W. 727.

55. Spriggs *v.* State, 161 Ind. 225, 66 N. E. 693, 67 N. E. 992; Schneck *v.* Cobb, 107 Ind. 439, 8 N. E. 271; Keys *v.* Williamson, 31 Ohio St. 561; Sessions *v.* Crunkilton, 20 Ohio St. 349.

Defective bond.— It was held in Casey *v.* Burt County, 59 Nebr. 624, 81 N. W. 851, that proceedings for the drainage of swamp lands and the levy of a tax thereunder were void where the provisions of the Nebraska statute requiring a bond in such proceedings are not strictly complied with, a bond not being sufficient which has no sureties thereon, liability of principal limited, and not being conditioned for the payment of costs that occur in case the board of county commissioners finds against such improvements, but only providing that if on a view of the route the commissioners find in favor of the location of the ditch, the obligation to be void, otherwise to be in force.

Where all obligors are petitioners.—Where there is a bond sufficient in form and substance, signed by solvent obligors and affording ample security, and taken and approved by the auditor, the proceedings will not be dismissed because all the obligors are petitioners. Sample *v.* Carroll, 132 Ind. 496, 32 N. E. 220.

56. *Indiana.*— Sites *v.* Miller, 120 Ind. 19, 22 N. E. 82; Carr *v.* Boone, 108 Ind. 241, 9 N. E. 110; Sunier *v.* Miller, 105 Ind. 393, 4 N. E. 867; Hobbs *v.* Tipton County, 103 Ind. 575, 3 N. E. 263; Grimes *v.* Coe, 102 Ind. 406, 1 N. E. 735; Wright *v.* Wilson, 95 Ind. 408.

Michigan.— Kinnie *v.* Bare, 68 Mich. 625, 36 N. W. 672; Corey *v.* Jackson County, 56 Mich. 524, 23 N. W. 205; Bettis *v.* Probate Judge, 54 Mich. 608, 20 N. W. 608; Whiteford Tp. *v.* Monroe County, 53 Mich. 130, 18 N. W. 593; Willcheck *v.* Drain Com'rs, 42 Mich. 105, 3 N. W. 282; Milton *v.* Wacker, 40 Mich. 229; Taylor *v.* Burnap, 39 Mich. 739; Lane *v.* Burnap, 39 Mich. 736; Strachan *v.* Brown, 39 Mich. 168; Dickenson *v.* Van Wormer, 39 Mich. 141; People *v.* Burnap, 38 Mich. 350. See also Flynn Tp. *v.* Woolman, (1903) 95 N. W. 567.

Minnesota.— Curran *v.* Sibley County, 47 Minn. 313, 50 N. W. 237.

Missouri.— Eaton *v.* St. Charles County, 8 Mo. App. 177.

Ohio.— Baltimore, etc., R. Co. *v.* Wagner, 43 Ohio St. 75, 1 N. E. 91; Sessions *v.* Crunk-

b. Statutes Strictly Construed. Where the mandate of the statute is that notice shall be given in a manner and for a time therein prescribed, before the time fixed for the hearing of the petition, failure in any respect to give the notice thus required will render invalid the hearing on and granting of the petition.[57]

c. Failure to Notify Parties Interested. In some states it has been held that failure to notify one or more interested landowners will not vitiate the proceedings as to those who were properly notified unless it appears that such failure would prevent the construction of the drain.[58]

d. Constructive Notice. Some statutes require that after the petition is filed

ilton, 20 Ohio St. 349. But see Zimmerman *v.* Canfield, 42 Ohio St. 463.

See 17 Cent. Dig. tit. "Drains," § 25 *et seq.*

Failure to give notice, actual or constructive, to an owner of land affected by a proposed drain is not a mere informality, but a jurisdictional error. Bixby *v.* Goss, 54 Mich. 551, 20 N. W. 581.

"Affected" defined.— In Neff *v.* Sullivan, 9 Ohio Dec. (Reprint) 765, 768, 17 Cinc. L. Bul. 168, the court said: "Those land owners whose lands are affected by the proposed improvement, are not confined within the meaning of the act to those whose lands are assessed therefor. The term has a broader signification, and includes all whose property rights are thereby appropriated. The extent of the appropriation is not material. If 'affected' the landowner is entitled to have his day in court to have his damages assessed."

Ex parte proceedings are unconstitutional. Rutherford's Case, 72 Pa. St. 82, 13 Am. Rep. 655.

Notice by commissioners.— In New York the commissioners are appointed by the court, upon the filing of a proper petition, and it is their duty to give notice to the petitioners and all others interested of the time and place of hearing on such petition. Matter of Beehler, 3 N. Y. St. 486.

Former owner.— Where a married woman's lands had been sold under foreclosure and conveyed without change of possession, notice of application to establish a drain affecting such land given to the owner and to the husband who occupied the land with his wife was held to be sufficient. Berryman *v.* Little, 49 N. J. L. 182, 6 Atl. 519.

Mortgagees.— It has been held under the Michigan statute that mortgagees do not come within the description of persons entitled to notice of hearing on application for the establishment of a drain. Kinnie *v.* Bare, 80 Mich. 345, 45 N. W. 345.

Purchaser pendente lite.— One who obtains title to land after the filing of the petition for the establishment of a drain in which the then holder of the legal title was named, and who had notice, is a purchaser *pendente lite,* and is bound by the proceedings to the same extent as if he had the legal title when they were begun. Chaney *v.* State, 118 Ind. 494, 21 N. E. 45.

Service on agent.— It has been held under Ohio statutes relating to township ditches that notice of the proceedings to a railroad company, by service upon its local agent, is not a valid service, and the company and its receiver, having no other notice and no knowledge of the proceedings until after the order of apportionment is made, is not bound thereby. Caldwell *v.* Harrison Tp., 2 Ohio Cir. Ct. 10.

57. *California.*— Yolo County Reclamation Dist. No. 537 *v.* Burger, 122 Cal. 442, 55 Pac. 156; People *v.* Reclamation Dist. No. 136, 121 Cal. 522, 50 Pac. 1068, 53 Pac. 1085.

Illinois.— Craig *v.* People, 188 Ill. 416, 58 N. E. 1000; Sanner *v.* Union Drainage Dist., 175 Ill. 575, 51 N. E. 857 [*reversing* 64 Ill. App. 62]; Payson *v.* People, 175 Ill. 267, 51 N. E. 588; People *v.* Cooper, 139 Ill. 461, 29 N. E. 872; Mason, etc., Special Drainage Dist. *v.* Griffin, 134 Ill. 330, 25 N. E. 995; Calkins *v.* Spraker, 26 Ill. App. 159.

Indiana.— McMullen *v.* State, 105 Ind. 334, 4 N. E. 903; Scott *v.* Brackett, 89 Ind. 413; Muncey *v.* Joest, 74 Ind. 409.

Michigan.— Campau *v.* Charbeneau, 105 Mich. 422, 63 N. W. 435; Taylor *v.* Burnap, 39 Mich. 739.

Minnesota.— Curran *v.* Sibley County, 47 Minn. 313, 50 N. W. 237.

North Dakota.— Erickson *v.* Cass County, (1902) 92 N. W. 841.

See 17 Cent. Dig. tit. "Drains," § 25 *et seq.*

Where hearing was adjourned.—It was held in Kinnie *v.* Bare, 80 Mich. 345, 45 N. W. 345, that one who was served with a citation to appear on a given day had sufficient notice to appear on a subsequent day which was fixed by adjournment announced in open court.

58. Pittsburgh, etc., R. Co. *v.* Machler, 158 Ind. 159, 63 N. E. 210; Carr *v.* Boone, 108 Ind. 241, 9 N. E. 110; Grimes *v.* Coe, 102 Ind. 406, 1 N. E. 735. Where a party has been properly served with notice he cannot raise the objection of defective service on others, who having assented and released their right of way are themselves not in a position to object. Wolpert *v.* Newcomb, 106 Mich. 357, 64 N. W. 326.

Parties without notice.—Where petitioners fail to give the statutory notice, even though some of the parties interested have waived such notice, it is proper, upon motion of a party who has not made such waiver, to set aside all proceedings had under the petition. Sites *v.* Miller, 120 Ind. 19, 22 N. E. 82.

Tenants in common.— Where the proceedings are void as to one of several tenants in common, who are owners of the land affected, for want of notice, they are void as to all. Brosemer *v.* Kelsey, 106 Ind. 504, 7 N. E. 569.

the auditor, clerk, or other designated officer shall give notice of such petition by publication in a newspaper and by posting copies of such notice in a mode specifically set forth, and this constructive mode of service is provided in lieu of personal service upon the interested landowners.[59]

e. Waiver. Where parties appear without objecting to the sufficiency of the notice or to its omission, they waive their right to question it;[60] but parties who enter a special appearance and object to the sufficiency of the notice cannot be deemed to have waived objections.[61]

f. Estoppel. When notice to parties interested is defective, such parties are not estopped to have the judgment therein set aside on motion.[62] And while the better doctrine seems to be that, although an interested landowner might by his actions be estopped from denying the validity of an assessment on account of want of notice, if he should stand by without objection until considerable money had been expended in the construction of the drain, yet, in the absence of evidence showing the value of the work or the amount of money expended, such estoppel cannot be claimed.[63]

g. Form and Requisites. Some statutes require the notice to contain a pertinent description of the terminus of such drain, its direction and course, and the names of the landowners who will be affected thereby.[64]

59. Carr *v.* State, 103 Ind. 548, 3 N. E. 375; Vizzard *v.* Taylor, 97 Ind. 90; Scott *v.* Brackett, 89 Ind. 413; *In re* Drainage Application, etc., 35 N. J. L. 497; Cupp *v.* Seneca County Com'rs, 19 Ohio St. 173.

Constitutional authority.— It has been held in Indiana that it is competent for the legislature to declare that constructive notice shall be sufficient. Carr *v.* State, 103 Ind. 548, 3 N. E. 375.

Non-residents.— It was held in Otis *v.* De Boer, 116 Ind. 531, 19 N. E. 317, that drainage proceedings under the Indiana act of March 13, 1879, were actions *in rem*, and constructive notice only by publication of the filing of the petition was necessary as against the land of non-residents.

60. Gilkerson *v.* Scott, 76 Ill. 509; Pittsburgh, etc., R. Co. *v.* Machler, 158 Ind. 159, 63 N. E. 210; Ford *v.* Ford, 110 Ind. 89, 10 N. E. 648; Carr *v.* Boone, 108 Ind. 241, 9 N. E. 110; Updegraff *v.* Palmer, 107 Ind. 181, 6 N. E. 353; Sunier *v.* Miller, 105 Ind. 393, 4 N. E. 867; Dunning *v.* Drain Com'rs, 44 Mich. 518, 7 N. W. 239.

Where a party joins in a remonstrance against the establishment of a drain, it is an appearance which waives notice. Sunier *v.* Miller, 105 Ind. 393, 4 N. E. 867; *In re* Drainage Application, etc., 35 N. J. L. 511.

61. Carr *v.* Boone, 108 Ind. 241, 9 N. E. 110.

Motion to amend petition.— Where, however, a party, after appearing specially to move to set aside the notice of petition for insufficiency, makes another motion, pending the first, to require the petition to be amended for non-conformity to the statute, he thereby waives such defects in the notice. Gilbert *v.* Hall, 115 Ind. 549, 18 N. E. 28.

62. Carr *v.* Boone, (Ind. 1886) 6 N. E. 626.

Jurisdictional defect.— This was held to be the case under an act which provided that the judgment should be deemed conclusive as to the regularity of the proceedings; the decision being placed on the ground that such a defect was jurisdictional and could not be cured. Scott *v.* Brackett, 89 Ind. 413.

Where a landowner is one of the petitioners he is estopped from setting up any defect in the notice, or that he did not have proper notice of the hearing, on the petition. Hackett *v.* State, 113 Ind. 532, 15 N. E. 799; Carr *v.* Boone, 108 Ind. 241, 9 N. E. 110; Carr *v.* Boone, (Ind. 1886) 6 N. E. 626.

63. Scudder *v.* Jones, 134 Ind. 547, 32 N. E. 221; Peters *v.* Griffee, 108 Ind. 121, 8 N. E. 727.

Personal knowledge of proceedings.—It was held in Rice *v.* Wellman, 5 Ohio Cir. Ct. 334, that personal knowledge of proceedings for the establishment of a ditch will not excuse the want of service of notice on a contesting landowner, where it does not appear that the ditch has been completed, or that it was located on the land of the contestant. See also Porter *v.* Durham, 98 N. C. 320, 3 S. E. 832.

64. Kepler *v.* Wright, 136 Ind. 77, 35 N. E. 1017; Young *v.* Wells, 97 Ind. 410; Wright *v.* Wilson, 95 Ind. 408; Watkins *v.* Pickering, 92 Ind. 332; Wolpert *v.* Newcomb, 106 Mich. 357, 64 N. W. 326. See, however, Goodrich *v.* Stangland, 155 Ind. 279, 58 N. E. 148.

Clerical error will not invalidate the notice or subsequent proceedings thereunder. Marsh *v.* Clark County, 11 Ohio Dec. (Reprint) 290, 26 Cinc. L. Bul. 3.

Names of landowners.— In Featherston *v.* Small, 77 Ind. 143 [*overruled* in Vizzard *v.* Taylor, 97 Ind. 90], it was held that the provision of the statute requiring the notice to contain the names of the owners of lands affected by the proposed drain was not mandatory.

No form of notice being prescribed by statute, the fact that the form of notice provided by the board contains more details than is necessary is no ground for complaint. Erickson *v.* Cass County, (N. D. 1902) 92 N. W. 841.

h. Proof of Service. In some states the statutes require proof of the service of notice by affidavit showing the manner of service, and failure to furnish such affidavit will render all subsequent proceedings void.[65] In other states, however, the statutes do not require the proof of proper service of notice to be made by affidavit, but permit it to be made by oral testimony as well.[66]

i. Second Notice. It has been held that where the first notice is not sufficient, the court may order a second notice.[67]

6. Remonstrance to Petition — a. In General. Some statutes provide that where a designated number of the landowners named in a petition, resident in the county or district, remonstrate against the construction of the drain, the petition shall be dismissed.[68] A remonstrance in drainage proceedings is in the nature of a pleading,[69] and its office is to tender some pertinent issue of fact upon which a trial may be had.[70]

b. Parties. Where one who was not named as a landowner in the petition is admitted as a party before remonstrance is made, he has a right to join with the other parties in a remonstrance against the proposed drain.[71]

c. Statement of Objections. A general statement of objections to the petition in drainage proceedings is not sufficient.[72]

Order for notice by publication.— Where the statute required the court to make an order prescribing the notice to be given of the time and place of hearing the petition it was held that the publication of the order itself instead of a formal notice was a substantial compliance with the statute, where the order contained all the essentials of a valid notice. Muskego *v.* Drainage Com'rs, 78 Wis. 40, 47 N. W. 11.

Where the notice to a non-resident owner was by publication, from which the name of such owner was omitted, it was held that the notice was insufficient to confer jurisdiction, under a statute requiring the citation to be addressed to such owner. Campau *v.* Charbeneau, 105 Mich. 422, 63 N. W. 435.

65. Bennett *v.* Drain Com'rs, 56 Mich. 634, 23 N. W. 449. See also Lampson *v.* Drain Com'r, 45 Mich. 150, 7 N. W. 772; Taylor *v.* Burnap, 39 Mich. 739; Lane *v.* Burnap, 39 Mich. 736; People *v.* Burnap, 38 Mich. 350; Porter *v.* Durham, 98 N. C. 320, 3 S. E. 832.

Where the jurat was omitted from the affidavit of service of notice, it was held that the court had power to cause the clerk to supply such omission, upon oral proof that such affidavit had been sworn to before him. Williams *v.* Stevenson, 103 Ind. 243, 2 N. E. 728.

66. Carr *v.* Boone, 108 Ind. 241, 9 N. E. 110; Carr *v.* State, 103 Ind. 548, 3 N. E. 375; Meranda *v.* Spurlin, 100 Ind. 380.

Under a former Indiana act proof of posting notice of petition could be made only by affidavit. Scott *v.* Brackett, 89 Ind. 413.

67. Provided there is no unreasonable delay, and no substantial rights are prejudiced. Carr *v.* Boone, 108 Ind. 241, 9 N. E. 110. See Kinnie *v.* Bare, 68 Mich. 625, 36 N. W. 672.

Where the court sets the commissioners' report aside for cause and orders them to make a second report, it is not necessary that any further notice be given to the landowners. Chaney *v.* State, 118 Ind. 494, 21 N. E. 45.

68. Hinchman *v.* Wilson, 156 Ind. 476, 60 N. E. 36; Sauntman *v.* Maxwell, 154 Ind. 114, 54 N. E. 397.

A township which is not named in a petition to establish a drain, and which is subject to an assessment therefor, payable from the township fund, is a "landowner," within the meaning of the provision that the petition shall be dismissed upon the remonstrance of two thirds of the landowners. Zumbro *v.* Parnin, 141 Ind. 430, 40 N. E. 1085.

Under a statute requiring that two thirds of the landowners named in the petition, resident in the county, should join in the remonstrance, it was held error to dismiss the petition where the two thirds required was made up by including some non-residents. Bell *v.* Cox, 122 Ind. 153, 23 N. E. 705.

69. See, generally, Pleading.

70. Ford *v.* Ford, 110 Ind. 89, 10 N. E. 648. See, however, Sauntman *v.* Maxwell, 154 Ind. 114, 54 N. E. 397.

71. Zumbro *v.* Parnin, 141 Ind. 43, 40 N. E. 1085.

An owner who fails to put his title of record cannot complain if the petitioners do not make him a party, but his failure to put his title on record does not estop him from applying for leave to be admitted to defend. Bell *v.* Cox, 122 Ind. 153, 23 N. E. 705; Stewart *v.* White, 98 Mo. 226, 11 S. W. 568.

But where new parties are admitted pursuant to the report of the commissioners that their lands will be affected, their being made parties to the case will not enlarge the rights of those brought in by the original petition, so as to enable them to remonstrate after their day for remonstrance has passed. Yancey *v.* Thompson, 130 Ind. 585, 30 N. E. 630.

72. Objections must be specifically stated. Updegraff *v.* Palmer, 107 Ind. 181, 6 N. E. 353. A cause of remonstrance that the report of the commissioner does not show with sufficient certainty the method of drainage is too uncertain. Meranda *v.* Spurlin, 100 Ind. 380.

d. Evidence to Support. The evidence in support of a remonstrance will be confined to the issues tendered by it.[73]

e. Time of Filing. The various statutes prescribe a stipulated time after the filing of the petition for any person named in the petition as a landowner to file any demurrer, remonstrance, or petition thereto; and all objections not made within the statutory period are deemed to be waived.[74]

7. Appointment of Commissioners or Viewers — a. Power of Appointment — (I) *In General.* Under statutes providing for the formation of drainage districts or for the construction of drains, the county court[75] or the board of supervisors is usually required to appoint a designated number of commissioners or viewers, disinterested persons,[76] residents of the county in which the district or some part of it lies, or in which the drain is to be constructed, whose duty it is to view and assess upon the lands situated within the district, or benefited by the drain, a charge proportionate to the whole expense, and to the benefits which will result from such work.

(II) *Effect of Interest.* It has been held that the judge of a court designated by statute to appoint drainage commissioners is not disqualified from exercising such power of appointment because he is an owner of lands to be affected by the proceedings.[77]

b. Order of Appointment. The order appointing drain commissioners should contain a description of the lands belonging to the several owners respectively.[78] The proposed drain should likewise be identified or described in the order.[79] But the order need not affirmatively show that they are disinterested freeholders and not of kin to the parties.[80]

An allegation that costs and damages would exceed benefits presents a legal objection to the proposed work sufficient to justify a remonstrance against the establishment of the drain. Trittipo *v.* Beaver, 155 Ind. 652, 58 N. E. 1034.

73. Meranda *v.* Spurlin, 100 Ind. 380.

74. Hinchman *v.* Wilson, 156 Ind. 476, 60 N. E. 36; Hoefgen *v.* Harness, 148 Ind. 224, 47 N. E. 470; Yancey *v.* Thompson, 130 Ind. 585, 30 N. E. 630; Heick *v.* Voight, 110 Ind. 279, 11 N. E. 306.

Signers of a remonstrance cannot withdraw their names therefrom after such period has elapsed. Hinchman *v.* Wilson, 156 Ind. 476, 60 N. E. 36; Sauntman *v.* Maxwell, 154 Ind. 114, 54 N. E. 397.

75. King's Lake Drainage, etc., Dist. *v.* Jamison, 176 Mo. 557, 75 S. W. 679, decided under a statute giving the power of appointment to the county court.

Appointment by court of record.—However, under a constitutional provision requiring that commissioners to ascertain the value of private property taken for public use be appointed by a court of equity, drainage commissioners appointed by a justice of the supreme court or county judge have no power to construct drains on the land of non-consenting owners. Matter of Lent, 47 N. Y. App. Div. 349, 62 N. Y. Suppl. 227.

76. "Disinterested person."— Under a statute of this character it was held that a person who acted as secretary of the board of trustees of the district, for which he received a salary but who owned no lands in the district, was a "disinterested person" within the meaning of that phrase as used in the statute. Lower Kings River Reclamation Dist. No. 531 *v.* Phillips, 108 Cal. 306, 39 Pac. 630, 41 Pac. 335. Where a party was appointed to appraise the benefits and damages to accrue to landowners along the line of a ditch, whose sister-in-law, niece, and nephew owned land along the line, it was held that he was not a disinterested party and was disqualified from acting. High *v.* Big Creek Ditching Assoc., 44 Ind. 356. Where a party was engaged in the manufacture of tile, it was held that this presented no legal objection to his qualifications to act as commissioner in a drainage proceeding, in the absence of a showing that he had some interest in the particular ditch then under consideration. Rogers *v.* Venis, 137 Ind. 221, 36 N. E. 841.

77. *In re* Ryers, 72 N. Y. 1, 28 Am. Rep. 88.

Tenants for years.— Under a special New York act giving the owner of land in Orange county certain powers for the purpose of drainage, among which was the yearly election of commissioners to manage the business of constructing the drain, it was held that tenants for years were not included, and were not entitled to vote in such proceedings. Philips *v.* Wicksham, 1 Paige 590.

78. Bennett *v.* Drain Com'rs, 56 Mich. 634, 23 N. W. 449, so as to enable the commissioners to ascertain the quantity of the several parcels belonging to the different owners, and failure to do so will render the same void.

79. Willcheck *v.* Drain Com'rs, 42 Mich. 105, 3 N. W. 282; Milton *v.* Wacker, 40 Mich. 229.

80. Kellogg *v.* Price, 42 Ind. 360.

Where, by mistake, the court named W R as one of the commissioners, although the intention had been to appoint R R, who in fact served on the commission in the place of

c. Power of Removal. It has been held that a court having power to appoint drainage commissioners has power likewise to remove them for good cause shown.[81]

d. Power to Fill Vacancies. The court has power to appoint another commissioner to fill the vacancy caused by the resignation of a commissioner.[82]

8. Proceedings of Commissioners or Viewers — a. Viewing Land. It is the duty of commissioners or appraisers to go upon the lands to be affected by the proposed drain and make such an examination as will enable them to form an intelligent judgment as to the benefits or damages which each part will receive from the completed work and then to make assessments accordingly.[83] They need not, however, act jointly in viewing the lands, but it will be sufficient if they view the land singly.[84]

b. Securing Releases. The statute may require the commissioners, after making personal examination of the lands proposed to be drained, to try to obtain a release of the right of way and other damages from every person through whose land such drain is to pass, and failure to do so is fatal to all subsequent proceedings.[85]

c. Discretion as to Construction. The question as to whether a proposed ditch is more comprehensive, or whether it embraces and affects more land than is necessary in order to accomplish the drainage of the land of the petitioners in the cheapest and best manner, is a question exclusively for the viewers.[86]

d. Misconduct. It has been held that it is not misconduct for a commissioner to subpœna witnesses,[87] or to be guided by the advice or petition of counsel merely as to the necessary legal steps required to be taken.[88] Nor will the report and award of commissioners be vitiated by the fact that one of the petitioners paid their hotel bill during the hearing.[89]

W R, it was held that all proceedings under such order were void. Bench *v.* Otis, 25 Mich. 29.

81. *In re* Underhill, 32 Hun (N. Y.) 449.

82. McMullen *v.* State, 105 Ind. 334, 4 N. E. 903, holding that the subsequent resignation of a commissioner will not stop the proceedings.

After his resignation has been received by the court a drainage commissioner cannot act as such. Olmsted *v.* Dennis, 77 N. Y. 378.

83. Swamp Land Dist. No. 307 *v.* Gwynn, 70 Cal. 566, 12 Pac. 462; People *v.* Ahern, 52 Cal. 208; People *v.* Hagar, 52 Cal. 171; Curry *v.* Jones, 4 Del. Ch. 559; Caldwell *v.* Harrison Tp., 2 Ohio Cir. Ct. 10, 1 Ohio Cir. Dec. 332.

84. Swamp Land Dist. No. 307 *v.* Gwynn, 70 Cal. 566, 12 Pac. 462; Dodge County *v.* Acom, 61 Nebr. 376, 85 N. W. 292, where the board was sitting at the court-house and went in a body to view the proposed drain, and it was held that the fact of adjournment did not affect the validity of their action, and that the view made would be regarded as the act of the board.

Under a former California statute the commissioners were required to jointly view the land, and failing to do that their assessment was void. People *v.* Ahern, 52 Cal. 208; People *v.* Hagar, 52 Cal. 171, 49 Cal. 229; People *v.* Coghill, 47 Cal. 361.

85. Whisler *v.* Lenawee County Drain Com'rs, 40 Mich. 591; Dickinson *v.* Van Wormer, 39 Mich. 141; Morseman *v.* Ionia, 32 Mich. 283; Arnold *v.* Decatur, 29 Mich. 77; Chicago, etc., R. Co. *v.* Sanford, 23 Mich. 418.

86. Bonfoy *v.* Goar, 140 Ind. 292, 39 N. E. 56; Zigler *v.* Menges, 121 Ind. 99, 22 N. E. 782, 16 Am. St. Rep. 357; Heick *v.* Voight, 110 Ind. 279, 11 N. E. 306; Meranda *v.* Spurlin, 100 Ind. 380; Anderson *v.* Baker, 98 Ind. 587; Oliver *v.* Monona County, 117 Iowa 43, 90 N. W. 510; State *v.* Colfax County, 51 Nebr. 28, 70 N. W. 500, holding that in proceedings to establish a drain under the Nebraska statute, providing that on petition for a ditch the county board shall find and enter upon its journal whether the line described in the petition for the proposed ditch is the best route for the improvement, such a finding is jurisdictional.

87. *In re* Penfield, 69 Hun (N. Y.) 601, 23 N. Y. Suppl. 944, although it is irregular and of questionable taste to do so instead of causing it to be done by some other person.

88. Such as giving proper notice, etc., where such attorneys are not consulted as to any question of fact to be decided by them. *In re* Penfield, 69 Hun (N. Y.) 601, 23 N. Y. Suppl. 944.

89. *In re* Penfield, 69 Hun (N. Y.) 601, 23 N. Y. Suppl. 944. This decision was placed on the ground that in case the drain was established their expenses would be a lien on the land benefited, and in case it was not established the expense would be borne by the petitioners, and in either case the commissioners would not be benefited.

Surveyor's compensation.—It has been held in Indiana that the authority of viewers appointed under the Drainage Act to appoint a surveyor does not extend to fixing his serv-

9. Report of Commissioners or Viewers — a. What It Must Contain — (I) *Description of Lands.* The description of the lands affected by a proposed drain in the commissioners' or viewers' report should be sufficiently accurate to enable the auditor to describe such lands on the tax duplicate and have the tax collected.[90] They need not, however, report as to lands not affected by the proposed drains, although such lands were mentioned in the petition.[91]

(II) *Description of Drain.* The report should also set forth the width, depth, length, commencement, and termination of the proposed drain.[92]

(III) *Description of Petitioners.* It has been held that it is not essential that the commissioners should make a finding to the effect that the petitioners are owners of lands to be affected, if such fact can be gathered from the petition and other proceedings.[93]

(IV) *Public Necessity.* Where the report adopts the language of the statutory forms in stating that the proposed drain will benefit public health and be of public utility, it is sufficient,[94] without stating how the public health will be benefited or its usefulness become general.

(V) *Estimated Cost.* Under some statutes the commissioners are required to find and report that the estimated expense of the proposed drain will be less than the supposed benefits.[95]

(VI) *Verification.* Where the report is adverse to the establishment of the drain petitioned for, it is not necessary for them to verify it.[96]

b. Drain in Two or More Counties. Under a statute providing that where a

ices and compensation, both of which are determined by statute. Moon *v.* Howard County, 97 Ind. 176.

90. Spahr *v.* Schofield, 66 Ind. 168. And see Crapo *v.* Hazelgreen, 93 Fed. 316, 35 C. C. A. 315. But see Anderson *v.* Baker, 98 Ind. 587, holding that the decision of the commissioners upon the questions whether the proposed drain is located upon the best, cheapest, and most available route, and if it is practicable to construct it without affecting the land of others, need not be embodied in the report.

Indefinite description.— Where the report stated that six acres of remonstrant's land would be benefited, without stating what six acres would be so benefited, it was held that this was not a sufficient description to authorize an assessment. Zigler *v.* Menges, 121 Ind. 99, 22 N. E. 782, 16 Am. St. Rep. 357.

91. Smith *v.* Smith, 97 Ind. 273.

92. Nugent *v.* Erb, 90 Mich. 278, 51 N. W. 282.

An order of determination of a drain commissioner containing "a description of the line of the drain," as required by the Michigan statute, must be treated as designating the center line of the strip intended to be appropriated. Anketell *v.* Hayward, 119 Mich. 525, 78 N. W. 557.

Copy of survey.— Under a statute requiring the board of supervisors of a newly organized drainage district to cause a survey to be made of a district immediately after their election, it has been held that it is not necessary that a copy of such survey accompany the report of the commissioners appointed to examine the district to be improved. Nishnabotna Drainage Dist. *v.* Campbell, 154 Mo. 151, 55 S. W. 276.

93. Dakota County *v.* Cheney, 22 Nebr. 437, 35 N. W. 211.

94. Indianapolis, etc., Gravel Road Co. *v.* Christian, 93 Ind. 360.

Conclusions of fact.— The commissioners are not required to set forth the evidence upon which they reached their conclusions. All that is required is that they state their conclusions of fact. Grimes *v.* Coe, 102 Ind. 406, 1 N. E. 735.

In New York it has been held that the determination of the commissioners must show that the proposed drain is necessary to drain the lands of the petitioners, and not merely lands in general. Burk *v.* Ayers, 19 Hun 17.

Under the Ohio statute there must be a specific finding that the proposed drain is necessary, in addition to a finding that it will be conducive to the public health, convenience, or general welfare. Rice *v.* Wellman, 5 Ohio Cir. Ct. 334; Caldwell *v.* Harrison Tp., 2 Ohio Cir. Ct. 10.

95. Roberts *v.* Gierss, 101 Ind. 408.

The estimated expense of the construction of a drain has been construed to mean all expenses, direct and incidental. Grimes *v.* Coe, 102 Ind. 406, 1 N. E. 735. Thus, where the report finds that the benefits of a drain are equal to the costs of construction, it will be construed as referring to the entire cost, including expenses of officers in charge. Denton *v.* Thompson, 136 Ind. 446, 35 N. E. 264.

Where the commissioners' report is adverse to the establishment of the ditch, it is not necessary that it should contain a statement of the estimated cost of the work, and the benefits or injuries to each tract. Blemel *v.* Shattuck, 133 Ind. 498, 33 N. E. 277.

96. Blemel *v.* Shattuck, 133 Ind. 498, 33 N. E. 277.

proposed drain is to be located in more than one county, a majority of the board of commissioners of each county may in joint session order the location and establishment of the same, it is essential to the validity of the proceedings in joint session that a majority of each board concur in such order.[97]

c. Time of Filing. The commissioners must present their report at the time fixed by the court,[98] unless their time is extended by the court.[99] Where the statute requires the commissioners to make a detailed statement of the costs, expenses, damages, and compensations of the drain, this statement is to be of the entire expense, and should not be made until the entire work is completed or practically so.[1]

d. Amended or Supplemental Report. The report of the drainage commissioners or viewers may be amended,[2] even after the report has been confirmed and the work of construction begun.[3] And under some statutes it is expressly provided that the commissioners may present a supplemental report where it is necessary.[4]

10. Jury in Lieu of Commissioners. In several states a jury is summoned to pass upon the question of the necessity of a proposed ditch and to assess damages and benefits;[5] and it has been held that such proceedings are void where the venire for the jury fails to give the dimensions of the proposed drain or to identify its course with some precision.[6] Where a jury makes a finding that a

97. Chesbrough *v.* Putnam, etc., Counties, 37 Ohio St. 508.

Where a petition was filed for the construction of a drain in three counties and dismissed as to a portion in one county because beyond the jurisdiction, it was held that a joint session by the commissioners of the remaining counties, without the commissioners from the county as to which the dismissal was had, was a proper joint session, and a concurrence by a majority of each board was sufficient. Bondurant *v.* Armey, 152 Ind. 244, 53 N. E. 169.

98. Blake *v.* Quivey, 113 Ind. 124, 14 N. E. 916; Claybaugh *v.* Baltimore, etc., R. Co., 108 Ind. 262, 9 N. E. 100; Munson *v.* Blake, 101 Ind. 78.

99. Extension of time.— When a judicial tribunal has a general power to designate a time within which a report of drainage commissioners shall be filed, it may extend the time, unless such power is limited to a certain time. Sarber *v.* Rankin, 154 Ind. 236, 56 N. E. 225 [*citing* Bondurant *v.* Armey, 152 Ind. 244, 53 N. E. 169]; Lipes *v.* Hand, 104 Ind. 503, 1 N. E. 871, 4 N. E. 160; Munson *v.* Blake, 101 Ind. 78. Where the court directs the commissioners to report on a petition for the establishment of a drain on a given date, the court may on application of the petitioners fix another day for the filing of the report. Bondurant *v.* Armey, 152 Ind. 244, 53 N. E. 169; Bohr *v.* Neuenschwander, 120 Ind. 449, 22 N. E. 416, where before the day fixed the time for holding the term of court was changed, and no term was to be held until after the time had passed.

1. Olmsted *v.* Dennis, 77 N. Y. 378.

2. *In re* Jacobs, 3 Harr. (Del.) 321, where a ditch return was returned to the commissioners to be amended, so as to specify the depth of the ditch and delineate an outline of the low lands to be drained.

Clerical error.— Thus it is proper to allow the commissioners to correct a clerical error in their report. Rogers *v.* Venis, 137 Ind. 221, 36 N. E. 841.

3. Steele *v.* Hanna, 117 Ind. 333, 20 N. E. 237.

New and corrected map.— Where the map filed by the commissioners in proceedings under the Drainage Act called for open ditches, and afterward a portion of them were made of tile and covered, it was held that the irregularity was cured by the filing of a new and corrected map, by order of the court, under its power to permit amendments in furtherance of justice. *In re* Underhill, 6 N. Y. Suppl. 716.

4. Muskego *v.* Drainage Com'rs, 78 Wis. 40, 47 N. W. 11.

5. Nugent *v.* Erb, 90 Mich. 278, 51 N. W. 282; Chapman *v.* Drain Com'rs, 49 Mich. 305, 13 N. W. 601; Milton *v.* Wacker, 40 Mich. 229; Kroop *v.* Forman, 31 Mich. 144; Lake Erie, etc., R. Co. *v.* Hancock County, 63 Ohio St. 23, 57 N. E. 1009; Emig *v.* Clark County, 5 Ohio S. & C. Pl. Dec. 459, 5 Ohio N. P. 471, holding that the jury is not required to find that a ditch is necessary, but only to respond to statutory questions provided for in Ohio Rev. St. §§ 4463, 4469.

An instruction to the jury that their view is not for the purpose of enabling them to determine any question involved in the case is properly refused, as such statement is too broad. So held in Neff *v.* Reed, 98 Ind. 341, where it was held that the jury might by a proper application of the evidence be enabled to determine questions which without such inspection they could not intelligently consider or decide. See also Lake Erie, etc., R. Co. *v.* Hancock County, 63 Ohio St. 23, 57 N. E. 1009.

6. Nugent *v.* Erb, 90 Mich. 278, 51 N. W. 282; Chapman *v.* Drain Com'rs, 49 Mich. 305, 13 N. W. 601; Milton *v.* Wacker, 40 Mich. 229; Kroop *v.* Forman, 31 Mich. 144.

proposed drain is not necessary, the court has no power to review and set aside such verdict.[7]

11. Remonstrance to Report — a. Who May Remonstrate. Upon filing the report a certain time designated by statute is allowed to any owner of lands affected by the work proposed to remonstrate against the report.[8]

b. Form and Requisites. The remonstrance should state the particulars in which the report is not according to law.[9] It must be duly verified by the affidavit of one of the remonstrants, or by an agent or other person having authority to do so, and until it is so verified it cannot be regarded as a statutory remonstrance.[10]

c. Time of Filing. The statutes designate the period after the filing of the commissioners' report during which remonstrances against such report may be filed, and after the lapse of such period it is too late for any interested party to remonstrate against the report.[11]

d. Effect of Withdrawal of Parties. Where some of the parties to the remonstrance afterward withdraw therefrom, such action on their part will not defeat the remonstrance.[12]

e. Where Additional Report Is Filed. Where the statute provides that, upon

7. Palmer *v.* Willett, 105 Mich. 86, 62 N. W. 1027.

8. Such an owner has a right to remonstrate, even though no damages are assessed in his favor and no benefits are assessed against his land. Hinchman *v.* Wilson, 156 Ind. 476, 60 N. E. 36; Reasoner *v.* Creek, 101 Ind. 482. See also Earhart *v.* Farmers' Creamery, 148 Ind. 79, 47 N. E. 227. See, however, Hackett *v.* Brown, 128 Mich. 141, 87 N. W. 102, where plaintiff claimed the title to certain land through a contract of sale executed after proceedings for the construction of the drain across it had been instituted, and which contract had been dated back and was not recorded until the meeting of the second set of special drain commissioners, and plaintiff, although residing in the county, never took possession of the land, and it was held that the contract of sale would not be deemed *bona fide*, being made to permit plaintiff to raise objections to the proceedings which the original owner had lost the right to make.

9. A vague, general objection is insufficient. Sample *v.* Carroll, 132 Ind. 496, 32 N. E. 220; Hudson *v.* Bunch, 116 Ind. 63, 18 N. E. 390; Meranda *v.* Spurlin, 100 Ind. 380; Higbee *v.* Peed, 98 Ind. 420, where it was held not to be error to require a cause of remonstrance to be made more specific, so as to state the lands, compared with the assessments against which the remonstrator's lands were assessed too much. *Compare* Smith *v.* Smith, 97 Ind. 273.

Amendment.— A paper which lacks an essential statutory element of a remonstrance cannot be amended into a statutory remonstrance after the expiration of the time fixed by statute for filing a remonstrance. Morgan Civil Tp. *v.* Hunt, 104 Ind. 590, 4 N. E. 299.

10. Morgan Civil Tp. *v.* Hunt, 104 Ind. 590, 4 N. E. 299; Hays *v.* Tippy, 91 Ind. 102.

Bond for costs.— Under the Indiana statute the remonstrance to the report of the board of commissioners or viewers must be accompanied by bond for costs, and failure to file such bond with the remonstrance is sufficient ground to authorize the dismissal of the remonstrance. Makeever *v.* Martindale, 156 Ind. 655, 60 N. E. 341.

11. Morgan Civil Tp. *v.* Hunt, 104 Ind. 590, 4 N. E. 299; Crume *v.* Wilson, 104 Ind. 583, 4 N. E. 169; Hays *v.* Tippy, 91 Ind. 102; Nishnabotna Drainage Dist. *v.* Campbell, 154 Mo. 151, 55 S. W. 276.

Where report is delayed.—The time allowed by statute for filing remonstrances to the commissioners' report commences to run from the time the report is filed, and where the report is not filed at the time fixed, and a remonstrance is offered within the statutory period after the report is actually filed, the court should permit it to be filed. Munson *v.* Blake, 101 Ind. 78. See also Breitweiser *v.* Fuhrman, 88 Ind. 28.

Where land is partially described.— The provision of the Indiana drainage law requiring the remonstrance to be filed within ten days after the filing of the final report of the commissioners does not apply to cases where all the owner's land so affected is not described in the petition; but these cases are governed by another provision of the act (section 3) which leaves the entire case open until the notice there specified has been given, and it is error to admit a remonstrance as to land not described, and strike it out as to land described. Goodwine *v.* Leak, 114 Ind. 499, 16 N. E. 816.

Presentation to court.— Under the Indiana statute it has been held that the remonstrance must not only be filed in the clerk's office, but presented to the court within the prescribed time, provided such presentation is not prevented by adjournment of court or other circumstance beyond remonstrant's control. Gilbert *v.* Hall, 115 Ind. 549, 18 N. E. 28.

12. Nor will it impair or affect in any manner the right of the other remonstrants to proceed with the remonstrance just as if no such withdrawal had occurred. Munson *v.* Blake, 101 Ind. 78. See also Little *v.* Thompson, 24 Ind. 146.

the filing of a remonstrance, the court may for cause shown direct the commissioners to amend their report or to bring in a new report, it is necessary for the remonstrant to file an additional remonstrance to the amended or new report.[13]

f. Waiver. A cause of remonstrance against the report of the commissioners may be waived.[14] So where the commissioners fail to file their report at the time fixed, the motion to reject the report should be made at the earliest opportunity, and a party waives this irregularity by remonstrating or asking leave to remonstrate against the report on its merits.[15]

12. Hearing — a. In General. Where authorized by statute, it is proper for the court or the clerk to hear evidence as to the sufficiency of the commissioners' report.[16]

b. Striking Out Causes in Remonstrance. It is proper to strike from a remonstrance to the commissioners' report matters that are not statutory causes for remonstrance.[17]

c. Referring Report Back. Under a statute with a provision for referring the report back to the commissioners for amendment, under certain circumstances, it has been held that this can only be done at time of hearing upon the question of confirmation of the report.[18]

d. Evidence — (i) *Burden of Proof.* On the hearing to confirm the report, where a remonstrance has been filed controverting material allegations of the petition, the burden of proof is upon the petitioner;[19] but where the only issue presented by the remonstrance is as to the amount of the remonstrant's assessment, it has been held that the burden of proof is on the remonstrant.[20]

(ii) *Report of Commissioners.* The report of the commissioners as to the advisability of establishing a drain is not competent evidence to prove the utility of the drain, where the remonstrant is contesting both the petition and the report.[21]

(iii) *Former Assessment.* Under a statute providing that under certain circumstances parties shall not be assessed the second time for the drainage of the

13. West Creek Tp. *v.* Miller, 142 Ind. 210, 41 N. E. 452, the original remonstrance not being applicable to the new report.

14. As by a failure to make such objection before the board, unless such objection goes to jurisdiction over the subject-matter. So held in Steele *v.* Empsom, 142 Ind. 397, 41 N. E. 822, where the objection was that one of the board was also a surety on the bond of the petitioner. But it was held in Wright *v.* Rowley, 44 Mich. 557, 7 N. W. 235, that the delay of a party in complaining of the establishment of a drain, in consequence of which water was drawn from a lake adjacent to his lands, leaving an unhealthy mud-hole, would not affect his rights, where the injury was not apparent until the work was done, and complainant had been assured that the drain would not lower the water.

15. Blake *v.* Quivey, 113 Ind. 124, 14 N. E. 916.

16. Worthington *v.* Coward, 114 N. C. 289, 19 S. E. 154.

Matters not reviewable.— The questions as to whether a system of drainage is more comprehensive and costly than need be in order to drain petitioner's lands, and as to whether a more natural outlet for drainage existed than the one decided on, are matters for the determination of the commissioners alone, and their decision is not reviewable by the court. Wilson *v.* Talley, 144 Ind. 74, 42 N. E. 362, 1009; Heick *v.* Voight, 110 Ind. 279, 11 N. E. 306; Meranda *v.* Spurlin, 100 Ind. 380; Anderson *v.* Baker, 98 Ind. 587; Neff *v.* Reed, 98 Ind. 341; Norfolk Southern R. Co. *v.* Ely, 101 N. C. 8, 7 S. E. 476. See also Collins *v.* Haughton, 26 N. C. 420.

17. Rogers *v.* Venis, 137 Ind. 221, 36 N. E. 841; Anderson *v.* Baker, 98 Ind. 587; Higbee *v.* Peed, 98 Ind. 420, where it was held that a cause of remonstrance stating that the commissioners did not locate the drain upon the most practicable route, or which contradicted the commissioners' report by stating that they did not view the land therein described, was properly stricken out.

It is harmless error to strike out a cause of remonstrance on a hearing to confirm the commissioners' report where such cause is embraced in other remaining causes. Higbee *v.* Peed, 98 Ind. 420.

18. And not after the report of the jury making the assessments has been filed. Gilkerson *v.* Scott, 76 Ill. 509. See also Worthington *v.* Coward, 114 N. C. 289, 19 S. E. 154.

19. Neff *v.* Reed, 98 Ind. 341, and he is entitled to open and close.

20. Wilson *v.* Talley, 144 Ind. 74, 42 N. E. 362, 1009; Rogers *v.* Venis, 137 Ind. 221, 36 N. E. 841; Conwell *v.* Tate, 107 Ind. 171, 8 N. E. 36.

21. Bohr *v.* Neuenschwander, 120 Ind. 449, 22 N. E. 416, as the report only embodies the opinion of the commissioners.

same lands, evidence is admissible that remonstrants have already been assessed for the construction of the same ditch or one on the same line, with the same beginning and terminus as the one proposed to be established.[22]

(IV) *CONFINED TO ISSUES RAISED.* Upon the hearing the remonstrator's proof must be restricted to the issues raised by his remonstrance.[23]

e. Motion to Dismiss Proceedings. A motion to dismiss the proceedings should not be sustained merely on the ground that the report of the commissioners is invalid or that the orders of the court based thereon are erroneous,[24] that the commissioners or reviewers failed to perform their duty and file their report at the proper time,[25] or that the clerk of the court failed to perform a ministerial duty.[26] But a petitioner may withdraw his petition and dismiss proceedings if his motion be made at the proper time.[27]

f. Decision — (I) *DISMISSAL OF PROCEEDINGS.* Where the special commissioners or the jury impaneled for the purpose decide that the drain applied for is unnecessary they must so state in their return, and the proceedings will thereupon be dismissed at the costs of the petitioners.[28] And where a remonstrance has been filed against the establishment of a drain, and the court, having been requested to make a special finding, fails to find the existence of any of the statutory grounds warranting the establishment of the drain, the judgment must be for the remonstrants.[29]

(II) *REMANDING REPORT.* Where in the opinion of the court the commissioners' report is not according to law, it is within its province to refer the same back to the commissioners for amendment, or for a new report.[30]

(III) *MODIFICATION OF ORDER.* Where the court enters an order confirming the commissioners' order, and authorizing them to expend the funds to be raised subject to approval of the court, it does not thereby divest itself of jurisdiction, so as to prevent it from modifying such order at a subsequent term.[31]

g. Record of Proceedings — (I) *IN GENERAL.* Many of the statutes provide that all of the findings of the board of commissioners or trustees shall be reduced to writing and entered of record by the clerk of the board; and a drain is not legally established in the absence of such written record showing the action of the board, and also showing the existence of one of the statutory grounds requisite for

22. Hardy *v.* McKinney, 107 Ind. 364, 8 N. E. 232.

Where a new ditch is to be constructed along the line of an old one, the papers and proceedings in the establishment of the old ditch are admissible to show its character, and thus aid in determining whether the new drain is necessary and practicable. Drebert *v.* Trier, 106 Ind. 510, 7 N. E. 223. See also Meranda *v.* Spurlin, 100 Ind. 380.

23. Higbee *v.* Peed, 98 Ind. 420.

24. Updegraff *v.* Palmer, 107 Ind. 181, 6 N. E. 353; Sunier *v.* Miller, 105 Ind. 393, 4 N. E. 867; Williams *v.* Stevenson, 103 Ind. 243, 2 N. E. 728.

25. Bohr *v.* Neuenschwander, 120 Ind. 449, 22 N. E. 416. See also Claybaugh *v.* Baltimore, etc., R. Co., 108 Ind. 262, 9 N. E. 100; Munson *v.* Blake, 101 Ind. 78, as such failure works no prejudice to the petitioners.

26. Such a failure to deliver to the commissioners a copy of the petition and an order fixing the time at which they should report did not vitiate their report. Bohr *v.* Neuenschwander, 120 Ind. 449, 22 N. E. 416.

27. Crume *v.* Wilson, 104 Ind. 583, 4 N. E. 169.

After the commissioners have filed their report and an order has been made approving the assessment petitioner cannot dismiss. Carr *v.* Boone, 108 Ind. 241, 9 N. E. 110. It is too late for the petitioner to dismiss his petition after the commissioner's report is filed and the statutory period for remonstrance has elapsed. Crume *v.* Wilson, 104 Ind. 583, 4 N. E. 169.

28. Lancaster *v.* Leaman, 107 Ky. 35, 52 S. W. 963, 21 Ky. L. Rep. 617; Kress *v.* Hammond, 92 Mich. 372, 52 N. W. 728.

29. Bass *v.* Elliott, 105 Ind. 517, 5 N. E. 663.

But where the jury are discharged on account of failure to agree, a new jury may be impaneled for the trial of the issues presented by the remonstrance. Kress *v.* Hammond, 92 Mich. 372, 52 N. W. 728.

30. Inwood *v.* Smith, 156 Ind. 687, 60 N. E. 703; West Creek Tp. *v.* Miller, 142 Ind. 210, 41 N. E. 452 (and where the report is referred back in pursuance of the remonstrance, and without objection by the remonstrant, he is estopped to assert that the reference was illegal); Wood County *v.* Ottawa County, 7 Ohio Cir. Dec. 593.

31. Hosmer *v.* Hunt Drainage Dist., 134 Ill. 360, 26 N. E. 584; Wood County *v.* Ottawa County, 7 Ohio Cir. Dec. 593.

the establishment of a drain.[32] The record must affirmatively show that proper notice of the hearing has been served upon all parties entitled thereto, and failure to do so makes such record fatally defective.[33] It has been held, however, that it is not necessary for the board of commissioners to enter a formal finding or order that the proper notice has been given.[34]

(II) *Time of Making Up.* The clerk may make up the record of proceedings for the establishment of a drain during their progress, or at their conclusion, and making memoranda or a partial record does not preclude him from completing the record.[35]

13. New Trial. As to questions of fact tried upon issues raised by remonstrances[36] to the report of the commissioners, it has been held that a motion for a new trial is allowable as in ordinary cases.[37]

14. Appeal[38] — a. Right to Review. An appeal from the orders and judgment in a drainage proceeding is a direct attack, and where any of the jurisdictional facts required by statute are wanting, the proceedings when thus attacked will fail.[39] However as a rule the courts will not examine the proceedings gen-

32. *Iowa.*— Hull *v.* Baird, 73 Iowa 528, 35 N. W. 613.

Kentucky.— Dixon *v.* Labry, 69 S. W. 791, 24 Ky. L. Rep. 697, holding that such records should be signed by the judge who presided when the records were made or by his successor.

Michigan.— Pieotter *v.* Whaley, 80 Mich. 257, 45 N. W. 81.

New Jersey.— Stout *v.* Hopewell Tp., 25 N. J. L. 202.

Ohio.— Miller *v.* Graham, 17 Ohio St. 1; Caldwell *v.* Harrison Tp., 2 Ohio Cir. Ct. 10; Hulse *v.* Coffland, 7 Ohio Dec. (Reprint) 611, 4 Cinc. L. Bul. 241.

Wisconsin.— State *v.* Curtis, 86 Wis. 140, 56 N. W. 475.

See 17 Cent. Dig. tit. "Drains," § 41 *et seq.*

All jurisdictional facts must be shown by the record, otherwise the proceedings will not stand, even as against a collateral attack. Eaton *v.* St. Charles County, 8 Mo. App. 177.

Proof of decision as to necessity of a drain and offer of compensation can only be proved by the official record of the commissioners' proceedings, which the statute requires to be kept by the town clerk and signed by the president and the clerk. Chaplin *v.* Wheatland, 129 Ill. 651, 22 N. E. 484.

Where the record failed to show what kind of a ditch had been approved of, and what specific land, if any, had been condemned, such defects were held to be fatal to the whole proceedings. Milton *v.* Wacker, 40 Mich. 229.

33. Brosemer *v.* Kelsey, 106 Ind. 504, 7 N. E. 569; Reinig *v.* Munson, 46 Mich. 138, 8 N. W. 723; Lampson *v.* Drain Com'rs, 45 Mich. 150, 7 N. W. 772; Dickinson *v.* Van Wormer, 39 Mich. 141; Daniels *v.* Smith, 38 Mich. 660; Purdy *v.* Martin, 31 Mich. 455; Eaton *v.* St. Charles County, 8 Mo. App. 177.

An unsworn certificate of an ex-drain commissioner that he personally served the required notice in drainage proceedings has been held to be insufficient proof, the certificate being no part of any legal return of his official doings. People *v.* Ruthruff, 40 Mich. 175.

Facts on which finding is based.— Where there is a finding in the record that the notice to interested parties required by the statute was "duly and legally given," it is not necessary that the facts upon which such finding was made appear of record. Keys *v.* Williamson, 31 Ohio St. 561.

34. Carr *v.* State, 103 Ind. 548, 3 N. E. 375. It was held in Updegraff *v.* Palmer, 107 Ind. 181, 6 N. E. 353, that the assumption of jurisdiction and the exercise of authority is a decision upon the question of notice without any formal entry declaring the notice sufficient.

35. Hulse *v.* Coffland, 7 Ohio Dec. (Reprint) 611, 4 Cinc. L. Bul. 241, holding that parties attacking such proceedings are not justified in relying on the memoranda, but are bound by the actual proceedings, although recorded afterward.

36. Objections not raised on trial.— A remonstrant cannot for the first time by a motion for a new trial raise objections to the report which he failed to interpose when the report was presented to the court, nor in any way raised before the entering of the decree establishing the drain. Goodwine *v.* Leak, 127 Ind. 569, 27 N. E. 161. See also Earhart *v.* Farmers' Creamery, 148 Ind. 79, 47 N. E. 226, holding that objection to the report of drainage commissioners for failure to designate the county in which the lands affected are situated cannot be taken by motion for a new trial of the issues of facts on remonstrance to the petition.

37. Neff *v.* Reed, 98 Ind. 341.

Improper ground.— The fact that other lands than those of the remonstrant were improperly assessed is no ground for granting such person a new trial. Goodwine *v.* Leak, 127 Ind. 569, 27 N. E. 161.

38. See, generally, Appeal and Error.

39. Frahm *v.* Craig Drainage Dist., 200 Ill. 233, 65 N. E. 649; Inwood *v.* Smith, 156 Ind. 687, 60 N. E. 703; Carr *v.* Boone, (Ind. 1886) 6 N. E. 626; Wright *v.* Wilson, 95 Ind. 408; Hume *v.* Little Flat Rocks Drainage Assoc., 72 Ind. 499. See also Bowman *v.* Ely, 135 Ind. 494, 35 N. E. 123; Burk *v.* Ayers, 19 Hun (N. Y.) 17; Endley *v.* Aldrich, 15 Ohio

erally of drainage commissioners on sweeping allegations of irregularity, but will presume them to be legal and regular unless expressly attacked on specific grounds.[40]

b. Matters Reviewable — (I) *Questions Not Properly Presented to Board.* Questions not properly presented to the board of commissioners cannot be raised upon appeal, unless they go to the jurisdiction over the subject-matter.[41]

(II) *Where Discretion Is Given to Officers.* It is wholly within the province of the inferior tribunals and their officers to decide questions as to the practicability of a proposed route for a drain, and as to whether such drain is necessary or conducive to public health or welfare, and in the absence of fraud such questions are not subject to review on appeal.[42]

(III) *On Appeal to Higher Court.* On an appeal from the judgment of the circuit or other like court to a higher court only the action of that tribunal will be reviewed; alleged erroneous rulings of the board of commissioners will not be considered.[43]

Cir. Ct. 36, holding that the finding of county commissioners in ditch improvement proceedings is a final order from which error will lie.

Appeal from justice's court.— It has been held in Illinois that an appeal will lie from the judgment of a justice of the peace to the circuit court; that section 6 of this act, which provides that the judgment as to the right to construct a drain shall be final and conclusive between the parties until after the expiration of two years from the finding in the former case, does not declare that the judgment of the justice shall be necessarily final, but that the final judgment, which may be the judgment on appeal, shall be conclusive. Chronic *v.* Pugh, 136 Ill. 539, 27 N. E. 415.

Appeal from order to dismiss.— Under the present Kentucky statute an appeal lies from an order dismissing a proceeding to establish a drain. Lancaster *v.* Leaman, 107 Ky. 35, 52 S. W. 963, 21 Ky. L. Rep. 617.

Under the Indiana drainage law providing that any party may appeal from orders of the board of commissioners, an appeal will lie from orders made under any of its sections. Houk *v.* Barthold, 73 Ind. 21.

40. De Gravelle *v.* Iberia, etc., Drainage Dist., 104 La. 703, 29 So. 302.

Under the Indiana act providing that any person aggrieved by the decision of the board of county commissioners may appeal from their order, and on such appeal have determined "any of the following matters," it has been held that only the matters therein specified can be tried on the appeal. Thompson *v.* Jasper County, 148 Ind. 136, 45 N. E. 519.

41. Steele *v.* Empsom, 142 Ind. 397, 41 N. E. 822; Budd *v.* Reidelbach, 128 Ind. 145, 27 N. E. 349; Metty *v.* Marsh, 124 Ind. 18, 23 N. E. 702; Ford *v.* Ford, 110 Ind. 89, 10 N. E. 648; Drebert *v.* Trier, 106 Ind. 510, 7 N. E. 223; King's Lake Drainage, etc., Dist. *v.* Jamison, 176 Mo. 557, 75 S. W. 679.

Under the Michigan statute it has been held that an appeal from an order of the county commissioners laying out a public ditch does not bring up for review the question whether the commissioners have exceeded their authority by establishing the ditch so as to drain a public meandered lake; that the proper remedy is by certiorari or by an action for an injunction. Dressen *v.* Nicollet County, 76 Minn. 290, 79 N. W. 113.

42. *Arkansas.*— Brown *v.* Henderson, 66 Ark. 302, 50 S. W. 501.

Illinois.— McCaleb *v.* Coon Run Drainage, etc., Dist., 190 Ill. 549, 60 N. E. 898.

Indiana.— Oathout *v.* Seabrooke, 159 Ind. 529, 65 N. E. 521; Chandler *v.* Beal, 132 Ind. 596, 32 N. E. 597; Sample *v.* Carroll, 132 Ind. 496, 32 N. E. 220; Zigler *v.* Menges, 121 Ind. 99, 22 N. E. 782, 16 Am. St. Rep. 357; Campbell *v.* Parker, 83 Ind. 449; Bryan *v.* Moore, 81 Ind. 9. But see Meehan *v.* Wiles, 93 Ind. 52; Houk *v.* Barthold, 73 Ind. 21.

Michigan.— Swan Creek Tp. *v.* Brown, 130 Mich. 382, 90 N. W. 38.

Nebraska.— Dodge County *v.* Acom, 61 Nebr. 376, 85 N. W. 292.

North Carolina.— Stanly *v.* Watson, 33 N. C. 124; Collins *v.* Haughton, 26 N. C. 420.

Ohio.— Engle *v.* Defiance County, 25 Ohio St. 425.

See 17 Cent. Dig. tit. "Drains," § 44 *et seq.*

Under a North Carolina statute relating to drainage, it was held that the commissioners provided for constituted a separate and distinct tribunal, whose report was not reviewable on a general appeal from the county court to the superior court. Skinner *v.* Nixon, 52 N. C. 342.

Under an Ohio statute it has been held that the decision of the board of commissioners establishing a public drain is final, and no appeal lies therefrom to the common pleas. Bowersox *v.* Seneca County Com'rs, 20 Ohio St. 496.

43. Lower Kings River Reclamation Dist. No. 531 *v.* McCullah, 124 Cal. 175, 56 Pac. 887; Briar *v.* Job's Creek Drainage Dist., 185 Ill. 257, 56 N. E. 1042; Wilson *v.* Talley, 144 Ind. 74, 42 N. E. 362, 1009. See also Pleasant Civil Tp. *v.* Cook, 160 Ind. 533, 67 N. E. 262 (holding that a judgment of the circuit court to establish a ditch under the drainage law of 1885, and the amendment of 1889, confirming the report of the commissioners as modified by it, and establishing the work, is final and conclusive, where it had jurisdiction of the subject-matter and of the par-

c. Requisites to Perfect — (I) *In General.* The general rules as to the necessity as well as the sufficiency of assignments of error,[44] exceptions,[45] appeal-bonds,[46] and motions for new trial[47] in order to perfect an appeal[48] have been applied to appeals to an appellate court in drainage proceedings.

(II) *Negligence of Court Officer.* Where the appellant has complied with the provisions of the statute, the failure of the officer of the court or board to perform the functions of his office will not affect the rights of the appellant.[49]

(III) *Notice of Appeal.* Under some statutes it has been held that, when an appeal is taken from the decision of the board of commissioners in drainage proceedings, no notice or summons is required to be issued or served upon the appellee;[50] and under other statutes requiring notice of appeal, it has been held that such notice need not specify the errors complained of.[51]

(IV) *Time of Appeal.* Where the statute fixes the time within which an appeal may be taken, an appeal taken after the expiration of such time is without jurisdiction, unless there be some subsequent action of the commissioners to which the appeal is applicable.[52]

d. Board of Review. Where the statute provides for an appeal from the commissioners' decision to a board of review,[53] such appeal must be availed of before complaint can be made in another form.[54]

ties); Thompson *v.* Jasper County, 148 Ind. 136, 45 N. E. 519.

44. McCaleb *v.* Coon Run Drainage, etc., Dist., 190 Ill. 549, 60 N. E. 898; *Ex p.* Sullivan, 154 Ind. 440, 56 N. E. 911 (where in the assignment of errors parties to the judgment adverse to appellants were not made parties, and the appeal was dismissed); Roberts *v.* Smith, 115 Mich. 5, 72 N. W. 1091 (holding that objections to proceedings for the establishment of a drain on the ground that the drain commissioners were interested parties cannot be considered on appeal, unless the matter was raised by a proper assignment of error). Thus, where no motion to dismiss or written objection appeared in the record, an assignment of error "that the court erred in overruling appellant's motion to dismiss appellee's petition for drainage, and the report of the commissioners of drainage," it was held that no question was presented which could be considered on appeal. Williams *v.* Stevenson, 103 Ind. 243, 2 N. E. 728.

45. The proper mode of reserving questions upon the evidence for the decision of the appellate court in drainage proceedings is by saving exceptions to the findings of the lower court, and the proper assignments of error for presenting such questions are those predicated upon such exceptions. Dukes *v.* Working, 93 Ind. 501.

46. Meehan *v.* Wiles, 93 Ind. 52 (sufficient bond filed in lieu of defective bond); Burke *v.* Jackson, 22 Ohio St. 268 (time of filing bond).

Failure to file bond.—Where no appeal-bond was filed with the clerk of the city court, as required by a Kentucky statute (§ 2396), it was held proper to dismiss an appeal from an order of the county court in a proceeding to appoint viewers to view a proposed drainage ditch. *In re* Wilson, 51 S. W. 149, 21 Ky. L. Rep. 231.

Where a justice's transcript on appeal recites the filing of a satisfactory bond and a plat of the land to be drained, this recital, in the absence of evidence to impeach it, must be taken as true, and evidence of the required filing. Chronic *v.* Pugh, 136 Ill. 539, 27 N. E. 415.

47. Baltimore, etc., R. Co. *v.* Ketring, 122 Ind. 5, 23 N. E. 527.

48. See, generally, Appeal and Error.

49. So held in Denton *v.* Thompson, 136 Ind. 446, 35 N. E. 264, where the auditor failed to certify a transcript of the proceedings and an appeal-bond with the clerk within the time prescribed by statute.

50. Johnson *v.* Mullinix, 102 Ind. 164, 1 N. E. 553.

51. Burk *v.* Ayers, 19 Hun (N. Y.) 17. See also Burke *v.* Jackson, 22 Ohio St. 268.

Where the statute requires the notice of appeal to contain a full statement of the grounds of appeal, no objection not urged in the notice of appeal will be considered by the appellate court. *In re* Underhill, 6 N. Y. Suppl. 716.

52. Lancaster *v.* Leaman, 110 Ky. 251, 61 S. W. 281, 22 Ky. L. Rep. 1842; Horner *v.* Biggam, 36 Mich. 243; Endley *v.* Aldrich, 15 Ohio Cir. Ct. 36, holding that in ditch improvement proceedings the petition in error must be filed within six months after the final order of the county commissioners.

53. Whole board must qualify and participate.— Where the statute provided for the appointment of five commissioners to hear appeals from the order of the board of supervisors in drainage proceedings, it was held that it was essential to the validity of their decision that all five of the commissioners so appointed should qualify and participate in the hearing and decision. Prichard *v.* Bixby, 71 Wis. 422, 37 N. W. 228; State *v.* Findley, 67 Wis. 86, 30 N. W. 224.

54. Sanner *v.* Union Drainage Dist., 175 Ill. 575, 51 N. E. 857 [*reversing* 64 Ill. App. 62].

e. Supersedeas. Where the statute provides for an appeal to the circuit court, it has been held that all proceedings taken pending the appeal are void, even though the order be sustained on appeal.[55]

f. Trial De Novo on Appeal — (i) *In General.* Under some statutes, on appeal to the circuit or like court from the order of the board of commissioners establishing a drain, the case stands for trial *de novo*, and not as a case on review;[56] and upon rendition of final judgment, it may remand the case to the board of commissioners, with directions to enforce its judgment, or it may retain jurisdiction of the cause and hear and determine the whole case and execute its orders made therein.[57]

(ii) *Qualifications of Appraisers.* While the question as to the statutory qualifications of appraisers appointed by the board may be raised on trial on appeal, in proceedings *de novo*, such a question cannot be raised by demurrer;[58] and on such appeal such parts of the proceedings below as can be considered as pleadings to show the issues are admissible in evidence.[59]

(iii) *Restricted to Questions as to Regularity of Appeal.* In proceedings *de novo*, on appeal to the probate court, that court cannot review and pass upon the regularity of the proceedings of the trustees or commissioners, but can only determine whether the proceedings relating to the appeal are regular, and if it so finds must issue a venire for a jury and proceed with the trial as provided by the statute.[60]

(iv) *Right to Open and Close.* On appeal to the circuit court from a decision of the board of commissioners in favor of petitioners, where the case is tried *de novo*, it has been held that the petitioners are entitled to open and close the case.[61]

(v) *Amendment of Petition.* On appeal, in proceedings *de novo* before the circuit court, the petition may be amended.[62]

55. Ford *v.* Ford, 110 Ind. 89, 10 N. E. 648; Meehan *v.* Wiles, 93 Ind. 52. But see Thompson *v.* Reasoner, 122 Ind. 454, 24 N. E. 223, 7 L. R. A. 495.

56. Trittipo *v.* Beaver, 155 Ind. 652, 58 N. E. 1034; Steele *v.* Empsom, 142 Ind. 397, 41 N. E. 822; Bonfoy *v.* Goar, 140 Ind. 292, 39 N. E. 56; Sharp *v.* Malia, 124 Ind. 407, 25 N. E. 9; Hardy *v.* McKinney, 107 Ind. 364, 8 N. E. 232; McKinsey *v.* Bowman, 58 Ind. 88; Lancaster *v.* Leaman, 110 Ky. 251, 61 S. W. 281, 22 Ky. L. Rep. 1842. See also Corey *v.* Swagger, 74 Ind. 211 (where it was also held that the report of the reviewers had no force or effect whatever, and could not even be read in evidence on the trial); King's Lake Drainage, etc., Dist. *v.* Jamison, 176 Mo. 557, 75 S. W. 679 (holding that the act giving the right of appeal to the supreme court as in other actions does not contemplate a direct appeal to that court, but for an appeal through the circuit court, where issues are to be tried *de novo*).

Motion in arrest of judgment.— On appeal to the circuit court in drain proceedings, the fact that the petition for the drain was vague and uncertain cannot be taken advantage of by motion in arrest of judgment. Bryan *v.* Moore, 81 Ind. 9.

57. Bonfoy *v.* Goar, 140 Ind. 292, 39 N. E. 56; Sharp *v.* Malia, 124 Ind. 407, 25 N. E. 9; Bryan *v.* Moore, 81 Ind. 9. Where the proceedings and report of a jury in the probate court on appeal from an order of the board have been reversed and remanded, and a second jury impaneled by the probate court, if the report of the jury is in accordance with the requirements of the statute, the probate court may approve and record it. Allyn *v.* Depew, 28 Ohio St. 619.

58. Kellogg *v.* Price, 42 Ind. 360.

Motion to dismiss.— In such proceedings pleadings are not contemplated, but a demurrer may be treated as a motion to dismiss. Spahr *v.* Schofield, 66 Ind. 168.

59. Bennett *v.* Meehan, 83 Ind. 566, 43 Am. Rep. 78.

60. Jackson Tp. *v.* Jones, 2 Ohio Cir. Ct. 482; Miller *v.* Weber, 1 Ohio Cir. Ct. 130.

Impaneling new jury.— In such a case the court may, however, set aside the verdict of the jury if it be contrary to law or against the evidence and impanel a new jury. Trimble *v.* Koch, 26 Ohio St. 434. See also Allyn *v.* Depew, 28 Ohio St. 619.

61. And that this is true, although they bring from the commissioners' court a *prima facie* case in their favor. Wilson *v.* Talley, 144 Ind. 74, 42 N. E. 362, 1009. See also Lancaster *v.* Leaman, 110 Ky. 251, 61 S. W. 281, 22 Ky. L. Rep. 1842.

62. Metty *v.* Marsh, 124 Ind. 18, 23 N. E. 702; Coolman *v.* Fleming, 82 Ind. 117, where the petition was allowed to be amended by the addition of an allegation that the drain would be conducive to public health and of public utility.

Where the record fails to show what amendment was allowed, the supreme court cannot presume on appeal that it was not a

(VI) *EVIDENCE.* In proceedings *de novo*, on appeal from the order of the county board, the jury may, in examining and determining the matter appealed from, consider in evidence facts made known to them personally from an actual view of the premises;[63] and the burden is upon the petitioner to establish by evidence such facts as were necessary to be established before the board, if such facts are controverted by the remonstrance.[64]

(VII) *JUDGMENT.* Where on appeal there is no issue presented for trial, it is proper for the court, after the question of the jurisdiction of the commissioners has been determined, to render judgment on motion affirming the decision of the commissioners upon the petition and report.[65]

(VIII) *FURTHER APPEAL.* The determination of the circuit court, on appeal from the board of commissioners, as to whether the facts set forth by the remonstrants are sufficient to abate the action, is final.[66]

15. CERTIORARI[67] — a. When Writ Will Lie. Certiorari will lie to review the proceedings of drain commissioners who have acted without jurisdiction.[68] So where the action taken by the judge of probate and a drainage commissioner appointed by him is void, because of want of jurisdiction, certiorari is the proper remedy.[69]

b. Who May Sue Out Writ. Proceedings to establish a drain cannot be quashed or their validity questioned by certiorari at the instance of one who will not be injured thereby.[70]

16. EXPENSES OF PROCEEDINGS[71] — a. Attorney's Fees. Under some statutes attorney's fees in proceedings for the establishment of a drain cannot be made

proper one. Williams *v.* Stevenson, 103 Ind. 243, 2 N. E. 728.

63. Williams *v.* Lockoman, 46 Ohio St. 416, 21 N. E. 358; Trimble *v.* Koch, 26 Ohio St. 434.

64. Trittipo *v.* Beaver, 155 Ind. 652, 58 N. E. 1034.

65. Metty *v.* Marsh, 124 Ind. 18, 23 N. E. 702; Hackett *v.* Brown, 128 Mich. 141, 87 N. W. 102. *Compare* Dowlan *v.* Sibley County, 36 Minn. 430, 31 N. W. 517, holding that it is immaterial that the judgment of the district court affirming the order of the board of commissioners fails to describe the lands through which the drain is laid, where the order, which is a part of the record, properly describes the drain and the lands affected.

66. Bonfoy *v.* Goar, 140 Ind. 292, 39 N. E. 56. And *compare In re* Draining Swamp Lands, 5 Hun (N. Y.) 116, where under the statute it was held that the decision of the county court, on appeal from the decision of the drainage commissioners, that a drain was not necessary for the public health, was conclusive, and could not be reviewed on further appeal.

67. Certiorari generally see CERTIORARI.

68. Brady *v.* Hayward, 114 Mich. 326, 72 N. W. 233; Grose *v.* Zierle, 52 Mich. 542, 18 N. W. 349; Null *v.* Zierle, 52 Mich. 540, 18 N. W. 348. See also Loree *v.* Smith, 100 Mich. 252, 58 N. W. 1015.

Legality of organization of drainage district.— It was held in Sanner *v.* Union Drainage Dist., 175 Ill. 575, 51 N. E. 857 [*reversing* 64 Ill. App. 62], that certiorari is the proper remedy to test the legality of the organization of a drainage district which includes land owned by persons who were not parties to the petition and received no notice thereof, since there is no remedy by appeal.

Notice of certiorari.— However, where the notice of certiorari is not served on the commissioner within the statutory period after his determination, the legality of his determination cannot thereafter be questioned by such writ. Blumfield Tp. *v.* Brown, 130 Mich. 504, 90 N. W. 284.

69. Whiteford *v.* Probate Judge, 53 Mich. 130, 18 N. W. 593. Thus where there is no evidence that statutory notice was given to the landowners affected drainage proceedings will be quashed on certiorari. Taylor *v.* Burnap, 39 Mich. 739; Daniels *v.* Smith, 38 Mich. 660.

Matters in discretion of officers.— Where any of the steps in proceedings to lay out a drain are left by statute to the discretion or judgment of designated officers, their determination is final and conclusive, and hence such matters are not reviewable on certiorari, except for fraud or partiality. Stout *v.* Hopewell Tp., 25 N. J. L. 202.

70. Wolpert *v.* Newcomb, 106 Mich. 357, 64 N. W. 326; Davison *v.* Otis, 24 Mich. 23.

Parties to proceedings.— In Michigan two drain commissioners of different counties who are acting jointly, as required by statute, in laying out a drain through the counties represented by them, must both be made parties to a certiorari brought to remove proceedings by them to the circuit court of one of the counties. Duflo *v.* Lillibridge, 114 Mich. 350, 72 N. W. 181.

71. Costs generally see COSTS.

A county surveyor is not entitled to compensation for services rendered in connection with allotments which were valid under the

part of the cost of construction and charged against either the landowners affected or the county.[72] While under other statutes it is held that attorney's fees are properly included under the item "incidental expenses," and are chargeable under the statute.[73]

b. Jury Fees. The fact that a drainage district lies in several counties does not affect the matter of jury fees in drainage proceedings brought in one of such counties, but the entire burden must be borne by said county as a governmental agency.[74]

c. Commissioners' Fees. Under one statute it has been held that where commissioners appointed by the court have reported, and the court declared the proposed system of drainage to be impracticable, the commissioners have no recourse against the county for pay or expenses.[75]

17. Costs.[76] The general rule is that where on appeal the finding of the court is against the remonstrance for any cause, such finding and judgment necessarily involves a judgment against the remonstrant for costs;[77] and the same rule applies where the petitioners are unsuccessful.[78] Where the one appealing from the report of the board, under a statute which provides four grounds of appeal, succeeds only on one ground, such appellant is entitled to judgment only for one quarter of his costs.[79]

18. Waiver and Estoppel — a. In General. And one who has made no objection to the construction of a drain, but who has had notice of every step in the proceedings and received all the benefits of it, is estopped in equity to contest his assessment for irregularities in the proceedings.[80]

previous allotment. Hendricks County *v.* Trotter, 19 Ind. App. 626, 49 N. E. 976.

Witness' fees.— It has been held in Indiana that remonstrants to a proposed drain who testify in their own behalf must do so without being subpœnaed, and unnecessary costs incurred by them in having subpœnas served upon themselves are properly charged to them. Sauntman *v.* Maxwell, 154 Ind. 114, 54 N. E. 397.

72. Kersey *v.* Turner, 99 Ind. 257; Higbee *v.* Peed, 98 Ind. 420; Zink *v.* Monroe County, 68 Mich. 283, 36 N. W. 73.

73. Erickson *v.* Cass County, 11 N. D. 494, 92 N. W. 841; Reclamation Dist. No. 108 *v.* Hagar, 4 Fed. 366, 6 Sawy. 567.

74. Sexton *v.* Henderson, 42 Ill. App. 234.

Clerk's certificate.— Where the statute allows the viewers or jurors a *per diem* and mileage, to be paid upon the certificate of the clerk, while in the discharge of their duties in establishing a drain, such certificate should include only the *per diem* and mileage, and not the personal expenses of a viewer or juror. Sexton *v.* Henderson, 42 Ill. App. 234.

75. Alderson *v.* St. Charles County, 6 Mo. App. 420.

76. Costs generally see Costs.

77. Perkins *v.* Hayward, 132 Ind. 95, 31 N. E. 670; Dearinger *v.* Ridgeway, 34 Ind. 54; Case *v.* Telling, 112 Mich. 689, 71 N. W. 510 (where it was held that liability for costs follows the proceedings throughout and attaches in all cases of dismissal, except where the failure to sustain is due to the negligence or fault of the commissioner); Rosenstiel *v.* Miller, 96 Mich. 99, 55 N. W. 655. See also Drain Com'rs *v.* Palmer, 54 Mich. 270, 20 N. W. 49. *Compare* Streuter *v.* Willow Creek Drainage Dist., 72 Ill. App. 561, holding that the taxing of costs in proceedings to annex lands to a drainage district is a matter resting in the discretion of the court and will not be disturbed unless there has been a plain and palpable abuse of it.

Costs follow the decree in proceedings in equity to enforce lien for drainage assessment. Hammond *v.* People, 178 Ill. 254, 52 N. E. 1030.

Not included in cost of construction.— It has been held that in a petition for the construction of a drain, when one of the owners of land to be assessed remonstrates against the construction of the proposed drain, he is not entitled to have his costs included in the cost of such construction. Zigler *v.* Menges, 121 Ind. 99, 22 N. E. 782, 16 Am. St. Rep. 357.

78. *In re* Bradley, 117 Iowa 472, 91 N. W. 780, holding that the fact that petitioners were required to give bond for costs did not prevent judgment being entered against them for costs, and that the parties entitled thereto need not look to the bond alone therefor.

79. Steele *v.* Empsom, 142 Ind. 397, 41 N. E. 822. See Bolt *v.* Ward, 156 Ind. 382, 59 N. E. 1053, holding that where three of four remonstrants in proceedings for the establishment of a drain succeed in reducing their assessment more than ten per cent, but the assessment of the fourth is not reduced, a joint motion to tax all the costs of the trial against the petitioners will be refused.

80. *Illinois.*— Wabash East R. Co. *v.* East Lake Fork Special Drainage Dist., 134 Ill. 384, 25 N. E. 781, 10 L. R. A. 285; Blake *v.* People, 109 Ill. 504.

Indiana.—Montgomery *v.* Wasem, 116 Ind. 343, 15 N. E. 795, 19 N. E. 184; Prezinger *v.* Harness, 114 Ind. 491, 16 N. E. 495; Davis

b. Illegal Incorporation. It has been held that where there is no legal incorporation of a drainage association, owners of land assessed are not estopped from resisting the collection of the assessments because a part of the work has been completed at great expense, thereby benefiting the lands of such owners, with their knowledge, and without objection.[81]

19. Collateral Attack on Proceedings. The general rule is that proceedings under a statute providing for the establishment of drains cannot be collaterally attacked for mere informalities.[82] Thus if a court which has jurisdiction of the subject-matter and which is required to determine all jurisdictional questions, either expressly or impliedly, adjudges that notice was given, its decision will repel a collateral attack, unless the record of the court shows affirmatively that no notice was given; and this is so, although the record shows a defective and irregular notice.[83] However, where jurisdictional questions are involved,

v. Lake Shore, etc., R. Co., 114 Ind. 364, 368, 16 N. E. 639, where the court said: "It would be unjust to permit a property-owner, whatever the nature of his property, to stand, by without objection and allow the construction of a ditch and subsequently either attack the validity of the proceedings or refuse to bear the share of the cost of maintaining it which the law allots to him."

Iowa.— Patterson *v.* Baumer, 43 Iowa 477.

Michigan.— Cook *v.* Covert, 71 Mich. 249, 39 N. W. 47; Gillett *v.* McLaughlin, 69 Mich. 547, 37 N. W. 551; Hall *v.* Slayhaugh, 69 Mich. 484, 37 N. W. 545; People *v.* Wayne County, 40 Mich. 745. See also Zabel *v.* Harshman, 68 Mich. 273, 42 N. W. 44.

New Jersey.— Haines *v.* Campion, 18 N. J. L. 49.

Ohio.— Kellogg *v.* Ely, 15 Ohio St. 64.

See 17 Cent. Dig. tit. "Drains," § 53.

Parties objecting should act with reasonable promptness in urging their objections, and should not wait until the completion of the improvement before alleging an entire want of authority to make the same. Oliver *v.* Monona County, 117 Iowa 43, 90 N. W. 510; Auditor-Gen. *v.* Melze, 124 Mich. 285, 82 N. W. 886; Dakota County *v.* Cheney, 22 Nebr. 437, 35 N. W. 211.

81. Newton County Draining Co. *v.* Nofsinger, 43 Ind. 566.

82. *California.*— People *v.* Hagar, 52 Cal. 171.

Delaware.— Wood *v.* Wilson, 4 Houst. 94.

Illinois.— Riebling *v.* People, 145 Ill. 120, 33 N. E. 1090.

Indiana.— Baltimore, etc., R. Co. *v.* Jackson County, 156 Ind. 260, 58 N. E. 837, 59 N. E. 856; McBride *v.* State, 130 Ind. 525, 30 N. E. 699; Mills *v.* Hardy, 128 Ind. 311, 27 N. E. 618; Donalson *v.* Lawson, 126 Ind. 169, 25 N. E. 903; State *v.* Jackson, 118 Ind. 553, 21 N. E. 321; Wishmier *v.* State, 110 Ind. 523, 11 N. E. 291; State *v.* Thompson, 109 Ind. 533, 10 N. E. 305; McMullen *v.* State, 105 Ind. 334, 4 N. E. 903; McKinney *v.* State, 101 Ind. 355; State *v.* Myers, 100 Ind. 487; Cauldwell *v.* Curry, 93 Ind. 363; Simonton *v.* Hays, 88 Ind. 70; Marshall *v.* Gill, 77 Ind. 402; Hume *v.* Little Flat Rock Draining Assoc., 72 Ind. 499; Chambers *v.* Kyle, 67 Ind. 206.

Kansas.— Griffith *v.* Pence, 9 Kan. App. 253, 59 Pac. 677.

Michigan.—Gillison *v.* Cressman, 100 Mich. 591, 59 N. W. 321; Clark *v.* Drain Com'rs, 50 Mich. 618, 16 N. W. 167; Freeman *v.* Weeks, 48 Mich. 255, 12 N. W. 215.

Missouri.— State *v.* Holt County Ct., 135 Mo. 533, 37 S. W. 521.

Ohio.— Haff *v.* Fuller, 45 Ohio St. 495, 15 N. E. 479.

See 17 Cent. Dig. tit. "Drains," § 54.

Where defects are not jurisdictional.— Proceedings to establish a drain cannot be collaterally attacked by suit to enjoin collection of assessments. Argo *v.* Barthand, 80 Ind. 63. The circuit court has jurisdiction of the construction of drains, and objections to its assumption thereof in a specific case must be made directly by appeal, and a party cannot after judgment make collateral objection to its authority to direct the construction of a partial drain, which it has assumed, by holding the petition sufficient to give the jurisdiction. Perkins *v.* Hayward, 132 Ind. 95, 31 N. E. 670.

83. Pittsburgh, etc., R. Co. *v.* Machler, 158 Ind. 159, 63 N. E. 210; Otis *v.* De Boer, 116 Ind. 531, 19 N. E. 317; Johnson *v.* State, 116 Ind. 374, 19 N. E. 298; Montgomery *v.* Wasem, 116 Ind. 343, 15 N. E. 795, 19 N. E. 184; Deegan *v.* State, 108 Ind. 155, 9 N. E. 148; Pickering *v.* State, 106 Ind. 228, 6 N. E. 611; McMullen *v.* State, 105 Ind. 334, 4 N. E. 903; Jackson *v.* State, 104 Ind. 516, 3 N. E. 863; Young *v.* Wells, 97 Ind. 410; Muncey *v.* Joest, 74 Ind. 409; Oliver *v.* Monona County, 117 Iowa 43, 90 N. W. 510.

Owners of easements.— The provisions of the Indiana Drainage Act in regard to notice to landowners apply also to owners of easements in lands, and it will be presumed, as against a collateral attack, that proper notice was given. Indianapolis, etc., Gravel Road Co. *v.* State, 105 Ind. 37, 4 N. E. 316.

Recital of jurisdictional facts in judgment.— A motion in a drainage proceeding to set aside a judgment entered on the report of the commissioners assessing benefits, on the ground that no notice was given to the moving parties, must show that the judgment record does not state facts giving jurisdiction to their persons, as such recitals would be conclusive in a collateral proceeding, and the circuit court is presumed to have had jurisdiction. Long *v.* Ruch, 148 Ind. 74, 47 N. E. 156.

an inquiry into such jurisdictional facts cannot be cut off, even on a collateral attack.[84]

E. Location, Construction, Maintenance, and Use — 1. Location and Plan — a. In General. It is the duty of the commissioners or viewers to locate the drain upon such line as they may deem best to accomplish the object sought, and while they should as far as practicable locate it on the division lines between lands owned by different persons, and thus avoid laying the same diagonally across the lands, they are not to sacrifice the general utility of the ditch to avoid diagonal lines.[85]

b. Discretion of Commissioners. In locating the route for a drain, the commissioners are not confined to that prayed for in the petition, but may in their sound discretion change either terminus.[86]

c. Utilizing Line of Former Drain. The fact that a proposed ditch is to be over the line of a ditch previously constructed has been held under some statutes to be no bar to the proceedings.[87]

d. Where Drain Makes Adjoining Property Servient. The various statutes providing for the establishment of drainage systems, public and private, do not contemplate the authorization of drains which will collect water on one landowner's property and discharge it upon an adjoining landowner's property.[88]

84. St. Louis, etc., R. Co. *v.* Dudgeon, 64 Ark. 108, 40 S. W. 786. See, however, Oliver *v.* Monona County, 117 Iowa 43, 90 N. W. 510, holding that the determination of the board of supervisors that a petition for a drain was signed by the required number of legal voters in the county may be reviewed by appeal or certiorari, but cannot be attacked collaterally.

Under a Missouri act authorizing county courts to appoint commissioners to make contracts to drain swamp lands, under certain prescribed conditions, it was held that the jurisdiction of the court under the act was limited, and where the record failed to show the facts conferring jurisdiction, such proceedings were subject to collateral attack. Eaton *v.* St. Charles County, 8 Mo. App. 177.

85. Cribbs *v.* Benedict, 64 Ark. 555, 44 S. W. 707; Wilson *v.* Talley, 144 Ind. 74, 42 N. E. 362, 1009; Metty *v.* Marsh, 124 Ind. 18, 23 N. E. 702; Zigler *v.* Menges, 121 Ind. 99, 22 N. E. 782, 16 Am. St. Rep. 357; Dodge County *v.* Acom, 61 Nebr. 376, 85 N. W. 292.

Land already dedicated to public use.— In Baltimore, etc., R. Co. *v.* North, 103 Ind. 486, 3 N. E. 144, it was held that in the absence of statutory authority a drain cannot be ordered to be constructed longitudinally on the right of way of a railroad. This decision is placed on the ground that lands once taken for a public use cannot under general law, without an express act of the legislature for that purpose, be appropriated by proceedings *in invitum* to a different public use. See, generally, Eminent Domain.

Ultra vires.— Township trustees in establishing a drain have no authority to agree, in order to avoid litigation, that no more than a certain amount of water shall be allowed to come down in the drain, and that all surplus water shall be turned into an old watercourse; hence such an agreement is not binding on their successors. Doney *v.* Truro Tp., 1 Ohio Cir. Ct. 566.

86. Cribbs *v.* Benedict, 64 Ark. 555, 44 S. W. 707; Sisson *v.* Drainage Com'rs, 163 Ill. 295, 45 N. E. 215; Northern Ohio R. Co. *v.* Hancock County, 63 Ohio St. 32, 57 N. E. 1023; Marsh *v.* Clark County, 11 Ohio Dec. (Reprint) 290, 26 Cinc. L. Bul. 3. *Contra*, Abel *v.* Hardin County, 9 Ohio S. & C. Pl. Dec. 339, 6 Ohio N. P. 349.

87. Rogers *v.* Venis, 137 Ind. 221, 36 N. E. 841; Denton *v.* Thompson, 136 Ind. 446, 35 N. E. 264; Sample *v.* Carroll, 132 Ind. 496, 32 N. E. 220; Meranda *v.* Spurlin, 100 Ind. 380; Hauser *v.* Burbank, 117 Mich. 463, 76 N. W. 109; Miller *v.* Logan County, 3 Ohio Cir. Ct. 617, 2 Ohio Cir. Dec. 358.

Aliter under Michigan statute.— Tomlin *v.* Newcomb, 70 Mich. 358, 38 N. W. 315 (where it was held that the drain commissioners have no jurisdiction to locate a drain on the line of another drain which has been neither vacated nor abandoned); Zabel *v.* Harshman, 68 Mich. 273, 42 N. W. 44.

Using old drain as outlet.— Drain commissioners may appropriate and use an established drain as the outlet for a new drain to be established, without the consent of the landowners on each side of the established drain, where they will not be damaged by the use of the drain, but on the contrary will be materially benefited, and where the dimensions of the ditch are not changed. Sturm *v.* Kelly, 120 Mich. 685, 79 N. W. 930.

88. French *v.* White, 24 Conn. 170; Bruggink *v.* Thomas, 125 Mich. 9, 83 N. W. 1019 (holding that a drain should not be so constructed by the drain commissioners as to discharge water into a small watercourse so as to cause the flooding of the land adjacent to the watercourse and the bringing down of quicksand thereon); Chapel *v.* Smith, 80 Mich. 100, 45 N. W. 69; Bungenstock *v.* Nishnabotna Drainage Dist., 163 Mo. 198, 64 S. W. 149 (holding that in an action for damages for negligently constructing a ditch across plaintiff's farm, an instruction that defendant was not required to construct its

e. Straightening and Widening Natural Streams. Most of the statutes contemplate that natural streams may be straightened, widened, and deepened, where in the judgment of the drainage commissioners the proposed system of drainage can be more effectually accomplished in that manner.[89]

2. Construction — a. Compliance With Plans. A deviation from approved plans in constructing a drain, where no injury results therefrom, is a discretion usually vested by statute in the commissioners or trustees, and a drain constructed, with a deviation justifiable under the circumstances, is a substantial compliance with the original approved plan;[90] but where the drain when completed shows a substantial deviation from the approved plan and specifications or from the order of court the report of the commissioners may be rejected, and assessments thereunder cannot be enforced.[91]

b. Contracts[92] — (i) *Notice and Time of Letting.* Most of the statutes provide for public notice of the letting of contracts for the construction of drains, and where such notice is omitted all proceedings thereunder are void.[93]

ditch so as to prevent overflow in time of high water was erroneous; defendant's duty being to so construct it as to prevent the overflow of plaintiff's land except in cases of extraordinary high water); Burton *v.* Jensen, 9 Ohio Dec. (Reprint) 120, 11 Cinc. L. Bul. 26.

Under a Massachusetts statute, providing for a system of drainage for swamp, meadows, and wet lands, it was held that the drain constructed must discharge the water where it will not interfere with the rights of others; hence a ditch from one owner's land that merely discharges the water upon the lands of an adjoining owner is unauthorized. Sherman *v.* Tobey, 3 Allen 7.

89. Briar *v.* Job's Creek Drainage Dist., 185 Ill. 257, 56 N. E. 1042; Lipes *v.* Hand, 104 Ind. 503, 1 N. E. 871, 4 N. E. 160; Beals *v.* James, 173 Mass. 591, 54 N. E. 245; Coomes *v.* Burt, 22 Pick. (Mass.) 422. See also French *v.* Kirkland, 1 Paige (N. Y.) 117.

Cleaning out, deepening, or widening stream. — Under the Michigan statute providing that where a natural watercourse needs cleaning out, deepening, or widening, and there have been no proceedings to establish such watercourse, it is immaterial whether the first proceedings shall be to clean out, deepen, or widen, "but the commissioner shall take such steps as may be necessary to obtain a right of way, [as heretofore provided] and go on with his proceedings in the manner provided by law," the commissioners under a petition to lay out a drain along the general course of the creek may include portions of the creek, and deepen, widen, or straighten the same. Hauser *v.* Burbank, 117 Mich. 463, 76 N. W. 109.

Meandered body of water. — Where by an early statute it was made a criminal offense for any person to drain a meandered body of water, it was held that such statute was not applicable to persons acting under the express authority of a law subsequently enacted, and for the accomplishment of public purposes. Dowlan *v.* Sibley County, 36 Minn. 430, 31 N. W. 517.

Straightening watercourses. — It has been held in Indiana that the primary object of the drainage laws is the reclamation of wet lands, and the power to alter and straighten watercourses is a mere incident, and that a proceeding to establish a drain where the primary purpose is to straighten a watercourse, and the drainage is a mere incident, is not within the jurisdiction conferred on the courts. Scruggs *v.* Reese, 128 Ind. 399, 27 N. E. 748.

90. Reclamation Dist. No. 3 *v.* Goldman, 65 Cal. 635, 4 Pac. 676; Cooper *v.* Shaw, 148 Ind. 313, 47 N. E. 679 (holding that where the line of a drain is changed on the lands of one or more persons by agreement with the county surveyor, persons owning land on the line of the ditch above the point where the change is made cannot complain if their lands receive as good drainage as the ditch completed on the established line would have given); Kinnie *v.* Bare, 80 Mich. 345, 45 N. W. 345 (where it was held that the establishment of a drain commencing one hundred and twelve rods north of a given point was a sufficient compliance with a petition, which asked for a drain commencing eighty rods north of it).

91. Racer *v.* Wingate, 138 Ind. 114, 36 N. E. 538. See also Studabaker *v.* Studabaker, 152 Ind. 89, 51 N. E. 933. In proceedings for the establishment of a drain where the plat showed a certain line therefor, under which the jury assessed damages, it was held that the subsequent adoption of an amended plat of a line varying substantially from the line indicated in the first plat, and an attempt to work thereunder, might be enjoined by the landowner. Rutledge *v.* Drainage Com'rs Dist. No. 6, 16 Ill. App. 655.

92. Contracts generally see Contracts.

93. Badger *v.* Inlet Drainage Dist., 141 Ill. 540, 31 N. E. 170; Drainage Com'rs *v.* Lewis, 101 Ill. App. 150. See also Ft. Chartres, etc., Drainage, etc., Dist. No. 5 *v.* Smalkand, 70 Ill. App. 449 (to the same effect, and also holding that commissioners of a drainage district have no power to make a verbal contract for the building or repair of public works); Burnett *v.* Drain Com'rs, 56 Mich. 374, 23 N. W. 50.

Advertisement for bids by sections. — Where the advertisement for the letting of a county contract for the digging of a ditch read,

It has been held that drainage commissioners have no authority to contract for work to be done until they have made an assessment, unless they have the money in their hands for the purpose.[94]

(II) *Liability of Commissioners.* Commissioners or trustees who execute contracts for the labor in cutting drains under acts authorizing drains to be constructed under certain conditions are not personally responsible upon such contracts or for the value of the labor.[95] However, a drainage district, created by statute, which is a body corporate, is liable in damages for a breach of contract lawfully made by its commissioners under the powers conferred by the statute.[96]

(III) *Drainage Certificates.* A contractor employed in the construction of a drain cannot compel the officer designated by statute to issue certificates for work done until he has completed the contract according to its specifications within the time agreed upon.[97]

c. Collateral Attack on Imperfect Construction. It is no defense to an action to recover drainage assessments that the work of construction was not completed according to the plans and specifications and the order of the court, such proceedings not being vulnerable to collateral attack.[98]

d. Bridges. Some of the statutes require that there shall be constructed and maintained by the commissioners at least one bridge or proper passageway over each open drain where the same crosses any inclosed field or parcel of land, and the cost of construction shall be charged as part of the cost of construction of such drain.[99]

"said job to be let by sections," it was held that there must be an offer to let it in sections before it could be let as an entirety. Smith *v.* Livingston, 115 Mich. 202, 73 N. W. 118. See, however, Smith *v.* Carlow, 114 Mich. 67, 72 N. W. 22, holding that the statute providing that the commissioners should divide the drain into convenient sections for letting the work is directory only, and, where the drain is more conveniently let as a whole, failure to divide into sections is immaterial.

Estoppel.—A party who has observed without objection the construction of a drain is estopped to enjoin the same for the reason that proper notice of the letting of the contract was not given. Muncey *v.* Joest, 74 Ind. 409.

94. Badger *v.* Inlet Swamp Drainage Dist., 42 Ill. App. 79. But *compare* Sturm *v.* Kelly, 120 Mich. 685, 79 N. W. 930, where it was held that the commissioners could not let contracts to construct a drain, and make the assessments therefor, until they obtain a release of the right of way and damages, or obtain the right by legal proceedings.

95. Smith *v.* Griffin, 9 Ohio Cir. Ct. 223; McCarty *v.* Bralton, 2 Ohio Dec. (Reprint) 110, 1 West. L. Month. 397.

96. Chicago Sanitary Dist. *v.* Ray, 85 Ill. App. 115 (holding that the drainage district will likewise be liable for damages resulting from its negligence, either in construction or operation of its canal); Rood *v.* Claypool Drainage, etc., Dist., 120 Fed. 207, 56 C. C. A. 527.

Void contracts.—Contracts for the construction of drains made with drainage commissioners who were illegally appointed are void, and no recovery can be had for their breach. Eaton *v.* St. Charles County, 8 Mo. App. 177.

97. State *v.* Bever, 143 Ind. 488, 41 N. E. 802.

A contract for the protection of laborers has been held by the Washington courts not to be required by the commissioners in the construction of a local ditch, such work not coming under the head of a county improvement. Wallace *v.* Skagit County, 8 Wash. 457, 36 Pac. 252.

98. Shrack *v.* Covault, 144 Ind. 260, 43 N. E. 229; Buckles *v.* State, 131 Ind. 600, 31 N. E. 86; Racer *v.* State, 131 Ind. 393, 31 N. E. 81; Montgomery *v.* Wasem, 116 Ind. 343, 15 N. E. 795, 19 N. E. 184; Hackett *v.* State, 113 Ind. 532, 15 N. E. 799; Indianapolis, etc., Gravel Road Co. *v.* State, 105 Ind. 37, 4 N. E. 316; Muncey *v.* Joest, 74 Ind. 409; Stafford *v.* State, 12 Ind. App. 540, 40 N. E. 701; Vance *v.* State, 9 Ind. App. 698, 36 N. E. 547; Wilson *v.* State, 9 Ind. App. 696, 36 N. E. 546. See also Racer *v.* Wingate, 138 Ind. 114, 36 N. E. 538; Putnam County *v.* Krauss, 53 Ohio St. 628, 42 N. E. 831.

99. Union Drainage Dist. *v.* O'Reilly, 132 Ill. 631, 24 N. E. 426 [*affirming* 34 Ill. App. 298]; Meents *v.* Reynolds, 62 Ill. App. 17. See also Chicago Sanitary Dist. *v.* Lee, 79 Ill. App. 159. See, however, Heffner *v.* Cass, etc., Counties, 193 Ill. 439, 62 N. E. 201, 58 L. R. A. 353; McCaleb *v.* Coon Run Drainage, etc., Dist., 190 Ill. 549, 60 N. E. 898.

Bridge over highway.— It has been held in New York that where a ditch dug under the Drainage Act, which makes no provision for the crossing of highways, is dug across a highway, it is the duty of the drainage commissioner to build a suitable crossing over such ditch without unnecessary delay. Conewango *v.* Shaw, 31 N. Y. App. Div. 354, 52 N. Y. Suppl. 327 [*affirming* 48 N. Y. Suppl. 1].

The Indiana act does not expressly require

3. Extension or Enlargement — a. In General. Most of the statutes require the same preliminary steps, such as filing petition, notice, etc., to be taken in proceedings for the improvement, extension, and enlargement of an existing drain as were required for its original establishment.[1]

b. Limit of Authority. Where the designated officers are empowered by statute, or by appropriate proceedings instituted for the purpose,[2] to repair or clean out a drain, they have no power to construct the new drain, or to deepen, widen, or extend one already constructed.[3] And in determining whether a drain has been enlarged or improved the original specifications must be taken as the guide.[4]

4. Repairs — a. Authority of Officers — (1) *In General.* Under some statutes a discretionary authority to determine when repairs to and cleaning out of drains are necessary is vested in the commissioner, surveyor, or other designated officer, without even requiring notice to be given of the intention to order such work.[5]

the commissioners to construct bridges, either public or private, over drains established by proper authority; and it has been held in that state that mandamus will not lie to compel them to do so. Rigney *v.* Fischer, 113 Ind. 313, 15 N. E. 594.

1. *Illinois.*— Badger *v.* Inlet Drainage Dist., 141 Ill. 540, 31 N. E. 170. See also Lima Lake Drainage Dist. *v.* Hunt Drainage Dist., 101 Ill. App. 72.

Massachusetts.— Smith *v.* Smith, 148 Mass. 1, 18 N. E. 595.

Michigan.— Tomlin *v.* Newcomb, 70 Mich. 358, 38 N. W. 315; Harbaugh *v.* Martin, 30 Mich. 234.

New Jersey.— Scattergood *v.* Lord, 26 N. J. L. 140.

New York.— Houston *v.* Wheeler, 52 N. Y. 641.

North Carolina.— Porter *v.* Armstrong, 129 N. C. 101, 39 S. E. 799, where the dominant owner brought proceedings to enlarge a drain, and the proceedings were dismissed because of his failure to make the servient owner a party thereto.

See 17 Cent. Dig. tit. "Drains," § 62.

Defective petition.— Thus it has been held in Michigan that the failure of the petition for widening and deepening a drain to allege that the petitioners were assessed for the construction of the drain which they ask to have widened and deepened is fatal to the proceedings, as the requirement is jurisdictional. Tinsman *v.* Monroe County Probate Judge, 82 Mich. 562, 46 N. W. 780.

Failure to object to complaint.— Where the drainage commissioners of a county sought to annex certain lands to the district, and the owner failed to appear at the time the complaint was filed and object on the ground that the lands would not be benefited, after annexation of the district such owner cannot insist on objections to the assessments that the lands so annexed were not benefited. Trigger *v.* Drainage Dist. No. 1, 193 Ill. 230, 61 N. E. 1114.

Where drain lies in two counties.— It has been held in Ohio that where a ditch lies through two counties, having been located and constructed by the joint boards of commissioners of the two counties, that the commissioners of one county have no authority to enlarge, deepen, or widen the part of the ditch running through their county so as to overtax the outlet to such ditch in the other county, without notice to, agreement with, or consent of, the board of commissioners of such county, and that such action, not being warranted by statute, is void. Redfern *v.* Hancock County, 18 Ohio Cir. Ct. 233, 10 Ohio Cir. Dec. 45.

2. **Under the Michigan statute, however, it** is held that it is not necessary in order to clean out, repair, or extend an existing drain, for the officers charged therewith to institute the proceedings required in the original establishment of such drain, but that they may upon their own initiative make such improvements as they deem necessary, and levy the proper assessments to cover same. Yeomans *v.* Riddle, 84 Iowa 147, 50 N. W. 886, where it was held that the reopening, repairs, and improvements of drains are really contemplated when they are originally authorized. See also Angell *v.* Cortright, 111 Mich. 223, 69 N. W. 486, holding that landowners cannot defeat a tax for cleaning a drain where the contract was simply for the cleaning, on the ground that in performing the work the contractors increased the width of the drain.

3. Romack *v.* Hohbs, (Ind. Sup. 1892) 32 N. E. 307; Weaver *v.* Templin, 113 Ind. 298, 14 N. E. 600; Fries *v.* Brier, 111 Ind. 65, 11 N. E. 958; Harbaugh *v.* Martin, 30 Mich. 234; Deuyer *v.* Shonert, 1 Ohio Cir. Ct. 73.

4. Weaver *v.* Templin, 113 Ind. 298, 14 N. E. 600.

5. Watkins *v.* State, 151 Ind. 123, 49 N. E. 169, 51 N. E. 79; Scott *v.* Stringley, 132 Ind. 378, 31 N. E. 953; Artman *v.* Wynkoop, 132 Ind. 17, 31 N. E. 468; Terre Haute, etc., R. Co. *v.* Soice, 128 Ind. 105, 27 N. E. 429; Taylor *v.* Brown, 127 Ind. 293, 26 N. E. 822; Zigler *v.* Menges, 121 Ind. 99, 22 N. E. 782, 16 Am. St. Rep. 357; Kirkpatrick *v.* Taylor, 118 Ind. 329, 21 N. E. 20; Davis *v.* Lake Shore, etc., R. Co., 114 Ind. 364, 16 N. E. 639; Markley *v.* Rudy, 115 Ind. 533, 18 N. E. 50; Trimble *v.* McGee, 112 Ind. 307, 14 N. E. 83; Morrow *v.* Geeting, 15 Ind. App. 358, 41 N. E. 848, 44 N. E. 59; Yeomans *v.* Riddle, 84 Iowa 147, 50 N. W. 886. And

(11) *WHERE DRAIN IS INCOMPLETE.* Under some statutes the officer designated is not authorized to repair a public ditch until after the construction of such work.[6]

b. Allotment of Work Among Landowners. Under the statute of at least one state the county surveyor is authorized to allot to the owner of each tract of land originally assessed for the construction of a drain the portion he should annually clean out and keep in repair.[7] And the statute also provides that the surveyor shall give notice to the landowners of the time when and place where he will hear objections to such allotments, giving to any person aggrieved the right to appeal from such order of the surveyor to the circuit or superior court.[8]

c. Notice of Letting of Contracts. In the absence of statutory directions the commissioner or surveyor need not give notice of the letting of the contract for repairing a drain.[9]

5. USE OF DRAIN BY OUTSIDERS. Many of the drainage statutes provide that landowners outside a drainage district, or who have not been assessed for the construction of a drain, may connect with drains already constructed on the payment of such amount as they would have been assessed if originally included in the

compare Hutchinson *v.* Clay Tp., 14 Pa. Super. Ct. 546. In Weaver *v.* Templin, 113 Ind. 298, 299, 14 N. E. 600, where the court said: "The Legislature has power to confer upon the officers of public corporations the authority to conclusively determine when repairs of streets, highways, drains and the like are necessary, and this power may be exercised by the Legislature without requiring notice to be given by the municipal authorities of the intention to order the repairs."

Discretionary authority.— So far as it relates to the expediency or necessity of making repairs to a drain, the judgment of such officer is conclusive. Amoss *v.* Lassell, 122 Ind. 36, 23 N. E. 525.

Drain in several counties.— It has been held under Ind. Rev. St. (1894) § 5631, imposing upon "the surveyor of the county in which the proceedings were had for construction" the duty of keeping in repair a drain in one or several counties, that this section referred to the surveyor of the county in which the proceedings for the original construction were begun. Watkins *v.* State, 151 Ind. 123, 49 N. E. 169, 51 N. E. 79.

Under the Michigan statute, any five freeholders of the township, one or more of whom shall be owners of land liable to assessment for the cleaning, may make the application setting forth the necessity for the cleaning. Angell *v.* Cortright, 111 Mich. 223, 69 N. W. 486.

6. But where such officer proceeds to repair a drain, it will be presumed, as against a general averment that the drain was not completed according to the original plans and specifications, that the work was duly accepted, as the law required. Bunnell *v.* Peet, 123 Ind. 436, 24 N. E. 146. See Artman *v.* Wynkoop, 132 Ind. 17, 31 N. E. 468. In Morrow *v.* Geeting, 15 Ind. App. 358, 41 N. E. 848, 44 N. E. 59, it was held that the fact that a drain was not completed under an original petition therefor, but was finished under a second petition for a drain to be constructed over the course outlined in the original petition, did not deprive the county surveyor of the right to clean out at least the portion originally built.

7. Zimmerman *v.* Savage, 145 Ind. 124, 44 N. E. 252; Wheatley *v.* Romack, 124 Ind. 430, 24 N. E. 1050; Davison *v.* Campbell, 28 Ind. App. 688, 63 N. E. 779; Beatty *v.* Pruden, 13 Ind. App. 507, 41 N. E. 961.

Landowners not originally assessed.—It has been held that the fact that lands in the vicinity of a public drain were not assessed for its original construction, it having been adjudged that they would not be benefited by the drain, does not exempt them from liability for its maintenance, where it is shown that they will derive benefit therefrom by reason of natural or artificial changes in their condition since the construction of the drain. Roundenbush *v.* Mitchell, 154 Ind. 616, 57 N. E. 510.

8. Zimmerman *v.* Savage, 145 Ind. 124, 44 N. E. 252; Davis *v.* Lake Shore, etc., R. Co., 114 Ind. 364, 16 N. E. 639; Beatty *v.* Pruden, 13 Ind. App. 507, 41 N. E. 961.

Failure to give such notice to some of the landowners will not invalidate the allotment as to others properly served. Hendricks County *v.* Trotter, 19 Ind. App. 626, 49 N. E. 976.

Voluntary appearance of landowner.— The allotment of a portion of a ditch to a landowner to be kept in repair by him is valid, although no personal notice was given him of the time and place to hear objections thereto, where he voluntarily appeared and presented his objections. Hendricks County *v.* Trotter, 19 Ind. App. 626, 49 N. E. 976. A mere acquiescence in the allotment, however, would not *per se* validate the allotment.

9. Bunnell *v.* Peet, 123 Ind. 436, 24 N. E. 146; Lanning *v.* Palmer, 117 Mich. 529, 76 N. W. 2.

Day labor.— Landowners cannot escape liability on assessments because the workmen employed were paid by the day, and no competition invited. Scott *v.* Stringley, 132 Ind. 378, 31 N. E. 953.

district.[10] In some jurisdictions the right is likewise granted by statute to a drainage district to connect with drains of another district already constructed.[11]

F. Damages[12] — **1. Compensation For Appropriation and Injury — a. In General.** The entry upon land and construction of a ditch, when obtained in proceedings instituted for that purpose under provisions of the statute applicable thereto, constitute in law a taking and appropriation of a perpetual easement in such land, and all damages both direct and consequential, which necessarily result from such taking and appropriation, are actual damages occasioned by the construction of such drain.[13]

b. Measure of Damages. Damages to a landowner caused by the construction of a drain are to be awarded for the full value of land actually appropriated for such drain, but only for the actual damage as to land not thus appropriated.[14]

10. People *v.* Drainage Dist. No. 5, 191 Ill. 623, 61 N. E. 381 (holding, however, that the connection must be a voluntary act of the landowner); People *v.* Drainage Dist. No. 3, 155 Ill. 45, 39 N. E. 613; People *v.* Drainage Dist. No. 1, 143 Ill. 417, 32 N. E. 688; Lake Fork Special Drainage Dist. *v.* People, 138 Ill. 87, 27 N. E. 857; Dayton *v.* Drainage Com'rs, 128 Ill. 271, 21 N. E. 198 [*affirming* 29 Ill. App. 31]; Young America Drainage Dist. No. 1 *v.* Shiloh Drainage Dist. No. 7, 91 Ill. App. 241; State *v.* Administrator of Public Accounts, 26 La. Ann. 336; Cuff *v.* State, 52 Ohio St. 361, 43 N. E. 1039; Seely *v.* Sebastian, 4 Oreg. 25.

Entailing enlargement of drain.— Where such connection, on account of the increase in volume of water, requires an enlargement of the existing drains, then the landowners so connecting are required to pay the cost of such enlargement. Dayton *v.* Drainage Com'rs, 128 Ill. 271, 21 N. E. 198 [*affirming* 29 Ill. App. 31].

Overtaxing drain.— But under such a statute an outside owner could not divert into such drains the drainage of large tracts of land belonging to other outside owners, who were taking no steps in the premises, and who would thus have the benefit of the established drainage system without being subjected to any of the burdens. Dayton *v.* Drainage Com'rs, 128 Ill. 271, 21 N. E. 198 [*affirming* 29 Ill. App. 31]. See also Drake *v.* Schoenstedt, 149 Ind. 90, 48 N. E. 629; Pence *v.* Garrison, 93 Ind. 345.

11. The former thereby incurring a statutory liability arising from the voluntary acceptance of the benefits accruing by reason of such connection. Young America Drainage Dist. No. 1 *v.* Shiloh Drainage Dist. No. 7, 91 Ill. App. 241.

12. Damages generally see Damages.

Eminent domain generally see Eminent Domain.

13. Chronic *v.* Pugh, 136 Ill. 539, 27 N. E. 415; Duke *v.* O'Bryan, 100 Ky. 710, 39 S. W. 444, 824, 19 Ky. L. Rep. 81; Bungenstock *v.* Nishnabotna Drainage Dist., 163 Mo. 198, 64 S. W. 149; Martin *v.* Fillmore County, 44 Nebr. 719, 62 N. W. 863. And see, generally, Eminent Domain.

In California it has been held that the occupation of land by a corporation for its own purposes pending the proceedings for condemnation is a taking of the property within the meaning of the constitution. Callahan *v.* Dunn, 78 Cal. 366, 20 Pac. 737; Davis *v.* San Lorenzo R. Co., 47 Cal. 517. See also Skagit County *v.* McLean, 20 Wash. 92, 54 Pac. 781.

Under the Illinois Farm Drainage Act the jury is to hear evidence as to the value of the land to be taken, and the consequent damages, and return the amount of damages found, if any. Under this act it was held that the jury were not authorized to find that the owner had suffered no damages for land actually taken, since to reach such a conclusion they would have to consider benefits, and this they were not authorized to do under the act. Drainage Com'rs *v.* Volke, 59 Ill. App. 283.

Farm bridges.— Under an Illinois statute which did not require the commissioners to construct farm bridges, it was held that a charge that the jury should take into consideration the benefits arising from the construction of such bridges in estimating the damages caused by the proposed ditch to any tract of land was erroneous. McCaleb *v.* Coon Run Drainage, etc., Dist., 190 Ill. 549, 60 N. E. 898.

Drains constructed by license.— It was held in Parker *v.* Wilson, 66 Ill. App. 91, that where, by consent of the landowners, under the act of July 1, 1889, a ditch is constructed and the agreement fails to provide for any damages done by the water, an owner of land so damaged is without remedy.

Persons must be party to action.— Under a Massachusetts statute it was held that commissioners who are appointed to effect improvements in meadows or lowlands have no authority to assess damages in favor of any one who is not a party to the proceedings instituted for such improvements with certain specified exceptions — persons whose land was damaged during the construction of the drain. Day *v.* Hulburt, 11 Metc. 321.

14. Sisson *v.* Drainage Com'rs, 163 Ill. 295, 45 N. E. 215; Union Drainage Dist. *v.* Volke, 163 Ill. 243, 45 N. E. 415 [*affirming* 59 Ill. App. 283]; Miller *v.* Weber, 1 Ohio Cir. Ct. 130. See also Lake Erie, etc., R. Co. *v.* Cluggish, 143 Ind. 347, 42 N. E. 743.

Overflow caused by temporary dam.— In McGillis *v.* Willis, 39 Ill. App. 311, it was held that when a temporary dam to float boats containing machinery was necessary in

c. Deductions For Benefits. The general rule is that the owner of land appropriated for a drain cannot recover damages for such land independent of an assessment of benefits to the remainder of his land, and if the latter exceed the former he has no valid claim to receive any damages, but must pay the difference.[15]

2. Proceedings to Award — a. Notice. The statutes usually require that, in proceedings to assess damages for land taken for a drain, notice shall be served on all persons interested in the same manner and with like effect as process in civil cases.[16]

b. Appeal.[17] The proper remedy of the landowner aggrieved by the award of the appraisers as to the damages is by appeal.[18]

3. Injuries From Defects or Torts. A county is not liable for a defect or want of efficiency in the plan of a drain, established pursuant to statute; neither is it liable for the negligence or failure of the contractor to whom the work of construction is let to perform such work in accordance with the plan adopted.[19] Nor is a county or a drainage district liable in damages for injuries caused by the tortious acts of its officers, but the remedy is against them personally;[20] although the trustees, under whose control and supervision the district is, may be enjoined if they act without authority or wilfully or maliciously.[21]

4. Injury to Drains.[22] Many of the statutes make it a misdemeanor for any

the construction of a drain, the damage caused by the consequent overflow of lands was presumed to be considered by the jury in assessing damages, and that it could not be recovered for independently of the jury's assessment.

The repair of ditches constructed for agricultural drainage is not cast upon the landowner by the Missouri statute, and as he is only required to keep the ditch open through his land, the statute does not contemplate that this shall be taken into consideration in assessing damages to his land. Lile *v.* Gibson, 91 Mo. App. 480.

15. Elgin, etc., R. Co. *v.* Hohenshell, 193 Ill. 159, 64 N. E. 1102; Winkelmann *v.* Drainage Dist., 24 Ill. App. 242; Pittsburgh, etc., R. Co. *v.* Machler, 158 Ind. 159, 63 N. E. 210; Wilson *v.* Talley, 144 Ind. 74, 42 N. E. 362, 1009.

The rule in Nebraska, however, is that where land is appropriated for the construction of a drain, the owner is entitled to damages equal to the value of the land so appropriated, without any deductions for benefits, and to any damages to his land not appropriated, in excess of benefits. Martin *v.* Fillmore County, 44 Nebr. 719, 62 N. W. 863.

16. Drainage Com'rs *v.* People, 26 Ill. App. 276.

Landowners outside district.— Under one statute, it has been held that the notice required to be given to all persons interested to appear and present their claims for damages applies to and affects those owners only whose lands are within the drainage district. Santa Fe Drainage Dist. *v.* Waeltz, 41 Ill. App. 575.

17. Appeal generally see Appeal and Error.

18. Thompson *v.* Polk County, 38 Minn. 130, 36 N. W. 267; People *v.* Wasson, 64 N. Y. 167; Chesbrough *v.* Putnam, etc., Counties, 37 Ohio St. 508. Where a drain was opened under a statute which gave no appeal from the award of the appraisers, and after such statute was amended, allowing an appeal to the circuit court, certain landowners applied for the appointment of appraisers to award their damages, it was held that an appeal would lie from their decision to the circuit court. Smeaton *v.* Austin, 82 Wis. 76, 51 N. W. 1090.

After filing assessment roll.— It has been held in Illinois that after the assessment roll has been filed with the clerk, the commissioners have no authority over it, and any credit allowed by them to landowners thereafter is invalid. Their proper remedy is appeal. People *v.* Chapman, 128 Ill. 496, 21 N. E. 507.

Right of appeal denied.— It was held in Miller *v.* Logan County, 3 Ohio Cir. Ct. 617, that an injunction would be allowed to restrain the construction of a drain, where it appeared that the assessment for damages for land taken was so made and entered as to deprive the landowner of his right of appeal to the probate court.

19. Dashner *v.* Mills County, 88 Iowa 401, 55 N. W. 468. See Holmes *v.* Calhoun County, 97 Iowa 360, 66 N. W. 145; Thompson *v.* Polk County, 38 Minn. 130, 36 N. W. 267.

Counties generally see Counties.

The county is not liable for damages caused by the overflowing of a drain primarily for the benefit of abutting owners, but constructed under its direction, and which has been obstructed by sediment. Nutt *v.* Mills County, 61 Iowa 754, 16 N. W. 536; Green *v.* Harrison County, 61 Iowa 311, 16 N. W. 136.

20. Hensley *v.* Reclamation Dist. No. 556, 121 Cal. 96, 53 Pac. 401; Elmore *v.* Drainage Com'rs, 135 Ill. 269, 25 N. E. 1010, 25 Am. St. Rep. 363; Havana Tp. *v.* Kelsey, 120 Ill. 482, 11 N. E. 256; Santa Fe Drainage Dist. *v.* Waeltz, 41 Ill. App. 575; McGillis *v.* Willis, 39 Ill. App. 311; Sels *v.* Greene, 88 Fed. 129, 81 Fed. 555.

21. Sels *v.* Greene, 88 Fed. 129.

22. Case for obstructing drain see Case, Action on, 6 Cyc. 691 note 31.

person to wilfully obstruct or injure a drain or divert the water from its proper channel, and also render such person liable for any damages accruing to any person by such act.[23] Injunction is the proper remedy to prevent the obstruction of a drain, and it need not appear that the party seeking such remedy has sustained actual damages.[24]

III. ASSESSMENT OR LEVY.

A. Constitutionality of Acts Authorizing — 1. In General. Legislative acts authorizing counties or certain designated officers to construct drains where necessary for the public health, welfare, or utility, and assess the cost of such construction upon the adjacent lands benefited thereby, have uniformly been held to be constitutional.[25]

2. Where Made by Private or Quasi-Public Corporations. In some jurisdictions it has been held that the legislature has no power to grant a private corpo-

23. Chambers *v.* Kyle, 67 Ind. 206; Ayres *v.* Laughlin, 62 Ind. 327; Freeman *v.* Weeks, 45 Mich. 335, 7 N. W. 904; Blessington *v.* Com., (Pa. 1888) 14 Atl. 416. See also Porter *v.* Armstrong, 129 N. C. 101, 39 S. E. 799.

Malice need not be shown in a prosecution under the Indiana act, making it a penal offense to unlawfully obstruct and injure a public ditch. Toops *v.* State, 92 Ind. 13.

Under the Indiana statute it has been held that an owner of land is not liable for obstructing a ditch thereon, unless it is wilfully done, and a person who has stood by and allowed his crops to be spoiled by reason of such obstruction, which he might easily have removed, has no remedy. Chambers *v.* Kyle, 87 Ind. 83.

24. Baskett *v.* Tippin, 66 S. W. 374, 23 Ky. L. Rep. 1895; Melrose *v.* Cutter, 159 Mass. 461, 34 N. E. 695. See Sidell, etc., Drainage Com'rs *v.* Sconce, 38 Ill. App. 120, where it was held that injunction will not lie to prevent cattle from passing through a public drain crossing land of the cattle-owner; the remedy being for damages, if the owner fails to repair the damages.

Injunction generally see INJUNCTIONS.

Where a drain is constructed by agreement of parties, under the Illinois act of July 1, 1809, which prohibits any person from interfering in any manner with it without the consent of the parties thereto, it has been held that an injunction will lie to prevent the owner of the land from filling up the drain without general consent. Parker *v.* Wilson, 66 Ill. App. 91.

25. *California.*— Holley *v.* Orange County, 106 Cal. 420, 39 Pac. 790; Hagar *v.* Yolo County, 47 Cal. 222.

Illinois.— Trigger *v.* Drainage Dist. No. 1, 193 Ill. 230, 61 N. E. 1114 (holding that under the drainage law the county court may in the first instance order the assessment of benefits to be made either by a jury or by the commissioners); Hyde Park *v.* Spencer, 118 Ill. 446, 8 N. E. 846; Moore *v.* People, 106 Ill. 376.

Indiana.— O'Reiley *v.* Kankakee Valley Drainage Co., 32 Ind. 169; Anderson *v.* Kerns Draining Co., 14 Ind. 199, 77 Am. Dec. 63.

Iowa.— Hatch *v.* Pottawattamie County, 43 Iowa 442.

Kansas.— Griffith *v.* Pence, 9 Kan. App. 253, 59 Pac. 677.

Kentucky.— Cypress Pond Draining Co. *v.* Hooper, 2 Metc. 350.

Michigan.— Auditor-Gen. *v.* Melze, 124 Mich. 285, 82 N. W. 886 (holding that an act allowing an assessment of ten per cent of the estimated cost of a drain to be added thereto for contingent expenses is not unconstitutional); Brady *v.* Hayward, 114 Mich. 326, 72 N. W. 233.

Minnesota.— *In re* Hegne-Hendrum Ditch No. 1, (1900) 82 N. W. 1094.

Nebraska.— Dodge County *v.* Acom, (1901) 85 N. W. 292.

New Jersey.— *In re* Pequest River, 39 N. J. L. 433; Tide-Water Co. *v.* Coster, 18 N. J. Eq. 518, 90 Am. Dec. 634. See Benjamin *v.* Bog, etc., Meadow Co., (Sup. 1902) 52 Atl. 215, holding that the New Jersey acts of April 1, 1875, and May 1, 1894, supplement to the act of 1811, are unconstitutional as directing that assessments be levied in proportion to the quantity of land, and not in proportion to the benefits received, where the parties to be charged are given no right to participate in the control of the undertaking.

New York.— Hartwell *v.* Armstrong, 19 Barb. 166.

North Dakota.— Erickson *v.* Cass County, 11 N. D. 494, 92 N. W. 841.

Ohio.— Sessions *v.* Crunkilton, 20 Ohio St. 349; Reeves *v.* Wood County, 8 Ohio St. 333.

Wisconsin.— Donnelly *v.* Decker, 58 Wis. 461, 17 N. W. 389, 46 Am. Rep. 637.

See 17 Cent. Dig. tit. "Drains," § 72 *et seq.*

When the damage or compensation for lands taken for drains has been constitutionally ascertained, the legislature can lawfully direct the mode of assessing damages on the property benefited thereby. People *v.* Nearing, 27 N. Y. 306.

Land not benefited by improvement.— It was held in Oliver *v.* Monona County, 117 Iowa 43, 90 N. W. 510, that the Iowa drainage law is not invalid for permitting the levying of an assessment on land which is not benefited by the improvement, where the land is located in the drainage district; the theory of the law being that the drainage will promote the public health and welfare and not

ration the right to construct drains without the owner's consent and assess them therefor.[26] While in other jurisdictions it has been held that it is not essential to the validity of an assessment for drainage that it should have been made by a municipal corporation.[27]

B. Nature of Benefits — 1. In General. In the assessments of benefits in drainage proceedings, the landowner should not be charged with general benefits which accrue to him as a member of the community, but only with such as are special.[28] The benefits for which an assessment may be made must relate to the betterment of the land for the purposes to which it may reasonably be put, and lands not benefited are not subject to assessment.[29]

2. Apportionment According to Special Benefits — a. In General. In levying assessments to cover the cost of the construction of a drain, each tract of land should be assessed its proportionate share of the entire cost, the amount of each share being governed by the amount of special benefits conferred by the drain upon each separate tract.[30]

merely render the lands of particular owners more valuable.

26. Cypress Pond Draining Co. *v.* Hooper, 2 Metc. (Ky.) 350; *In re* New Orleans Draining Co., 11 La. Ann. 338; Kean *v.* Driggs Drainage Co., 45 N. J. L. 91; Coster *v.* Tidewater Co., 18 N. J. Eq. 54.

27. Reclamation Dist. No. 108 *v.* Hagar, 66 Cal. 54, 4 Pac. 945; Moore *v.* People, 106 Ill. 376; Mound City Land, etc., Co. *v.* Miller, 170 Mo. 240, 70 S. W. 721, 94 Am. St. Rep. 727, 60 L. R. A. 190 (holding that the fact that an owner is rendered liable for an assessment against his will does not affect the validity of the law); Hagar *v.* Reclamation Dist. No. 108, 111 U. S. 701, 4 S. Ct. 663, 28 L. ed. 569.

In Illinois it has been held that the clause of the constitution of 1870, authorizing the passing of "laws permitting the owners or occupants of lands to construct drains or ditches, for agricultural or sanitary purposes," implies that the community whose property is to be taxed may have the right of election in the matter, and a law authorizing a drainage and the imposition of taxes or special assessments without any previous vote of the persons affected thereby is unconstitutional. Updike *v.* Wright, 81 Ill. 49.

It was formerly held in Illinois that a drainage company, being a private corporation, could not be empowered by the legislature to levy taxes or assessments, even on the lands within the district benefited by the drain. Harward *v.* St. Clair, etc., Drainage Co., 51 Ill. 130. See also Hessler *v.* Drainage Com'rs, 53 Ill. 105.

28. Skinkle *v.* Clinton Tp., 39 N. J. L. 656.

Special benefits are those which increase the value of the land, relieve it from a burden, or make it especially adapted to a purpose which enhances its value. Lipes *v.* Hand, 104 Ind. 503, 1 N. E. 871, 4 N. E. 160.

29. Beals *v.* James, 173 Mass. 591, 54 N. E. 245; People *v.* Jefferson County Ct., 56 Barb. (N. Y.) 136; Moore *v.* Barry, 30 S. C. 530, 9 S. E. 589, 4 L. R. A. 294.

In California it has been held that the question as to whether or not the mode of assessment in a reclamation district is in accordance with proper apportionment or equality of burden or benefit is for the consideration of the legislative department, in the absence of a palpable violation of private rights. Reclamation Dist. No. 108 *v.* Hagar, 66 Cal. 54, 4 Pac. 945.

In Illinois it has been held that not only the benefit to lands assessed by the drainage thereof, but also the benefit which the owner may derive by the drainage of a slough separating such land from other lands so as to render it unnecessary for him to bridge the slough to reach such other lands, may be considered by the jury on the trial of an appeal from an assessment of benefits to such owners' land by the proposed drainage. Spear *v.* Drainage Com'rs, 113 Ill. 632.

Where lands by reason of their situation are provided with sufficient natural drainage they are not liable for the cost and expense of a ditch necessary for the drainage of other lands, simply for the reason that the surface water of his lands naturally drain therefrom to and upon the lands requiring artificial drainage. Blue *v.* Wentz, 54 Ohio St. 247, 43 N. E. 493.

30. Moore *v.* People, 106 Ill. 376; Lee *v.* Ruggles, 62 Ill. 427; Lydecker *v.* Englewood Tp. Drainage, etc., Com'rs, 41 N. J. L. 154. See also Reclamation Dist. No. 108 *v.* West, 129 Cal. 622, 62 Pac. 272. So it has been held in New York that an assessment by the commissioners upon lands benefited by a drainage system at the same rate per acre, without making a personal examination thereof, or without regard to its quality or location, is erroneous. People *v.* Jefferson County Ct., 1 Thomps. & C. (N. Y.) 603. Where the estimate of the referee as to benefits accruing to a landowner from a ditch contemplated the full construction of such ditch, whereas it was never fully completed, it was held that the landowner could only be required to pay for the benefits conferred by the ditch as actually constructed. Peck *v.* Watros, 30 Ohio St. 590. Where the statute provided that the commissioners "shall jointly view and assess, upon each and every acre to be reclaimed or benefited thereby, a tax proportionate to the whole expense, and to the

b. Division of Lands For Assessment. An act providing that the commissioners should assess each tract of land its proportionate share of the entire cost of the construction of a drain was construed as not requiring a tract to be divided into the smallest legal subdivisions in making the assessments, but only as prohibiting the assessment of two or more disconnected tracts together.[31]

3. Omission of Lands Subject to Assessment. As a general rule the omission to assess a portion of the lands subject to assessment under the provisions of the drainage law renders the entire assessment made invalid.[32]

C. Property Liable — 1. Lands Outside Drainage District. Since, where landowners outside of a drainage district connect their drains with the district drains they are deemed to have voluntarily applied to be included in the district,[33] the drainage commissioners have jurisdiction to classify and assess such lands as other lands of the district, even where such lands are in another township.[34]

2. Townships and Villages. An assessment for the benefits for the construction of a drain may be made against a township[35] or a village[36] when the benefit is apparent.

3. Highways and Railroads. It has been held that drainage commissioners have jurisdiction to assess highways and railroads where they are specially benefited by the establishment of a drain.[37]

4. Public School Lands. It has been held in some jurisdictions that school property or school lands held in trust for school purposes are exempt from special assessments for drainage purposes as well as from general taxation.[38]

D. For Repairs — 1. Apportionment — a. In General. The assessments for repairs to a drain are to be levied in proportion to the benefits received there-

benefit which will result from such works," it was held that this provision was within the rule requiring an apportionment according to benefits. Reclamation Dist. No. 108 *v.* Hagar, 4 Fed. 366, 6 Sawy. 567.

In North Carolina, however, it has been held that in the passage of a general law the legislature is not bound to provide that the right of taxation for benefits shall be upon each landowner within the locality according to the benefit that it may be estimated he will receive, and therefore a drainage law providing for such taxation according to the number of acres owned by each individual benefited is valid. Brown *v.* Keener, 74 N. C. 714.

Total cost exceeding aggregate benefits.— Where the reported benefits by a proposed drain exceed the reported cost thereof and the several property-owners do not question the benefits assessed against them, remonstrants against the drain cannot, upon the ground that the expense of the drain will exceed the aggregate benefits, question the amount of the benefits, but only the cost of the drain. Earhart *v.* Farmers' Creamery, 148 Ind. 79, 47 N. E. 226.

31. Moore *v.* People, 106 Ill. 376.

32. Nevins, etc., Drainage Co. *v.* Alkire, 36 Ind. 189. Where the whole of the expense of making a drain and the cost of the proceedings are assessed upon one tract of land, leaving another tract benefited by the drain not charged with its proportionate share, such assessment is erroneous and will be set aside. Gilkerson *v.* Scott, 76 Ill. 509.

In New Jersey it has been held that lands lying outside the geological survey and the boundaries given in the notice of application for the appointment of drainage commissioners (act of March 3, 1871), cannot be assessed for benefits. *In re* Pequest River, 42 N. J. L. 553; *In re* Pequest River Drainage, 39 N. J. L. 197.

33. See *supra*, II, E, 5.

34. People *v.* Dornblazer, 143 Ill. 417, 32 N. E. 688.

35. Grimes *v.* Coe, 102 Ind. 406, 1 N. E. 735; Ingerman *v.* Noblesville Tp., 90 Ind. 393; Mason *v.* Hazelton Tp., 82 Mich. 440, 46 N. W. 784; Bryant *v.* Robbins, 70 Wis. 258, 35 N. W. 545.

36. It has been held that lands in an incorporated village may be assessed by the trustees of a township in which the village is situated for the construction or enlargement of a drain outside the village limits. And the fact that the village has a board of health will make no difference. Kent *v.* Perkins, 36 Ohio St. 639.

37. Heffner *v.* Cass, etc., Counties, 193 Ill. 439, 62 N. E. 201, 58 L. R. A. 353; Illinois Cent. R. Co. *v.* East Lake Fork Special Drainage Dist., 129 Ill. 417, 21 N. E. 925; Colfax *v.* East Lake Fork Special Drainage Dist., 127 Ill. 581, 21 N. E. 206; Lake Erie, etc., R. Co. *v.* Cluggish, 143 Ind. 347, 42 N. E. 743; Baltimore, etc., R. Co. *v.* Ketring, 122 Ind. 5, 23 N. E. 527.

In Kansas when a drainage ditch drains and benefits a public road, the county through its clerk is liable for a proportionate share of the cost of construction. Sargent *v.* Burch, 26 Kan. 581.

38. People *v.* School Trustees Tp. 19, 118 Ill. 52, 7 N. E. 262; Edgerton *v.* Huntington School Tp., 126 Ind. 261, 26 N. E. 156; Erickson *v.* Cass County, 11 N. D. 494, 92 N. W.

from, and not merely in proportion to the amount assessed for the construction of the drain.[39]

b. Lands Not Assessed For Construction. It is expressly provided by statute in some states that lands not assessed for the construction of a drain cannot be assessed for its repairs.[40]

2. Assessments in Excess of Benefits — a. General Rule. The general rule is that the expense of construction of a drain cannot be assessed against particular lands to an amount in excess of the benefits received by such land,[41] and an assessment upon a tract of land in excess of the benefits received is void as to such excess.[42]

b. Where They Exceed Estimated Cost. It has been held in one jurisdiction that in levying an assessment for drains a drainage company is not limited to the estimate of the probable cost of the work required to be made by their charter, provided the total assessments are within the benefits conferred;[43] and in another that the fact that an assessment for the benefits conferred by a drain exceeds the value of the land so assessed does not invalidate the law or assessment made thereunder.[44]

3. Where Amount Is Fixed at Organization of District. It has been held under one statute that where an annual assessment for repairs is made at the organization of a district and confirmed, the court has no power thereafter to enlarge such assessment, although it is less than the maximum amount authorized by the statute.[45]

E. Time of Assessment — 1. Instalments. Where the statute authorizes the drainage commissioners to levy and enforce assessments from time to time as the work of construction progresses, they have authority to exercise a reasonable discretion in levying assessments, and the exercise of such power is not inhibited until the money is required to pay for work actually done.[46]

841. See, however, State *v.* Henry, 28 Wash. 38, 68 Pac. 368, holding that under the Washington act (Sess. Laws (1895), p. 142), providing for the construction of drainage ditches, and that all state, county, and school lands shall be subject thereto, the school lands cannot be excluded from the assessment for the costs of the improvement.

39. Parke County Coal Co. *v.* Campbell, 140 Ind. 28, 39 N. E. 149, 558; Morrow *v.* Geeting, 15 Ind. App. 358, 41 N. E. 848, 44 N. E. 59.

40. Scott *v.* Stingley, 132 Ind. 378, 31 N. E. 953.

Where such lands are benefited.—But it has been held that where lands are benefited by the reopening and repairs to a drain, such lands may be assessed therefor, although they were not assessed for the original location and establishment of such drain. Yeomans *v.* Riddle, 84 Iowa 147, 50 N. W. 886.

41. Winkelmann *v.* Moredock, etc., Drainage Dist., 170 Ill. 37, 48 N. E. 715; Briggs *v.* Union Drainage Dist. No. 1, 140 Ill. 53, 29 N. E. 721; Illinois Cent. R. Co. *v.* East Lake Fork Special Drainage Dist., 129 Ill. 417, 21 N. E. 925; People *v.* Myers, 124 Ill. 95, 16 N. E. 89; Kean *v.* Driggs Drainage Co., 45 N. J. L. 91; Tide-Water Co. *v.* Coster, 18 N. J. Eq. 518, 90 Am. Dec. 634. See Moore *v.* Barry, 30 S. C. 530, 9 S. E. 589, 4 L. R. A. 294.

If a court should compel an arbitrary sum to be assessed on the lands of a district, regardless of the question of benefits, its action could not be sustained. Hosmer *v.* Hunt Drainage Dist., 135 Ill. 51, 26 N. E. 587.

In New Jersey it has, however, been held that an assessment for drains does not have to be limited in amount to the actual benefit received from the drain by the land so assessed in order to be constitutional. *In re* Pequest River, 42 N. J. L. 553; Britton *v.* Blake, 35 N. J. L. 208.

42. People *v.* Myers, 124 Ill. 95, 16 N. E. 89.

43. *In re* New Orleans Draining Co., 11 La. Ann. 338.

44. *In re* Tuthill, 50 N. Y. Suppl. 410.

45. Hammond *v.* Carter, 161 Ill. 621, 44 N. E. 274.

46. Buckles *v.* State, 131 Ind. 600, 31 N. E. 86; Racer *v.* State, 131 Ind. 393, 31 N. E. 81; Heefgen *v.* State, 17 Ind. App. 537, 47 N. E. 28; *In re* Pequest River, 39 N. J. L. 433. See also Hoagland *v.* Wurts, 41 N. J. L. 175.

Where benefit is evident.— Special assessments for the drainage of lands of individuals to be made in advance of the completion of the work can be made only where the benefit is demonstrably certain, and not where the intended benefits are speculative and doubtful.

Creating indebtedness in advance.— It has been held in Illinois that drainage commissioners have no power to create an indebtedness in advance for the repairs to a drain, and then levy an assessment for the purpose of meeting it. Winkelmann *v.* Moredock, etc., Drainage Dist., 170 Ill. 37, 48 N. E. 715;

2. When Work Is Completed. In some jurisdictions it has been held that assessments to defray the expenses of the construction of a drain cannot be made until the work is completed and the damages are ascertained.[47]

3. For Repairs. The rule seems to be that an assessment for the repair of a drain should not be made until it is completed and accepted.[48]

F. Additional Assessments. Under most of the drainage acts the commissioners are not confined to one assessment, and if the first assessment proves insufficient to complete the drain additional assessments may be ordered;[49] but in making subsequent assessments, the previous assessments should be considered, and in no case should the aggregate amount exceed the benefits to the lands assessed.[50]

G. Jurisdiction — 1. Assessment by Jury. Where the statute prescribes that assessments for annual repairs shall be made by jury, the court has no jurisdiction to make such assessment without the intervention of a properly impaneled jury.[51]

2. Acquired by Notice. Under some statutes it is held that jurisdiction to assess highways for special benefits conferred by the construction of a drain is acquired by service of notice of the proceedings on the highway commissioners.[52]

H. Notice of Assessment. The nature and necessity of the notice[53] to be

First Nat. Bank *v.* Union Dist. No. 1, 82 Ill. App. 626.

47. People *v.* Haines, 49 N. Y. 587.

In New York it has been held that drainage commissioners cannot collect an assessment for the expense of a drain until they have acquired title to the required lands, and that a mere license from landowners to construct the drain is insufficient. Olmsted *v.* Dennis, 77 N. Y. 378. Although it has been held that land damages need not necessarily be paid before the assessment is levied. Matter of Swan, 35 Hun (N. Y.) 625.

48. Under one statute it has been held that a county surveyor has no jurisdiction to make assessments for the repair of a drain until it is completed, accepted, and approved by the court. Morrow *v.* Geeting, (Ind. App. 1894) 37 N. E. 739. This decision was placed on the ground that the surveyor had no jurisdiction over the drain until it was completed and accepted.

When there is delay.— Where the statute fails to provide within what time after making repairs the trustees shall make assessments therefor, it has been held that the lapse of a considerable length of time after the completion of such repairs will not invalidate the assessment, if the rights of parties concerned or of third parties have not been affected thereby. So held in Geiger *v.* Bradley, 117 Ind. 120, 19 N. E. 760, where there was a delay of eighteen months.

49. *California.*— Hager *v.* Yolo County, 51 Cal. 474.

Illinois.— Reynolds *v.* Milk Grove Special Drainage Dist., 134 Ill. 268, 25 N. E. 516; Boul *v.* People, 127 Ill. 240, 20 N. E. 1; People *v.* Myers, 124 Ill. 95, 16 N. E. 89; Havana Tp. *v.* Kelsey, 120 Ill. 482, 11 N. E. 256; Moore *v.* People, 106 Ill. 376. See, however, Ahrens *v.* Minnie Creek Drainage Dist., 170 Ill. 262, 48 N. E. 971, holding that the statute authorizing additional assessments for drainage purposes, where a prior assessment has proved inadequate, does not authorize a reassessment to reimburse the drainage commissioners for moneys advanced by them to pay the excess of the expense of the work of the district above the amount of the first assessment.

Indiana.— Rogers *v.* Voorhees, 124 Ind. 469, 24 N. E. 374.

Missouri.— State *v.* Holt County Ct., 135 Mo. 533, 37 S. W. 521.

Wisconsin.— Muskego *v.* Drainage Com'rs, 78 Wis. 40, 47 N. W. 11.

See 17 Cent. Dig. tit. "Drains," § 72 *et seq.*

Assessment in main and subdistrict.— Under the present Illinois statute land is liable to assessment in both main and subdistricts. People *v.* Keener, 194 Ill. 16, 61 N. E. 1069.

50. Hosmer *v.* Hunt Drainage Dist., 135 Ill. 51, 26 N. E. 587; Havana Tp. *v.* Kelsey, 120 Ill. 482, 11 N. E. 256.

51. Robeson *v.* People, 161 Ill. 176, 43 N. E. 619.

52. Colfax *v.* East Lake Fork Special Drainage Dist., 127 Ill. 581, 21 N. E. 206.

53. Some of the statutes required that personal notice shall be given of an assessment, or notice by publication in a newspaper published in the county where the lands are situated, a specified time before payment is due, stating when and where such payment shall be made. Hayes *v.* State, 96 Ind. 284.

Notice of second assessment.— Under a statute requiring notice of an assessment, it has been held that no notice is necessary of a second assessment occasioned by a change of plans, when such change becomes necessary to protect all of the lands assessed. Reynolds *v.* Milk Grove Special Drainage Dist., 134 Ill. 268, 25 N. E. 516; People *v.* Chapman, 127 Ill. 387, 19 N. E. 872.

Notice of assessment for repairs.— In Iowa it is held that assessments for repairs of a drain are in the nature of a tax, and that it is not necessary in the absence of a statutory agreement that notice of the levy be given to the landowners affected. Yeomans *v.* Riddle, 84 Iowa 147, 50 N. W. 886.

Waiver of notice.— Taking an appeal from

given of an assessment, as well as its requisites,[54] are usually prescribed by statute.

I. Assessment Roll or Return — **1. List of Lands Affected.** Some statutes require that the appraisers should show in their schedule that they have included therein all lands the intrinsic or market value of which will in their judgment be liable to be affected by the proposed drain.[55]

2. Description of Lands. It has been held that the assessment roll of the commissioners or appraisers must describe the land benefited with such reasonable certainty as will make the record of it notice to all affected thereby.[56] A description of land in a drainage assessment by well understood abbreviations is not bad for uncertainty.[57]

3. Recital of Benefits. Where the assessment roll contains the amount of the charge assessed against each tract, it is not necessary for the assessment report to recite that the assessments were made proportionate to the resulting benefits.[58]

the decision of the commissioners in the matter of a special assessment is a waiver of notice of the meeting of the commissioners, since the appellant is thereby given an opportunity to be heard and a right to a trial on the merits. Kilgour *v.* Drainage Com'rs, 111 Ill. 342.

54. Notice is sometimes required to be given of the time and place of letting contracts, for the construction of a drain must contain a statement that at such times the assessment of benefits will be subject to review, and an assessment without such notice is void. Cook *v.* Covert, 71 Mich. 249, 39 N. W. 47.

Partial notification.— Under a statute requiring notice of assessment to be given to all parties whose lands are affected thereby, it has been held that failure to notify a party interested in an assessment will not invalidate the assessments of other parties properly notified. Grimes *v.* Coe, 102 Ind. 406, 1 N. E. 735.

Where the statute failed to provide any mode by which the party assessed should have notice of the proceeding and an opportunity to object to the amount charged against his land, this was held not to render the statute unconstitutional, since the owner might contest the assessment in the action to collect it. Reclamation Dist. No. 108 *v.* Evans, 61 Cal. 104.

55. Beck *v.* Tolen, 62 Ind. 469; Etchison Ditching Assoc. *v.* Jarrell, 33 Ind. 131.

Where no lands are injured by the construction of a drain the appraisers may so declare in their return, and if in such case the schedule returned contained all the lands benefited it will be sufficient. Pigeon Creek Draining Assoc. *v.* Lagrange, 41 Ind. 272.

Where the schedule merely included certain lands which it was alleged would be benefited, without showing that they were all the lands that would be benefited, and without showing whether any lands would be injured or not, it was held that such appraisement was invalid. Bannister *v.* Grassy Fork Ditching Assoc., 52 Ind. 178.

56. Drake *v.* Schoenstedt, 149 Ind. 90, 48 N. E. 629 (holding that it was proper when only two acres of a forty-acre tract were benefited by a drain, to assess such benefit against and describe the whole tract); Ross *v.* State, 119 Ind. 90, 21 N. E. 345; Boatman *v.* Macy, 82 Ind. 490; Eel River Draining Assoc. *v.* Topp, 16 Ind. 242; Atwell *v.* Zeluff, 26 Mich. 118.

Description by legal subdivisions.— Under a statute requiring assessment lists to contain a description by legal subdivisions, swamp-land surveys, or natural boundaries, it has been held that a description naming the adjoining proprietors on the respective boundaries is insufficient. Swamp Land Reclamation Dist. No. 407 *v.* Wilcox, 75 Cal. 443, 17 Pac. 241 [*affirming* (1887) 14 Pac. 843]. And under this statute it has been held that the land need not be described in the smallest legal subdivisions. Lower Kings River Reclamation Dist. No. 531 *v.* McCullah, 124 Cal. 175, 56 Pac. 887.

Incomplete schedule.— It has been held in Indiana that, although the description of a tract of land in the appraisers' schedule was incomplete, yet where it clearly referred to the description of such tract in the petition for the establishment of the drain, which was complete, the assessment would not thereby be invalidated. Bate *v.* Sheets, 50 Ind. 329.

57. Frazer *v.* State, 106 Ind. 471, 7 N. E. 203.

In California it has been held that the fact that in the description of land in the assessment list the abbreviations used are not those ordinarily used will not vitiate the description, if they are uniformly used in the same manner in the list, and must have been understood by all taxpayers who examined them. Lower Kings River Reclamation Dist. No. 531 *v.* Phillips, 108 Cal. 306, 39 Pac. 630, 41 Pac. 335.

Sufficient description.— An assessment returned by appraisers which described the land assessed as "S. 1/2 S. E., Sec. 27, T. 27, R. 6 E., 20 Acres," was held to be a sufficient description upon which to base a judgment for the amount of the assessment. Etchison Ditching Assoc. *v.* Jarrell, 33 Ind. 131. See also Smith *v.* State, 8 Ind. App. 661, 36 N. E. 298.

58. Swamp Land Reclamation Dist. No. 407 *v.* Wilcox, 75 Cal. 443, 17 Pac. 241 [*affirming* (1887) 14 Pac. 843], for in the absence of evidence to the contrary this will be presumed.

4. Amendment and Surplusage. In a proper case the assessment roll may be amended,[59] and immaterial statements therein may be regarded as surplusage.[60]

J. Remedy of Parties Seeking Relief From Assessment — 1. Waiver and Estoppel. An objection as to the classification of lands in a drainage district should be made to the commissioners, and comes too late on application for judgment for unpaid special assessments; such objection is then deemed to have been waived.[61]

2. Collateral Attack. The decision of the commissioners in making assessments and determining what property is benefited is conclusive as against a collateral attack on application for judgment for non-payment of the assessment.[62]

3. Application to Court of Equity. So irregularities[63] in a drainage assessment which do not affect the jurisdiction of the tribunal imposing it are not sufficient to warrant the interference of a court of equity;[64] the statutory remedies of appeal and quo warranto being the proper methods of testing such alleged errors.[65]

Balance of benefits over damages.— Under an act directing the jury to assess the damage and benefits against each tract separately in the proportion in which such tract will be damaged or benefited, it has been held that it is not required that the amount of each shall be entered in the roll, but that it is only necessary that the balance or excess of one over the other be carried forward to a column prepared for that purpose. Huston *v.* Clark, 112 Ill. 344.

59. Huston *v.* Clark, 112 Ill. 344, where it was held that the amendment of the assessment roll by the foreman of the jury after the jury has separated, correcting an obvious clerical error, will not invalidate the assessment. See also McCaleb *v.* Coon Run Drainage, etc., Dist., 190 Ill. 549, 60 N. E. 898.

60. Under an act empowering a jury impaneled under said act to assess benefits and damages, where the jury reported that only a portion of a certain tract of land was benefited, it was held that such statement was outside the jury's power, and would be treated as a mere nullity, and would not invalidate the assessment. Rickert *v.* Moredock, etc., Drainage Dist. No. 1, (Ill. 1891) 27 N. E. 86; Gauen *v.* Moredock, etc., Drainage Dist. No. 1, 131 Ill. 446, 23 N. E. 633.

61. People *v.* Chapman, 127 Ill. 387, 19 N. E. 872.

The rule of estoppel, however, does not apply where the surveyor or other officer has no jurisdiction to levy the assessment, for his acts are not then merely voidable but void. Morrow *v.* Geeting, (Ind. 1894) 37 N. E. 739.

62. *California.*— People *v.* Hagar, 66 Cal. 59, 4 Pac. 957.

Illinois.— Tucker *v.* People, 156 Ill. 108, 40 N. E. 451; Wabash East R. Co. *v.* Lake Erie Fork Special Drainage Dist., 134 Ill. 384, 25 N. E. 781, 10 L. R. A. 285; Moore *v.* People, 106 Ill. 376.

Indiana.—Terre Haute, etc., R. Co. *v.* Soice, 128 Ind. 105, 27 N. E. 429; State *v.* Thompson, 109 Ind. 533, 10 N. E. 305; Sunier *v.* Miller, 105 Ind. 393, 4 N. E. 867; Foster *v.* Paxton, 90 Ind. 122; Cox *v.* Bird, 88 Ind. 142; Powell *v.* Clelland, 82 Ind. 24; Moffit *v.* Medsker Draining Assoc., 48 Ind. 107.

Michigan.— Brady *v.* Hayward, 114 Mich. 326, 72 N. W. 233.

New Jersey.— Craig *v.* Mackey, 48 N. J. L. 363, 7 Atl. 494.

Wisconsin.— Stone *v.* Little Yellow Drainage Dist., 118 Wis. 388, 95 N. W. 405.

See 17 Cent. Dig. tit. "Drains," § 83.

Where no opportunity was given to be heard.— A landowner may set up as a defense to an action to enforce a drainage assessment the fact that the assessment is unjust or excessive, provided he was given no opportunity to make such defense when the assessment was made. Such an attack on the assessment is only apparently not really collateral. Lower Kings River Reclamation Dist. No. 531 *v.* Phillips, 108 Cal. 306, 39 Pac. 630, 41 Pac. 335; Payson *v.* People, 175 Ill. 267, 51 N. E. 588; Robeson *v.* People, 161 Ill. 176, 43 N. E. 619.

In California, under a statute requiring the board to jointly view and assess the land, where the board's report stated that they had jointly viewed and assessed the land, when in fact they were not all present, it was held that this recital was not conclusive of the question, if the statute did not require them to thus report, nor even *prima facie* evidence of the fact, but that the assessment might be attacked in a collateral action to recover the tax. People *v.* Hagar, 49 Cal. 229. See also Swamp Land Dist. No. 307 *v.* Gwynn, 70 Cal. 566, 12 Pac. 462.

63. Irregularities.—Neither an irregularity in the assessment nor the failure of the surveyor to make out a certified copy of the assessment can be made available in a suit to enjoin its collection. Davis *v.* Lake Shore, etc., R. Co., 114 Ind. 364, 16 N. E. 639.

64. A court of equity will not review the assessment of benefits for a county drain, unless fraud or collusion on the part of the commissioners is alleged. Miller *v.* Logan County, 3 Ohio Cir. Ct. 617. And see, generally, Equity.

65. Morrell *v.* Union Drainage Dist. No. 1, 118 Ill. 139, 8 N. E. 675; Keigwin *v.* Drainage Com'rs, 115 Ill. 347, 5 N. E. 575; Dunkle *v.* Herron, 115 Ind. 470, 18 N. E. 12; Wilson *v.* Woolman, (Mich. 1903) 94 N. W. 1076.

4. Appeal[66] **— a. Right in General.** In some jurisdictions it has been held that a statute providing for the *ex parte* assessment and apportionment of the cost of drainage repairs upon the lands benefited, without any right of appeal or hearing to the landowner so assessed, is unconstitutional.[67] In other jurisdictions, however, it has been held that it is not essential to the validity of an act to authorize the drainage of lands that the landowners should be given the right of appeal from assessments.[68]

b. Questions to Be Raised. Under some statutes giving an appeal from assessments of benefit on lands drained, it has been held that the only question which can be considered on appeal or review is whether the assessment is greater than the benefit accruing to the land in question.[69] So also it has been held that the appellate court can hear evidence showing that the ditch was not repaired on the line designated in the original specifications, but on a different one.[70]

5. Certiorari.[71] It has been held in some jurisdictions that certiorari is a proper method of testing the legality of an attempted tax levy by the board of supervisors for the construction of a drain,[72] and in others that certiorari does not lie to review assessments made upon lands by drainage commissioners if they have proceeded on no erroneous principle and have violated no property rights.[73]

K. Proceedings in Review — 1. Parties. Where the statute provides that drainage assessments shall be made by the county surveyor, and appeals therefrom prosecuted against him, it has been held that the county is the real party at interest, and is entitled to defend in the name of the surveyor, or to employ counsel to appear for him and resist the appeal.[74]

66. Appeal generally see Appeal and Error.

67. Tyler *v.* State, 83 Ind. 563; Campbell *v.* Dwiggins, 83 Ind. 473.

In Illinois it has been held that an appeal lies from an assessment under such a statute, although not expressly given by it. Howard *v.* Drainage Com'rs, 126 Ill. 53, 18 N. E. 313.

Judgment of county court conclusive.— Under the Illinois statutes the judgment of the county court confirming assessments of benefits and damages for drainage purposes is conclusive, and an objection that an assessment is in excess of the estimated cost of such work cannot be raised after judgment of the county court. Hammond *v.* People, 169 Ill. 545, 48 N. E. 573. See, however, Havana Tp. *v.* Kelsey, 120 Ill. 482, 11 N. E. 256, holding that an appeal lies to the supreme court from the judgment of the county court in a proceeding to confirm a special assessment made by a township drainage district.

68. *Iowa.*— Oliver *v.* Monona County, 117 Iowa 43, 90 N. W. 510; Lambert *v.* Mills County, 58 Iowa 666, 12 N. W. 715, where it was held that in the absence of statutory provision for an appeal the supervisors have final jurisdiction to determine what lands are subject to assessment, and no appeal lies to review their discretion.

Michigan.—Gillett *v.* McLaughlin, 69 Mich. 547, 37 N. W. 551.

New Jersey.— Britton *v.* Blake, 36 N. J. L. 442.

North Dakota.— Turnquist *v.* Cass County Drain Com'rs, 11 N. D. 514, 92 N. W. 852.

Ohio.— Bowersox *v.* Seneca County Com'rs, 20 Ohio St. 496.

69. Sisson *v.* Drainage Com'rs, 163 Ill. 295, 45 N. E. 215. *Compare* Markley *v.* Rudy, 115 Ind. 533, 18 N. E. 50, holding that such a statute does not preclude an issue as to the disqualification of the surveyor by reason of interest or relationship. Under such statutes, however, inquiry may be had on appeal into the question as to whether appellant's lands are subject to any assessment at all. Goff *v.* McGee, 128 Ind. 394, 27 N. E. 754; Kirkpatrick *v.* Taylor, 118 Ind. 329, 21 N. E. 20.

70. Taylor *v.* Brown, 127 Ind. 293, 26 N. E. 822.

71. Certiorari generally see Certiorari.

72. Shepard *v.* Johnson County, 72 Iowa 258, 33 N. W. 770.

73. People *v.* Haines, 3 Thomps. & C. (N. Y.) 224 (where it was held that the proper remedy was appeal to the county court within the time designated by the statute); State *v.* King County Super. Ct., 31 Wash. 32, 71 Pac. 601. See also People *v.* Jefferson County Ct., 1 Thomps. & C. (N. Y.) 603. On certiorari to commissioners in drainage proceedings, where the commissioners had only assessed the benefits, it was held that the question of the right of the relator to receive compensation or damages for land taken for the drain could not be discussed. People *v.* Nearing, 27 N. Y. 306.

Amount of assessment.— It has been held in Massachusetts that the amount of an assessment for a drain cannot be considered on an application for a writ of certiorari to review the proceedings of the selectmen in making such assessment, but should be by a petition for an abatement. Beals *v.* James, 173 Mass. 591, 54 N. E. 245.

74. Stingley *v.* Nichols, 131 Ind. 214, 30 N. E. 34.

Parties defendant.— It has been held in Michigan that on appeal to the township board from assessments of the drain commissioner of one county, the drain commis-

2. Presumptions and Burden of Proof. The proper presumptions will be indulged in favor of the legality and regularity of the assessment.[75] And on an appeal from the confirmation of an assessment for the construction of a drain, the burden of proof is on the appellant, and where the evidence is conflicting the appellate court will not disturb the findings of the lower court.[76]

3. Pleadings. Under one statute it has been held that on appeal by a landowner from the decision of the commissioners in assessing his lands no issues can be made by pleadings.[77]

4. Trial De Novo. Under some statutes the trial of an appeal from the confirmation of an assessment is a trial *de novo*.[78]

5. Decision. Where on appeal assessments are found to be based on an erroneous method or rule of assessment, it is not necessary to set aside the assessment entirely, but the court may order a reassessment.[79]

IV. Collection and Enforcement of Assessments.

A. Lien. An assessment upon lands for the construction of a drain as approved and confirmed by the court constitutes and becomes a lien on the lands so assessed.[80] In some states this lien upon the approval and confirmation by the

sioner of another county, who acted in conjunction with the former in laying out the drain, is not a necessary party. Thomas *v.* Walker Tp., 116 Mich. 597, 74 N. W. 1048.

75. Thus where assessments levied for repairs to a drain are less than the amounts actually paid for the repairs, the appellate court will presume in the absence of evidence to the contrary that appellants' lands were not assessed in an amount greater than their just proportion for such repairs. Scott *v.* Stringley, 132 Ind. 378, 31 N. E. 953. See also Erickson *v.* Cass County, 11 N. D. 494, 92 N. W. 841. And where on appeal in drainage proceedings the column in the assessment roll for damages contains no entry of any damages, it will be presumed that the column showing benefits shows only benefits in excess of damages. Huston *v.* Clark, 112 Ill. 344.

76. People *v.* Keener, 194 Ill. 16, 61 N. E. 1069; Campbell *v.* Parker, 83 Ind. 449.

New Jersey.— It has been held that objections to assessments made by the commissioners must be supported by proof of such error on their part as to indicate bias or fraud. *In re* Pequest River, 42 N. J. L. 552.

77. Campbell *v.* Parker, 83 Ind. 449; Baker *v.* Arctic Ditchers, 54 Ind. 310; Arctic Ditchers *v.* Coon, 47 Ind. 201; Foster's Branch Ditching Co. *v.* Makepeace, 45 Ind. 226; Kellogg *v.* Price, 42 Ind. 360; Romack *v.* Hobbs, 13 Ind. App. 138, 41 N. E. 391.

78. And the introduction of the assessment roll in evidence makes out a *prima facie* case in favor of its confirmation and it is then necessary for the objectors to introduce evidence to impeach such assessment. Trigger *v.* Drainage Dist. No. 1, 193 Ill. 230, 61 N. E. 1114; McCaleb *v.* Coon Run Drainage, etc., Dist., 190 Ill. 549, 60 N. E. 898; Briggs *v.* Union Drainage Dist. No. 1, 140 Ill. 53, 29 N. E. 721; Gilkerson *v.* Scott, 76 Ill. 509.

In Indiana, however, it has been held that on appeal to the circuit court in a proceeding to assess benefits for the construction of a drain, the report of the appraisers is not admissible. Beck *v.* Pavey, 69 Ind. 304; McKinsey *v.* Bowman, 58 Ind. 88.

Where the appellant adduced convincing evidence that his land was in no wise benefited by a drain, but had theretofore been drained by appellant at his own expense, and the only showing to the contrary is the report of the commissioners, unaccompanied by any evidence to sustain it, the court is bound to review such assessment. *In re* New York Cent., etc., R. Co., 5 Silv. Supreme (N. Y.) 390, 8 N. Y. Suppl. 247.

79. People *v.* Jefferson County Ct., 56 Barb. (N. Y.) 136. See also Scholtz *v.* Ely, 123 Mich. 541, 82 N. W. 237, holding that the board of review is without power to reduce the apportionment of an appealing township, without adding a corresponding increase to the apportionment of other townships traversed by the drain.

Changing drainage district boundaries.—It has been held in Michigan, under a statute empowering the township board to review the action of the commissioner in making assessments, that such board has no power to change the boundaries of the drainage district, and to exclude land which the drainage commissioner has determined were benefited. Thomas *v.* Walker Tp., 116 Mich. 597, 74 N. W. 1048.

80. People *v.* Hagar, 52 Cal. 171; Hammond *v.* People, 169 Ill. 545, 48 N. E. 573; People *v.* Weber, 164 Ill. 412, 45 N. E. 723; Samuels *v.* Drainage Com'rs, 125 Ill. 536, 17 N. E. 829; Kennedy *v.* State, 124 Ind. 239, 24 N. E. 748; Cook *v.* State, 101 Ind. 446; Hoefgen *v.* State, 17 Ind. App. 537, 47 N. E. 28. See Weinreich *v.* Hensley, 121 Cal. 647, 54 Pac. 254.

Under an Indiana statute, providing that on failure of a landowner to perform his allotment of work on the repair of a public drain, the township trustee shall perform the work and certify the costs to the auditor, etc., it has been held that the claim becomes a lien on its entry on the tax duplicate, although

court of the assessment attaches from the date of filing the petition for the drain, provided such lands are named in the petition.[81]

B. Priorities. Under some statutes a mortgage executed by a person not a party to and having no notice of drainage proceedings before the approval of the assessments by the court will take precedence thereof.[82] While under other statutes it is held that, drainage assessments being liens upon each and every tract of land assessed, such liens are superior to any preëxisting encumbrances.[83]

C. Payment. Some of the statutes provide that the drainage commissioners may require assessments made in aid of the construction of a drain to be paid in instalments.[84] It has been held under one statute that an assessment for the drainage of swamp-lands may properly be made payable in gold coin.[85]

D. Interest on Delinquent Assessment. Most of the statutes fail to provide an interest penalty for the non-payment of drainage assessments.[86]

E. Assessments Illegally Collected. It has been held in one jurisdiction that an action will not lie against a township for the recovery of illegal drain assessments paid to its treasurer under protest.[87]

F. Actions and Summary Remedies — 1. Right of Action — a. In General. The lien of a drainage assessment may be enforced by suit in the manner provided by statute for the enforcement of liens arising from other taxes.[88]

b. Conditions Precedent. It has been held in some jurisdictions that the completion of the drain is not a condition precedent to the right to collect assessments therefor,[89] and that it is not necessary that an estimate of the final cost of completing the work contemplated should be made before suit is brought.[90]

not expressly so declared by statute. Beatty *v.* Pruden, 13 Ind. App. 507, 41 N. E. 961.

Personal liability.— As a general rule the drainage acts do not create a personal liability against the landowner; the right to enforce the assessment is confined to the land assessed. State *v.* Ætna L. Ins. Co., 117 Ind. 251, 20 N. E. 144.

81. State *v.* Loveless, 133 Ind. 600, 33 N. E. 622; Kennedy *v.* State, 124 Ind. 239, 24 N. E. 748; Louisville, etc., R. Co. *v.* State, 122 Ind. 443, 24 N. E. 350; Cook *v.* State, 101 Ind. 446. See Ranney *v.* Burthe, 15 La. Ann. 343.

Under a former Indiana statute the lien of an assessment attached from the date of filing the assessment in the recorder's office. Chase *v.* Arctic Ditchers, 43 Ind. 74.

82. Even though on approval the lien is made to relate back to the filing of the petition. Pierce *v.* Ætna L. Ins. Co., 131 Ind. 284, 31 N. E. 68; State *v.* Ætna L. Ins. Co., 117 Ind. 251, 20 N. E. 144; Cook *v.* State, 101 Ind. 446. Where a mortgage was executed and recorded prior to the filing of the petition for a drain, it was held that the mortgagee upon the foreclosure of the mortgage acquired title free from the lien of the drain assessment. State *v.* Loveless, 133 Ind. 600, 33 N. E. 622.

The lien of the state for taxes is paramount and superior to the lien of a ditch assessment. McCollum *v.* Uhl, 128 Ind. 304, 27 N. E. 152, 725.

83. Wabash East R. Co. *v.* East Lake Fork Drainage Dist., 134 Ill. 384, 25 N. E. 781, 10 L. R. A. 285.

84. Not exceeding a given per cent per month at such times as they may fix after due notice. People *v.* Weber, 164 Ill. 412, 45 N. E. 723; Hackett *v.* State, 113 Ind. 532, 15 N. E. 799.

85. People *v.* Hagar, 52 Cal. 171.

86. And it has generally been held that delinquent assessments do not bear interest. People *v.* Hagar, 52 Cal. 171; Bump *v.* Jepson, 106 Mich. 641, 64 N. W. 509; Jackson Fire-Clay, etc., Co. *v.* Snyder, 93 Mich. 325, 53 N. W. 359.

Rule in Illinois.— In Illinois, under the act of 1879, section 31, as amended by the act of 1885, making assessments for benefits payable in instalments, such assessments draw interest from confirmation until paid, where an assessment is made payable in instalments, interest on all instalments being allowed from date of confirmation of the assessment. People *v.* Weber, 164 Ill. 412, 45 N. E. 723.

87. Taylor *v.* Avon Tp., 73 Mich. 604, 41 N. W. 703; Camp *v.* Algansee Tp., 50 Mich. 4, 14 N. W. 672; Dawson *v.* Aurelius Tp., 49 Mich. 479, 13 N. W. 824.

88. Skelton *v.* Sharp, (Ind. Sup. 1903) 67 N. E. 535; Daggy *v.* Ball, 7 Ind. App. 64, 34 N. E. 246; State *v.* Angert, 127 Mo. 456, 30 S. W. 118. See also Hammond *v.* People, 169 Ill. 545, 48 N. E. 573.

Taxation generally see TAXATION.

Drainage taxes, when reassessed, are to follow the course of other taxes, and be collected in the same manner. They are a lien upon the lands, to be enforced by sale if necessary. Bump *v.* Jepson, 106 Mich. 641, 64 N. W. 509.

89. Eel River Draining Assoc. *v.* Topp, 16 Ind. 242; Hoefgen *v.* State, 17 Ind. App. 537, 47 N. E. 28.

90. Delawter *v.* Sand Creek Ditching Co., 26 Ind. 407.

c. Consolidation of Actions. It has been held that two assessments for drainage made on the same lands at different times may be recovered in one action.[91]

2. Defenses — a. In General. It has been held that premature commencement of the work of construction,[92] unnecessary expenditures,[93] or the fact that the surveyor exceeded his jurisdiction in matters of detail[94] is no defense to an action for the collection of an assessment. Proof that the assessment is too high, although otherwise valid, will not defeat the action.[95]

b. Excessive Assessment on Third Parties' Lands. It is no defense to an action to recover drainage assessments that more land of other parties was assessed for the drain than was mentioned in the petition for the drain.[96]

3. Time to Institute. Some statutes provide that if a drainage assessment is not paid on or before the annual sale of lands for the non-payment of taxes, the commissioners shall file a petition in the circuit court of the proper county for a foreclosure of such lien.[97]

4. Jurisdiction — a. In General. In the absence of a statute to the contrary an action to collect a drain assessment by enforcing a lien upon the land should be brought in the county where the land is situated, even where the drainage proceedings were instituted in another county.[98]

b. Failure to Obtain. Where the authorities attempting to impose a drainage assessment have failed to obtain jurisdiction of the person or subject-matter, but are nevertheless proceeding to sell and thereby cast a cloud on the title to the property, such sale will be enjoined.[99]

5. Parties.[1] In some jurisdictions it is held that the drainage district, as the

91. Swamp, etc., Land Dist. No. 110 *v.* Feck, 60 Cal. 403.

Consolidation of actions generally see Consolidation and Severance of Actions.

92. Premature commencement of work.— The fact that a drain was improperly commenced before an estimate of the cost of construction and an assessment of benefits had been made is no defense to an action for the collection of a drain assessment. Liberty Tp. Draining Assoc. *v.* Brumback, 68 Ind. 93; Smith *v.* Duck Pond Ditching Assoc., 54 Ind. 235.

93. Unnecessary expenditures.—Unless there is some fraudulent purpose in the assessment, or unless the purpose is clearly *ultra vires*, a landowner cannot prevent its collection, merely because some portion of the expenditure in the construction of the drain was useless or unnecessary. Kingsessing, etc., Meadow Co. *v.* Shields, 14 Pa. Co. Ct. 647. See also Clinton School Dist.'s Appeal, 56 Pa. St. 315.

94. That the surveyor exceeded his jurisdiction in that he widened the bottom of the drain beyond the original specifications does not relieve the landowner from paying an assessment for so much of the work as was within the surveyor's jurisdiction. Scott *v.* Stringley, 132 Ind. 378, 31 N. E. 953.

95. Such proof will only go to mitigate or reduce the amount to the actual benefits. New Eel River Draining Assoc. *v.* Carriger, 30 Ind. 173.

96. Since such fact is in favor of the party seeking to set up such defense, as it tends to reduce the assessment on his land. Bate *v.* Sheets, 50 Ind. 329. See also Bannister *v.* Grassy Fork Ditching Assoc., 52 Ind. 178.

97. Samuels *v.* Drainage Com'rs, 125 Ill. 536, 17 N. E. 829; People *v.* Clayton, 115 Ill. 150, 4 N. E. 193.

Under the Illinois act which provides that the lien of taxes on land may be foreclosed by suit in equity in the name of the people when the land has been forfeited to the state at tax-sale for two years, it has been held that the lien of special assessments for drainage purposes may be foreclosed by such suit. Rickert *v.* Moredock, etc., Drainage Dist. No. 1, (Sup. 1889) 23 N. E. 639; Gauen *v.* Moredock, etc., Drainage Dist. No. 1, 131 Ill. 446, 23 N. E. 633.

It was held in Indiana where a copy of the county surveyor's certificate of acceptance of a ditching job was placed upon the tax duplicate, as provided in Rev. St. (1881) § 4305, in August, that such tax became delinquent on the failure of the landowner to pay it on or before the first Monday of November, as required by section 6426; and it was the duty of those charged with its collection to cause the land to be sold to enforce payment. White *v.* McGrew, 129 Ind. 83, 28 N. E. 322; Cullen *v.* Strauz, 124 Ind. 340, 24 N. E. 883.

98. Dowden *v.* State, 106 Ind. 157, 6 N. E. 136.

Action not involving title.— It has been held in New Jersey that an action for the recovery of a drainage assessment does not involve the title to the land sought to be assessed, and therefore such action may be brought in the court for the trial of small causes. Craig *v.* Mackey, 48 N. J. L. 363, 7 Atl. 494.

99. Keigwin *v.* Drainage Com'rs, 115 Ill. 347, 5 N. E. 575.

Injunction generally see Injunctions.

1. Parties generally see Parties.

real party in interest, may sue in its own name to recover delinquent drain assessments.[2] In other jurisdictions, however, it is held that such actions should be brought in the name of the people for the use of the drainage district.[3]

6. Pleadings[4] — a. Complaint or Petition — (i) *Necessary Averments.* The complaint or petition for the enforcement of the collection of drain assessments must contain all the necessary allegations to bring the case within the provisions of the statute under which the assessment is levied;[5] such as allegations as to the eligibility of the appraisers;[6] that the amount of benefits assessed are not exceeded by the estimated cost of construction;[7] that proper notice of the petition for the drain was given;[8] a description of the drain, where defendant is not a member of the drainage association;[9] the jurisdictional facts necessary to the formation of the drainage district;[10] the assessment, unless the complaint is accompanied by a copy of it.[11]

2. Reclamation Dist. No. 3 *v.* Parvin, 67 Cal. 501, 8 Pac. 43; Reclamation Dist. No. 108 *v.* Hagar, 66 Cal. 54, 4 Pac. 945; People *v.* Haggin, 57 Cal. 579.

3. People *v.* Weber, 164 Ill. 412, 45 N. E. 723; Sennott *v.* Moredock, etc., Drainage Dist. No. 1, 155 Ill. 96, 39 N. E. 567; Ganen *v.* Moredock, etc., Drainage Dist., 131 Ill. 446, 23 N. E. 633.

Township trustee.— Under a statute providing that actions to enforce the collection of delinquent drainage assessments may be brought in the name of the township trustee, it has been held that such actions may also be prosecuted by such trustee in the name of the township. Hoch *v.* Monroe Tp., 12 Ind. App. 595, 40 N. E. 925.

Suit by single commissioner.— It has also been held that a drainage commissioner in charge of construction may bring suit in his own name for so much of an assessment made for the construction of a drain before he was placed in sole charge of construction as may be necessary to its construction, and that he is not restricted to assessments made by himself. Smith *v.* State, 131 Ind. 441, 31 N. E. 353.

4. Pleading generally see Pleading.

5. Reclamation Dist. No. 3 *v.* Parvin, 67 Cal. 501, 8 Pac. 43; Chaney *v.* State, 118 Ind. 494, 21 N. E. 45; Laverty *v.* State, 109 Ind. 217, 9 N. E. 774; Frazer *v.* State, 106 Ind. 471, 7 N. E. 203; Moss *v.* State, 101 Ind. 321; Wishmier *v.* State, 97 Ind. 160; Shaw *v.* State, 97 Ind. 23; Scott *v.* State, 89 Ind. 368; Bogart *v.* Castor, 87 Ind. 244; Boatman *v.* Macy, 82 Ind. 490; Thompson *v.* Honey Creek Draining Co., 33 Ind. 268; Hoefgen *v.* State, 17 Ind. App. 537, 47 N. E. 28; Beatty *v.* Pruden, 13 Ind. App. 507, 41 N. E. 961; Hoch *v.* Monroe Tp., 12 Ind. App. 595, 40 N. E. 925; Combs *v.* Michaelis, 7 Kan. App. 105, 53 Pac. 77.

6. Eligibility of appraisers.— The complaint must aver that the appraisers by whom the assessment was made were not of kin to any of the parties, and were disinterested freeholders of the county. Laughlin *v.* Ayres, 66 Ind. 445; Seits *v.* Sinel, 62 Ind. 253; Combs *v.* Etter, 49 Ind. 535. But see Albertson *v.* State, 95 Ind. 370.

7. It is not necessary, however, to aver the amount of either. Smith *v.* Duck Pond Ditching Assoc., 54 Ind. 235; Smith *v.* Duck Pond Ditching Assoc., 45 Ind. 94; Etchison Ditching Assoc. *v.* Hillis, 40 Ind. 408; Slusser *v.* Ransom, 39 Ind. 506. See also Dixon *v.* Labry, 69 S. W. 791, 24 Ky. L. Rep. 697.

8. Notice of petition.— Chaney *v.* State, 118 Ind. 494, 21 N. E. 45; Hackett *v.* State, 113 Ind. 532, 15 N. E. 799; Whittaker *v.* State, 109 Ind. 600, 9 N. E. 916; Kennedy *v.* State, 109 Ind. 236, 9 N. E. 778; Laverty *v.* State, 109 Ind. 217, 9 N. E. 774; Deegan *v.* State, 108 Ind. 155, 9 N. E. 148; Jackson *v.* State, 103 Ind. 250, 2 N. E. 742. But see Jackson *v.* State, 104 Ind. 516, 3 N. E. 863; Albertson *v.* State, 95 Ind. 370.

9. Description of drain.— Large *v.* Keen's Creek Draining Co., 30 Ind. 263, 95 Am. Dec. 696; West *v.* Bullskin Prairie Ditching Co., 19 Ind. 458; Beatty *v.* Pruden, 13 Ind. App. 507, 41 N. E. 961.

10. St. Louis, etc., R. Co. *v.* Dudgeon, 64 Ark. 108, 40 S. W. 786.

Formation of drainage district.— People *v.* Haggin, 57 Cal. 579 (where the complaint was held insufficient in failing to show the publication of the petition for the formation of the district for the four weeks next preceding the hearing on the same, and in not showing that the board noted its approval on the petition); Cooper *v.* Arctic Ditchers, 56 Ind. 233; McIntire *v.* McLain Ditching Assoc., 40 Ind. 104 (where it was held that recording the articles of association of a drainage company in the recorder's office of the county where the work is contemplated is a condition precedent to the investment of corporate powers upon the company, and hence must be averred in the complaint to enforce the assessment).

11. Assessment.— Ross *v.* State, 119 Ind. 90, 21 N. E. 345; Laverty *v.* State, 109 Ind. 217, 9 N. E. 774; Pickering *v.* State, 106 Ind. 228, 6 N. E. 611; State *v.* Myers, 100 Ind. 487; State *v.* Turvey, 99 Ind. 599; Neiman *v.* State, 98 Ind. 58; Roberts *v.* State, 97 Ind. 399; Crist *v.* State, 97 Ind. 389; Smith *v.* Clifford, 83 Ind. 520; Busenbark *v.* Etchison Ditching Assoc., 62 Ind. 314; Jerrell *v.* Etchison Ditching Assoc., 62 Ind. 200; Alspaugh *v.* Ben Franklin Draining Assoc., 51 Ind. 271; Alkire *v.* Timmons Ditching Co., 51 Ind. 71; West *v.* Bullskin Prairie Ditching Co., 19 Ind. 458.

(II) *UNNECESSARY AVERMENTS.* Where the petition for the construction of the drain and the proceedings of the board show the specifications on which the assessment was made, the interest of plaintiff in the work, the description of defendant's lands sought to be charged, and his ownership of the land, it has been held that it is not necessary for the complaint to contain allegations relative to these matters;[12] nor need the complaint set out the articles of association of a drainage association.[13]

b. Demurrer. The fact that plaintiff is not duly organized cannot be taken advantage of by demurrer.[14] Where the complaint alleges that the petition for the drain stated that the lands to be drained were in the county, such allegations must be taken as true on demurrer, and the petition cannot be looked to, although filed with the complaint.[15]

c. Answer or Set-Off. Damages caused by failure to construct and fully complete a drain as petitioned for are not proper subjects of counter-claim or set-off in a suit to collect a drainage assessment and enforce the statutory lien thereof.[16]

7. TRIAL.[17] Upon the trial of an action to enforce a drainage assessment the court has no power to determine the amount the owners of an old drain should be credited for its use in the construction of the new drain.[18] The court having jurisdiction to adjudicate upon the merits of the controversy may reform an erroneous and insufficient description of the land in the original petition for the drain;[19] or, where the complaint clearly shows the land intended to be benefited, and shows the mistake in the assessment describing it, may correct such mistake.[20]

8. EVIDENCE — a. Admissibility. In an action to collect a drainage assessment the report and assessments of benefits made by the commissioners or assessors, the entry showing the assessments made for the construction of the drain,[21] the original petition filed, and the order-book entries in the proceedings for the location and construction of the drain are admissible.[22]

b. Sufficiency. Where the statute provided that drainage assessments might be required to be paid after thirty days' notice thereof, to be given by personal notice, or by one publication in a newspaper stating when and where such payment shall be made, proof that a notice was sent by mail, without evidence of its contents, or when or where it was sent, was held to be insufficient.[23]

c. Burden of Proof. In an action to recover an assessment for repairs to a drain, where it is shown that the officer had jurisdiction to make the repairs, the burden of proof is on defendant to show that the assessments were not in proportion to the benefits received, that there was error in their computation, or that they were excessive.[24] But the burden of proof is on the party asserting the lien

12. Johnson *v.* State, 116 Ind. 374, 19 N. E. 298; Bate *v.* Sheets, 50 Ind. 329. See also Bannister *v.* Grassy Fork Ditching Assoc., 52 Ind. 178.

13. Etchison Ditching Assoc. *v.* Busenback, 39 Ind. 362; Jordan Ditching, etc., Assoc. *v.* Wagoner, 33 Ind. 50; Delawter *v.* Sand Creek Ditching Co., 26 Ind. 407; Eel River Draining Assoc. *v.* Topp, 16 Ind. 242.

14. Swamp, etc., Land Dist. No. 110 *v.* Feck, 60 Cal. 403; Dobson *v.* Duck Pond Ditching Assoc., 42 Ind. 312; Etchison Ditching Assoc. *v.* Jewell, 41 Ind. 143; Etchison Ditching Assoc. *v.* Hillis, 40 Ind. 408; Etchison Ditching Assoc. *v.* Busenback, 39 Ind. 362; Excelsior Draining Co. *v.* Brown, 38 Ind. 384.

15. Combs *v.* Etter, 49 Ind. 535.

16. Laverty *v.* State, 109 Ind. 217, 9 N. E. 774; Indianapolis, etc., R. Co. *v.* State, 105 Ind. 37, 4 N. E. 316.

17. Trial generally see TRIAL.

18. People *v.* Chapman, 128 Ill. 496, 21 N. E. 507.

19. State *v.* Smith, 124 Ind. 302, 24 N. E. 331.

20. Martin *v.* State, 132 Ind. 600, 31 N. E. 453; Luzadder *v.* State, 131 Ind. 598, 31 N. E. 453.

21. McKinney *v.* State, 117 Ind. 26, 19 N. E. 613 (although they have been held to be only *prima facie* evidence); Eel River Draining Assoc. *v.* Topp, 16 Ind. 242.

22. Voss *v.* State, 9 Ind. App. 294, 36 N. E. 654.

23. Hayes *v.* State, 96 Ind. 284.

24. Morrow *v.* Geeting, 15 Ind. App. 358, 41 N. E. 848, 44 N. E. 59.

to show a substantial compliance with the statute as to notice to the landowner of the drain proceedings.[25]

9. Effect of Default. A default in a suit to enforce a drainage assessment does not admit the amount claimed to be due.[26]

10. Judgment[27] — a. Nature of. Under most of the drainage acts in an action to enforce an unpaid drainage assessment, the judgment must be *in rem* only against the property affected and not *in personam*.[28]

b. How Enforced.[29] The statutes usually provide that any judgment received in an action for a drainage assessment may be enforced and collected as other judgments in the same court.[30] Where the statute provides that no property shall be sold on execution for less than two thirds of its appraised value, a sale without appraisement under a judgment for the enforcement of a drainage assessment in illegal.[31]

11. Appeal. The rule in favor of presumptions on appeal[32] as well as the

25. Brosemer *v.* Kelsey, 106 Ind. 504, 7 N. E. 569.

26. It simply admits that something is due, and the amount must be shown by proper proof. McKinney *v.* State, 101 Ind. 355.

Opening up default.— Under one jurisdiction, a person claiming an interest in land after judgment has been entered against it for a delinquent drainage assessment may, after neglecting to answer within the time prescribed by statute, move to vacate the judgment. Ignorance of the pendency of the action will excuse his neglect to answer. Reclamation Dist. No. 124 *v.* Coghill, 56 Cal. 607.

27. Judgment generally see Judgments.

28. Illinois Cent. R. Co. *v.* East Lake Fork Special Drainage Dist., 129 Ill. 417, 21 N. E. 925; State *v.* Ætna L. Ins. Co., 117 Ind. 251, 20 N. E. 144.

Lien on railroad.— In Illinois it has been held that upon a foreclosure of a drain lien on a railroad passing through a drainage district, it is proper to decree a sale of that portion of the road within the district in satisfaction of the lien. Wabash East R. Co. *v.* East Lake Fork Special Drainage Dist., 134 Ill. 384, 25 N. E. 781, 10 L. R. A. 285.

Under the Pennsylvania act drainage assessments might be enforced and collected by levy, distress, and sale of the goods and chattels of the delinquent (Rutherford *v.* Mynes, 97 Pa. St. 78), although it was held that this did not authorize a distress upon the goods of a tenant to satisfy assessments imposed prior to his tenancy.

Under a former Indiana statute, however, it was held that in an action to recover a drainage assessment, a judgment *in personam* might be had against the landowner, if a resident, as well as a judgment *in rem*. Bate *v.* Sheets, 64 Ind. 209.

The right of way of a railroad cannot be sold to pay the lien of a drainage assessment, but a personal judgment may be rendered against the company. Louisville, etc., R. Co. *v.* State, 122 Ind. 443, 24 N. E. 350; Louisville, etc., R. Co. *v.* State, 8 Ind. App. 377, 35 N. E. 916.

29. See, generally, Executions.

30. Samuels *v.* Drainage Com'rs, 125 Ill. 536, 17 N. E. 829, where it was held that a decree authorizing a master in chancery to sell the lands assessed in the event of nonpayment of the amount was proper.

Approval of deed.— Under the Illinois Revenue Act the circuit court, which is given jurisdiction to foreclose for drainage assessments, has jurisdiction to approve a deed made under the decree in a suit to foreclose, and to place the purchaser in possession, where there has been proper notice and demand therefor. Hammond *v.* People, 178 Ill. 503, 53 N. E. 308.

Against highway commissioners.—In an action against the highway commissioners to recover a special assessment for benefits to a highway, the judgment against the commissioners is not a charge on the highway so benefited, and upon such judgment no execution can issue. It is simply a charge against the municipality, and payment may be enforced by mandamus. Colfax *v.* East Lake Fork Special Drainage Dist., 127 Ill. 581, 21 N. E. 206. And see, generally, Mandamus.

Where land was injured.— In some jurisdictions it has been held that a judgment for a drainage tax will not be enforced, when it is shown that the property assessed was injured rather than benefited by the drain. Davidson *v.* New Orleans, 34 La. Ann. 170.

Where drainage proceedings are wholly void, a purchaser of lands at a sale made to enforce payment of a tax therefor acquires no title to such lands. Mitchell *v.* Lane, 62 Hun (N. Y.) 253, 16 N. Y. Suppl. 707.

31. Cox *v.* Bird, 88 Ind. 142.

32. See, generally, Appeal and Error.

As to corporate existence.— Under an act requiring courts in counties where their articles of association are filed to take judicial notice of the existence of drainage associations or districts, the appellate court will presume that the action of the lower court in determining this question was correct. Delawter *v.* Sand Creek Ditching Co., 26 Ind. 407.

As to purpose of drain.— In an action to enforce a drainage assessment, the record on appeal not showing the facts of the case, the appellate court will presume that the object designed to be attained by the establishment of the drain was one authorized by statute.

rule against raising objections for the first time on appeal[33] has been applied in appeals in actions to enforce drainage assessments.

G. Remedies For Wrongful Enforcement — 1. Injunction[34] — a. In General. If proceedings for the establishment of a drain are absolutely void, a suit to enjoin the collection of an assessment for its construction is maintainable.[35] So where it appears that the proposed drain will not be of benefit to the lands assessed by the commissioners,[36] injunction will lie to prevent them from apportioning any of such assessment upon such lands, and oral testimony is admissible on the hearing of the application for the injunction as to the justice of the apportionment. Where, however, the property assessed for the expenses of a drainage ditch has received all the benefits of the ditch, the assessment will not be enjoined merely for an irregularity in the acceptance of the work by the surveyor,[37] or on the ground that the work on the drain was not completed according to plans and specifications.[38]

b. Parties. An action to enjoin the sale of a landowner's property under a void drainage assessment may be brought against the county treasurer without making the county a party defendant.[39] It has been held that two persons owning separate tracts of land, both subject to a drainage assessment, cannot join in

Anderson *v.* Kerns Draining Co., 14 Ind. 199, 77 Am. Dec. 63, where in the absence of facts in the record the court presumed that the object to be attained was the promotion of public health and not the benefit of agriculture.

33. See, generally, Appeal and Error.

Error not in record.— A variance between the number of acres in a tract of land assessed and the number of acres named in the assessment roll cannot be urged for the first time on appeal, where it is not shown that the assessment was levied upon the lands by acreage. Swamp Land Dist. No. 307 *v.* Glide, 112 Cal. 85, 44 Pac. 451.

34. Injunction generally see Injunctions.

35. Drummer *v.* Cox, 165 Ill. 648, 46 N. E. 716 (holding that an injunction against the extension and collection of a tax because of want of power in the municipality to make the levy also prohibits the use by the town of a portion of the tax collected); Studabaker *v.* Studabaker, 152 Ind. 89, 51 N. E. 933.

Laches.— Where a bill to enjoin the collection of drainage assessments does not affirmatively allege fraud, and is delayed until the work has been almost completed, and the assessment, or almost the entire assessment, has been collected, it will be dismissed. Harwood *v.* Drain Com'rs, 51 Mich. 639, 17 N. W. 216; Darst *v.* Griffin, 31 Nebr. 668, 48 N. W. 819; Turnquist *v.* Cass County Drain Com'rs, 11 N. D. 514, 92 N. W. 852; Erickson *v.* Cass County, 11 N. D. 494, 92 N. W. 841. See Barker *v.* Omaha, 16 Nebr. 269, 20 N. W. 382.

Want of jurisdiction.— Where a bill in chancery seeks to enjoin drainage commissioners from levying and collecting drainage assessments, and it appears on the face of the bill that the commissioners were acting within their powers, the bill is properly dismissed for want of jurisdiction. Reynolds *v.* Milks Grove Special Drainage Dist., 34 Ill. App. 302.

36. Buckley *v.* Lorain County, 1 Ohio Cir. Ct. 251. See also Zimmerman *v.* Savage, 145 Ind. 124, 44 N. E. 252.

An allegation in a complaint, in a suit to enjoin an assessment for benefits of a drainage ditch, that plaintiff had no notice of the time set for the hearing of the petition, without stating that the constructive notice provided for by statute was not given, is insufficient. Sarber *v.* Rankin, 154 Ind. 236, 56 N. E. 225.

Gross injustice in apportionment.— Under the Ohio statute an action may be maintained to enjoin the placing on the duplicate for collection of an assessment made to pay the cost and expense of locating and constructing a ditch improvement, on the single ground of gross injustice in the apportionment, and if the fact of gross injustice is established on the trial, plaintiff is entitled to injunctive relief. But it has been held under this statute that if upon the trial it is established that plaintiff derived a substantial benefit from the improvement it is not a gross injustice to apportion some part of the necessary cost and expense of the improvement to plaintiff, and where substantial benefit is made to appear, the remedial right changes, and it becomes a proposition not of gross injustice, but of equitable apportionment between the persons mutually benefited, and the party must then pursue such remedy as is provided for by law, and is not entitled to the extraordinary remedy of injunction. Cleveland, etc., R. Co. *v.* Logan County, 17 Ohio Cir. Ct. 436.

37. Sarber *v.* Rankin, 154 Ind. 236, 56 N. E. 225; Fletcher *v.* White, 151 Ind. 401, 51 N. E. 482; Watkins *v.* State, 151 Ind. 123, 49 N. E. 169, 51 N. E. 79; Denton *v.* Thompson, 136 Ind. 446, 35 N. E. 264; Montgomery *v.* Wasem, 116 Ind. 343, 15 N. E. 795, 19 N. E. 184; Flynn Tp. *v.* Woolman, (Mich. 1903) 95 N. W. 567.

38. Studabaker *v.* Studabaker, 152 Ind. 89, 51 N. E. 933.

39. Davis *v.* Lake Shore, etc., R. Co., 114 Ind. 364, 16 N. E. 639.

one action to enjoin the collection of the assessments, their causes of action being separate and distinct, and held in separate rights.[40]

2. ACTION TO SET ASIDE SALE. In an action to set aside a sale of land made under an execution on a judgment in a drain assessment action, it will be presumed that the order of sale did not direct a sale without an appraisement where it is required by statute.[41]

H. Drainage Certificates — 1. NATURE OF. Some of the statutes provide that if any one shall fail to construct the portion of the ditch set off to him, the work shall be let, and on completion and acceptance thereof by the proper officer, a certificate shall be issued to the one doing the work for the amount due, which amount is then entered on the tax duplicate against the land.[42]

2. ACTION ON. A contractor holding a drainage certificate cannot sue the landowner for the amount due, but should file a copy of the certificate with the auditor, who is required to place it on the tax duplicate, to be collected as other taxes are collected.[43]

3. ACTION TO SET ASIDE LIEN OF. In a suit to set aside and annul the lien of a drain certificate, the invalidity of the certificate is not shown by an averment that the contractor did not complete the work, it not appearing that he had not done work to the full amount of the certificate.[44]

DRAIN SUGAR. To separate molasses contained in all sugars cooked or boiled in open kettles from the sugar itself.[1]

DRAM. In common parlance, something that has alcohol in it — something that can intoxicate.[2] As applied to weights and measures, avoirdupois, one-sixteenth of an ounce.[3] (See, generally, INTOXICATING LIQUORS; WEIGHTS AND MEASURES.)

DRAMA.[4] A poem or composition representing a picture of human life, and accommodated to action;[5] a story represented by action; the representation is as if the real persons were introduced and employed in the action itself.[6] (See, generally, COPYRIGHT; THEATERS AND SHOWS.)

DRAMATIC PERFORMANCE. A performance adapted to the stage, with the appropriate scenery for its representation.[7] (See, generally, THEATERS AND SHOWS.)

DRAMSHOP. See INTOXICATING LIQUORS.

DRAMSHOP-KEEPER. See INTOXICATING LIQUORS.

DRAMSHOPS. A term which, in a generic sense, may mean the liquor traffic generally.[8] (See, generally, INTOXICATING LIQUORS.)

40. Jones *v.* Cardwell, 98 Ind. 331.

41. Cox *v.* Bird, 88 Ind. 142.

42. State *v.* Bever, 143 Ind. 488, 41 N. E. 802; Baker *v.* Clem, 102 Ind. 109, 26 N. E. 215.

43. State *v.* Bever, 143 Ind. 488, 41 N. E. 802; Lockwood *v.* Chambers, 105 Ind. 600, 5 N. E. 4; Lockwood *v.* Ferguson, 105 Ind. 380, 5 N. E. 3; Storms *v.* Stevens, 104 Ind. 46, 3 N. E. 401.

44. Baker *v.* Clem, 102 Ind. 109, 26 N. E. 215.

1. Meyer *v.* Queen Ins. Co., 41 La. Ann. 1000, 1004, 6 So. 899.

2. Lacy *v.* State, 32 Tex. 227, 228.

3. St. 41 & 42 Vict. c. 49, § 14.

4. "Dramatic composition" defined see 9 Cyc. 903.
"Dramatic piece" defined see 9 Cyc. 903 note 46.

5. Jacko *v.* State, 22 Ala. 73, 74 [*citing* Webster Dict.], where it is said: "It may be conceded, that its signification is broad enough to cover any representation in which a story is told, a moral conveyed, or the passions portrayed, whether by words and actions combined, or by mere actions alone."

6. Bell *v.* Mahn, 121 Pa. St. 225, 228, 15 Atl. 523, 6 Am. St. Rep. 786, 1 L. R. A. 364 [*citing* Webster Dict.], where it is said: "It is ordinarily designed to be spoken, but it may be represented in pantomime, when the actors use gesticulation, sometimes in the form of the ballet, but do not speak; or in opera, where music takes the place of poetry and of ordinary speech, and the dramatic treatment is essentially different from either."

7. Jacko *v.* State, 22 Ala. 73, 74.

8. People *v.* Harrison, 191 Ill. 257, 265, 61 N. E. 99.

DRAUGHT. DRAFT,[9] *q. v.*

DRAW. As a verb,[10] to write in due form, to prepare a draft of.[11] As a noun, a depression in land into which surplus waters sometimes flow;[12] and as applied to drawbridges,[13] that part of a bridge which is made to be drawn up or aside;[14] the movable section of a bridge, whether raised up, as was the earlier practice, or moved to one side, as at present.[15]

DRAWBACK. See CUSTOMS DUTIES.

DRAWBAR. See DEAD-WOOD.

DRAWBRIDGE. A bridge, one or more sections of which can be lifted or moved aside to permit the passage of boats.[16] (See, generally, BRIDGES; NAVIGABLE WATERS.)

DRAWEE. A person in whose favor a bill of exchange is drawn.[17] (See, generally, BANKS AND BANKING; COMMERCIAL PAPER.)

DRAWER. In general, a person who draws an instrument in writing.[18] Used in connection with commercial paper, a person who draws a bill of exchange.[19] (See CONVEYANCE; DRAFT; DRAW; DRAWEE; and, generally, BANKS AND BANKING; COMMERCIAL PAPER; DEEDS; MORTGAGES.)

DRAWING. A representation on a plane surface, by means of lines and shades;[20] a game of chance.[21] In patent law, a representation of the appearance of material objects by means of lines and marks upon paper, card-board, or other substance.[22] (See DRAW; and, generally, BUILDERS AND ARCHITECTS; GAMING; LOTTERIES; PATENTS.)

DRAWING A PRIZE. In common parlance, the ascertainment by chance or otherwise, of who is entitled to a particular result, or a particular thing, by means of some pre-arranged mode of ascertaining the result.[23] (See, generally, GAMING; LOTTERIES.)

DRAWING A WARRANT. An act incident to the auditing of a claim; a part of the formal and convenient mode provided by statute for recording the auditor's decision relative to a claim.[24]

9. Seeberger *v.* Wright, etc., Oil Mfg. Co., 157 U. S. 183, 185, 15 S. Ct. 583, 39 L. ed. 665, distinguishing this word from "draff."

10. "To draw has several well-understood meanings, but, as applied to a written instrument, but one." Winnebago County State Bank *v.* Hustel, 119 Iowa 115, 117, 93 N. W. 70.

"Draw any pistol upon any other person" as used in a statute see Siberry *v.* State, (Ind. 1897) 47 N. E. 458, 459.

In old criminal practice, as a verb, the word meant to drag (on a hurdle) to the place of execution. Black L. Dict. [*citing* 4 Blackstone Comm. 92, 377].

11. Webster Dict. [*quoted* in Hawkins *v.* State, 28 Fla. 363, 367, 9 So. 652; Winnebago County State Bank *v.* Hustel, 119 Iowa 115, 117, 93 N. W. 70].

12. Lincoln, etc., R. Co. *v.* Sutherland, 44 Nebr. 526, 529, 62 N. W. 859.

13. See DRAWBRIDGE.

14. Worcester Dict. [*quoted* in Hughes *v.* Northern Pac. R. Co., 18 Fed. 106, 114, 9 Sawy. 313, where the term is also defined as "a contrivance by which a section of a bridge across a navigable water is turned upwards or at right angles to itself, and parallel with the direction of the stream, so as to admit of the passage of vessels through the open space that could not otherwise pass the point"].

15. Gildersleeve *v.* New York, etc., R. Co., 82 Fed. 763, 766.

16. Savannah, etc., R. Co. *v.* Daniels, 90 Ga. 608, 611, 17 S. E. 647, 20 L. R. A. 416 [*quoting* Century Dict. and *citing* Webster Dict.], where it is said: "Although the term 'drawbridge' is often applied to the movable section of a bridge, it means also the whole bridge of which the 'draw' or movable section forms a part."

"Drawbridge" used in a contract with reference to construction and defects in the work see Florida R. Co. *v.* Smith, 21 Wall. (U. S.) 255, 262, 22 L. ed. 513.

17. Cal. Civ. Code (1899), § 3171; Mont. Civ. Code (1895), § 4110.

18. Winnebago County State Bank *v.* Hustel, 119 Iowa 115, 117, 93 N. W. 70, where it is said: "And from this circumstance sprung the use of the word in connection with bills of exchange."

19. Cal. Civ. Code (1899), § 3171; Mont. Civ. Code (1895), § 4110.

20. "Its synonyms are delineation, picture." Ampt *v.* Cincinnati, 8 Ohio S. & C. Pl. Dec. 624, 628.

21. State *v.* Bruner, 17 Mo. App. 274, 276.

22. Black L. Dict.

23. People *v.* Kent, 6 Cal. 89, 91, where it is said: "And as soon as the number, which entitles the ticket holder to the money or article, is drawn from the wheel, or otherwise ascertained, the prize is said to be drawn."

24. Brown *v.* Fleischner, 4 Oreg. 132, 149.

"Drawing a warrant is not drawing money

DRAW LOTS. To determine an event by drawing one thing from a number, whose marks are concealed from the drawer, and thus determining an event.[25] (See, generally, LOTTERIES.)

DRAWN. Selected;[26] extended in either length or breadth by hammering or forging.[27]

DRAW UP. To compose in due form, to draught, to form in writing.[28] (See DRAFT; DRAW.)

DRAY. A low, strong cart with stout wheels, used for carrying heavy loads.[29]

DRAYAGE. See WHARVES.

DREDGE.[30] As a noun, in its original meaning, a net or drag for taking oysters: it is now called a machine for cleansing canals and rivers; but sometimes applied to a DREDGER, *q. v.* As a verb, to gather or take with a dredge — to remove sand, mud and filth from the beds of rivers, harbors and canals with a dredging machine.[31]

DREDGER. A sort of open barge for removing sand, silt, mud, or the like, from the beds of rivers, docks and harbors,[32] rivers and canals — a dredging machine.[33]

DRESSING. A process by which skins or pelts are treated, converted into leather, and made soft and flexible.[34]

DRESSMAKER. One whose occupation is the making of gowns and other articles of female attire.[35]

DRESS VICTUALS. To prepare food fit for consumption.[36]

DRIFTING IN A TUNNEL. In mining, taking earth, gravel, or ore, from ground made accessible by means of the tunnel.[37] (See, generally, MINES AND MINING.)

DRIFT STUFF. See NAVIGABLE WATERS.

DRIFTWAY. A common way for driving cattle.[38] In Scotch law, a DROVE-ROAD,[39] *q. v.*

DRINK. To absorb; to take in.[40]

DRINKING SHOP. Bar-room; tavern.[41] (See, generally, INTOXICATING LIQUORS.)

out of the treasury." Brown *v.* Fleischner, 4 Oreg. 132, 149.

25. Webster Dict. [*quoted* in Wilkinson *v.* Gill, 74 N. Y. 63, 66, 30 Am. Rep. 264].

26. Smith *v.* State, 136 Ala. 1, 6, 34 So. 168, as used in the phrase "petit jurors drawn and impanelled." See also, generally, JURIES.

27. U. S. *v.* Wetherell, 65 Fed. 987, 988, 13 C. C. A. 264, distinguishing "drawn" as an adjective from "drawn" as a verb when applied to steel.

28. Winnebago County State Bank *v.* Hustel, 119 Iowa 115, 117, 93 N. W. 70 [*quoting* Webster Dict., and *citing* Hawkins *v.* State, 28 Fla. 363, 367, 9 So. 652], where it is said: "This is the meaning generally given by the lexicographers."

29. Century Dict. See also Griffin *v.* Powell, 64 Ga. 625, 627 (distinguishing "dray" from "wagon"); Snyder *v.* North Lawrence, 8 Kan. 82, 84 (distinguishing a "dray" from a "four-horse vehicle").

30. "Dredging" as used in a contract see Boynton *v.* Lynn Gas Light Co., 124 Mass. 197, 201.

31. The Nithsdale, 15 Can. L. J. N. S. 268, 269.

32. Wright Dict. [*quoted* in The Nithsdale, 15 Can. L. J. N. S. 268, 269].

33. Worcester Dict. [*quoted* in The Nithsdale, 15 Can. L. J. N. S. 268, 269].

34. U. S. *v.* Wotten, 53 Fed. 344, 3 C. C. A. 553.

35. Century Dict. See also Marx *v.* Miller, 134 Ala. 347, 353, 32 So. 765, distinguishing a dressmaker from a seamstress.

36. Omit *v.* Com., 21 Pa. St. 426, 432, where it is said: "And hence the table or bench on which the meat or other things are dressed, or prepared for use, is sometimes called a dresser, from the French *dressoir*. But we know of no figure of speech, and no rule of construction, either in grammar or law, that can make the selling of liquor the dressing of victuals."

37. It "is not the same as 'running a tunnel.'" Jurgenson *v.* Diller, 114 Cal. 491, 493, 46 Pac. 610, 55 Am. St. Rep. 83.

38. Smith *v.* Ladd, 41 Me. 314, 320.

In Rhode Island the term is in use. Bouvier L. Dict. [*citing* Hilliard Abr. Prop. 33].

"A carriage-way will comprehend a horse-way, but not a drift-way." Ballard *v.* Dyson, 1 Taunt. 279, 285, 9 Rev. Rep. 770.

39. Burrill L. Dict. [*citing* Coke Litt. 56*a*].

40. Webster Dict. [*quoted* in Baker *v.* Jacobs, 64 Vt. 197, 201, 23 Atl. 588, where it is said: "To drink tobacco was a common phrase [in 1791]. It was used in that sense by the best authors, like Spenser, Dryden, Pope and rare Ben. Johnson. . . . In 1620 George Wither wrote a poem on the weed, the refrain of which was 'Thus thinke then drinke tobacco'"].

41. *In re* Schneider, 11 Oreg. 288, 297, 8 Pac. 289.

DRIP. An easement by which the water which falls on one house is allowed to fall upon the land of another.[42] (See, generally, EASEMENTS.)

DRIVE. As a noun, in its original meaning, an excursion in a carriage;[43] in logging, the term is sometimes applied to a raft of logs afloat in a stream.[44] As a verb, to go or pass in a carriage;[45] to force.[46]

DRIVEN WELL. See WATERS.

DRIVER. Any person riding or propelling a bicycle or tricycle or directing a motor carriage.[47]

DROIT. In general, right.[48] In old English law, a writ of right, so called in the old books.[49] In French law, right, justice, equity, law, the whole body of law: also a right.[50]

DROIT D'AUBAINE. In French law, a rule by which all the property of a deceased foreigner, whether movable, or immovable, was confiscated to the use of the state, to the exclusion of his heirs, whether claiming *ab intestato* or under a will of the deceased.[51]

DROIT NE DONE PLUIS QUE SOIT DEMAUNDE. A maxim meaning "Justice gives no more than is demanded."[52]

DROIT NE POIT PAS MORIER. A maxim meaning "Right cannot die."[53]

DROITS OF ADMIRALTY. A term applied to goods found derelict at sea.[54]

DROP-FEED. A particular form or mode of application of four motion feed.[55]

DROP IN TENSION. Loss of the propulsive force which measures initially the forward movement of the electrical energy or so-called "current" as it leaves the generator, and seizes upon and follows the conductor.[56]

DROP WRIST. In medicine, the paralysis of the nerves which control the muscles on the back of the wrist, thereby impairing the use of the hand.[57]

DROVE. A collection of cattle driven; a number of animals.[58]

42. Bouvier L. Dict. See also Merrick La. Civ. Code (1900), art. 713.

43. People *v.* Green, 52 How. Pr. (N. Y.) 440, 445, where it is said that the term as applied to parks, etc., "has been lately extended beyond its former meaning."

44. Miller *v.* Chatterton, 46 Minn. 338, 340, 48 N. W. 1109.

"Driven" as applied to logs see St. Louis Dalles Imp. Co. *v.* C. N. Nelson Lumber Co., 43 Minn. 130, 134, 44 N. W. 108.

45. Webster Dict. [*quoted* in Citizens' R. Co. *v.* Ford, 93 Tex. 110, 113, 53 S. W. 575, 46 L. R. A. 457].

May be equivalent to "ride."— Citizens' R. Co. *v.* Ford, 93 Tex. 110, 113, 53 S. W. 575, 46 L. R. A. 457.

46. Webster Dict.

The verb "drive" in its usual sense denotes innocent action. Hinesley *v.* Sheets, 18 Ind. App. 612, 48 N. E. 802, 803, 63 Am. St. Rep. 356.

"Driven" as applied to cattle see Frontier Land, etc., Co. *v.* Baldwin, 3 Wyo. 764, 767, 31 Pac. 403.

"The 'driving or conducting' cattle intended in the statute [against driving cattle through the streets on Sunday], must be the ordinary driving, when the cattle are themselves driven." Triggs *v.* Lester, L. R. 1 Q. B. 259, 261, 13 L. T. Rep. N. S. 701, 14 Wkly. Rep. 279.

"Driven to the wall," in criminal law, "is illustrated by the familiar instance given of two men in a room and one assailing another to take his life or inflict upon him some great harm . . . ; in such case the assailed must retreat as far as he can — be driven to the wall, as we often say figuratively with respect to other pressure in life — before he takes upon himself the final remedy for protection." State *v.* Walker, 9 Houst. (Del.) 464, 467, 33 Atl. 227.

47. Conn. Gen. St. (1902) § 2038.

"The conductor of a street railroad car, is not a driver of a 'carriage' within the statute" rendering the owners liable for injuries caused thereby. Isaacs *v.* Third Ave. R. Co., 47 N. Y. 122, 124, 7 Am. Rep. 418.

48. Black L. Dict. [*quoted* in Opel *v.* Shoup, 100 Iowa 407, 420, 69 N. W. 560, 37 L. R. A. 583].

49. Black L. Dict. [*citing* Coke Litt. 158*b*].

50. Black L. Dict. See also Leroux *v.* Brown, 12 C. B. 801, 824, 16 Jur. 1021, 22 L. J. C. P. 1, 1 Wkly. Rep. 22, 74 E. C. L. 801.

51. Black L. Dict. [*quoted* in Opel *v.* Shoup, 100 Iowa 407, 420, 69 N. W. 560, 37 L. R. A. 583].

52. Wharton L. Lex. [*citing* 2 Inst. 286].

53. Wharton L. Lex. [*citing* Jenkins Cent. 100].

54. Burrill L. Dict. [*citing* Kent Comm. 357 note]. See The Magnus, 1 C. Rob. 31.

55. Florence Sewing Mach. Co. *v.* Grover, etc., Sewing Mach. Co., 110 Mass. 70, 87, 14 Am. Rep. 579, as applied to sewing machines.

56. Edison Electric Light Co. *v.* Westinghouse, 55 Fed. 490, 495.

57. Missouri, etc., R. Co. *v.* Bodie, (Tex. Civ. App. 1903) 74 S. W. 100, 105.

58. Webster Dict. [*quoted* in McConvill *v.* Jersey City, 39 N. J. L. 38, 43, where it is

DROWNED.[59] Suffocated, in water or other fluid; perished in water; deprived of life by immersion in water or other liquid.[60]

DRUG.[61] A substance used in the composition of medicines;[62] a substance or commodity used as a remedy for disease;[63] any mineral substance used in chemical operations;[64] any animal or mineral substance used in the composition of medicines; any stuff used in dying or in chemical operations; any ingredient used in chemical preparations employed in the arts;[65] compounds, mostly of mineral, animal, or vegetable substances, made by apothecaries and others, and used as a medicine in the treatment of disease, and commonly called "physic."[66] As defined by statute, all medicines for internal or external use;[67] any medicinal substance or any preparation authorized or known in the "Pharmacopœia of the United States," or the "National Formulary," or the "American Homeopathic Pharmacopœia," or the "American Homeopathic Dispensatory."[68] (See, ALCOHOL; BENZINE; CHEMICAL; COMPOSITION; and, generally, DRUGGISTS; EXPLOSIVES; PHYSICIANS AND SURGEONS.)

said that the term implies an indeterminate number]. *Compare* Caldwell *v.* State, 2 Tex. App. 53, 55, where an information was not considered defective because it described the stock as "fifty head of cattle," instead of calling them a drove of cattle, etc., under an act which declared it unlawful, to herd any "drove of horses or cattle," etc.

59. "**Drowning,**" as used in an insurance policy, "is, in itself, not a 'danger,' but the result of a peril, and against that result they [the company] insure." Moore *v.* Perpetual Ins. Co., 16 Mo. 98, 101.

60. Webster Int. Dict. [*quoted* in U. S. *v.* Barber, 20 D. C. 79, 93].

61. "**Drugs in a crude state**" as used in a tariff act see Cowl *v.* U. S., 124 Fed. 475, 476; U. S. *v.* Merck, 66 Fed. 251, 252, 13 C. C. A. 432.

62. Webster Dict. [*quoted* in Collins *v.* Farmville Ins., etc., Co., 79 N. C. 279, 281, 28 Am. Rep. 322].

63. State *v.* Ohmer, 34 Mo. App. 115, 124 [*cited* in Penniston *v.* Newnan, 117 Ga. 700, 703, 45 S. E. 65].

64. Webster Dict. [*quoted* in Carrigan *v.* Lycoming F. Ins. Co., 53 Vt. 418, 426, 38 Am. Rep. 687].

65. Phœnix Ins. Co. *v.* Flemming, 65 Ark. 54, 58, 44 S. W. 464, 67 Am. St. Rep. 900, 39 L. R. A. 789 [*citing* Century Dict.; Webster Dict.].

Saltpeter is included within the meaning of the term. Collins *v.* Farmville Ins., etc., Co., 79 N. C. 279, 281, 28 Am. Rep. 322.

The term does not include cigars (Com. *v.* Marzynski, 149 Mass. 68, 72, 21 N. E. 228), tobacco (State *v.* Ohmer, 34 Mo. App. 115, 124 [*cited* in Penniston *v.* Newnan, 117 Ga. 700, 703, 45 S. E. 65]), or whiskey (Gault *v.* State, 34 Ga. 533, 535; Kloch *v.* Burger, 58 Md. 575, 577. *Contra,* State *v.* Hutchinson, 56 Ohio St. 82, 84, 46 N. E. 71).

Whether benzine is included within the meaning of the term has been held to be a question for the jury. Carrigan *v.* Lycoming F. Ins. Co., 53 Vt. 418, 426, 38 Am. Rep. 687.

66. Gault *v.* State, 34 Ga. 533, 535 [*quoted* in Penniston *v.* Newnan, 117 Ga. 700, 703, 45 S. E. 65].

67. State *v.* Hutchinson, 56 Ohio St. 82, 84, 46 N. E. 71; Mass. Rev. L. (1902) c. 75, § 17; Miss. Annot. Code (1892), § 2095; N. J. Gen. St. (1895) p. 1175, § 75; N. M. Comp. L. (1897) § 1256; S. C. Civ. Code (1902), § 1581; Tex. Pen. Code (1895), art. 431.

68. 3 Pepper & L. Dig. Pa. col. 397, § 2.

DRUGGISTS

By Thomas Dwight Crawford*
Reporter of the Supreme Court of Arkansas

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CROSS-REFERENCES

For Matters Relating to:

Criminal Responsibility, see ASSAULT AND BATTERY; HOMICIDE.
Physician or Surgeon, see PHYSICIANS AND SURGEONS.
Sale of:
Liquor, see INTOXICATING LIQUORS.
Poison, see POISONS.
Taxation of Proprietary Article, see INTERNAL REVENUE.

I. DEFINITION.

A druggist is one who deals in drugs and medicines.[1] The term is synonymous with "pharmacist" or "chemist." In the United States, as also in Scotland, the term "apothecary" is likewise synonymous with "druggist." In England and Ireland, however, the term "apothecary" is applied to a member of an inferior branch of the medical profession licensed to practise medicine as well as to dispense and sell drugs.[2]

II. REGULATION.

A. Registration — 1. VALIDITY OF STATUTES REQUIRING. Statutes which require the retailer of drugs, medicines, and poisons to submit to examination and to procure a registration certificate or license from a board created for the purpose of conducting such examination have been uniformly upheld as a valid exercise of police power;[3] and such acts are not invalid as attempting to delegate legislative power to the pharmacy board.[4] It is held, however, that the provisions of pharmacy acts which confer upon registered pharmacists the exclusive right to sell patent or proprietary medicines and domestic remedies not compounded by them, without requiring such pharmacists to make any examination or analysis thereof, are invalid as conferring a special power in violation of the constitution;[5] and a provision that the board might in their discretion issue permits to parties engaged in business in villages or other localities to sell domestic remedies and proprietary medicines was held invalid as conferring discretionary and legislative power upon such board.[6]

1. Bouvier L. Dict.; Century Dict.

It is said that the term "druggist" properly means one whose occupation is to buy and sell drugs without compounding or preparation (State *v.* Holmes, 28 La. Ann. 765, 26 Am. Rep. 110), but in its usual acceptation, it means one who deals either in medicines or in the materials that are used in compounding medicines (Mills *v.* Perkins, 120 Mass. 41; Black L. Dict.).

It is not essential that a druggist or apothecary shall compound or manufacture medicines in order to constitute him a druggist. Hainline *v.* Com., 13 Bush (Ky.) 350.

A commission merchant dealing principally in alcohol is not a druggist within the meaning of the Massachusetts act regulating the sale of alcohol by druggists. Mills *v.* Perkins, 120 Mass. 41.

2. Bouvier L. Dict.; Century Dict; Apothecaries' Co. *v.* Greenough, 1 Q. B. 799, 1 G. & D. 378, 11 L. J. Q. B. 156, 41 E. C. L. 783; Woodward *v.* Ball, 6 C. & P. 577, 25 E. C. L. 583; Thompson *v.* Lewis, 3 C. & P. 483, M. & M. 255, 14 E. C. L. 674; *Ex p.* Crabb, 2 Jur. N. S. 628, 25 L. J. Bankr. 45, 4 Wkly. Rep. 501. See also Apothecaries Act, 55 Geo. III, c. 194; Pharmacy Act, 31 & 32 Vict. c. 121, § 3.

The term "pharmaceutical chemist" is wider than and embraces the term "pharmacist." State Bd. of Pharmacy *v.* White, 84 Ky. 626, 632, 2 S. W. 225, 8 Ky. L. Rep. 678.

3. *Illinois.*— Noel *v.* People, 187 Ill. 587, 58 N. E. 616, 79 Am. St. Rep. 238, 52 L. R. A. 287.

Iowa.— Hildreth *v.* Crawford, 65 Iowa 339, 21 N. W. 667.

New Hampshire.— State *v.* Forcier, 65 N. H. 42, 17 Atl. 577.

Pennsylvania.— Com. *v.* Zacharias, 181 Pa. St. 126, 130, 37 Atl. 185 [*affirming* 5 Pa. Dist. 475], where it is said: "Their object is the protection of the public health. The requirement that one conducting such a trade should have such chemical and pharmaceutical knowledge as to qualify him to handle intelligently the dangerous commodities in which he deals is reasonable."

Wisconsin.— State *v.* Heinemann, 80 Wis. 253, 49 N. W. 818, 27 Am. St. Rep. 34.

See 17 Cent. Dig. tit. "Druggists," § 1 *et seq.*

4. Hildreth *v.* Crawford, 65 Iowa 339, 21 N. W. 667.

5. Noel *v.* People, 187 Ill. 587, 58 N. E. 616, 79 Am. St. Rep. 238, 52 L. R. A. 287; People *v.* Moorman, 86 Mich. 433, 49 N. W. 263; State *v.* Donaldson, 41 Minn. 74, 42 N. W. 781.

6. Noel *v.* People, 187 Ill. 587, 58 N. E.

2. Appointment and Powers of Board. The appointment of a state board of pharmacy is governed by constitutional or statutory provisions.[7] The board has implied power to do such acts as are necessary to the enjoyment of the powers expressly conferred upon it;[8] but under an act empowering the board to fix a fee for the required certificate for druggists, the board is not authorized to fix the fees arbitrarily or to discriminate between individuals.[9]

3. Right to Be Registered. Some of the pharmacy acts provide that those who have graduated in pharmacy or who have practised as druggists for a certain number of years before the passage of such acts shall be entitled to be entered as registered pharmacists without examination;[10] and mandamus will lie to compel the state board of pharmacy to enter a graduate in pharmacy as a registered pharmacist, the board having no discretion in the matter.[11]

4. Necessity of Registration — a. In General. An article, such as borax, which, although often used in compounding medicines and prescribed for medical purposes, is extensively and generally used for domestic and household purposes, may be sold by one not a registered pharmacist;[12] and under some statutes there is no prohibition against the sale of drugs other than poisons or patent medicines containing poison by one not a registered pharmacist, provided he does not describe himself as "druggist," "chemist," or "pharmacist."[13] So too it has been held that an unregistered clerk may aid a pharmacist under his immediate personal supervision.[14] And where a pharmacist entitled to registration pays his fee, he is entitled to proceed in his business until the expiration of the year, and cannot be held liable in a criminal prosecution because of the non-action of the board of pharmacy in issuing his certificate.[15] Where a license required by statute is for the protection of the public, and not for revenue only, the imposition of a penalty amounts to a prohibition of a contract in violation of the statute;[16] and where the owner of a stock of drugs transferred the same to another, to be held and treated by him as its ostensible owner, for the purpose of evading the law relating to registered pharmacists, and the property is levied upon under execu-

616, 79 Am. St. Rep. 238, 52 L. R. A. 287, construing the Illinois act of 1895.

7. Thus in Colorado the governor may appoint a state board of pharmacy without the advice and consent of the senate. *In re* Governor's Question, 12 Colo. 399, 21 Pac. 488. But in Minnesota it has been held that Gen. St. (1894) § 7926, in so far as it requires the governor to appoint members of the state board of pharmacy from among a certain number of pharmacists elected by the state pharmaceutical association, is in conflict with the constitutional provision vesting the power in the governor to appoint such officers as may be provided by law, subject to the approval of the senate. State *v.* Griffen, 69 Minn. 311, 72 N. W. 117.

8. State *v.* State Bd. of Pharmacy, 105 La. 535, 29 So. 989, holding that the establishment by the Louisiana state board of pharmacy of a domicile in the city of New Orleans was a competent exercise of such implied power.

9. People *v.* Moorman, 86 Mich. 433, 49 N. W. 263, construing the Michigan act of 1885.

10. Braniff *v.* Weaver, 72 Iowa 641, 34 N. W. 456; Kentucky Bd. of Pharmacy *v.* Lordier, 109 Ky. 119, 58 S. W. 531, 22 Ky. L. Rep. 621; State Bd. of Pharmacy *v.* White, 84 Ky. 626, 2 S. W. 225, 8 Ky. L. Rep. 678; L'Association Pharmaceutique *v.* Brunet, 14 Can. Supreme Ct. 738.

In England members of the Pharmaceutical society, since the passage of 15 & 16 Vict. c. 56, are entitled to be admitted to registration as pharmaceutical chemists without examination. Reg. *v.* Pharmaceutical Soc., 1 Jur. N. S. 698, 24 L. J. Q. B. 177, 3 Wkly. Rep. 485.

11. State Bd. of Pharmacy *v.* White, 84 Ky. 626, 2 S. W. 225, 8 Ky. L. Rep. 678.

12. State *v.* Donaldson, 41 Minn. 74, 42 N. W. 781.

13. So under the English Pharmacy Act (31 & 32 Vict. c. 121, §§ 1, 15). Pharmaceutical Soc. *v.* Armson, [1894] 2 Q. B. 720, 59 J. P. 52, 64 L. J. Q. B. 32, 71 L. T. Rep. N. S. 315, 9 Reports 587, 42 Wkly. Rep. 662; Pharmaceutical Soc. *v.* Piper, [1893] 1 Q. B. 686, 57 J. P. 502, 62 L. J. Q. B. 305, 68 L. T. Rep. N. S. 490, 5 Reports 296, 41 Wkly. Rep. 447.

14. State *v.* Mullenhoff, 74 Iowa 271, 37 N. W. 329. *Contra*, Haas *v.* People, 27 Ill. App. 416.

15. Carberry *v.* People, 39 Ill. App. 506.

16. Taliaferro *v.* Moffert, 54 Ga. 150, which considers what should be averred in a plea that plaintiff was carrying on the business of druggist without a license. See also Westmoreland *v.* Bragg, 2 Hill (S. C.) 414, holding that one who is engaged in selling liquids compounded of roots and herbs "under the Thompsonian system" is an apothecary, within the meaning of the South Carolina act of 1817, and being unlicensed cannot recover for medicines sold by him.

tion as that of the person so in possession, the real owner will be estopped from claiming any title thereto.[17] On the other hand an insurance policy on a stock of drugs kept for sale by an unregistered pharmacist is not void, as the owner may employ a duly registered pharmacist to conduct his business;[18] and a law providing that only registered pharmacists shall sell drugs has no reference to a sale of a stock of drugs under foreclosure or judicial sale.[19]

b. By Physician Compounding Prescription. A physician has no vested right, from the nature of his profession, to keep a drug store;[20] and under a statute[21] prohibiting the selling or compounding of drugs, except by a registered pharmacist, and providing that nothing in the act should interfere with the business of any licensed practising physician, or prevent him from applying to his patients such articles as might seem to him proper, or with his compounding his own prescriptions, a physician was held liable to the penalty prescribed if, not being a registered pharmacist, he filled prescriptions sent to him by others.[22] One sued for an alleged violation of the pharmacy law, and shown to have compounded prescriptions without a pharmacist's license, if he claims the right as a physician to compound them, must show registration or license as a physician.[23]

c. For Sale of Patent, Domestic, and Commonly Used Medicines. No registration is probably necessary for the sale of patent medicines,[24] and under an act exempting the vendor of "domestic remedies" from its penalties, it has been held that a drug prepared by skilled chemists and scientific apparatus may come into such common use and be so well understood in its effects by people without medical knowledge as to make it a domestic remedy, and accordingly it was left to the jury to determine whether iodine and quinine were "domestic remedies."[25] So too an act[26] permitting shopkeepers, not pharmacists, whose places of business are more than one mile from a drug store to sell the commonly used medicines and poisons, if put up by a registered pharmacist, but prohibiting such sales within that distance, was held reasonable.[27]

5. Forfeiture or Revocation of Certificate of Registration. Druggists may under statute forfeit their rights;[28] and upon the record of conviction of an unlaw-

17. McIntosh *v.* Wilson, 81 Iowa 339, 46 N. W. 1003.

18. Erb *v.* German Ins. Co., 99 Iowa 398, 68 N. W. 701.

19. Cocke *v.* Montgomery, 75 Iowa 259, 39 N. W. 386.

20. People *v.* Moorman, 86 Mich. 433, 49 N. W. 263.

21. Ky. St. §§ 2620, 2632.

22. Com. *v.* Hovious, 66 S. W. 3, 23 Ky. L. Rep. 1724. It was held in New York, however, that a physician might, without taking out a pharmacist's license, compound a prescription made by another physician, if he was not engaged in the business of pharmacy, the Pharmacy Act (N. Y. Laws (1893), c. 661) exempting from its provisions a "practitioner of medicine who is not the proprietor of a store for the retailing of drugs." Suffolk County *v.* Shaw, 21 N. Y. App. Div. 146, 47 N. Y. Suppl. 349.

23. Suffolk County *v.* Shaw, 21 N. Y. App. Div. 146, 47 N. Y. Suppl. 349.

24. See cases cited *supra*, note 5. See also Kentucky Bd. of Pharmacy *v.* Cassidy, 74 S. W. 730, 25 Ky. L. Rep. 102. But see People *v.* Abraham, 16 N. Y. App. Div. 58, 44 N. Y. Suppl. 1077, holding that a sale at retail, by one not a registered pharmacist, of medicine in the original package of the manufacturer constitutes a violation of N. Y. Laws (1879), c. 502, as amended by N. Y. Laws (1886), c. 275, which provides that it shall be unlawful for any person, unless a registered pharmacist, "to open or conduct any pharmacy or store for retailing, dispensing or compounding medicines or poison."

Under the Pharmacy Act of West Virginia (W. Va. Code (1889), c. 150, § 11), which permits the sale by one not a registered pharmacist of "patent, proprietary medicines and such other ordinary drugs as are usually sold in a country store," it was held that it was not unlawful for a merchant to sell saltpeter and Epsom salts. Peters *v.* Johnson, 50 W. Va. 644, 652, 41 S. E. 190, 88 Am. St. Rep. 909, 57 L. R. A. 428.

25. People *v.* Fisher, 83 Ill. App. 114.

A finding that quinine was not a "domestic remedy" was upheld in Cook *v.* People, 125 Ill. 278, 17 N. E. 849.

26. Minn. Laws (1885), c. 147.

27. State *v.* Donaldson, 41 Minn. 74, 42 N. W. 781.

A provision in the New York Public Health Law, prohibiting the practice of pharmacy without license, that it shall not apply to the sale of the usual domestic remedies by retail dealers in the "rural districts" does not apply to a town of twelve thousand inhabitants. Westchester County *v.* Dressner, 23 N. Y. App. Div. 215, 48 N. Y. Suppl. 953.

28. Thus druggists who were in business at the passage of the Iowa law of 1882, c. 137,

ful sale of liquors, although not upon *ex parte* testimony, the commissioners of pharmacy may in some states revoke the certificate of a registered pharmacist.[29]

6. Violations of Registration Acts — a. By Owner — (i) *What Constitute.* Where the owner of a drug store[30] takes no part in conducting the same himself, but employs a duly certified pharmacist for said purpose, he is not subject to indictment for engaging as manager in the business of apothecary without the certificate of qualification required by the act.[31] The owner of a drug store is not liable for the statutory penalty where medicine was sold therein by one in his employ not a registered pharmacist if the sale was made without such owner's knowledge or assent.[32]

(ii) *Defenses.* In a prosecution for keeping a pharmacy without being registered, under the New York statute, it is no defense that there was no board of pharmacy for examination and registration, as defendant could have compelled the appointment of such a board.[33]

(iii) *Indictment.* An allegation that defendant "carried on the business of a druggist without a license therefor," using the language of the statute, is sufficient.[34] An indictment for keeping a pharmacy without being registered is not void for duplicity, although it charges that defendant, not being a registered pharmacist, "did unlawfully open and conduct a certain pharmacy," and not being registered "did unlawfully keep open shop for retailing medicines," etc.[35]

(iv) *Actions to Enforce Penalty.* Under a statute[36] providing for the licensing of pharmacists, and authorizing a recovery of a penalty for "every" violation of the act, there may be a recovery of accumulated penalties.[37] Under a similar statute providing for an action of debt[38] the declaration[39] must allege

and who therefore were licensed without examination, forfeited their right to a license, except on examination, by an abandonment for two years of the business at the place designated in the certificate of registration, even though during such two years they were engaged in the same business at another place in the state. Braniff *v.* Weaver, 72 Iowa 641, 34 N. W. 456.

29. Straight *v.* Crawford, 73 Iowa 676, 35 N. W. 920; Hildreth *v.* Crawford, 65 Iowa 339, 21 N. W. 667.

In Missouri to authorize a revocation of a druggist's certificate, under Rev. St. (1899) § 3047, the previous conviction must be charged in the indictment. State *v.* Watts, 101 Mo. App. 666, 74 S. W. 376.

Where defendant pleaded guilty in court and a complaint was thereupon ordered filed against him, this was held a sufficient conviction to justify the revocation of his license. Munkley *v.* Hoyt, 179 Mass. 108, 60 N. E. 413.

30. A corporation engaged in the business of dispensing and selling drugs is not liable to the penalty prescribed by 31 & 32 Vict. c 121, for assuming the title of "chemist" and "druggist" without complying with the act if it kept a registered and certified chemist in the shop who dispensed the drugs and conducted the sales. Pharmaceutical Soc. *v.* London Supply Assoc., 5 App. Cas. 857, 45 J. P. 20, 49 L. J. Q. B. 736, 43 L. T. Rep. N. S. 389, 28 Wkly. Rep. 957.

31. Com. *v.* Zacharias, 181 Pa. St. 126, 37 Atl. 185; Com. *v.* Johnson, 144 Pa. St. 377, 22 Atl. 703, which construe the Pennsylvania act of May 24, 1887, § 6. See also State *v.* Workman, 75 Mo. App. 454. But the Iowa statute which provides that "it shall be unlawful for any person not a registered pharmacist to conduct any pharmacy or drug-store" is violated if the person having the ultimate control of the business is not a registered pharmacist, although he employed a registered pharmacist who dispensed all the drugs and made all the sales. State *v.* Norton, 67 Iowa 641, 642, 25 N. W. 842.

32. State *v.* Robinson, 55 Minn. 169, 56 N. W. 594; Westchester County *v.* Dressner, 23 N. Y. App. Div. 215, 48 N. Y. Suppl. 953. But section 15 of the British Pharmacy Act (31 & 32 Vict. c. 121), providing that "any person who shall sell . . . poisons . . . not being a duly registered pharmaceutical chemist or chemist and druggist . . . shall for every such offence be liable," etc., is violated by the unregistered assistant of a duly qualified chemist who makes a sale of a poison. Pharmaceutical Soc. *v.* Wheeldon, 24 Q. B. D. 683, 54 J. P. 407, 59 L. J. Q. B. 400, 62 L. T. Rep. N. S. 727.

33. People *v.* Rontey, 4 N. Y. Suppl. 235, 6 N. Y. Cr. 249. In a prosecution for carrying on business as a druggist without license, the burden of justifying under or proving license is on the defendant. State *v.* Horner, 52 W. Va. 373, 43 S. E. 89.

34. State *v.* Enoch, 26 W. Va. 253.

35. People *v.* Rontey, 4 N. Y. Suppl. 235, 6 N. Y. Crim. 249, construing N. Y. Laws (1882), c. 410.

36. N. Y. Laws (1893), c. 661.

37. Suffolk County *v.* Shaw, 21 N. Y. App. Div. 146, 47 N. Y. Suppl. 349.

38. Me. Rev. Stat. c. 28.

39. A formal complaint is not a prerequisite to the bringing of a suit before a justice

that defendant was thus engaged in such business for one week in some place in the county in which the action is brought.[40] Under a statute imposing a penalty on the proprietor of a pharmacy for the retail of drugs, where neither the proprietor nor his clerk is a registered pharmacist, the burden is on defendant to prove compliance with the statute.[41]

b. By Clerk. Where a registered pharmacist is employed and placed in charge of a drug store, he becomes personally liable for the statutory penalty if he permits one who is not a registered pharmacist to vend medicines or poisons.[42]

B. Privilege or Occupation Tax[43] — **1. In General.** In addition to requiring a certificate of registration from a board of pharmaceutical examiners, an additional license is required of druggists in some states, either by statute[44] or municipal ordinance.[45] The object of the license is to produce revenue, while the object of the registration is to restrict the sales of drugs and poisons to those who are capable of dispensing them properly.[46]

2. For Itinerant Vendors of Drugs. Statutes requiring itinerant vendors of drugs, who publicly profess to cure diseases thereby, to pay a license-fee, have been upheld as a valid exercise of police power, and are applicable alike to articles produced within the state and to those brought in original packages from another state.[47]

III. Conduct of Business.

A. Prescriptions — 1. Manner of Compounding. Under some statutes druggists are required to compound their medicines in accordance with certain formularies.[48]

for the penalty prescribed for a violation of the Illinois pharmacy act of 1881. Cook *v.* People, 125 Ill. 278, 17 N. E. 849.

40. Plaisted *v.* Walker, 77 Me. 459, 1 Atl. 356.

41. People *v.* Nedrow, 16 Ill. App. 192.

42. Haas *v.* People, 27 Ill. App. 416.

43. See, generally, Licenses.

44. Where the statutes require separate state licenses from retail merchants and from druggists, one having a license as a retail merchant is not authorized to sell drugs without procuring a license as druggist also. State *v.* Holmes, 28 La. Ann. 765, 26 Am. Rep. 110.

Additional license for patent medicines.— Under the Pennsylvania act of April 10, 1849, an apothecary was liable to pay an additional license-tax if he sold patent medicines. Com. *v.* Fuller, 2 Walk. (Pa.) 550.

45. Reasonableness of municipal tax.—Under a statute authorizing a city to levy and collect a just and reasonable license-tax on druggists, an ordinance imposing an annual tax of five hundred dollars on a business, the gross receipts of which were one thousand dollars per year, was held unreasonable. Lyons *v.* Cooper, 39 Kan. 324, 18 Pac. 296. A municipal tax was held reasonable in Tulloss *v.* Sedan, 31 Kan. 165, 1 Pac. 285.

46. Accordingly it was held that W. Va. Acts (1877), c. 107, § 1, providing that no person without a state license therefor should "carry on the business of a druggist" was not repealed by the pharmacy act of 1881. State *v.* Enoch, 26 W. Va. 253. So under the South Carolina act of 1881 (17 St. 582) authorizing a city council to impose a license on citizens engaged in any calling, business, or profession, a city could impose a license-tax on druggists, although they already had a license from the board of pharmaceutical examiners, as required by S. C. Gen. St. §§ 924–926. *In re* Jager, 29 S. C. 438, 7 S. E. 605.

47. State *v.* Wheelock, 95 Iowa 577, 64 N. W. 620, 58 Am. St. Rep. 442, 30 L. R. A. 429; State *v.* Bair, 92 Iowa 28, 60 N. W. 486; State *v.* Gouss, 85 Iowa 21, 51 N. W. 1147; State *v.* Sayman, 61 Mo. App. 244.

Persons within statute.— A manufacturer of proprietary medicines, who attends county fairs for the purpose of introducing his medicines and publicly recommends them as a cure for certain diseases, is within Iowa Acts (1880), c. 75, § 12 (Snyder *v.* Closson, 84 Iowa 184, 50 N. W. 678); but the statute does not apply to a physician who advertises that he will be at a specified place at a given time to treat patients for specified diseases, and who uses his own medicines (State *v.* Bonham, 96 Iowa 252, 65 N. W. 154. See, however, State *v.* Gouss, 85 Iowa 21, 51 N. W. 1147).

Possession of physician's certificate no defense.— The possession of a physician's certificate from the state board of medical examiners will not exempt an itinerant vendor of drugs from the operation of the statute. State *v.* Gouss, 85 Iowa 21, 51 N. W. 1147.

48. In Ohio the reference in section 3 of the Pure Drug Statute (87 Ohio Laws 248) is to the edition of the United States Pharmacopœia in use when the statute was enacted — that of 1880 — so that the sale of a drug equal to the standard of strength, quality, and purity laid down in that edition is not rendered unlawful because it is below a standard set in a subsequent edition. State *v.* Emery, 55 Ohio St. 364, 45 N. E. 319.

In England chemists are required to compound the medicines of the British Pharma-

2. Right to Prescriptions and Manner of Keeping Them. A statute[49] requiring every druggist to keep all prescriptions, numbering and filing them in order, and to produce them when required, is constitutional.[50] Nevertheless a druggist has such an interest in his file of prescriptions, notwithstanding the qualified right of the persons who deposited them, that he may transfer such file to another; and it was held that a mortgage of a stock of drugs does not include a file of prescriptions.[51]

B. Right to Discriminate as to Customers. A drug store in which soda-water is sold is not a place of public accommodation, within the Civil Rights Act, and the keeper thereof may refuse to sell soda-water to a colored person.[52] So a druggist may refuse to fill the prescriptions of a certain physician without rendering himself liable in damages.[53]

C. Right to Practise Medicine. Where there are acts regulating the practice of medicine, druggists are usually confined in the exercise of their business to the preparing, compounding, dispensing, and vending of drugs and medicines. They cannot give advice to or attend a patient, or administer medicines for profit; nor can they recover for the value of medicines so prescribed by them, unless they are also qualified to act as physicians.[54]

IV. Liability of Druggists.

A. Ex Contractu. A druggist undertaking to sell a certain drug to a customer impliedly warrants the good quality of the drug sold, that the article sold and delivered is of the kind he contracted to sell, and if a prescription that it is compounded *secundum artem*. The rule *caveat emptor* does not apply.[55] In case of a breach of such warranty the vendee may recover for such losses as naturally and proximately resulted therefrom,[56] but the vendor is liable on the contract only to those with whom he has contracted or their privies.[57]

copœia only according to its formularies. Pharmacy Act, 31 & 32 Vict. c. 121, § 15.

49. Mo. Rev. St. (1889) § 4622.

50. State *v.* Davis, 108 Mo. 666, 18 S. W. 894, 32 Am. St. Rep. 640.

Requisites of subpœna to produce.— The subpœna should not require the druggist to produce all prescriptions compounded between certain dates, but should specify the kind of prescriptions or of what doctor. State *v.* Bragg, 51 Mo. App. 334.

51. Stuart Drug Co. *v.* Hirsch, (Tex. Civ. App. 1899) 50 S. W. 583.

52. Cecil *v.* Green, 161 Ill. 265, 43 N. E. 1105, 32 L. R. A. 566.

53. Tarleton *v.* Lagarde, 46 La. Ann. 1368, 16 So. 180, 49 Am. St. Rep. 353, 26 L. R. A. 325.

The English Apothecaries Act (55 Geo. III, c. 194, § 5) imposes a penalty upon an apothecary who refuses to compound a prescription of a licensed physician.

54. Apothecaries' Co. *v.* Greenough, 1 Q. B. 799, 1 G. & D. 378, 11 L. J. Q. B. 156, 41 E. C. L. 783; 2 Chitty Contr. 807.

In Louisiana a penalty is by statute (La. Acts (1894), No. 49, § 12), imposed on any itinerant vendor of drugs who professes to cure or treat diseases by any such drug. State *v.* Edwards, 105 La. 371, 29 So. 893.

Liability for negligent treatment.— If a druggist undertakes to treat a patient and does so ignorantly or negligently he is liable. Jones *v.* Fay, 4 F. & F. 525.

What acts constitute unlawful practice of medicine.—A druggist is guilty of unlawfully practising medicine where he prescribes medicine and charges for it. Reg. *v.* Howarth, 24 Ont. 561. If a chemist prescribes medicine to his customer, as well as makes it up and sells it, he renders himself liable to the penalty of the Pharmacy Act (31 & 32 Vict. c. 121, § 16). Apothecaries' Co. *v.* Nottingham, 34 L. T. Rep. N. S. 76. If one sells medicine, receiving payment therefor, and gives advice gratuitously as to the use to be made of it, he is not holding himself out as a physician. Com. *v.* St. Pierre, 175 Mass. 48, 55 N. E. 482.

55. Fleet *v.* Hollenkemp, 13 B. Mon. (Ky.) 219, 56 Am. Dec. 563; Jones *v.* George, 61 Tex. 345, 48 Am. Rep. 280, 56 Tex. 149, 42 Am. Rep. 689; Rogers L. & Med. Men 177.

A druggist undertakes that he possesses the ordinary skill of a druggist, and that he will exercise due and proper care in putting up the medicine required, where he assumes to put up a prescription for a customer. Beckwith *v.* Oatman, 43 Hun (N. Y.) 265.

56. Hadley *v.* Baxendale, 2 C. L. R. 517, 9 Exch. 341, 18 Jur. 358, 23 L. J. Exch. 179, 2 Wkly. Rep. 302; 2 Mechem Sales, §§ 1820, 1824.

57. Davidson *v.* Nichols, 11 Allen (Mass.) 514; Whittaker Smith Neg. (10).

Distinction between liability in contract and tort.— Where a druggist substitutes a harmful drug in lieu of a harmless one, he commits a breach of warranty of the contract; if he is guilty of negligence in so doing he is also guilty of a tort. See *infra*,

B. Ex Delicto — 1. In General — a. Degree of Care and Skill Exacted of Druggists.[58] In a number of cases it has been held that apothecaries, druggists, and all persons engaged in manufacturing, compounding, or selling drugs, poisons, or medicines are required to be extraordinarily skilful, and to use the highest degree of care known to practical men to prevent injury from the use of such articles and compounds.[59] In others it is held that when a druggist assumes to put up a prescription for a customer he undertakes that he possesses the ordinary skill of a druggist, and that he will exercise proper care and skill in putting up the medicine required, the degree of care being proportionate to the gravity of the injury that would naturally result from a want of care.[60]

b. What Constitutes Negligence — (I) *Delivering Deleterious For Harmless Drug* — (A) *In General.* A druggist who negligently delivers a deleterious drug when a harmless one is called for is responsible to the customer for the consequences, as being guilty of a breach of the duty which the law imposes on him to avoid acts in their nature dangerous to the lives of others.[61] Thus while the mere sale of tartaric acid to one who called for Rochelle salts was in one case held not sufficient to show negligence,[62] yet in another it was held that the sale of strychnine, when a preparation of camphor was called for, was sufficient to show negligence, in the absence of explanation.[63] So where a prescription called for snakeroot and Peruvian bark, and the druggist ran them through a mill in which he knew cantharides, a poisonous drug, had shortly before been ground without being properly cleansed, he was liable to the party injured.[64]

(B) *Mistake in Label.* If a druggist on application sells a harmful drug as and for a harmless one, he is liable to one who relying upon his label uses the drug and is injured thereby;[65] and the mistaken label of the manufacturer will not protect a retailer if he was negligent in failing to discover the mistake.[66]

(II) *Failure to Analyze Patent or Proprietary Medicine.* A druggist is not required to analyze the contents of each bottle or package of a patent or proprietary medicine which he gets from the manufacturer. If he delivers to the customer the article called for, with the label of the proprietary or patentee on it, he cannot justly be charged with negligence in so doing.[67]

IV, B. In an action on the warranty plaintiff must allege and prove privity of contract, but not negligence; while in an action of tort he must allege and prove negligence, but not privity of contract. See Howes *v.* Rose, 13 Ind. App. 674, 42 N. E. 303, 55 Am. St. Rep. 251.

58. The case of Fleet *v.* Hollenkemp, 13 B. Mon. (Ky.) 219, 56 Am. Dec. 563, which holds that a druggist cannot escape liability in tort by proving that there was an accidental or innocent mistake, and that he used extraordinary care and diligence in compounding the medicine which caused the injury seems to stand alone.

59. Howes *v.* Rose, 13 Ind. App. 674, 42 N. E. 303, 55 Am. St. Rep. 251; Walton *v.* Booth, 34 La. Ann. 913; Kerr *v.* Clason, 2 Ohio Dec. (Reprint) 666, 4 West. L. Month. 488; Peters *v.* Johnson, 50 W. Va. 644, 41 S. E. 190, 88 Am. St. Rep. 909, 57 L. R. A. 428; Barrows Neg. § 155.

60. Beckwith *v.* Oatman, 43 Hun (N. Y.) 265; Shearman & Redf. Neg. § 691; 3 Wharton & Stillé Med. Jur. § 774. See also Simonds *v.* Henry, 39 Me. 155, 63 Am. Dec. 611; Brown *v.* Marshall, 47 Mich. 576, 11 N. W. 392, 41 Am. Rep. 728.

61. *Illinois.*— Smith *v.* Hays, 23 Ill. App. 244.

Louisiana.— Walton *v.* Booth, 34 La. Ann. 913.

Michigan.— Brown *v.* Marshall, 47 Mich. 576, 11 N. W. 392, 41 Am. Rep. 728.

New York.— McVeigh *v.* Gentry, 72 N. Y. App. Div. 598, 76 N. Y. Suppl. 535.

United States.— District of Columbia Nat. Sav. Bank *v.* Ward, 100 U. S. 195, 25 L. ed. 621.

62. Howes *v.* Rose, 13 Ind. App. 674, 42 N. E. 303, 55 Am. St. Rep. 251.

63. Minner *v.* Scherpich, 5 N. Y. St. 851.

64. Fleet *v.* Hollenkemp, 13 B. Mon. (Ky.) 219, 56 Am. Dec. 563.

65. Fisher *v.* Golladay, 38 Mo. App. 531; Thomas *v.* Winchester, 6 N. Y. 397, 57 Am. Dec. 455; Bigelow Lead. Cas. Torts 602.

Illustration.— For a druggist to fill an order for one-quarter grain calomel tablets with morphine, and place them in a box labeled calomel, without giving notice of the fact, may be found to be gross negligence, rendering him liable for punitive damages. Smith *v.* Middleton, 66 S. W. 388, 23 Ky. L. Rep. 2010, 56 L. R. A. 484.

66. Howes *v.* Rose, 13 Ind. App. 674, 42 N. E. 303, 55 Am. St. Rep. 251.

67. West *v.* Emanuel, 198 Pa. St. 180, 47 Atl. 965, 53 L. R. A. 329.

(III) *Failure to Notify Customer of Dangerous Character of Drug.* No liability attaches to a druggist for injuries to a customer for lack of instruction as to the safe method of handling an article called for and sold to him, the dangerous qualities of which are generally known, where he has reached the age of discretion, and there was nothing to apprise the seller that he was unfit to be intrusted with the substance.[68]

(IV) *Filling Illegible Prescription.* If the prescription of a physician is so illegibly written that a druggist, notwithstanding the exercise of ordinary care, makes such a mistake in mixing the ingredients as to cause or hasten the death of the patient who partook thereof the druggist is not liable in damages.[69]

(V) *Recommending Prescription.* Where a druggist in good faith recommended the prescription of another person to the owner of a sick horse, who ordered him to put it up and paid him, the owner had no cause of action because the horse was injured by the medicine, which had been properly prepared according to the prescription.[70]

c. Privity of Contract as Affecting Recovery. While a contract ordinarily creates no duty except as to the parties and their privies, actions for damages may be maintained by persons who are neither parties nor privies to a contract when the injury complained of arises from want of care in the sale of a thing imminently dangerous.[71] Thus a manufacturing druggist selling a poisonous or dangerous drug labeled as a harmless one is liable in damages to any person who, without carelessness and relying on the erroneous label, takes such drug as a medicine, on the ground of a breach of public duty, and whether the injured one is an immediate customer of defendant or not.[72] So the proprietor of a patent medicine is liable to one who, having purchased it from a retailer and used it as prescribed, is injured by reason of some harmful ingredient contained in the medicine;[73] and a druggist was held liable where he recommended and put up a hairwash for a customer which was to be used by the latter's wife, and which injured her hair.[74]

68. Gibson *v.* Torbert, 115 Iowa 163, 88 N. W. 443, 56 L. R. A. 98.

69. McClardy *v.* Chandler, 3 Ohio Dec. (Reprint) 1, 2 Wkly. L. Gaz. 1.

70. Ray *v.* Burbank, 61 Ga. 505, 34 Am. Rep. 103.

71. Bishop *v.* Weber, 139 Mass. 411, 1 N. E. 154, 52 Am. Rep. 715; Loop *v.* Litchfield, 42 N. Y. 351, 1 Am. Rep. 513; Longmeid *v.* Holliday, 6 Exch. 761, 20 L. J. Exch. 430; 2 Jaggard Torts, §§ 260, 261.

72. Thomas *v.* Winchester, 6 N. Y. 397, 57 Am. Dec. 455; District of Columbia Nat. Sav. Bank *v.* Ward, 100 U. S. 195, 25 L. ed. 621; Bigelow Lead. Cas. Torts 602; Cooley Torts 83; Shearman & Redf. Neg. § 690. Although in Heaven *v.* Pender, 11 Q. B. D. 503, 47 J. P. 709, 52 L. J. Q. B. 702, 49 L. T. Rep. N. S. 357, Brett, M. R., doubted whether Thomas *v.* Winchester, 6 N. Y. 397, 57 Am. Dec. 455, did not go too far, the case has been followed without question elsewhere. Norton *v.* Sewall, 106 Mass. 143, 8 Am. Rep. 298; McVeigh *v.* Gentry, 72 N. Y. App. Div. 598, 76 N. Y. Suppl. 535; Davis *v.* Guarnieri, 45 Ohio St. 470, 15 N. E. 350, 4 Am. St. Rep. 548; Peters *v.* Johnson, 50 W. Va. 644, 41 S. E. 190, 88 Am. St. Rep. 909, 57 L. R. A. 428.

Illustrations.— In Phillips *v.* Wood, 2 L. J. K. B. 100, 1 N. & M. 434, 28 E. C. L. 545, it was held that where it was agreed between A and B that B should take A's mare to graze and have her blistered, A could maintain an action against a chemist for selling an ointment to B which upon being applied injured the mare. In Davidson *v.* Nichols, 11 Allen (Mass.) 514, certain wholesale druggists sold to a retailer a quantity of sulphide of antimony for black oxide of manganese, and the retailer sold it to plaintiff, who supposing it to be what it purported to be used it in combination with chlorate of potassa, causing an explosion and injuring him. It was held that the wholesalers were not liable, because the article was not in itself dangerous, and they had no notice that it was intended to be used in the combination which rendered it dangerous. The distinction is criticized as unsound in a note to Thomas *v.* Winchester, 57 Am. Dec. 461, 462.

73. Blood Balm Co. *v.* Cooper, 83 Ga. 457, 10 S. E. 118, 20 Am. St. Rep. 324, 5 L. R. A. 612.

74. George *v.* Skivington, L. R. 5 Exch. 1, 39 L. J. Exch. 8, 21 L. T. Rep. N. S. 495, 18 Wkly. Rep. 118.

Selling laudanum to wife.— An action may be maintained by a husband against a druggist to recover damages for selling to plaintiff's wife secretly, from day to day, large quantities of laudanum to be used by her as a beverage, and which was so used by her to defendant's knowledge, without plaintiff's knowledge, whereby she was made sick and unable to perform her duties as wife, and

d. Defenses — (I) *IN GENERAL.* If a druggist sell one drug for another, and injury result, it is no defense that he was careful and prudent in handling drugs,[75] or that plaintiff's case was negligently treated,[76] although it would be a defense that the mistake caused no injury.[77] The fact that morphine was sold for quinine on private application, and not on prescription, did not excuse the druggist.[78]

(II) *CONTRIBUTORY NEGLIGENCE.* One who is injured by the negligence of a druggist in substituting an injurious drug where a harmless one was called for cannot recover if he was guilty of contributory negligence in taking the medicine;[79] but the contributory negligence of a husband in the purchase of a drug to be used by his wife is not to be imputed to her in an action by her administrator against the dealer for her death resulting from the use of such drug.[80]

2. NEGLIGENCE OF EMPLOYEE. Where a druggist's clerk, in the course of his employment, negligently supplies a harmful drug in lieu of a harmless one called for, either by prescription or otherwise, and injury results from taking it, the druggist will be liable in damages.[81] In such case it is no defense that the clerk is a registered and competent pharmacist.[82]

DRUG STOCK. A term which includes all articles ordinarily and usually kept therein at the place where the stock is situated.[1]

DRUG STORE. A pharmacy; a store, shop or other place of business where drugs, medicines or poisons are compounded, dispensed or sold at retail.[2]

DRUMMER.[3] A commercial agent who is travelling for a wholesale merchant,

her affections were alienated from plaintiff. Hoard *v.* Peck, 56 Barb. (N. Y.) 202.

75. Hall *v.* Rankin, 87 Iowa 261, 54 N. W. 217.

76. Brown *v.* Marshall, 47 Mich. 576, 11 N. W. 392, 41 Am. Rep. 728. See also McCubbin *v.* Hastings, 27 La. Ann. 713, holding that an action by a husband against a druggist for alleged neglect in substituting spirits of camphor when the prescription called for camphor water, which caused the wife's death, is not precluded by the facts that the woman was very sick with yellow fever, that the attending physician gave a certificate of death from yellow fever, and that the husband caused the certificate to be published in the newspapers.

77. Rabe *v.* Sommerbeck, 94 Iowa 656, 63 N. W. 458.

78. Brunswig *v.* White, 70 Tex. 504, 8 S. W. 85.

79. Hackett *v.* Pratt, 52 Ill. App. 346; Gwynn *v.* Duffield, 66 Iowa 708, 24 N. W. 523, 55 Am. Rep. 286, 61 Iowa 64, 15 N. W. 594, 47 Am. Rep. 802; Wohlfahrt *v.* Beckert, 92 N. Y. 490, 44 Am. Rep. 406.

Burden of proving contributory negligence. — In Iowa one who sues because injurious medicine was negligently sold to him must plead and prove that he was free from contributory negligence, and defendant may urge his failure to do so in arrest of judgment. Rabe *v.* Sommerbeck, 94 Iowa 656, 63 N. W. 458. This is in conflict with the general rule, and with Phillips *v.* Wood, 2 L. J. K. B. 100, 1 N. & M. 434, 28 E. C. L. 545. See also Gramm *v.* Boener, 56 Ind. 497.

80. Fisher *v.* Golladay, 38 Mo. App. 531; Davis *v.* Guarnieri, 45 Ohio St. 470, 15 N. E. 350, 4 Am. St. Rep. 548.

81. *Iowa.*— Burgess *v.* Sims Drug Co., 114 Iowa 275, 86 N. W. 307, 89 Am. St. Rep. 359, 54 L. R. A. 364.

Kentucky.— Hansford *v.* Payne, 11 Bush 380.

Louisiana.— McCubbin *v.* Hastings, 27 La. Ann. 713.

Minnesota.— Osborne *v.* McMasters, 40 Minn. 103, 41 N. W. 543, 12 Am. St. Rep. 698.

New York.— Quin *v.* Moore, 15 N. Y. 432.

Ohio.— Davis *v.* Guarnieri, 45 Ohio St. 470, 15 N. E. 350, 4 Am. St. Rep. 548.

Texas.— Hargrave *v.* Vaughn, 82 Tex. 347, 18 S. W. 695; Brunswig *v.* White, 70 Tex. 504, 8 S. W. 85.

82. Burgess *v.* Sims Drug Co., 114 Iowa 275, 86 N. W. 307, 89 Am. St. Rep. 359, 54 L. R. A. 364.

1. Kern *v.* Wilson, 73 Iowa 490, 493, 35 N. W. 594, where it was said: "It was a question for the jury to determine what such articles consisted of."

2. Hurd Ill. St. (1897) pp. 1075, 1076, § 4 [*quoted* in Noel *v.* People, 187 Ill. 587, 590, 58 N. E. 616, 79 Am. St. Rep. 238, 52 L. R. A. 287].

3. This term "has come to have a fixed and proper place in our language as well as in our law." John Matthews' Apparatus Co. *v.* Renz, 61 S. W. 9, 10, 22 Ky. L. Rep. 1528. And it has acquired a common acceptation. Singleton *v.* Fritsch, 4 Lea (Tenn.) 93, 96 [*quoted* in State *v.* Miller, 93 N. C. 511, 515, 53 Am. Rep. 469; Robbins *v.* Shelby County Taxing Dist., 13 Lea (Tenn.) 303, 305 (*reversed* in 120 U. S. 489, 7 S. Ct. 592, 30 L. ed. 694)].

Distinguished from: "Hawker" or "peddler" in Emmons *v.* Lewistown, 132 Ill. 380, 384, 24 N. E. 58, 22 Am. St. Rep. 540, 8

and supplying the retail trade with goods, or rather taking orders for goods to be shipped to the retail merchant;[4] a COMMERCIAL TRAVELER,[5] *q. v.*; a person employed to work up business for his employer;[6] a person who exhibits samples for the purpose of effecting a sale of goods;[7] a person who goes about, from place to place, soliciting the purchase of goods, wares, or merchandise, or offering to sell, barter, or deliver any goods, wares, or merchandise, by sample or otherwise;[8] a person who travels for a wholesale merchant, taking orders from retail dealers for goods to be shipped to them;[9] a solicitor of orders for others;[10] a traveling agent, acting as an intermediary between the importer or the wholesaler, and the local trade;[11] a traveling agent who sells or offers to sell by sample, by representation of his employer's goods, or by soliciting orders;[12] a traveling and soliciting salesman;[13] one who sells to retail dealers or others by sample;[14] one who solicits custom;[15] one who solicits trade from retail dealers or others by sample, or one whose business is to canvass and take orders for future delivery of books or other commodities.[16] (Drummer: In General, see HAWKERS AND PEDDLERS. Liability of Carrier For Loss of Samples of, see CARRIERS. License Tax of, see COMMERCE; LICENSES.)

DRUMMING. The usual taking of an order by the drummer and transmitting it to his "house" for action, approval or rejection.[17]

DRUMMY. As applied to the roof or sides of a tunnel in a mine, a term meaning not solid and strong.[18] (See, generally, MINES AND MINING.)

DRUNK. Under the influence of intoxicating liquor to such an extent as to have lost the normal control of one's bodily and mental faculties, and, commonly, to evince a disposition to violence, quarrelsomeness, and bestiality.[19] (See, generally, DRUNKARDS.)

L. R. A. 328 [*quoted* in Potts *v.* State, (Tex. Cr. App. 1903) 74 S. W. 31, 33]. "Merchant tailor" in Singleton *v.* Fritsch, 4 Lea (Tenn.) 93, 96. "Peddler" in Brookfield *v.* Kitchen, 163 Mo. 546, 551, 63 S. W. 825; State *v.* Hoffman, 50 Mo. App. 585, 590; Titusville *v.* Brennan, 143 Pa. St. 642, 22 Atl. 893, 24 Am. St. Rep. 580, 14 L. R. A. 100. "Peddler" or "merchant" in Kansas City *v.* Collins, 34 Kan. 434, 436, 8 Pac. 865. "Salesman" in State *v.* Miller, 93 N. C. 511, 515, 53 Am. Rep. 469.

4. Singleton *v.* Fritsch, 4 Lea (Tenn.) 93, 96 [*quoted* in State *v.* Miller, 93 N. C. 511, 515, 53 Am. Rep. 469; Robbins *v.* Shelby County Taxing Dist., 13 Lea (Tenn.) 303, 305 (*reversed* in 120 U. S. 489, 7 S. Ct. 592, 30 L. ed. 694)].

5. Kansas City *v.* Collins, 34 Kan. 434, 436, 8 Pac. 865.

6. Weller *v.* Pennsylvania R. Co., 113 Fed. 502, 505.

7. Robbins *v.* Shelby County Taxing Dist., 120 U. S. 489, 490, 7 S. Ct. 592, 30 L. ed. 694 [*cited* in Emert *v.* Missouri, 156 U. S. 296, 318, 15 S. Ct. 367, 39 L. ed. 430].

"In common language a drummer sells goods; he sells by sample; he sells by soliciting and procuring orders; the dealers sell by drummers as their agents." State *v.* Ascher, 54 Conn. 299, 306, 7 Atl. 822.

8. *Ex p.* Hanson, 28 Fed. 127, 129, as defined in an ordinance.

9. Anderson L. Dict [*cited* in State *v.* Hoffman, 50 Mo. App. 585, 590].

10. *Ex p.* Taylor, 58 Miss. 478, 481, 38 Am. Rep. 336.

11. Titusville *v.* Brennan, 143 Pa. St. 642, 646, 22 Atl. 893, 24 Am. St. Rep. 580, 14 L. R. A. 100.

12. Robbins *v.* Shelby County Taxing Dist., 13 Lea (Tenn.) 303, 305.

13. State *v.* Miller, 93 N. C. 511, 515, 53 Am. Rep. 469.

14. Emmons *v.* Lewistown, 132 Ill. 380, 385, 24 N. E. 58, 22 Am. St. Rep. 540, 8 L. R. A. 328 [*quoted* in Potts *v.* State, (Tex. Cr. App. 1903) 74 S. W. 31, 33].

15. Webster Dict. [*cited* in Thomas *v.* Hot Springs, 34 Ark. 553, 557, 36 Am. Rep. 24, where it is said: "Drummers are, and have been for ages, a large and active class of commercial and business agents"].

16. Twining *v.* Elgin, 38 Ill. App. 356, 361 [*citing* Emmons *v.* Lewistown, 132 Ill. 380, 385, 24 N. E. 58, 22 Am. St. Rep. 540, 8 L. R. A. 328].

17. John Matthews' Apparatus Co. *v.* Renz, 61 S. W. 9, 10, 22 Ky. L. Rep. 1528.

18. Kelley *v.* Fourth of July Min. Co., 16 Mont. 484, 499, 41 Pac. 273.

19. Standard Dict. [*quoted* in Sapp *v.* State, 116 Ga. 182, 185, 42 S. E. 410]. And see State *v.* Pierce, 65 Iowa 85, 21 N. W. 195 [*citing* Bouvier L. Dict., and *cited* in Sapp *v.* State, 116 Ga. 182, 185, 42 S. E. 410].

"Drunk" in various degrees.—"A man is said to be dead drunk when he is perfectly unconscious,— powerless. He is said to be stupidly drunk when a kind of stupor comes over him. He is said to be staggering drunk when he staggers in walking. He is said to be foolishly drunk when he acts the fool. All these are cases of drunkenness,— of different degrees of drunkenness." Elkin *v.* Buschner, (Pa. 1888) 16 Atl. 102, 103.

DRUNKARDS

By Ernest H. Wells*

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I. DEFINITIONS.

A. "Drunkards," "Habitual Drunkards," and "Common Drunkards." A drunkard is one with whom drunkenness has become a habit; one who habitually drinks to intoxication; a sot;[1] one who habitually gets drunk.[2] The material difference between the terms "drunkard" and "habitual drunkard" is not well defined.[3] The latter appears to be the stronger term. A habitual drunkard is one who has acquired a fixed habit of drunkenness;[4] one who has formed the

1. People *v.* Radley, 127 Mich. 627, 86 N. W. 1029. See instruction given by the court and approved by the United States supreme court in Northwestern Mut. L. Ins. Co. *v.* Muskegon Nat. Bank, 122 U. S. 501, 7 S. Ct. 1221, 30 L. ed. 1100, an insurance case.
There may be a habit of intoxication in one who occasionally resists temptation. People *v.* Radley, 127 Mich. 627, 86 N. W. 1029.

2. Com. *v.* Whitney, 5 Gray (Mass.) 85, 88.

3. Com. *v.* Whitney, 5 Gray (Mass. 85, 88.

4. Sitton *v.* Grand Lodge A. O. U. W., 84 Mo. App. 208, 212.
"An habitual drunkard means more than being drunk on two or three occasions within a given time,—two or three times within a given number of months; that it means the

habit of drinking liquor to excess and of becoming intoxicated;[5] one who is in the habit of getting drunk or who commonly or frequently is drunk.[6] The term "common drunkard" has been considered as synonymous with "habitual drunkard."[7]

B. "Drunkenness" and "Habitual Drunkenness." Drunkenness is the state of being drunk or overpowered by intoxicants; the habit of indulging in intoxicants;[8] ebriety, inebriation, intoxication; the result of the excessive drinking of intoxicating liquors;[9] the term does not include the physical state resulting from the use of drugs.[10] Habitual drunkenness is the fixed habit of fre-

use of intoxicating liquors to such an extent as to in some manner disqualify a man from pursuing his avocation; but you can perhaps define it as well as the court." Rude *v.* Nass, 79 Wis. 321, 330, 48 N. W. 555, 24 Am. St. Rep. 717, 721. This was a charge to the jury and was objected to on the ground that the court left the jury to define for themselves the words "habitual drunkard." To this objection the supreme court answered that the trial court had already defined those words in a sufficiently favorable manner to plaintiff, and what was added was merely to indicate that the words were not such as to admit of a precise definition, although well understood by the public.

That he should always be intoxicated or under the influence of intoxicating liquors is not necessary to constitute one a habitual drunkard.

Alabama.— Tatum *v.* State, 63 Ala. 147, 152.

Kansas.— Walton *v.* Walton, 34 Kan. 195, 198, 8 Pac. 110.

Ohio.—Miller *v.* Gleason, 10 Ohio Cir. Dec. 20, 21.

Oregon.— McBee *v.* McBee, 22 Oreg. 329, 333, 29 Pac. 887, 29 Am. St. Rep. 613.

Pennsylvania.— Ludwick *v.* Com., 18 Pa. St. 172, 175, the court saying: "We agree that a man who is intoxicated or drunk one-half of his time is an habitual drunkard, and should be pronounced such."

Vermont.— State *v.* Pratt, 34 Vt. 323.

5. Miller *v.* Gleason, 10 Ohio Cir. Dec. 20, 21.

Before a man can be regarded as a habitual drunkard, it must appear that he drinks to excess so frequently as to become a fixed habit or practice with him. Walton *v.* Walton, 34 Kan. 195, 198, 8 Pac. 110, suit for divorce.

6. State *v.* Pratt, 34 Vt. 323.

A still stronger definition is: One who has "the habit of indulging in intoxicating liquors so firmly fixed that he becomes intoxicated as often as the temptation is presented by his being in the vicinity where liquors are sold." Magahay *v.* Magahay, 35 Mich. 210. See also Tatum *v.* State, 63 Ala. 147, 152; McBee *v.* McBee, 22 Oreg. 329, 333, 29 Pac. 887, 29 Am. St. Rep. 613; Ludwick *v.* Com., 18 Pa. St. 172, 174.

"Gross and confirmed habits of intoxication" within the meaning of a divorce statute see Blaney *v.* Blaney, 126 Mass. 205.

7. Either of the expressions may in general terms be defined as meaning one who drinks intoxicating liquors to excess with habitual frequency. State *v.* Savage, 89 Ala. 1, 9, 7 So. 7, 183, 7 L. R. A. 426.

"The use of the word 'common' imports frequency." Com. *v.* McNamee, 112 Mass. 285, 286.

8. See Century Dict.

"Drunkenness is that effect produced on the mind, passions, or body, by intoxicants taken into the system, which so far changes the normal condition, as to materially disturb and impair the capacity for healthy, rational action or conduct; which causes abnormal results, or such as would not ensue, in the absence of the intoxicants — the changed effect produced by the immoderate, or excessive use of intoxicants, as contrasted with normal status and conduct." State *v.* Savage, 89 Ala. 1, 8, 7 So. 7, 183, 7 L. R. A. 426 [*approved* in State *v.* Robinson, 111 Ala. 482, 20 So. 30].

Drunkenness is the physical state which results from taking into the body excessive quantities of intoxicating liquor. Youngs *v.* Youngs, 130 Ill. 230, 234, 22 N. E. 806, 17 Am. St. Rep. 313, 6 L. R. A. 548; Smith *v.* Bigelow, 19 Iowa 459.

9. Com. *v.* Whitney, 11 Cush. (Mass.) 477, 479.

"'Intoxication' . . . means an abnormal mental or physical condition due to the influence of alcoholic liquors — a visible excitation of the passions, an impairment of the judgment, or a derangement or impairment of physical functions or energies." Wadsworth *v.* Dunnam, 98 Ala. 610, 613, 13 So. 597. See also Roden *v.* State, 136 Ala. 89, 90, 34 So. 351; State *v.* Savage, 89 Ala. 1, 7 So. 7, 183, 7 L. R. A. 426; Lafler *v.* Fisher, 121 Mich. 60, 62, 79 N. W. 934; Shader *v.* Railway Pass. Assur. Co., 5 Thomps. & C. (N. Y.) 643.

One is "intoxicated" when intoxicating liquor has "affected" his faculties or caused him to lose self-control, etc. (State *v.* Huxford, 47 Iowa 16), but not when his potations do not affect — disturb or interfere with — his mental or physical faculties (Roden *v.* State, 136 Ala. 89, 90, 34 So. 351).

The word "intoxicated" as used in the statute declaring it a misdemeanor to be found intoxicated means that the condition described therein has been produced by the drinking of intoxicating spirituous liquors. State *v.* Kelley, 47 Vt. 294.

10. Youngs *v.* Youngs, 130 Ill. 230, 234, 22 N. E. 806, 17 Am. St. Rep. 313, 6 L. R. A. 548; Com. *v.* Whitney, 11 Cush. (Mass.) 477.

quently getting drunk;[11] the term does not necessarily imply a state of continual drunkenness.[12]

II. THE CRIME OF DRUNKENNESS OR OF BEING A DRUNKARD.[13]

A. At Common Law. By the early common law of England public drunkenness was not an offense.[14] In some of the states, however, public drunkenness has been declared to be an offense at common law;[15] but some cases hold that public drunkenness is not an offense unless it is a public nuisance.[16]

B. The Statutory Offense[17] — 1. "Public" Commission. Where a statute provides a penalty for being drunk in a public place, the phrase "a public place" means a place where the public has a right to go and to be and does not include all places where people may be congregated.[18] To violate an ordinance against

11. Brown *v.* Brown, 38 Ark. 324, 328.

12. The person may be so addicted that he may not be oftener drunk than sober, may even be sober for weeks. Brown *v.* Brown, 38 Ark. 324. See *supra*, I, A. See also Mahone *v.* Mahone, 19 Cal. 626, 627, 81 Am. Dec. 91; Richards *v.* Richards, 19 Ill. App. 465, 467.

Habitual intemperance is a persistent habit of becoming intoxicated from the use of strong drink. Burns *v.* Burns, 13 Fla. 369, 376. "The phrase 'habitual intemperance' scarcely requires an interpretation; it is easily understood. It means the custom or habit of getting drunk. The constant indulgence in such stimulants as wine, brandy and whiskey, whereby intoxication is produced. Not the ordinary use, but the habitual abuse of them. The habit should be actual and confirmed. It may be intermittent. It need not be continuous, or even of daily occurrence." Mack *v.* Handy, 39 La. Ann. 491, 497, 2 So. 181. See also Mahone *v.* Mahone, 19 Cal. 626, 81 Am. Dec. 91; Dennis *v.* Dennis, 68 Conn. 186, 193, 36 Atl. 34, 57 Am. St. Rep. 95, 34 L. R. A. 449.

"**The words 'continued drunkenness'** are used in their ordinary sense in our statutes, and signify gross and confirmed habits of intoxication." Gourlay *v.* Gourlay, 16 R. I. 705, 707, 19 Atl. 142, a suit for divorce.

13. **Criminal law and criminal prosecutions** generally see CRIMINAL LAW, 12 Cyc. 70 *et seq.*

14. It was made an offense by 4 Jac. 1, c. 5. See 4 Blackstone Comm. 864 (where drunkenness is classed under offenses against God and religion); Jacob L. Dict. See also argument of counsel in Com. *v.* Miller, 8 Gray (Mass.) 484, 485.

15. See State *v.* Brown, 38 Kan. 390, 397, 16 Pac. 259, where it was said: "Voluntary drunkenness in a public place was always a misdemeanor at common law; and it was always wrong morally and legally. It is *malum in se*." In Tipton *v.* State, 2 Yerg. (Tenn.) 542, 543, holding that public drunkenness was an indictable offense at common law, the court said: "The pernicious influence of an evil example is plain to every reflecting mind, and the powerful influence of this vice upon society, not only in its effect on the relations of private life, but also as being the origin, the fomenter, and the promoter of the greater portion of public crime of the country, proves it to be what it is, an indictable offence."

Even a single act of open and notorious drunkenness has been held indictable. Smith *v.* State, 1 Humphr. (Tenn.) 396 [*citing* 4 Blackstone Comm. 61]. The principle is recognized in State *v.* Graham, 3 Sneed (Tenn.) 134. Subsequently by statute in Tennessee a single act of drunkenness was made not indictable. State *v.* Smith, 3 Heisk. (Tenn.) 465; Hutchison *v.* State, 5 Humphr. (Tenn.) 142.

16. Thus a single act of drunkenness, although it was in the presence of a crowd, was held not indictable if the persons assembled are not annoyed or disturbed. State *v.* Deberry, 27 N. C. 371.

A single instance of an innkeeper being drunk in his own inn is not indictable at common law unless it becomes a nuisance. State *v.* Locker, 50 N. J. L. 512, 14 Atl. 749 [*citing* 2 Wharton Prec. 778].

17. **Conflict of laws.**— A municipal by-law for the punishment of persons intoxicated on the public streets is not rendered inoperative by 32 & 33 Vict. c. 28, which was an act against vagrants. Winslow *v.* Gallagher, 27 N. Brunsw. 25. The crime of being drunk and disorderly is an entirely different offense from the crime of being simply found "drunk or grossly intoxicated" in any street, highway, etc. Therefore an ordinance describing a penalty for the first offense is not repealed by a statute defining the second offense. *Ex p.* Schmidt, 24 S. C. 363.

18. State *v.* Waggoner, 52 Ind. 481; State *v.* Sowers, 52 Ind. 311; State *v.* Tincher, 21 Ind. App. 142, 51 N. E. 943.

A public place does not mean a place devoted solely to the uses of the public, but it means a place which in point of fact is public as distinguished from private — a place that is visited by many persons and is usually accessible to the neighboring public. Murchison *v.* State, 24 Tex. App. 8, 5 S. W. 508.

A grand jury room is a public place. Murchison *v.* State, 24 Tex. App. 8, 5 S. W. 508.

A room in a hotel is not a public place in this sense. Bordeaux *v.* State, 31 Tex. Cr. 37, 19 S. W. 603.

Highways and streets.— Under such a statute a public highway is a public place and a street is a public highway and therefore a public place. See State *v.* Stevens, 36 N. H.

"public drunkenness," it is not necessary to be drunk in a public place; public drunkenness is not equivalent to drunkenness in a public place.[19]

2. Intent. To constitute the offense of being "found" intoxicated, it is not necessary that the liquor should have been drunk with the intent to become and to be found intoxicated.[20]

3. Defenses. It has been held to be no defense to an offense to be found in a public place in a state of intoxication that defendant became drunk from liquor taken by a physician's prescription.[21] On the other hand, it has been held that an honest mistake as to the intoxicating qualities of the liquor taken may constitute a good defense.[22]

C. Arresting Without Warrant. Under a statute requiring an officer who arrests an intoxicated person without a warrant to make a complaint against such person, an officer who in good faith has arrested a person who was not intoxicated or who fails to make such a complaint is liable for assault.[23]

D. Indictment, Information, or Complaint[24] — **1. Charging Within and Following Terms of Statute.** Generally where the offense is charged in the terms of the statute it will be sufficient.[25] Where, however, a statute makes it an offense to be drunk under certain conditions, the indictment must charge the offense within the conditions prescribed.[26] But the complaint, indictment, or

59 [*citing* State *v.* Hall, 22 N. H. 384]. *Compare* Strafford County *v.* Dover, 61 N. H. 617.

Private houses are not public places. State *v.* Sowers, 52 Ind. 311; State *v.* Tincher, 21 Ind. App. 142, 51 N. E. 943.

Being "found" intoxicated.—By Vt. Rev. L. § 3121, which imposes a penalty on one found "intoxicated," that intoxication alone is a crime which is seen and witnessed by another. State *v.* Austin, 62 Vt. 291, 19 Atl. 117. See also *In re* Rogers, 75 Vt. 329, 55 Atl. 661.

Drunkenness in another person's room in the house in which defendant resides was punishable under Mass. Rev. St. c. 130, § 18, without proof that the drunkenness was made public. Com. *v.* Miller, 8 Gray (Mass.) 484.

19. State *v.* McNinch, 87 N. C. 567.

Only when intoxication results in a disturbance of the good order and quiet of the corporation is it punishable by ordinance under Ohio Rev. St. § 2108. Jefferies *v.* Defiance, 11 Ohio Dec. (Reprint) 144, 25 Cinc. L. Bul. 68. See also, generally, Disorderly Conduct.

20. State *v.* White, 64 Vt. 372, 24 Atl. 250 [*citing* State *v.* Hopkins, 56 Vt. 250].

21. State *v.* Sevier, 117 Ind. 338, 340, 20 N. E. 245, where the court said: "The offense does not consist in being found in a state of intoxication, but in being found in a public place in a state of intoxication."

22. State *v.* Brown, 38 Kan. 390, 397, 16 Pac. 259, where the court quoted the maxim *ignorantia facti excusat* and cited 1 Bishop Cr. L. 301. But the court took the precaution to say that intoxication through an honest mistake might not constitute a complete defense to the action: "If after becoming drunk, he was still sufficiently in the possession of his faculties to know what he was doing, and to know the character of his acts, and went voluntarily into a public place, he would be guilty."

23. Phillips *v.* Fadden, 125 Mass. 198.

Arrest generally see Arrest, 3 Cyc. 867.

Assault generally see Assault and Battery, 3 Cyc. 1014.

A complaint made by another at the request of an officer is sufficient, especially where the officers present testify at the time. Gainey *v.* Parkman, 100 Mass. 316.

24. **Criminal complaint** generally see Criminal Law, 12 Cyc. 70.

Indictment or information generally see Indictments and Informations.

25. Gallatin *v.* Tarwater, 143 Mo. 40, 44 S. W. 750. See also Com. *v.* Boon, 2 Gray (Mass.) 74; State *v.* Kelly, 12 R. I. 535, where a complaint under R. I. Gen. St. c. 232, § 25, for being a common drunkard is set out. Especially is this so when the words of the statute creating and defining the offense are fully descriptive of it. Such words are then technical and may therefore be used to describe the offense. Com. *v.* Boon, 2 Gray (Mass.) 74. But see Com. *v.* Whitney, 5 Gray (Mass.) 85.

An exception to the rule that it is sufficient to charge the offense in the language of the statute defining it is that where the statute is not to be taken in the broad meaning of the words used, but limited by construction to a special subject or matter; in which case the indictment should charge the crime so as to bring it within the construction placed upon the act. State *v.* Welch, 88 Ind. 308.

A complaint under Mass. Gen. St. c. 165, § 25, alleging that on a day named defendant "was guilty of the crime of drunkenness by the voluntary use of intoxicating liquor" is sufficient. Com. *v.* McNamara, 116 Mass. 340 [*citing* Com. *v.* Miller, 8 Gray (Mass.) 484].

Being a "habitual drunkard" need not be charged in an indictment under a statute which makes it an offense to be a drunkard. People *v.* Radley, 127 Mich. 627, 86 N. W. 1029.

26. Thus under a statute which made it an offense to be "found" intoxicated a complaint which alleges that on a specified day

information charging one with the offense of being drunk should be free from duplicity.[27]

2. Particular Averments — a. As to Place. An indictment at common law for drunkenness should show that the offense was common and public;[28] and under a statute which makes it a penal offense to be found intoxicated in a public place it is necessary that the indictment should with reasonable certainty describe the place[29] where the accused was found, so that the court may see that such place is a public place within the meaning of the statute.

b. As to Time. A complaint that on a certain day defendant "was and is a common drunkard, having been at divers days and times" since said day drunk and intoxicated by the voluntary and excessive use of intoxicating liquors, charges that defendant was a common drunkard on the day named only.[30]

c. Of Means of Intoxication. It is not necessary to allege the means by which or the thing upon which the accused became intoxicated.[31]

defendant was drunk and intoxicated whereby he was disabled and deprived of his reason but does not aver that he was found in that condition is insufficient. State *v.* Bromley, 25 Conn. 6; State *v.* Carville, (Me. 1888) 14 Atl. 942; State *v.* Austin, 62 Vt. 291, 19 Atl. 117.

Alleging annoyance.— Where a statute makes it an offense to be drunk on any street, avenue, or public place within the city or in any private house to the annoyance of any citizen or any person, a report of a police officer which does not allege defendant's drunkenness was to the annoyance of any person and which is unaccompanied by the names of witnesses is insufficient. St. Joseph *v.* Harris, 59 Mo. App. 122.

Substantial compliance.— That defendant was "indecently drunk contrary to the provisions of a statute" is equivalent to averring the "being intoxicated under such circumstances as amount to a violation of decency," the offense defined by the statute. Alexander *v.* Card, 3 R. I. 145.

27. See Criminal Law; Indictments and Informations.

No duplicity.— Where a complaint charges the offense of being drunk in several different public places enumerated conjunctively, it charges only one offense, although such enumeration is made disjunctively in the forbidding ordinance under which the complaint was brought. Gallatin *v.* Tarwater, 143 Mo. 40, 44 S. W. 750.

28. Tipton *v.* State, 2 Yerg. (Tenn.) 542 [*approved* in Smith *v.* State, 1 Humphr. (Tenn.) 396]. See also State *v.* Waller, 7 N. C. 229, to the effect that an indictment for common drunkenness must charge that the offense was in view of the public.

Allegation of disturbance of the good order of a city.— Under Ohio Rev. St. § 2108, authorizing city councils to punish persons disturbing the good order and quiet of the corporation by clamor and noise in the night season and by intoxication and drunkenness, a person who is charged with the violation of an ordinance passed in pursuance of the power granted by this provision of the statute must be accused of disturbing the good order and quiet of the city. An affidavit which contains no such averment charges no offense. Jefferies *v.* Defiance, 11 Ohio Dec. (Reprint) 144, 25 Cinc. L. Bul. 68.

29. State *v.* Welch, 88 Ind. 308; State *v.* Waggoner, 52 Ind. 481.

Alleging that defendant was found intoxicated in a public highway and on a sidewalk sufficiently charges the commission of the offense in a public place. State *v.* Moriarty, 74 Ind. 103; State *v.* Waggoner, 52 Ind. 481. See also Rosenstein *v.* State, 9 Ind. App. 290, 36 N. E. 652.

Alleging the name of the town is not a sufficient description of the place. State *v.* McLoon, 78 Me. 420, 6 Atl. 601.

Private house.— Indictment which charges that defendant "was then and there found unlawfully in a state of intoxication in a public place, to wit, at a social party held and had at the residence of Jackson Simmons" is insufficient in that it charges that defendant was intoxicated only at the private house of a gentleman which is not a public place. State *v.* Sowers, 52 Ind. 311, 312.

Street and court-house.—An allegation that defendant was drunk in a street in a certain city and in another count that he was drunk in the court-house of said city is sufficient. State *v.* Brown, 38 Kan. 390, 16 Pac. 259.

The name of the street need not be set out. State *v.* Brown, 38 Kan. 390, 16 Pac. 259.

A description which would be good in an affray ought to be sufficient in an indictment for being found intoxicated, for to constitute an affray the fighting must be in a public place, and there is no reason why the description of the public place should be different in the two offenses. State *v.* Waggoner, 52 Ind. 481. See also 2 Cyc. 41, 45.

30. The indictment does not allege in proper form that defendant was a common drunkard at any other time, the words "having been at divers days and times since," etc., are not sufficient to charge him with being a "common drunkard" in those times. Com. *v.* Foley, 99 Mass. 499, 500 [*citing* Com. *v.* Boon, 2 Gray (Mass.) 74].

31. A complaint which alleged that defendant "became and was intoxicated" was held sufficient. State *v.* Kelley, 47 Vt. 294.

d. "Force and Arms." The indictment need not allege that the offense was committed with "force and arms."[32]

e. Of Previous Conviction. An indictment for a second drunkenness by voluntary use of intoxicating liquors which charges that defendant at a certain time and before a certain court "was duly and legally convicted of the crime of drunkenness" committed at a certain time and place is a sufficient allegation of a former conviction.[33]

E. Evidence[34] — **1. Admissibility.** The evidence must be confined to the charge of the indictment.[35] Evidence of defendant's demeanor at other times when intoxicated is admissible to show the character of the acts relied upon in the case.[36] A witness may state whether or not in his opinion defendant was drunk.[37] On a prosecution for a second offense, evidence that defendant had formerly pleaded guilty to similar charges is competent as admissions of fact tending to support the charge.[38]

2. Sufficiency. On a charge of being a common drunkard, proof of habitual intoxication is sufficient, without showing any disturbance of the public peace and good order.[39]

F. Instructions. An instruction that the presumption of innocence stands good against everything except what is specifically proved beyond a reasonable doubt sufficiently protects one accused of being a drunkard, as to his innocence on the days during a certain period in question in which he is not proved to have been intoxicated.[40]

G. Questions For Jury. Whether the charge has been sustained by the evidence is a question for the jury.[41]

32. Tipton *v.* State, 2 Yerg. (Tenn.) 542.

33. Com. *v.* Miller, 8 Gray (Mass.) 484.

Statute abolishing the necessity of alleging former conviction.— A statute which provides that it shall not be necessary, in complaints under it for drunkenness, to allege two previous convictions of a like offense within the next preceding twelve months, upon which the extent of the punishment depends, is repugnant to that article of the declaration of rights which provides that no subject shall be held to answer for any crime until fully and plainly described to him; for a statute which imposes a higher penalty on a third conviction makes the former convictions a part of the description and character of the offense intended to be punished. Com. *v.* Harrington, 130 Mass. 35.

34. **Evidence** generally see Criminal Law; Evidence.

35. Thus where defendant was charged with being on a specified day a common drunkard, "having been at divers days and times since," etc., "drunk," etc., the evidence must be confined to the acts of defendant on the day specified, for he was not charged with being a common drunkard on the "divers days and times since," etc. Com. *v.* Foley, 99 Mass. 499.

Whether a man is a habitual drunkard being in issue, evidence that the alleged drunkard used liquor to excess at some particular times; that he has been seen the worse for liquor some number of times; and that the alleged drunkard was a dissipated man, has a legal tendency to show that the alleged person was a habitual drunkard. State *v.* Pratt, 34 Vt. 323.

36. State *v.* Huxford, 47 Iowa 16.

37. He is not confined to a statement of the conduct and demeanor of the party inquired about. State *v.* Huxford, 47 Iowa 16 [*citing* People *v.* Eastwood, 14 N. Y. 562].

38. People *v.* Radley, 127 Mich. 627, 86 N. W. 1029.

39. Com. *v.* Conley, 1 Allen (Mass.) 6. But evidence of habitual intoxication from the use of chloroform will not sustain a complaint under Mass. Rev. St. c. 143, § 5, charging a person with being "a common drunkard." Com. *v.* Whitney, 11 Cush. (Mass.) 477.

On trial for drunkenness by the voluntary use of liquor, where two previous convictions are alleged, evidence that defendant was found in the street behaving in a drunken manner, and that his breath smelt of liquor, and evidence that he was twice convicted before under pleas of guilty, is sufficient to warrant a finding that defendant's drunkenness was caused by the voluntary use of liquor. Com. *v.* Hughes, 133 Mass. 496.

Proof of intoxication five to seven times within a period of between three and four months is insufficient to support a conviction as a mere drunkard, without evidence of his condition at other times. Com. *v.* McNamee, 112 Mass. 285.

40. Thus where the evidence showed that defendant had been drunk from five to seven times on as many different days within a period of three to four months, it is not error to refuse to instruct that he was presumed to have been sober on those days on which he was not proven to have been drunk. Com. *v.* McNamee, 112 Mass. 285.

41. See State *v.* Pratt, 34 Vt. 323. Where the jury are furnished with the evidence of the attendant circumstances, such as defendant's character, conduct, and behavior, it is

H. Punishment. The punishment for this offense is regulated by statute and, the offense being a misdemeanor, the offender is usually punished by fine or imprisonment or both.[42] The power of the court to modify a sentence in furtherance of justice may be exercised in cases of conviction for drunkenness.[43]

I. Compelling Defendant to Disclose. In some jurisdictions the statutes provide that a person arrested for drunkenness may be compelled to disclose whence and from whom he obtained the liquor which intoxicated him.[44]

III. GUARDIANSHIP[45] AND STATUS OF HABITUAL DRUNKARDS.[46]

A. Proceedings to Determine Status and to Obtain Guardianship — **1. PETITION FOR COMMISSION.** A petition[47] for a commission or for a writ de inebrietate inquirendo must be supported by affidavits of the truth of its averments.[48]

2. THE COMMISSION — a. Requisites. The commission should specify a time within which the commissioners are required to make return.[49]

b. Execution of by Inquisition — (i) *NOTICE TO AND PRESENCE OF ALLEGED DRUNKARD.* It is the privilege of the party against whom a commission de inebrietate inquirendo is issued to be present at[50] and to have notice of its execution.[51] Notice must be given as required by statute.[52]

solely for them to determine whether, upon a charge of drunkenness by the voluntary use of liquor, it has been proved that the drunkenness is voluntary. Com. *v.* Hughes, 133 Mass. 496.

42. People *v.* Markell, 20 Misc. (N. Y.) 149, 45 N. Y. Suppl. 904. See also Hill *v.* People, 20 N. Y. 363, 18 How. Pr. (N. Y.) 289.

Punishment for drunkenness was first provided for in the reign of King James. St. 4 Jac. I, c. 5; 4 Blackstone Comm. 64; Jacob L. Dict. 324. See also Com. *v.* Miller, 8 Gray (Mass.) 484, 486.

The Vermont statutes (St. § 5206; Acts (1902), p. 112, § 97, No. 90) are considered and construed with reference to punishment for being found intoxicated in *In re* Rogers, 75 Vt. 329, 55 Atl. 661.

43. People *v.* Mulkins, 25 Misc. (N. Y.) 599, 54 N. Y. Suppl. 414.

Cruel and unusual punishment is not inflicted by a statute which prescribes a fine of twenty-five dollars, or imprisonment not exceeding thirty days, as a penalty for being drunk in any street or public building, and under such a statute defendant may be sentenced to pay a fine of ten dollars, and to be imprisoned until the fine and costs are paid. State *v.* Brown, 38 Kan. 390, 16 Pac. 259.

Warrant of commitment for the statutory offense of intoxication is not insufficient because the word "drunkenness" is used instead of "intoxication." Smith *v.* Bigelow, 19 Iowa 459. A mittimus which recites merely that respondent had been "duly convicted of the crime of a second offense of intoxication" is defective in that it fails to state an essential element of the offense, viz., that defendant was "found intoxicated." But the prisoner has no right to be released because of a defect in the mittimus. It is the right and duty of the court to issue a new mittimus to carry the sentence into effect. *In re* Rogers, 75 Vt. 329, 55 Atl. 661.

44. See Strafford County *v.* Dover, 61 N. H. 617; *In re* Irish, 64 Vt. 376, 24 Atl. 435; *In re* Hardigan, 57 Vt. 100. And see CONTEMPT, 9 Cyc. 17; CRIMINAL LAW, 12 Cyc. 400.

45. Guardianship generally see GUARDIAN AND WARD; INSANE PERSONS.

46. Insane persons generally see INSANE PERSONS.

47. A petition by a wife against her husband as a habitual drunkard will be entertained by the court. *Ex p.* Smith, 17 Leg. Int. (Pa.) 332.

48. Com. *v.* Lambert, 4 Pa. Co. Ct. 439.

It must appear by the affidavits that the person against whom the proceeding is instituted is a habitual drunkard. Matter of Hoyt, 20 Abb. N. Cas. (N. Y.) 162.

49. *In re* Clark, 10 Pittsb. Leg. J. (Pa.) 519.

50. *In re* Single, 2 Lanc. L. Rev. 217.

Waiver of proceedings.— In Maryland a respondent may appear and dispense with legal proceedings to establish the fact and, under Code, art. 16, § 47, may with the approval of the court appoint his own committee. His election to dispense with legal proceedings and the nomination or appointment of a committee need not be put in writing, nor is there any particular mode prescribed in which it shall be evidenced. Tome *v.* Stump, 89 Md. 264, 42 Atl. 902.

51. Matter of Coffin, 41 Misc. (N. Y.) 131, 83 N. Y. Suppl. 941.

If peculiar circumstances render it improper or unsafe to give such notice, they may be stated in the petition to the court so that a special provision may be inserted in the commission dispensing with notice to him. Where such notice has been omitted and it appeared that it would not be safe to discharge the committee, the court ordered the proceedings to stand until a new commission could be issued. Matter of Tracy, 1 Paige (N. Y.) 580. See also Matter of Petit, 2 Paige (N. Y.) 174; and N. Y. Code Civ. Proc. § 427.

52. *In re* Bennett, 5 N. Y. Suppl. 373.

(II) *FUNCTIONS OF COMMISSIONERS.* As incident to their duties the commissioners under the chancery practice have full power to issue subpœnas for witnesses and to compel their attendance.[53] In relation to every legal question arising in the execution of the commission, the majority of the commissioners must decide.[54] After the testimony is closed, the commissioners should submit the question to the jury in the form of a charge, stating the law applicable to the case.[55]

(III) *THE JURY.* Misconduct in the selection[56] of the jurors or in respect to their deliberations[57] will vitiate the proceedings.

(IV) *EVIDENCE.*[58] When habitual drunkenness is shown, evidence that respondent is still able to take care of himself and manage his estate is inadmissible.[59] If a fixed habit of drunkenness is proved upon an inquisition, it is sufficient without showing that the respondent was always drunk.[60]

(V) *THE FINDING.* If the finding establishes the habitual drunkenness, it will be sufficient, although no reference to the respondent's incapacity is made.[61]

(VI) *COSTS.*[62] The court is not authorized to allow the solicitor of the petitioner anything beyond the ordinary taxable costs and disbursements.[63] The

Compliance with the statute is sufficient. Angell *v.* North Providence Probate Ct., 11 R. I. 187.

The petition need not be recited in the notice in the absence of any statutory requirement therefor. Angell *v.* North Providence Probate Ct., 11 R. I. 187.

53. The commissioners may have this power also under the statute. Their failure to exercise it is fatal to the proceedings. *In re* Plank, 10 Pittsb. Leg. J. (Pa.) 519.

54. Matter of Arnhout, 1 Paige (N. Y.) 498.

55. And they should recapitulate the facts, if necessary, but without arguments of counsel on either side. Matter of Arnhout, 1 Paige (N. Y.) 498. See also *In re* Burr, 3 Lack. Leg. N. (Pa.) 662.

56. Thus the proceedings will be set aside if the commissioners dictate to the sheriff what jurors to summon. Matter of Wager, 6 Paige (N. Y.) 11.

57. The deliberations of the jury must be secret. If the sheriff or other officer who summons the jury goes into the jury-room during their deliberations or converses with the jury in relation to the matter under consideration the verdict will be set aside. Matter of Arnhout, 1 Paige (N. Y.) 498. But in Pennsylvania it has been held that the mere fact that the commissioner at the request of the jury went into the room into which they had retired to deliberate to further instruct them upon certain points and retired immediately after having done so was not ground for setting aside the finding of the inquest. *In re* Burr, 3 Lack. Leg. N. 162.

The fact that jurors took notes of the testimony, no objection having been made by counsel for respondent, and the fact that the jurors, while deliberating upon their verdict, remarked upon the consequences to the respondent and his family, in case of a finding favorable to him, are not grounds for setting aside the inquest. *In re* Burr, 3 Lack. Leg. N. (Pa.) 162.

58. See, generally, EVIDENCE.

59. Ludwick *v.* Com., 18 Pa. St. 172. See charge to jury in Com. *v.* McGinnis, 3 Pittsb. (Pa.) 445.

A single instance of the respondent's intoxication, of which she was convicted by a justice pending the proceeding, cannot be considered on an application to set aside the order finding her a habitual drunkard. *In re* Bennett, 5 N. Y. Suppl. 373. As to what constitutes a habitual drunkard see *supra*, I, note 4.

60. Ludwick *v.* Com., 18 Pa. St. 172.

It is at least prima facie evidence that respondent is incapable of managing his property where his intoxication for a considerable part of the time to the degree of losing the ordinary use of his reasoning faculties is shown. Matter of Tracy, 1 Paige (N. Y.) 580.

61. Upon the jury's finding of habitual drunkenness, the law establishes incapacity. McGinnis *v.* Com., 74 Pa. St. 245; Ludwick *v.* Com., 18 Pa. St. 172.

Review of proceedings.— Respondent may have the regularity of the proceedings examined upon exceptions. The testimony taken before the inquest is no part of the record and cannot be considered by the court. *In re* Burr, 3 Lack. Leg. N. (Pa.) 162.

The appeal-bond on appeal from an order of a county judge appointing a guardian of the person and estate of a drunkard should run to the guardian and not to the county judge. State *v.* Flint, 19 Wis. 621.

62. See, generally, COSTS.

63. Matter of Root, 8 Paige (N. Y.) 625.

A retaining fee for counsel is not taxable. Commissioners should be appointed who are competent to execute the commission without the aid of counsel. Matter of Root, 8 Paige (N. Y.) 625.

Priorities in payment.— The real estate of a habitual drunkard was sold by order of the court, he having no personal estate with which to pay the costs of the inquisition that found him such drunkard. It was held that these costs could not be paid to the prejudice of a prior lien creditor. All costs that are connected with the sale and leading to it should be paid from the proceeds. All

relator in inquisition proceeding is not liable for costs upon being unsuccessful, unless he proceeded in bad faith and without probable cause.[64]

B. Legal Consequences of Status Adjudicated — 1. Control and Custody of Drunkard's Person and Property. Although a traverse be put in, the adjudication that the respondent is a habitual drunkard and an incompetent places the custody of his person and estate in the hands of the court.[65] The committee or guardian appointed by the court is entitled to the actual control and custody of the drunkard, subject to the direction of the court, and the court will sustain the committee in the proper exercise of his authority.[66] The property of the drunkard, upon inquisition found, being *in custodia legis*, the court will see that the drunkard's family will be provided for as he himself were he sane would provide for them;[67] but the real estate the court cannot order to be sold except where a sale is necessary.[68]

precedent to it are not to be allowed. Malone's Appeal, 79 Pa. St. 481.

64. Matter of Arnhout, 1 Paige (N. Y.) 497, holding further that when an unsuccessful application is made to charge him with such costs he is entitled to his costs for opposing it. See also Com. *v.* Quinter, 2 Woodw. (Pa.) 377.

That drunkards are not civilly dead see 7 Cyc. 154 note 52.

65. McGinnis *v.* Com., 74 Pa. St. 245.

"At common law, the king was the guardian and protector of idiots and of persons of unsound mind. By the constitution of this state that power is conferred by the people on the Supreme Court and the courts of common pleas. . . . Under our statutes an habitual drunkard is classed with a lunatic, and all such are special subjects in relation to whom the courts of common pleas are expressly invested with the jurisdiction and powers of a court of chancery. In effect the lunatic is the ward of the court, and his estate is *in custodia legis*." Tarr's Estate, 10 Pa. Super. Ct. 554, 557.

The court of chancery has, by statute, exclusive care and the custody of the person and estate of a habitual drunkard. L'Amoureux *v.* Crosby, 2 Paige (N. Y.) 422, 22 Am. Dec. 655. See Lewis *v.* Jones, 50 Barb. (N. Y.) 645.

The master appointed by the court to take account of the estate of a common drunkard with his committee cannot be removed by agreement with the parties and another master substituted without the sanction of the court. Matter of Carter, 3 Paige (N. Y.) 146.

66. Tarr's Estate, 10 Pa. Super. Ct. 554, 557 [*citing* Shaffer *v.* List, 114 Pa. St. 486, 7 Atl. 80].

Where a person interferes with the exercise of this control, the committee, on application to the court, may leave an *ex parte* order that the meddler desist from his interference. Matter of Lynch, 5 Paige (N. Y.) 120.

Where vendors of intoxicating liquors continued to furnish the same to a habitual drunkard against the wishes of his committee, the court made an order prohibiting them from so doing, upon pain of being held liable for criminal contempt, and directed the committee in case of disobedience of the order to apply to the court to punish the offenders or to lay the case before the grand jury that they might be proceeded against by indictment. Matter of Hoag, 7 Paige (N. Y.) 312. See also Matter of Heller, 3 Paige (N. Y.) 199.

Constitutionality of laws confining inebriates see 8 Cyc. 1093; People *v.* St. Saviour's Sanitarium, 34 N. Y. App. Div. 363, 56 N. Y. Suppl. 431; State *v.* Ryan, 70 Wis. 676, 36 N. W. 823.

The fact that an inebriate voluntarily surrendered herself to an asylum for treatment does not validate a commitment for a stated term, which is void as based on a proceeding had without notice. People *v.* St. Saviour's Sanitarium, 34 N. Y. App. Div. 363, 56 N. Y. Suppl. 431.

67. Tarr's Estate, 10 Pa. Super. Ct. 554. In *In re* Stackhouse, 2 N. Brunsw. Eq. 91, the court, under authority of 53 Vict. (N. B.) c. 4, § 276, ordered a yearly sum to be paid out of the principal (the income being insufficient) by the committee to the family for their support.

68. As for paying the drunkard's debts or for the support of himself and family see Matter of Hoag, 7 Paige (N. Y.) 312. *Compare* Tome *v.* Stump, 89 Md. 264, 42 Atl. 902, under a statute providing that the proceedings, in case of habitual drunkards, "shall be like those now authorized by law in cases of persons alleged to be lunatics or insane; and the rules of law and proceedings now applicable to the property of lunatics shall apply to cases of persons 'declared' to be habitual drunkards."

In New York a statute relating to the care and custody of the estate of an adjudged habitual drunkard at one time prohibited the leasing of the real estate for more than five years and the mortgaging, aliening, or disposing of it in any manner otherwise than is directed in that act. Lewis *v.* Jones, 50 Barb. 645, 671.

To whom the proceeds of the sale awarded. — Where a judgment is obtained against the person declared a habitual drunkard, and his realty is subsequently sold, it is proper to award that portion of the fund arising from the sale to the committee of the estate until the inquisition is set aside or the compe-

2. Contractual Disability of Drunkard[69] **— a. Obligations Subsequently Incurred** — (i) *In General.* One found by inquisition to be a habitual drunkard is thereby rendered incompetent subsequently to enter into a contract;[70] and a contract so entered into by him is void, even though at the time of the attempt to form the contract the drunkard was sober.[71]

(ii) *With Persons Without Actual Notice.* The rule just stated applies even against persons who have not actual notice of the adjudication.[72]

(iii) *For Necessaries.* One who has furnished a drunkard with the necessaries proper to his station in life may recover from the drunkard's estate the reasonable value of the necessaries furnished.[73]

b. Obligations Incurred After Proceedings Begun. Where the other party to the contract has notice of proceedings begun to determine the status of an alleged drunkard, the contract entered into can be set aside on the application of the committee afterward appointed.[74]

tency of the drunkard restored. The fact that the inquisition has been traversed is immaterial so long as it stands. Paul *v.* Divine, 4 Phila. (Pa.) 21.

69. Disability affecting capacity to enter into contract generally see Contracts.

Intoxication as defense to contract see *infra*, IV.

Laches.— A person under guardianship for habitual drunkenness is not a person who is of such incompetency as will exonerate him from the consequences of his own laches. Therefore a delay of twenty years on the part of a person who is a habitual drunkard and spendthrift and whose mind is alleged to be weak will defeat a suit instituted by him to set aside conveyances of his property to one who had conveyed to a third person who has made valuable improvements thereon in the belief that his title was good. Wright *v.* Fisher, 65 Mich. 275, 32 N. W. 605, 8 Am. St. Rep. 886.

70. Devin *v.* Scott, 34 Ind. 67; L'Amoureux *v.* Crosby, 2 Paige (N. Y.) 422, 22 Am. Dec. 655. See also Matter of Heller, 3 Paige (N. Y.) 199; Imhoff *v.* Witmer, 31 Pa. St. 243; Cockrill *v.* Cockrill, 92 Fed. 811, 34 C. C. A. 254 [*affirming* 79 Fed. 143]. It is not necessary that the statute which provides for the inquisition and for the guardianship of the drunkard should in express terms declare his subsequent contracts void. The judicial finding is conclusive evidence that such contracts are void. Devin *v.* Scott, 34 Ind. 67 [*following* Wadsworth *v.* Sherman, 14 Barb. (N. Y.) 169]. See also Contracts, 9 Cyc. 461.

71. Wadsworth *v.* Sharpsteen, 8 N. Y. 388, 59 Am. Dec. 499. A judgment entered against a defendant on a note signed by him after the adjudication and committee appointed gives plaintiff no priority of lien. Execution cannot be issued on the judgment. Boner *v.* Meyer, 11 York Leg. Rec. 58.

72. The finding is conclusive against a person who has not actual notice, for the finding and the proceedings thereto are analogous to a judgment and proceedings *in rem* — conclusive against all the world. Wadsworth *v.* Sharpsteen, 8 N. Y. 388, 59 Am. Dec. 499, holding that one found by inquisition to be a habitual drunkard who is an indorser of a bill of exchange cannot waive notice of protest.

73. See Darby *v.* Cabanne, 1 Mo. App. 126; Brockway *v.* Jewell, 52 Ohio St. 187, 39 N. E. 470. And this, even though a statute provides that a contract made by one who has been adjudged a drunkard upon an inquisition is invalid, "for such construction [of a statute] might expose the party to actual suffering . . . or oblige the town to maintain him and his family as paupers for a time, when he had ample means for their support; and thus produce the very mischief it was intended to prevent." McCrillis *v.* Bartlett, 8 N. H. 569, 571.

Attorney's services.— A contract made by the agent of a man whose intellect had become debilitated through the use of intoxicating liquors for the services of an attorney to procure the appointment of a guardian for the drunkard and for his estate may be upheld where the statute provides for the appointment of a guardian for such persons. Darby *v.* Cabanne, 1 Mo. App. 126.

Necessity of pleading necessaries.— Since the general rule is that contracts made by a person who has been found incapable of conducting his affairs on account of drunkenness and placed under guardianship are void, it is the duty of the party who relies upon this exception to the rule as to necessaries to allege and prove that it came within the exception. Devin *v.* Scott, 34 Ind. 67.

74. Griswold *v.* Miller, 15 Barb. (N. Y.) 520. *Contra*, Klohs *v.* Klohs, 61 Pa. St. 245.

A receipt given by a habitual drunkard after inquisition found, who carries on his business, does work, and receives pay therefor, is a valid discharge of the debt. Black's Estate, 8 Pa. Co. Ct. 266.

Payment for services of a nurse by the drunkard transferring to him harness was not considered to be a sale within the meaning of a statute which provides that no sale or conveyance or encumbrance of the property of the alleged drunkard shall be valid after the service of a notice of proceedings begun. Brockway *v.* Jewell, 52 Ohio 187, 39 N. E. 470. See also McCrillis *v.* Bartlett, 8 N. H. 569.

Where one who appeared to possess business capacity and who transacted some of his af-

c. Obligations Incurred Prior to Proceedings Begun. The finding is presumptive, but not conclusive, evidence of incapacity as to acts done by the drunkard before the issuing of the commission.[75]

3. Testamentary Capacity.[76] A person whose status as a habitual drunkard has been adjudicated and whose person is in the care and custody of the court may nevertheless if of sufficient mental capacity make a valid will.[77]

C. Guardian or Committee[78] — 1. Fiduciary Position. The rule that a person in a fiduciary relation cannot place himself in a position antagonistic to his trust applies to the committee of a drunkard.[79]

2. Accounting.[80] The committee or guardian of a drunkard is held to a strict accountability for the execution of his trust.[81] He will not be credited with any money which was not spent for purposes consistent with the trust.[82] Where he has failed to file the proper inventory or to keep any account of the estate, everything in relation to his dealings with the estate will be presumed most strongly against him.[83]

fairs contracted a debt between the time when an inquisition was found and the time when the inquisition was recorded, declaring him to be a habitual drunkard, it was held that the other party having no knowledge of the pendency of the inquisition proceedings could maintain an action for the recovery of the debt. Matter of McGarvey, 64 How. Pr. (N. Y.) 135.

75. L'Amoureux *v.* Crosby, 2 Paige (N. Y.) 422, 22 Am. Dec. 655. Especially is this true where the contract was made within the period in which the commission finds that respondent to the inquisition was a habitual drunkard. *In re* Sampson, 5 Pa. Dist. 717, 19 Pa. Co. Ct. 1. See Klohs *v.* Klohs, 61 Pa. St. 245.

Rebutting presumption.— A commission found that the respondent to the inquisition had been a habitual drunkard for a year previous, and that certain notes upon which judgments were subsequently entered were given within the year, and the judgment creditor testified that the debtor was sober when the notes were given; the debtor, however, and another testified that the debtor was drunk, although neither showed any distinct recollection of the circumstances. It was held that the preponderance of the evidence was in the creditor's favor and overcame the presumption arising from the finding that the debtor was a habitual drunkard. Donehoo's Appeal, (Pa. 1888) 15 Atl. 924.

76. **Intoxication as affecting testamentary capacity** generally see Wills.

77. His adjudged status is merely *prima facie* evidence of incapacity to make a will and may be rebutted by proof. Lewis *v.* Jones, 50 Barb. (N. Y.) 645.

Where a devisee has been adjudged a habitual drunkard and his guardian appointed trustee for him, the corpus of the estate devised vests in the beneficiary who has full power to dispose of the estate by will. *In re* Engle, 14 Montg. Co. Rep. (Pa.) 74. See Wills.

78. **Removal of committee.**— The county court has concurrent jurisdiction of the supreme court to remove the committee of the person and estate of a drunkard and to appoint another in its place. Scribner *v.* Qualtrough, 44 Barb. (N. Y.) 431, where it is said that the rule was otherwise prior to the constitution of 1846.

79. Matter of Carter, 3 Paige (N. Y.) 146.

80. **Accounting** generally see Accounts and Accounting.

81. Matter of Carter, 3 Paige (N. Y.) 146.

Costs of accounting charged to committee. — Where the committee of a drunkard had been guilty of gross negligence in the management of the estate, he was charged with the cost of proceedings against him for his removal and for the settlement of accounts. Matter of Carter, 3 Paige (N. Y.) 146. See also Stephens *v.* Marshall, 23 Hun (N. Y.) 641.

The wife of a drunkard cannot file a bill against his committee for an account without making her husband a party. And this although he be absent from the state and has not been heard from for seven years. Hay *v.* Warren, 8 Paige (N. Y.) 609.

Upon petition of his sureties alleging that he has mismanaged his ward's estate, the court has jurisdiction to compel an accounting by a guardian of a drunkard under the provisions of the New Jersey statute. Dickerson *v.* Dickerson, 31 N. J. Eq. 652.

A complaint in an action on the bond of the guardian of the habitual drunkard is demurrable if no exhibit of the bond is filed therewith. Miller *v.* State, 63 Ind. 219.

82. Matter of Carter, 3 Paige (N. Y.) 146.

Allowing money to be spent for alcoholic liquors is conduct so subversive of the purposes of the trust that the committee cannot be credited with such charges. Stephens *v.* Marshall, 23 Hun (N. Y.) 641.

The fact that the committee furnished spending money subject to abuse by the drunkard or that they mismanaged the estate is no reason for a refusal to correct a clerical error in their accounts whereby they have charged instead of having credited themselves with a sum of money. Stephens *v.* Caulfield, 13 N. Y. Wkly. Dig. 567.

83. Matter of Carter, 3 Paige (N. Y.) 146. And in such a case the committee may properly be charged with one-half the expense of

3. Compensation.[84] Although a guardian may be entitled to commissions upon sums with which he is charged in consequence of losses arising through his own negligence,[85] he will not be allowed commissions on expenditures subversive of the trust.[86]

D. Enforcement of Obligations of Adjudicated Drunkard — 1. In General. The proper course to pursue to recover a debt from the drunkard is to apply by petition to the court whose ward he is.[87]

2. Parties.[88] In a suit against the committee[89] for a recovery of a debt due from the drunkard, the drunkard is a proper, but not a necessary, party.[90] In

the accounting. Stephens *v.* Marshall, 23 Hun (N. Y.) 641.

84. **For English chancery court rule** which did not allow compensation to a trustee, guardian, executor, committee of a lunatic, or drunkard and for a review of the early cases in this country which infringed upon that rule and gradually overthrew it see Meacham *v.* Sternes, 9 Paige (N. Y.) 398.

Where the guardian asks for more than five per cent commissions, the burden is generally on him to show that his services are worth more. "But it would be a harsh rule which would limit the compensation of the committee of the person and estate of an habitual drunkard to five per cent." Thus, where the estate of a habitual drunkard is small and the committee is compelled to repair the buildings which are old, to collect monthly the rent, which averages about five hundred and eighty dollars a year, a compensation of forty-five dollars a year is just. *In re* Keiper, 7 Kulp (Pa.) 60.

85. See Stephens *v.* Marshall, 23 Hun (N. Y.) 641 [*citing* Meacham *v.* Sternes, 9 Paige (N. Y.) 398].

86. As for allowing an undue amount of spending money to the drunkard, a large part of which was spent in the purchase of liquor. Such conduct on the part of the committee or guardian goes to the very heart of the trusteeship and stamps it with general mismanagement. Stephens *v.* Marshall, 23 Hun (N. Y.) 641.

87. Hall *v.* Taylor, 8 How. Pr. (N. Y.) 428 (a proceeding by bill is improper except by direction of the court and to begin a suit at law without the permission of the court is contempt); Matter of Heller, 3 Paige (N. Y.) 199; L'Amoureux *v.* Crosby, 2 Paige (N. Y.) 422, 22 Am. Dec. 655. See Sternbergh *v.* Schoolcraft, 2 Barb. (N. Y.) 153.

An exception to the rule of proper practice of proceeding by petition may exist where it is shown that a trial is necessary in order to settle some disputed question or right which cannot be properly determined and adjusted on a reference to ascertain the amount due in a proceeding by petition. In such a case an order should be obtained authorizing the bringing of an action in the nature of a suit in equity before such action should be permitted against either the committee or the habitual drunkard. Where the demand is already in judgment, no action is necessary to determine the amount due. Hall *v.* Taylor, 8 How. Pr. (N. Y.) 428.

The former rule in New York was that the drunkard could be sued at law notwithstanding the appointment of a committee, but when the creditor had obtained his judgment he was compelled to stop and could proceed no further with it. Clarke *v.* Dunham, 4 Den. 262; Robertson *v.* Lain, 19 Wend. 649. See also Sternbergh *v.* Schoolcraft, 2 Barb. 153.

After an action for separation had been begun against a person by his wife, the former was adjudged a habitual drunkard upon proceedings begun before the action for separation was brought, and a committee of the adjudged drunkard's estate was appointed with authority given him, by order of the court, to assist in the defense of the action for separation. On a suit to restrain the action for separation the court refused to do so. "So far as such separation may be followed by a provision for alimony, such provision is entirely within the power of the court. And the court is fully competent in this action to protect the estate of the lunatic, now within its control. We do not see why the court cannot act as wisely in regard to alimony in this action as it could in an application by way of motion to direct the committee. And since the plaintiff is plainly entitled to proceed in this action, so far as the principal matter, that of separation, is concerned, it is highly proper that the subject of alimony be also disposed of in the same action." Gregg *v.* Gregg, 48 Hun (N. Y.) 451, 452, 1 N. Y. Suppl. 453.

Enforcement of payment after decree.— Where the court has decreed payment, by the committee of a drunkard, of a debt due from a drunkard, payment should be enforced by summary process. If the court authorizes filing a bill for that purpose simply, it will be erroneous, as subjecting the estate to needless costs of litigation. Beach *v.* Bradley, 8 Paige (N. Y.) 146.

88. Parties generally see Parties.

89. **Upon the contract entered into before the findings of the inquisition** it has been held that the trustee or committee of a habitual drunkard cannot be sued, even though he may have effects in his hands sufficient to pay. Steel *v.* Young, 4 Watts (Pa.) 459. So in an action upon a note made by the drunkard before the committee's appointment the committee is not liable. The drunkard should be sued. Janvier *v.* Coombs, 31 N. J. L. 240.

90. For if he is made a party, the proceedings are made binding upon him in case he should be restored to the possession and control of his estate before the termination of his suit. Beach *v.* Bradley, 8 Paige (N. Y.) 146.

some jurisdictions, the guardian of a drunkard is the proper party to defend suit brought against the drunkard.[91]

3. **Requisites of Complaint.**[92] A complaint against the committee which omits to allege or show by what court or authority the debtor was declared a habitual drunkard and the custody of his person awarded to defendant does not state a cause of action,[93] and is therefore bad on demurrer.

E. Proceedings For Release From Guardianship[94] — 1. **In General.** According to the old chancery practice in this country[95] the allowing of a traverse to an inquisition found rests in the discretion of the court.[96] The practice in proceedings to supersede a commission in cases of habitual drunkenness should be substantially the same as in cases of lunacy.[97]

2. **Notice.** Want of notice[98] upon such a proceeding cannot be taken advantage of in a collateral proceeding.[99]

3. **Proof.**[1] The fact of the finding of the inquisition is *prima facie* and on

The drunkard should be made a party to a suit for partition brought by his committee; for a decree in such a suit will not transfer the legal title to the drunkard's undivided share of the premises which may be set off to defendants in severalty unless he is made a party. Gorham *v.* Gorham, 3 Barb. Ch. (N. Y.) 24.

91. Thus where a statute gives guardians of habitual drunkards all the powers and duties of a guardian of a minor, and makes it the duty of a guardian of a minor to defend all suits against his ward, and provides that if he does so a guardian *ad litem* need not be appointed, it was held that in ejectment by the guardian of a drunkard that a guardian *ad litem* need not be appointed to defend against a cross complaint seeking to quiet cross complainant's title. Makepeace *v.* Bronnenberg, 146 Ind. 243, 45 N. E. 336.

If the committee has no interest adverse to the drunkard, where the suit is against the drunkard and his committee the committee will be appointed his guardian *ad litem.* New *v.* New, 6 Paige (N. Y.) 237.

92. **Pleading** generally see Pleading.

93. Hall *v.* Taylor, 8 How. Pr. (N. Y.) 428.

Where, pending a suit by a creditor to reach the assets of his debtor, the latter is, by proceedings previously commenced in another court, adjudged to be a habitual drunkard and a committee is appointed, the court in which the creditor's action is pending cannot properly proceed to final judgment. While plaintiff in such case, if he commenced his action in good faith, may be permitted to retain it, yet his proceedings therein should be stayed until the reformation of defendant and the discharge of the committee, if such event should occur. And a receiver appointed in such creditor's suit should be discharged on paying the moneys in his hands into court. Niblo *v.* Harrison, 9 Bosw. (N. Y.) 668.

94. **Habeas corpus proceedings** to release a drunkard from his committee see Habeas Corpus.

95. **In England,** under 2 & 3 Edw. VI, c. 8, a traverse is a matter of right. The court has no discretion. See Matter of Tracy, 1 Paige (N. Y.) 580 [*citing Ex p.* Wragg, 5 Ves. 450, 832, 31 Eng. Reprint 677, 882; Sherwood *v.* Sanderson, 19 Ves. Jr. 280, 34 Eng. Reprint 521].

96. In all cases of doubt, where a jury trial would be proper, it is a discreet exercise of the power of the court to direct an issue instead of having a formal traverse. Matter of Tracy, 1 Paige (N. Y.) 580. Where the decision of the court declaring a person a habitual drunkard was acquiesced in, without appeal, on application by the committee of the drunkard for the custody of his person, defendant, who had harbored the drunkard against the wishes of the committee, thereby interfering with his control of the drunkard, was not allowed to traverse the finding of the jury, which was the basis of the vice-chancellor's decision. Matter of Lynch, 5 Paige (N. Y.) 120.

97. The truth of the facts alleged in the petition may be examined, either in open court or before a master. Proceeding by reference to a master adopted as the most convenient and expeditious course. *In re* Weis, 16 N. J. Eq. 318.

Lunacy proceedings generally see Insane Persons.

A habitual drunkard under guardianship may by his own petition institute such an inquiry. Cockrill *v.* Cockrill, 92 Fed. 811, 34 C. C. A. 254 [*affirming* 79 Fed. 143].

The vendee who has received a conveyance from the drunkard within the period in which the finding adjudged the respondent to be a habitual drunkard may traverse the finding, since he is the person aggrieved by it. *In re* Sampson, 5 Pa. Dist. 717, 19 Pa. Co. Ct. 1.

98. **Supersedeas** will not be ordered upon an *ex parte* hearing without notice; nor upon *ex parte* affidavits, even with the assent of the guardian. *In re* Weis, 16 N. J. Eq. 318.

99. For this want of notice is at most an irregularity, and is not jurisdictional. Cockrill *v.* Cockrill, 92 Fed. 811, 34 C. C. A. 254, holding that one from whom the disability has been removed cannot impeach the judgment which discharged his guardian on the ground that no notice of the application was given to his guardian.

1. **Evidence** generally see Evidence.

the trial of a traverse throws the burden of disproof on respondent.[2] After a respondent has given evidence in answer to the inquisition, the relator may give evidence in rebuttal to establish the finding.[3] The court will not discharge the committee and restore the possession and control of the property to the drunkard upon mere proof of the fact that he is competent to manage his affairs, without evidence of a permanent reformation.[4]

4. Costs.[5] Upon a petition for leave to traverse the inquisition, the allowance of costs is discretionary.[6]

IV. Intoxication as a Defense to Contracts.[7]

A. In General. Intoxication which is so deep and excessive as to deprive one of his understanding is a good defense to an alleged contract made while defendant was in that condition.[8]

B. Degree of Intoxication Necessary. If, however, intoxication alone is relied on as a defense, it must be to such a degree that the party who wishes to avoid his contract on this ground must have been deprived of his reason and

2. McGinnis *v.* Com., 74 Pa. St. 245. To sustain an allegation of reformation by one who has been found to be a habitual drunkard, the onus is upon him to clearly show that he has voluntarily abandoned the entire use of intoxicating drinks and has proved himself able to resist all temptation to indulge therein. *Ex p.* Worrall, 1 Del. Co. (Pa.) 148.

3. McGinnis *v.* Com., 74 Pa. St. 245.

4. Matter of Hoag, 7 Paige (N. Y.) 312, holding that the abstinence from intoxication for at least one year is necessary to raise such a presumption of reformation as would justify restoring such drunkard to the possession of his property.

A discharge of the guardian will be presumed to have been the result of a finding in accordance with the requirements of the statute, that the ward had reformed, and that therefore his legal disability ceased. Makepeace *v.* Bronnenbergh, 146 Ind. 243, 45 N. E. 336.

Suspension of guardianship.—In the case of *In re* Roberts, 197 Pa. St. 621, 47 Atl. 987, upon proceedings and proofs, under the act of June 13, 1836, as amended by the act of June 15, 1897, a commission, inquisition, and appointment of committee were suspended until further order, the time being too short to grant a complete restoration of capacity. It was held that this decree did not prevent a reinstatement of the proceedings.

5. Costs generally see Costs.

6. Matter of Van Cott, 1 Paige (N. Y.) 489 [*citing* Matter of Folger, 4 Johns. Ch. (N. Y.) 169], holding also that in case of an unsuccessful traverse the solicitor of the traverser cannot have costs out of the estate, where traverse was for the benefit of the traverser who was a grantee of the drunkard's real estate.

The next friend of the drunkard is entitled to be reimbursed out of the estate for the taxed costs of an unsuccessful action he brought on behalf of the drunkard against the guardian, if such action was brought in good faith and with reasonable caution. Voorhees *v.* Polhemus, 36 N. J. Eq. 456 [*citing* 1 Daniell Ch. Pr. 79].

Upon an action by the children of the drunkard which resulted in the dismissal of the committee and a correction of the committee's accounts and a betterment of the security of the estate, the attorneys of the children may be paid out of the estate. Tarr's Estate, 10 Pa. Super. Ct. 554.

7. Defenses to contracts generally see Contracts.

Bond signed by intoxicated person see 5 Cyc. 745 note 97.

Drunkenness of arbitrator see 3 Cyc. 747 note 43.

Recognizance entered into by drunken person see 5 Cyc. 57 note 44.

No defense to action for breach of promise to marry see 5 Cyc. 1003 note 29.

Intoxication as excuse for crime see Criminal Law.

Evidence of drunkenness in prosecution for burglary see 6 Cyc. 234, 235 notes 75, 82.

No defense to prosecution for blasphemy see 5 Cyc. 715 note 10.

8. McClure *v.* Mausell, 4 Brewst. (Pa.) 119; Gore *v.* Gibson, 9 Jur. 140, 14 L. J. Exch. 151, 13 M. & W. 623. A drunkard when in a complete state of intoxication so as not to know what he is doing has no capacity to contract. Wright *v.* Waller, 127 Ala. 557, 29 So. 57, 54 L. R. A. 440 [*citing* Benjamin Sales, § 33]; Prentice *v.* Achorn, 2 Paige (N. Y.) 30.

The rule formerly was that intoxication was no excuse and created no privilege or plea in avoidance of the contract. 2 Kent Comm. 451. "Although," says Coke, "he who is drunk, is for the time, *non compos mentis*, yet his drunkenness does not extenuate his act or offence, nor turn to his avail; but it is a great offence in itself, and therefore aggravates his offence, and doth not derogate from the act which he did during that time, and that as well in cases touching his life, his lands, his goods, or any other thing that concerns him." Burroughs *v.* Richman, 13 N. J. L. 233, 236, 23 Am. Dec. 717.

understanding.[9] Whether this degree of intoxication existed is always a question for the jury.[10]

C. Contract Rendered Void or Voidable in Law. As to whether a contract entered into by a person so intoxicated as to be incapable of understanding its nature is void or voidable, the authorities differ. The modern trend seems in many instances to be toward regarding it as only voidable.[11] Under this theory the party setting up this defense should show that he has in some way rescinded the contract or, where the status of the parties has changed so that the other party is prejudiced, that he has attempted to restore the *status in quo*.[12] A number of the earlier common-law authorities in this country and in England take the more logical ground that such contracts are void absolutely.[13]

To an action on an implied contract for borrowed money, intoxication is no defense. Haneklau *v.* Felchlin, 57 Mo. App. 602 [*quoting* Gore *v.* Gibson, 9 Jur. 140, 14 L. J. Exch. 151, 13 M. & W. 623].

9. *Alabama.*— See Wright *v.* Waller, 127 Ala. 557, 29 So. 57, 54 L. R. A. 440.

Arkansas.— Taylor *v.* Purcell, 60 Ark. 606, 31 S. W. 567.

California.— Pickett *v.* Sutter, 5 Cal. 412.

Delaware.— Dulany *v.* Green, 4 Harr. 285.

Illinois.— Bates *v.* Ball, 72 Ill. 108.

Iowa.— Willcox *v.* Jackson, 51 Iowa 208, 1 N. W. 513 [*citing* Story Eq. Jur. 231]; Mansfield *v.* Watson, 2 Iowa 111.

Maryland.— Johns *v.* Fritchey, 39 Md. 258.

Michigan.—Wright *v.* Fisher, 65 Mich. 275, 32 N. W. 605, 8 Am. St. Rep. 886.

Missouri.— Longhead *v.* B. F. Coombs, etc., Commission Co., 64 Mo. App. 559.

Pennsylvania.— Bush *v.* Brenig, 113 Pa. St. 310, 6 Atl. 86, 57 Am. Rep. 469; Wilson *v.* Bigger, 7 Watts & S. 111.

South Carolina.— Wade *v.* Colvert, 2 Mill 27, 12 Am. Dec. 652; Lee *v.* Ware, 1 Hill 313.

Tennessee.— Birdsong *v.* Birdsong, 2 Head 289.

Vermont.— Foot *v.* Tewksbury, 2 Vt. 97.

See 17 Cent. Dig. tit. "Drunkards," § 7.

Mere intoxication (Reynolds *v.* Dechaums, 24 Tex. 174, 76 Am. Dec. 101); mere excitement from the use of liquor (Cavender *v.* Waddingham, 5 Mo. App. 457); excitement to the extent that the party does not clearly understand the business, no advantage having been taken of him (Henry *v.* Ritenour, 31 Ind. 136); intoxication to such an extent that the party could not give proper attention to the contract he enters into (Wright *v.* Waller, 127 Ala. 557, 29 So. 57, 54 L. R. A. 440 [*distinguishing* Holland *v.* Barnes, 53 Ala. 83, 25 Am. Rep. 595; Hale *v.* Brown, 11 Ala. 871]); or intoxication to the extent that the party could not give the attention which a reasonably prudent man would have given to a contract which he was entering into (Wright *v.* Waller, 127 Ala. 557, 29 So. 57, 54 L. R. A. 440) does not incapacitate the person in fact. So also where the party at the time of agreement did not have the same capacity to contract that he would have had had he been sober. Foot *v.* Tewksbury, 2 Vt. 97. See also Taylor *v.* Patrick, 1 Bibb (Ky.) 168.

An instruction that the drunkenness must be excessive and absolute, so as to suspend the reason and create impotence of mind in order to enable the party to avoid his contract, is correct. Cavender *v.* Waddingham, 5 Mo. App. 457. But an instruction that "a man must be so drunk as not to be able to stand, or write, or understand what he is doing, to avoid his contract on the plea of drunkenness" is a misstatement of the law. Cummings *v.* Henry, 10 Ind. 109, 110.

10. Cummings *v.* Henry, 10 Ind. 109.

11. *Indiana.*— Joest *v.* Williams, 42 Ind. 565, 13 Am. Rep. 377 [*following* McGuire *v.* Callahan, 19 Ind. 128, and *citing* Story Contr. § 45, note 4]; Cummings *v.* Henry, 10 Ind. 109.

Kansas.— Lacey *v.* Mann, 59 Kan. 777, 53 Pac. 754.

Kentucky.— English *v.* Young, 10 B. Mon. 141.

Michigan.— Carpenter *v.* Rodgers, 61 Mich. 384, 28 N. W. 156, 1 Am. St. Rep. 595.

Missouri.— Broadwater *v.* Darne, 10 Mo. 277.

Pennsylvania.— Bush *v.* Breinig, 113 Pa. St. 310, 6 Atl. 86, 57 Am. Dec. 469.

England.— Matthews *v.* Baxter, L. R. 8 Exch. 132, 42 L. J. Exch. 73, 28 L. T. Rep. N. S. 169, 21 Wkly. Rep. 389.

See 17 Cent. Dig. tit. "Drunkards," § 7.

Who may avoid.— The defense can be set up only by the party himself or his representative. Broadwater *v.* Darne, 10 Mo. 277. See also Wigglesworth *v.* Steers, 1 Hen. & M. (Va.) 70, 3 Am. Dec. 602, for avoidance by representatives.

12. Carpenter *v.* Rodgers, 61 Mich. 384, 28 N. W. 156, 1 Am. St. Rep. 595.

"It follows, according to a well settled rule of law, that to enable the maker or his representative to defend successfully on that ground [intoxication], there must have been a rescission of the contract, by placing the parties *in statu quo*. As it appears that the maker of the note, as alleged in the second paragraph of the reply, received a deed of conveyance for the real estate for which in part a note was given, and it is not alleged or shown by the evidence that he or his representatives ever reconveyed the title, or in any way properly rescinded the contract, the court should have found for the plaintiff upon the evidence, instead of finding for the defendant." Joest *v.* Williams, 42 Ind. 565, 569, 13 Am. Rep. 377. See *infra*, IV, D, E.

13. *Delaware.*—See charge to jury in Drummond *v.* Hopper, 4 Harr. 327.

D. Aspect of Defense in Equity. In law the contracts of an intoxicated person are avoided on the ground of incompetency;[14] but in equity they are avoided on the ground of fraud.[15] When therefore the intoxication has been induced by the other party to the alleged contract,[16] or where the intoxicated party has been taken advantage of or been imposed upon,[17] equity will set aside

Indiana.— Jenners *v.* Howard, 6 Blackf. 240.

Missouri.—Cavender *v.* Waddingham, 2 Mo. App. 551.

North Carolina.— Hyman *v.* Moore, 48 N. C. 416.

Pennsylvania.— Clifton *v.* Davis, 1 Pars. Eq. Cas. 31. See State Bank *v.* McCoy, 69 Pa. St. 204, 8 Am. Dec. 246.

South Carolina.— Wade *v.* Colvert, 2 Mill 27, 12 Am. Dec. 652.

England.— Pitt *v.* Smith, 3 Campb. 33, 13 Rev. Rep. 741; Hawkins *v.* Bone, 4 F. & F. 311. See also *supra*, note 8.

Rule in the civil law.— The above cases take the ground of the civil law on this question, namely, that if a man is so intoxicated that he is incapable of understanding what he is doing, he cannot give his assent to the contract, and therefore no contract can exist. Pothier Traité des Obligations, p. 1, c. 1, art. 4, says: "Il est evident que l'ivresse, lorsqu'elle va jusqu'au point de faire perdre l'usage de la raison, rend la personne qui est en cet etat, pendant qu'il dure, incapable de contracter, puisque elle rend incapable de consentement." (It is clear that intoxication, when it reaches the point of causing the loss of reason, makes the person who is in that condition, while it lasts, incapable of contracting, since it renders him incapable of assent.)

The Scotch law follows the civil law in this. Thus Erskine, in his Institutes (p. 822), says: "An obligation granted by a person in a state of absolute and total drunkenness is ineffectual because the grantor is incapable of consent."

14. Intoxication as a defense at law see *supra*, IV, C.

A court of law can interfere, only by avoiding the contract. It cannot, like a court of equity, accommodate itself to the particular case and oblige him who seeks relief to do equity. Burroughs *v.* Richman, 13 N. J. L. 233, 23 Am. Dec. 717.

15. Mansfield *v.* Watson, 2 Iowa 111. See also Bowen *v.* Clark, 3 Fed. Cas. No. 1,721, 1 Biss. 128; Butler *v.* Mulvihill, 1 Bligh 137, 4 Eng. Reprint 49.

16. White *v.* Cox, 3 Hayw. (Tenn.) 79; Say *v.* Barwick, 1 Ves. & B. 195, 35 Eng. Reprint 76; Cooke *v.* Clayworth, 18 Ves. Jr. 12, 11 Rev. Rep. 137, 34 Eng. Reprint 222. The having been in drink is not any reason to relieve a man against any deed or agreement gained from him when in those circumstances; for this were to encourage drunkenness; *secus*, if through the management or contrivance of him who gained the deed, etc., the party from whom such deed has been gained was drawn into drink. Johnson *v.* Medlicott [*cited* in Osmond *v.* Fitzroy, 3 P. Wms. 129, 131 note 1, 24 Eng. Reprint 997].

Where the contract was manifestly an unfair one, and the person who asked the help of the court of equity was weak from drink, or old age, or both, it will be set aside by a court of equity. Hume *v.* Cook, 16 Grant Ch. (U. C.) 84; McGregor *v.* Boulton, 12 Grant Ch. (U. C.) 288. See Clarkson *v.* Kitson, 4 Grant Ch. (U. C.) 244. In Brandon *v.* Old, 3 C. & P. 440, 14 E. C. L. 652, it was held that a publican could not recover for beer furnished to third persons by the order of an individual who has previously become intoxicated by drinking in his house, because the publican in such a case would be taking advantage of an offense which he himself had been instrumental in producing. Nevills *v.* Nevills, 6 Grant Ch. (U. C.) 121.

An agreement which is reasonable, and made to settle family disputes, wherein no unfair advantage has been taken, will not be set aside because the party was drunk, or because paternal authority exercised. Cory *v.* Cory, 1 Ves. 19, 27 Eng. Reprint 864; Stockley *v.* Stockley, 1 Ves. & B. 23, 12 Rev. Rep. 184, 35 Eng. Reprint 9.

Lack of professional advice.— Where a person given to drinking made a deed to his wife, understanding what he was doing, but without professional advice, a bill by his heir impeaching the deed was dismissed, where it was shown that no advantage had been taken of plaintiff. Corrigan *v.* Corrigan, 15 Grant Ch. (U. C.) 341. See Lightfoot *v.* Heron, 3 Y. & C. Exch. 586.

17. Reynolds *v.* Waller, 1 Wash. (Va.) 164; Wiltshire *v.* Marshall, 14 L. T. Rep. N. S. 396, 14 Wkly. Rep. 602; Cooke *v.* Clayworth, 18 Ves. Jr. 12, 11 Rev. Rep. 137, 34 Eng. Reprint 222.

Surprise and mistake.— Plaintiff and defendant, occupying adjoining farms, met at night at a public house, where plaintiff drew up an agreement between defendant and himself for the sale and purchase of forty-five acres of land for £2000. The agreement was executed by both parties and attested by two witnesses, and a check for £200 deposit was drawn by plaintiff on a plain piece of paper. This was the next day exchanged for one drawn on the banker's ordinary form. No abstract was asked for for nearly four months, and three months after that defendant asked for a copy of the contract, and he then objected that he had only thirty-five acres to sell, and was so drunk when he entered into the agreement that he did not know what he was doing. He offered to sell for the £2000, or give up the agreement and return the deposit. This was refused and an abatement claimed in respect of the ten acres short, and a bill filed for specific performance. It was held that on the evidence defendant was incapable of contracting at the time, and the circumstances were such as to bring the case

the contract. But where there has been no fraud practised equity will not set aside a contract on the ground of the intoxication of defendant.[18]

E. Against Innocent Third Persons. It has been held that a party to a contract cannot set up the defense of intoxication so as to prejudice an innocent third person.[19]

F. Evidence.[20] Evidence of incapacity by reason of intoxication is admissible under the general issue.[21] Where the person who sets up intoxication as a defense to his contract is able to remember the morning after the contract was made what he had done,[22] or where he was able to testify as to the circumstances attending the transaction,[23] a case of sufficient intoxication is not made out.

within the rule of surprise and mistake, and the bill dismissed with costs. Cox *v.* Smith, 19 L. T. Rep. N. S. 517.

18. Campbell *v.* Ketcham, 1 Bibb (Ky.) 406; Reinicker *v.* Smith, 2 Harr. & J. (Md.) 421. *Compare* Schofield *v.* Tummonds, 6 Grant Ch. (U. C.) 568, where no costs were allowed to defendant, although the contract was not in force.

Mere intoxication where no unfair advantage has been taken of him and intoxication was not procured by the other party will not entitle a party to rescind a contract. Rodman *v.* Zilley, 1 N. J. Eq. 320. See also Keough *v.* Foreman, 33 La. Ann. 1434.

Parol trust raised to defeat a conveyance.— A, who was addicted to drinking, gave to B a mortgage to secure a small debt, the property being worth at least seven times the debt, and the rent of half the property for three years being sufficient to pay off the claim. Five years before the debt was payable, A, without any additional consideration, released his equity of redemption to B, and B was allowed to remain in possession for seven or eight years after the mortgage debt was paid off by rents. It was held that the facts and evidence showed that the release was given on a parol trust for the benefit of the mortgagor and his family, and that to set up the release as an absolute purchase was fraud on B, against which the court should relieve, notwithstanding the lapse of time and death of some of the witnesses. Crippen *v.* Ogilvie, 18 Grant Ch. (U. C.) 253.

Specific performance refused.— A contract procured by plaintiff and prepared and written by him, the other party to the contract being an illiterate man, and at the time of the execution of the agreement considerably in liquor, and being without professional advice and without any knowledge of its nature and consequences, which were highly favorable to plaintiff, and the agreement being somewhat vague and obscure, will not be enforced specifically in a court of equity. Plaintiff will be left to his remedy (if any) at law for damages for non-performance. Vivers *v.* Tuck, 9 L. T. Rep. N. S. 794, 1 Moore P. C. N. S. 516, 15 Eng. Reprint 794. But where, after a contract fairly entered into with a man addicted to drinking to sell to plaintiff leasehold premises for £735, another person with notice of this contract, within a few days prevailed on the vendor to sell and execute an assignment thereof to him for £760, the court decreed specific performance of the first contract on the ground that it could not assist in getting rid of the first agreement on the mere ground of intoxication, no fraud being alleged. Shaw *v.* Thackray, 17 Jur. 1045, 1 Smale & G. 537. See also, generally, SPECIFIC PERFORMANCE.

Sufficient relief at law.— In Lacy *v.* Garrard, 2 Ohio 7, the court said that, although a bond was executed by one who was intoxicated, and the intoxication was procured by the obligee, the bond might be avoided at law, and therefore there was no reason for coming into a court of equity.

Equity doctrine followed by law courts.— Where it appeared that a note was made under suspicious circumstances, by a person of weak intellect and a habitual drunkard, it was held that the circumstances of the case wore a strong badge of fraud; that it was incumbent upon the payee to make out a fair case and good consideration, it having been previously shown that the note was given on settlement of accounts and the presumption created either that nothing was due or a less sum than the note called for. Hale *v.* Brown, 11 Ala. 87. See also Holland *v.* Barnes, 53 Ala. 83, 25 Am. Rep. 595.

19. Thus the maker of a negotiable note cannot set up the defense against an innocent third purchaser of the note. State Bank *v.* McCoy, 69 Pa. St. 204, 8 Am. Rep. 246. The court in this case distinguished between intoxicated persons and lunatics: that the former were under a much more temporary disability than a lunatic. See INSANE PERSONS. See also Caulkins *v.* Fry, 35 Conn. 170; and COMMERCIAL PAPER, 7 Cyc. 495.

A guaranty fraudulently obtained from an intoxicated person may be enforced against him by an innocent third person who has acted to his prejudice upon the faith of the guaranty which was addressed to him. Page *v.* Krekey, 137 N. Y. 307, 33 N. E. 311, 33 Am. St. Rep. 731, 21 L. R. A. 409 [*reversing* 17 N. Y. Suppl. 764].

An assignment by A to B of an agreement, although objectionable on account of A's intoxication when he executed it, will not affect B's subsequent assignment of the agreement to C without notice. Campbell *v.* Breckinridge, 8 Blackf. (Ind.) 471.

20. Evidence generally see EVIDENCE.

21. Cavender *v.* Waddingham, 2 Mo. App. 551.

22. Caulkin *v.* Fry, 35 Conn. 170.

23. Bates *v.* Ball, 72 Ill. 108.

DRUNKENNESS. See DRUNKARDS.

DRY.[1] To free from water, or from moisture of any kind, and by any means;[2] to prepare and to expose to the sun or any heat in order to free from moisture.[3]

DRY-DOCK. See WHARVES.

DRY-GOODS. Textile fabrics, cottons, woolens, linens, silks, laces, etc.,[4] such as are sold by linen drapers, mercers, etc., in distinction from groceries.[5]

DRY MORTGAGE. A term sometimes used to designate a lien for the security of money without any absolute personal liability beyond the value of the property.[6]

DRY ROT. A rapid decay of timber by which its substance is converted into a dry powder;[7] a decay affecting timber, destroying it.[8]

DRY TRUST. See TRUSTS.

DRY WEIGHT. Air-dry weight.[9] (See, generally, CUSTOMS DUTIES; WEIGHTS AND MEASURES.)

DUAS UXORES EODEM TEMPORE HABERE NON LICET. A maxim meaning "It is not lawful to have two wives at one time."[10]

DUCES TECUM. Literally "You bring with you." In practice a term applied to certain writs, where a party summoned to appear in court is required to bring with him some piece of evidence, or other thing that the court would view.[11]

DUCKING-STOOL. A CUCKING-STOOL,[12] *q. v.*

DUE.[13] As an adjective, capable of being justly demanded;[14] justly claimed as a right or property;[15] mature;[16] owed;[17] owing;[18] owing and demand-

1. "Dried fruit" as used in a tariff act see Nordlinger *v.* U. S., 69 Fed. 92, 93.

2. Webster Dict. [*quoted* in U. S. *v.* Trinidad Asphalt Co., 77 Fed. 609, 610].

3. Century Dict. [*quoted* in U. S. *v.* Trinidad Asphalt Co., 77 Fed. 609, 610].

4. Wood *v.* Allen, 111 Iowa 97, 100, 82 N. W. 451. See also Germania F. Ins. Co. *v.* Francis, 52 Miss. 457, 468, 24 Am. Rep. 674.

"Dry goods consist of cloths, velvets, silks, satins, laces, cottons, and probably of a hundred other articles." Nolan *v.* Donnelly, 4 Ont. 440, 445.

Whether boots and shoes, hats and caps, are embraced within the term is a question for the jury. Bassell *v.* American F. Ins. Co., 2 Fed. Cas. No. 1,094, 2 Hughes 531, 537.

5. Worcester Dict. [*quoted* in Levy *v.* Friedlander, 24 La. Ann. 439, 441].

6. Frowenfeld *v.* Hastings, 134 Cal. 128, 132, 66 Pac. 178.

7. Webster Dict. [*quoted* in Page *v.* Defoe, 24 Ont. 569, 573].

8. Century Dict. [*quoted* in Page *v.* Defoe, 24 Ont. 569, 573].

9. U. S. *v.* Perkins, 66 Fed. 50, 51, 13 C. C. A. 324.

10. Bouvier L. Dict. [*citing* 1 Blackstone Comm. 436].

11. Burrill L. Dict. [*citing* Cowell Termes de la Ley].

12. See 12 Cyc. 986.

13. Derived from the Latin verb, *debeo*, through the French *du*. Leggett *v.* Sing Sing Bank, 25 Barb. (N. Y.) 326, 332.

The word has a variety of meanings, depending on the connection in which it is used. Feeser *v.* Feeser, 93 Md. 716, 725, 50 Atl. 406. And "considered by itself, [it] has many definitions." Elkins *v.* Wolfe, 44 Ill. App. 376, 380.

14. Latham [*quoted* in Rider *v.* Fritchey, 49 Ohio St. 285, 294, 30 N. E. 692, 15 L. R. A. 513].

"It seems natural to say that where one is injured by the negligence of another, reparation is due." Rider *v.* Fritchey, 49 Ohio St. 285, 294, 30 N. E. 692, 15 L. R. A. 513.

15. Webster Dict. [*quoted* in Rider *v.* Fritchey, 49 Ohio St. 285, 294, 30 N. E. 692, 15 L. R. A. 513].

16. Marstiller *v.* Ward, 52 W. Va. 74, 84, 43 S. E. 178.

17. Equitable L. Ins. Co. *v.* Board of Equalization, 74 Iowa 178, 181, 37 N. W. 141; Shanks *v.* Greenville, 57 Miss. 168, 171; U. S. *v.* North Carolina Bank, 6 Pet. (U. S.) 29, 36, 8 L. ed. 308; Latham [*quoted* in Rider *v.* Fritchey, 49 Ohio St. 285, 294, 30 N. E. 692, 15 L. R. A. 513]; Webster Int. Dict. [*quoted* in Elkins *v.* Wolfe, 44 Ill. App. 376, 380; Buehler *v.* Pierce, 175 N. Y. 264, 266, 67 N. E. 573].

18. *California.*— Crocker-Woolworth Nat. Bank *v.* Carle, 133 Cal. 409, 411, 65 Pac. 951] [*citing* Bouvier L. Dict.; Century Dict., and *cited* in Sather Banking Co. *v.* Arthur R. Briggs Co., 138 Cal. 724, 732, 72 Pac. 352]; Tomlinson *v.* Ayres, 117 Cal. 568, 571, 49 Pac. 717 [*citing* Anderson L. Dict.].

Iowa.— Stout *v.* Marshall, 75 Iowa 498, 499, 39 N. W. 808.

Michigan.— Putze *v.* Saginaw Valley Mut. F. Ins. Co. (1903) 94 N. W. 191, 192; Smalley *v.* Ashland Brown-Stone Co., 114 Mich. 104, 107, 72 N. W. 29; Fowler *v.* Hoffman, 31 Mich. 215, 219 [*cited* in Buehler *v.* Pierce, 175 N. Y. 264, 267, 67 N. E. 573].

Minnesota.—Bowers *v.* Hechtman, 45 Minn. 238, 240, 47 N. W. 792; Fowler *v.* Johnson, 26 Minn. 338, 343, 3 N. W. 986, 6 N. W. 486.

Nebraska.— Ryan *v.* Douglas County, 47 Nebr. 9, 17, 66 N. W. 30.

able;[19] owing and unpaid,[20] remaining unpaid;[21] payable;[22] fulfilling obligation;[23] just and proper;[24] proper; suitable;[25] regular; formal; according to rule or form.[26] As an adverb, exactly;[27] directly.[28] As a noun,[29] an existing obligation;[30] an obligation to pay, either present or future;[31] an indebtedness;[32] a simple indebt-

New York.— Buehler *v.* Pierce, 175 N. Y. 264, 267, 67 N. E. 573; Allen *v.* Patterson, 7 N. Y. 476, 480, 57 Am. Dec. 542.

Pennsylvania.— Fulweiler *v.* Hughes, 17 Pa. St. 440, 447.

Texas.— Dunn *v.* Sublett, 14 Tex. 521, 527.

West Virginia.— Marstiller *v.* Ward, 52 W. Va. 74, 84, 43 S. E. 178.

Wisconsin.— Wyman *v.* Kimberly-Clark Co., 93 Wis. 554, 558, 67 N. W. 932.

United States.— U. S. *v.* North Carolina Bank, 6 Pet. 29, 36, 8 L. ed. 308 [*cited* in Buehler *v.* Pierce, 175 N. Y. 264, 267, 67 N. E. 573; Allen *v.* Patterson, 7 N. Y. 476, 480, 57 Am. Dec. 542; Jones *v.* Adams, 37 Oreg. 473, 478, 59 Pac. 811, 62 Pac. 16, 82 Am. St. Rep. 766, 50 L. R. A. 388; *In re* B. H. Gladding Co., 120 Fed. 709, 710; *In re* West Norfolk Lumber Co., 112 Fed. 759, 767].

Canada.— Mail Printing Co. *v.* Clarkson, 25 Ont. App. 1, 8.

But as distinguished from "owing" see People *v.* Arguello, 37 Cal. 524, 525; Carr *v.* Thompson, 67 Mo. 472, 475 [*cited* in Jones *v.* Adams, 37 Oreg. 473, 478, 59 Pac. 811, 62 Pac. 16, 82 Am. St. Rep. 766, 50 L. R. A. 388].

19. Webster Dict. [*quoted* in Elkins *v.* Wolfe, 44 Ill. App. 376, 380].

20. Myers *v.* McDonald, 68 Cal. 162, 168, 8 Pac. 809.

21. Fowler *v.* Hoffman, 31 Mich. 215, 219.

22. *California.*— Crocker-Woolworth Nat. Bank *v.* Carle, 133 Cal. 409, 411, 65 Pac. 951.

Illinois.—Elkins *v.* Wolfe, 44 Ill. App. 376, 380 [*quoting* Webster Dict.].

Minnesota.— Ball *v.* Northwestern Mut. Acc. Assoc., 56 Minn. 414, 419, 57 N. W. 1063.

New York.— Leggett *v.* Sing Sing Bank, 25 Barb. 326, 332 [*cited* in Jones *v.* Adams, 37 Oreg. 473, 478, 59 Pac. 811, 62 Pac. 16, 82 Am. St. Rep. 766, 50 L. R. A. 388]; Read *v.* Worthington, 9 Bosw. 617, 627 [*citing* Allen *v.* Patterson, 7 N. Y. 476, 57 Am. Dec. 542; Worcester Dict.].

Pennsylvania.— Prentiss *v.* Kingsley, 10 Pa. St. 120, 123; Commonwealth Bank *v.* Wise, 3 Watts 394, 403.

Wisconsin.—Blunt *v.* Walker, 11 Wis. 334, 350, 78 Am. Dec. 709.

England.— *In re* Stockton Malleable Iron Co., 2 Ch. D. 101, 103, 45 L. J. Ch. 168.

Canada.— Corham *v.* Kingston, 17 Ont. 432, 434; Mail Printing Co. *v.* Clarkson, 25 Ont. App. 1, 8.

"Due and payable" as used in pleading see Hershfield *v.* Aiken, 3 Mont. 442, 448.

More generally it has reference to the time of payment, particularly as applied to notes either negotiable or not. Adams *v.* Clarke, 14 Vt. 9, 13. But at other times it shows that the day of payment or render has passed. Scudder *v.* Scudder, 10 N. J. L. 340, 345.

23. Webster Dict. [*quoted* in Rider *v.* Fritchey, 49 Ohio St. 285, 294, 30 N. E. 692, 15 L. R. A. 513].

24. Bouvier Dict. [*quoted* in Elkins *v.* Wolfe, 44 Ill. App. 376, 380].

"Due examination" see State *v.* Hamilton, 42 Mo. App. 24, 31.

25. Webster Dict. [*quoted* in Elkins *v.* Wolfe, 44 Ill. App. 376, 380].

26. Burrill L. Dict.

"Due and lawful authority" as used in an affidavit of defense see May *v.* Forbes, 2 Pennew. (Del.) 194, 43 Atl. 839.

"Due" as used in connection with the duty of bank directors to make reports to the government see People *v.* Vail, 57 How. Pr. (N. Y.) 81, 85 [*cited* in People *v.* McComber, 7 N. Y. Suppl. 71, 73].

"Due form" as applied to the execution of deeds (see Lucas *v.* Cobbs, 18 N. C. 228, 233); as used in judicial proceedings (see McRae *v.* Stokes, 3 Ala. 401, 402, 37 Am. Dec. 698).

"Due notice" as used in practice see Wilde *v.* Wilde, 2 Nev. 306, 307. See also Slattery *v.* Doyle, 180 Mass. 27, 61 N. E. 264.

"'In due form' means the mode of attestation [of a document] in use in the State from whence the record comes." Ducommun *v.* Hysinger, 14 Ill. 249, 250 [*cited* in Haynes *v.* Cowen, 15 Kan. 637, 643].

27. As in the words "due north" (Wells *v.* Jackson Iron Mfg. Co., 47 N. H. 235, 260, 90 Am. Dec. 575) or "due west" (McKinney *v.* McKinney, 8 Ohio St. 423, 426).

28. Archibald *v.* Morrison, 7 Nova Scotia 272, 275.

29. Distinguished from "demand" in Clarke *v.* Tyler, 30 Gratt. (Va.) 134, 139.

Distinguished from "arrears" in Wiggin *v.* K. of P., 31 Fed. 122, 125.

30. Sand Blast File Sharpening Co. *v.* Parsons, 54 Conn. 310, 313, 7 Atl. 716. And see Cutter *v.* Perkins, 47 Me. 557, 566.

31. Buehler *v.* Pierce, 175 N. Y. 264, 267, 67 N. E. 573; People *v.* Vail, 57 How. Pr. (N. Y.) 81, 85 [*citing* Webster Dict.].

"Due" and "to become due."— "It is difficult, in a single word, to express present liabilities, payable hereafter; but 'due,' and 'to become due,' have, by long usage come to mean liabilities past due and hereafter to grow due." Read *v.* Worthington, 9 Bosw. (N. Y.) 617, 627. As applied to pension money see Beecher *v.* Barber, 6 Dem. Surr. (N. Y.) 129, 131, 20 N. Y. St. 136. See also Rozell *v.* Rhodes, 116 Pa. St. 129, 134, 9 Atl. 160, 2 Am. St. Rep. 591.

32. Bates *v.* State Bank, 2 Ala. 451, 491; Scudder *v.* Scudder, 10 N. J. L. 340, 345 [*cited* in Green *v.* McCrane, 55 N. J. Eq. 436, 442, 37 Atl. 318]; Bowen *v.* Slocum, 17 Wis. 181, 184.

edness without reference to the time of payment;[33] a debt ascertained and fixed, though payable in future;[34] a debt immediately payable;[35] a debt matured;[36] a debt, when the money has become payable, so that suit will lie on it presently;[37] a present debt, though not payable then;[38] a right, just title or claim;[39] that which any one has a right to demand, claim or possess;[40] that which can justly be required;[41] that which belongs or may be claimed as a right;[42] that which is owed, that which custom, statute or law requires to be paid;[43] that which law or justice requires to be paid,[44] or done;[45] that which may be justly claimed;[46] whatever custom, law, or morality requires to be done;[47] what may be demanded;[48] what ought to be paid,[49] or done to another,[50] or for another;[51] what one owes;[52] and sometimes the word is employed as meaning the unpaid purchase price.[53] (See CLAIM; DEBT; DUES; and, generally, COMMERCIAL PAPER.)

DUE-BILL. See COMMERCIAL PAPER.

DUE CARE. See NEGLIGENCE.

DUE COMPENSATION. Paying the full value.[54] (See DUE; and, generally, EMINENT DOMAIN.)

DUE COURSE OF ADMINISTRATION. As applied to a claim against an estate the term means that it shall be paid as, and *pro rata* with, other claims of that class, out of the assets administered.[55] (See, generally, EXECUTORS AND ADMINISTRATORS.)

DUE COURSE OF LAW. See CONSTITUTIONAL LAW.

But as distinguished from "indebtedness" see Yocum *v.* Allen, 58 Ohio St. 280, 287, 50 N. E. 909.

33. Ryan *v.* Douglas County, 47 Nebr. 9, 17, 66 N. W. 30; Scudder *v.* Scudder, 10 N. J. L. 340, 345 [*quoted* in Hoyt *v.* Hoyt, 16 N. J. L. 138, 143; Jones *v.* Adams, 37 Oreg. 473, 478, 59 Pac. 811, 62 Pac. 16, 82 Am. St. Rep. 766, 50 L. R. A. 388; Wiggin *v.* K. of P., 31 Fed. 122, 125].

34. Putze *v.* Saginaw Valley Mut. F. Ins. Co., (Mich. 1903) 94 N. W. 191, 192.

35. Ryan *v.* Douglas County, 47 Nebr. 9, 17, 66 N. W. 30; U. S. *v.* North Carolina Bank, 6 Pet. (U. S.) 29, 36, 8 L. ed. 308. See also Leggett *v.* Sing Sing Bank, 25 Barb. (N. Y.) 326, 332; Collins *v.* Janey, 3 Leigh (Va.) 389, 391.

36. Yocum *v.* Allen, 58 Ohio St. 280, 287, 50 N. E. 909. And see Van Hook *v.* Walton, 28 Tex. 59, 76.

37. Putze *v.* Saginaw Valley Mut. F. Ins. Co., (Mich. 1903) 94 N. W. 191, 192.

38. Adams *v.* Clarke, 14 Vt. 9, 13. See also 8 Cyc. 107 note 81.

"'Money due,' . . . implies such an obligation as will, by the effluence of time alone, ripen into a cause of action." Ryan *v.* Douglas County, 47 Nebr. 9, 17, 66 N. W. 30.

39. Webster Dict. [*quoted* in Rider *v.* Fritchey, 49 Ohio St. 285, 294, 30 N. E. 692, 15 L. R. A. 513].

40. Worcester Dict. [*quoted* in Rider *v.* Fritchey, 49 Ohio St. 285, 294, 30 N. E. 692, 15 L. R. A. 513].

41. Worcester Dict. [*quoted* in Clarke *v.* Tyler, 30 Gratt. (Va.) 134, 139].

42. Webster Dict. [*quoted* in Rider *v.* Fritchey, 49 Ohio St. 285, 294, 30 N. E. 692, 15 L. R. A. 513]. And see Buehler *v.* Pierce, 175 N. Y. 264, 67 N. E. 573.

43. Feeser *v.* Feeser, 93 Md. 716, 50 Atl. 406; Webster Dict. [*quoted* in Clarke *v.* Tyler, 30 Gratt. (Va.) 134, 139].

44. Webster Dict. [*quoted* in Buehler *v.* Pierce, 175 N. Y. 264, 267, 67 N. E. 573].

45. Ryerson *v.* Boorman, 8 N. J. Eq. 701, 705.

46. Latham [*quoted* in Rider *v.* Fritchey, 49 Ohio St. 285, 294, 30 N. E. 692, 15 L. R. A. 513].

47. Webster Dict. [*quoted* in Rider *v.* Fritchey, 49 Ohio St. 285, 294, 30 N. E. 692, 15 L. R. A. 513].

48. Bouvier L. Dict. [*quoted* in Elkins *v.* Wolfe, 44 Ill. App. 376, 380; Buehler *v.* Pierce, 175 N. Y. 264, 266, 67 N. E. 573; Rider *v.* Fritchey, 49 Ohio St. 285, 294, 30 N. E. 692, 15 L. R. A. 513; Ward *v.* Joslin, 105 Fed. 224, 227, 44 C. C. A. 456].

49. Bouvier L. Dict. [*quoted* in Elkins *v.* Wolfe, 44 Ill. App. 376, 380; Buehler *v.* Pierce, 175 N. Y. 264, 266, 67 N. E. 573; Rider *v.* Fritchey, 49 Ohio St. 285, 294, 30 N. E. 692, 15 L. R. A. 513; Ward *v.* Joslin, 105 Fed. 224, 227, 44 C. C. A. 456]; Burrill L. Dict. [*quoted* in Buehler *v.* Pierce, 175 N. Y. 264, 267, 67 N. E. 573]; Webster Dict. [*quoted* in Elkins *v.* Wolfe, 44 Ill. App. 376, 380; Buehler *v.* Pierce, 175 N. Y. 264, 267, 67 N. E. 573].

50. Burrill L. Dict. [*quoted* in Buehler *v.* Pierce, 175 N. Y. 264, 267, 67 N. E. 573]; Webster Dict. [*quoted* in Elkins *v.* Wolfe, 44 Ill. App. 376, 380; Buehler *v.* Pierce, 175 N. Y. 264, 267, 67 N. E. 573].

51. Webster Dict. [*quoted* in Rider *v.* Fritchey, 49 Ohio St. 285, 294, 30 N. E. 692, 15 L. R. A. 513].

52. Webster Dict. [*quoted* in Buehler *v.* Pierce, 175 N. Y. 264, 267, 67 N. E. 573].

53. Lawton *v.* Fonner, 59 Nebr. 214, 218, 80 N. W. 808.

54. Langdon *v.* New York, 13 N. Y. Suppl. 864, 866.

55. Darling *v.* McDonald, 101 Ill. 370, 377 [*cited* in McCall *v.* Lee, 120 Ill. 261, 266, 11 N. E. 522].

DUE COURSE OF TRADE.[56] See COMMERCIAL PAPER.

DUE DILIGENCE. Such watchful caution and foresight as the circumstances of the particular service demand.[57] (Due Diligence : In General, see NEGLIGENCE. In Procuring Absent Witness or Evidence, see CONTINUANCES IN CIVIL CASES; CONTINUANCES IN CRIMINAL CASES. In Procuring Newly-Discovered Evidence, see CRIMINAL LAW; NEW TRIAL. Of Agent, see PRINCIPAL AND AGENT. Of Assignee, see ASSIGNMENTS; BONDS; COMMERCIAL PAPER. Of Attorney, see ATTORNEY AND CLIENT. Of Bailee, see BAILMENTS. Of Carrier, see CARRIERS. Of Creditor, see CREDITORS' SUITS. Of Master, see MASTER AND SERVANT. Of Party — Seeking Equity in General, see EQUITY; Seeking Specific Performance, see SPECIFIC PERFORMANCE. Of Servant, see MASTER AND SERVANT. To Avoid Estoppel by, see ESTOPPEL. To Fix Liability of Bail, see BAIL.)

DUEL. See DUELING.

"Due course of administration" as applied to a marriage settlement in trust see Briggs *v.* Upton, L. R. 7 Ch. 376, 381, 41 L. J. Ch. 519, 27 L. T. Rep. N. S. 62, 21 Wkly. Rep. 20 [*quoted* in Davies *v.* Davies, 55 Conn. 319, 326, 11 Atl. 500].

56. "In due course of trade" see 7 Cyc. 925 note 85.

57. Nord-Deutcher Lloyd *v.* Insurance Co. of North America, 110 Fed. 420, 427, 49 C. C. A. 1.

DUELING

By Ernest H. Wells*

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CROSS-REFERENCES

For Matters Relating to:

Breach of the Peace, see Breach of the Peace.

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*Author of "Contribution," 9 Cyc. 792; "Court Commissioners," 11 Cyc. 622; "Disorderly Houses," 14 Cyc. 479; "Drunkards," 14 Cyc. 1089; etc.

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Dueling:
Affecting Eligibility to Office, see OFFICERS.
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Fighting:
By Agreement Without Weapons, see PRIZE-FIGHTING.
Without Previous Agreement, see AFFRAY.
Homicide, see HOMICIDE.
For General Matters Relating to Criminal Law and Criminal Procedure, see CRIMINAL LAW.

I. DUELING PROPER.

A. Definition. Dueling is the act of fighting with deadly weapons[1] between two persons[2] in pursuance of a previous agreement.[3]

B. Nature and Elements of Offense — 1. At Common Law. Dueling as a specific offense was unknown in the common law;[4] but was treated, when not resulting in homicide[5] or a maiming,[6] as a breach of the peace[7] or as an assault and battery.[8] Considered as either one of these offenses, it of course constituted a misdemeanor.[9]

2. By Statute.[10] Where a statute provides that a person who shall fight a duel and kill his antagonist shall be subject to a penalty, the offense consists in fighting the duel with the result stated in the statute.[11]

3. Necessary Elements — a. The Agreement. It is necessary to establish only the fact of an agreement in pursuance of which a fight with deadly weapons took place to constitute the crime.[12]

1. **As to the weapons** see *infra*, I, B, 3, b.

2. **Under Cal. Pen. Code, § 225,** the definition of "duel" does not confine the combat to one between two persons only.

3. State *v.* Herriott, 1 McMull. (S. C.) 126; Anderson L. Dict. See also Abbott L. Dict.; Bouvier L. Dict.

"What we now call a duel, is, a fighting between two, upon some quarrel precedent." Jacob L. Dict.

The origin of the practice of dueling is said to be the ancient battel, or judicial combat of feudal times. Century Dict.; 7 Encycl. Britt. But the modern duel is distinguished from the battel in that the latter was a proceeding at law, sanctioned by the sovereign power. 2 Pollock & M. Hist. Eng. L. 600, 610; 1 Pollock & M. Hist. Eng. L. 146. See also speech of Sir Francis Bacon, attorney-general, in The Case of Duels, 2 How. St. Tr. 1033, 1039. And see 3 Coke Inst. 159.

As to the agreement see *infra*, I, B, 3, a.

4. **But dueling is "a high contempt of the justice of the Nation."** 4 Blackstone Comm. 145. "For it is *vi et armis, et contra pacem domini regis*, etc., and in respect to encroachment upon royall authority for revenge, it is *contra coronam et dignitatem*." 3 Coke Inst. 158.

5. **Homicide** generally see HOMICIDE.

6. **Mayhem** generally see MAYHEM.

7. Com. *v.* Lambert, 9 Leigh (Va.) 603; 3 Coke Inst. 158; Rex *v.* Rice, 3 East 581; 3 Stephen Hist. Cr. L. Eng. 100.

For breaches of the peace see 5 Cyc. 1023.

8. Com. *v.* Lambert, 9 Leigh (Va.) 603; 3 Stephen Hist. Cr. L. Eng. 100.

Assault and battery see 3 Cyc. 1014.

9. Rex *v.* Darcy, 1 Keb. 694, Sid. 186; 3 Coke Inst. 158; 2 Comyns Dig. 270.

Distinguished from affray.— It has also been treated by the text-book writers as an aggravation of an affray. 4 Blackstone Comm. 145; 1 Hawkins P. C. c. 63, § 1; 4 Stephen Comm. (12th ed.) 181. But dueling is distinguished from affray in that it may and usually does lack the essential element of a public place and in that deadly weapons are not a necessary element of affray. See AFFRAY, 4 Cyc. 43.

It might be prosecuted as an attempt at murder. See 2 How. St. Tr. 1033, 1041.

10. See 1 Archbold 60, 835 (Pomeroy's notes) for results of legislation in the different states. See also 2 Bishop New Cr. L. § 316.

Dueling has never been the subject of special legislation in England. Hence a duel which did not result in death or maiming remained in all cases a misdemeanor until 43 Geo. III, c. 58, which imposed a special penalty for one who shot at another with a pistol. 3 Stephen Cr. L. 100.

11. The offense specified in such statute was not designed to fall within the definition of murder given in the statutes, but has its own separate definition given, in the specific act, as a separate and distinct offense. People *v.* Bartlett, 14 Cal. 651.

12. It is immaterial at what time prior to the encounter the agreement was made. State

b. The Weapons. The weapons used must be of a kind which is hazardous to life.[13]

4. Seconds, Aiders, and Abetters. At common law the seconds were equally guilty with the principals.[14] Where a statute imposes a penalty for any one who shall consent to be a second in a duel, if the consent is given within the state the offense is complete irrespective of where the duel was fought.[15] Mere presence at a duel will not be sufficient to make one guilty of a crime, but if one is present, encouraging the principals by advice or assistance, he is equally guilty with the principals.[16]

C. Indictment or Information[17] — **1. In General.**[18] At common law an indictment which charges that defendant did fight a duel with pistols is insufficient.[19] The date of the offense should be correctly alleged.[20]

2. For Aiding and Abetting.[21] An indictment for aiding and abetting in fighting a duel which does not state with clearness and certainty that a duel was fought is bad on general demurrer.[22]

D. Trial — 1. Privilege of Witness. Where by statute the statement of a witness who was concerned in a duel otherwise than as principal cannot be used against him, he can nevertheless at the trial of the principal refuse to testify on the ground that his answer might incriminate him.[23]

2. Question For Jury. Whether under all the circumstances of the case a fight with pistols was actually a duel is a question for the jury.[24]

E. Punishment. At common law the punishment was by fine and imprisonment.[25]

v. Herriott, 1 McMull. (S. C.) 126. See also *infra*, III.

13. See the charge to the jury in Com. *v.* Hooper, Thach. Cr. Cas. (Mass.) 400, 405.

For what constitutes a deadly weapon see 13 Cyc. 283; 4 Cyc. 1029.

14. Reg. *v.* Cuddy, 1 C. & K. 210, 47 E. C. L. 210; Reg. *v.* Young, 8 C. & P. 644, 34 E. C. L. 939; Hawkins P. C. c. 31, § 31. In Rex *v.* Taverner, 3 Bulstr. 171, where defendant was convicted, after returning from being outlawed for murder resulting from a duel, it is said that the second, one Thomas Musgrove, stood outlawed. All these authorities hold the seconds equally guilty with the principals, who were charged with murder. It would seem equally good law that they should be held equally guilty with the principals when the latter are charged with a breach of the peace or an assault and battery. See Assault and Battery, 3 Cyc. 1033. In Case of Duels, 2 How. St. Tr. 1033, 1041, Sir Francis Bacon, attorney-general, said, in the star chamber, that he would prosecute any one who, in the future, should "accept to be a second in a challenge of either side." They were certainly equal in guilt to the principals when the duel amounted to an affray. See Affray, 2 Cyc. 44.

15. Harris *v.* State, 58 Ga. 332.

16. And even if he goes to the ground for the purpose of encouraging and forwarding the unlawful conflict, although he neither does nor says anything, yet if he is present assisting and encouraging the principals by his presence, he is guilty of a crime. Reg. *v.* Young, 8 C. & P. 644, 34 E. C. L. 939, the crime charged in this case was murder.

It has been doubted whether a surgeon of a party to a duel can be considered as an aider or abetter of a duel, either under the principles of the common law or under the statutes against dueling. Cullen *v.* Com., 24 Gratt. (Va.) 624.

17. See, generally, Indictments and Informations.

18. For form of indictment see White Pen. Code Tex. art. 716, § 1287.

19. Com. *v.* Lambert, 9 Leigh (Va.) 603, for a breach of the peace is the crime to be charged. Such a charge as the one made in the text does not charge an offense known to the common law.

20. Harris *v.* State, 58 Ga. 332.

21. For form of indictment see White Pen. Code Tex. art. 716, § 1292.

For form of indictment for acting as second see White Pen. Code Tex. art. 716, § 1290.

22. Com. *v.* Dudley, 6 Leigh (Va.) 613.

23. For whether any statute which furnishes the witness a complete indemnity by discharging him from all prosecution for his offense of being concerned in the duel would require him to answer, the statute in question furnishes no such indemnity. He therefore can claim the privilege given him by the constitution of not being compelled to give evidence against himself. Cullen *v.* Com., 24 Gratt. (Va.) 624, 625.

Waiver.— The fact that he had already testified to the facts before the coroner cannot be construed as a waiver of his privilege when he had not been advised of his privilege before giving such testimony. Cullen *v.* Com., 24 Gratt. (Va.) 624.

24. State *v.* Herriott, 1 McMull. (S. C.) 126.

25. Rex *v.* Darcy, 1 Keb. 694, Sid. 186; 3 Coke Inst. 158; 2 Comyns Dig. 270.

II. CHALLENGE TO FIGHT.[26]

A. Nature and Elements of Offense — 1. In General. Duels are usually preceded by a formal challenge which with the acceptance thereof constitutes the necessary precedent agreement. The challenge is simply the invitation to fight. This was an offense at common law of the same denomination as actually engaging in the duel,[27] for it tended to provoke a breach of the peace.[28] It could be prosecuted equally as well upon the theory of an attempt to commit a felony.[29] But to constitute an offense the words used must be intended as a demand or request to fight,[30] and the request must be to fight with deadly weapons[31] and communicated or delivered to another.[32]

2. Form of Challenge. The form of the challenge is immaterial. At common law[33] or under a statute forbidding without qualification the sending of one,[34] it may be verbal or written or by message,[35] or it may consist not only of words or writings but of acts,[36] the various acts together forming the offense.

3. Place of Duel. The place where the duel is to be fought is immaterial,[37] for the offense consists in the invitation to fight and is complete upon the delivery of the challenge.

B. Indictment or Information[38] — 1. Circumstances Governing Relief by Information. Upon producing verified copies of the letters in which the challenge was contained, a rule to show cause why an information shall not be granted will

Public recantation.—The star chamber also compelled the parties, when their case was before it, to make public recantation of their acts and bound them to their good behavior. Rex *v.* Darcy, 1 Keb. 694, Sid. 186.

26. Construction of statutes against sending, giving, or accepting challenges see Com. *v.* Hart, 6 J. J. Marsh. (Ky.) 119; State *v.* Cunningham, 2 Speers (S. C.) 246; State *v.* Dupont, 2 McCord (S. C.) 334; State *v.* S. S., 1 Tyler (Vt.) 180; and, generally, STATUTES.

Accepting challenge.—In The Case of Duels, 2 How. St. Tr. 1033, Bacon said that he would prosecute any man who in the future should accept a challenge to fight. By his course of reasoning an acceptance should be a misdemeanor just as challenging was.

27. Norton's Case, 3 City Hall Rec. (N. Y.) 90; Rex *v.* Rice, 3 East 581; 3 Coke Inst. 158; 1 Hawkins P. C. c. 63, § 3; Stephen Dig. Cr. L. 40. See Brown *v.* Com., 2 Va. Cas. 516. And *compare* Smith *v.* State, 1 Stew. (Ala.) 506, which recognized challenging as an offense at common law, but held that as the statute of 1807 against challenging was repealed by the statute of 1819, because under the earlier statute a greater penalty was attached to challenging than was attached to dueling under the later. This conclusion is contrary to the usual rule of interpretation see Bishop St. Cr. § 155. In Norton's Case, 3 City Hall Rec. (N. Y.) 90, the court said in its charge that the New York statute against dueling did not take away the common-law remedy.

28. 4 Blackstone Comm. 150; 3 Stephen Hist. Cr. L. Eng. 100. See Com. *v.* Lambert, 9 Leigh (Va.) 603.

29. Case of Duels, 2 How. St. Tr. 1033, 1046.

30. Com. *v.* Tibbs, 1 Dana (Ky.) 524. And see Aulger *v.* People, 34 Ill. 486.

A letter which contained the words, "You are a Scoundrel and defrauded the King of his Duty, I will prick you to the Heart, and call you to an Account," was held not to import a challenge, although an information might be granted for libel. Rex *v.* Pownell, W. Kel. 58, 25 Eng. Reprint 488.

31. See Charge of Thacher, J., in Com. *v.* Hooper, Thach. Cr. Cas. (Mass.) 400, 405.

32. See State *v.* Gibbons, 4 N. J. L. 40.

33. State *v.* Farrier, 8 N. C. 487; Case of Duels, 2 How. St. Tr. 1033 (see speech of Sir Francis Bacon, attorney-general); 4 Blackstone Comm. 150; 3 Coke Inst. 158; 1 Hawkins P. C. c. 63, § 3; 1 Russell Crimes 396.

34. State *v.* Perkins, 6 Blackf. (Ind.) 20; State *v.* Strickland, 2 Nott & M. (S. C.) 181. See also Com. *v.* Hart, 6 J. J. Marsh. (Ky.) 119; Charge of Thacher, J., in Com. *v.* Hooper, Thach. Cr. Cas. (Mass.) 400, 405.

35. 2 Comyns Dig. 270. See Case of Duels, 2 How. St. Tr. 1033, 1041.

36. See Brown *v.* Com., 2 Va. Cas. 516.

37. Ivey *v.* State, 12 Ala. 276; State *v.* Taylor, 3 Brev. (S. C.) 243. See also Case of Duels, 2 How. St. Tr. 1033, 1042.

"A challenge to fight a duel out of the State, is indictable for the same reason that a challenge to fight in the State is, because its tendency is to break the peace of the State." State *v.* Farrier, 8 N. C. 487, 492. *Compare* Com. *v.* Scott, Thach. Cr. Cas. (Mass.) 390.

38. See, generally, INDICTMENTS AND INFORMATIONS.

For forms of indictment see Ivey *v.* State, 12 Ala. 276, 277; State *v.* Farrier, 8 N. C. 487; Ala. Cr. Code, § 4923, form No. 27; White Pen. Code Tex. art. 716.

be made.[39] But the court will not grant a criminal information to a prosecutor who has himself sent a challenge in connection with the same affair, but will leave him to the ordinary remedy by indictment.[40]

2. Charging Offense — a. In General. The offense may be described in any or all of the ways in which it may have been committed.[41] It is sufficient, however, at common law to charge the offense generally.[42] Where a statute makes a challenge to fight an offense, it is not necessary to follow the words of the statute;[43] but it is absolutely necessary that the offense as defined by the statute should be charged.[44]

b. Particular Averments — (i) *Intent.* Intent on the part of defendant to send a challenge or to accept one, as the case may be, need not be specifically alleged where such intent appears on the face of the indictment;[45] otherwise a particular averment of the intent is necessary.[46]

(ii) *Citizenship.* Citizenship of defendant or of the other parties concerned in the duel need not be alleged.[47]

(iii) *Place of Intended Duel.* Where it is an offense by statute to give a challenge to fight a duel within or without the state, it is not necessary to aver where the duel is to be fought.[48]

C. Defenses. Provocation is no excuse for the offense.[49]

D. Evidence.[50] The note which is alleged to be a challenge is admissible in evidence, together with all testimony of the circumstances of the case, and the conduct and declarations of defendant relating thereto.[51] Likewise the oral

39. Rex *v.* Chappel, 1 Burr. 402; 1 Russell Crimes, c. 27.

40. As where upon affidavits it appeared that the party applying for an information had himself given the first challenge. Rex *v.* Hankey, 1 Burr. 316, where the court said that "it would have been right . . . to have granted cross-informations, in case each party had applied for an information against the other."

Where a prosecutor sent a challenge to a third person connected in the transaction with the party against whom he moved, the information was not granted, even though the prosecutor's challenge was sent into another country without any intention of breaking the peace in England. Rex *v.* Larrieu, 7 A. & E. 277, 34 E. C. L. 161.

41. For since the challenge may be given by word, or by a verbal message communicated by a friend of the challenger, or it may be in writing delivered by the party himself, or sent to a third person, or it may be given in any other manner by which it may be understood that one challenges or provokes another to a deadly contest; and as it may be uncertain what the manner of challenging was, it may be described in each of these ways in separate counts, so as to meet the evidence at the trial in any aspect in which it may appear. See Charge of Thacher, J., in Com. *v.* Hooper, Thach. Cr. Cas. (Mass.) 400, 405.

42. Hence an indictment for sending a challenge in the form of a letter to fight a duel need not set out the words of the letter or the substance thereof. State *v.* Farrier, 8 N. C. 487; Brown *v.* Com., 2 Va. Cas. 516.

43. *In re* Wood, 3 City Hall Rec. (N. Y.) 139.

44. State *v.* Gibbons, 4 N. J. L. 40. See also Ivey *v.* State, 12 Ala. 276, where it was held that the allegation that the prisoner "gave" the prosecutor a challenge to fight in single combat was equivalent to the averment that he "challenged" him to fight.

45. Heffren *v.* Com., 4 Metc. (Ky.) 5.

46. Com. *v.* Rowan, 3 Dana (Ky.) 395. See also Com. *v.* Pope, 3 Dana (Ky.) 418 [*followed* in Moody *v.* Com., 4 Metc. (Ky.) 1], where an indictment containing a particular averment of intent was sustained.

47. Moody *v.* Com., 4 Metc. (Ky.) 1, where the statute provided "whoever shall challenge another" shall be guilty of an offense. See also *supra*, II, A, 3.

48. Ivey *v.* State, 12 Ala. 276 (for the place where the duel is to be fought does not constitute a part of the definition of the offense); Com. *v.* Hooper, Thach. Cr. Cas. (Mass.) 400. See also *supra*, II, A, 3.

49. But it may influence the court in imposing the penalty. 1 Russell Crimes (6th ed.), c. 27 [*citing* Rex *v.* Rice, 3 East 581]. See *infra*, II, G.

50. As to what the state should prove on a trial for challenging another see 1 Archbold 835 (Pomeroy's notes). In Aulger *v.* People, 34 Ill. 486, it was said, *obiter dictum*, that it was necessary to prove that defendant "sent" the challenge, and to prove this the bearer of the challenge should have been called to show by what authority he bore it.

51. Com. *v.* Hart, 6 J. J. Marsh. (Ky.) 119 [*approved* in Com. *v.* Pope, 3 Dana (Ky.) 271].

Proof that a written challenge had been sent without producing the challenge is sufficient. The government is not presumed to have the original challenge in its possession. Com. *v.* Hooper, Thach. Cr. Cas. (Mass.) 400.

declarations[52] and the letters[53] of the seconds when acting as such are admissible. But a witness' statements as to what were the rules of the code duello in relation to sending and accepting challenges are inadmissible.[54]

E. Variance. A slight variance, resulting in no change of meaning, between the copy of the challenge set out in the indictment and the original challenge offered in evidence is not a material one.[55]

F. Question For Jury. Whether the alleged challenge under all the circumstances of the case was intended as or amounted to a challenge is always a question for the jury.[56]

G. Punishment. Challenging to fight was punished at common law by fine and imprisonment, and the offender was usually bound over to keep the peace.[57] But the punishment was within the discretion of the court; and in exercising its discretion the court was guided by such circumstances of aggravation or mitigation as were to be found in the case.[58]

III. CARRYING CHALLENGE.

A. Nature of Offense. One who knowingly[59] carries a challenge is guilty of a misdemeanor at common law.[60]

52. State *v.* Taylor, 3 Brev. (S. C.) 243 [*followed* in State *v.* Dupont, 2 McCord (S. C.) 334].

53. Moody *v.* Com., 4 Metc. (Ky.) 1.

Sufficient foundation for the admission of the copies of such letters was laid when it was shown that the originals when last seen were in the possession of an officer of the United States army, who was absent in the performance of his duties. Moody *v.* Com., 4 Metc. (Ky.) 1.

54. Moody *v.* Com., 4 Metc. (Ky.) 1, where the court said in this case that it had no judicial knowledge of any such code. Whether or not the code itself if properly proved would have been admissible the court did not decide; but if admissible the code itself should have been produced instead of the witness' testifying as to its contents.

55. Thus the misspelling of certain words in the indictment which constituted a variance from the words as spelled in the challenge, as "differences" for "difference," "immgined" for "imagined," "clumny" for "calumny" and "there" for "their," was held an immaterial variance. State *v.* Farrier, 8 N. C. 487.

56. Com. *v.* Hart, 6 J. J. Marsh. (Ky.) 119; Com. *v.* Hooper, Thach. Cr. Cas. (Mass.) 400; Norton's Case, 3 City Hall Rec. (N. Y.) 90. See Com. *v.* Pope, 3 Dana (Ky.) 418. Whether a challenge to fight in single combat with deadly weapons was intended, or whether it was the mere effusion of passion or folly, or the idle boast of a braggart, not intended at the time to lead to any result, or to be understood by the other party to be a challenge to fight a duel, are questions which the jury must determine. Ivey *v.* State, 12 Ala. 276; State *v.* Strickland, 2 Nott & M. (S. C.) 181. See also Com. *v.* Tibbs, 1 Dana (Ky.) 524.

57. Rex *v.* Rice, 3 East 581. The offenders were sometimes forced "to make Publick Acknowledgment of their Offence" and were "bound to their good Behaviour." Hawkins P. C. c. 63, § 21.

If the challenge arose on account of any money won at gaming, the offender, by 9 Anne, c. 14, forfeited all his goods to the Crown and suffered two years' imprisonment. 4 Blackstone Comm. 150.

58. Rex *v.* Rice, 3 East 581. See 1 Russell Crimes, c. 27.

Nolle prosequi.— When by statute complainant in assault and battery or other misdemeanors to injury and damage of party complaining can appear before the court and acknowlege satisfaction for an injury, and the court in such case may in its discretion order a *nolle prosequi*, a challenge is not a misdemeanor of kind in statute, and the court will not order a *nolle prosequi*. *In re* Wood, 3 City Hall Rec. (N. Y.) 139.

What not included in sentence.— The provisions of the act that prohibits an offender from holding an office of honor, profit, or trust, or in exercising any trade, profession, or calling, does not constitute a part of the sentence to be passed on one convicted; and whether constitutional or not can only be determined by a person so convicted attempting to hold any such office, etc. State *v.* Dupont, 2 McCord (S. C.) 334.

59. Knowledge is necessary. U. S. *v.* Shackelford, 27 Fed. Cas. No. 16,260, 3 Cranch C. C. 178.

60. For his action, like that of the challenger, tends to provoke others to a breach of the peace. Case of Duels, 2 How. St. Tr. 1033, particularly the speech of Sir Francis Bacon, attorney-general (p. 1041), where he refers to the case of one Acklam, who was censured by the star chamber for carrying a challenge. See also 4 Blackstone Comm. 150.

Under a statute providing that "any person resident in, or being a citizen of this State, shall send, give, or accept a challenge, or bear such a challenge as a second," shall be subject to a penalty; and where it is fur-

B. Indictment or Information.[61] Where a statute provides that "if any person resident in or being a citizen of this state, shall send, give or accept a challenge, or bear such a challenge as a second" he shall be guilty of a crime, it is unnecessary to allege in the indictment for carrying a challenge that the challenger was at the time of the alleged challenge "a resident in or a citizen of this state."[62]

C. Evidence. Evidence of a custom for a second to deliver a challenge,[63] or evidence tending to show that defendant had acted as a friend to the principal in a previous difficulty,[64] is inadmissible; but declarations of the principal which tend to establish the guilt of the second are admissible, although such declarations were made in the absence of the second.[65] And it must appear from the evidence that the court had jurisdiction of the offense charged.[66]

D. Questions For Jury. Whether a note which defendant is charged with carrying is a challenge to fight a duel[67] and whether he knew it to be a challenge[68] are questions for the jury.

E. Punishment. The punishment at common law was by fine or imprisonment.[69]

IV. PROVOKING A CHALLENGE.

To provoke another to commit the misdemeanor of challenging to a duel is itself a misdemeanor,[70] particularly where the provocation was given by a writing containing libelous matter.[71]

ther provided that "all and every other person or persons directly or indirectly concerned in fighting a duel, sending, giving, accepting, or carrying any challenge" shall likewise be subject to a penalty, the bearing of a challenge within the state is an offense, no matter by whom the challenge was sent. State *v.* Yancey, 2 Speers (S. C.) 246.

As to the form of the challenge the rule heretofore stated (see *supra*, II, A, 2) should apply. It is as much an offense to carry a verbal as a written one. See Case of Duels, 2 How. St. Tr. 1033, 1041.

61. See, generally, INDICTMENTS AND INFORMATIONS.

For forms of indictment see Ala. Cr. Code § 4923, form No. 27; White Pen. Code Tex. art. 716.

62. If the words "resident in or being a citizen of this State" are at all to be noticed in framing the indictment, it is only necessary to use them as applying to the person charged with the commission of the offense presented by the indictment. State *v.* Yancey, 2 Speers (S. C.) 246.

63. Com. *v.* Boott, Thach. Cr. Cas. (Mass.) 390.

64. Com. *v.* Boott, Thach. Cr. Cas. (Mass.) 390.

65. The jury must be satisfied that a challenge was sent. Any evidence therefore tending to establish the guilt of the principal is admissible. Com. *v.* Boott, Thach. Cr. Cas. (Mass.) 390.

66. Com. *v.* Boott, Thach. Cr. Cas. (Mass.) 390; Gordon *v.* State, 4 Mo. 375.

67. State *v.* Yancey, 2 Speers (S. C.) 246.

68. And the circumstances that the letter was not sealed and defendant declared that he thought that it was a legal notice are for the consideration of the jury in deciding whether defendant knew it was a challenge. U. S. *v.* Shackelford, 27 Fed. Cas. No. 16,260, 3 Cranch C. C. 178.

69. Case of Duels, 2 How. St. Tr. 1033; 4 Blackstone Comm. 150.

70. 1 Hawkins P. C. c. 63, § 3; Jacob L. Dict. See also Com. *v.* Tibbs, 1 Dana (Ky.) 524.

Venue.— If a man writes a letter with intent to provoke a challenge, seals it up and puts it into the post-office at Westminster, addressed to a person in the city of London, who receives it there, the writer may be indicted for this offense in the county of Middlesex. Rex *v.* Williams, 2 Campb. 506.

Averring intent.— An allegation in the prefatory part of the indictment that the provoking letter was sent with intent to do the receiver bodily harm and to break the king's peace is a sufficient averment of the intent of the act. Rex *v.* Philipps, 6 East 464.

What prosecutor should prove at the trial see 1 Archbold 835 (Pomeroy's Notes).

71. Rex *v.* Philipps, 6 East 464.

A letter "containing many despightfull scandalous words delivered *ironicè*, as saying you will not play the —— nor the Hypocrite, and in that sort taunting of him for an Almes House and certaine good workes that he had done, all which he charged him to doe for vaine glory" was held a misdemeanor upon a suit in the star chamber, because it was a provocation to challenge, and to make a breach of the peace. Hick's Case, Hob. 299.

Mere words of provocation, however, as "liar" and "knave" are not sufficient to constitute the offense, as not tending immediately to the breach of the peace. King's Case, 4 Coke Inst. 181. But if it can be shown that such words were intended to provoke a challenge, it would seem that a case

V. LEAVING STATE TO FIGHT.

The indictment for the statutory offense of leaving the state for the purpose of eluding the provisions of the act against dueling must state the venue.[72]

VI. SUPPRESSION OR PREVENTION OF DUELS.

At common law it is the duty of a sheriff, justice of the peace, constable, or other peace officer, when he sees a duel in progress, to endeavor to part and apprehend the persons engaged.[73] And, where a judge has reason to suspect that a duel is about to take place, he can call upon any person for his affidavit on which to ground a warrant against those concerned.[74]

DUELLUM. Trial by battle; judicial combat.[1]

DUE NOTICE. Public or personal notice, at the discretion of the judge.[2] (See, generally, NOTICE.)

DUE PROCESS OF LAW. See CONSTITUTIONAL LAW.

DUE PROOF. Legal proof.[3] (See, generally, EVIDENCE.)

DUE PROOF ON OATH OR AFFIRMATION. Proof by some competent witness.[4] (See, generally, EVIDENCE.)

DUE RIGHTS. Just rights — legal rights.[5]

DUES.[6] A word of general significance, and includes all contractual obligations.[7] (Dues: Of Member of — Association, see ASSOCIATIONS; Club, see CLUBS; Mutual Benefit Company, see MUTUAL BENEFIT INSURANCE. On Stock of — Building and Loan Association, see BUILDING AND LOAN SOCIETIES; Corporation, see CORPORATIONS. See also DUE; and, generally, PAYMENT.)

would be made out. 1 Archbold (Pomeroy's Notes) 835 [*citing* Rex *v.* Philipps, 6 East 464].

72. At least when there is no statutory provision as to laying the venue other than the requirement that all offenses should be prosecuted in the county where committed. State *v.* Warren, 14 Tex. 406, where it was seriously doubted whether, under the statute, any indictment charging this offense could be sustained, since there was no statutory provision as to the county where the prosecution must be commenced.

An indictment of two persons, under Mass. Gen. St. c. 160, § 17, which avers, substantially in the words of the statute, that, being inhabitants of this commonwealth, they on a certain day, by a previous appointment made within this commonwealth, did leave the commonwealth and on said day did engage in a fight with each other without its limits, sufficiently charges that both the leaving the commonwealth and the fighting were in pursuance of one and the same previous appointment made here. Com. *v.* Barrett, 108 Mass. 302.

73. 2 Comyns Dig. 270. See also ARREST; BREACH OF THE PEACE.

He may call to his assistance any who are present, and if they refuse, they may be fined or imprisoned. 2 Comyns Dig. 270.

Any private person could by the common law interfere to part the participants; and if he was struck or injured in so doing he had a remedy by action at law. 2 Comyns Dig. 270.

74. And if such a person refuses to make affidavit of his knowledge of the affair he can be committed for contempt. Com. *v.* Jones, 1 Va. Cas. 270.

1. Bouvier L. Dict. [*citing* Spelman Gloss.].

2. Me. Rev. St. (1893) p. 534, c. 63, § 38. "No fixed rule can be recognized as to what shall constitute 'due notice.' 'Due' is a relative term, and must be applied to each case in the exercise of the discretion of the court in view of the particular circumstances." Lawrence *v.* Bowman, 15 Fed. Cas. No. 8,134, 1 McAll. 419, 420.

3. Byrne *v.* Mulligan, 41 N. Y. Super. Ct. 515, 516. See also Stanley *v.* Horner, 24 N. J. L. 511, 513; Jarvis *v.* Northwestern Mut. Relief Assoc., 102 Wis. 546, 549, 78 N. W. 1089, 72 Am. St. Rep. 895.

4. Minick *v.* Tharp, 5 Pa. Dist. 44, 46.

5. Ryerson *v.* Boorman, 8 N. J. Eq. 701, 705.

6. "This term 'dues' is of extended import." Rider *v.* Fritchey, 49 Ohio St. 285, 294, 30 N. E. 692, 15 L. R. A. 513.

7. Whitman *v.* Oxford Nat. Bank, 176 U. S. 559, 562, 20 S. Ct. 477, 44 L. ed. 587 [*quoted* in Ward *v.* Joslin, 105 Fed. 224, 227, 44 C. C. A. 456] (where it is said: "Whether broad enough to include liabilities for torts, either before or after judgment, is not a question before us, and upon it we express no opinion"); Carver *v.* Braintree Mfg. Co., 5 Fed. Cas. No. 2,485, 2 Story 432, 449, 2 Robb. Pat. Cas. 141 [*quoted* in Ward *v.* Joslin, 105 Fed. 224, 227, 44 C. C. A. 456, where Judge Story remarks on "the words 'debts'

DUE SERVICE. Service made in proper time and in proper manner.[8] (See, generally, PROCESS.)

DUKE OF EXETER'S DAUGHTER. A rack in the Tower of London, so called after a minister of Henry VI, who sought to introduce it into England.[9]

DULY.[10] Properly; regularly;[11] fitly;[12] in a due, fit,[13] suitable, or becoming manner;[14] in due manner; when or as due; agreeable to obligation or propriety, exactly, fittingly;[15] in due time or proper manner; in accordance with what is right, required, or suitable; fittingly, becomingly, regular.[16] In legal parlance, according to law,[17] or some rule of law;[18] legally, on proper authority.[19] In a pleading it imports but a conclusion[20] relating only to the formalities observed or

and 'dues,' that 'dues' is broader than 'debts.' "].

8. Woolsey *v.* Abbett, 65 N. J. L. 253, 255, 48 Atl. 949.

9. Wharton L. Lex. See also James *v.* Com., 12 Serg. & R. (Pa.) 220, 226.

10. **"Duly allowed by the probate court"** see Sykora *v.* J. I. Case Threshing Mach. Co., 59 Minn. 130, 134, 60 N. W. 1008.

"Duly certified" see People *v.* Ransom, 2 Hill (N. Y.) 51, 54.

Duly contracted see Folson *v.* Chisago County, 28 Minn. 324, 325, 9 N. W. 881.

"Duly given or made" see Young *v.* Wright, 52 Cal. 403, 410; Midland R. Co. *v.* Eller, 7 Ind. App. 216, 33 N. E. 265, 266; Scanlan *v.* Murphy, 51 Minn. 536, 538, 53 N. W. 799; Harmon *v.* Comstock Horse, etc., Co., 9 Mont. 243, 249, 23 Pac. 470; Pierstoff *v.* Jorges, 86 Wis. 128, 135, 56 N. W. 735, 39 Am. St. Rep. 881.

"Duly organized" see Rubey *v.* Shain, 54 Mo. 207, 209 (railroad corporation); Fidelity Ins. Trust, etc., Co.'s Appeal, 99 Pa. St. 443, 449 (church and congregation).

"Duly verified" see Summerfield *v.* Phœnix Assur. Co., 65 Fed. 292, 296.

11. *Kansas.*— Morrison *v.* Wells, 48 Kan. 494, 496, 29 Pac. 601 [*quoted* in Citizens' State Bank *v.* Morse, 60 Kan. 526, 529, 57 Pac. 115].

New York.— Gibson *v.* People, 5 Hun 542, 543 [*citing* Burns *v.* People, 59 Barb. 531; People *v.* Walker, 23 Barb. 304; Fryatt *v.* Lindo, 3 Edw. 239].

Pennsylvania.— Beale *v.* Com., 25 Pa. St. 11, 21; Batt *v.* Pennsylvania Globe Gas Light Co., 18 Phila. 357.

South Carolina.— Blount *v.* Walker, 28 S. C. 545, 554, 6 S. E. 558 dissenting opinion, where it is said: "Such are its ordinary meanings."

Washington.— Webster Dict. [*quoted* in British Columbia Bank *v.* Port Townsend, 16 Wash. 450, 47 Pac. 896, 897].

United States.— Robertson *v.* Perkins, 129 U. S. 233, 235, 9 S. Ct. 279, 32 L. ed. 686.

"Duly convened" means regularly convened. People *v.* Walker, 23 Barb. (N. Y.) 304.

"Duly summoned," in respect to a grand jury, means properly summoned. Keith *v.* Territory, 8 Okla. 307, 311, 57 Pac. 834.

12. Beale *v.* Com., 25 Pa. St. 11, 21.

13. Blount *v.* Walker, 28 S. C. 545, 554, 6 S. E. 558 (dissenting opinion); Webster Dict. [*quoted* in British Columbia Bank *v.* Port Townsend, 16 Wash. 450, 454, 47 Pac. 896.

14. Beale *v.* Com., 25 Pa. St. 11, 21; Blount *v.* Walker, 28 S. C. 545, 554, 6 S. E. 558 (dissenting opinion); Standard Dict. [*quoted* in Citizens' State Bank *v.* Morse, 60 Kan. 526, 528, 57 Pac. 115]; Webster Dict. [*quoted* in British Columbia Bank *v.* Port Townsend, 16 Wash. 450, 454, 47 Pac. 896].

15. Century Dict. [*quoted* in Citizens' State Bank *v.* Morse, 60 Kan. 526, 528, 57 Pac. 115].

16. Standard Dict. [*quoted* in Citizens' State Bank *v.* Morse, 60 Kan. 526, 528, 57 Pac. 115].

17. Brownell *v.* Greenwich, 114 N. Y. 518, 527, 22 N. E. 24, 4 L. R. A. 685 [*citing* Gibson *v.* People, 5 Hun (N. Y.) 542, 543; Burns *v.* People, 59 Barb. (N. Y.) 531, 543; People *v.* Walker, 23 Barb. (N. Y.) 304; Fryatt *v.* Lindo, 3 Edw. (N. Y.) 239; Webb *v.* Bidwell, 15 Minn. 479, 484, and *quoted* in Citizens' State Bank *v.* Morse, 60 Kan. 526, 528, 57 Pac. 115; Baxter *v.* Lancaster, 58 N. Y. App. Div. 380, 382, 68 N. Y. Suppl. 1092; Youngs *v.* Perry, 42 N. Y. App. Div. 247, 59 N. Y. Suppl. 19; Batchelor *v.* Bacon, 37 N. Y. App. Div. 414, 416, 55 N. Y. Suppl. 1045, 29 N. Y. Civ. Proc. 111; People *v.* Bainbridge Town Clerk, 26 Misc. (N. Y.) 220, 223, 56 N. Y. Suppl. 54]; Robertson *v.* Perkins, 129 U. S. 233, 237, 9 S. Ct. 279, 32 L. ed. 686.

"Duly adjudged" is adjudged according to law, that is according to the statute governing the subject, and implies the existence of every fact essential to perfect regularity of procedure and to confer jurisdiction. Brownell *v.* Greenwich, 114 N. Y. 518, 527, 22 N. E. 24, 4 L. R. A. 685.

"Duly executed," used in a statute relative to the execution of writs, presumptively means duly executed by the laws of the state. Van Arsdale *v.* Van Arsdale, 26 N. J. L. 404, 423.

18. People *v.* Bainbridge Town Clerk, 26 Misc. (N. Y.) 220, 223, 56 N. Y. Suppl. 64.

19. Batt *v.* Pennsylvania Globe Gas Light Co., 18 Phila. (Pa.) 357. But see State *v.* Clancy, 56 Vt. 698, 700, where it is said that the term is not synonymous with, or equivalent to, "legally."

20. Bury *v.* Mitchell, (Tex. Civ. App. 1903) 74 S. W. 341.

"Duly and legally established," in pleading as to a highway, includes creation by dedication, and is not limited to establishment by due proceedings under statutes and ordinances. Hartford City *v.* New York, etc., R. Co., 59 Conn. 250, 252, 22 Atl. 37.

non-observed, and tenders no issue.[21] It does not relate to form merely, but includes form and substance.[22] (See DUE; and, generally, PLEADING.)

DULY ASSIGNED[23] AND TRANSFERRED. Transferred in writing.[24]

DULY AUTHORIZED. A term which implies that all things have been done which are requisite to confer legal authority.[25]

DULY COMMENCED. With respect to an action, the act of suing out a writ.[26] (See, generally, ACTIONS.)

DULY COMMISSIONED AND SWORN. Legally authorized.[27]

DULY DIRECTED. Directed in the ordinary way, in writing on the outside; externally addressed.[28]

DULY ENACTED FOR THAT PURPOSE. As applied to an ordinance, a term which means that the object of the ordinance must be expressed in the title.[29]

DULY FILED. Filed in accordance with law;[30] regularly and properly filed.[31] (See FILED; and, generally, RECORDS.)

DULY FOUND AND DECLARED A BANKRUPT. A phrase which implies a finding and declaration not only in mere form, but upon a proper foundation.[32]

DULY ISSUED. Issued in due form.[33]

DULY PROSECUTED.[34] Fully prosecuted from commencement to final termination; prosecuted in good faith, with all reasonable diligence and without unnecessary delay.[35]

DULY QUALIFIED. Used in relation to a referee, when he has been duly sworn.[36] (See, generally, REFERENCES.)

DULY RECORDED. Recorded in compliance with the requirement of law.[37] (See, generally, RECORDS.)

"Duly appointed," in pleading, is a term which embraces whatever was necessary to a legal appointment (Lethbridge *v.* New York, 59 N. Y. Super. Ct. 486, 15 N. Y. Suppl. 562), and it sufficiently alleges the appointment of a public officer without specifying by whom it was made (Com. *v.* Chase, 127 Mass. 7, 13).

"Duly completed," in pleading, is a sufficient allegation of the completion of public work in accordance with the specification of an ordinance. Auburn *v.* Eldridge, 77 Ind. 126, 128.

21. Going *v.* Dinwiddie, 86 Cal. 633, 638, 25 Pac. 129; Miles *v.* McDermott, 31 Cal. 270, 273.

22. Brownell *v.* Greenwich, 114 N. Y. 518, 22 N. E. 24, 4 L. R. A. 685; Batchelor *v.* Bacon, 37 N. Y. App. Div. 414, 55 N. Y. Suppl. 1045, 29 N. Y. Civ. Proc. 111; People *v.* Bainbridge Town Clerk, 26 Misc. (N. Y.) 220, 223, 56 N. Y. Suppl. 64.

23. **"Duly assigned"** see Colburn's Appeal, 74 Conn. 463, 466, 51 Atl. 139, 92 Am. St. Rep. 231 (life-insurance policy); Boston *v.* Mt. Washington, 139 Mass. 15, 16, 29 N. E. 60 (part of a military quota); Hoag *v.* Mendenhall, 19 Minn. 335 (promissory note); Allen *v.* Pancoast, 20 N. J. L. 68, 74.

24. Ragland *v.* Wood, 71 Ala. 145, 149, 46 Am. Rep. 305 [*citing* Enloe *v.* Reike, 56 Ala. 500; Andrews *v.* Carr, 26 Miss. 577; Bouvier L. Dict.].

25. Farmers', etc., Bank *v.* Empire Stone Dressing Co., 5 Bosw. (N. Y.) 275, 287.

26. Eaton *v.* Chapin, 7 R. I. 408, 410; Hall *v.* Spencer, 1 R. I. 17. See also Taft *v.* Daggett, 6 R. I. 266, 272.

27. Hall *v.* Gitting, 2 Harr. & J. (Md.) 380, 390.

28. Birch *v.* Edwards, 5 C. B. 45, 50, 12 Jur. 18, 17 L. J. C. P. 32, 2 Lutw. Reg. Cas. 37, 57 E. C. L. 45, referring to a notice sent by mail.

29. Detroit *v.* Detroit City R. Co., 60 Fed. 161, 166.

30. People *v.* Bainbridge Town Clerk, 26 Misc. (N. Y.) 220, 223, 56 N. Y. Suppl. 54.

31. Morrison *v.* Wells, 48 Kan. 494, 496, 29 Pac. 601 [*quoted* in Citizens' State Bank *v.* Morse, 60 Kan. 526, 529, 57 Pac. 115].

32. Doe *v.* Ingleby, 15 M. & W. 465, 469, as used in a lease.

33. McVickar *v.* Jones, 70 Fed. 754, 758.

In respect to an execution see Jones *v.* Davis, 22 Wis. 421, 423.

In respect to a warrant see Blake *v.* U. S., 71 Fed. 286, 289, 18 C. C. A. 117.

34. **"Duly prosecute"** is not synonymous with "prosecute to effect." Citizens' State Bank *v.* Morse, 60 Kan. 526, 529, 57 Pac. 115 [*distinguishing* Biddinger *v.* Pratt, 50 Ohio St. 719, 35 N. E. 795].

35. Tinsley *v.* Rice, 105 Ga. 285, 288, 31 S. E. 174, applied to an action. See also McAlester *v.* Suchy, 1 Indian Terr. 666, 669, 43 S. W. 952; Phillips *v.* Allegheny Valley R. Co., 107 Pa. St. 472, 481; Corrigan's Estate, 82 Pa. St. 495; Maus *v.* Hummel, 11 Pa. St. 228, 230; Penn *v.* Hamilton, 2 Watts (Pa.) 53.

36. Edwardson *v.* Garnhart, 56 Mo. 81, 86.

37. Dunning *v.* Coleman, 27 La. Ann. 47, 48. And see Marden *v.* Dorthy, 160 N. Y. 39, 58, 54 N. E. 726, 46 L. R. A. 694.

DULY RENDERED. Duly pronounced and ordered to be entered.[38] A term which may be used as equivalent to "recovered."[39]

DULY SERVED. Served in the manner directed by law in every particular.[40] (See, generally, PROCESS.)

DULY SHOWN. Under a statute specifying a cause for removal of a public officer, a term which implies an opportunity, before removal, for a hearing as to the sufficiency of the cause.[41]

DULY SWORN. A swearing according to law;[42] lawfully sworn, according to statute.[43] A term which imports the administration of an oath according to the formula prescribed by law for all similar cases.[44] (See, generally, OATHS AND AFFIRMATIONS.)

DUMB. Unable to speak; mute.[45] (Dumb Person: As Witness, see WITNESSES. Asylum For, see ASYLUMS. Capacity and Status of, see INSANE PERSONS.)

DUMB ANIMAL. A term which includes every living creature.[46] (See, generally, ANIMALS.)

DUM FUIT INFRA ÆTATEM. A writ whereby one who had made a feoffment of his land while an infant, when he came of full age might recover those lands and tenements which were so aliened.[47]

DUM FUIT IN PRISONA. A writ which lay for the recovery of lands which a man had alienated while in prison or under duress.[48]

DUM FUIT NON COMPOS MENTIS. A writ of entry which lay for a man who had aliened his lands while he was of unsound mind, to recover them from the alienee.[49] (See, generally, ENTRY, WRIT OF.)

DUMP CART. A two-wheeled cart.[50] (See DRAY.)

DUN. A color partaking of brown and black.[51]

DUNCE. In common intendment and speech one of dull capacity and apprehension, and not fit for a lawyer.[52]

DUNNAGE. Fagots, boughs, or loose materials of any kind, laid on the bottom of a ship to raise heavy goods above the bottom, to prevent injury by water in the hold; also, loose articles of merchandise wedged between parts of

In respect to a mortgage see Martens *v.* Rawdon, 78 Ind. 85, 86.

38. Young *v.* Wright, 52 Cal. 407, 410, applied to a judgment.

39. Hansford *v.* Van Auken, 79 Ind. 157, 161, used in a pleading.

40. Applied to service of a summons. White *v.* Johnson, 27 Oreg. 282, 288, 40 Pac. 511, 513, 50 Am. St. Rep. 726; Trullenger *v.* Todd, 5 Oreg. 36, 38. *Compare* Reg. *v.* Lightfoot, 6 E. & B. 822, 824, 2 Jur. N. S. 786, 25 L. J. M. C. 115, 4 Wkly. Rep. 655, 88 E. C. L. 822.

In the federal courts the words may mean personal service of process within the district within which it legally issued. Kirk *v.* U. S., 124 Fed. 324, 337.

41. Thompson *v.* Troup, 74 Conn. 121, 123, 49 Atl. 907.

42. Wilson *v.* Pugh, 32 Miss. 196, 198. See also Fryatt *v.* Lindo, 3 Edw. (N. Y.) 239, 240.

43. Burns *v.* People, 59 Barb. (N. Y.) 531, 543.

44. Garner *v.* State, 28 Fla. 113, 147, 9 So. 835, 29 Am. St. Rep. 232. See also Patterson *v.* Creighton, 42 Me. 367, 376; Bennett *v.* Treat, 41 Me. 226, 227.

A statement that a witness was sworn to testify the whole truth and nothing but the truth relating to said cause is equivalent to a statement that he was "duly sworn." Bowman *v.* Van Kuren, 29 Wis. 209, 214, 9 Am. Rep. 554. See also Sydnor *v.* Palmer, 29 Wis. 226, 239.

In respect to a jury, the term implies that the oath was administered with the requisite formality and solemnity; that the jurors in open court were required to hold up their hands and promise to perform the duties specified, there being an appropriate reference to the Deity; such as "'in the presence of the ever-living God'" or "'so help you God.'" Minich *v.* People, 8 Colo. 440, 451, 9 Pac. 4 [*citing* Kerr *v.* State, 36 Ohio St. 614; Bartlett *v.* State, 28 Ohio St. 669; Wareham *v.* State, 25 Ohio St. 601].

45. Bouvier L. Dict.

46. People *v.* Brunell, 48 How. Pr. (N. Y.) 435, 447; Indian Terr. Annot. St. (1899) § 1298; N. C. Code (1883), § 2490.

"Dumb animal" includes a dog which has an owner. McDaniel *v.* State, 5 Tex. App. 475, 479. See also 2 Cyc. 428 note 97.

47. Tomlins L. Dict. [*quoted* in Gilchrist *v.* Ramsay, 27 U. C. Q. B. 500, 503].

48. Brown L. Dict.

49. Burrill L. Dict. [*citing* 2 Blackstone Comm. 291; 3 Reeves Hist. Eng. L. 31].

50. Iverson *v.* Cirkel, 56 Minn. 299, 303, 57 N. W. 800, dissenting opinion.

51. Webster Dict. [*cited* in Cameron *v.* State, 44 Tex. 652, 656].

52. Peard *v.* Jones, Cro. Car. 382 [*cited* in Fitzgerald *v.* Redfield, 51 Barb. (N. Y.) 484, 492].

the cargo to prevent rubbing, and to hold them steady.[53] (See, generally, MARINE INSURANCE; SHIPPING.)

DUODENAS. A term which may be taken for a Latin word meaning a dozen.[54]

DUO NON POSSUNT IN SOLIDO UNAM REM POSSIDERE. A maxim meaning "Two persons cannot each have the entire right to one thing."[55]

DUORUM IN SOLIDUM DOMINUM VEL POSSESSIO ESSE NON POTEST. A maxim meaning "Ownership or possession in entirety cannot be in two persons of the same thing."[56]

DUO SUNT INSTRUMENTA AD OMNES RES AUT CONFIRMANDAS AUT IMPUGNANDAS — RATIO ET AUCTORITAS. A maxim meaning "There are two instruments either to confirm or impugn all things — reason and authority."[57]

DUPLEX PLACITUM NON ADMITTITUR. A maxim meaning "A double decree can not be regarded."[58]

DUPLICATE. A copy of the original;[59] the double of anything;[60] an original repeated, a document the same as another, a transcript equivalent to the first or original writing, a counterpart;[61] one of two originals of the same tenor;[62] a document which is essentially the same as some other instrument.[63] A term which means that one document resembles the other in all essentials.[64] It is not technically nor really a mere copy of the original;[65] but differs from a copy in that it has all the validity of an original.[66] (Duplicate: Of Bill — Of Exchange or Check, see COMMERCIAL PAPER; Of Lading, see CARRIERS. See also COPY.)

DUPLICATE TAXATION. See TAXATION.

DUPLICATIONEM POSSIBILITATIS LEX NON PATITUR. A maxim meaning "The law does not allow the doubling of a possibility."[67]

DUPLICITY. In pleading, duplex, twofold; double;[68] double pleading.[69] (Duplicity: In Appeal, see APPEAL AND ERROR. In Indictment, see INDICT-

53. Webster Dict. [*quoted* in Great Western Ins. Co. *v.* Thwing, 13 Wall. (U. S.) 672, 674, 20 L. ed. 607, where "ballast" and "dunnage" are compared and their uses explained].

54. Sanders *v.* Powell, Lev. 129.

55. Trayner Leg. Max.

56. Bouvier L. Dict. [*citing* Bracton 28*b*; 1 Mackeldey Civ. L. p. 245, § 236].

57. Wharton L. Lex.

58. Morgan Leg. Max.

59. Radford *v.* Dixon County, 29 Nebr. 113, 115, 45 N. W. 275. See 9 Cyc. 886 note 41.

60. McCuaig *v.* City Sav. Bank, 111 Mich. 356, 358, 69 N. W. 500 [*citing* Bouvier L. Dict.].

61. Gilby Bank *v.* Farnsworth, 7 N. D. 6, 72 N. W. 901, 38 L. R. A. 843; Anderson L. Dict. [*quoted* in State *v.* Allen, 56 S. C. 495, 505, 35 S. E. 204]; Burrill L. Dict. [*quoted* in State *v.* Graffam, 74 Wis. 643, 647, 43 N. W. 727]; Webster Dict. [*quoted* in Dakota L. & T. Co. *v.* Codington County, 9 S. D. 159, 163, 68 N. W. 314].

62. Grant *v.* Griffith, 39 N. Y. App. Div. 107, 109, 56 N. Y. Suppl. 791.

"Duplicate articles of association" is an original instrument, just as much so as the original article of which it is a duplicate. Nelson *v.* Blakey, 54 Ind. 29, 36.

63. State *v.* Graffam, 74 Wis. 643, 647, 43 N. W. 727; Toms *v.* Cuming, B. & Arn. 347, 9 Jur. 90, 14 L. J. C. P. 67, 1 Lutw. Reg. Cas. 200, 7 M. & G. 88, 93, 8 Scott N. R. 910, 49 E. C. L. 88; Burrill L. Dict. [*quoted* in Gilby Bank *v.* Farnsworth, 7 N. D. 6, 11, 72 N. W. 901, 38 L. R. A. 843]; Rapalje & L. L. Dict. [*quoted* in State *v.* Allen, 56 S. C. 495, 505, 35 S. E. 204]; Webster Dict. [*quoted* in Dakota L. & T. Co. *v.* Codington County, 9 S. D. 159, 163, 68 N. W. 314].

64. Toms *v.* Cuming, B. & Arn. 347, 9 Jur. 90, 14 L. J. C. P. 67, 1 Lutw. Reg. Cas. 200, 7 M. & G. 88, 93, 8 Scott N. R. 910, 49 E. C. L. 88 [*quoted* in State *v.* Graffam, 74 Wis. 643, 647, 43 N. W. 727].

65. Grant *v.* Griffith, 39 N. Y. App. Div. 107, 109, 56 N. Y. Suppl. 791; State *v.* Allen, 55 S. C. 495, 505, 35 S. E. 204; Missouri Pac. R. Co. *v.* Heidenheimer, 82 Tex. 195, 200, 17 S. W. 608 [*citing* Black L. Dict.; Burrill L. Dict.]; State *v.* Graffam, 74 Wis. 643, 647, 43 N. W. 727.

66. Missouri Pac. R. Co. *v.* Heidenheimer, 82 Tex. 195, 200, 17 S. W. 608 [*citing* Black L. Dict.; Burrill L. Dict.]; Burrill L. Dict. [*quoted* in Gilby Bank *v.* Farnsworth, 7 N. D. 6, 11, 72 N. W. 901, 38 L. R. A. 843]; Webster L. Dict. [*quoted* in Dakota L. & T. Co. *v.* Codington County, 9 S. D. 159, 163, 68 N. W. 314].

Distinguished from an examined copy.— "It is a very different thing from an examined copy; although an examined copy may, in effect, be a duplicate under certain circumstances." Toms *v.* Cuming, B. & Arn. 347, 9 Jur. 90, 14 L. J. C. P. 67, 1 Lutw. Reg. Cas. 200, 7 M. & G. 88, 94, 8 Scott N. R. 910, 49 E. C. L. 88.

67. Burrill L. Dict.

68. Bouvier L. Dict.

69. Sprouse *v.* Com., 81 Va. 374, 376.

MENTS AND INFORMATIONS. In Pleading, see EQUITY; PLEADING. Joinder of Causes of Action, see JOINDER AND SPLITTING OF ACTIONS.)

DURATION. Extent, limit, or time;[70] the power of enduring; continuance in time; the portion of time during which anything exists.[71]

DURESS. A condition which exists where one, by the unlawful act of another, is induced to make a contract or perform or forego some act under circumstances which deprive him of the exercise of free will;[72] a condition of mind produced by the improper external pressure or influence that practically destroys the free agency of a party, and causes him to do an act or make a contract not of his own volition;[73] personal restraint or fear of personal injury or imprisonment;[74] an unlawful restraint, intimidation, or compulsion of another to such an extent and degree as to induce such other person to do or perform some act which he is not legally bound to do, contrary to his will and inclination;[75] an actual or threatened violence, or restraint of a man's person, contrary to law, to compel him to enter into a contract, or to discharge one;[76] a constraint which overcomes the will of the person constrained, and which may be the result of imprisonment, or threats of immediate imprisonment;[77] a species of fraud in which compulsion in some form takes the place of deception in accomplishing the injury.[78] As defined by statute, unlawful confinement of the person of the party or of the husband or wife of such party, or of an ancestor, descendant or adopted child of such party, husband or wife;[79] (1) unlawful confinement of the person of the party, or of the husband or wife of such party, or of an ancestor, descendant, or adopted child of such party, husband or wife; (2) unlawful detention of the property of any such person; or (3) confinement of such person, lawful in form, but fraudulently obtained, or fraudulently made unjustly harassing or oppressive;[80] any

70. People *v.* Hill, 7 Cal. 97, 102.

"Duration of any office" "means the term which may be fixed by the constituting authority as the limit beyond which the incumbent's right by election or appointment to the office shall not extend." People *v.* Stratton, 28 Cal. 382, 388. See also People *v.* Sturges, 27 N. Y. App. Div. 387, 389, 50 N. Y. Suppl. 5. See, generally, OFFICERS.

71. Webster Dict. [*quoted* in Cheyney *v.* Smith, (Ariz. 1890) 23 Pac. 680, 685, dissenting opinion].

72. *Michigan.*— Hackley *v.* Headley, 45 Mich. 469, 574, 8 N. W. 511.

Mississippi.— Davis *v.* Mississippi Cent. R. Co., 46 Miss. 552, 567.

Nebraska.— Iowa Sav. Bank *v.* Frink, (1901) 92 N. W. 916, 919.

Pennsylvania.— Phillips *v.* Henry, 160 Pa. St. 24, 25, 28 Atl. 477, 40 Am. St. Rep. 706 [*affirming* 10 Montg. Co. Rep. (Pa.) 9, 10].

Wisconsin.— Wolff *v.* Bluhm, 95 Wis. 257, 259, 70 N. W. 73, 60 Am. St. Rep. 115 [*citing* Dayton City Nat. Bank *v.* Kusworm, 91 Wis. 166, 173, 64 N. W. 843].

United States.— Newburyport Water Co. *v.* Newburyport, 103 Fed. 584, 594.

"The modern doctrine of duress is established where actual or threatened violence or restraint contrary to law compels one to enter into or discharge a contract." Cribbs *v.* Sowle, 87 Mich. 340, 348, 49 N. W. 587, 24 Am. St. Rep. 166 [*citing* Bouvier L. Dict.]. See also 9 Cyc. 443 *et seq.*

73. Pride *v.* Baker, (Tenn. Ch. App. 1901) 64 S. W. 329, 332.

74. Hazelrigg *v.* Donaldson, 2 Metc. (Ky.) 445, 447.

Standing alone it means any intimidation, restraint, or imprisonment; any restraint on action or anything tending to restrain free and voluntary action. Schoellhamer *v.* Rometsch, 26 Oreg. 394, 403, 38 Pac. 344.

75. David City First Nat. Bank *v.* Sargeant, 65 Nebr. 594, 91 N. W. 595, 59 L. R. A. 296.

76. Bouvier L. Dict. [*cited* in Noble *v.* Enos, 19 Ind. 72, 78; McDonald *v.* Carlton, 1 N. M. 172, 177].

77. Francis *v.* Hurd, 113 Mich. 250, 256, 71 N. W. 582; Wolf *v.* Troxell, 94 Mich. 573, 576, 54 N. W. 383; Hackley *v.* Headley, 45 Mich. 569, 574, 8 N. W. 511; Galusha *v.* Sherman, 105 Wis. 263, 272, 81 N. W. 495, 47 L. R. A. 417.

In its more extended sense, the word means "that degree of severity, either threatened and impending, or actually inflicted, which is sufficient to overcome the mind and will of a person of ordinary firmness." Davis *v.* Mississippi Cent. R. Co., 46 Miss. 552, 568; Wallach *v.* Hoexter, 17 Abb. N. Cas. (N. Y.) 267, 269 [*quoting* Abbott L. Dict.]; 2 Greenleaf Ev. § 301 [*cited* in Lafayette, etc., R. Co. *v.* Pattison, 49 Ind. 312, 321; Fellows *v.* Fayette School Dist. No. 8, 39 Me. 559, 561; Tapley *v.* Tapley, 10 Minn. 448, 88 Am. Dec. 76; McDonald *v.* Carlton, 1 N. M. 172, 177; Edwards *v.* Bowden, 107 N. C. 58, 60, 12 S. E. 58; Landa *v.* Obert, 78 Tex. 33, 51, 14 S. W. 297].

78. Bancroft *v.* Bancroft, 110 Cal. 374, 383, 42 Pac. 896 [*quoting* Cooley Torts 506], dissenting opinion. See also Treadwell *v.* Torbert, 133 Ala. 504, 507, 32 So. 125.

79. N. D. Rev. Codes (1899), § 3845.

80. S. D. Comp. L. § 3504 [*quoted* in Bueter *v.* Bueter, 1 S. D. 94, 97, 45 S. W. 208, 8 L. R. A. 562].

illegal imprisonment or legal imprisonment used for an illegal purpose, or threats of bodily or other harm, or other means amounting to or tending to coerce the will of another, and actually inducing him to do an act contrary to his free will.[81] (Duress: As a Criminal Offense, see THREATS. As a Ground For Divorce, see DIVORCE. Extortion, see EXTORTION. In Procuring — Accord and Satisfaction, see ACCORD AND SATISFACTION; Acknowledgment, see ACKNOWLEDGMENTS; Assignment, see ASSIGNMENTS; ASSIGNMENTS FOR BENEFIT OF CREDITORS; Bill of Exchange, see COMMERCIAL PAPER; Bond, see BONDS; Chattel Mortgage, see CHATTEL MORTGAGES; Commercial Paper, see COMMERCIAL PAPER; Compromise, see COMPROMISE AND SETTLEMENT; Confession of Crime, see CRIMINAL LAW; Contract in General, see CONTRACTS; Deed, see DEEDS; Marriage, see BREACH OF PROMISE TO MARRY; DIVORCE; MARRIAGE; Mortgage, see CHATTEL MORTGAGES; MORTGAGES; Payment, see PAYMENT; Promissory Note, see COMMERCIAL PAPER; Will, see WILLS. Of Husband, see HUSBAND AND WIFE. Of Imprisonment, see CONTRACTS. Of Principal, see PRINCIPAL AND SURETY. Per Minas, see CONTRACTS. Threat, see THREATS. See also COERCION; CONSTRAINT.)

DURESS BY GOVERNMENT. Moral duress not justified by law.[82] (See, generally, CUSTOMS DUTIES.)

DURESS OF GOODS. An act which consists in seizing by force, or withholding from the party entitled to it, the possession of personal property, and extorting something as the condition for its release, or in demanding and taking personal property under color of legal authority, which, in fact, is either void, or for some other reason does not justify the demand.[83] (See DURESS.)

DURESS OF IMPRISONMEMT. See CONTRACTS.

DURESS PER MINAS. See CONTRACTS.

DURING.[84] In the time of; in the course of; throughout the continuance of.[85] (See DURATION; and, generally, TIME.)

DURITIA. In old English law, DURESS,[86] *q. v.*

DURUM EST PER DIVINATIONEM A VERBIS RECEDERE. A maxim meaning "It is hard by conjecture to depart from the meaning of words."[87]

DUTCH AUCTION. See AUCTIONS AND AUCTIONEERS.

DUTCH BEER. A malt inebriating liquor.[88] (See BEER; and, generally, INTOXICATING LIQUORS.)

81. Ga. Code, § 2637 [*quoted* in McCoy *v.* State, 78 Ga. 490, 496, 3 S. E. 768]; Plant *v.* Gunn, 19 Fed. Cas. No. 11,205, 2 Woods 372.

82. Applied to the collection of customs duties. Newburyport Water Co. *v.* Newburyport, 103 Fed. 584, 594 [*citing* Maxwell *v.* Griswold, 10 How. (U. S.) 242, 256, 13 L. ed. 405]. See also Block *v.* U. S., 8 Ct. Cl. 461, 464.

83. Adams *v.* Schiffer, 11 Colo. 15, 31, 17 Pac. 21, 7 Am. St. Rep. 202 [*quoting* Cooley Torts 507]. See also 9 Cyc. 447.

Duress of goods may exist when one is compelled to submit to an illegal exaction in order to obtain them from one who has them, but refuses to surrender them unless the exaction is endured. Hackley *v.* Headley, 45 Mich. 569, 8 N. W. 511 [*quoted* in Fuller *v.* Roberts, 35 Fla. 110, 116, 17 So. 359]. See also Cobb *v.* Charter, 32 Conn. 358, 87 Am. Dec. 178.

84. "The word . . . is nothing more than the Latin durante." Archer *v.* Kelly, 1 Dr. & Sm. 300, 307, 6 Jur. N. S. 814, 29 L. J. Ch. 911, 8 Wkly. Rep. 684.

85. Century Dict. [*quoted* in Bird *v.* Beckwith, 45 N. Y. App. Div. 124, 127, 60 N. Y. Suppl. 1041].

"During the continuance of the lease" see Rutland *v.* Doe, 10 Cl. & F. 419, 444, 12 M. & W. 355, 8 Eng. Reprint 419.

"During coverture" as used in a marriage settlement "means after the commencement and before the termination of the coverture." Archer *v.* Kelly, 1 Dr. & Sm. 300, 307, 6 Jur. N. S. 814, 29 L. J. Ch. 911, 8 Wkly. Rep. 684.

"During which years he was an inhabitant and resident" in C used in respect to a pauper see Reg. *v.* Anderson, 9 Q. B. 663, 668, 58 E. C. L. 663.

"During such trial" as used in a statute see Maurer *v.* People, 43 N. Y. 1, 3.

"During their natural lives" as used in a will see Merill *v.* Bickford, 65 Me. 118, 119; Dow *v.* Doyle, 103 Mass. 489, 491.

"During the said voyage" as used in a marine insurance policy see Crow *v.* Falk, 8 Q. B. 467, 472, 10 Jur. 374, 15 L. J. Q. B. 183, 55 E. C. L. 467.

"During working hours" used in respect to the operation of a mill see Binney *v.* Phœnix Cotton Mfg. Co., 128 Mass. 496, 499.

86. Burrill L. Dict. See also Knight's Case, 3 Leon. 239.

87. Morgan Leg. Max.

88. People *v.* Wheelock, 3 Park. Cr. (N. Y.)

DUTCH NET. A net used for catching fish.[89] (See, generally, FISH AND GAME.)

DUTIABLE VALUE. The value of the property after the debts or other allowances or exemptions authorized by the act are deducted.[90]

DUTIES OF DETRACTION. A tax levied upon the removal from one state to another of property acquired by succession or testamentary disposition.[91]

DUTY. The power to command and to coerce obedience;[92] a right due from a person;[93] a thing due and recoverable by law;[94] a service, business or office;[95] a term sometimes used in the same sense as "obligation";[96] that which one is bound or under obligation to do;[97] a legal obligation to perform some work;[98] and sometimes used also in the sense of debt.[99] The word is also used to desig-

9, 15, where the terms "strong beer" and "dutch beer" are compared and explained.

89. Rea *v.* Hampton, 101 N. C. 51, 52, 7 N. E. 649, 9 Am. St. Rep. 21.

90. Atty.-Gen. *v.* Brown, 5 Ont. L. Rep. 167, 170, as defined by statute in relation to estates of deceased persons.

91. Matter of Strobel, 5 N. Y. App. Div. 621, 39 N. Y. Suppl. 169, 170 [*citing* Wheaton Int. L. 166; Frederickson *v.* Louisiana, 23 How. (U. S.) 445, 16 L. ed. 577].

92. Kentucky *v.* Dennison, 24 How. (U. S.) 66, 107, 16 L. ed. 717.

Includes both power and right.— Com. *v.* Anthes, 5 Gray (Mass.) 185, 252; Chadwick *v.* Earhart, 11 Oreg. 389, 391, 4 Pac. 1180 [*citing* U. S. *v.* Bassett, 24 Fed. Cas. No. 14,539, 2 Story 389]. "What it is a man's duty to do, he has the rightful power to do." Com. *v.* Anthes, 5 Gray (Mass.) 185, 252.

93. Burrill L. Dict. [*citing* 1 Blackstone Comm. 123].

94. Tomlins L. Dict. [*quoted* in Pacific Ins. Co. *v.* Soule, 7 Wall. (U. S.) 433, 445, 19 L. ed. 95].

95. Missouri Pac. R. Co. *v.* Mackey, 33 Kan. 298, 315, 6 Pac. 291 [*quoting* Worcester Dict., and *citing* Imperial Dict.], where it is said: "When we speak of duty as applied to a servant or employé, the matter involves his service or business."

96. Sharon *v.* Sharon, 75 Cal. 1, 10, 16 Pac. 345.

Compared with obligation.— "In reference to the payment of taxes the terms duty and obligation are used in two senses, the first being in reference to the sovereign imposing the tax, the second being in reference to individuals. The matter of duty to the sovereign is fixed by the legislative enactment imposing the tax. The matter of obligation to individuals arises from the legal or equitable relation of the parties. In neither case is the measure of the obligation fixed by the mere fact of an interest or estate in the land." Shrigley *v.* Black, 66 Kan. 213, 221, 71 Pac. 301 [*citing* Spratt *v.* Price, 18 Fla. 289], dissenting opinion.

97. Crockett *v.* Barre, 66 Vt. 269, 272, 29 Atl. 147 [*citing* Soule Syn. (ed. 1880) 129, 337], where it is said: "One's responsibility is its liability, obligation, bounden duty."

Certain duty.— "A duty is certain, when, by law, it must be absolutely performed, and the occasion, mode and term of its exercise are fixed so that nothing remains subject to the discretion of the officer." Morton *v.* Comptroller Gen., 4 S. C. 430, 473.

"A duty imposed by law is specific when a case or state of circumstances exists proper for its discharge. A specific duty may arise in two ways. It may be imposed directly, as when a public officer is directed by statute to execute a particular conveyance to a person by name, or it may arise out of a general duty imposed by law, as where a case or state of circumstances has arisen such as was in the contemplation of the law imposing such general duty as the object and occasion of its exercise. In either case the duty becomes specific the moment a proper occasion arises for its exercise." Morton *v.* Comptroller Gen., 4 S. C. 430, 473. "Duty by law imposed," in a statute respecting the duty of persons *in loco parentis* toward minors, means to furnish necessary food, clothing or medical attendance required for the preservation of the health and life of the child. People *v.* Pierson, 176 N. Y. 201, 206, 68 N. E. 243, 63 L. R. A. 187.

"A duty is ministerial when an individual has such a legal interest in its performance that neglect of performance becomes a wrong to such individual." Morton *v.* Comptroller Gen., 4 S. C. 430, 474.

Duty, line of, as applied to a fireman see Conn. Gen. St. (1902) § 139.

Duty of constable, to faithfully discharge his duty means his whole duty, which includes his duty respecting all legal processes. Quimby *v.* Adams, 11 Me. 332, 334.

"Duty of county clerk" as defined by statute see Mont. Civ. Code (1895), § 4671.

"Duty" used in connection with "will" and "may" in an instruction to a jury see North Chicago St. R. Co. *v.* Zeiger, 182 Ill. 9, 13, 54 N. E. 1006, 74 Am. St. Rep. 157.

Relative to communications which are privileged because of a "duty" to make them is not confined to legal duties which may be enforced by indictment, action, or mandamus, but includes moral and social duties of imperfect obligation. Harrison *v.* Bush, 5 E. & B. 344, 349, 1 Jur. N. S. 846, 25 L. J. Q. B. 25, 3 Wkly. Rep. 474, 85 E. C. L. 344.

"The neighbor to whom duty is due" see 21 Cent. L. J. 382.

98. Allen *v.* Dickson, Minor (Ala.) 119, 120.

Distinguished from "legal obligation" see Black L. Dict.

99. Fox *v.* Hills, 1 Conn. 295, 303 [*cited* in Fowler *v.* Frisbie, 3 Conn. 320, 324]; Black L. Dict. As when applied to a pecuniary obligation. Fox *v.* Hills, 1 Conn. 295, 304, where it is said: "It has not the sig-

nate a tax or impost due to the government upon the importation or exportation of goods;[1] an indirect tax imposed on the importation, exportation or consumption of goods; having a broader meaning than custom, which is a duty imposed on imports or exports.[2] (See, generally, CUSTOMS DUTIES; INTERNAL REVENUE; TAXATION.)

DUTY ON TONNAGE. A charge upon a vessel, according to its tonnage, as an instrument of commerce, for entering or leaving a port, or navigating the public waters of the country;[3] a tax graduated according to the capacity of the ship or vessel;[4] tonnage.[5]

DWELL.[6] To inhabit; to reside;[7] to remain; to be domiciled;[8] to live in a place; to have a habitation;[9] to have a fixed place of residence, &c.;[10] to abide as a permanent resident, or to inhabit for a time, to live in a place;[11] to have a habitation for some time or permanence.[12] (See DWELLING-HOUSE; and, generally, DOMICILE.)

DWELLING AND LANDS. One's home — the place where he lives — where he is settled.[13]

DWELLING-HOUSE.[14] Defined as the house or the building in which a person

nification of trespass, tort or damage. In the statute, it is not contra-distinguished from debt, but merely presents the same idea by another term of equivalent meaning, that it may be the more intelligible. The word 'duty' obviously must be construed with some limitation; otherwise it will include the natural, moral and social obligations, for which no one will contend. So usual is it to understand it as commensurate with debt, that the pecuniary demands of government for the most part receive that appellation."

1. Black L. Dict. See also U. S. *v.* Fifty-Nine Demijohns Aguadiente, etc., 39 Fed. 401, 402, distinguishing "duty" from "tax" which is applied to imposts from internal revenue.

In its most enlarged sense, "duty" is nearly equivalent to "tax," embracing an imposition or charge levied on persons or things. Union Bank *v.* Hill, 3 Coldw. (Tenn.) 325, 328 [*citing* Story Const. § 949]; Bouvier L. Dict. [*quoted* in Alexander *v.* Wilmington, etc., R. Co., 3 Strobh. (S. C.) 594, 595]. And includes all manner of taxes, charges, or governmental impositions. Black L. Dict. See also Hylton *v.* U. S., 3 Dall. (U. S.) 171, 175, 1 L. ed. 556.

In its more restrained sense, "duties" is often used as equivalent to customs or imposts. Union Bank *v.* Hill, 3 Coldw. (Tenn.) 325, 328 [*citing* Story Const. § 949]; Pacific Ins. Co. *v.* Soule, 7 Wall. (U. S.) 433, 445. See also Ashner *v.* Abenheim, 19 Misc. (N. Y.) 282, 287, 43 N. Y. Suppl. 69.

2. Cooley Taxation 3 [*quoted* in Pollock *v.* Farmers' L. & T. Co., 158 U. S. 601, 622, 15 S. Ct. 912, 39 L. ed. 1108].

It is not merely a duty on the act on importation, but is a duty on the thing imported. It is not, taken in its literal sense, confined to a duty levied while the article is entering the country, but extends to a duty levied after it has entered the country. Brown *v.* Maryland, 12 Wheat. (U. S.) 419, 436, 6 L. ed. 678.

"By the terms tax, impost, and duty, mentioned in the ordinance [of 1787 that the navigable waters leading into the Mississippi and the St. Lawrence shall be common highways, forever free, without tax, impost, or duty therefor] is meant a charge for the use of the government, not compensation for improvements." Huse *v.* Glover, 119 U. S. 543, 549, 7 S. Ct. 313, 30 L. ed. 487 [*quoted* in Sands *v.* Manistee River Imp. Co., 123 U. S. 288, 297, 8 S. Ct. 113, 31 L. ed. 149].

3. Huse *v.* Glover, 119 U. S. 543, 549, 7 S. Ct. 313, 30 L. ed. 487.

4. Hackley *v.* Geraghty, 34 N. J. L. 332, 336 [*citing* Bouvier L. Dict.; Jacob L. Dict.].

5. Alexander *v.* Wilmington, etc., R. Co., 3 Strobh. (S. C.) 594, 595.

6. **"Dwells"** see Macdougall *v.* Paterson, 11 C. B. 755, 769, 15 Jur. 1108, 21 L. J. C. P. 27, 2 L. M. & P. 681, 73 E. C. L. 755, 7 Eng. L. & Eq. 510; Taylor *v.* Crowland Gas, etc., Co., 11 Exch. 1, 12, 1 Jur. N. S. 358, 24 L. J. Exch. 233.

"Dwells actually" in respect to a pauper see Hay River *v.* Sherman, 60 Wis. 54, 59, 18 N. W. 740.

7. Gardener *v.* Wagner, 9 Fed. Cas. No. 5,218, Baldw. 454; Worcester Dict. [*quoted* in Eatontown *v.* Shrewsbury, 49 N. J. L. 188, 190, 6 Atl. 319].

8. Webster Dict. [*quoted* in Turney *v.* State, 60 Ark. 259, 260, 29 S. W. 893].

9. Gardener *v.* Wagner, 9 Fed. Cas. No. 5,218, Baldw. 454.

10. Worcester Dict. [*quoted* in Eatontown *v.* Shrewsbury, 49 N. J. L. 188, 190, 6 Atl. 319].

11. *Ex p.* Blumer, 27 Tex. 734, 737; Webster Dict. [*quoted* in Turney *v.* State, 60 Ark. 259, 260, 29 S. W. 893; Hinds *v.* Hinds, 1 Iowa 36, 41].

12. *Ex p.* Blumer, 27 Tex. 734, 737; Webster Dict. [*quoted* in Turney *v.* State, 60 Ark. 259, 260, 29 S. W. 893].

"'Dwell' . . . is not to be restricted in meaning to actual presence. Such is not the meaning attributed to it in common parlance or by the lexicographers." Eatontown *v.* Shrewsbury, 49 N. J. L. 188, 190, 6 Atl. 319.

13. Warlick *v.* Lowman, 103 N. C. 122, 125, 9 S. E. 458, so used in a petition asking for a right of way.

14. **"There is a diversity of decision** as to what does, and what does not, in law consti-

lives[15] or which is inhabited by man;[16] an inhabited house;[17] the house in which one dwells;[18] the house in which one resides — the house of his present abode;[19] a place of habitation;[20] a place of residence;[21] habitation; place or house in which a person lives; abode;[22] a place of abode; a habitation; a house occupied or intended to be occupied as a residence;[23] some permanent abode or residence with intention to remain;[24] a residence;[25] a domicile;[26] a mansion;[27] a mansion-house;[28] the apartment building, or cluster of buildings, in which a man with his family resides;[29] a building or office for the habitation of man; a dwelling place,

tute a part of the dwelling-house. Some cases include all within the curtilage; and this, according to Blackstone, appears to have been the common law rule; while others are made to turn upon the use." Mitchell *v.* Com., 88 Ky. 349, 353, 11 S. W. 203, 10 Ky. L. Rep. 910. See also State *v.* McCall, 4 Ala. 643, 644, 39 Am. Dec. 314 [*citing* East P. C. 492, 493, 501, 508; 1 Hale P. C. 358 559; Hawkins P. C. 38, § 12]; State *v.* South, 136 Mo. 673, 676, 38 S. W. 716 [*citing* 1 Hale P. C. 558]; State *v.* Whit, 49 N. C. 349, 352 [*citing* Roscoe Cr. Ev. 348, 362].

"The law does not contemplate by the word 'dwelling house' any particular kind of house. It may be a 'brown-stone front,' all of which is occupied for residence purposes, or it may be a building part of which is used for banking or business purposes, or it may be a tent of cloth." Corey *v.* Schuster, 44 Nebr. 269, 275, 62 N. W. 470.

"[The term] is to be understood in its ordinary and popular sense." Lisbon *v.* Lyman, 49 N. H. 553, 562. And if it "have a technical meaning, it has also a common meaning." Wells *v.* Somerset, etc., R. Co., 47 Me. 345, 347.

The term has been held to include a log cabin belonging to the owner of a tobacco factory, in which the superintendent of the factory usually slept. State *v.* Jake, 60 N. C. 471, 473 [*quoted* in State *v.* Weber, 156 Mo. 257, 260, 56 S. W. 893].

Distinguished from "hotel" see People *v.* D'Oench, 111 N. Y. 359, 361, 18 N. E. 862. But see State *v.* Troth, 36 N. J. L. 422, 424.

Distinguished from "house" see State *v.* Garity, 46 N. H. 61, 62. See also Com. *v.* Barney, 10 Cush. (Mass.) 478, 479 [*citing* 1 Hale P. C. 567].

Distinguished from "pauper" settlement see Lisbon *v.* Lyman, 49 N. H. 553, 562 [*citing* Phillips *v.* Kingfield, 19 Me. 375, 36 Am. Dec. 760].

Distinguished from "settlement" see Jefferson *v.* Washington, 19 Me. 293, 300.

"Dwelling-house" under the Homestead Act see *In re* Lammer, 14 Fed. Cas. No. 8,031, 7 Biss. 269, 14 Nat. Bankr. Reg. 460.

That cottages are equivalent to "dwelling-houses" see 11 Cyc. 294 note 22.

15. Lincoln *v.* Smith, 27 Vt. 328, 348; Webster Dict. [*quoted* in Wells *v.* Somerset, etc., R. Co., 47 Me. 345, 347; Phelps *v.* Rooney, 9 Wis. 70, 91, 76 Am. Dec. 244, dissenting opinion].

16. Bouvier L. Dict. [*quoted* in Wells *v.* Somerset, etc., R. Co., 47 Me. 345, 347; Massillon Engine, etc., Co. *v.* Hubbard, 11 S. D. 325, 327, 77 N. W. 588].

"Whether a building is or is not a dwelling-house depends upon the use to which it is put. A barn may be converted into a dwelling-house, or a dwelling-house into a barn, by a change of uses; so an infirmary may or may not be a dwelling-house, depending in no wise upon the question of its ownership or the purposes of its original construction, but upon outside facts and circumstances." Davis *v.* State, 38 Ohio St. 505, 506 [*citing* Barnett *v.* State, 38 Ohio St. 7]. See also Pitcher *v.* People, 16 Mich. 142, 148 [*citing* People *v.* Taylor, 2 Mich. 250; 1 Bishop Cr. L. § 171]; 4 Blackstone Comm. 255; State *v.* Jones, 106 Mo. 302, 310, 17 S. W. 366; State *v.* Meadows, 22 W. Va. 766, 768 [*quoting* Pitcher *v.* People, 16 Mich. 142].

17. State *v.* Clark, 52 N. C. 167.

18. Humes *v.* Taber, 1 R. I. 464, 471, defined in connection with a search warrant.

19. Bruce *v.* Cloutman, 45 N. H. 37, 39, 84 Am. Dec. 111 [*citing* Crabb Synonyms 263; Webster Dict.].

20. State *v.* Troth, 34 N. J. L. 377, 385.

21. Bell *v.* State, 20 Wis. 599, 601.

22. Webster Dict. [*quoted* in Massillon Engine, etc., Co. *v.* Hubbard, 11 S. D. 325, 327, 77 N. W. 588].

23. Agricultural Ins. Co. *v.* Hamilton, 82 Md. 88, 92, 33 Atl. 429, 51 Am. St. Rep. 457, 30 L. R. A. 633.

24. Warren *v.* Thomaston, 43 Me. 406, 418, 69 Am. Dec. 69 [*citing* Jefferson *v.* Washington, 19 Me. 293; Turner *v.* Buckfield, 3 Me. 229].

"A person has his dwelling where he resides permanently, or from which he has no present intention to remove." Anderson L. Dict. [*quoted* in Massillon Engine, etc., Co. *v.* Hubbard, 11 S. D. 325, 327, 77 N. W. 588].

25. North Yarmouth *v.* West Gardiner, 58 Me. 207, 210, 4 Am. Rep. 279; Warren *v.* Thomaston, 43 Me. 406, 418, 69 Am. Dec. 69 [*citing* Drew *v.* Drew, 37 Me. 389]. But see Phelps *v.* Rooney, 9 Wis. 70, 91, 76 Am. Dec. 244, dissenting opinion per Dixon, C. J.

26. McFarlane *v.* Cornelius, 43 Oreg. 513, 522, 73 Pac. 325, 74 Pac. 468; Webster Dict. [*quoted* in Massillon Engine, etc., Co. *v.* Hubbard, 11 S. D. 325, 327, 77 N. W. 588].

27. Thompson *v.* People, 3 Park. Cr. (N. Y.) 208, 214.

"A dwelling may be humble and inexpensive, yet as much a domicile as a mansion." Matter of Lyman, 24 Misc. (N. Y.) 552, 553, 53 N. Y. Suppl. 577.

28. State *v.* Clark, 89 Mo. 423, 430, 1 S. W. 332 [*quoting* Bishop St. Cr. (2d ed.) § 242].

29. Fuller *v.* State, 48 Ala. 273, 275 [*citing* 1 Bishop Cr. L. § 295]; State *v.* Huffman, 136

mansion, or abode, for any of the human species; that is, a building or office, or place designed or constructed for the habitation of man, as distinguished from those other buildings, edifices, etc., constructed by man for other purposes;[30] a house usually occupied by the person there residing and his family;[31] a house in which the occupier and his family usually reside,[32] and in a certain sense, any house in which people dwell;[33] a house designed to be occupied as a place of abode by night as well as by day, and which is constructed with especial reference to that object;[34] a structure for business uses, whereof any internally connected room is occupied for sleeping and abode.[35] The term is sometimes defined as the house where a person sleeps at night;[36] and sometimes it means "usual place of abode."[37] As defined by statute, every house, prison, jail or other edifice, which shall have been usually occupied by persons lodging therein;[38] any house within which some person habitually sleeps or eats his meals;[39] every house or edifice, any part of which has usually been occupied by any person lodging therein at night, and any structure joined to and immediately connected with such a house or edifice;[40] every building or structure, which shall have been usually occupied by persons lodging therein at night;[41] a building any part of which is usually occupied by a person lodging therein at night;[42] any house, out-house apartment, building, erection, shed or box, in which there sleeps, &c.[43] (Dwelling-House: In General, see DOMICILE; HOMESTEAD. Breaking and Entering, see BURGLARY. Burning, see ARSON. See also CURTILAGE.)

DWELLING-HOUSE OF ANOTHER. A dwelling in the possession of another.[44]

DWELLING-PLACE. Residence, usual place of abode.[45] (See DOMICILE.)

DWELLS AND HAS HIS HOME. A residence with an intention to remain, or at least without an intention of removal.[46]

DYEING. The art of coloring in a permanent manner porous or absorbent substances by impregnating them with coloring bodies.[47]

Mo. 58, 65, 37 S. W. 797 [*quoting* Bishop St. Cr. 278, 279]; State *v.* Clark, 89 Mo. 423, 430, 1 S. W. 332 [*quoting* Bishop St. Cr. (2d ed.) 278]; State *v.* Sampson, 12 S. C. 567, 569, 32 Am. Rep. 513 [*quoting* 2 Bishop Cr. L. 104]; Bouvier L. Dict. [*quoted* in Massillon Engine, etc., Co. *v.* Hubbard, 11 S. D. 325, 327, 77 N. W. 588].

30. Webster Dict. [*quoted* in Phelps *v.* Rooney, 9 Wis. 70, 91, 76 Am. Dec. 244, dissenting opinion].

31. Bouvier L. Dict. [*quoted* in Massillon Engine, etc., Co. *v.* Hubbard, 11 S. D. 325, 327, 77 N. W. 588].

32. State *v.* Meerchouse, 34 Mo. 344, 345, 86 Am. Dec. 109.

33. Glover *v.* National F. Ins. Co., 85 Fed. 125, 130, 30 C. C. A. 95.

34. New York Fire Dept. *v.* Buhler, 1 Daly (N. Y.) 391, 394.

35. State *v.* Clark, 89 Mo. 423, 430, 1 S. W. 332 [*quoting* Bishop St. Cr. (2d ed.) § 242].

36. U. S. *v.* Johnson, 26 Fed. Cas. No. 15,485, 2 Cranch C. C. 21.

37. McFarlane *v.* Cornelius, 43 Oreg. 513, 522, 73 Pac. 325, 74 Pac. 468. See also Lewis *v.* Botkin, 4 W. Va. 533, 536.

38. Mo. Rev. St. (1889) § 3512 [*quoted* in State *v.* Whitmore, 147 Mo. 78, 81, 47 S. W. 1068].

39. "Though it may be used for other purposes, as a store-house, office, mill-house, or the like. A tent or open shed does not come within the meaning of a dwelling-house." Tex. Code, art. 2311 [*quoted* in Callahan *v.* State, 41 Tex. 43, 45].

Within a statute conferring the electoral franchise "dwelling-house" it is declared by the interpretation clause "shall include any part of a house used as a separate dwelling, and separately rated to the relief of the poor." Thompson *v.* Ward, L. R. 6 C. P. 327, 353, 1 Hopw. & C. 530, 537, 40 L. J. C. P. 169, 24 L. T. Rep. N. S. 679.

40. N. D. Rev. Codes (1899), § 7412.

41. N. Y. Pen. Code (1903), 429.

42. Minn. Gen. St. (1894) § 6683.

43. State *v.* Evans, 18 S. C. 137, 139, under a statute (S. C. Gen. St. (1882) § 2483), in regard to arson.

44. Lipschitz *v.* People, 25 Colo. 261, 267, 53 Pac. 1111 [*citing* State *v.* Fish, 27 N. J. L. 323], where it is said: "This shows that the phrase 'dwelling house of another' is quite different from the expression 'dwelling house, the property of another person.'" See also Hicks *v.* State, 43 Fla. 171, 29 So. 631, 632.

45. Eatontown *v.* Shrewsbury, 49 N. J. L. 188, 190, 6 Atl. 319, where it is said: "It does not cease to be such because of temporary absences, whether for pleasure or for business, provided there exist and continue an intent to return to the abode as a dwelling-place."

46. Turner *v.* Buckfield, 3 Me. 229 [*quoted* in North Yarmouth *v.* West Gardiner, 58 Me. 207, 210, 4 Am. Rep. 279].

47. Encyclopædia Brit. (1894) [*quoted* in Tannage Patent Co. *v.* Donallan, 93 Fed. 811, 817].

"Technically speaking, and as contrasted with painting, a saturation or impregnation

DYEING WORKS. Any premises in which the process of dyeing yarn or cloth of any material is carried on.[48]

DYING DECLARATIONS.[49] See HOMICIDE.

DYING WITHOUT ISSUE. See WILLS.

DYKE. See DIKE.

DYNAMITE. See EXPLOSIVES.

DYNAMO MACHINE. A device for converting mechanical energy into electricity.[50] (See, generally, ELECTRICITY.)

E. A Latin preposition, meaning from, out of, after, or according.[51] Sometimes used as an abbreviation for "East,"[52] "Easter," "Eastern," "Ecclesiastical," "Edward," "English," "Equity," or "Exchequer."[53]

EACH.[54] Every one of any number separately considered, or every one of

of the fiber in order to secure fixation of color. As applied to some animal fibers, such as silk or wool, it means a thorough saturation; as applied to skins, it may signify a thorough or a partial saturation; in other words, skins may be dyed on the surface, or a portion of the way through, or all the way through." Tannage Patent Co. *v.* Donallan, 93 Fed. 811, 817, where it is said: "The dyeing of skins is effected either by plunging or dipping in the dyeing solution, or by spreading the dyeing material on the surface by brushing over it."

48. Mass. Rev. L. (1902) p. 916, c. 106, § 8.

49. In prosecution for abortion when admissible see 1 Cyc. 185; Pa. Pub. Laws 387, § 1.

50. Thomson-Houston Electric Co. *v.* Western Electric Co., 65 Fed. 615, 616, where it is said: "It has a revolving part, called the 'armature,' usually driven from a steam engine. At one end of the armature there is a projecting part, called the 'commutator,' standing out something like the hub of a wagon wheel. Upon two opposite sides of this commutator are placed two copper strips, bars, or bundles of thin copper leaves, called 'commutator brushes,' which press upon the surface of the commutator during its revolution. A wire joined to one of these brushes leads away from the machine through the lamps or motors in which the current is used, and back to and through the other brushes. Thus the electric current which is generated in the armature by its revolutions passes out through one brush and back through the other."

51. It occurs in many Latin phrases; but (in this form) only before a consonant. When the initial of the following word is a vowel, *ex* is used. Black L. Dict.

52. Webster Dict. [*quoted* in Sibley *v.* Smith, 2 Mich. 486, 503, where the court, in speaking of the letters "E." "W." and "S." as abbreviations said: "When used in a proper connection these abbreviations are plain, and valid in law."].

53. Black L. Dict.

54. For the construction of the word in wills see Martin *v.* Mercer University, 98 Ga. 320, 326, 25 S. E. 522; Auger *v.* Tatham, 191 Ill. 296, 303, 61 N. E. 77; Bartlett *v.* Houdlette, 147 Mass. 25, 27, 16 N. E. 740; Claflin *v.* Tilton, 141 Mass. 343, 344, 5 N. E. 649; Daggett *v.* Slack, 8 Metc. (Mass.) 450, 454; *In re* Penney, 159 Pa. St. 346, 349, 28 Atl. 255; Pennsylvania L. Ins., etc., Co.'s Appeal, 109 Pa. St. 479, 488.

"Each block," in an ordinance providing for assessments for paving a street between two blocks, means each block on the street between each block for the distance of a block; each block on two half blocks divided by the street the distance of a block. Blair *v.* Atchison, 40 Kan. 353, 355, 19 Pac. 815.

"Each case."— In a policy of marine insurance exempting the underwriters from liability "for any partial loss on other goods, or on the vessel or freight unless it amount to 5 per cent., exclusive, "in each case," of all charges and expenses incurred for the purpose of ascertaining and proving the loss" apply to goods, vessel and freight, and require 5 per cent damage to justify a claim in each case. Donnell *v.* Columbian Ins. Co., 7 Fed. Cas. No. 3,987, 2 Sumn. 366, 375.

"Each offense" in a statute imposing a fine for each offense, means every violation of either of the prohibitions of the statute (Suydam *v.* Smith, 52 N. Y. 383, 389); but where but one penalty can be recovered under the act, relates to the description of the offense and not to repetitions of either of the offenses (Washburn *v.* McInroy, 7 Johns. (N. Y.) 134).

"Each party" in a statute allowing "each party" a certain number of peremptory challenges, means either party to the action, whether plaintiff or defendant, regardless as to whether one, or more than one person is included as plaintiff or defendant. People *v.* O'Loughlin, 3 Utah 133, 142, 1 Pac. 653. "On the one hand, to include all persons named as plaintiffs, and on the other, all who are joined as defendants." Snodgrass *v.* Hunt, 15 Ind. 274, 276.

"Each ton" within a statute providing that "each ton of phosphate rock or phosphatic deposit, . . . shall be deemed the property of the state until the said parties shall have paid thereon a royalty," means "[that] each ton, taken severally, individually, shall be deemed the property of the state until the said parties have paid the royalty thereon; that is, on that individual ton." Malcomson *v.* Wappoo Mills, 86 Fed. 192, 195.

"Each tax-payer" in a statute exempting each citizen owning taxable property see Morristown First Nat. Bank *v.* Morristown, 93 Tenn. 208, 211, 23 S. W. 975.

"Each week" in the phrase "to be paid on the second day of each week" means "payment on fixed days, and which can, in no in-

several.[55] Commonly the word is understood to mean every one of the two or more individuals composing the whole, considered separately from the rest.[56] It is a distributive adjective pronoun denoting or referring to every one of two or more of the series mentioned;[57] either or any unit of a numerical aggregate consisting of two or three, indefinitely; used in predicating the same thing, or both or all the numbers of the pair, aggregate or series mentioned or taken into account, considered individually, or one by one; often followed by "one" with or before a noun.[58] In law, it implies individuality and separateness.[59]

EADEM CAUSA DIVERSIS RATIONIBUS CORAM JUDICIBUS ECCLESIASTICIS ET SECULARIBUS VENTILATUR. A maxim meaning "The same cause is argued upon different principles before ecclesiastical and secular judges."[60]

EADEM MENS PRÆSUMITUR REGIS QUÆ EST JURIS ET QUÆ ESSE DEBET, PRÆSERTIM IN DUBIIS. A maxim meaning "The mind of the sovereign is

stance, be more than one week asunder." State *v.* Stiles, 12 N. J. L. 296, 297.

"Each year" in a statute inhibiting the catching of trout "between the 1st day of October of each year and the 1st day of June of each year," shows a legislative intention that the close season shall run from October of one year to June of the succeeding year. *Ex p.* Hewlett, 22 Nev. 333, 335, 40 Pac. 96. In a statute requiring corporations to make report, each year means annually. Allen *v.* Clark, 21 N. Y. Suppl. 338, 340.

55. State *v.* Maine Cent. R. Co., 66 Me. 488, 510; Potter *v.* Berthelet, 20 Fed. 240, 242 [*citing* Webster Dict.], where the court, in construing a contract by which a lessee was given the right of purchasing certain machinery and apparatus said: "Then follow the words 'and each of them;' the word 'each,' as a distributive adjective pronoun, denoting every one of the several letters patent composing a whole, considered separately from the rest."

Distinguished from "all."— Where a statute provided that each of the justices of the supreme court and judges of the circuit should have the same power at chambers to issue writs of habeas corpus as when in open court, the court said: "The term 'each' is used in contradistinction to 'all' of the Justices, as implied, necessarily, in the term 'Court,' which is made up of 'all' of the Justices; the term 'chambers,' in contradistinction to 'open Court;' and the power of the several Justices, in granting interlocutory orders at chambers, is the same 'as' the 'Court,' when it is 'open,' in considering an application for an interlocutory writ or order of injunction." Salinas *v.* Aultman, 49 S. C. 378, 386, 27 S. E. 407 [*quoted* in Lamotte *v.* Smith, 50 S. C. 558, 561, 27 S. E. 933].

56. Knickerbocker *v.* People, 102 Ill. 218, 233, dissenting opinion.

57. Seiler *v.* State, 160 Ind. 605, 625, 65 N. E. 922, 66 N. E. 946, 67 N. E. 448 [*citing* Adams Express Co. *v.* Lexington, 83 Ky. 657, 660; Anderson L. Dict.; Century Dict.; Fowler Eng. Grammar 298, 543].

Applied to the taxation of express companies.— Where a city charter provided for the taxation and licensing of "each intelligence office, . . . express company," etc., the court said: "It is true that the word 'each' denotes every one of the two or more comprising the whole; but in this instance it must be regarded as indicating that the license fee for each of the companies intended to be included in the provision of the charter, and which were not exempted from city taxation by the then existing law, should be so much. It includes the whole of the class which were not then exempt from such taxation." Adams Express Co. *v.* Lexington, 83 Ky. 657, 660.

In a contract to furnish certain specified articles of different kinds at a designated price each, the term refers to all the articles named which precede it. Beck, etc., Lithographing Co. *v.* Evansville Brewing Co., 25 Ind. App. 662, 58 N. E. 859, 861. In a contract providing to pay "each his one half, in instalments" means that each "shall pay one half of each instalment, as it becomes due, and no more." Costigan *v.* Lunt, 104 Mass. 217, 219.

58. **Illustrations.**— "As each sex; each side of the river; each stone in the building; each of them has a different course from every other" (Beck, etc., Lithographing Co. *v.* Evansville Brewing Co., 25 Ind. App. 662, 58 N. E. 859, 861 [*quoting* Century Dict.]); or "As, each went his way; each had two; each of them was of a different size; that is, from all the others, or from every one else in the number" (Beck, etc., Lithographing Co. *v.* Evansville Brewing Co., 25 Ind. App. 662, 58 N. E. 859, 861; Malcomson *v.* Wappoo Mills, 86 Fed. 192, 195 [*quoting* Century Dict.]).

Used with "among" and "any" to distinguish estates. In cases where construction arises distinguishing between joint tenancy and tenancy in common, the distributive words "among," "any" and "each" are used to distinguish estates in common from joint tenancies and are given controlling effect in determining those estates to be tenancies in common. Sturm *v.* Sawyer, 2 Pa. Super. Ct. 254, 258.

59. Sturm *v.* Sawyer, 2 Pa. Super. Ct. 254, 257, where the court after quoting the words of a testator "it is my design to invest each of my living heirs with a life estate in the income of my property" said: "The word 'each' is here employed as a distributive adjective pronoun, and means that each one is considered individually and separately from the other; it implies individuality and separateness. In law the word has like signification."

60. Wharton L. Lex.

presumed to be coincident with that of the law, and with that which it ought to be, especially in ambiguous matters." [61]

EA EST ACCIPIENDA INTERPRETATIO, QUÆ VITIO CARET. A maxim meaning "That interpretation is to be received which is free from fault." [62]

EAGLE. A gold coin of the United States of the value of ten dollars.[63] (See COIN.)

EA INTENTIONE. With that intent.[64]

EA QUÆ COMMENDANDI CAUSÂ IN VENDITIONIBUS DICUNTUR SI PALAM APPAREANT VENDITOREM NON OBLIGANT. A maxim meaning "Those things which are said for the sake of commendation in sales, if they are plainly apparent, do not bind the seller." [65] (See DEALER'S TALK.)

EA QUÆ IN CURIÂ NOSTRÂ RITÉ ACTA SUNT DEBITÆ EXECUTIONI DEMANDARI DEBENT. A maxim meaning "Those things which are properly transacted in our Court ought to be committed to a due execution." [66]

EA QUÆ RARO ACCIDUNT, NON TEMERE IN AGENDIS NEGOTIIS COMPUTANTUR. A maxim meaning "Those things which seldom happen are not rashly to be taken into account in transacting business." [67]

EAR. In a mechanical sense, a projecting part from the side of anything.[68]

EAR GRASS. In English law, such grass which is upon the land after the mowing, until the feast of the Annunciation after.[69]

EARLDOM. The office, jurisdiction, or dignity of an earl.[70]

EARLY. Pertaining to the first part or period of some division of time, or of some course in time.[71] (See, generally, TIME.)

EARMARK. A mark put upon a thing to distinguish it from another.[72] (Earmark: Identification of Property — In General, see CONFUSION OF GOODS; Of Trust Property, see TRUSTS.)

EARN. To gain, get, obtain, or acquire as the reward of labor or performance of some service,[73] or as a just return or recompense by service, labor, or exertion.[74] (See EARNINGS.)

EARNEST.[75] A part payment of the purchase price of goods.[76] (See, generally, FRAUDS, STATUTE OF.)

61. Wharton L. Lex. [*citing* Rex *v.* Arundell, Hob. 151, 154].

62. Bouvier L. Dict. [*citing* Bacon Max. Reg. 3, b, 47].

Applied in State *v.* Carr, 3 Mo. App. 6, 9.

63. Judson *v.* Griffin, 13 U. C. C. P. 350, 353 [*citing* Webster Dict.].

64. Black L. Dict. See also Norfolk's Case, Dyer 138*a*, 138*b*.

65. Wharton L. Lex.

66. Wharton L. Lex. [*citing* Coke Litt. 289].

67. Wharton L. Lex.

68. Webster Dict. [*quoted* in Consolidated Vapor-Stove Co. *v.* Ellwood Gas-Stove, etc., Co., 63 Fed. 698, 699].

69. Black L. Dict. See also Hitchcock's Case, 3 Leon. 213.

70. Burrill L. Dict. [*citing* Rex *v.* Knollys, 1 Ld. Raym. 10, 13].

71. Century Dict.

Payment "at the earliest possible moment." —An obligation to pay a sum of money "at the earliest possible moment" is not an agreement to pay instantly, unless the maker has the ability so to pay; but it is conditional. Rowlett *v.* Lane, 43 Tex. 274, 275.

72. Burrill L. Dict.

"The dictum that money has no ear-mark must be understood in the same way; i. e. as predicated only of an undivided and undistinguishable mass of current money. But money in a bag, or otherwise kept apart from other money, guineas or other coin marked (if the fact were so) for the purpose of being distinguished, are so far ear-marked as to fall within the rule on this subject," &c. Taylor *v.* Plumer, 3 M. & S. 562, 575, 2 Rose 457, 16 Rev. Rep. 361, per Lord Ellenborough.

73. Worcester Dict. [*quoted* in *In re* Lewis, 156 Pa. St. 337, 339, 27 Atl. 35; Rafferty *v.* Rafferty, 5 Pa. Dist. 453, 458]. And see *In re* Lewis, 156 Pa. St. 337, 340, 27 Atl. 35 [*quoting* Worcester Dict.], and construing the word "earned" under the married women's property act.

74. Dayton *v.* Ewart, 28 Mont. 153, 155, 72 Pac. 420 [*citing* Century Dict.; Standard Dict.; Webster Dict.].

75. "The idea of 'earnest,' in connection with contracts, was taken from the civil law." Howe *v.* Hayward, 108 Mass. 54, 55, 11 Am. Rep. 306 [*citing* Güterbock Bracton (Am. transl.) 145].

76. Howe *v.* Hayward, 108 Mass. 54, 55, 11 Am. Rep. 306 [*citing* Morton *v.* Tibbett, 15 Q. B. 428, 14 Jur. 669, 19 L. J. Q. B. 382, 69 E. C. L. 428; Walker *v.* Nussey, 11 Jur. 23, 16 L. J. Exch. 20, 16 M. & W. 302; Pordage *v.* Cole, 1 Saund. 319*i*; Langfort *v.* Tiler, 1 Salk. 113; 2 Blackstone Comm. 447; 1 Dane Abr. 325].

"Earnest is only one mode of binding the bargain, and giving to the buyer a right to

EARNINGS.[77] That which is earned;[78] reward;[79] the reward for personal services, whether in money or chattels;[80] the fruit or reward of labor; the price of services performed;[81] that which is gained or merited by labor, services, or performances;[82] the fruits of skill, experience and industry;[83] property acquired by labor, skill or talents,[84] or mental effort;[85] money or property gained or merited by labor, service, or the performance of something;[86] gains derived from service or labor without the aid of capital.[87] Sometimes the term means more than labor.[88] A term often applied to earnings for personal service, as contradistinguished from the income arising from a business involving other elements of gain than the mere personal services of those conducting it,[89] and it implies a sum due for personal services and will not include, to any substantial extent, recompense for materials furnished.[90] The term includes not only wages but also compensation for materials furnished and expenditures made in connection with the labor, or services rendered.[91] As applied to labor in a more limited sense, wages;[92] the sum which a workman gets for his work when he comes to it properly equipped according to the general understanding and practice in a particular trade;[93] and

the goods upon payment." Robinson *v.* Thoma, 30 Wash. 129, 133, 70 Pac. 240 [*quoting* 2 Kent Comm. 495].

The delivery of sacks by the purchaser of corn, who agreed to pay a certain sum per bushel, and as part of the consideration to furnish the sacks in which to put it, was not a delivery of anything in "earnest," for they were not a part payment for the price of the corn. Hudnut *v.* Weir, 100 Ind. 501, 502.

77. That the term "earnings" is broader than "wages" see 4 Cyc. note 82.

The term includes money due for board furnished by a debtor, under an agreement with a third person, within the meaning of a statute declaring that an unrecorded assignment of future earnings shall be invalid against a trustee process. Jason *v.* Antone, 131 Mass. 534, 535.

"Earnings" does not include a fund resulting from sales of materials, manufactured iron, products from the land, or general personal property of a corporation (Gehr *v.* Mont Alto Iron Co., 174 Pa. St. 430, 433, 34 Atl. 638); rents payable under an ordinary contract or lease which requires no personal service on the part of the lessor (Kendall *v.* Kingsley, 120 Mass. 94, 95).

An assignment of a building contract is not an assignment of earnings within a statute requiring such an assignment to be recorded. Abbott *v.* Davidson, 18 R. I. 91, 25 Atl. 839.

As used in an exemption statute it does not mean merely the earnings by manual labor, but would include earnings obtained with a team, wagon, or dray and tackle. Kuntz *v.* Kinney, 33 Wis. 510, 513.

78. Berlin Iron Bridge Co. *v.* Connecticut River Banking Co., (Conn. 1904) 57 Atl. 275, 276 [*citing* Anderson L. Dict.; Century Dict.; Webster Dict.]; Dayton *v.* Ewart, 28 Mont. 153, 155, 72 Pac. 420 [*citing* Century Dict.; Standard Dict.; Webster Dict.].

79. Webster Dict. [*quoted* in Dayton *v.* Walsh, 47 Wis. 113, 120, 2 N. W. 65, 32 Am. Rep. 757].

80. Nuding *v.* Urich, 169 Pa. St. 289, 293, 32 Atl. 409, where it is said: "They may be 'acquired,' or 'owned,' or 'possessed,' within the fair meaning of" a statute.

81. Pryor *v.* Metropolitan St. R. Co., 85 Mo. App. 367, 372; Anderson L. Dict. [*quoted* in Goodhart *v.* Pennsylvania R. Co., 117 Pa. St. 1, 15, 35 Atl. 191, 55 Am. St. Rep. 705].

82. Webster Dict. [*quoted* in Dayton *v.* Walsh, 47 Wis. 113, 120, 2 N. W. 65, 32 Am. Rep. 757].

83. Brown *v.* Hebard, 20 Wis. 326, 330, 91 Am. Dec. 408.

84. Dayton *v.* Walsh, 47 Wis. 113, 120, 2 N. W. 65, 32 Am. Rep. 757.

85. Dayton *v.* Walsh, 47 Wis. 113, 120, 2 N. W. 65, 32 Am. Rep. 757, where it is said that the term may include property acquired by labor, skill, or talents, as by singing or performance on the stage; or by well-directed efforts in some branch of industry.

86. Berlin Iron Bridge Co. *v.* Connecticut River Banking Co., (Conn. 1904) 57 Atl. 275, 276 [*citing* Anderson L. Dict.; Century Dict.; Webster Dict.].

87. Brown *v.* Hebard, 20 Wis. 326, 330, 91 Am. Dec. 408 [*quoted* in Campfield *v.* Lang, 25 Fed. 128, 131].

88. Hoyt *v.* White, 46 N. H. 45, 48.

89. Shelly *v.* Smith, 59 Iowa 453, 455, 13 N. W. 419.

90. Dayton *v.* Ewart, 28 Mont. 153, 155, 72 Pac. 420.

91. Berlin Iron Bridge Co. *v.* Connecticut River Banking Co., (Conn. 1904) 57 Atl. 275, 276. See also Chester *v.* McDonald, (Mass. 1904) 69 N. E. 1075, where it is said: "While the word 'earnings,' used in St. 1865, c. 43, § 2, subsequently Pub. St. c. 183, § 39, now Rev. Laws, c. 189, § 34, is generally held to embrace wages, it is not to be limited to so narrow a restriction, but is broad enough to include money expended and material furnished, as well as work to be done or services rendered, under a contract which calls for both."

92. Berlin Iron Bridge Co. *v.* Connecticut River Banking Co., (Conn. 1904) 57 Atl. 275, 276; Webster Dict. [*quoted* in Dayton *v.* Walsh, 47 Wis. 113, 120, 2 N. W. 65, 32 Am. Rep. 757].

93. Abram Coal Co. *v.* Southern, [1903] A. C. 306, 308, 72 L. J. K. B. 691, 89 L. T. Rep. N. S. 103, per Lord Macnaghten, con-

it has a more extensive signification than the term "wages."[94] As applied to corporations, gross earnings and not net earnings unless so qualified;[95] earnings declared as dividends.[96] (Earnings: Assignment, see ASSIGNMENTS. Dividends on Stock, see CORPORATIONS. Exemption From Seizure and Sale, see EXEMPTIONS. Of Apprentice, see APPRENTICES. Of Child, see PARENT AND CHILD. Of Husband and Wife, see HUSBAND AND WIFE. Taxation, see TAXATION.)

EARTH.[97] Soil of all kinds, including gravel, clay, loam, and the like, in distinction from the firm rock.[98] In chemistry, metallic oxide, inodorous, dry, uninflammable, and infusible.[99] (See EARTHENWARE.)

EARTHENWARE. Anything made of clay, and baked in a kiln or dried in the sun;[1] vessels, and other utensils, ornaments, or the like, made of baked clay.[2] (See EARTH.)

struing the "Workmen's Compensation Act" (1897), c. 37.

94. Campfield *v.* Lang, 25 Fed. 128, 132.

Of broader import than "wages."—Within the meaning of Mass. St. (1865) § 2, declaring an unrecorded assignment of future earnings invalid against trustee process, "earnings" has a more extensive signification than the word "wages," and applies to the compensation for services, a term which involves more than the mere labor of the person by whom they are rendered, and may include compensation for expenditures incurred or materials furnished, as well as labor. Kendall *v.* Kingsley, 120 Mass. 94, 95; Somers *v.* Keliher, 115 Mass. 165, 167; Jenks *v.* Dyer, 102 Mass. 235, 236.

"The wages of labor are earned" (*In re* Lewis, 150 Pa. St. 337, 339, 27 Atl. 35), in the sense in which that term is used in the Bankruptcy Act of 1898 (*In re* B. H. Gladding Co., 120 Fed. 709, 711).

95. So construed in reference to the acceptance of an order and agreement to pay if the earnings of the drawer are sufficient to cover the amount. Smith *v.* Bates Mach. Co., 182 Ill. 166, 169, 55 N. E. 69.

96. Bigbee, etc., Packet Co. *v.* Moore, 121 Ala. 379, 383, 25 So. 602.

The term "net earnings" may be, and often is, the equivalent of surplus or net profits, as net earnings for the whole period of time a corporation has existed. Cotting *v.* New York, etc., R. Co., 54 Conn. 156, 168, 5 Atl. 851. See, generally, CORPORATIONS.

97. **"Earthy material"** includes carbonate of lead. Bryan *v.* Stevens, 4 Fed. Cas. No. 2,066*a*.

"Earth oils" include naphtha, benzine or benzol (Morse *v.* Buffalo F. & M. Ins. Co., 30 Wis. 534, 536, 11 Am. Rep. 587), and kerosene (Buchanan *v.* Exchange F. Ins. Co., 61 N. Y. 26, 29. See also Bennett *v.* North British, etc., Ins. Co., 81 N. Y. 273, 275, 37 Am. Rep. 501).

Earths and earthenware see 12 Cyc. 1119.

98. Webster Dict. [*quoted* in Dickinson *v.* Poughkeepsie, 75 N. Y. 65, 76].

"Earth" as used in a contract for the excavation of earth at a certain price per cubic yard, means ordinary earth, and includes all materials whatever from beneath the surface of the ground, which would include indurated earth or gravel. Shephard *v.* St. Charles Western Plankroad Co., 28 Mo. 373, 377.

Meaning of "earth excavations."— In a contract for grading, the term "earth excavations" means ordinary earth, and although excavations in general might include all materials found beneath the surface of the ground, yet the expression "excavations of earth" excludes other materials than ordinary earth, such as indurated earth or gravel. Blair *v.* Corby, 37 Mo. 313, 317.

Under a contract for grading, which included earth, loose rock, and solid earth, the word "earth" was defined as follows: "All materials, of whatever nature, including boulders measuring less than one cubic foot, and loose sand rock, slate and shale, which can be excavated with picks, shall be estimated and considered earth, and under the head of 'excavation' or 'embankment,' as the case may be." Spaulding *v.* Cœur D'Alene R., etc., Co., 5 Ida. 528, 532, 51 Pac. 408.

"Earth and gravel" in a statute authorizing a town to select and lay out a lot of land for a gravel pit for the purpose of securing earth and gravel to be used in the repair of roads, include any earth, gravel or stone suitable for use in repairing and constructing roads, and capable of being dug out of the ground and removed by ordinary excavation. The words "earth and gravel" are not to be taken with such extreme strictness as to require that the gravel should be screened, or that the question should be raised and decided judicially how large a piece of gravel or stone may be included in the general description of "earth and gravel." Hatch *v.* Hawkes, 126 Mass. 177, 181.

Within a contract for excavating, "earth" includes everything except rocks, grubbing, and clearing. Nesbitt *v.* Louisville, etc., R. Co., 2 Speers (S. C.) 697, 705.

"Hardpan" is included within the term. Dickinson *v.* Poughkeepsie, 75 N. Y. 65, 76 [*quoting* Webster Dict.].

99. Jenkins *v.* Johnson, 13 Fed. Cas. No. 7,271, 9 Blatchf. 516, where it is said: "And, among the chemical earths, are silica and magnesia."

1. Century Dict. [*quoted* in Bing *v.* U. S., 121 Fed. 194, 195].

2. Webster Dict. [*quoted* in Rossman *v.* Hedden, 145 U. S. 561, 569, 12 S. Ct. 925, 36 L. ed. 817].

"Tiles" are included within the term within Customs Duty Act (22 U. S. St. at L. 488 [U. S. Comp. St. (1901) p. 2247]). Rossman *v.* Hedden, 145 U. S. 561, 568, 12 S. Ct. 925, 36 L. ed. 817.

EASEMENTS

By Walter H. Michael and James A. Gwyn

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I. DEFINITION.[1]

An easement is a liberty, privilege, or advantage without profit which the owner of one parcel of land may have in the lands of another;[2] or to state it from the opposite point of view it is a service which one estate owes to another — or a right or privilege in one man's estate for the advantage or convenience of the owner of another estate.[3] Again an easement or a servitude has been defined as a right which one proprietor has to some profit, benefit, or beneficial use, out of, in, or over the estate of another proprietor.[4] But this definition seems to be too broad as applied to pure easements from which a great majority of the cases exclude the suggestion of profit. Rights to *profits à prendre* are easements of a peculiar kind and are treated in another place.[5] An easement, although only an incorporeal right and appurtenant to another, the dominant, tenement, is yet properly denominated an interest in land which constitutes the servient tenement, and the expression, "estate or interest in lands," when used in a statute is broad enough to include such rights,[6] for an easement must be an interest in or over the soil.[7]

II. ESSENTIAL QUALITIES.

The essential qualities of easements are: (1) They are incorporeal; (2) they are imposed upon corporeal property and not upon the owner of it; (3) they confer no right to a participation in the profits arising from such property; (4) they are imposed for the benefit of corporeal property; (5) there must be two distinct tenements — the dominant, to which the right belongs, and the servient, upon which the obligation rests.[8] In order to constitute an easement there must

1. Distinguished from servitudes see SERVITUDES.

2. *Arkansas.*— Johnson *v.* Lewis, 47 Ark. 66, 71, 14 S. W. 466; Wynn *v.* Garland, 19 Ark. 23, 33, 68 Am. Dec. 190.

Iowa.— Churchill *v.* Burlington Water Co., 94 Iowa 89, 93, 62 N. W. 646; Cook *v.* Chicago, etc., R. Co., 40 Iowa 451, 456; Dubuque *v.* Maloney, 9 Iowa 450, 455, 74 Am. Dec. 358.

Massachusetts.— Owen *v.* Field, 102 Mass. 90, 103; Ritger *v.* Parker, 8 Cush. 145, 147, 54 Am. Dec. 744.

New York.— Greenwood Lake, etc., R. Co. *v.* New York, etc., R. Co., 134 N. Y. 435, 439, 31 N. E. 874; Nellis *v.* Munson, 108 N. Y. 453, 454, 15 N. E. 739; Pierce *v.* Keator, 70 N. Y. 419, 421, 26 Am. Rep. 612; Post *v.* Pearsall, 22 Wend. 425, 438; Hills *v.* Miller, 3 Paige 254, 257, 24 Am. Dec. 218.

Oregon.— Jackson *v.* Trullinger, 9 Oreg. 393, 397.

Pennsylvania.— Big Mountain Imp. Co.'s Appeal, 54 Pa. St. 361, 369.

Wisconsin.— Hazelton *v.* Putnam, 3 Pinn. 107, 115, 3 Chandl. 117, 54 Am. Dec. 158.

United States.— Schaal *v.* Alhambra Min. Co., 79 Fed. 821.

See 17 Cent. Dig. tit. "Easements," § 1.

An easement is "a privilege without profit, which the owner of one tenement has a right to enjoy in respect to that tenement in or over the tenement of another person, by reason whereof the latter is obliged to suffer or refrain from doing something on his own tenement for the advantage of the former." Goddard Easem. 2 [*quoted* in Tardy *v.* Creasy, 81 Va. 553, 556, 59 Am. Rep. 676; Stevenson *v.* Wallace, 27 Gratt. (Va.) 77, 87].

3. Morrison *v.* Marquardt, 24 Iowa 35, 61, 92 Am. Dec. 444; Karmuller *v.* Krotz, 18 Iowa 352, 357.

4. Los Angeles Terminal Land Co. *v.* Muir, 136 Cal. 36, 48, 68 Pac. 208; Ritger *v.* Parker, 8 Cush. (Mass.) 145, 147, 54 Am. Dec. 744; Morrill *v.* Mackman, 24 Mich. 279, 284, 9 Am. Rep. 124; Huyck *v.* Andrews, 113 N. Y. 81, 85, 20 N. E. 581, 10 Am. St. Rep. 432, 3 L. R. A. 789.

5. See *infra*, III, F.

6. Matter of Niagara Falls, etc., R. Co., 15 N. Y. St. 546, 547.

7. Rowbotham *v.* Wilson, 8 E. & B. 123, 3 Jur. N. S. 1297, 5 Wkly. Rep. 820, 92 E. C. L. 123.

8. Pierce *v.* Keator, 70 N. Y. 419, 421, 26 Am. Rep. 612; Wolfe *v.* Frost, 4 Sandf. (N. Y.) 72, 89; Harrison *v.* Boring, 44 Tex. 255, 267; Bouvier L. Dict.; Gale & W. Easem. 5; Washburn Easem. c. 1, § 1.

be two estates, the one giving and the other receiving the advantage, denominated respectively the servient and the dominant estates.[9]

III. CLASSES OF EASEMENTS AND RIGHTS IN THE NATURE OF EASEMENTS.

A. Easements Appurtenant. Easements appurtenant inhere in the land, concern the premises, and are necessary to the enjoyment thereof.[10] Such easements are incapable of existence separate and apart from the particular messuage or land to which they are annexed, there being nothing for them to act upon.[11] They are in the nature of covenants running with the land, attach to the land, to which they are appurtenant, and pass by a deed of conveyance.[12]

B. Easements in Gross — 1. In General. It has been contended that there can be no such thing according to the common law or the civil law as an easement in gross.[13] But there is a class of rights which one may have in another's land without their being exercised in connection with the occupancy of other lands, and they are therefore called rights or easements in gross. In such cases the burden rests upon one piece of land in favor of a person or an individual; the principal distinction between an easement proper (the class of easements considered in the preceding section) and a right in gross is found in the fact that in the first there is and in the second there is not a dominant tenement.[14] Furthermore, unlike easements appurtenant, an easement in gross cannot ordinarily be assigned or transmitted by descent, nor can the owner of the right take another person into company with him.[15] Thus a right of way which has neither of its termini on the premises of the owner and is not appurtenant to any estate is called a right of way in gross. It is a mere personal right and is neither assignable nor inheritable, nor can it be made so by any terms in the grant.[16] But there are cases where it was the manifest intention of the parties to create an assignable

9. Goodwin *v.* Hamersley, 69 Conn. 115, 36 Atl. 1065; Karmuller *v.* Krotz, 18 Iowa 352; Dark *v.* Johnston, 55 Pa. St. 164, 93 Am. Dec. 732.

The right to the use of a pew in a church may be annexed to a house as appurtenant thereto and may even be acquired by prescription. Philipps *v.* Halliday, [1891] A. C. 228, 55 J. P. 741, 61 L. J. Q. B. 210, 64 L. T. Rep. N. S. 745; Harris *v.* Drewe, 2 B. & Ad. 164, 22 E. C. L. 77; Walker *v.* Gunner, 1 Hagg. Const. 314; Stocks *v.* Booth, 1 T. R. 428, 1 Rev. Rep. 244.

10. Moore *v.* Crose, 43 Ind. 30.

11. Cadwalader *v.* Bailey, 17 R. I. 495, 23 Atl. 20, 14 L. R. A. 300.

12. Kuecken *v.* Voltz, 110 Ill. 264; Moore *v.* Crose, 43 Ind. 30; Boatman *v.* Lasley, 23 Ohio St. 614; Black L. Dict.; Bouvier L. Dict.

A thing to which another is appurtenant must be something of a higher character and of perpetual continuance. Coke Litt. 122*a*; Jones Easem. 15.

13. Rangeley *v.* Midland R. Co., L. R. 3 Ch. 306, 311, 37 L. J. Ch. 313, 18 L. T. Rep. N. S. 69, 16 Wkly. Rep. 547.

14. Willoughby *v.* Lawrence, 116 Ill. 11, 19, 4 N. E. 356, 56 Am. Rep. 758.

15. Tinicum Fishing Co. *v.* Carter, 61 Pa. St. 21, 100 Am. Dec. 597; Cadwalader *v.* Dailey, 17 R. I. 495, 23 Atl. 20, 14 L. R. A. 300.

Illustrations.— Where two persons held land in partnership under an agreement that mills thereon should be kept up during their joint lives and the life of the survivor at their joint expense, and on one of them dying the mill site was partitioned to the survivor and the rest of the tract to heirs of the deceased, it was held that any easement which the survivor might have under the agreement to overflow the lands of the heirs was personal and terminated at his death (McDaniel *v.* Walker, 46 S. C. 43, 24 S. E. 378); so a grant of a right to lay down an aqueduct upon the land of the grantor and draw water therefrom for the use of the grantee does not convey an assignable interest, unless words of inheritance are used or it can be inferred from the language of the whole deed that such was the intent of the parties (Wilder *v.* Wheeler, 60 N. H. 351); and the grant of a right to transport stone from a designated tract of land over a certain tract owned by the grantor cannot be used with the permission of the grantee by a third person for the purpose of carrying stone quarried in another tract of land (Hoosier Stone Co. *v.* Malott, 130 Ind. 21, 29 N. E. 412).

16. *California.*— Wagner *v.* Hanna, 38 Cal. 111, 99 Am. Dec. 354.

Illinois.— Kuecken *v.* Voltz, 110 Ill. 264; Louisville, etc., R. Co. *v.* Koelle, 104 Ill. 455; Koelle *v.* Knecht, 99 Ill. 396; Garrison *v.* Rudd, 19 Ill. 558.

Indiana.— Moore *v.* Crose, 43 Ind. 30.

New Jersey.— Shreve *v.* Mathis, 63 N. J. Eq. 170, 52 Atl. 234.

Ohio.— Boatman *v.* Lasley, 23 Ohio St. 614.

interest, and in such cases the courts have given effect to that intention. Thus a grant of the right to draw water from a spring or well for family use or any other purpose in terms to a person his heirs and assigns forever has been held to be an easement in gross which is assignable, inheritable, and devisable.[17]

2. Presumption as to Character of Easement. An easement will never be presumed to be a mere personal right when it can fairly be construed to be appurtenant to some other estate.[18] The question whether an easement is a personal

South Carolina.— Fisher *v.* Fair, 34 S. C. 203, 13 S. E. 470, 14 L. R. A. 333; Whaley *v.* Stevens, 21 S. C. 221, 27 S. C. 549, 4 S. E. 145.

England.— Thorpe *v.* Brumfitt, L. R. 8 Ch. 650; Ackroyd *v.* Smith, 10 C. B. 164, 14 Jur. 1047, 19 L. J. C. P. 315, 70 E. C. L. 164.

See 17 Cent. Dig. tit. "Easements," §§ 8, 9.

A right of way assigned to a dowager over land of her husband with her dower ceases with the estate in dower. Hoffman *v.* Savage, 15 Mass. 130.

The owner of a lot separated by four lots from a right of way cannot claim the same as appurtenant to his lot. Metzger *v.* Holwick, 17 Ohio Cir. Ct. 605.

A right of way to their store granted to certain persons so long as they occupy it for a designated business ceases on the passing of such business into other hands, although they are retained as employees by the new owners of the business. Hall *v.* Armstrong, 53 Conn. 554, 4 Atl. 113.

17. Amidon *v.* Harris, 113 Mass. 59; Owen *v.* Field, 102 Mass. 90; French *v.* Morris, 101 Mass. 68; Goodrich *v.* Burbank, 12 Allen (Mass.) 459, 90 Am. Dec. 161; Poull *v.* Mockley, 33 Wis. 482.

Easement in gross in perpetuity.— Where the owners of land adjacent to a river granted to a city, its successors and assigns, the right to enter thereon and construct, maintain, and operate a canal and a highway along the shore of the river and to cut timber and quarry stone thereon for that purpose upon the express condition that before the water should be let into the canal for the purpose of operating it the highway should be constructed and finished and that both the canal and the highway should be completed within five years, the grant is an easement in gross and in perpetuity, the fee of the land remaining in the grantors. Pinkum *v.* Eau Claire, 81 Wis. 301, 51 N. W. 550.

A water right granted in gross does not become technically appurtenant to land, and a mill upon and for which it is subsequently used by the grantee thereof; but where such water-power is taken and applied to run a mill belonging to the owner of the power, and afterward, while the water-power is so being used, the owner conveys the premises by metes and bounds without mentioning the water right, the right may pass therewith, as parcel thereof, if such appears to have been the intention of the parties. Bank of British North America *v.* Miller, 6 Fed. 545, 7 Sawy. 163.

Grant of water to run factory.—Where by instrument sealed and recorded the right is granted to take and use water for the operation of a cheese factory so long as the water shall be used for that purpose, the grant is not personal to the grantee, but inures to the benefit of the cheese factory while it continues to be used as such, and that too notwithstanding the absence of words of inheritance and of the fact that the instrument was in the form of a lease. Whitney *v.* Richardson, 59 Hun (N. Y.) 605, 13 N. Y. Suppl. 861.

Use of a spring on other land.— Where the owner of opposite tracts of land abutting on a street conveyed one with the privilege of using a spring on the other, it creates an easement in fee for the benefit of the tract conveyed. Blood *v.* Millard, 172 Mass. 65, 51 N. E. 527.

18. *Alabama.*— McMahan *v.* Williams, 79 Ala. 288.

California.— Hopper *v.* Barnes, 113 Cal. 636, 41 Pac. 874; Wagner *v.* Hanna, 38 Cal. 111, 99 Am. Dec. 354.

Connecticut.— Bissell *v.* Grant, 35 Conn. 288.

Illinois.— Horner *v.* Keene, 177 Ill. 390, 52 N. E. 492; Oswald *v.* Wolf, 126 Ill. 542, 19 N. E. 28; Kuecken *v.* Voltz, 110 Ill. 264; Kramer *v.* Knauff, 12 Ill. App. 115.

Massachusetts.— Dennis *v.* Wilson, 107 Mass. 591; Smith *v.* Porter, 10 Gray 66.

Minnesota.— Winston *v.* Johnson, 42 Minn. 398, 43 N. W. 958.

New Jersey.— Mitchell *v.* D'Olier, 68 N. J. L. 375, 53 Atl. 467, 59 L. R. A. 949; Richardson *v.* International Pottery Co., 63 N. J. L. 248, 43 Atl. 692.

New York.— Valentine *v.* Schreiber, 3 N. Y. App. Div. 235, 38 N. Y. Suppl. 417.

Ohio.— Boatman *v.* Lasley, 23 Ohio St. 614.

Rhode Island.— Cadwalader *v.* Bailey, 17 R. I. 495, 23 Atl. 20, 14 L. R. A. 300.

Virginia.— French *v.* Williams, 82 Va. 462, 4 S. E. 591.

Wisconsin.— Reise *v.* Enos, 76 Wis. 634, 45 N. W. 414, 8 L. R. A. 617; Spensley *v.* Valentine, 34 Wis. 154.

England.— Thorpe *v.* Brumfitt, L. R. 8 Ch. 650.

See 17 Cent. Dig. tit. "Easements," § 8 *et seq.*

Right to take seaweed.— The heirs of an owner of real estate which was bounded in part by a sea beach divided the estate by deed and assigned to some of them parcels of land bounded by the beach and to the others different parcels. The deeds assign-

right or is to be construed to be appurtenant to some other estate must be determined by the fair interpretation of the grant or reservation creating the easement aided if necessary by the situation of the property and the surrounding circumstances; and here, in the case of a right of way, the *terminus ad quem* is of especial significance.[19]

C. Continuous and Discontinuous Easements. Continuous easements are those of which the enjoyment may be continued without the necessity of any actual interference by man. Discontinuous easements are those the enjoyment of which can be had only by the interference of man.[20]

D. Affirmative and Negative Easements. Easements are also classified as affirmative and negative. An easement is affirmative when the servient estate must permit something to be done thereon; it is negative when the owner of the servient estate is prohibited from doing something otherwise lawful on his estate because it will affect the dominant estate.[21]

E. Private and Public Easements. Easements may also be classified as private or public, accordingly as they are enjoyed by an individual or by the public.[22] The distinguishing feature here is that in case of private easements there must be two distinct tenements — one dominant and the other servient.[23] Public easements on the other hand are in gross,[24] and in this class of easements there is no dominant tenement.[25]

F. Profits à Prendre — 1. In General. The right to profits, denominated *profits à prendre*, consists of a right to take a part of the soil or produce of the land, in which there is a supposable value.[26] The right to enter upon the land of another for any of the following purposes has been held to be a *profit à pren-*

ing the latter parcels granted the privilege of getting seaweed from the beach below the lands granted by the deeds of the former parcels. It was held that this was a grant of incorporeal hereditament appurtenant to the land to which it was annexed and not a right in gross, and that it could not be severed and sold separate from that land, and that the sale of the right to a stranger would either be void or would extinguish the right. Phillips *v.* Rhodes, 7 Metc. (Mass.) 322.

19. *Connecticut.*— Russell *v.* Heublein, 66 Conn. 486, 34 Atl. 486.

Illinois.— Kramer *v.* Knauff, 12 Ill. App. 115.

Iowa.— Karmuller *v.* Krotz, 18 Iowa 352.

Massachusetts.— Peck *v.* Conway, 119 Mass. 546; Dennis *v.* Wilson, 107 Mass. 591; Stearns *v.* Mullen, 4 Gray 151; Brown *v.* Thissell, 6 Cush. 254; Mendell *v.* Delano, 7 Metc. 176; Kent *v.* Waite, 10 Pick. 138; White *v.* Crawford, 10 Mass. 183.

Minnesota.— Winston *v.* Johnson, 42 Minn. 398, 45 N. W. 958.

Ohio.— Jones Fertilizer Co. *v.* Cleveland, etc., R. Co., 2 Ohio S. & C. Pl. Dec. 511, 7 Ohio N. P. 245.

See 17 Cent. Dig. tit. "Easements," § 10.

Presumption from absence of words of inheritance how overcome.— The fact that a right of way given by a deed was intended for the benefit of the grantee's land, and was to be used in connection with its occupancy, and has been so used, and is useless for any other purpose, will overcome any presumption that might otherwise arise from the absence of the words, "heirs and assigns," that it was intended to be in gross. Lidgerding *v.* Zignego, 77 Minn. 421, 80 N. W. 360, 77 Am. St. Rep. 677.

20. Lampman *v.* Milks, 21 N. Y. 505, giving as examples of the first class a waterspout, or right to light and air, and of the second class, rights of way or a right to draw water. Bouvier L. Dict.

Apparent or continuous easements are those depending upon some artificial structure upon, or natural formation of, the servient tenement, obvious and permanent, which constitutes the easement or is the means of enjoying it; as the bed of a running stream, an overhanging roof, a pipe for conveying water, a drain, or a sewer. Non-apparent or non-continuous easements are such that have no means specially constructed or appropriated to their enjoyment, and that are enjoyed at intervals, leaving between these intervals no visible sign of their existence; such as a right of way or the right of drawing a seine upon the shore. Fetters *v.* Humphreys, 18 N. J. Eq. 260.

21. 2 Washburn Real Prop. (6th ed.) § 1230, giving as an example of the first class the right to discharge water upon the servient estate or to pass over it; of the second class, interruption of light and air or diverting a natural watercourse, whereby the water is prevented from flowing into an ancient mill.

22. Black L. Dict. And see Dedication, 13 Cyc. 434.

23. See *supra*, II.

24. See Jones Easem. § 422.

25. See *supra*, III, B, 1.

26. Pierce *v.* Keator, 70 N. Y. 419, 26 Am. Rep. 612; Gloninger *v.* Franklin Coal Co., 55 Pa. St. 9, 93 Am. Dec. 720; Texas, etc., R. Co. *v.* Durrett, 57 Tex. 48.

dre; to cut grass,[27] to depasture the land,[28] to shoot over the land and take game or wild fowl,[29] to fish in an unnavigable stream,[30] to take away drifting sand from the beach,[31] or seaweed thrown upon the shore,[32] to take iron ore from the land,[33] to mine metals generally,[34] to search for and dig coal,[35] and to take timber from the land.[36] Running water, whether above or below the surface, is not a product of the soil. It does not remain for any appreciable period of time in any one place and has no appreciable value. Consequently the right to enter upon the land of another and take water for domestic purposes from any natural fountain is not a *profit à prendre*, but merely an easement.[37] On the other hand the right to water artificially produced as by means of cisterns or wells would seem to be an interest in the land or a right to a *profit à prendre*.[38]

2. NATURE OF RIGHT. A right of *profit à prendre*, if enjoyed in connection with a certain estate, although not a pure easement, for that is a right without profit, is frequently spoken of as an easement or at least a right in the nature of an easement, which is appurtenant to the estate in connection with which it is enjoyed, and passes with it as in the case of an easement proper.[39]

3. HOW CREATED. The right is incorporeal and incapable of creation except by grant or prescription.[40] In order to acquire the right by prescription, there must be a dominant estate to which it attaches. The inhabitants of a town cannot so acquire the right for themselves and their successors; and this for the further reason that there is no one to whom a grant can be presumed to have been made, for the unorganized public is incapable of taking by grant.[41] A custom to take a profit in the land of another has uniformly been held bad, for although custom

27. Viner Abr. tit. "Prescription."

28. Fowler *v.* Dale, Cro. Eliz. 362.

29. Bingham *v.* Salene, 15 Oreg. 208, 14 Pac. 523, 3 Am. St. Rep. 152; Webber *v.* Lee, 9 Q. B. D. 315, 47 J. P. 4, 51 L. J. Q. B. 485, 47 L. T. Rep. N. S. 215, 30 Wkly. Rep. 866; Pickering *v.* Noyes, 4 B. & C. 639, 7 D. & R. 49, 4 L. J. K. B. O. S. 10, 28 Rev. Rep. 430, 10 E. C. L. 736; Ewart *v.* Graham, 7 H. L. Cas. 331, 5 Jur. N. S. 773, 29 L. J. Exch. 88, 7 Wkly. Rep. 621, 11 Eng. Reprint 132; Wickham *v.* Hawker, 10 L. J. Exch. 153, 7 M. & W. 63.

30. Turner *v.* Hebron, 61 Conn. 175, 22 Atl. 951, 14 L. R. A. 386; Waters *v.* Lilley, 4 Pick. (Mass.) 145, 16 Am. Dec. 333.

31. Blewett *v.* Tregonning, 3 A. & E. 554, 1 Hurl. & W. 432, 4 L. J. K. B. 234, 5 N. & M. 308, 30 E. C. L. 260.

32. *Connecticut.*— Chapman *v.* Kimball, 9 Conn. 38, 21 Am. Dec. 707.

Maine.— Hill *v.* Lord, 48 Me. 83.

Massachusetts.— Sale *v.* Pratt, 19 Pick. 191.

New Hampshire.— Nudd *v.* Hobbs, 17 N. H. 524.

New York.— Emans *v.* Turnbell, 2 Johns. 313, 3 Am. Dec. 427.

33. Johnstown Iron Co. *v.* Cambria Iron Co., 32 Pa. St. 241, 72 Am. Dec. 783.

34. Muskett *v.* Hill, 5 Bing. N. Cas. 694, 9 L. J. C. P. 201, 7 Scott 855, 35 E. C. L. 371.

35. Caldwell *v.* Fulton, 31 Pa. St. 475, 72 Am. Dec. 760; Chetham *v.* Williamson, 4 East 469, 1 Smith K. B. 278.

36. Clark *v.* Way, 11 Rich. (S. C.) 621.

37. Hill *v.* Lord, 48 Me. 83; Goodrich *v.* Burbank, 12 Allen (Mass.) 459, 90 Am. Dec. 161; Manning *v.* Wasdale, 5 A. & E. 758, 2 Hurl. & W. 431, 6 L. J. K. B. 59, N. & P. 172, 31 E. C. L. 814; Race *v.* Ward, 3 C. L. R. 744, 4 E. & B. 702, 1 Jur. N. S. 704, 24 L. J. Q. B. 153, 82 E. C. L. 702; Weekly *v.* Wildman, 1 Ld. Raym. 405.

38. Hill *v.* Lord, 48 Me. 83; Race *v.* Ward, 3 C. L. R. 744, 4 E. & B. 702, 1 Jur. N. S. 704, 24 L. J. Q. B. 153, 82 E. C. L. 702.

39. *Massachusetts.*— Goodrich *v.* Burbank, 12 Allen 459, 90 Am. Dec. 161.

New York.— Huntington *v.* Asher, 96 N. Y. 604, 48 Am. Rep. 652.

Oregon.— Bingham *v.* Salene, 15 Oreg. 208, 14 Pac. 523, 3 Am. St. Rep. 152.

Pennsylvania.— Grubb *v.* Grubb, 74 Pa. St. 25.

England.— Ackroyd *v.* Smith, 10 C. B. 164, 14 Jur. 1047, 19 L. J. C. P. 315, 70 E. C. L. 164; Bailey *v.* Stephens, 12 C. B. N. S. 91, 8 Jur. N. S. 1063, 31 L. J. C. P. 226, 6 L. T. Rep. N. S. 356, 10 Wkly. Rep. 868, 104 E. C. L. 91; Douglass *v.* Kendal, Cro. Jac. 256; Wickham *v.* Hawker, 10 L. J. Exch. 153, 7 M. & W. 63.

40. Hill *v.* Lord, 48 Me. 83; Taylor *v.* Millard, 118 N. Y. 244, 23 N. E. 376, 6 L. R. A. 667; Gloninger *v.* Franklin Coal Co., 55 Pa. St. 9, 93 Am. Dec. 720; Huff *v.* McCauley, 53 Pa. St. 206, 91 Am. Dec. 203; Cowlam *v.* Slack, 15 East 108, 13 Rev. Rep. 401.

41. Turner *v.* Hebron, 61 Conn. 175, 22 Atl. 951, 14 L. R. A. 386; Merwin *v.* Wheeler, 41 Conn. 14; Hill *v.* Lord, 48 Me. 83. It was held as long ago as the case of Foxall *v.* Venables, Cro. Eliz. 180, that the inhabitants cannot prescribe for a profit in the soil. This doctrine was affirmed four years later, and the satisfactory reason given that there could be no presumption of a grant for an inhabitant cannot purchase to himself and his successors. Fowler *v.* Dale, Cro. Eliz. 362. See also Whittier *v.* Stockman, 2 Bulstr. 86;

may support a claim for an easement, nothing less than prescription can sustain a claim for a *profit à prendre*. The owner of the fee can be divested of his right only by a grant from himself, or by such enjoyment in another as raises the presumption of a previous grant.[42]

4. Whether Assignable. Where this right is appurtenant to an estate it cannot be severed and assigned separately.[43] But if the right be granted to one in gross it is treated as an estate or interest in land which may be assignable or inheritable if granted in fee.[44]

IV. Distinction Between Easement and License.

An easement is a liberty, privilege, or advantage in land without profit existing distinct from the ownership of the land, and because it is a permanent interest in the land of another with the right to enter at all times and enjoy it, it must be founded upon a grant by writing or upon prescription which presupposes a grant; but a license is an authority to do a particular act or series of acts upon the land of another without possessing any estate therein. A license is founded in personal confidence and is not assignable and requires no writing, as it is not within the statute of frauds, and is revocable at will,[45] while the grant of an easement is within the statute of frauds and must be in writing.[46] The distinction between a license and an easement is often very subtle and difficult to discern, but it is mainly important where the right in question has been conferred by parol and

Fowler *v.* Sanders, Cro. Jac. 446; Weekly *v.* Wildman, 1 Ld. Raym. 405.

42. *Maine.*— Hill *v.* Lord, 48 Me. 83; Littlefield *v.* Maxwell, 31 Me. 134, 50 Am. Dec. 653.

Massachusetts.— Waters *v.* Lilley, 4 Pick. 145, 16 Am. Dec. 333.

New Hampshire.— Nudd *v.* Hobbs, 17 N. H. 524; Perley *v.* Langley, 7 N. H. 233.

New Jersey.—Cobb *v.* Davenport, 33 N. J. L. 223, 97 Am. Dec. 718.

New York.— Smith *v.* Floyd, 18 Barb. 522.

England.— Blewett *v.* Tregonning, 3 A. & E. 554, 1 Hurl. & W. 432, 4 L. J. K. B. 234, 5 N. & M. 308, 30 E. C. L. 260; Constable *v.* Nicholson, 14 C. B. N. S. 230, 32 L. J. C. P. 240, 11 Wkly. Rep. 698, 108 E. C. L. 230; Gateward's Case, 6 Coke 59*b*, Cro. Jac. 152; Cocksedge *v.* Fanshaw, Dougl. (3d ed.) 119; Race *v.* Ward, 4 E. & B. 702, 3 C. L. R. 744, 1 Jur. N. S. 704, 24 L. J. Q. B. 153, 82 E. C. L. 702; Grimstead *v.* Marlowe, 4 T. R. 717, 2 Rev. Rep. 512.

43. Drury *v.* Kent, Cro. Jac. 14.

44. *Illinois.*—Cadwalader *v.* Bailey, 17 R. I. 495, 23 Atl. 20, 14 L. R. A. 300.

Massachusetts.— Goodrich *v.* Burbank, 12 Allen 459, 90 Am. Dec. 161.

New York.— Post *v.* Pearsall, 22 Wend. 425; Leyman *v.* Abeel, 16 Johns. 30.

Ohio.— Boatman *v.* Lasley, 23 Ohio St. 614.

Pennsylvania.— Tinicum Fishing Co. *v.* Carter, 61 Pa. St. 21, 100 Am. Dec. 597.

England.— Muskett *v.* Hill, 5 Bing. N. Cas. 694, 9 L. J. C. P. 201, 7 Scott 855, 35 E. C. L. 371; Welcome *v.* Upton, 8 L. J. Exch. 267, 6 M. & W. 536.

45. *Iowa.*— Cook *v.* Chicago, etc., R. Co., 40 Iowa 451.

Maryland.—Hays *v.* Richardson, 1 Gill & J. 366.

Massachusetts.— Fitch *v.* Seymour, 9 Metc. 462; Cook *v.* Stearns, 11 Mass. 533.

Michigan.— Morrill *v.* Mackman, 24 Mich. 279, 9 Am. Rep. 124.

New York.— Miller *v.* Auburn, etc., R. Co., 6 Hill 61; Mumford *v.* Whitney, 15 Wend. 380, 30 Am. Dec. 60; Thompson *v.* Gregory, 4 Johns. 81, 4 Am. Dec. 255.

Tennessee.—Nunnelly *v.* Southern Iron Co., 94 Tenn. 397, 29 S. W. 361, 28 L. R. A. 421.

Wisconsin.— Hazelton *v.* Putnam, 3 Pinn. 107, 3 Chandl. 117, 54 Am. Dec. 158.

England.— Hewlins *v.* Shippam, 5 B. & C. 221, 7 D. & R. 783, 4 L. J. K. B. O. S. 241, 31 Rev. Rep. 757, 11 E. C. L. 437; Fentiman *v.* Smith, 4 East 107, 7 Rev. Rep. 533; Wood *v.* Ledbitter, 9 Jur. 187, 14 L. J. Exch. 161, 13 M. & W. 838; Thomas *v.* Sorrell, Vaugh. 330.

See 17 Cent. Dig. tit. "Easements," § 4.

Limitations of rule.— In some of the states when the licensee has acted under the authority conferred and incurred expense in the execution of it, equity regards it as an executed contract and will not permit it to be revoked. Johnson *v.* Lewis, 47 Ark. 66, 2 S. W. 329, 14 S. W. 466; Wynn *v.* Garland, 19 Ark. 23, 68 Am. Dec. 190; Cook *v.* Chicago, etc., R. Co., 40 Iowa 451; Beatty *v.* Gregory, 17 Iowa 109, 85 Am. Dec. 546; Wickersham *v.* Orr, 9 Iowa 253, 74 Am. Dec. 348. And see, generally, Licenses.

A resolution by the trustees of a town giving one "liberty to make a roadway and to erect a bridge" does not create an easement, but a license revocable at will. Southampton *v.* Jessup, 10 N. Y. App. Div. 456, 42 N. Y. Suppl. 4.

46. Johnson *v.* Lewis, 47 Ark. 66, 2 S. W. 329, 14 S. W. 466; Wynn *v.* Garland, 19 Ark. 23, 68 Am. Dec. 190.

the question is, whether the agreement creates a mere authority to do acts upon the land of another and hence may be given by parol, or creates a privilege in the land and hence is void, because not in writing.[47]

V. CREATION AND EXISTENCE.

A. By Prescription — 1. IMMEMORIAL USAGE. According to the principles of the common law a right to an incorporeal hereditament may be acquired by lapse of time. This mode of acquisition is denominated prescription and is founded on uninterrupted use and enjoyment time out of mind, or in the quaint langnage of the early writers, "for a time whereof the memory of man runneth not to the contrary."[48] No presumption of a lost grant of a right of way or other easement would be tolerated at common law so long as a time could be shown when it was not in use.[49] At an early date the time for the commencement of memory was fixed by statute at the beginning of the reign of Richard I who ascended the throne in the year 1189.[50] At length by Lord Tenterden's Act the time of prescription was shortened and fixed at twenty, thirty, forty, and sixty years for the different classes of cases.[51]

2. DOCTRINE OF LOST GRANT. The doctrine of lost grant grew up in this way. The common-law judges hesitated to apply the statute of limitations to easements as well as to estates in the soil itself, but for a series of years prior to the passage of Lord Tenterden's Act they were in the habit of instructing juries that if they found that the use of an incorporeal right had been enjoyed continuously and uninterruptedly for a time sufficient to acquire title to the soil by adverse possession, adopting the period of twenty years by analogy to the statute of limitations, they were at liberty to presume a grant.[52] Under this doctrine if it were known that there was no grant, or the circumstances were such that the jury could not find one, the alleged easement failed for want of proof.[53] The purpose of the statute was to relieve the consciences and good sense of juries from the heavy tax which they were called on to incur for the sake of administering substantial justice by making that enjoyment a bar or title of itself which was so before only by the intervention of a jury.[54] In the United States it is generally held in analogy to

47. Cook *v.* Chicago, etc., R. Co., 40 Iowa 451.

48. Johnson *v.* Lewis, 47 Ark. 66, 2 S. W. 329, 14 S. W. 466; Hall *v.* McLeod, 2 Metc. (Ky.) 98, 74 Am. Dec. 400.

49. Johnson *v.* Lewis, 47 Ark. 66, 2 S. W. 329, 14 S. W. 466.

50. Statute of Westminster I, 3 Edw. I, c. 39.

51. St. 2 & 3 Wm. IV, c. 71. For cases construing this act see Eaton *v.* Swansea Waterworks Co., 17 Q. B. 267, 15 Jur. 675, 20 L. J. Q. B. 482, 79 E. C. L. 267; Parker *v.* Mitchell, 11 A. & E. 788, 9 L. J. Q. B. 194, 3 P. & D. 655, 39 E. C. L. 418; Bright *v.* Walker, 1 C. M. & R. 211, 3 L. J. Exch. 250, 4 Tyrw. 502; Wright *v.* Williams, 1 Gale 410, 5 L. J. Exch. 107, 1 M. & W. 77, 1 Tyrw. & G. 375; England *v.* Wall, 12 L. J. Exch. 273, 10 M. & W. 699; Welcome *v.* Upton, 8 L. J. Exch. 267, 6 M. & W. 536; Ward *v.* Robins, 15 M. & W. 237.

Sufficiency of actual uninterrupted enjoyment without title.— It is not necessary that "any person claiming right" to an easement under section 2 of the prescription act of 1832 should, during the whole period of the twenty or forty years, have claimed to be legally entitled against the owner of the servient tenement. Actual uninterrupted enjoyment for the prescribed period, without any title or justification, is enough. Gardner *v.* Hodgson's Kingston Breweries Co., [1900] 1 Ch. 592, 64 J. P. 344, 69 L. J. Ch. 368, 82 L. T. Rep. N. S. 455, 48 Wkly. Rep. 469.

52. Bass *v.* Gregory, 25 Q. B. D. 481, 55 J. P. 119, 59 L. J. Q. B. 574; Angus *v.* Dalton, 4 Q. B. D. 162; Cross *v.* Lewis, 2 B. & C. 686, 4 D. & R. 234, 2 L. J. K. B. O. S. 136, 9 E. C. L. 299; Livett *v.* Wilson, 3 Bing. 115, 3 L. J. C. P. O. S. 186, 10 Moore C. P. 439, 11 E. C. L. 64; Bright *v.* Walker, 1 C. M. & R. 211, 13 L. J. Exch. 250, 4 Tyrw. 502.

A right to any easement may be acquired by an enjoyment of not less than the statutory period commencing prior to the ownership, such enjoyment implying a grant not later than its commencement. Jordeson *v.* Sutton, etc., Gas Co., [1898] 2 Ch. 614, 63 J. P. 137, 67 L. J. Ch. 666, 79 L. T. Rep. N. S. 478, 47 Wkly. Rep. 222.

53. Livett *v.* Wilson, 3 Bing. 115, 3 L. J. C. P. O. S. 186, 10 Moore C. P. 439, 11 E. C. L. 64.

54. Bright *v.* Walker, 1 C. M. & R. 211, 3 L. J. Exch. 250, 4 Tyrw. 502.

the statute of limitations, which applies only to corporeal hereditaments, that the enjoyment of an incorporeal hereditament exclusive and uninterrupted for a time sufficient to acquire title to the soil by adverse possession, affords a conclusive presumption of a grant to be applied as a *presumptio juris et de jure*.[55] Where

55. *Alabama.*— Polly *v.* McCall, 37 Ala. 20.
Arkansas.— Johnson *v.* Lewis, 47 Ark. 66, 2 S. W. 329, 14 S. W. 466.
California.— Thomas *v.* England, 71 Cal. 456, 12 Pac. 491; Kripp *v.* Curtis, 71 Cal. 62, 11 Pac. 879; Barbour *v.* Pierce, 42 Cal. 657; Grigsby *v.* Clear Lake Water Works Co., 40 Cal. 396; Crandall *v.* Woods, 8 Cal. 136.
Connecticut.— Legg *v.* Horn, 45 Conn. 409; Bradley's Fish Co. *v.* Dudley, 37 Conn. 136; Coe *v.* Walcottville Mfg. Co., 35 Conn. 175; Sherwood *v.* Burr, 4 Day 244, 4 Am. Dec. 211.
Delaware.— Huggins *v.* McGregor, 1 Harr. 447; Clawson *v.* Primrose, 4 Del. Ch. 643.
Illinois.— Chicago *v.* Chicago, etc., R. Co., 152 Ill. 561, 38 N. E. 768; McKenzie *v.* Elliott, 134 Ill. 156, 24 N. E. 965; Ballard *v.* Struckman, 123 Ill. 636, 14 N. E. 682; Kuhlman *v.* Hecht, 77 Ill. 570; Keyser *v.* Mann, 36 Ill. App. 596; Ribordy *v.* Pellachoud, 28 Ill. App. 303.
Indiana.— Miller *v.* Richards, 139 Ind. 263, 38 N. E. 854; Postlethwaite *v.* Payne, 8 Ind. 104.
Kentucky.— Kamer *v.* Bryant, 103 Ky. 723, 46 S. W. 14, 20 Ky. L. Rep. 340; Hansford *v.* Berry, 95 Ky. 56, 23 S. W. 665, 15 Ky. L. Rep. 415; Talbott *v.* Thorn, 91 Ky. 417, 16 S. W. 88, 13 Ky. L. Rep. 401; O'Daniel *v.* O'Daniel, 88 Ky. 185, 10 S. W. 638, 10 Ky. L. Rep. 760; Butt *v.* Napier, 14 Bush 39; Bowen *v.* Cooper, 66 S. W. 601, 23 Ky. L. Rep. 2065; Potts *v.* Clark, 62 S. W. 884, 23 Ky. L. Rep. 332; Browning *v.* Davis, 53 S. W. 9, 21 Ky. L. Rep. 786; Benedict *v.* Johnson, 42 S. W. 335, 19 Ky. L. Rep. 937; Henry *v.* Louisville, 42 S. W. 94, 19 Ky. L. Rep. 790; Gatewood *v.* Cooper, 38 S. W. 690, 18 Ky. L. Rep. 869.
Louisiana.— Kennedy *v.* McCollam, 34 La. Ann. 568; Macheca *v.* Avegno, 25 La. Ann. 55.
Maine.— Cole *v.* Bradbury, 86 Me. 380, 29 Atl. 1097; Littlefield *v.* Maxwell, 31 Me. 134, 50 Am. Dec. 653.
Maryland.— Waters *v.* Snouffer, 88 Md. 391, 41 Atl. 785; Barry *v.* Edlavitch, 84 Md. 95, 35 Atl. 170, 33 L. R. A. 294; Cox *v.* Forrest, 60 Md. 74.
Massachusetts.— O'Brien *v.* Goodrich, 177 Mass. 32, 58 N. E. 151; Stearns *v.* Janes, 12 Allen 582; White *v.* Chapin, 12 Allen 516; Melvin *v.* Whiting, 13 Pick. 184; Hill *v.* Crosby, 2 Pick. 466, 13 Am. Dec. 448; Hoffman *v.* Savage, 15 Mass. 130; Gayetty *v.* Bethune, 14 Mass. 49, 7 Am. Dec. 188.
Michigan.— Chase *v.* Middleton, 123 Mich. 647, 82 N. W. 612; Hoag *v.* Place, 93 Mich. 450, 53 N. W. 617, 18 L. R. A. 39; Chapel *v.* Smith, 80 Mich. 100, 45 N. W. 69; Turner *v.* Hart, 71 Mich. 128, 38 N. W. 890, 15 Am. St. Rep. 243.
Minnesota.— Mueller *v.* Fruen, 36 Minn. 273, 30 N. W. 886.
Mississippi.— Hardy *v.* Alabama, etc., R. Co., 73 Miss. 719, 19 So. 661; Alcorn *v.* Sadler, 71 Miss. 634, 14 So. 444, 42 Am. St. Rep. 484; Bonelli *v.* Blackemore, 66 Miss. 136, 5 So. 228.
Missouri.— Boyce *v.* Missouri Pac. R. Co., 168 Mo. 583, 68 S. W. 920, 58 L. R. A. 442; Smith *v.* Musgrove, 32 Mo. App. 241; House *v.* Montgomery, 19 Mo. App. 170.
Nebraska.—Omaha, etc., R. Co. *v.* Rickards, 38 Nebr. 847, 57 N. W. 739.
Nevada.— Chollar-Potosi Min. Co. *v.* Kennedy, 3 Nev. 361, 93 Am. Dec. 409.
New Hampshire.— Smith *v.* Putman, 62 N. H. 639; Wallace *v.* Fletcher, 30 N. H. 434; French *v.* Marstin, 24 N. H. 440, 57 Am. Dec. 294; Watkins *v.* Peck, 13 N. H. 360, 40 Am. Dec. 156.
New Jersey.— Clement *v.* Bettle, 65 N. J. L. 675, 48 Atl. 567; Castner *v.* Riegel, 54 N. J. L. 498, 24 Atl. 484; Lehigh Valley R. Co. *v.* McFarlan, 43 N. J. L. 605; Horner *v.* Stillwell, 35 N. J. L. 307; Cobb *v.* Davenport, 32 N. J. L. 369.
New York.— Lewis *v.* New York, etc., R. Co., 162 N. Y. 202, 56 N. E. 540; Woodruff *v.* Paddock, 130 N. Y. 618, 29 N. E. 1021; Snell *v.* Levitt, 110 N. Y. 595, 18 N. E. 370, 1 L. R. A. 414; Nicholls *v.* Wentworth, 100 N. Y. 455, 3 N. E. 482; Prentice *v.* Geiger, 74 N. Y. 341; Hammond *v.* Zehner, 21 N. Y. 118; Riehlman *v.* Field, 81 N. Y. App. Div. 526, 81 N. Y. Suppl. 239; Lowenberg *v.* Brown, 79 N. Y. App. Div. 414, 79 N. Y. Suppl. 1060; Hey *v.* Collman, 78 N. Y. App. Div. 584, 79 N. Y. Suppl. 778; Bell *v.* Hayes, 69 N. Y. App. Div. 382, 69 N. Y. Suppl. 898; Smith *v.* Sponable, 54 N. Y. App. Div. 615, 66 N. Y. Suppl. 177; Heiser *v.* Gaul, 39 N. Y. App. Div. 162, 57 N. Y. Suppl. 198; Miller *v.* Garlock, 8 Barb. 153; Winne *v.* Winne, 49 Misc. 435, 82 N. Y. Suppl. 647; Lansing *v.* Wiswall, 5 Den. 213; Parker *v.* Foote, 19 Wend. 309; Corning *v.* Gould, 16 Wend. 531.
North Carolina.— Willey *v.* Norfolk, etc., R. Co., 96 N. C. 408, 15 S. E. 446; Benbow *v.* Robbins, 71 N. C. 338.
Ohio.— Pavey *v.* Vance, 56 Ohio St. 162, 46 N. E. 898; Tootle *v.* Clifton, 22 Ohio St. 247, 10 Am. Rep. 732; Bates *v.* Sherwood, 24 Ohio Cir. Ct. 146; Tytus Gardner Paper Co. *v.* Middletown Hydraulic Co., 15 Ohio Cir. Ct. 118, 8 Ohio Cir. Dec. 248.
Oregon.—Coventon *v.* Seufert, 23 Oreg. 548, 32 Pac. 508; Tolman *v.* Casey, 15 Oreg. 83, 13 Pac. 669.
Pennsylvania.— Carter *v.* Tinicum Fishing Co., 77 Pa. St. 310; Okeson *v.* Patterson, 29 Pa. St. 22; Garrett *v.* Jackson, 20 Pa. St. 331; Crawford *v.* Neff, 3 Grant 175; Cooper *v.* Smith, 9 Serg. & R. 26, 11 Am. Dec. 658; Biddle *v.* Ash, 2 Ashm. 211.

the origin of the easement is known a lost grant is not to be presumed.[56] Nevertheless the open, notorious, uninterrupted, adverse use of land under a claim of right for the statutory period may ripen into a title by prescription to an easement, although originally known to be a trespass.[57] Statutes of limitation prescribing the time within which an entry shall be made into lands, tenements, or hereditaments and within which every real, possessory, ancestral, mixed, or other action for any lands, tenements, or hereditaments shall be brought are not deemed to comprehend in terms and within their purview incorporeal rights; but upon the wise principle of such statutes and in analogy to them to quiet men's possession and to put an end to and fix a limit to strife, a rule has been established that after the lapse of the period mentioned in those statutes a grant will be presumed, not that in such cases the court really thinks a grant has been made, but presumes the fact for the purpose of and upon the principle of quieting the possession.[58] It has been held that the presumption, unrebutted, arising from the adverse possession of an incorporeal right continued for so long a time as is fixed by statute as a bar to the recovery of land held adversely is a presumption of law, and is conclusive or sufficient evidence to warrant the court in holding that it confers a right on the possessor to the extent of his use.[59] The owner of the servient tenement cannot overcome the presumption of right arising from an uninterrupted user for the prescriptive period by proof that no grant was in fact made. He may rebut the presumption by contradicting or explaining the facts upon which it rests, but he cannot overcome it by proof in denial of a grant.[60] While the presumption of a grant arising from a long continued adverse and uninterrupted use and enjoyment operates in analogy to the statute of limitations, it differs from the case of title to land claimed by adverse possession. There the owner is disseized, and if such disseizin continues long enough the title becomes complete. A mere verbal protest or prohibition to occupy the premises will not be sufficient without entry. The owner in such case would still be disseized. But title to an easement by adverse user stands on a somewhat different ground. There the owner remains in possession of the premises. The title rests chiefly on his acquiescence in the adverse use, and evidence which disproves such acquiescence rebuts the title to the easement.[61]

3. When Time Begins to Run. Where a right as to land by prescription is claimed, the period required for the prescription to mature does not begin until

Rhode Island.— Brightman *v.* Chapin, 15 R. I. 166, 1 Atl. 412; Evans *v.* Dana, 7 R. I. 306.

Tennessee.— Louisville, etc., R. Co. *v.* Mossman, 90 Tenn. 157, 16 S. W. 64, 25 Am. St. Rep. 670; Ferrell *v.* Ferrell, 1 Baxt. 329.

Texas.— Texas West R. Co. *v.* Wilson, 83 Tex. 153, 18 S. W. 325; School Trustees *v.* Galveston, etc., R. Co., (Civ. App. 1902) 67 S. W. 147.

Utah.— Funk *v.* Anderson, 22 Utah 238, 61 Pac. 1006; Clawson *v.* Wallace, 16 Utah 300, 52 Pac. 9; Harkness *v.* Woodmansee, 7 Utah 227, 26 Pac. 291.

Vermont.— Tracy *v.* Atherton, 36 Vt. 503; Shumway *v.* Simons, 1 Vt. 53.

West Virginia.— Boyd *v.* Woolwine, 40 W. Va. 282, 21 S. E. 1020; Lucas *v.* Smithfield, etc., Turnpike Co., 36 W. Va. 427, 15 S. E. 182; Rogerson *v.* Shepherd, 33 W. Va. 307, 10 S. E. 632.

Wiscansin.— Wilkins *v.* Nicolai, 99 Wis. 178, 74 N. W. 103; Carmody *v.* Mulrooney, 87 Wis. 552, 58 N. W. 1109; Pentland *v.* Keep, 41 Wis. 490; Haag *v.* Delorme, 30 Wis. 591.

United States.— Rickard *v.* Williams, 7 Wheat. 59, 5 L. ed. 398; Hazard *v.* Robinson, 11 Fed. Cas. No. 6,281, 3 Mason 272.

See 17 Cent. Dig. tit. "Easements," § 13.

56. Claflin *v.* Boston, etc., R. Co., 157 Mass. 489, 32 N. E. 659, 20 L. R. A. 638; Smith *v.* New York, etc., R. Co., 142 Mass. 21, 6 N. E. 842.

57. Sibley *v.* Ellis, 11 Gray (Mass.) 417.

58. Lehigh Valley R. Co. *v.* McFarlan, 43 N. J. L. 605; Campbell *v.* Smith, 8 N. J. L. 140, 14 Am. Rep. 400.

59. Tracy *v.* Atherton, 36 Vt. 503.

Not on fiction of a grant.— Roads by prescription rest upon uninterrupted adverse user for twenty-one years in analogy to the statute of limitations and not on the fiction of a grant. *In re* Krier's Private Road, 73 Pa. St. 109.

60. Lehigh Valley R. Co. *v.* McFarlan, 43 N. J. L. 605; Angus *v.* Dalton, 4 Q. B. D. 162.

61. Powell *v.* Bagg, 8 Gray (Mass.) 441, 69 Am. Dec. 262; Lehigh Valley R. Co. *v.* McFarlan, 30 N. J. Eq. 180; Workman *v.* Curran, 89 Pa. St. 226.

some act or fact exists giving the party against whom the prescriptive right is set up a cause of action.[62] The use by the grantee of an easement in land previously mortgaged by the grantor does not begin to be adverse as against the mortgagee until he takes possession of the land.[63] Where a private right of way is claimed by prescription over a former highway the adverse use commences from the abandonment of the highway.[64] If an easement is enjoyed under a deed there can be no adverse enjoyment until the expiration of the right under the deed,[65] although an easement created by grant or reservation may be enlarged by prescription.[66]

4. No Prescription Against Public. No prescriptive right can be acquired against a sovereign nation or state.[67] But where by the express terms of the statute title by disseizin may be acquired against the state as readily as against a private person, by analogy, there seems to be no good reason why prescriptive rights may not be acquired in real property of the state.[68]

5. Characteristics of the User — a. Must Be With the Knowledge and Acquiescence of Owner. A user to ripen into a prescriptive right must be continued under a claim of right, with the knowledge and acquiescence of the owner of the servient tenement,[69] or at least must be so visible, open, and notorious that knowledge will be presumed.[70] The enjoyment must be of such a character that an ordinary owner of land, diligent in the protection of his interests, would have or must be taken to have, a reasonable opportunity of becoming aware of that enjoyment.[71] The word "clam" as applied to the enjoyment by which an easement may be acquired does not mean surreptitiously or fraudulently, but only

62. Van Duzen *v.* Schraffenberger, 2 Ohio S. & C. Pl. Dec. 470, 7 Ohio N. P. 294. Thus where a right by prescription to maintain a railroad bridge and change the current of a stream and injure land of a riparian owner below by causing it to wash away his land is claimed, the commencement of the time required for the prescription to ripen is not from the erection of the bridge, but from the first actual damage to the land consequent on the erection of the bridge. Eells *v.* Chesapeake, etc., R. Co., 49 W. Va. 65, 38 S. E. 479, 87 Am. St. Rep. 787.

Preëmption of government land.— Where plaintiff preëmpted government land, his right of sole possession and use was sufficient estate in him, without a patent, to start the statute of limitations running as to a right of way claimed in behalf of such lands over lands of another. Frantz *v.* Mendonca, 131 Cal. 205, 63 Pac. 361.

63. Murphy *v.* Welch, 128 Mass. 489.

64. Black *v.* O'Hara, 54 Conn. 17, 5 Atl. 598.

65. Claflin *v.* Boston, etc., R. Co., 157 Mass. 489, 32 N. E. 659, 20 L. R. A. 638.

66. Atkins *v.* Bordman, 20 Pick. (Mass.) 291.

67. Glaze *v.* Western, etc., R. Co., 67 Ga. 761; Miser *v.* O'Shea, 37 Oreg. 231, 62 Pac. 491, 82 Am. St. Rep. 751.

68. Atty.-Gen. *v.* Revere Copper Co., 152 Mass. 444, 25 N. E. 605, 9 L. R. A. 510.

69. *Alabama.*— Stewart *v.* White, 128 Ala. 202, 30 So. 526, 55 L. R. A. 211.

California.— Richard *v.* Hupp, (1894) 37 Pac. 920; American Co. *v.* Bradford, 27 Cal. 360.

Georgia.— Everedge *v.* Alexander, 75 Ga. 858.

Illinois.— Chicago, etc., R. Co. *v.* Hoag, 90 Ill. 339; Warren *v.* Jacksonville, 15 Ill. 236, 58 Am. Dec. 610.

Indiana.— Peterson *v.* McCullough, 50 Ind. 35.

Massachusetts.— Sargent *v.* Bullard, 9 Pick. 251; Medford First Parish *v.* Pratt, 4 Pick. 222; Gayetty *v.* Bethune, 14 Mass. 49, 7 Am. Dec. 188.

New Hampshire.— Wallace *v.* Fletcher, 30 N. H. 434; Knowles *v.* Dow, 22 N. H. 387, 55 Am. Dec. 163.

New York.— Treadwell *v.* Inslee, 120 N. Y. 458, 24 N. E. 651; Parker *v.* Foote, 19 Wend. 309.

Pennsylvania.— Jones *v.* Crow, 32 Pa. St. 398.

Tennessee.— Ferrell *v.* Ferrell, 1 Baxt. 329.

Virginia.— Reid *v.* Garnett, 101 Va. 47, 43 S. E. 182.

See 17 Cent. Dig. tit. "Easements," § 15.

70. Carbrey *v.* Willis, 7 Allen (Mass.) 364, 83 Am. Dec. 688; Hurt *v.* Adams, 86 Mo. App. 73; Cobb *v.* Davenport, 32 N. J. L. 369; Treadwell *v.* Inslee, 120 N. Y. 458, 24 N. E. 651; Pearsall *v.* Westcott, 45 N. Y. App. Div. 34, 60 N. Y. Suppl. 816.

User sufficient to charge with notice.— Where the owner of a servient estate had no actual notice of the use of a certain right of way over the estate, it was held that continuous and open use for a period of over twenty years would charge him with notice. O'Brien *v.* Goodrich, 177 Mass. 32, 58 N. E. 151.

71. Union Lighterage Co. *v.* London Graving Dock Co., [1902] 2 Ch. 557, 71 L. J. Ch. 791, 87 L. T. Rep. N. S. 381.

in such a manner as could not reasonably be expected to attract the notice of the servient owner.[72]

b. Must Be Continuous and Uninterrupted. To acquire an easement by prescription the use must be continuous and uninterrupted. It is one of the essential ingredients of a valid prescription that it must have a continuous and peaceable use and enjoyment.[73] A total cessation of the enjoyment of an easement for a considerable time such as to give the owner good reason to believe that the claim was abandoned is such an interruption of the user as will prevent the maturing of a prescriptive right,[74] and if an obstruction to an unauthorized way be put up before the time of prescription has run the running of the time will be interrupted, although the obstruction is very soon torn down and the use of the way resumed.[75] Interruptions of the use of an easement when brought to the knowledge of the claimant rebut the presumption of a grant, unless such interruptions are promptly contested by the claimant and the easement reasserted.[76] An easement cannot arise by prescription if the owner of the servient estate has habitually broken and interrupted the use at will[77] or denied the right and threatened to put an end to the use and enjoyment of it,[78] for it cannot be said that the owner has acquiesced in a right which has been exercised against his protest.[79] But it has been held that mere denials of the right, complaints, remonstrances, or prohibitions of user unaccompanied by any act which in law would amount to a disturbance and be actionable as such will not prevent the acquisition of a right by prescription.[80] It has also been held that an isolated instance of attempted inter-

72. Union Lighterage Co. *v.* London Graving Dock Co., [1901] 2 Ch. 300, 70 L. J. Ch. 558, 84 L. T. Rep. N. S. 527.

73. *Alabama.*— Jesse French Piano, etc., Co. *v.* Forbes, 135 Ala. 277, 33 So. 183.

Arkansas.— Johnson *v.* Lewis, 47 Ark. 66, 2 S. W. 329, 14 S. W. 466.

California.— Richard *v.* Hupp, (1894) 37 Pac. 920; American Co. *v.* Bradford, 27 Cal. 360.

Illinois.— Chicago, etc., R. Co. *v.* Hoag, 90 Ill. 339.

Indiana.— Peterson *v.* McCullough, 50 Ind. 35.

Kansas.— Phœnix Ins. Co. *v.* Haskett, 64 Kan. 93, 67 Pac. 446.

Louisiana.— Delahoussaye *v.* Judice, 13 La. Ann. 587, 71 Am. Dec. 521.

Maine.— Pierre *v.* Fernald, 26 Me. 436, 46 Am. Dec. 573.

Maryland.— Day *v.* Allender, 22 Md. 511.

Massachusetts.— Sargent *v.* Ballard, 9 Pick. 251; Medford First Parish *v.* Pratt, 4 Pick. 222; Gayetty *v.* Bethune, 14 Mass. 49, 7 Am. Dec. 188.

Minnesota.— Schulenberg *v.* Zimmerman, 86 Minn. 70, 90 N. W. 156.

New Hampshire.— Wallace *v.* Fletcher, 30 N. H. 434.

New York.— Smith *v.* Floyd, 18 Barb. 522; Miller *v.* Garlock, 8 Barb. 153; Parker *v.* Foote, 19 Wend. 309.

Pennsylvania.— Jones *v.* Crow, 32 Pa. St. 398.

Tennessee.— Ferrell *v.* Ferrell, 1 Baxt. 329.

Texas.— Rhodes *v.* Whitehead, 27 Tex. 304, 84 Am. Dec. 631.

Vermont.— Shumway *v.* Simons, 1 Vt. 53.

Virginia.— Reid *v.* Garnett, 101 Va. 47, 43 S. E. 182.

Canada.— Huddlestone *v.* Love, 13 Manitoba 432.

See 17 Cent. Dig. tit. "Easements," § 15.

74. Pollard *v.* Barnes, 2 Cush. (Mass.) 191.

75. Brayden *v.* New York, etc., R. Co., 172 Mass. 225, 51 N. E. 1081.

Plowing and cultivation of land over which another claims a right of way is such an interruption of the use thereof as will, being unexplained, tend to prevent an easement by prescription from attaching. Sears *v.* Hayt, 37 Conn. 406; Barker *v.* Clark, 4 N. H. 380, 17 Am. Dec. 428.

Obstruction of opening through fence.—The running of the statute so as to give a right of way across a railroad by prescription is interrupted by the company's obstructing the opening through its fence, although the obstruction is torn down within a short time. Brayden *v.* New York, etc., R. Co., 172 Mass. 225, 51 N. E. 1081.

Gate across way.— That there was a gate maintained across an alley is of no consequence if the owner of the dominant estate and those under whom he claims used it whenever they chose to do so. Demuth *v.* Amweg, 90 Pa. St. 181.

76. Willey *v.* Norfolk, etc., R. Co., 96 N. C. 408, 1 S. E. 446.

77. Kirschner *v.* Western, etc., R. Co., 67 Ga. 760.

78. Reid *v.* Garnett, 101 Va. 47, 43 S. E. 182.

79. Chicago, etc., R. Co. *v.* Hoag, 90 Ill. 339; Wooldridge *v.* Coughlin, 46 W. Va. 345, 33 S. E. 233.

80. Lehigh Valley R. Co. *v.* McFarlan, 43 N. J. L. 605; Okeson *v.* Patterson, 29 Pa. St. 22. Thus where a party enjoys the use of an easement in a manner otherwise sufficient to gain a right by adverse use he will not be prevented from acquiring the right even if the other party owning the servient estate

ruption of the user resulting in no actual interruption and followed by no attempt to test the right will not as a matter of law necessarily destroy the presumption of a grant founded on a user in other respects sufficient.[81]

c. Must Be Adverse. A user to ripen into a prescriptive right must be adverse, not by license or favor, but under a claim or assertion of right hostile to the rights of the owner, so as to expose the claimant to an action of trespass if his claim is not well founded.[82] Continuance for the statutory period of a use permissive in its inception will not ripen into a hostile right,[83] and the use of a way over the land of another will not be deemed adverse where it is also used by the

verbally objects or denies the right occasionally during such user, if he does not in any way interfere with or interrupt that enjoyment, having the power to do so, and the easement being of such a character that the owner of the dominant estate had only to enjoy the use without other adversary acts on his part. Kimball *v.* Ladd, 42 Vt. 747. *Compare* Powell *v.* Bagg, 8 Gray (Mass.) 441, 69 Am. Dec. 262, holding that if the owner of land while on the land forbids the owner of adjoining land to enter thereon and orders him off while there for the purpose of repairing an aqueduct, under a claim of an easement in the aqueduct by adverse possession, such verbal order, although unaccompanied by further acts, is admissible as evidence of an interruption of an enjoyment of the easement.

81. Connor *v.* Sullivan, 40 Conn. 26, 16 Am. Rep. 10.

82. *Alabama.*— Sharpe *v.* Marcus, 137 Ala. 147, 33 So. 821; Jesse French Piano, etc., Co. *v.* Forbes, 135 Ala. 277, 33 So. 183; Stewart *v.* White, 128 Ala. 202, 30 So. 526, 55 L. R. A. 211.

California.— Clarke *v.* Clarke, 133 Cal. 667, 66 Pac. 10; Richard *v.* Hupp, (1894) 37 Pac. 920.

Connecticut.— Whiting *v.* Gaylord, 66 Conn. 337, 34 Atl. 85, 50 Am. St. Rep. 87; Bradley's Fish Co. *v.* Dudley, 37 Conn. 136; Tucker *v.* Jewett, 11 Conn. 311.

Illinois.— Chicago, etc., Co. *v.* Ives, 202 Ill. 69, 66 N. E. 940; Rose *v.* Farmington, 196 Ill. 226, 63 N. E. 631; Cleveland, etc., R. Co. *v.* Munsell, 192 Ill. 430, 61 N. E. 374; Lambe *v.* Manning, 171 Ill. 612, 49 N. E. 509; Chicago, etc., R. Co. *v.* Hoag, 90 Ill. 339.

Indiana.— Peterson *v.* McCullough, 50 Ind. 35; Kibbey *v.* Richards, 30 Ind. App. 101, 65 N. E. 541, 96 Am. St. Rep. 333.

Iowa.— Friday *v.* Henah, 113 Iowa 425, 85 N. W. 768.

Kansas.— Phœnix Ins. Co. *v.* Haskett, 64 Kan. 93, 67 Pac. 446; Atchison, etc., R. Co. *v.* Conlon, 62 Kan. 416, 63 Pac. 432, 53 L. R. A. 781.

Kentucky.— Manier *v.* Myers, 4 B. Mon. 514; Louisville, etc., R. Co. *v.* Dickey, 72 S. W. 332, 24 Ky. L. Rep. 1710; Patterson *v.* Griffith, 62 S. W. 884, 23 Ky. L. Rep. 334; Abell *v.* Payne, 62 S. W. 880, 23 Ky. L. Rep. 243; Thornton *v.* Louisville, etc., R. Co., 39 S. W. 694, 19 Ky. L. Rep. 96.

Maine.— Donnell *v.* Clark, 19 Me. 174.

Maryland.— Waters *v.* Snouffer, 88 Md. 391, 41 Atl. 785; Clark *v.* Henckel, (1893) 26 Atl. 1039; Day *v.* Allender, 22 Md. 511.

Massachusetts.—Kilburn *v.* Adams, 7 Metc. 33, 39 Am. Dec. 754; Sargent *v.* Ballard, 9 Pick. 251; Medford First Parish *v.* Pratt, 4 Pick. 222; Gayetty *v.* Bethune, 14 Mass. 49, 7 Am. Dec. 188.

Michigan.— People *v.* Ferguson, 119 Mich. 373, 78 N. W. 334.

Minnesota.— Schulenberg *v.* Zimmerman, 86 Minn. 70, 90 N. W. 156.

Missouri.— Hurt *v.* Adams, 86 Mo. App. 73.

New Hampshire.— Beach *v.* Morgan, 67 N. H. 529, 41 Atl. 349, 68 Am. St. Rep. 692; Wallace *v.* Fletcher, 30 N. H. 434.

New Jersey.— Cobb *v.* Davenport, 32 N. J. L. 369.

New York.— Buffalo *v.* Delaware, etc., R. Co., 68 N. Y. App. Div. 488, 74 N. Y. Suppl. 343; India Wharf Brewing Co. *v.* Brooklyn Wharf, etc., Co., 59 N. Y. App. Div. 83, 69 N. Y. Suppl. 274; Smith *v.* Floyd, 18 Barb. 522; Miller *v.* Garlock, 8 Barb. 153; Luce *v.* Carley, 24 Wend. 451, 35 Am. Dec. 637; Hart *v.* Vose, 19 Wend. 365; Parker *v.* Foote, 19 Wend. 309.

North Carolina.— Mebane *v.* Patrick, 46 N. C. 23; Felton *v.* Simpson, 33 N. C. 84.

Pennsylvania.— Jones *v.* Crow, 32 Pa. St. 398; Esling *v.* Williams, 10 Pa. St. 126; O'Brien's Appeal, 11 Wkly. Notes Cas. 229.

South Carolina.— Bailey *v.* Gray, 53 S. C. 503, 31 S. E. 354; Nash *v.* Peden, 1 Speers 17; Hogg *v.* Gill, 1 McMull. 329.

Tennessee.— Connor *v.* Frierson, 98 Tenn. 183, 38 S. W. 1031; Ferrell *v.* Ferrell, 1 Baxt. 329; Murray *v.* Ealy, (Ch. App. 1899) 57 S. W. 412.

Texas.— Klein *v.* Gehrung, 25 Tex. Suppl. 232, 78 Am. Dec. 565.

Vermont.— Dee *v.* King, 73 Vt. 375, 50 Atl. 1109; Wilder *v.* Wheeldon, 56 Vt. 344.

Virginia.— Reid *v.* Garnett, 101 Va. 47, 43 S. E. 182; Gaines *v.* Merryman, 95 Va. 660, 29 S. E. 738.

Wisconsin.— Frye *v.* Highland, 109 Wis. 292, 85 N. W. 351.

England.— Daniel *v.* North, 11 East 372; Campbell *v.* Wilson, 3 East 294, 7 Rev. Rep. 462; Easton *v.* Isted, 71 L. J. Ch. 442, 86 L. T. Rep. N. S. 442, 50 Wkly. Rep. 472; Barker *v.* Richardson, 4 B. & Ald. 579, 23 Rev. Rep. 400, 6 E. C. L. 609.

See 17 Cent. Dig. tit. "Easements," § 23.

83. Pennsylvania R. Co. *v.* Hulse, 59 N. J. L. 54, 35 Atl. 790.

owner.[84] So a user by an individual which is not distinguished from that of the public will be considered permissive and not adverse, unless there is evidence that it was under a claim of right in himself and that the owner knowing of such claim acquiesced in it.[85] If one offers to purchase a right adversely used before the full period of prescription has elapsed it is evidence of an admission that he at that time had no title.[86] But negotiations in regard to the purchase of the right after it has matured by prescription will not conclude the party from relying upon the presumption of a grant.[87]

d. Must Not Be Permissive. A mere permissive use of the land of another for any length of time confers no rights of continued enjoyment. The owner may prohibit the use or discontinue it altogether at his pleasure so long as it is merely permissive.[88] It has been held, however, that the fact that the use began by permission will not affect the prescriptive right if all the other requisites

84. Long *v.* Mayberry, 96 Tenn. 378, 36 S. W. 1040, holding further that the doing of work on the way, by keeping it in repair for the use of both parties, will not estop the owner from denying the right to an easement.

85. Cobb *v.* Davenport, 32 N. J. L. 369.

86. Watkins *v.* Peck, 13 N. H. 360, 40 Am. Dec. 156.

87. Watkins *v.* Peck, 13 N. H. 360, 40 Am. Dec. 156.

Application for a license to use way.— A right of way having become established by adverse use will not be divested by applying for and obtaining a license to use it, but it would be strong evidence to show that the previous use was not under a claim of right. Tracy *v.* Atherton, 36 Vt. 503.

88. *Alabama.*— Sharpe *v.* Marcus, 137 Ala. 147, 33 So. 821.

California.— Thomas *v.* England, 71 Cal. 456, 12 Pac. 491.

Connecticut.— Manion *v.* Creigh, 37 Conn. 462; Pierce *v.* Selleck, 18 Conn. 321.

Georgia.— Nott *v.* Tinley, 69 Ga. 766.

Illinois.— Chicago, etc., R. Co. *v.* Ives, 202 Ill. 69, 66 N. E. 940; Dexter *v.* Tree, 117 Ill. 532, 6 N. E. 506; Kuhlman *v.* Hecht, 77 Ill. 570; Quincy *v.* Jones, 76 Ill. 231, 20 Am. Rep. 243.

Indiana.— Cargar *v.* Fee, 140 Ind. 572, 39 N. E. 93; Conner *v.* Woodfill, 126 Ind. 85, 25 N. E. 876, 22 Am. St. Rep. 568; Parish *v.* Kaspare, 109 Ind. 586, 10 N. E. 109; Hill *v.* Hagaman, 84 Ind. 287.

Kentucky.— Conyers *v.* Scott, 94 Ky. 123, 21 S. W. 530, 14 Ky. L. Rep. 784; Hall *v.* McLeod, 2 Metc. 98, 74 Am. Dec. 400; Strohmier *v.* Leahy, 9 S. W. 238, 10 Ky. L. Rep. 333.

Massachusetts.— Johnson *v.* Knapp, 150 Mass. 267, 23 N. E. 40; Deerfield *v.* Connecticut River R. Co., 144 Mass. 325, 11 N. E. 105; Bachelder *v.* Wakefield, 8 Cush. 243; Thomas *v.* Marshfield, 13 Pick. 240; Medford *v.* Pratt, 4 Pick. 222; Gayetty *v.* Bethune, 14 Mass. 49, 7 Am. Dec. 188.

Minnesota.— Minneapolis Western R. Co. *v.* Minneapolis, etc., R. Co., 58 Minn. 128, 59 N. W. 983.

Mississippi.— Lanier *v.* Booth, 50 Miss. 410.

Missouri.— Nelson *v.* Nelson, 41 Mo. App. 130.

New Hampshire.— Beach *v.* Morgan, 67 N. H. 529, 41 Atl. 349, 68 Am. St. Rep. 692; Taylor *v.* Gerrish, 59 N. H. 569; Stevens *v.* Dennett, 51 N. H. 324; Burnham *v.* McQuesten, 48 N. H. 446.

New Jersey.— Heiser *v.* Martin, 9 N. J. L. J. 277.

New York.— White *v.* Manhattan R. Co., 139 N. Y. 19, 34 N. E. 887; Wiseman *v.* Lucksinger, 84 N. Y. 31, 38 Am. Rep. 479; Eckerson *v.* Crippen, 39 Hun 419; White *v.* Sheldon, 35 Hun 193.

North Carolina.— Ingraham *v.* Hough, 46 N. C. 39.

Ohio.— Elster *v.* Springfield, 49 Ohio St. 82, 30 N. E. 274.

Pennsylvania.— Bennett *v.* Biddle, 140 Pa. St. 396, 21 Atl. 363; Demuth *v.* Amweg, 90 Pa. St. 181; Chestnut Hill, etc., Tp. Co. *v.* Piper, 77 Pa. St. 432.

South Carolina.— Bailey *v.* Gray, 53 S. C. 503, 31 S. E. 354; Turnbull *v.* Rivers, 3 McCord 131, 15 Am. Dec. 622; Witter *v.* Harvey, 1 McCord 67, 10 Am. Dec. 650.

Texas.— Klein *v.* Gehrung, 25 Tex. Suppl. 232, 78 Am. Dec. 565.

Wisconsin.— Thoemke *v.* Fiedler, 91 Wis. 386, 64 N. W. 1030; Pinkum *v.* Eau Claire, 81 Wis. 301, 51 N. W. 550.

United States.— Kirk *v.* Smith, 9 Wheat. 241, 6 L. ed. 81.

See 17 Cent. Dig. tit. "Easements," § 24.

A parol license, given before the commencement of the prescriptive period, under Prescription Act (1832), § 2, whether gratuitous or for a consideration, will suffice to defeat actual, uninterrupted enjoyment in respect to a twenty-year title, but is insufficient to defeat such enjoyment for forty years, which is absolute and conclusive evidence of title, in the absence of any written consent or agreement. Gardner *v.* Hodgson's Kingston Breweries Co., [1900] 1 Ch. 592, 64 J. P. 344, 69 L. J. Ch. 368, 82 L. T. Rep. N. S. 455, 48 Wkly. Rep. 469.

As a guardian cannot acquire an interest hostile to his wards in their estate it will be conclusively presumed that a passway which he opened over their lands for his and their convenience was permissive merely, and that it so continued throughout the term of the

exist.[89] When a licensee renounces the authority under which he began the use and claims it as his own right, and that fact is brought to the knowledge of the licensor, after which the licensee continues the use under such adverse claim exclusively, continuously, and uninterruptedly for the full prescriptive period, the right will become absolute.[90] Nevertheless to transform a permissive use into an adverse one there must be a distinct and positive assertion of a right hostile to the rights of the owner, and such assertion must be brought to his attention.[91] Although a parol grant of an easement is invalid under the statute of frauds, yet where a person under such grant uses the land of another in a manner hostile to the rights of the owner for a sufficient length of time, he thereby acquires an easement by prescription,[92] for the use of an easement under a claim of right by virtue of a parol contract is adverse and not permissive.[93] And where by parol agreement the owners of adjacent lots have dedicated an alley to the common use of the lots and have erected their buildings in reference to the alley, the easement becomes appurtenant to each lot and is not defeated by the statute of frauds, and a subsequent purchaser of one of the lots takes an easement as an appurtenance.[94] Where a use is substantially in accordance with the terms of a grant or reservation, it will be deemed to have been under the same and not adverse, and no prescriptive right will be gained.[95]

e. User by Successive Occupants. In order that the periods of user of successive occupants may so accumulate as to make up the full period of prescription, there must be a privity of estate between them.[96] The periods of enjoyment by an ancestor and his heir may be added to make out the full period of prescription,[97] and so of the periods of enjoyment of vendor and purchaser or persons

guardianship. Patterson *v.* Griffith, 62 S. W. 884, 23 Ky. L. Rep. 334.

89. McKenzie *v.* Elliott, 134 Ill. 156, 24 N. E. 965; Butt *v.* Napier, 14 Bush (Ky.) 39; Nicholls *v.* Wentworth, 100 N. Y. 455, 3 N. E. 482.

Permission of a perpetual or unlimited character.— Where the owner of a spring of water agreed that the grantor of plaintiff might always or forever draw water from the spring for the use of his house by bearing a proportionate part of the expense of an aqueduct through which the water was to be carried both to the house of plaintiff and to that of the owner of the spring, and under this agreement plaintiff and his grantors did so obtain and use water from the spring for a period of more than fifteen years without interruption, it was held that plaintiff thereby acquired a right by prescription so to obtain and use the water. Arbuckle *v.* Ward, 29 Vt. 43.

90. Nelson *v.* Nelson, 41 Mo. App. 130.

91. Hurt *v.* Adams, 86 Mo. App. 73.

92. Talbott *v.* Thorn, 91 Ky. 417, 16 S. W. 88, 13 Ky. L. Rep. 401; Jewett *v.* Hussey, 70 Me. 433.

93. Stearns *v.* Janes, 12 Allen (Mass.) 582; House *v.* Montgomery, 19 Mo. App. 170; Boyd *v.* Woolwine, 40 W. Va. 282, 21 S. E. 1020.

94. Rhea *v.* Forsyth, 37 Pa. St. 503, 78 Am. Dec. 441.

95. Atkins *v.* Bordman, 2 Metc. (Mass.) 457, 37 Am. Dec. 100. Thus where plaintiff by his deed had a right of way over a certain lot, the fact that he used other portions of the lot for teams to stand upon does not give him a right by prescription, the use being substantially in accordance with the grant was deemed to be adverse. Smith *v.* Wiggin, 52 N. H. 112.

96. Bryan *v.* East St. Louis, 12 Ill. App. 390. Thus where a former owner of land had enjoyed an easement for less than twenty years, when the commonwealth confiscated his land and conveyed it to plaintiff, who likewise enjoyed the easement, it was held that the time of enjoyment by the former owner could not be added to the time of enjoyment by plaintiff in order to make up the twenty years (Sargent *v.* Ballard, 9 Pick. (Mass.) 251); and an easement cannot be acquired by adverse possession while the owner of the servient tenement as agent of the owner of the dominant tenement lets the latter to third persons for short and not continuous terms (Holland *v.* Long, 7 Gray (Mass.) 486).

Dominant estate owned by unincorporated association.— Where a fishing-place and fishing implements were owned by sundry persons as an unincorporated association, and the different interests were from time to time transferred as personal property, involving frequent changes in the membership of the association, it was held that the adverse use of a way to the fishing-place by the successive owners was to be regarded as a continuous use, and that thereby a right of way might be acquired appurtenant to the fishing-place and accruing to the benefit of the persons who should be owners at the end of the period of prescription. Bradley's Fish Co. *v.* Dudley, 37 Conn. 136.

97. Cole *v.* Bradbury, 86 Me. 380, 29 Atl. 1097; Sargent *v.* Ballard, 9 Pick. (Mass.) 251; Dodge *v.* Stacy, 39 Vt. 558.

claiming under the same title may be added to make out the complete prescriptive period.[98]

f. Disability of Party to Resist Use or Make Presumed Grant. Since a prescription presumes a grant and cannot exist where there is no power to grant, it follows that a prescriptive right cannot be acquired against a person who is under legal disability and unable in law to resist the adverse claim if it is not well founded.[99] And moreover it must be of something which one party could lawfully have granted to the other.[1] Inasmuch as the acquisition of an easement by adverse use follows the analogy of the acquisition of the title by adverse possession, it has been held that a disability arising after the adverse use has commenced and has become known to the owner of the servient estate does not suspend the acquisition of the right or extend the time necessary to acquire it.[2] This doctrine has been denied in another decision which holds that the adverse user is suspended during the period of disability.[3]

g. Unity of Title to Dominant and Servient Estates. The time during which the alleged dominant and servient estates were owned by the same person cannot be considered in determining whether or not an easement has been acquired by prescription.[4] Where the adverse enjoyment of an easement has been for a time interrupted by the unity of seizin and possession of the dominant and the servient estates, the times of enjoyment before and after such interruption cannot be added together to make out the full period of prescription.[5] Neither can time be

98. Ross *v.* Thompson, 78 Ind. 90; Cole *v.* Bradbury, 86 Me. 380, 29 Atl. 1097; Leonard *v.* Leonard, 7 Allen (Mass.) 277; Reed *v.* West, 16 Gray (Mass.) 283; Sargent *v.* Ballard, 9 Pick. (Mass.) 251.

99. Peterson *v.* McCullough, 50 Ind. 35; Watkins *v.* Peck, 13 N. H. 360, 40 Am. Dec. 156; Saunders *v.* Simpson, 97 Tenn. 382, 37 S. W. 195; Ferrell *v.* Ferrell, 1 Baxt. (Tenn.) 329; Austen *v.* Hall, 93 Tex. 591, 57 S. W. 563.

Land of an insane person.— An easement in the land of an insane person cannot be acquired by prescription until the expiration of such time after his death or the removal of his disability as would bar an action by him, or his legal representative for the land, no matter how long such disability may continue. Edson *v.* Munsell, 10 Allen (Mass.) 557.

Cumulative disabilities.— No presumption of a grant arises from the adverse enjoyment of an easement against a minor or a *feme covert*, but a second disability added to or assumed during the existence of the one operating when the adverse use began is to be disregarded. Thus a coverture taking place during infancy is not to be considered after the infancy is ended. Reimer *v.* Stuber, 20 Pa. St. 458, 59 Am. Dec. 744.

Land in possession of tenant for life or for years.— No user of land by a third person not injurious to the reversion will create an easement therein as against the owner of the fee where during the whole period of such user the land has been in the possession of a tenant for life or years. Pentland *v.* Keep, 41 Wis. 490.

1. Peterson *v.* McCullough, 50 Ind. 35.

Land held by Indians.— There can be no prescriptive right of way over land held by a tribe of Indians forbidden by statute to sell their lands. Woodworth *v.* Raymond, 51 Conn. 70.

2. Ballard *v.* Demmon, 156 Mass. 449, 453, 31 N. E. 635; Tracy *v.* Atherton, 36 Vt. 503.

3. Lamb *v.* Crosland, 4 Rich. (S. C.) 536.

4. *Connecticut.*— Whiting *v.* Gaylord, 66 Conn. 337, 34 Atl. 85, 50 Am. St. Rep. 87.

Massachusetts.— Murphy *v.* Welch, 128 Mass. 489.

Missouri.— Vossen *v.* Dautel, 116 Mo. 379, 28 S. W. 734.

New Jersey.— Stuyvesant *v.* Woodruff, 21 N. J. L. 133, 47 Am. Dec. 156.

Pennsylvania.— Church *v.* Dobbins, 12 Pa. Co. Ct. 375.

South Carolina.— Payne *v.* Williams, 2 Speers 15.

Texas.— International, etc., R. Co. *v.* Bost, 2 Tex. App. Civ. Cas. § 383.

Canada.— *Re* Cockburn, 27 Ont. 450.

See 17 Cent. Dig. tit. "Easements," § 20.

Application of rule.— Where the owners of a mill claimed an easement by prescription in the lot of another person and it appeared that the mill and the lot in which the easement was claimed were during a part of the twenty years next preceding owned by the same person, it was held that the time of such ownership should be excluded from the period required to establish a right by prescription. Mansur *v.* Blake, 62 Me. 38.

Effect of wrongful occupancy.— The time for acquisition of an easement by prescription does not run while the dominant and servient tenements are in the occupation of the same person, even though the occupation of the servient tenement be wrongful and without the privity of the true owner. Innes *v.* Ferguson, 21 Ont. App. 323 [*affirmed* in 24 Can. Supreme Ct. 703].

5. Manning *v.* Smith, 6 Conn. 289; Onley *v.* Gardiner, 4 M. & W. 496.

counted during which the claimant of the right was in possession of the alleged servient estate as tenant of the owner.[6] But the fact that the lessee of the dominant estate is at the same time the lessee of the servient estate will not break the continuity of the adverse use and interrupt the running of the statute.[7] A person may, however, acquire by prescription an easement in land of which he is tenant in common.[8] So also sundry tenants in common may acquire by adverse user for the benefit of and as appurtenant to the land owned in common an easement over land owned by one of them in severalty.[9]

h. Extent and Manner of User. In order to acquire an easement by prescription, the adverse user must not only be continuous in point of time, but substantially identical during the whole of the statutory period with respect to manner and extent.[10] It has been held, however, that a more extensive and burdensome use for a portion of the prescriptive period will not impair the effect of such user as has been continuous for the full prescriptive period.[11] No prescriptive right can be acquired which is so extensive in its character and the manner of its user as to destroy the ordinary use of the whole property by the owner.[12]

6. Particular Easements Created by Prescription — a. Rights of Way — (i) *Right to Acquire by Prescription* **— (A)** *In General.* A grant of a right of way may be presumed from an uninterrupted adverse user for the full prescriptive period.[13]

6. Pierre *v.* Fernald, 26 Me. 436, 46 Am. Dec. 573; Vossen *v.* Dautel, 116 Mo. 279, 22 S. W. 734.

7. Franz *v.* Memdonca, 131 Cal. 205, 63 Pac. 361.

8. Reed *v.* West, 16 Gray (Mass.) 283.

9. Bradley's Fish Co. *v.* Dudley, 37 Conn. 136.

10. *Illinois.*— Ohio, etc., R. Co. *v.* Elliott, 34 Ill. App. 589.

Massachusetts.— Shaughnessey *v.* Leary, 162 Mass. 108, 38 N. E. 197; Richardson *v.* Pond, 15 Gray 387; Atwater *v.* Bodfish, 11 Gray 150; Ray *v.* Fletcher, 12 Cush. 200; Cotton *v.* Pocasset Mfg. Co., 13 Metc. 429.

Nebraska.— Dunn *v.* Thomas, (1903) 96 N. W. 142.

Nevada.— Boynton *v.* Longley, 19 Nev. 69, 6 Pac. 437, 3 Am. St. Rep. 781.

New Jersey.— Horner *v.* Stillwell, 35 N. J. L. 307.

New York.— American Bank-Note Co. *v.* New York El. R. Co., 129 N. Y. 252, 29 N. E. 302; Sander *v.* New York, etc., R. Co., 58 N. Y. App. Div. 622, 69 N. Y. Suppl. 155.

England.— Ballard *v.* Dyson, 1 Taunt. 279, 9 Rev. Rep. 770.

Canada.— Mason *v.* Davison, 27 Nova Scotia 84.

Abandonment of part of ditch.— A ditch through its entire length should be considered as one ditch, and the abandonment of material portions of it as a ditch before the expiration of the twenty years necessary to give a right to its use by prescription operates to prevent the completion of that right as to other parts of the ditch. Davis *v.* Herbert, 71 Ill. App. 257.

11. Shaughnessey *v.* Leary, 162 Mass. 108, 38 N. E. 197; Alcorn *v.* Sadler, 71 Miss. 634, 14 So. 444, 42 Am. St. Rep. 484.

12. Dempster *v.* Cleghorn, 2 Dow. 40, 3 Eng. Reprint 780; Dyce *v.* Hay, 1 Macq. H. L. 305.

13. *Georgia.*— Everedge *v.* Alexander, 75 Ga. 858.

Illinois.— Kuhlman *v.* Hecht, 77 Ill. 570; Keyser *v.* Mann, 36 Ill. App. 596.

Indiana.— Sheeks *v.* Erwin, 130 Ind. 31, 29 N. E. 11; Fankboner *v.* Corder, 127 Ind. 164, 26 N. E. 766; Sanxay *v.* Hunger, 42 Ind. 44.

Kentucky.— O'Daniel *v.* O'Daniel, 88 Ky. 185, 10 S. W. 638, 10 Ky. L. Rep. 760; Thomas *v.* Bertram, 4 Bush 317; Hall *v.* McLeod, 2 Metc. 98, 74 Am. Dec. 400.

Maryland.— Browne *v.* Baltimore M. E. Church, 37 Md. 108.

Massachusetts.— Deerfield *v.* Connecticut River R. Co., 144 Mass. 325, 11 N. E. 105; Gordon *v.* Taunton, 126 Mass. 349; Blake *v.* Everett, 1 Allen 248; Barnes *v.* Haynes, 13 Gray 188, 74 Am. Dec. 629; Sibley *v.* Ellis, 11 Gray 417; Hill *v.* Crosby, 2 Pick. 466, 13 Am. Dec. 448.

Mississippi.—Lanier *v.* Booth, 50 Miss. 410.

New Hampshire.— Smith *v.* Putman, 62 N. H. 369.

New Jersey.— Leonard *v.* Hart, (Ch. 1885) 2 Atl. 36.

New York.— Ward *v.* Warren, 82 N. Y. 265; Bushey *v.* Santiff, 86 Hun 384, 33 N. Y. Suppl. 473; Colburn *v.* Marsh, 68 Hun 269, 22 N. Y. Suppl. 990; Wicks *v.* Thompson, 59 Hun 618, 13 N. Y. Suppl. 651; Miller *v.* Garlock, 8 Barb. 153; Lansing *v.* Wiswall, 5 Den. 213.

North Carolina.— State *v.* Hunter, 27 N. C. 369, 44 Am. Dec. 41.

Pennsylvania.—Young *v.* Collins, 2 Browne 292.

South Carolina.— Whaley *v.* Stevens, 27 S. C. 549, 4 S. E. 145; Smith *v.* Kinard, 2 Hill 642 note; Cuthbert *v.* Lawton, 3 McCord 194.

Tennessee.— Ferrell *v.* Ferrell, 1 Baxt. 329.

Vermont.— Strong *v.* Wales, 50 Vt. 361.

West Virginia.— Boyd *v.* Woolwine, 40 W. Va. 282, 21 S. E. 1020.

(B) *Public Ways.* A private right of way cannot be acquired by prescription in a street or public highway while it is in use as such.[14] But after the discontinuance of a public highway a private right of way may be acquired by prescription over the same route.[15] And the creation of a public right to be enjoyed *in futuro* whenever the public authorities shall see fit to adopt the extension of a proposed street or avenue as a public highway, is not inconsistent with private easements which inure to the grantees immediately upon delivery of their deeds.[16]

(C) *Way Across Railroad Tracks.* One whose land abuts on a strip of land acquired by a railroad for its right of way may acquire by prescription a private right of way across the railroad tracks.[17]

(D) *Way Through Uninclosed Lands.* The mere use of a road through open woodland will not give a right of way by prescription; there must be some notorious assertion of right by an act done which would be equivalent to a *possessio pedis*;[18] but if the circumstances make it evident that the way was used adversely under claim of right a user for the prescriptive period will confer an easement by prescription.[19]

(II) *NATURE, EXTENT, AND TIME OF USE*—(A) *In General.* As in the case of other easements the user of a private way to ripen into an easement must be adverse under a claim of right, continuous, uninterrupted, and with the knowl-

Wisconsin.— Carmody *v.* Mulrooney, 87 Wis. 552, 58 N. W. 1109.

See 17 Cent. Dig. tit. "Easements," § 27.

14. Quincy *v.* Jones, 76 Ill. 231, 20 Am. Rep. 243; Webster *v.* Lowell, 143 Mass. 324, 8 N. E. 54; Leonard *v.* Adams, 119 Mass. 366; Whaley *v.* Stevens, 27 S. C. 549, 4 S. E. 145.

Right to travel without paying toll.—Proof that for more than twenty years the owner of land over which a turnpike was laid out, with a right on the part of the turnpike company to take toll, and his predecessors in the ownership and occupation in the land had passed over the turnpike without paying toll, and had always done this under a claim of right and had always refused to pay toll, is not sufficient to establish a prescriptive right to pass the toll-gate free. Cleaveland *v.* Ware, 98 Mass. 409. But see Lucas *v.* Smithfield, etc., Turnpike Co., 36 W. Va. 427, 15 S. E. 182.

15. Lansing *v.* Wiswall, 5 Den. (N. Y.) 313.

16. Booraem *v.* North Hudson County R. Co., 40 N. J. Eq. 557, 5 Atl. 106.

17. Fitchburg R. Co. *v.* Frost, 147 Mass. 118, 16 N. E. 773; Turner *v.* Fitchburg R. Co., 145 Mass. 433, 14 N. E. 627; Wright *v.* Boston, etc., R. Co., 142 Mass. 296, 7 N. E. 866; Gay *v.* Boston, etc., R. Co., 141 Mass. 407, 6 N. E. 236; Fisher *v.* New York, etc., R. Co., 135 Mass. 107; Hardy *v.* Alabama, etc., R. Co., 73 Miss. 719, 19 So. 661; Plitt *v.* Cox, 43 Pa. St. 486. *Contra*, Sapp *v.* Northern Cent. R. Co., 51 Md. 115, holding that inasmuch as a railroad corporation has no power or right to grant an easement of a footway for persons to walk on, or by the side of its tracks, there can be no prescriptive right or presumption of such a grant, although parties owning houses along the line of the railroad for twenty-five years have used a private footway over the lands of the company from the houses to a public highway.

Notice that the property is private.— One whose lands abut on a strip acquired by a railroad as its right of way has no rights over such strip, although it was used for passage to the lands for over thirty years, where the railway company actually and continuously occupied it and maintained notices that the property was private. Andries *v.* Detroit, etc., R. Co., 105 Mich. 557, 63 N. W. 526.

18. Trump *v.* McDonnell, 120 Ala. 353, 24 So. 353; Hutto *v.* Tindall, 6 Rich. (S. C.) 396; Gibson *v.* Durham, 3 Rich. (S. C.) 85; Watt *v.* Trapp, 2 Rich. (S. C.) 136; Nash *v.* Peden, 1 Speers (S. C.) 17; Sims *v.* Davis, Cheves (S. C.) 1, 34 Am. Dec. 581; Smith *v.* Kinard, 2 Hill (S. C.) 642 note; McKee *v.* Garrett, 1 Bailey (S. C.) 341. And see Conyers *v.* Scott, 94 Ky. 123, 21 S. W. 530, 14 Ky. L. Rep. 784. But see Reimer *v.* Stuber, 20 Pa. St. 458, 59 Am. Dec. 744; Worrall *v.* Rhoads, 2 Whart. (Pa.) 427, 30 Am. Dec. 274 (in which cases it is held that mere user for the prescriptive period affords presumptive evidence of a grant of easement, whether the land over which the way passes is inclosed or uninclosed, cleared or Woodland); Peter *v.* Hunsiker, 28 Pa. St. 202 (holding that a right of way through uninclosed woodland acquired by prescription before the passage of the act is not affected by the provisions of the act).

Land bounded on three sides by deep water and protected on the fourth from the intrusion of cattle by a fence or bank is inclosed land within the meaning of the rule that twenty years' use over inclosed land will give a right of way. Heyward *v.* Chisolm, 11 Rich. (S. C.) 253.

19. Hansford *v.* Berry, 95 Ky. 56, 23 S. W. 665, 15 Ky. L. Rep. 415; Conyers *v.* Scott, 94 Ky. 123, 21 S. W. 530, 14 Ky. L. Rep. 784;

edge and acquiescence of the owner of the soil, for the full prescriptive period.[20] In those easements which require the repeated acts of man for their enjoyment as rights of way, it may be sufficient if the user is of such a nature and takes place at such intervals as to afford an indication to the owner of the servient tenement that a right is claimed against him.[21] Inasmuch as a man may not wish to travel every day, the use of a way over the land of another whenever one sees fit and without asking leave is deemed continuous and adverse.[22] But the use must be continuous within the bounds of reason; thus a use in one year cannot be connected with a use five years afterward, so as to give a right of way by prescription.[23]

(B) *Indefinite Line of Travel.* To establish a private right of way by prescription the line of the traveled road must be definite.[24] The practice of passing over land in different directions, however long continued, does not establish a right of way by prescription.[25] In order to acquire a prescriptive right to a private way by constant and uninterrupted use of the same, the use must relate strictly to the same identical strip of land over which such right is claimed, and the claimant cannot tack together the use of two or more strips to make out the prescriptive period.[26] But the user is not affected by an occasional

Talbott *v.* Thorn, 91 Ky. 417, 16 S. W. 83, 13 Ky. L. Rep. 401.

20. *Arkansas.*— Johnson *v.* Lewis, 47 Ark. 66, 2 S. W. 329, 14 S. W. 466.

Connecticut.—Black *v.* O'Hara, 54 Conn. 17, 5 Atl. 598. Mere user for less than fifteen years, however open and continuous, cannot establish a right of way, nor does such user constitute an ouster of the owner of the soil which will prevent him from conveying the fee. Botsford *v.* Wallace, 69 Conn. 263, 37 Atl. 902.

Georgia.— Puryear *v.* Clements, 53 Ga. 232.

Illinois.— Kuhlman *v.* Hecht, 77 Ill. 570; Drda *v.* Schmidt, 47 Ill. App. 267.

Indiana.— Parish *v.* Kasper, 109 Ind. 586, 10 N. E. 109; Hill *v.* Hagaman, 84 Ind. 287; Palmer *v.* Wright, 58 Ind. 486; Peterson *v.* McCullough, 50 Ind. 35.

Iowa.— Zigefoose *v.* Zigefoose, 69 Iowa 391, 28 N. W. 654.

Kentucky.— Hall *v.* McLeod, 2 Metc. 98, 74 Am. Dec. 400; Bowman *v.* Wickliffe, 15 B. Mon. 84; Prewitt *v.* Graves, 35 S. W. 263, 18 Ky. L. Rep. 53.

Maine.— Blanchard *v.* Moulton, 63 Me. 434.

Maryland.— Cox *v.* Forrest, 60 Md. 74.

Massachusetts.— Odiorne *v.* Wade, 5 Pick. 421.

New Jersey.— Heiser *v.* Martin, 9 N. J. L. J. 277.

North Carolina.— Boyden *v.* Achenbach, 86 N. C. 397; Ray *v.* Lipscomb, 48 N. C. 185; Smith *v.* Bennett, 46 N. C. 372.

Ohio.— Young *v.* Spangler, 2 Ohio Cir. Ct. 549.

South Carolina.— Golding *v.* Williams, Dudley 92; Jeter *v.* Mann, 2 Hill 641; McKee *v.* Garrett, 1 Bailey 341; Rowland *v.* Wolfe, 1 Bailey 56, 19 Am. Dec. 651.

Tennessee.— Ferrell *v.* Ferrell, 1 Baxt. 329.

Virginia.— Reid *v.* Garnett, 101 Va. 47, 43 S. E. 182.

Wisconsin.— Whaley *v.* Jarrett, 69 Wis. 613, 34 N. W. 727, 2 Am. St. Rep. 764.

See 17 Cent. Dig. tit. "Easements," § 28.

21. Cox *v.* Forrest, 60 Md. 74; Pollard *v.* Barnes, 2 Cush. (Mass.) 191; Winnipiseogee Lake Co. *v.* Young, 40 N. H. 420; Ingraham *v.* Hough, 46 N. C. 39.

22. Cox *v.* Forrest, 60 Md. 74; Chollar-Potosi Min. Co. *v.* Kennedy, 3 Nev. 361, 93 Am. Dec. 409; Pierce *v.* Cloud, 42 Pa. St. 102, 82 Am. Dec. 496; Garret *v.* Jackson, 20 Pa. St. 331; Esling *v.* Williams, 10 Pa. St. 126.

23. Watt *v.* Trapp, 2 Rich. (S. C.) 136.

24. Johnson *v.* Lewis, 47 Ark. 66, 2 S. W. 329, 14 S. W. 466; Bushey *v.* Santiff, 86 Hun (N. Y.) 384, 33 N. Y. Suppl. 473; Golding *v.* Williams, Dudley (S. C.) 92.

25. *Massachusetts.*— Jones *v.* Percival, 5 Pick. 485, 16 Am. Dec. 415.

Missouri.— Garnett *v.* Slater, 56 Mo. App. 207.

Montana.— Montana Ore Purchasing Co. *v.* Butte, etc., Consol. Min. Co., 25 Mont. 427, 65 Pac. 420.

Pennsylvania.— Arnold *v.* Cornman, 50 Pa. St. 361.

Vermont.— Clark *v.* Paquette, 66 Vt. 386, 29 Atl. 370.

Canada.— Rogers *v.* Duncan, 18 Can. Supreme Ct. 710.

See 17 Cent. Dig. tit. "Easements," § 31.

Necessity of using particular route.—In order to acquire a prescriptive right of way it is necessary that in going across the land to any particular point or for any particular purpose a particular route be used, and not such route as at the time may seem most convenient. Hoyt *v.* Kennedy, 170 Mass. 54, 48 N. E. 1073.

Location of way changed by consent of parties.— Plaintiff having used a passway over defendant's land for more than forty years, it will be presumed that the use has been as a matter of right, although the location of the passway has been changed from time to time by mutual assent of the parties. List *v.* Jacoby, 61 S. W. 355, 22 Ky. L. Rep. 1757.

26. Peters *v.* Little, 95 Ga. 151, 22 S. E. 44. To acquire a prescriptive right to a pri-

slight deviation to avoid obstructions, such as fallen trees, mud-holes, and the like.[27]

(c) *Use of Way in Common With Others.* The mere use of a way in common with the general public, although it may establish a public road, cannot establish a private right of way.[28] Such use is regarded as being under an implied license and is not adverse, unless there is some act on the part of the claimant indicating an independent assertion of right more pronounced and more clearly indicative of a claim of right than his open and notorious use of the way.[29] But it is not necessary that the party claiming an easement or a right of way shall be the only one who can or may enjoy that or a similar right over the same land, although his right should not depend for its enjoyment upon a similar right in others. He must exercise it under some claim existing in his own favor independently of all others.[30] The fact that certain persons have a right of way by grant does not prevent other persons from acquiring a prescriptive right to the use of the way.[31]

b. Easements of Light and Air.[32] At common law a prescriptive right to the unobstructed flow of light and air to ancient windows might be acquired; but for the obstruction of prospect, which was said to be a matter of delight only, no action would lie,[33] and now by the Prescription Act it is provided that when the access and use of light to and for any dwelling-house, work-shop, or other building shall have been actually enjoyed therewith for the full period of twenty years without interruption the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose, by deed or writing;[34] and a right of light and air may be

vate way over land of another, it is necessary to show the uninterrupted use of a permanent way not over fifteen feet wide, kept open and in repair for seven years. Mere frequency of passage across one's land not continuing in the same track for the requisite time and with no repairs or work on the alleged way will not suffice. Aaron *v.* Gunnels, 68 Ga. 528. One cannot establish a private way over another's ground by prescription which shifts from one place to another as to any part of the route, but the same ground must be occupied all the while and the way kept in repair on that ground. Follendore *v.* Thomas, 93 Ga. 300, 20 S. E. 329.

27. Cheney *v.* O'Brien, 69 Cal. 199, 10 Pac. 479; Everedge *v.* Alexander, 75 Ga. 858; Talbott *v.* Thorn, 91 Ky. 417, 16 S. W. 88, 13 Ky. L. Rep. 401; Kurtz *v.* Hoke, 172 Pa. St. 165, 33 Atl. 549.

28. *Maryland.*— Day *v.* Allender, 22 Md. 511.

Massachusetts.— Kilburn *v.* Adams, 7 Metc. 33, 39 Am. Dec. 754.

New York.— Wood *v.* Reed, 30 N. Y. Suppl. 112.

South Carolina.— Prince *v.* Wilbourn, 1 Rich. 58; McKee *v.* Garrett, 1 Bailey 341.

Vermont.— Strong *v.* Wales, 50 Vt. 361.

Virginia.— Reid *v.* Garnett, 101 Va. 47, 43 S. E. 182.

See 17 Cent. Dig. tit. "Easements," § 33.

29. O'Neil *v.* Blodgett, 53 Vt. 213; Plimpton *v.* Converse, 44 Vt. 158; Reid *v.* Garnett, 101 Va. 47, 43 S. E. 182.

30. *Illinois.*— McKenzie *v.* Elliott, 134 Ill. 156, 24 N. E. 965.

Maryland.— Cox *v.* Forrest, 60 Md. 74.

Massachusetts.— Ballard *v.* Demmon, 156 Mass. 449, 31 N. E. 635. If a private way is laid out for the use of the tenants of an estate abutting thereon, the owner of another estate also abutting thereon may acquire a right of way therein by adverse use, although his use is of the same character as that of the tenants and does not interfere with their use. Webster *v.* Lowell, 142 Mass. 324, 8 N. E. 54.

Pennsylvania.— Wanger *v.* Hipple, (1888) 13 Atl. 81.

Virginia.— Reid *v.* Garnett, 101 Va. 47, 43 S. E. 182.

See 17 Cent. Dig. tit. "Easements," § 33.

31. Ballard *v.* Demmon, 156 Mass. 449, 31 N. E. 635; Webster *v.* Lowell, 142 Mass. 324, 8 N. E. 54; Fitchburg R. Co. *v.* Page, 131 Mass. 391.

32. Easements of light and air by grant see ADJOINING LANDOWNERS, 1 Cyc. 786 *et seq.*

33. Aldred's Case, 9 Coke 57*b*. See also Moore *v.* Rawson, 3 B. & C. 332, 5 D. & R. 234, 3 L. J. K. B. O. S. 32, 27 Rev. Rep. 375, 10 E. C. L. 156.

34. St. 2 & 3 Wm. IV, c. 71. See Tapling *v.* Jones, 20 C. B. N. S. 166, 11 H. L. Cas. 290, 11 Jur. N. S. 309, 34 L. J. C. P. 342, 12 L. T. Rep. N. S. 555, 13 Wkly. Rep. 617, 11 Eng. Reprint 1344; Chastey *v.* Ackland, [1895] 2 Ch. 389, 64 L. J. Q. B. 523, 72 L. T. Rep. N. S. 845, 12 Reports 420, 43 Wkly. Rep. 627; Stokoe *v.* Singers, 8 E. & B. 31, 3 Jur. N. S. 1256, 26 L. J. Q. B. 257, 5 Wkly. Rep. 756, 92 E. C. L. 31; Gale *v.* Abbot, 8 Jur. N. S. 987, 6 L. T. Rep. N. S. 852, 10

acquired by enjoyment for the statutory period against a statutory company or other servient owner incapable of granting it.[35] At any time before the expiration of the full period of twenty years the owner of adjoining land has the right to build on it as he pleases or to erect a wall to prevent the acquisition of prescriptive rights.[36] But one has no right to obstruct new lights unless he can do so without obstructing ancient ones.[37] The right to light and air coming through windows of a building which may grow into the statutory right acquired by twenty years' user and enjoyment, as of right and without interruption, commences when the exterior walls of the building with the spaces for the windows are completed and the building is properly roofed in, although the window-sashes and the glass may not be put in and the interior may not be finished until some time afterward.[38] To support an action for obstructing light plaintiff must show that there is such a diminution of light and air as makes his premises sensibly less fit for occupation.[39] The English doctrine that an easement for light and air may be acquired by user or prescription has been very generally rejected in the United States.[40] Such a rule, it has been said, is not adapted to the circumstances or

Wkly. Rep. 748; Hall *v.* Lichfield Brewery Co., 49 L. J. Ch. 655, 43 L. T. Rep. N. S. 384.

35. Jordeson *v.* Sutton, etc., Gas Co., [1899] 2 Ch. 217, 63 J. P. 692, 68 L. J. Ch. 457, 80 L. T. Rep. N. S. 815.

36. Chastey *v.* Ackland, [1895] 2 Ch. 389, 64 L. J. Q. B. 523, 72 L. T. Rep. N. S. 845, 12 Reports 420, 43 Wkly. Rep. 627; Bonner *v.* Great Western R. Co., 24 Ch. D. 1, 48 L. T. Rep. N. S. 623.

37. Aynsley *v.* Glover, L. R. 18 Eq. 544, 43 L. J. Ch. 777, 31 L. T. Rep. N. S. 219, 23 Wkly. Rep. 147; Tapling *v.* Jones, 20 C. B. N. S. 166, 11 H. L. Cas. 290, 11 Jur. N. S. 309, 34 L. J. C. P. 342, 12 L. T. Rep. N. S. 555, 13 Wkly. Rep. 617, 11 Eng. Reprint 1344.

38. Collis *v.* Laugher, [1894] 3 Ch. 659, 63 L. J. Ch. 851, 71 L. T. Rep. N. S. 226, 8 Reports 760, 43 Wkly. Rep. 202.

39. Wells *v.* Ody, 7 C. & P. 410, 5 Dowl. P. C. 95, 2 Gale 12, 5 L. J. Exch. 199, 1 M. & W. 452, 1 Tyrw. & G. 715, 32 E. C. L. 681; Pringle *v.* Wernham, 7 C. & P. 377, 32 E. C. L. 664; Parker *v.* Smith, 5 C. & P. 438, 24 E. C. L. 644; Back *v.* Stacey, 2 C. & P. 465, 31 Rev. Rep. 679, 12 E. C. L. 677.

40. *Alabama.*— Jesse French Piano, etc., Co. *v.* Forbes, 129 Ala. 471, 29 So. 683, 87 Am. St. Rep. 71; Ward *v.* Neal, 37 Ala. 500.

California.— Kennedy *v.* Burnap, 120 Cal. 488, 52 Pac. 843, 40 L. R. A. 476; Western Granite, etc., Co. *v.* Knickerbocker, 103 Cal. 111, 37 Pac. 192.

Georgia.— Turner *v.* Thompson, 58 Ga. 268, 24 Am. Rep. 497; Mitchell *v.* Rome, 49 Ga. 19, 15 Am. Rep. 669.

Illinois.— Kotz *v.* Illinois Cent. R. Co., 188 Ill. 578, 59 N. E. 240; Keating *v.* Springer, 146 Ill. 481, 34 N. E. 805, 37 Am. St. Rep. 175, 22 L. R. A. 544; Tinker *v.* Forbes, 136 Ill. 221, 26 N. E. 503; Dexter *v.* Tree, 117 Ill. 532, 6 N. E. 506; Guest *v.* Reynolds, 68 Ill. 478, 18 Am. Rep. 570.

Indiana.— Stein *v.* Hauck, 56 Ind. 65, 26 Am. Rep. 10; Keiper *v.* Klein, 51 Ind. 316.

Kansas.— Lapere *v.* Luckey, 23 Kan. 534, 33 Am. Rep. 196.

Kentucky.— Ray *v.* Sweeney, 14 Bush 1, 29 Am. Rep. 388.

Louisiana.— Goodwin *v.* Alexander, 105 La. 658, 30 So. 102; Bryant *v.* Sholars, 104 La. 786, 29 So. 350; Oldstein *v.* Firemen's Bldg. Assoc., 44 La. Ann. 492, 10 So. 928.

Maine.— Pierre *v.* Fernald, 26 Me. 436, 46 Am. Dec. 573.

Maryland.— Cherry *v.* Stein, 11 Md. 1.

Massachusetts.— Paine *v.* Boston, 4 Allen 168; Rogers *v.* Sawin, 10 Gray 376.

New Jersey.— Hayden *v.* Dutcher, 31 N. J. Eq. 217; King *v.* Miller, 8 N. J. Eq. 559, 55 Am. Dec. 246.

New York.— Sweeney *v.* St. John, 28 Hun 634; Levy *v.* Brothers, 4 Misc. 48, 23 N. Y. Suppl. 825; Knabe *v.* Levelle, 23 N. Y. Suppl. 818; Parker *v.* Foote, 19 Wend. 309.

Ohio.— Mullen *v.* Stricker, 19 Ohio St. 135, 2 Am. Rep. 379.

Pennsylvania.— Haverstick *v.* Sipe, 33 Pa. St. 368; King *v.* Large, 7 Phila. 282; McDonald *v.* Bromley, 6 Phila. 302.

South Carolina.— The owner of a lot adjoining an alley cannot have an injunction to restrain the erection of a building therein on the ground that it prevents the passage of light and air through his windows, since such a right to light and air cannot be acquired by the enjoyment of such privileges for any length of time. Bailey *v.* Gray, 53 S. C. 503, 31 S. E. 354; Napier *v.* Bulwinkle, 5 Rich. 311.

Texas.— Klein *v.* Gehrung, 25 Tex. Suppl. 232, 78 Am. Dec. 565.

Vermont.— Hubbard *v.* Town, 33 Vt. 295.

Virginia.— Tunstall *v.* Christian, 80 Va. 1, 56 Am. Rep. 581.

West Virginia.— Powell *v.* Sims, 5 W. Va. 1, 13 Am. Rep. 629.

See 17 Cent. Dig. tit. "Easements," § 34.

In Delaware it has been decided that the doctrine of presumptive title to light and air received over land of another person arising from the uninterrupted enjoyment of it for twenty years and upward through the windows of a dwelling-house was part of the common law of England and of the Colonies at the period of American independence and as such continued to be the law of Delaware

existing state of things in this country, and cannot be applied without working the most mischievous consequences.[41]

B. Express Grants, Reservations, and Covenants — 1. Easements Lie Only in Grant. An easement lies not in livery but in grant, and a freehold interest in it cannot be created or passed otherwise than by deed or by prescription which presupposes a grant.[42]

2. Requisites and Validity of Grant. No one but the owner of land can create an easement over it.[43] It is beyond the scope of the power of executors or administrators to create incidental rights or easements of this character.[44] An instrument creating a real servitude to be valid should express and describe the estate in favor of which it was established, especially where it is shown that the party claiming such servitude was the owner of several estates at the time the servitude was acquired.[45] But it has been held that a failure to describe the dominant estate in an instrument granting a right of way is not fatal, where it clearly appears what estate was intended.[46] A grant of a right of way *de novo* must be acknowledged and recorded the same as other formal instruments affecting the title to real estate.[47] And in order to create an easement the instrument must

under the constitution of the state adopted at the organization of the state government in 1776. Clawson *v.* Primrose, 4 Del. Ch. 643. But the authority of this case has been much shaken by the opinion in Hulley *v.* Security Trust, etc., Co., 5 Del. Ch. 578, and it does not appear that the court of appeals has yet decided the question.

The placing of a window in one's own house located upon his own land and overlooking the land of his neighbor is no encroachment of his neighbor's rights and therefore cannot be regarded as adverse to him. It is a mere enjoyment of a right for which no action lies. Sweeney *v.* St. John, 28 Hun (N. Y.) 634.

41. Parker *v.* Foote, 19 Wend. (N. Y.) 309.

42. *Arkansas.*— Johnson *v.* Lewis, 47 Ark. 66, 14 S. W. 466; Wynn *v.* Garland, 19 Ark. 23, 68 Am. Dec. 190.

California.— *In re* North Beach, etc., R. Co., 32 Cal. 499.

Colorado.— Stewart *v.* Stevens, 10 Colo. 440, 15 Pac. 786; Burlington, etc., R. Co. *v.* Schweikart, 10 Colo. 178, 14 Pac. 329; Ward *v.* Farwell, 6 Colo. 66.

Delaware.— Jackson, etc., Co. *v.* Philadelphia, etc., R. Co., 4 Del. Ch. 180.

Illinois.— Tinker *v.* Forbes, 136 Ill. 221, 26 N. E. 503; Oswald *v.* Wolf, 126 Ill. 542, 19 N. E. 28.

Indiana.— Robinson *v.* Thrailkill, 110 Ind. 117, 10 N. E. 647; Davidson *v.* Nicholson, 59 Ind. 411; Richter *v.* Irwin, 28 Ind. 26.

Kentucky.— Talbott *v.* Thorn, 91 Ky. 417, 16 S. W. 88, 13 Ky. L. Rep. 401; Hall *v.* McLeod, 2 Metc. 98, 74 Am. Dec. 400.

Massachusetts.— Cole *v.* Hadley, 162 Mass. 579, 39 N. E. 279; Morse *v.* Copeland, 2 Gray 302; Cook *v.* Stearns, 11 Mass. 533. A private right of way belongs to that class of rights which are said to lie in grant and not in livery, for, existing only in idea, in contemplation of the law they cannot be transferred by livery of possession. Randall *v.* Chase, 133 Mass. 210.

Mississippi.— Bonelli *v.* Blakemore, 66 Miss. 136, 5 So. 228, 14 Am. St. Rep. 550.

Montana.— Great Falls Waterworks Co. *v.* Great Northern R. Co., 21 Mont. 487, 54 Pac. 963.

New Hampshire.— Tibbetts *v.* Tibbetts, 66 N. H. 360, 20 Atl. 979.

New Jersey.— Lawrence *v.* Springer, 49 N. J. Eq. 289, 24 Atl. 933, 31 Am. St. Rep. 702.

New York.— White *v.* Manhattan R. Co., 139 N. Y. 19, 34 N. E. 887; Taylor *v.* Millard, 18 N. Y. 244, 23 N. E. 376, 6 L. R. A. 667; Cronkhite *v.* Cronkhite, 94 N. Y. 323; Pierce *v.* Keator, 70 N. Y. 419, 26 Am. Rep. 612; Post *v.* Pearsall, 22 Wend. 425; Thompson *v.* Gregory, 4 Johns. 81, 4 Am. Dec. 255; Wolfe *v.* Frost, 4 Sandf. Ch. 72.

North Carolina.— Cagle *v.* Parker, 97 N. C. 271, 2 S. E. 76.

Pennsylvania.— Huff *v.* McCauley, 53 Pa. St. 206, 91 Am. Dec. 203; Collam *v.* Hocker, 1 Rawle 108.

Rhode Island.— Foster *v.* Browning, 4 R. I. 47, 67 Am. Dec. 505.

Tennessee.— Long *v.* Mayberry, 96 Tenn. 378, 36 S. W. 1040; Nunnelly *v.* Southern Iron Co., 94 Tenn. 397, 29 S. W. 361, 28 L. R. A. 421.

Texas.— Texas, etc., R. Co. *v.* Durrett, 57 Tex. 48.

England.— Adams *v.* Andrews, 15 Q. B. 284, 15 Jur. 149, 20 L. J. Q. B. 33, 69 E. C. L. 284; Hewlins *v.* Shippam, 5 B. & C. 221, 7 D. & R. 783, 4 L. J. K. B. O. S. 241, 31 Rev. Rep. 757, 11 E. C. L. 437; Fentiman *v.* Smith, 4 East 107, 7 Rev. Rep. 533; Wallis *v.* Harrison, 1 H. & H. 405, 2 Jur. 1019, 4 M. & W. 538; Wood *v.* Ledbitter, 9 Jur. 187, 14 L. J. Exch. 161, 13 M. & W. 838.

43. Rangeley *v.* Midland R. Co., L. R. 3 Ch. 306, 37 L. J. Ch. 313, 18 L. T. Rep. N. S. 69, 16 Wkly. Rep. 547.

44. Bloomfield *v.* Ketcham, 25 Hun (N. Y.) 218.

45. Declouet *v.* Borel, 15 La. Ann. 606.

46. Durkee *v.* Jones, 27 Colo. 159, 60 Pac. 618.

47. Hays *v.* Richardson, 1 Gill & J. (Md.) 366. *Contra*, Union Terminal R. Co. *v.* Kan-

be under seal, otherwise it will create a license only.[48] An instrument creating a servitude need not mention accessory rights, since they pass as incidents to the contract.[49]

3. Acceptance of Grant. The acceptance by a grantee of a deed conveying a right of way in express terms and defining with precision the exact piece of land over which the easement is to extend is an acceptance of all it conveys, and no act is required of him to show his acceptance of the easement as the owner of the dominant tenement.[50] A grantee in a deed creating an easement over the granted premises by its acceptance becomes bound by all its restrictions, reservations, and exceptions.[51] In other words one who acquires title through a deed expressly reserving a right of way through the land is estopped by the deed from denying the existence of the right of way.[52] And the same principle applies to the acceptance of a deed reserving an easement of any other nature.[53]

4. Construction and Operation of Grant — a. In General. The determination of the extent of an easement granted or reserved in express terms by deed depends upon a proper construction of the language of the instrument.[54] If a grant of a right of way will not convey all that was intended it will not therefore be entirely void, but will be construed to convey all that it was in the power of the grantor to convey.[55] A deed providing that the grantor shall open and use as a private alley a certain described strip of land leading from the street over other land of the grantor to the rear of the grantee's lot to be used as a private alley so long as the grantee, his heirs and assigns, shall require the same for such purpose, and reserving title to such strip in the grantor, conveys a private right of way.[56] A deed cannot be construed as granting a right of way over land which the grantor does not own.[57] A right of way *in esse* will pass by a deed of bargain and sale of the premises to which it is appurtenant.[58] But a right of way *de novo* cannot be created by deed of bargain and sale. This can be accomplished only by grant or lease.[59] Where a right of way appurtenant to land is plainly

sas City Belt R. Co., 9 Kan. App. 281, 60 Pac. 541.

48. Brady *v.* Blackinton, 174 Mass. 559, 55 N. E. 474; Isele *v.* Schwamb, 131 Mass. 337; Dyer *v.* Sanford, 9 Metc. (Mass.) 395, 43 Am. Dec. 399; Cook *v.* Stearns, 11 Mass. 533; Wilkins *v.* Irvine, 33 Ohio St. 138; Kenyon *v.* Nichols, 1 R. I. 411. But see Union Terminal R. Co. *v.* Kansas City Belt R. Co., 9 Kan. App. 281, 60 Pac. 541.

Although an unsealed instrument is insufficient at law as a grant of an easement, yet where it has been performed and the right acquiesced in for a long time, equity may treat the easement attempted to be granted as an indefeasible right. Ashelford *v.* Willis, 194 Ill. 492, 62 N. E. 817.

49. Patout *v.* Lewis, 51 La. Ann. 210, 25 So. 134.

50. Smith *v.* Worn, 93 Cal. 206, 28 Pac. 944; Shannon *v.* Timm, 22 Colo. 167, 43 Pac. 1021.

51. Morrison *v.* Chicago, etc., R. Co., 117 Iowa 587, 91 N. W. 793; Ledford *v.* Cummins, 46 S. W. 507, 20 Ky. L. Rep. 393; Winthrop *v.* Fairbanks, 41 Me. 307; Hagerty *v.* Lee, 54 N. J. L. 580, 25 Atl. 319, 20 L. R. A. 631; Fitzgerald *v.* Faunce, 46 N. J. L. 536; Sheppard *v.* Hunt, 4 N. J. Eq. 277.

52. Lakenan *v.* Hannibal, etc., R. Co., 36 Mo. App. 363; Rosendale Protestant Reformed Dutch Church *v.* Bogardus, 5 Hun (N. Y.) 304.

A call in a deed for a street is an implied covenant as to parties who are *sui juris* that there is such a street, and the grantee takes the property conveyed subject to the existence of such way. Moses *v.* St. Louis Sectional Dock Co., 84 Mo. 242 [*reversing* 9 Mo. App. 571].

53. Rosenkrans *v.* Snover, 19 N. J. Eq. 420, 97 Am. Dec. 668; Overdeer *v.* Updegraff, 69 Pa. St. 110; Meyer *v.* Young, 7 Wkly. Notes Cas. (Pa.) 60; Walsh *v.* Mallon, 2 Wkly. Notes Cas. (Pa.) 444.

54. Horner *v.* Keene, 177 Ill. 390, 52 N. E. 492; Dodge *v.* Pennsylvania R. Co., 43 N. J. Eq. 351, 11 Atl. 751; Watertown *v.* Cowen, 4 Paige (N. Y.) 510, 27 Am. Dec. 80. An instrument creating a servitude such as right of way, although in terms which might appropriately be employed in the constitution of a personal obligation only, may be a burden on the land if it be a matter of reasonable inference from the terms of the document or the circumstances of the case that the constitution of a real servitude was what the parties contemplated. North British R. Co. *v.* Park Yard Co., (1898) A. C. 643.

55. Law *v.* Hempstead, 10 Conn. 23.

56. Shannon *v.* Timm, 22 Colo. 167, 43 Pac. 1021.

57. Bigelow Carpet Co. *v.* Clinton, 108 Mass. 70.

58. Hays *v.* Richardson, 1 Gill & J. (Md.) 366.

59. Hays *v.* Richardson, 1 Gill & J. (Md.) 366; Beaudely *v.* Brook, Cro. Jac. 189.

conveyed by the terms of a deed it is not competent to prove by parol evidence that it was not the intention of the parties that it should be conveyed.[60]

b. In Location of Right of Way. Where a right of way is specifically bounded and defined in the grant or reservation, the terms of the deed will control and the question of convenient use is immaterial.[61] Where a right of way is granted or reserved, but not specifically defined, the rule is that the way need be only such as is reasonably necessary and convenient for the purpose for which it was created. When the right of way is not bounded in the grant or reservation, the law bounds it by the line of reasonable enjoyment.[62] Thus the owner of the soil of an alley or passageway over which another has a right of way may lawfully cover it with a building, provided he leaves a space so wide, high, and light that the way is substantially as convenient as before for the purpose for which it was granted or reserved,[63] unless it is clear from the language of the grant and the surrounding circumstances that the parties intended to have the passageway remain open to the sky.[64] It is a familiar rule that when a right of way is granted without defined limits, the practical location and use of such way by the grantee under his deed acquiesced in for a long time by the grantor will operate as an assignment of the right.[65] But this rule, which is a rule of practical construction adopted to ascertain the intent of the parties, will not be permitted to defeat an intention fairly expressed in the terms of the grant controlling the future location.[66]

c. What Title Passes by Grant — (i) *In General.* It is true that in some cases the grant of an estate designated and described only by the particular use or purpose for which the land is appropriated will be held to pass a fee.[67] But a different rule of construction is applicable when a particular or special right or easement in land is conveyed which may well coexist and be enjoyed and used by the grantee consistently with the ownership of the fee in the grantor. In such cases the fee is not passed in express terms and it does not pass by implication, because it is not incidental or essential to the right or interest which is

60. Shepherd *v.* Watson, 1 Watts (Pa.) 35.

61. Gerrish *v.* Shattuck, 128 Mass. 571.

62. *Kentucky.*— Maxwell *v.* McAtee, 9 B. Mon. 20, 48 Am. Dec. 409.

Massachusetts.— Atkins *v.* Bordman, 2 Metc. 457, 37 Am. Dec. 100.

New York.— Grafton *v.* Moir, 130 N. Y. 465, 29 N. E. 974, 27 Am. St. Rep. 533; Bakemen *v.* Talbot, 31 N. Y. 366, 88 Am. Dec. 275; Tyler *v.* Cooper, 47 Hun 94 [*affirmed* in 124 N. Y. 626, 26 N. E. 338]; Spencer *v.* Weaver, 20 Hun 450; Farrington *v.* Bundy, 5 Hun 617; Rexford *v.* Marquis, 7 Lans. 249; York *v.* Briggs, 7 N. Y. St. 124.

Pennsylvania.— Snyder's Appeal, (1887) 8 Atl. 26.

England.— Clifford *v.* Hoare, L. R. 9 C. P. 362, 43 L. J. C. P. 225, 30 L. T. Rep. N. S. 465, 22 Wkly. Rep. 828; Hutton *v.* Hamboro, 2 F. & F. 218.

Right to erect gate at entrance of way.— The owner of land over which a right of way "as now laid out" has been granted has no right in the absence of evidence of a contrary usage to erect a gate at the entrance of the way, or to narrow the passage by gate-posts. Welch *v.* Wilcox, 101 Mass. 162, 100 Am. Dec. 113.

63. Burnham *v.* Nevins, 144 Mass. 88, 10 N. E. 494, 59 Am. Rep. 61; Grafton *v.* Moir, 130 N. Y. 465, 29 N. E. 974, 27 Am. St. Rep. 533. In Gerrish *v.* Shattuck, 132 Mass. 235, it appears that defendant built over a passageway four feet wide, that had been reserved in, through, and over certain premises, but placed no part of his building on the surface of the ground and left the way unobstructed for a reasonable height above. It was held that plaintiff as the dominant owner had no right to light and air above the way, and that she had only the right of passage and repassage with such incidental rights as are necessary to its enjoyment. In Atkins *v.* Bordman, 2 Metc. (Mass.) 457, 475, 37 Am. Dec. 100, Shaw, C. J., said: "We may conceive of a covered passage of eight or ten feet high, of a length so considerable, that unless openings were left, there would not be light enough admitted at the ends to enable persons to use it with comfort, for the purposes of a passageway. But unless darkened to that extent, it is not a case for damage."

64. Atty.-Gen. *v.* Williams, 140 Mass. 329, 2 N. E. 80, 3 N. E. 214, 54 Am. Rep. 468; Salisbury *v.* Andrews, 128 Mass. 336; Brooks *v.* Reynolds, 106 Mass. 31.

65. Stetson *v.* Curtis, 119 Mass. 266; Bannon *v.* Angier, 2 Allen (Mass.) 128.

66. Stetson *v.* Curtis, 119 Mass. 266.

67. Jamaica Pond Aqueduct Corp. *v.* Chandler, 9 Allen (Mass.) 159; Home *v.* Richards, 4 Call (Va.) 441, 2 Am. Dec. 574.

described in the deed. Whenever a grant is made of a right or easement in land which falls within the class sometimes described as non-continuous, that is, where the use of the premises by the grantee for the purpose designated in the deed will be only intermittent and occasional, and does not embrace the entire beneficial occupation and improvement of the land, the reasonable interpretation is that an easement in the soil and not the fee is intended to be conveyed. Among the most prominent of this class of easements is a private way.[68] An owner whose land is burdened with a right of way has all the rights and benefits of the soil consistent with the reasonable use of the way, and the owner of the easement cannot prevent even a trespasser from using the land if his use does not impede the free exercise of the right of passage.[69] So also a reservation of a right of way over land described in the granting clause of a deed reserves only an easement and the title in fee passes to the grantee.[70] There is, however, nothing in the fact that a strip of land is to be used by the grantee for a road to prevent its being conveyed in fee; and the fee will pass if the language of the deed shows that the parties so intended.[71] The grant of the right to construct a flume of dimensions sufficient for a specified purpose and to a flow of water through the flume sufficient to accomplish that purpose does not carry with it the fee in the land through which the flume is to be constructed.[72]

(II) *On Grant of Right of Way to Railroad Company.* The grant of a right of way to a railroad company is the grant of an easement merely and the fee to the soil remains in the grantor.[73] Although the language used in the granting part of the deed and in the *habendum* is appropriate and that commonly used to convey the fee, yet the clause descriptive of the use to be made of the land may so limit or qualify the grant as to change it from a fee to an easement.[74] And if the right of way be obtained by condemnation proceedings the company still takes only an easement and not the fee of the soil.[75]

5. Covenant Operating as Grant. It is settled law that easements may be created by agreements or covenants, that one shall have a right or privilege in the estate of another as well as by express grants; such agreements are grants in effect.[76] But words strictly of covenant will not be construed into the grant of

68. *California.*— Peterson *v.* Machado, (1896) 43 Pac. 611.
Illinois.— Truax *v.* Gregory, 196 Ill. 83, 63 N. E. 674.
Massachusetts.— Jamaica Pond Aqueduct Corp. *v.* Chandler, 9 Allen 159.
Mississippi.— Lott *v.* Payne, 82 Miss. 218, 33 So. 948.
New Hampshire.—Low *v.* Streeter, 66 N. H. 36, 20 Atl. 247, 9 L. R. A. 271.
Virginia.— Home *v.* Richards, 4 Call 441, 2 Am. Dec. 574.
Canada.— Fisher *v.* Webster, 27 Ont. 35.

69. Low *v.* Streeter, 66 N. H. 36, 20 Atl. 247, 9 L. R. A. 271. See also Nesbitt *v.* Trumbo, 39 Ill. 110, 89 Am. Dec. 290.

70. Morrison *v.* Skowhegan First Nat. Bank, 88 Me. 155, 33 Atl. 782; Towne *v.* Salentine, 92 Wis. 404, 66 N. W. 395.

71. Pellissier *v.* Corker, 103 Cal. 516, 37 Pac. 465; Low *v.* Streeter, 66 N. H. 36, 20 Atl. 247, 9 L. R. A. 271; Kilmer *v.* Wilson, 49 Barb. (N. Y.) 86; Long Island R. Co. *v.* Conklin, 32 Barb. (N. Y.) 381.

72. Nichols *v.* New England Furniture Co., 100 Mich. 230, 59 N. W. 155.

73. *Indiana.*— Cincinnati, etc., R. Co. *v.* Geisel, 119 Ind. 77, 21 N. E. 470.
Massachusetts.— Fitchburg R. Co. *v.* Frost, 147 Mass. 118, 16 N. E. 773.
Michigan.— Jones *v.* Van Bochove, 103 Mich. 98, 61 N. W. 342.
Washington.— Riechenbach *v.* Washington Short Line R. Co., 10 Wash. 357, 38 Pac. 1126.
Wisconsin.— Williams *v.* Western Union R. Co., 50 Wis. 71, 5 N. W. 482.

74. Robinson *v.* Missisquoi R. Co., 59 Vt. 426, 10 Atl. 522.

75. Lyon *v.* McDonald, 78 Tex. 71, 14 S. W. 261, 9 L. R. A. 295; Williams *v.* Western Union R. Co., 50 Wis. 71, 5 N. W. 482. Where the state invests a corporation with the prerogative of eminent domain for the purpose of enabling it to construct and operate a public highway, and it takes land by force of its charter for the purpose of such highway, the grant to it should be construed, not as investing it with capacity to take a fee, but as merely giving it power to acquire such an easement in the land taken as will enable it fully to accomplish the purposes for which it was created. New Jersey Zinc, etc., Co. *v.* Morris Canal, etc., Co., 44 N. J. Eq. 398, 15 Atl. 227, 1 L. R. A. 133.

76. *Alabama.*— McCarthy *v.* Nicrosi, 72 Ala. 332, 47 Am. Rep. 418.
Illinois.— Van Ohlen *v.* Van Ohlen, 56 Ill. 528
Massachusetts.— Ladd *v.* Boston, 151 Mass.

an easement in land, unless there be context to force them from their ordinary signification.[77]

6. Reservations and Exceptions — a. In General. A grantor of land may by an exception or reservation in his deed create an easement in the land granted for the benefit of his remaining land, in which case the fee of the soil passes encumbered by the easement excepted or reserved, and the right and burden thus created will pass to and be binding upon all subsequent grantees of the respective tracts.[78] A reservation of a right of way to the grantor and his heirs should be limited to

585, 24 N. E. 858, 21 Am. St. Rep. 481; O'Neil *v.* Holbrook, 121 Mass. 102; Stetson *v.* Curtis, 119 Mass. 266.

New Jersey.— Brewer *v.* Marshall, 18 N. J. Eq. 337.

New York.— Wetmore *v.* Bruce, 118 N. Y. 319, 23 N. E. 303; Van Rensselaer *v.* Albany, etc., R. Co., 62 N. Y. 65; Valentine *v.* Schreiber, 3 N. Y. App. Div. 235, 38 N. Y. Suppl. 417; Gibert *v.* Peteler, 38 Barb. 488; Day *v.* New York Cent. R. Co., 31 Barb. 548; Watts *v.* Coffin, 11 Johns. 498.

North Carolina.— Hall *v.* Turner, 110 N. C. 292, 14 S. E. 791; Norfleet *v.* Cromwell, 64 N. C. 1.

Pennsylvania.— Wilkinson *v.* Suplee, 166 Pa. St. 315, 31 Atl. 36.

Rhode Island.— Greene *v.* Creighton, 7 R. I. 1.

See 17 Cent. Dig. tit. "Easements," § 39.

Mutual covenants operating as negative easements.—Mutual covenants of persons, one owning one side, the other the other side of a building, that no change in the front of the building or in the principal entrance thereto shall be made by either without the consent of the other are grants of negative easements. Portsmouth First Nat. Bank *v.* Portsmouth Sav. Bank, 71 N. H. 547, 53 Atl. 1017.

77. Blount *v.* Harvey, 51 N. C. 186. And see Farley *v.* Howard, 60 N. Y. App. Div. 193, 70 N. Y. Suppl. 51.

Applications of rule.— An agreement by a turnpike company to give the owner of a ranch the right to use the road free of toll for all the purposes of the ranch in consideration of his giving the company a right of way over the ranch does not give the ranch-owner an easement in the road. Kellett *v.* Ida Clayton, etc., Wagon Road Co., 99 Cal. 210, 33 Pac. 885. So a covenant not to sell marl from a certain tract of land or not to carry on any specific business on it does not create an easement, but is merely a personal covenant. Brewer *v.* Marshall, 18 N. J. Eq. 337. And where one covenants with adjoining landowners to reserve an open space in front of their lots and makes a subsequent conveyance subject to the conditions of party-wall agreements that the walls shall commence eight feet back from the street line, but which does not prohibit building on the eight feet, it cannot be inferred that he agreed that the eight feet adjoining the street was to be kept open. Bradley *v.* Walker, 138 N. Y. 291, 33 N. E. 1079. A landlord may by contract under seal impose on lands which he leases burdens which will not only be binding on the tenant, but also on subtenants, they being covenants real running with the land; but except between landlord and tenant no burdens can be imposed on lands by any covenant of the owner which will run with the land and bind a grantee, for such covenants are personal and are not covenants real running with the land. West Virginia Transp. Co. *v.* Ohio River Pipe Line Co., 22 W. Va. 600, 46 Am. Rep. 527.

78. *Alabama.*— Webb *v.* Robbins, 77 Ala. 176.

Illinois.— Horner *v.* Keene, 177 Ill. 390, 52 N. E. 492; Keucken *v.* Voltz, 110 Ill. 264; Koelle *v.* Knecht, 99 Ill. 396.

Kentucky.—Gibson *v.* Porter, 15 S. W. 871, 12 Ky. L. Rep. 917. All succeeding titleholders must take notice of the reservation in a deed of a road for the benefit of the grantor. Ledford *v.* Cummins, 46 S. W. 507, 20 Ky. L. Rep. 393.

Maine.— Where the owner of a large tract of land conveys out of it a smaller tract, and in the deed reserves to himself and his heirs a right of way across the land conveyed, which becomes definitely located, a right of way over that particular location becomes vested in the grantor as effectually as if by express grant. Tabbutt *v.* Grant, 94 Me. 371, 47 Atl. 899.

Massachusetts.—Jones *v.* Adams, 162 Mass. 224, 38 N. E. 437; Hamlin *v.* New York, etc., R. Co., 160 Mass. 459, 36 N. E. 200; Hankey *v.* Clark, 110 Mass. 262; Boston, etc., R. Co. *v.* Middlesex County, 1 Allen 324; Brown *v.* Thissell, 6 Cush. 254; Bowen *v.* Conner, 6 Cush. 132; White *v.* Crawford, 10 Mass. 183.

Minnesota.— Winston *v.* Johnson, 42 Minn. 398, 45 N. W. 958.

New Jersey.— Hagerty *v.* Lee, 54 N. J. L. 580, 25 Atl. 319, 20 L. R. A. 631.

New York.— Andrus *v.* National Sugar Refining Co., 72 N. Y. App. Div. 551, 76 N. Y. Suppl. 530.

Ohio.— Jones Fertilizer Co. *v.* Cleveland, etc., Co., 2 Ohio S. & C. Pl. Dec. 511, 7 Ohio N. P. 245; Metzger *v.* Holwick, 31 Cinc. L. Bul. 241.

Wisconsin.— Fischer *v.* Laack, 76 Wis. 313, 45 N. W. 104.

See 17 Cent. Dig. tit. "Easements," § 40.

Imposition of conditions as to erection of buildings.— Where a tenant in common of a tract of land has leased to his cotenant for a term of years a portion of the tract, on condition that a building contemplated by the lessee shall not be reared above the third floor of a hotel on the other portion of the tract, and afterward conveys the demised

a right of way over the land conveyed by the deed and does not affect any other land of the grantee.[79] So a condition imposed on a grant of lands to a railroad company for its track or embankment that it shall maintain an under-grade crossing is a covenant of the company and operates to grant a new easement back to the grantor.[80] A grant of land by metes and bounds with full covenants of warranty, excepting or reserving a roadway for the use of the public, or a right of way for a railroad, passes the fee to the land subject to the easements reserved.[81] But it is otherwise where it clearly appears from the language of the deed that the grantor intended to reserve to himself the fee in the soil of the roadway.[82] A reservation is always something issuing or coming out of the thing or property granted and not part of the thing itself, and it must be to the grantor or party executing the conveyance and not to a stranger.[83] It has been distinctly held that a reservation of a right of way in favor of one not a party to the deed is void,[84] although there are cases upholding such reservations.[85] So an easement appurtenant to the grantor's remaining land may be created by a condition in the deed limiting and restricting the use to be made of the land granted.[86]

b. Distinction Between Reservation and Exception. The distinction between a reservation and exception is considered in a subsequent section.[87]

premises to a third person subject to the lease, the condition creates an easement, the due enjoyment of which will be protected against encroachment by injunction. Thruston *v.* Minke, 32 Md. 487. Where the owner of two lots conveyed one of them with the restriction that no building should be erected thereon within a certain distance of the other lot such reservation creates an easement in the lot granted for the benefit of the second lot. Herrick *v.* Marshall, 66 Me. 435.

A reservation in a deed of "the rangeway if ever wanted for a road" is not the reserving of a private way, but is for a public highway. Morgan *v.* Palmer, 48 N. H. 336.

Across railroad track.—A railroad company obtained a right of way through plaintiff's land, the track cutting the land into two tracts; a clause in the deed granting the right of way reserved a crossing to pass to the back tract; and the evidence disclosed no way to the back tract except this crossing from the front tract. It was held that the court should find the back tract inaccessible except by the way reserved in the deed. Knowlton *v.* New York, etc., R. Co., 72 Conn. 188, 44 Atl. 8.

Reservation not enlarged by construction.—The city of New York made a grant of certain land fronting on the East river and situated between the original high-water mark and the harbor commissioner's line giving the grantee the wharfage rights along the river boundary of the premises except those at the bulkhead in front of two streets extending to the river and reserving a street along the bulkhead line between these two streets. It was held that the reservation of this street did not also reserve for the city an easement over the premises granted to the end of the piers in front of the two streets. Whitman *v.* New York, 85 N. Y. App. Div. 468, 83 N. Y. Suppl. 465.

79. S. K. Edwards Hall Co. *v.* Dresser, 168 Mass. 136, 46 N. E. 420.

80. U. S. Pipe Line Co. *v.* Delaware, etc., R. Co., 62 N. J. L. 254, 41 Atl. 759, 42 L. R. A. 572.

81. Hart *v.* Chalker, 5 Conn. 311; Peck *v.* Smith, 1 Conn. 103, 6 Am. Dec. 216; Day *v.* Philbrook, 85 Me. 90, 26 Atl. 999; Kuhn *v.* Farnsworth, 69 Me. 404; Tuttle *v.* Walker, 46 Me. 280; Stetson *v.* French, 16 Me. 204; Jamaica Pond Aqueduct Corp. *v.* Chandler, 9 Allen (Mass.) 159; Graves *v.* Amoskeag Co., 44 N. H. 462; Richardson *v.* Palmer, 38 N. H. 212; Leavitt *v.* Howle, 8 N. H. 96.

Instances.— A deed containing the words "excepting the roads laid out over said land" conveys the fee within the limits of the road, subject to the easement of the public incident to the uses of the way. Wellman *v.* Dickey, 78 Me. 29, 2 Atl. 133. So a conveyance of a strip of land itself in explicit terms with a restriction that it shall be used only for a road is nevertheless a grant of the fee and not of a mere easement. Coburn *v.* Coxeter, 51 N. H. 158.

82. Stearns *v.* Mullen, 4 Gray (Mass.) 151.

83. Karmuller *v.* Krotz, 18 Iowa 352; Borst *v.* Empie, 5 N. Y. 33.

84. S. K. Edwards Hall Co. *v.* Dresser, 168 Mass. 136, 46 N. E. 420.

85. Where a conveyance of lands reserved a passway to a third person, an adjoining owner, in terms, "Be it known that R is to have the privilege of a passway from R's orchard round to a gate during her life or [till] she sells," it was held that R had the right to use the passway during her life or till she should sell the land occupied by her. Griffith *v.* Rigg, 37 S. W. 58, 18 Ky. L. Rep. 463. So where a deed contained a clause excepting from its operation a certain designated portion and dedicating that portion to the perpetual use of the owners of property abutting thereon, it was held that it created a perpetual easement in favor of such abutting owners. Northern Pac. R. Co. *v.* Duncan, 87 Minn. 91, 91 N. W. 271.

86. Webb *v.* Robbins, 77 Ala. 176; Herrick *v.* Marshall, 66 Me. 435.

87. See *infra*, V, B, 7.

7. Necessity of Words of Inheritance. Unless this necessity has been removed by statute, it is the settled rule that in a deed to an individual the word "heirs" is necessary to create an estate of inheritance in the grantee, if he takes to his own use and not in trust,[88] and in the grant of an easement the use of the word "heirs" is necessary in order to create an easement in fee.[89] By the strict rules of law, in the absence of statutory interference, an instrument creating an easement in fee by way of reservation must contain words of inheritance, for here the whole estate is granted and the legal effect of the reservation is that of a grant from the vendee back to the vendor, vesting some new interest in him not before possessed.[90] But if created by way of exception words of inheritance are not necessary to create an easement in fee if the grantor owned the fee of the premises at the time of the conveyance, for the simple reason that the thing excepted is not granted, and the grantor retains a part of the estate by virtue of his original title.[91] But as an exception may be created by words of reservation little reliance can be placed upon the language used in the deed in determining whether the right is by way of exception or by way of reservation. The intention of the parties must govern, and this is to be ascertained from all the facts and circumstances in the case. Where by the construction of the grant it fairly appears that it was the intention of the parties to create or reserve an easement appurtenant to the grantor's remaining land, and not merely a personal right for the life of the grantor, the courts will give effect to that intention no matter in what language it may be expressed.[92]

88. Bean *v.* French, 140 Mass. 229, 3 N. E. 206; Sedgwick *v.* Laflin, 10 Allen (Mass.) 430; Buffum *v.* Hutchinson, 1 Allen (Mass.) 58.

89. Hogan *v.* Barry, 143 Mass. 538, 10 N. E. 253; Bean *v.* French, 140 Mass. 229, 3 N. E. 206.

90. Koelle *v.* Knecht, 99 Ill. 396; Claflin *v.* Boston, etc., R. Co., 157 Mass. 489, 32 N. E. 659, 20 L. R. A. 638; Wood *v.* Boyd, 145 Mass. 176, 13 N. E. 476; Murphy *v.* Lee, 144 Mass. 371, 11 N. E. 550; Bean *v.* French, 140 Mass. 229, 3 N. E. 206; Ashcroft *v.* Eastern R. Co., 126 Mass. 196, 30 Am. Rep. 672; Jamaica Pond Aqueduct Co. *v.* Chandler, 9 Allen (Mass.) 159; Curtis *v.* Gardner, 13 Metc. (Mass.) 457; Hornbeck *v.* Westbrook, 9 Johns. (N. Y.) 73; Durham, etc., R. Co. *v.* Walker, 2 Q. B. 940, 2 G. & D. 326, 11 L. J. Exch. 442, 42 E. C. L. 987; Wickham *v.* Walker, 10 L. J. Exch. 153, 7 M. & W. 63.

91. Claflin *v.* Boston, etc., R. Co., 157 Mass. 489, 32 N. E. 659, 20 L. R. A. 638; Wood *v.* Boyd, 145 Mass. 176, 13 N. E. 476; Ashcroft *v.* Eastern R. Co., 126 Mass. 196, 30 Am. Rep. 672; Dennis *v.* Wilson, 107 Mass. 591; Emerson *v.* Mooney, 50 N. H. 315.

92. *Connecticut.*— Chappell *v.* New York, etc., R. Co., 62 Conn. 195, 24 Atl. 997, 17 L. R. A. 420.

Illinois.— Kuecken *v.* Voltz, 110 Ill. 264.

Iowa.— Karmuller *v.* Krotz, 18 Iowa 352.

Kentucky.— Witt *v.* Jefferson, 18 S. W. 229, 13 Ky. L. Rep. 746.

Maine.— Bangs *v.* Parker, 71 Me. 458; Herrick *v.* Marshall, 66 Me. 435; Tuttle *v.* Walker, 46 Me. 280; Smith *v.* Ladd, 41 Me. 314; Winthrop *v.* Fairbanks, 41 Me. 307.

Massachusetts.— Hamlin *v.* New York, etc., R. Co., 160 Mass. 459, 36 N. E. 200; Claflin *v.* Boston, etc., R. Co., 157 Mass. 489, 32 N. E. 659, 20 L. R. A. 638; White *v.* New York, etc., R. Co., 156 Mass. 181, 30 N. E. 612; Wood *v.* Boyd, 145 Mass. 176, 13 N. E. 476; Peck *v.* Conway, 119 Mass. 546; Whitney *v.* Union R. Co., 11 Gray 359, 71 Am. Dec. 715; Bowen *v.* Conner, 6 Cush. 132; Mendell *v.* Delano, 7 Metc. 176; White *v.* Crawford, 10 Mass. 183.

Michigan.— Lathrop *v.* Elsner, 93 Mich. 599, 53 N. W. 791.

Minnesota.— Lidgerding *v.* Zignego, 77 Minn. 421, 80 N. W. 360, 77 Am. St. Rep. 677; Long *v.* Fewer, 53 Minn. 156, 54 N. W. 1071; Winson *v.* Johnson, 42 Minn. 398, 45 N. W. 958.

New Jersey.— Hagerty *v.* Lee, 54 N. J. L. 580, 25 Atl. 319, 20 L. R. A. 631; Coudert *v.* Sayre, 46 N. J. Eq. 386, 19 Atl. 190; Cooper *v.* Louanstein, 37 N. J. Eq. 284.

New York.— Borst *v.* Empie, 5 N. Y. 33; Burr *v.* Mills, 21 Wend. 290.

Pennsylvania.— Whitaker *v.* Brown, 46 Pa. St. 197.

See 17 Cent. Dig. tit. "Easements," §§ 40, 71.

Tenny, C. J., in Winthrop *v.* Fairbanks, 41 Me. 307, 311, said: "It is well settled, that in giving construction to instruments in writing, the intention of the parties is to be effectuated, and if a deed cannot effect the design of them in one mode known to the law, their purpose may be accomplished in another; provided no rule of law is violated. Hence, the distinction between an exception and a reservation is so obscure in many cases, that it has not been observed; but that which in terms is a reservation in a deed is often construed to be a good exception, in order that the object designed to be secured may not be lost."

C. By Implication — 1. By Implied Grant — a. In General. Upon the principle of construction that where a man grants a thing he grants with it everything necessary to its enjoyment, it is held that by a grant of land easements necessary for its enjoyment are created *ex necessitate* and pass by the grant, although no expressly named.[93] The rule of the common law upon this subject is that where the owner of two heritages or of one heritage consisting of several parts has arranged and adapted these, so that one derives a benefit or advantage from the other of a continuous and obvious character, and he sells one of them without making mention of those incidental advantages or burdens of one in respect to the other, there is in the silence of the parties an implied understanding and agreement that these advantages and burdens respectively shall continue as before the separation of the title.[94] In other words upon the grant by the owner of a tenement of part of that tenement as it is then used and enjoyed, there will pass to the grantee all those continuous and apparent quasi-easements which are necessary to the reasonable enjoyment of the property granted and which have been and are at the time of the grant used by the owner of the entirety for the benefit of the part granted,[95] which are easements appurtenant to the land granted and fix the rights not only of the immediate parties but of those claiming under them,[96] and, whether the severance is by voluntary alienation or by judicial proceedings, the use is continued by operation of law.[97]

A deed of a railroad right of way releasing all claim for damages but "reserving" to the grantor a private crossing over the track along the course of a previously existing cartway, excepts the cartway from the grant, and does not create a new right in the grantor by way of reservation, and hence the word "heirs" is not necessary to make the easement of crossing perpetual. Hamlin *v.* New York, etc., R. Co., 160 Mass. 459, 36 N. E. 200.

93. Lanier *v.* Booth, 50 Miss. 410; Brakely *v.* Sharp, 9 N. J. Eq. 9; Miller *v.* Lapham, 44 Vt. 416.

94. Cihak *v.* Klekr, 117 Ill. 643, 7 N. E. 111 [*reversing* 17 Ill. App. 124]; Ingals *v.* Plamondon, 75 Ill. 118; Morrison *v.* King, 62 Ill. 30; Jones *v.* Jenkins, 34 Md. 1, 6 Am. Rep. 300; Lampman *v.* Milks, 21 N. Y. 505.

95. *California.*— Cave *v.* Crafts, 53 Cal. 135.

Indiana.— Ellis *v.* Bassett, 128 Ind. 118, 27 N. E. 344, 25 Am. St. Rep. 421; John Hancock Mut. L. Ins. Co. *v.* Patterson, 103 Ind. 582, 2 N. E. 188, 53 Am. Rep. 550.

Kentucky.— Irvine *v.* McCreary, 108 Ky. 495, 56 S. W. 966, 22 Ky. L. Rep. 169, 49 L. R. A. 417.

Maine.— Jordan *v.* Otis, 38 Me. 439.

Maryland.— Du Val *v.* Du Val, 21 Md. 149; McTavish *v.* Carroll, 7 Md. 352, 61 Am. Dec. 353.

Massachusetts.— Thayer *v.* Payne, 2 Cush. 327.

Nebraska.— Freemont, etc., R. Co. *v.* Gayton, (1903) 93 N. W. 163.

New Jersey.— Central R. Co. *v.* Valentine, 29 N. J. L. 561; Kelly *v.* Dunning, 43 N. J. Eq. 62, 10 Atl. 276; Brakely *v.* Sharp, 10 N. J. Eq. 206.

New York.— Simmons *v.* Cloonan, 81 N. Y. 557; Parsons *v.* Johnson, 68 N. Y. 62, 23 Am. Rep. 149; Voorhees *v.* Burchard, 55 N. Y. 98; Lampman *v.* Milks, 21 N. Y. 505; Stuyvesant *v.* Early, 58 N. Y. App. Div. 242, 68 N. Y. Suppl. 752; New York Cent. R. Co. *v.* Needham, 29 Misc. 435, 61 N. Y. Suppl. 992.

Pennsylvania.— Wacker *v.* McDevitt, 18 Lanc. L. Rev. 33.

South Carolina.— Elliott *v.* Rhett, 5 Rich. 405, 57 Am. Dec. 750.

Vermont.— McElroy *v.* McLeay, 71 Vt. 396, 45 Atl. 898.

Virginia.— Sanderlin *v.* Baxter, 76 Va. 299, 44 Am. Rep. 165; Stevenson *v.* Wallace, 27 Gratt. 77.

Wisconsin.— Galloway *v.* Bonesteel, 65 Wis. 79, 26 N. W. 262, 56 Am. Rep. 616; Jarstadt *v.* Smith, 51 Wis. 96, 8 N. W. 29; Dillman *v.* Hoffman, 38 Wis. 559.

England.—Brown *v.* Alabaster, 37 Ch. D. 490, 57 L. J. Ch. 255, 58 L. T. Rep. N. S. 265, 36 Wkly. Rep. 155; Wheeldon *v.* Burrows, 12 Ch. D. 31, 48 L. J. Ch. 853, 41 L. T. Rep. N. S. 327, 28 Wkly. Rep. 196; Ewart *v.* Cochrane, 7 Jur. N. S. 925, 5 L. T. Rep. N. S. 1, 4 Macq. H. L. 117, 10 Wkly. Rep. 3; Nicholls *v.* Nicholls, 81 L. T. Rep. N. S. 811.

Canada.— Hart *v.* McMullen, 30 Can. Supreme Ct. 245; Israel *v.* Leith, 20 Ont. 361.

See 17 Cent. Dig. tit. "Easements," §§ 43, 44.

Necessity to enjoyment of estate.— "The American cases have with almost entire unanimity limited easements by implied grant to such as were open, visible,— such as would be apparent to an ordinary observer,— continuous, and necessary to the enjoyment of the estate granted or retained." Whiting *v.* Gaylord, 66 Conn. 337, 348, 34 Atl. 85, 50 Am. St. Rep. 87.

96. Ellis *v.* Bassett, 128 Ind. 118, 27 N. E. 344, 25 Am. St. Rep. 421; Chase *v.* Hall, 41 Mo. App. 15; Bond *v.* Willis, 84 Va. 796, 6 S. E. 136.

97. Ellis *v.* Bassett, 128 Ind. 118, 27 N. E. 344, 25 Am. St. Rep. 421.

b. Simultaneous Conveyances. Two deeds executed and delivered at the same time by the same grantor to different grantees, one conveying one parcel of real estate with an easement in another parcel, and the other deed conveying the latter parcel, but reserving the easement, are to be construed together.[98] So where there are several grants not absolutely at the same moment, but so far at the same moment that they are to be considered as one transaction and done at the same time, then each of the grantees gets the benefit of an implied grant of easements. It is sometimes said that this is a reservation, but in reality it is not; for in order to make all those grants which are looked upon as one transaction available and effectual it is considered that each of the grantees is to be looked upon as taking from the grantor, while he has still the power to give each what it is right he should give; so that there is an implied grant against all the other grantees of those easements which will be reasonably necessary for the property which is conveyed.[99] But when there has once been a severance of the unity of title by a conveyance of a portion of a tenement, the grantee of the residue can take nothing by implication except what may have been reserved by the grantor.[1]

c. Partition Among Heirs. A right by implication sometimes arises in case of a partition among heirs when it would not arise in the case of a conveyance of a part of a heritage to a stranger.[2] So, although a right of way is extinguished

98. Knight *v.* Dyer, 57 Me. 174, 99 Am. Dec. 765. When two properties belonging to the same owner are sold at the same time, and each purchaser has notice of sale to the other, the right to any continuous easement passes with the sale as an absolute legal right. But the easement must have been enjoyed by the former owner at the time of the sale. Therefore one purchaser could not claim the right to use a dam on his land in such a way as to cause the water to flow back on the other property, where such right, if it had ever been enjoyed by the former owner, had been abandoned years before the sale. Hart *v.* McMullen, 30 Can. Supreme Ct. 245.

99. Baker *v.* Rice, 56 Ohio St. 463, 47 N. E. 653; Russell *v.* Watts, 25 Ch. D. 559, 50 L. T. Rep. N. S. 673, 32 Wkly. Rep. 626.

Illustration.— On a natural mill stream there were three successive dams and mills. E being the owner of the upper and lower mills only, dug and opened a raceway on his own land from the dam of his lower mill to the stream above the dam of the middle mill belonging to another person, so as to tap the stream there and partially to divert its waters from the middle mill; subsequently he purchased the middle mill and became the owner of the three mills and of all the land affected by them, their dams, races, and appurtenances, and continued to use said raceway as an actual appurtenance to the lower mill, until by deeds of even date he conveyed said mills with their appurtenances to his three sons. The upper mill to J F, the middle mill to J, and the lower mill to W. In an action by the owner of the middle mill, the grantee of J, against the owner of the lower mill, the grantee of W, to recover damages for the continued partial diversion of the water from the middle mill by means of said raceway, it was held that the grantees of E and those holding under them respectively took and each was entitled to hold his mill with its appurtenances as it actually existed in fact and in use at the time of the conveyance from E. Elliott *v.* Sallee, 14 Ohio St. 10 [*following* Morgan *v.* Mason, 20 Ohio 401, 55 Am. Dec. 464].

Severance by mortgage.— The rule that when the owner of two tenements severs the same by conveyance to two different persons the purchaser of the one takes subject to apparent easements in favor of the other is not varied by the fact that the severance is by mortgage merely. Havens *v.* Klein, 51 How. Pr. (N. Y.) 82.

1. Brakely *v.* Sharp, 9 N. J. Eq. 9.

Conveyance of servient part first.— Where a common grantor owned two tracts of land and on one of the tracts a spring was located, the water from which was conducted by underground pipes and discharged in a receptacle on the other tract, and conveyed the tract on which the spring was located to one person and thereafter the other tract to another, and neither deed contained any mention of the spring or water, it was held that since at the time of the second conveyance the grantor owned no property rights in the spring, the grantee of the second tract acquired no easement therein, or in the flow of the water to the receptacle as appurtenant to the land. Marcy *v.* Reimer, 47 N. Y. App. Div. 636, 62 N. Y. Suppl. 203.

2. Goodall *v.* Godfrey, 53 Vt. 219, 38 Am. Rep. 671; Burwell *v.* Hobson, 12 Gratt. (Va.) 322, 65 Am. Dec. 247.

Illustration.— Thus in Brakely *v.* Sharp, 10 N. J. Eq. 206, the intestate owned two farms at his death with a house on each, and had constructed an aqueduct from a spring upon one of them to both of these houses. Upon his death the farm upon which the spring was located was set apart to the widow and one heir, and the other farm to the other heir. The question arose as to the effect of this partition upon the right which the owner of

by unity of possession, it may be revived if the estates descend to daughters who make partition by which the dominant estate is allotted to one and the servient to the other.[3]

d. Character of Easements Which Pass by Implied Grant — (I) *Necessity of Permanency.* All easements of whatever class which pass by implication or construction of law must not only be reasonably necessary and apparent, but also permanent in their character. A mere temporary provision or arrangement made for the convenience of the entire estate will not constitute that degree of necessity and permanency required to burden the property with a continuance of the same when divided or separated by conveyance to different parties.[4] Three things are essential to the creation of an easement in this way: (1) A separation of the title; (2) that before the separation takes place the use which gives rise to the easement shall have been so long continued and so obvious as to show that it was meant to be permanent; and (3) that the easement shall be necessary to the beneficial enjoyment of the land granted or retained.[5]

(II) *Necessity of Continuity* — (A) *In General.* The distinction between easements which are apparent and continuous and those which are not apparent and continuous is well established by adjudicated cases. The former pass on the severance of the two tenements as appurtenant without the use of the word "appurtenances," but the latter do not pass unless the grantor uses language in the conveyance sufficient to create the easement *de novo*;[6] or as has been said discontinuous easements not constantly apparent are continued or created by a severance only when they are necessary, and that necessity cannot be obviated by a substitute constructed on or over the dominant premises.[7] In order that an easement may pass by implication it must be annexed to the estate granted, must be reasonably necessary for the beneficial enjoyment of the same, and must be in open, apparent, and continuous use at the time of the grant.[8]

the second farm had to the benefit of this aqueduct. The chancellor held that if the ancestor while owning both farms had conveyed to a stranger the one which was set apart to the widow, he would have lost all benefit of the aqueduct as an easement if he had not expressly reserved it in his deed; but the widow and heir did not stand in the light of purchasers from the ancestor; all the heirs came in with equal rights and no preference arose from mere priority of assignment, as all took title from the same partition proceedings.

3. James *v.* Plant, 4 A. & E. 749, 6 L. J. Exch. 260, 6 N. & M. 282, 31 E. C. L. 330; 1 Jenkins Cent. 37.

4. Francies' Appeal, 96 Pa. St. 200; Elliott *v.* Rhett, 5 Rich. (S. C.) 405, 52 Am. Dec. 750.

5. Kelly *v.* Dunning, 43 N. J. Eq. 62, 10 Atl. 276.

6. *New Jersey.*— Fetters *v.* Humphreys, 18 N. J. Eq. 260, 19 N. J. Eq. 471.

New York.— Parsons *v.* Johnson, 68 N. Y. 62, 23 Am. Rep. 149.

Pennsylvania.— Francies' Appeal, 96 Pa. St. 200.

Rhode Island.— O'Rorke *v.* Smith, 11 R. I. 259, 23 Am. Rep. 440.

England.— Thomson *v.* Waterlow, L. R. 6 Eq. 36, 37 L. J. Ch. 495, 18 L. T. Rep. N. S. 545, 16 Wkly. Rep. 686; Russell *v.* Harford, L. R. 2 Eq. 507, 15 L. T. Rep. N. S. 171; Langley *v.* Hammond, L. R. 3 Exch. 161, 37 L. J. Exch. 118, 18 L. T. Rep. N. S. 858, 16 Wkly. Rep. 937; Pearson *v.* Spencer, 1 B. & S. 571, 7 Jur. N. S. 1195, 4 L. T. Rep. N. S. 769, 101 E. C. L. 571; Worthington *v.* Gimson, 2 E. & E. 618, 6 Jur. N. S. 1053, 29 L. J. Q. B. 116, 105 E. C. L. 618.

7. Thayer *v.* Payne, 2 Cush. (Mass.) 327; Fetters *v.* Humphreys, 18 N. J. Eq. 260; Lampman *v.* Milks, 21 N. Y. 505; Pheysey *v.* Vicary, 16 M. & W. 484.

8. *Connecticut.*— Whiting *v.* Gaylord, 66 Conn. 337, 34 Atl. 85, 50 Am. St. Rep. 87.

Illinois.— Cihak *v.* Klekr, 117 Ill. 643, 7 N. E. 111.

Maine.— Warren *v.* Blake, 54 Me. 276, 89 Am. Dec. 748.

Maryland.— Mitchell *v.* Seipel, 53 Md. 251, 36 Am. Rep. 404; Janes *v.* Jenkins, 34 Md. 1, 6 Am. Rep. 300.

Massachusetts.— Philbrick *v.* Ewing, 97 Mass. 133; Randall *v.* McLaughlin, 10 Allen 366; Carbrey *v.* Willis, 7 Allen 364, 83 Am. Dec. 688.

New Hampshire.— Dunklee *v.* Wilton R. Co., 24 N. H. 489.

New Jersey.— Denton *v.* Leddell, 23 N. J. Eq. 64; Fetters *v.* Humphreys, 18 N. J. Eq. 260, 19 N. J. Eq. 471.

New York.— Root *v.* Wadhams, 107 N. Y. 384, 14 N. E. 281; Griffiths *v.* Morrison, 106 N. Y. 165, 12 N. E. 580; Parsons *v.* Johnson, 68 N. Y. 62, 23 Am. Rep. 149; Butterworth *v.* Crawford, 46 N. Y. 349, 7 Am. Rep. 352; Lampman *v.* Milks, 21 N. Y. 505.

Pennsylvania.— Francies' Appeal, 96 Pa. St. 200.

(B) *What Easements Considered Continuous* — (1) DITCHES AND DRAINS. If the owner of land makes an artificial, open ditch across it for the purpose of drainage and afterward sells either the upper or lower portion of the land without reference to the ditch, neither he nor his grantee can afterward stop up the drain, and an attempt to do so by the occupant of the lower tenement is ground for injunctive relief.[9] So if he sells the two portions to different parties the easement passes with the title to the land and the grantee of the servient tenement takes it subject thereto.[10] But it is otherwise in the case of a subterranean drain not open to observation. If the owner of land under which there is such a drain conveys a part of it with full covenants of warranty without reference to the drain no easement is either granted or reserved.[11]

(2) RIGHTS OF WAY. According to the weight of authority a right of way is not such a continuous easement as will pass by implication upon the severance of an estate, inasmuch as it is enjoyed merely at intervals, leaving in the interim no visible sign of its existence.[12] But this distinction between ways and other ease-

Rhode Island.— O'Rorke *v.* Smith, 11 R. I. 259, 23 Am. Rep. 440; Providence Tool Co. *v.* Corlies Steam Engine Co., 9 R. I. 564; Evans *v.* Dana, 7 R. I. 306.

England.— Watts *v.* Kelson, L. R. 6 Ch. 166, 40 L. J. Ch. 126, 24 L. T. Rep. N. S. 209, 19 Wkly. Rep. 833; Brown *v.* Alabaster, 37 Ch. D. 490, 57 L. J. Ch. 255, 58 L. T. Rep. N. S. 265, 36 Wkly. Rep. 155; Russell *v.* Watts, 25 Ch. D. 559, 50 L. T. Rep. N. S. 673, 32 Wkly. Rep. 626; Wheeldon *v.* Burrows, 12 Ch. D. 31, 48 L. J. Ch. 853, 41 L. T. Rep. N. S. 327, 28 Wkly. Rep. 196; Suffield *v.* Brown, 4 De G. J. & S. 185, 10 Jur. N. S. 111, 33 L. J. Ch. 249, 9 L. T. Rep. N. S. 627, 3 New Rep. 340, 12 Wkly. Rep. 356, 69 Eng. Ch. 143 [*overruling* Pyer *v.* Carter, 1 H. & N. 916, 26 L. J. Exch. 258, 5 Wkly. Rep. 371].

9. Kelly *v.* Dunning, 43 N. J. Eq. 62, 10 Atl. 276; Denton *v.* Leddell, 23 N. J. Eq. 64; Sanderlin *v.* Baxter, 76 Va. 299, 44 Am. Rep. 165; Dodd *v.* Burchell, 1 H. & C. 113, 8 Jur. N. S. 1180, 31 L. J. Exch. 364.

Drains between houses.— Where the owner of two or more adjoining houses sells and conveys one of them to a purchaser, such house is entitled to the benefit and subject to the burden of all existing drains communicating with the other house without any express reservation or grant for that purpose. Pyer *v.* Carter, 1 H. & N. 916, 26 L. J. Exch. 258, 5 Wkly. Rep. 371.

Implied reservation — Degree of necessity. — A right to discharge water by ditch on a servient tenement may be claimed by express grant, by prescription, or by express or implied reservation in the conveyance of the land over which the right is claimed; but to raise an implied reservation of such an easement in favor of the grantor of the alleged servient tenement the necessity of it to the dominant tenement retained by the grantor must be imperious. Crosland *v.* Rogers, 32 S. C. 130, 10 S. E. 874.

10. Hair *v.* Downing, 96 N. C. 172, 2 S. E. 520.

11. Carbrey *v.* Willis, 7 Allen (Mass.) 364, 83 Am. Dec. 688; Treadwell *v.* Inslee, 120 N. Y. 458, 24 N. E. 651 [*affirming* 46 Hun 399]; Scott *v.* Beutel, 23 Gratt. (Va.) 1.

12. *Colorado.*—Ward *v.* Farwell, 6 Colo. 66.

District of Columbia.—McPherson *v.* Acker, MacArthur & M. 150, 48 Am. Rep. 749.

Louisiana.— Cleris *v.* Tieman, 15 La. Ann. 316; Fisk *v.* Haber, 7 La. Ann. 652.

Maine.— Stevens *v.* Orr, 69 Me. 323; Warren *v.* Blake, 54 Me. 276, 89 Am. Dec. 748.

Maryland.— Mitchell *v.* Seipel, 53 Md. 251, 36 Am. Rep. 404; Oliver *v.* Hook, 47 Md. 301.

Massachusetts.—Oliver *v.* Pitman, 98 Mass. 46; Pettingill *v.* Porter, 8 Allen 1, 85 Am. Dec. 671; Miller *v.* Bristol, 12 Pick. 550; Grant *v.* Chase, 17 Mass. 443, 9 Am. Dec. 161; Gayetty *v.* Bethune, 14 Mass. 49, 7 Am. Dec. 188.

Michigan.— Morgan *v.* Meuth, 60 Mich. 238, 27 N. W. 509.

New Jersey.— Stuyvesant *v.* Woodruff, 21 N. J. L. 133, 57 Am. Dec. 156; Kelly *v.* Dunning, 43 N. J. Eq. 62, 10 Atl. 276; Fetters *v.* Humphreys, 19 N. J. Eq. 471.

Rhode Island.— O'Rorke *v.* Smith, 11 R. I. 259, 23 Am. Dec. 440.

West Virginia.— Standiford *v.* Goudy, 6 W. Va. 364.

England.— Thomson *v.* Waterlow, L. R. 6 Eq. 36, 37 L. J. Ch. 495, 18 L. T. Rep. N. S. 545, 16 Wkly. Rep. 686; Langley *v.* Hammond, L. R. 3 Exch. 161, 37 L. J. Exch. 118, 18 L. T. Rep. N. S. 858, 16 Wkly. Rep. 937; Polden *v.* Bastard, L. R. 1 Q. B. 156, 7 B. & S. 130, 35 L. J. Q. B. 92, 13 L. T. Rep. N. S. 441, 14 Wkly. Rep. 198; Whalley *v.* Thompson, 1 B. & P. 371, 4 Rev. Rep. 826; Pearson *v.* Spencer, 1 B. & S. 571, 7 Jur. N. S. 1195, 4 L. T. Rep. N. S. 769, 101 E. C. L. 571; Brett *v.* Clowser, 5 C. P. D. 376; Worthington *v.* Gimson, 2 E. & E. 618, 6 Jur. N. S. 1053, 29 L. J. Q. B. 116, 105 E. C. L. 618; Dodd *v.* Burchell, 1 H. & C. 113, 8 Jur. N. S. 1180, 31 L. J. Exch. 364; Daniel *v.* Anderson, 8 Jur. N. S. 328, 31 L. J. Ch. 610, 7 L. T. Rep. N. S. 183, 10 Wkly. Rep. 366; Pheysey *v.* Vicary, 16 M. & W. 484.

See 17 Cent. Dig. tit. "Easements," § 45.

Erle, C. J., in Polden *v.* Bastard, L. R. 1 Q. B. 156, 161, 7 B. & S. 130, 35 L. J. Q. B. 92, 13 L. T. Rep. N. S. 441, 14 Wkly. Rep. 198, said: "There is a distinction be-

ments which are enjoyed without any active intervention of the party entitled to enjoy them has not been uniformly regarded; and there are cases in which it has been held that ways which are visibly and permanently established on one part of an estate for the benefit of another will, upon a severance of the estate, pass as implied or constructive easements appurtenant to the part of the estate for the benefit of which they were established.[13] This has been put upon the ground that the way being a formed and inclosed road is considered a continuous and apparent easement which will pass by implied grant without any large general words or indeed without any general words at all.[14] But no such easement will pass by implication if it is necessary to change the physical condition of the property in order to create the way claimed.[15] In other cases it has been held that a grant of a right of way cannot be inferred merely from the fact that there is a way leading to the premises purchased,[16] even though the grant of the land be with all privileges and appurtenances, for the use of the word "appurtenances," although appropriate in the conveyance of an existing easement, is not sufficient to create one where none exists.[17]

tween easements, such as a right of way or easements used from time to time, and easements of necessity or continuous easements. The cases recognize this distinction, and it is clear law that, upon a severance of tenements, easements used as of necessity, or in their nature continuous, will pass by implication of law without any words of grant; but with regard to easements which are used from time to time only, they do not pass, unless the owner, by appropriate language, shews an intention that they should pass."

13. *Illinois.*— Cihak *v.* Klekr, 117 Ill. 643, 7 N. E. 111.

Indiana.— Robinson *v.* Thrailkill, 110 Ind. 117, 10 N. E. 647.

Iowa.— Thompson *v.* Miner, 30 Iowa 386.

New York.— Huttemeier *v.* Albro, 18 N. Y. 48.

Ohio.— Baker *v.* Rice, 56 Ohio St. 463, 47 N. E. 653; Mosher *v.* Hibbs, 24 Ohio Cir. Ct. 375.

Pennsylvania.— Maubeck *v.* Jones, 190 Pa. St. 171, 42 Atl. 536; Cannon *v.* Boyd, 73 Pa. St. 179; Overdeer *v.* Updegraff, 69 Pa. St. 110; Phillips *v.* Phillips, 48 Pa. St. 178, 86 Am. Dec. 577; McCarty *v.* Kitchenman, 47 Pa. St. 239, 86 Am. Dec. 538; Kieffer *v.* Imhoff, 26 Pa. St. 438; Building Assoc. *v.* Getty, 11 Phila. 305.

England.— Thomas *v.* Owen, 20 Q. B. D. 225, 52 J. P. 516, 57 L. J. Q. B. 198, 58 L. T. Rep. N. S. 162, 36 Wkly. Rep. 440; Ford *v.* Metropolitan, etc., R. Co., 17 Q. B. D. 12, 50 J. P. 661, 55 L. J. Q. B. 296, 54 L. T. Rep. N. S. 718, 34 Wkly. Rep. 426; Watts *v.* Kelson, L. R. 6 Ch. 166, 40 L. J. Ch. 126, 24 L. T. Rep. N. S. 209, 19 Wkly. Rep. 833; Kay *v.* Oxley, L. R. 10 Q. B. 360, 44 L. J. Q. B. 210, 33 L. T. Rep. N. S. 164; Plant *v.* James, 5 B. & Ad. 791, 27 E. C. L. 333; Brown *v.* Alabaster, 37 Ch. D. 490, 57 L. J. Ch. 255, 58 L. T. Rep. N. S. 265, 36 Wkly. Rep. 155; Bayley *v.* Great Western R. Co., 26 Ch. D. 434, 51 L. T. Rep. N. S. 337; Barkshire *v.* Grubb, 18 Ch. D. 616, 50 L. J. Ch. 731, 45 L. T. Rep. N. S. 383, 29 Wkly. Rep. 929.

See 17 Cent. Dig. tit. "Easements," § 45.

If the owner of a house and land makes a formed road over the land for the apparent use of the house and then conveys the house separately from the land with the ordinary general words, it seems that a right of way over the road will pass. Watts *v.* Kelson, L. R. 6 Ch. 166, 40 L. J. Ch. 126, 24 L. T. Rep. N. S. 209, 19 Wkly. Rep. 833; Langley *v.* Hammond, L. R. 3 Exch. 161, 37 L. J. Exch. 118, 18 L. T. Rep. N. S. 858, 16 Wkly. Rep. 937. In Watts *v.* Kelson, L. R. 6 Ch. 166, 174, 40 L. J. Ch. 126, 24 L. T. Rep. N. S. 209, 19 Wkly. Rep. 833 [*quoted* and *approved* in Barkshire *v.* Grubb, 18 Ch. D. 616, 622, 50 L. J. Ch. 731, 45 L. T. Rep. N. S. 383, 29 Wkly. Rep. 929], Mellish, L. J., said: "We may also observe that, in Langley *v.* Hammond, L. R. 3 Exch. 161, 37 L. J. Exch. 118, 18 L. T. Rep. N. S. 858, 16 Wkly. Rep. 937, Baron Bramwell expressed an opinion, in which we concur, that even in the case of a right of way, if there was a formed road made over the alleged servient tenement, to and for the apparent use of the dominant tenement, a right of way over such road might pass by a conveyance of the dominant tenement with the ordinary general words."

14. Brown *v.* Alabaster, 37 Ch. D. 490, 57 L. J. Ch. 255, 58 L. T. Rep. N. S. 265, 36 Wkly. Rep. 155.

15. Roe *v.* Siddons, 22 Q. B. D. 224.

16. Stevens *v.* Orr, 69 Me. 323; Warren *v.* Blake, 54 Me. 276, 89 Am. Dec. 748; Standiford *v.* Goudy, 6 W. Va. 364.

17. *Maine.*— Stevens *v.* Orr, 69 Me. 323.

Maryland.— Oliver *v.* Hook, 47 Md. 301.

Mississippi.— Bonelli *v.* Blakemore, 66 Miss. 136, 5 So. 228, 14 Am. St. Rep. 550.

New Hampshire.— Barker *v.* Clark, 4 N. H. 380, 17 Am. Dec. 428.

New York.— Longendyke *v.* Anderson, 101 N. Y. 625, 4 N. E. 629; Parsons *v.* Johnson, 68 N. Y. 62, 23 Am. Rep. 149.

Rhode Island.— Kenyon *v.* Nichols, 1 R. I. 411.

Vermont.— Swasey *v.* Brooks, 30 Vt. 692.

West Virginia.— Standiford *v.* Goudy, 6 W. Va. 364.

(III) *Degree of Necessity Required.* In some cases it is held that easements will not pass by implication except in cases of strict necessity.[18] But the weight of authority sustains a rule less exacting than that of strict and indispensable necessity, namely, that the degree of necessity is such merely as renders the easement necessary for the convenient and comfortable enjoyment of the property as it existed when the severance was made, not that it shall be absolutely necessary for the enjoyment of the estate granted.[19]

2. By Implied Reservation. As regards implied reservations of easements the matter stands on principle in a position very different from implied grants. If the grantor intends to reserve any right over the tenement granted it is his duty to reserve it expressly in the grant. To say that a grantor reserves to himself in entirety that which may be beneficial to him, but which may be most injurious to his grantee, is quite contrary to the principle upon which an implied grant depends, which is that a grantor shall not derogate from or render less effectual his grant or render that which he has granted less beneficial to his grantee.[20] Accordingly where there is a grant of land with full covenants of warranty without express reservation of easements, the best considered cases hold that there can be no reservation by implication, unless the easement is strictly one of necessity,[21]

See 17 Cent. Dig. tit. "Easements," § 45.

18. Warren *v.* Blake, 54 Me. 276, 89 Am. Dec. 748; Buss *v.* Dyer, 125 Mass. 287; Randall *v.* McLaughlin, 10 Allen (Mass.) 366; Carbrey *v.* Willis, 7 Allen (Mass.) 364, 83 Am. Dec. 688; Shaver *v.* Edgell, 48 W. Va. 502, 37 S. E. 664.

19. *California.*— Cave *v.* Crafts, 53 Cal. 135.

Illinois.— Cihak *v.* Klekr, 117 Ill. 643, 7 N. E. 111; Ingals *v.* Plamondon, 75 Ill. 118.

Indiana.— John Hancock Mut. L. Ins. Co. *v.* Patterson, 103 Ind. 582, 2 N. E. 188, 53 Am. Rep. 550.

Kentucky.— Henry *v.* Koch, 80 Ky. 391, 44 Am. Rep. 484.

Maryland.— Janes *v.* Jenkins, 34 Md. 1, 6 Am. Rep. 300.

New Jersey.— Kelly *v.* Dunning, 43 N. J. Eq. 62, 10 Atl. 276.

New York.— Simmons *v.* Cloonan, 81 N. Y. 557.

Pennsylvania.— Cannon *v.* Boyd, 73 Pa. St. 179.

Vermont.— McElroy *v.* McLeay, 71 Vt. 396, 45 Atl. 898; Goodall *v.* Godfrey, 53 Vt. 219, 38 Am. Rep. 671.

United States.— U. S. *v.* Appleton, 24 Fed. Cas. No. 14,463, 1 Sumn. 492.

20. Brown *v.* Alabaster, 37 Ch. D. 490, 57 L. J. Ch. 255, 58 L. T. Rep. N. S. 265, 36 Wkly. Rep. 155; Russell *v.* Watts, 25 Ch. D. 559, 50 L. T. Rep. N. S. 673, 32 Wkly. Rep. 626; Wheeldon *v.* Burrows, 12 Ch. D. 31, 48 L. J. Ch. 853, 41 L. T. Rep. N. S. 327, 28 Wkly. Rep. 196.

21. *Alabama.*—Walker *v.* Clifford, 128 Ala. 67, 29 So. 588, 86 Am. St. Rep. 74.

Maine.— Stevens *v.* Orr, 69 Me. 323; Warren *v.* Blake, 54 Me. 276, 89 Am. Dec. 748.

Maryland.— Burns *v.* Gallagher, 62 Md. 462; Mitchell *v.* Seipel, 53 Md. 251, 36 Am. Rep. 404.

Massachusetts.— Sullivan *v.* Ryan, 130 Mass. 116; Carbrey *v.* Willis, 7 Allen 364, 83 Am. Dec. 688.

New Jersey.— Larsen *v.* Paterson, 53 N. J. Eq. 88, 30 Atl. 1094; Toothe *v.* Bryce, 50 N. J. Eq. 589, 25 Atl. 182.

New York.— Whyte *v.* New York Builders' League, 164 N. Y. 429, 58 N. E. 517; Wells *v.* Garbutt, 132 N. Y. 430, 30 N. E. 978; Scrymser *v.* Phelps, 33 Hun 474; Shoemaker *v.* Shoemaker, 11 Abb. N. Cas. 80; Sloat *v.* McDougal, 9 N. Y. Suppl. 631; Burr *v.* Mills, 21 Wend. 290.

Virginia.— Scott *v.* Beutel, 23 Gratt. 1.

England.— Ford *v.* Metropolitan, etc., R. Co., 17 Q. B. D. 12, 50 J. P. 661, 55 L. J. Q. B. 296, 54 L. T. Rep. N. S. 718, 34 Wkly. Rep. 426; Crossley *v.* Lightowler, L. R. 2 Ch. 478, 36 L. J. Ch. 584, 16 L. T. Rep. N. S. 438, 15 Wkly. Rep. 801; Down *v.* Alabaster, 37 Ch. D. 490, 57 L. J. Ch. 255, 58 L. T. Rep. N. S. 265, 36 Wkly. Rep. 155; Russell *v.* Watts, 25 Ch. D. 559, 50 L. T. Rep. N. S. 673, 32 Wkly. Rep. 626; Wheeldon *v.* Burrows, 12 Ch. D. 31, 48 L. J. Ch. 853, 41 L. T. Rep. N. S. 327, 28 Wkly. Rep. 196; Suffield *v.* Brown, 4 De G. J. & S. 185, 195, 10 Jur. N. S. 111, 33 L. J. Ch. 249, 9 L. T. Rep. N. S. 627, 3 New Rep. 340, 12 Wkly. Rep. 356, 69 Eng. Ch. 143. In this last case the Lord Chancellor said: "Many rules of law are derived from fictions, and the rules of the French Code, which Mr. Gale has copied, are derived from the fiction of the owner of the entire heritage, which is afterwards severed, standing in the relation of *père de famille*, and impressing upon the different portions of his estate mutual services and obligations which accompany such portions when divided among them, or even as it is used in French law, when aliened to strangers. But this comparison of the disposition of the owner of two tenements to the *destination du père de famille* is a mere fanciful analogy, from which rules of law ought not to be derived. And the analogy, if it be worth grave attention, fails in the case to be decided, for when the owner of two tenements sells and conveys one for an absolute estate therein, he puts an end by contract to the relation which he had himself created between the tenement

for the operation of a plain grant not pretended to be otherwise than in conformity with the contract between the parties ought not to be limited and cut down by the fiction of an implied reservation.[22] There are, however, many cases which hold that an easement will be reserved by implication where all the conditions and circumstances exist under which it would be granted by implication.[23]

3. Particular Easements Created by Implication — a. Ways of Necessity — (i) *Grant as a Basis of Existence.* A way of necessity such as the law recognizes derives its origin from a grant or reservation and cannot exist where there was never any unity of ownership of the alleged dominant and servient estates, for no one can have a way of necessity over the land of a stranger.[24] Necessity alone without reference to any relations between the respective owners of the land is not sufficient to create this right.[25] So where land is taken by condemnation proceedings, no way of necessity arises, because there has been no grant from which it could be implied.[26] Where easements have been created by

sold and the adjoining tenement; and discharges the tenement so sold from any burden imposed upon it during his joint occupation; and the condition of such tenement is thenceforth determined by the contract of alienation, and not by the previous user of the vendor during such joint ownership."

22. Mitchell *v.* Seipel, 53 Md. 251, 36 Am. Rep. 404; Suffield *v.* Brown, 4 De G. J. & S. 185, 10 Jur. N. S. 111, 33 L. J. Ch. 249, 9 L. T. Rep. N. S. 627, 3 New Rep. 340, 12 Wkly. Rep. 356, 69 Eng. Ch. 143.

Land flowed by a mill dam.— Where the owner of land conveys away a portion of his premises, a part of which at the time of the conveyance is flowed by a mill dam belonging to him, and makes no reservation of the right to continue to flow the land, he loses the right and cannot set up an implied reservation. Burr *v.* Mills, 21 Wend. (N. Y.) 290.

23. *Colorado.*— Croke *v.* American Nat. Bank, (App. 1902) 70 Pac. 229.

Illinois.— Cihak *v.* Klekr, 117 Ill. 643, 7 N. E. 111; Morrison *v.* King, 62 Ill. 30; McCann *v.* Day, 57 Ill. 101; McEwan *v.* Baker, 98 Ill. App. 271.

Indiana.— Steinke *v.* Bentley, 6 Ind. App. 663, 34 N. E. 97.

New Hampshire.—Dunklee *v.* Wilton R. Co., 24 N. H. 489.

North Carolina.—Hair *v.* Downing, 96 N. C. 172, 2 S. E. 520.

Pennsylvania.— Maubeck *v.* Jones, 190 Pa. St. 171, 42 Atl. 536; Ormsby *v.* Pinkerton, 159 Pa. St. 458, 28 Atl. 300; Geible *v.* Smith, 146 Pa. St. 276, 23 Atl. 437, 28 Am. St. Rep. 796; Pierce *v.* Cleland, 133 Pa. St. 189, 19 Atl. 352, 7 L. R. A. 752; Zell *v.* Universalist Soc., 119 Pa. St. 390, 13 Atl. 447, 4 Am. St. Rep. 654; Cannon *v.* Boyd, 73 Pa. St. 179; Phillips *v.* Phillips, 48 Pa. St. 178, 86 Am. Dec. 577; Held *v.* McBride, 3 Pa. Super. Ct. 155; Hunter *v.* Wilcox, 23 Pa. Co. Ct. 191.

South Carolina.— Crosland *v.* Rogers, 32 S. C. 130, 10 S. E. 874.

Tennessee.—Rightsell *v.* Hale, 90 Tenn. 556, 18 S. W. 245.

Vermont.— Harwood *v.* Benton, 32 Vt. 724.

Wisconsin.—Galloway *v.* Bonesteel, 65 Wis. 79, 26 N. W. 262, 56 Am. Rep. 616; Jarstadt *v.* Smith, 51 Wis. 96, 8 N. W. 29.

24. *Alabama.*— Trump *v.* McDonnell, 120 Ala. 200, 24 So. 353.

Connecticut.— Collins *v.* Prentice, 15 Conn. 39, 423, 38 Am. Dec. 61.

Indiana.—Stewart *v.* Hartman, 46 Ind. 331.

Maryland.— Brice *v.* Randall, 7 Gill & J. 349.

Massachusetts.— Nichols *v.* Luce, 24 Pick. 102, 35 Am. Dec. 302.

New Hampshire.— Quimby *v.* Straw, 71 N. H. 160, 51 Atl. 656.

Tennessee.— Pearne *v.* Coal Creek, etc., Co., 90 Tenn. 619, 18 S. W. 402.

Vermont.— Tracy *v.* Atherton, 35 Vt. 52, 82 Am. Dec. 621.

England.— Proctor *v.* Hodgson, 3 C. L. R. 755, 10 Exch. 824, 24 L. J. Exch. 195, 29 Eng. L. & Eq. 453; Bullard *v.* Harrison, 4 M. & S. 387, 16 Rev. Rep. 493.

Compare Dutton *v.* Tayler, 2 Lutw. 1487, which seems to assert the doctrine that strict necessity alone is sufficient to maintain a way of necessity. An examination of the English cases above cited will, however, reveal the fact that this is not now the law of England. So also in Snyder *v.* Warford, 11 Mo. 513, 49 Am. Dec. 94, it was held that a right of way of necessity exists in all cases where an individual owns land surrounded by other lands excluding it from any public highway. See also Adams *v.* Harrison, 4 La. Ann. 165; Miller *v.* Thompson, 3 La. Ann. 567; Broussard *v.* Etie, 11 La. 394, decided under a statute in that state regulating this subject.

See 17 Cent. Dig. tit. "Easements," § 50.

25. Collins *v.* Prentice, 15 Conn. 39, 423, 38 Am. Dec. 61; Nichols *v.* Luce, 24 Pick. (Mass.) 102, 35 Am. Dec. 302; Bullard *v.* Harrison, 4 M. & S. 387, 16 Rev. Rep. 493.

The fact that one's land is completely surrounded by the land of another does not of itself give the former a way of necessity over the land of the latter where there is no privity of ownership. Ellis *v.* Blue Mountain Forest Assoc., 69 N. H. 385, 41 Atl. 856, 42 L. R. A. 570.

26. Banks *v.* School Directors, 194 Ill. 247, 62 N. E. 604. And see Atchison, etc., R. Co. *v.* Conlon, 62 Kan. 416, 63 Pac. 432, 53 L. R. A. 781, holding that where a grantor in a deed excepted from the land conveyed a

the sale of lots abutting upon a proposed street or alley way, a purchaser of the land set apart for such street or alley way at a tax-sale is not estopped to interfere therewith, inasmuch as he does not claim under the original owner by whose grants the easements were created.[27] So a right of way from necessity from one part of the claimant's land to another part of the same tract over the land of another cannot exist.[28]

(II) *Convenience as Ground For Claim.* No implication of a grant of a right of way can arise from proof that the land granted cannot be conveniently occupied without it. Its foundation rests in necessity not in convenience.[29] It follows that a party cannot have a way of necessity through the land of another when the necessary way to the highway can be obtained through his own land, however convenient and useful another way might be.[30] And the same is true

strip one hundred feet wide through the same, theretofore taken by a railroad company under condemnation proceedings under a statute by which the railroad obtained title in fee, it was held that the grantee was not entitled to a way of necessity from one part of the land to another divided by the strip so condemned.

27. Smith *v.* Griffin, 14 Colo. 429, 23 Pac. 905.

28. Cooper *v.* Maupin, 6 Mo. 624, 35 Am. Dec. 456.

29. *Alabama.*—Walker *v.* Clifford, 128 Ala. 67, 29 So. 588, 86 Am. St. Rep. 74.

Louisiana.— Martin *v.* Patin, 16 La. 55.

Maine.— Stevens *v.* Orr, 69 Me. 323; Trask *v.* Patterson, 29 Me. 499.

Missouri.— Field *v.* Mark, 125 Mo. 502, 28 S. W. 1004.

New York.— Matter of New York City, 83 N. Y. App. Div. 513, 82 N. Y. Suppl. 417.

Oregon.— Lankin *v.* Terwilliger, 22 Oreg. 97, 29 Pac. 268.

Pennsylvania.— McDonald *v.* Lindall, 3 Rawle 492.

Rhode Island.— Valley Falls Co. *v.* Dolan, 9 R. I. 489.

South Carolina.— Bailey *v.* Gray, 53 S. C. 503, 31 S. E. 354; Seabrook *v.* King, 1 Nott & M. 140; Lawton *v.* Rivers, 2 McCord 445, 13 Am. Dec. 741.

Vermont.— Hyde *v.* Jamaica, 27 Vt. 443.

Canada.— Huddlestone *v.* Love, 13 Manitoba 432.

See 17 Cent. Dig. tit. "Easements," § 53.

Degree of convenience immaterial.— Where it appears that one claiming a way of necessity over the land of another can easily reach a portion of his land by such way, but that otherwise it is necessary for him to cross a hill, which can only be done by making many turns and then with very light loads, he is not entitled to a way of necessity inasmuch as mere inconvenience, however great, is not sufficient to entitle one to such a way. Dee *v.* King, 73 Vt. 375, 50 Atl. 1109.

Immateriality of expense.— The fact that the construction of any other road than the one used as a means of ingress and egress from certain land would be inconvenient and expensive does not give the owner of such land a right to such road through the doctrine of necessity. Hall *v.* Austin, 20 Tex. Civ. App. 59, 48 S. W. 53.

Construction of deed.— Where in plaintiff's deed from the common grantor there was no right of way given over defendant's land, and it did not appear necessary to the use of plaintiff's land, it was held that the fact that the common grantor had used defendant's portion for a passageway did not affect the construction of the deed. Bentley *v.* Mills, 174 Mass. 469, 54 N. E. 885.

30. *Alabama.*—Motes *v.* Bates, 74 Ala. 374.

California.— Carey *v.* Rae, 58 Cal. 159; Ramirez *v.* McCormick, 4 Cal. 245.

Colorado.— Smith *v.* Griffin, 14 Colo. 429, 23 Pac. 905.

Connecticut.—Botsford *v.* Wallace, 69 Conn. 263, 37 Atl. 902.

Illinois.— Sterricker *v.* McBride, 157 Ill. 70, 41 N. E. 744.

Indiana.— Anderson *v.* Buchanan, 8 Ind. 132.

Iowa.— Ward *v.* Robertson, 77 Iowa 159, 41 N. W. 603.

Louisiana.— Pousson *v.* Porche, 6 La. Ann. 118.

Maine.— Allen *v.* Kincaid, 11 Me. 155.

Maryland.— Burns *v.* Gallagher, 62 Md. 462.

Massachusetts.—Oliver *v.* Pitman, 98 Mass. 46; Nichols *v.* Luce, 24 Pick. 102, 35 Am. Dec. 302.

Missouri.— Vossen *v.* Dautel, 116 Mo. 379, 22 S. W. 734; Seidel *v.* Bloeser, 77 Mo. App. 172.

New Hampshire.— Quimby *v.* Straw, 71 N. H. 160, 51 Atl. 656; Batchelder *v.* State Capital Bank, 66 N. H. 386, 22 Atl. 592.

New Jersey.— Heiser *v.* Martin, 9 N. J. L. J. 277; Fetters *v.* Humphreys, 18 N. J. Eq. 260.

New York.— Kings County F. Ins. Co. *v.* Stevens, 101 N. Y. 411, 8 N. E. 353; Matter of New York City, 83 N. Y. App. Div. 513, 82 N. Y. Suppl. 417; Outerbridge *v.* Phelps, 45 N. Y. Super. Ct. 555, 58 How. Pr. 77; Huttemeier *v.* Albro, 2 Bosw. 546.

Ohio.— Meredith *v.* Frank, 56 Ohio St. 479, 47 N. E. 656; Jones Fertilizing Co. *v.* Cleveland, etc., R. Co., 2 Ohio S. & C. Pl. Dec. 511, 7 Ohio N. P. 245.

Pennsylvania.—Francies' Appeal, 96 Pa. St. 200; Ogden *v.* Grove, 38 Pa. St. 487.

South Carolina.— Screven *v.* Gregorie, 8 Rich. 158, 64 Am. Dec. 747; Jeter *v.* Mann, 2 Hill 641; Witter *v.* Harvey, 1 McCord 67, 10 Am. Dec. 650.

where he has a prescriptive right of way left over the land of another.[31] A way of necessity is derived from the law and depends solely on the situation and boundaries of the land to which it is claimed to be appurtenant as they existed at the time of the conveyance.[32]

(III) *Cases of Strict Necessity* — (A) *When Ways Exist in Behalf of Grantee* — (1) Roadways — (a) On Sale or Lease of Land — aa. *In General.* When there is a conveyance of a tract of land and there is no means of access thereto or egress therefrom except over the remaining land of the grantor a way of necessity over such land is granted by implication of law,[33] whether the transfer be

Tennessee.— Murray *v.* Ealy, (Ch. App. 1899) 57 S. W. 412.

Vermont.— Murphy *v.* Lincoln, 63 Vt. 278, 22 Atl. 418; Plimpton *v.* Converse, 42 Vt. 712.

Wisconsin.— Fischer *v.* Laack, 76 Wis. 313, 45 N. W. 104.

England.— Titchmarsh *v.* Royston Water Co., 64 J. P. 56, 81 L. T. Rep. N. S. 673, 48 Wkly. Rep. 201.

See 17 Cent. Dig. tit. "Easements," § 53.

31. Leonard *v.* Leonard, 2 Allen (Mass.) 543.

32. Botsford *v.* Wallace, 69 Conn. 263, 37 Atl. 902.

33. *California.*— Blum *v.* Weston, 102 Cal. 362, 36 Pac. 778, 41 Am. St. Rep. 188; Barnard *v.* Lloyd, 85 Cal. 131, 24 Pac. 658; Taylor *v.* Warnaky, 55 Cal. 350.

Connecticut.— Myers *v.* Dunn, 49 Conn. 71; Collins *v.* Prentice, 15 Conn. 39, 38 Am. Dec. 61.

Illinois.— Rock Island, etc., R. Co. *v.* Dimick, 144 Ill. 628, 32 N. E. 291, 19 L. R. A. 105; Kuhlman *v.* Hecht, 77 Ill. 570; McEwan *v.* Baker, 98 Ill. App. 271.

Indiana.— Sanxay *v.* Hunger, 42 Ind. 44.

Kansas.— Mead *v.* Anderson, 40 Kan. 203, 19 Pac. 708.

Kentucky.— Estep *v.* Hammons, 104 Ky. 144, 46 S. W. 715, 20 Ky. L. Rep. 448; Beall *v.* Clore, 6 Bush 676; Thomas *v.* Bertram, 4 Bush 317; Hall *v.* McLeod, 2 Metc. 98, 74 Am. Dec. 400; Brown *v.* Burkenmeyer, 9 Dana 159, 33 Am. Dec. 541.

Massachusetts.— New York, etc., R. Co. *v.* Board of Railroad Com'rs, 162 Mass. 81, 38 N. E. 27; Bass *v.* Edwards, 126 Mass. 445; Leonard *v.* Leonard, 2 Allen 543.

Mississippi.—Bonelli *v.* Blakemore, 66 Miss. 136, 5 So. 228, 14 Am. St. Rep. 550.

Missouri.— Chase *v.* Hall, 41 Mo. App. 15.

New Hampshire.— Pingree *v.* McDuffie, 56 N. H. 306.

New Jersey.— Camp *v.* Whitman, 51 N. J. Eq. 467, 26 Atl. 917; French *v.* Smith, 40 N. J. Eq. 361, 3 Atl. 130; Love *v.* Stiles, 25 N. J. Eq. 381.

New York.— Smyles *v.* Hastings, 22 N. Y. 217; Holmes *v.* Seely, 19 Wend. 507.

Ohio.— Mosher *v.* Hibbs, 24 Ohio Cir. Ct. 375.

Pennsylvania.— Wissler *v.* Hershey, 23 Pa. St. 333.

Rhode Island.— Hall *v.* Lawrence, 2 R. I. 218, 57 Am. Dec. 715.

Tennessee.— Pearne *v.* Coal Creek, etc., Co., 90 Tenn. 619, 18 S. W. 402; Rightsell *v.* Hale, 90 Tenn. 556, 18 S. W. 245; Brown *v.* Berry, 6 Coldw. 98.

Texas.— Sellers *v.* Texas Cent. R. Co., 81 Tex. 458, 17 S. W. 32, 13 L. R. A. 657; Kruegel *v.* Nitschman, 15 Tex. Civ. App. 641, 40 S. W. 68.

Vermont.— Dee *v.* King, 73 Vt. 375, 50 Atl. 1109; Willey *v.* Thwing, 68 Vt. 128, 34 Atl. 428.

Virginia.— Bond *v.* Willis, 84 Va. 796, 6 S. E. 136.

West Virginia.— Boyd *v.* Woolwine, 40 W. Va. 282, 21 S. E. 1020; Rogerson *v.* Shepherd, 33 W. Va. 307, 10 S. E. 632.

See 17 Cent. Dig. tit. "Easements," §§ 50, 51.

Cotton, L. J., in Russell *v.* Watts, 25 Ch. D. 559, 573, 50 L. T. Rep. N. S. 673, 32 Wkly. Rep. 626, said: "Take the common case of a man having a field, which he does not sell, in the midst of land which he sells; of course it is implied that he intends to have the power of using the field not sold, and not to give the exclusive right or control over it to the person to whom he sells the surrounding land, and a way over that is said to be a way of necessity, and that is reserved without express words as an implied reservation."

Applications of rule.— One claiming lands under a mortgage foreclosure sale, to which access cannot be had except over the lands of third persons, or over the homestead of the mortgagor, which was included in the mortgage, but was not sold, because the proceeds of the other lands were sufficient to pay the debt, is entitled to a way of necessity over such homestead, although the declaration of homestead was filed prior to the decree of foreclosure and although the statute provides that a homestead can only be encumbered or conveyed by an instrument signed by both husband and wife and is exempt from execution or forced sale. San Joaquin Valley Bank *v.* Dodge, 125 Cal. 77, 57 Pac. 687. So where the owner has established and used a private way over his land which is the only means of access to his house from the highway, such fact being known to the grantee of a portion of the land over which the way necessarily passes, the way is reserved from the grant by implication, although it contains a covenant against encumbrances. Meredith *v.* Frank, 56 Ohio St. 479, 47 N. E. 656.

Where a person conveys to another a piece of land completely surrounded by land of the grantor the grantee and those claiming under him may have a right of way by necessity through the lands of the grantor as an inci-

voluntary or by sale under execution.[34] So also leasing premises which cannot be approached except across the lessor's land gives a right of way across it of necessity in order that the tenement may be rendered beneficial.[35] And a deed of land bounded on all sides by lands of other owners passes as appurtenant, an existing prescriptive right of way over one of the adjoining lots to other land of the grantor and a way by necessity over that.[36] A right of way by necessity is always one over the surface of the servient estate. The owner of the dominant estate has no right to tunnel under the surface of the servient estate in order to reach coal or minerals lying beneath the surface of his own estate.[37] A right of way of necessity may be acquired over the land of another, although the road to which the way leads is not a county road, but a mere by-road open to the public.[38] It has been held that a right of way cannot exist by necessity in any case in favor of the state's grantee of lands over other adjoining vacant lands held by the state.[39]

bb. *Necessity Created by Party.* This necessity must not be created by the party claiming the right of way.[40] A grantee cannot so improve his land as to convert a way of convenience into a way of necessity; whether or not it is a way of necessity depends upon the state of things at the date of his deed.[41]

dent of the grant. Rock Island, etc., R. Co. *v.* Dimick, 144 Ill. 628, 32 N. E. 291, 19 L. R. A. 105; McEwan *v.* Baker, 98 Ill. App. 271; Brigham *v.* Smith, 4 Gray (Mass.) 297, 64 Am. Dec. 76; Palmer *v.* Palmer, 150 N. Y. 139, 44 N. E. 966, 55 Am. St. Rep. 653; Uhl *v.* Ohio River R. Co., 47 W. Va. 59, 34 S. E. 934.

If the land is partly surrounded by that of the grantor and partly by that of strangers, a right of way over the remaining land of the grantor exists by necessity (McEwan *v.* Baker, 98 Ill. App. 271; Fairchild *v.* Stewart, 117 Iowa 734, 89 N. W. 1075; Pleas *v.* Thomas, 75 Miss. 495, 22 So. 820; Palmer *v.* Palmer, 150 N. Y. 839, 44 N. E. 966, 55 Am. Rep. 653; Mosher *v.* Hibbs, 24 Ohio Cir. Ct. 275; Wooldridge *v.* Coughlin, 46 W. Va. 345, 33 S. E. 233); and this right is not affected by a contract of sale of part of the surrounding lands of the grantor made prior to the conveyance to the grantee but of which he had no notice (Fairchild *v.* Stewart, 117 Iowa 734, 89 N. W. 1075).

Access by water only.— It has been held that the fact that the only way of access to land is over navigable water is not such necessity as calls for another right of way. Hildreth *v.* Googins, 91 Me. 227, 39 Atl. 550; Kingsley *v.* Gouldsborough Land Imp. Co., 86 Me. 279, 29 Atl. 1074, 25 L. R. A. 502; Turnbull *v.* Rivers, 3 McCord (S. C.) 131, 15 Am. Dec. 622; Lawton *v.* Rivers, 2 McCord (S. C.) 445, 13 Am. Dec. 741. But if it appears that the way by water is not available for the transportation of all such things as may be needed for the use of the land in a reasonable way, a way of necessity over the land will be deemed to be granted or reserved by implication. Ipswich Grammar School *v.* Jeffrey's Neck Pasture, 174 Mass. 572, 55 N. E. 462. And see Jay *v.* Michael, 92 Md. 198, 48 Atl. 61, holding that where the owner of a life-estate in one piece of land which was surrounded by another tract except at two points where it was bounded by water, conveyed the surrounding tract, it was held that there was an implied reservation of a right of way over the tract conveyed to the piece surrounded, although the deed contained full covenants of warranty.

34. Blum *v.* Weston, 102 Cal. 362, 36 Pac. 778, 41 Am. St. Rep. 188; Russell *v.* Jackson, 2 Pick. (Mass.) 574; Taylor *v.* Townsend, 8 Mass. 411, 5 Am. Dec. 107; Pernam *v.* Wead, 2 Mass. 203, 3 Am. Dec. 43.

Set-off on an execution.— A right of way by necessity may be created where the dominant estate is set off on an execution from the servient estate, and no such right of way is described in the set-off, if there is no other practicable way and the owner of the servient estate has not assigned or offered to assign any other way. Schmidt *v.* Quinn, 136 Mass. 575.

35. Powers *v.* Harlow, 53 Mich. 507, 19 N. W. 257, 51 Am. Rep. 154.

36. Leonard *v.* Leonard, 2 Allen (Mass.) 543.

37. Pearne *v.* Coal Creek, etc., Co., 90 Tenn. 619, 18 S. W. 402.

Pipe line for natural gas.— Where a landowner conveyed a right of way through his farm in fee to a railroad company and years afterward natural gas was found on his land situated on the further side of such right of way from his residence, it was held that the law would imply a way of necessity by which he might pipe such gas to his residence for use therein, the pipes to be so laid and constructed as not to interfere in any wise with such railroad company's proper use and occupation of its right of way. Uhl *v.* Ohio River R. Co., 47 W. Va. 59, 34 S. E. 934.

38. Cheney *v.* O'Brien, 69 Cal. 199, 10 Pac. 479.

39. Pearne *v.* Coal Creek, etc., Co., 90 Tenn. 619, 18 S. W. 402.

40. Outerbridge *v.* Phelps, 58 How. Pr. (N. Y.) 77.

41. Mitchell *v.* Seipel, 53 Md. 251, 36 Am. Rep. 404.

(b) On Sale of Something to Be Removed From Land. So where the owner of land grants to another some product of the soil, such as growing timber, stone in a quarry, iron ore, or the like, the grant necessarily carries with it such a reasonable way over the surface of the land as will render the right to enter and take away the thing granted available.[42] But in such case the purchaser is not at liberty to use any way he chooses; his right to use a particular way depends upon its being reasonably necessary.[43] The grantee of a wreck has of necessity a right of way to it over the land of another.[44] Upon a like principle a contract to permit the use of a wall for a sign space creates an easement and implies the right of such access to the wall as is necessary to use it for that purpose.[45]

(2) Halls and Stairways. If a building consisting of several apartments is so constructed that all the occupants must enter and depart by the same hall and stairway these become a way of necessity upon the sale or lease of part of the building.[46] But it is otherwise if the building be so constructed that the grantee can readily construct an entrance and stairway in his own part.[47] Where the owner of two adjoining lots on one of which there is a building with an outside stairway projecting over the other lot grants this lot with the building and the right to maintain the stairway, the grantee takes a perpetual easement or a right of way to the second story of the building over the stairway on the adjoining lot.[48]

(B) *When Ways Exist in Behalf of Grantor.* If the owner of an estate grants a portion of it to another, leaving other land of the grantor to which he can have access only by passing over the land granted, a way of necessity is reserved in the grant by implication.[49] And a deed of warranty does not estop the grantor to claim such way over the land granted.[50] Although the owner cannot subject one part of his land to another by an easement because he cannot have an easement on his own property, yet if a person owns two tenements with a road from one over the other to the highway and sells the latter without reserving in the deed any right of way, he may, if he has no other, use the road over the latter as a way of necessity.[51] But the reservation in such case is confined to a way of strict necessity.[52]

b. Ways Created by Sale by Reference to Map or Plat or Bounding on Road or Highway — (1) *Sale by Reference to Map or Plan* — (A) *In General.* Where the owner of a tract of land lays it out in streets and lots delineated on a

42. Louisville Turnpike Co. *v.* Shadburne, 1 Ky. L. Rep. 325; Worthen *v.* Garno, 182 Mass. 243, 65 N. E. 67.

The right to take cutting stone from a tract of land necessarily carries with it such reasonable use of the surface over the stone as is necessary to make the right available. Bedford-Bowling Green Stone Co. *v.* Oman, 73 S. W. 1038, 24 Ky. L. Rep. 2274.

The grant of all the pine on a tract of land which is inaccessible except over other land of the grantor, or that of strangers, with the right to enter and remove the timber, carries by implication a right of way for that purpose over such other land of the grantor. Pine Tree Lumber Co. *v.* McKinley, 83 Minn. 419, 86 N. W. 414.

43. Worthen *v.* Garno, 182 Mass. 243, 65 N. E. 67.

44. Hetfield *v.* Baum, 35 N. C. 394, 57 Am. Dec. 563; Anonymous, 6 Mod. 149.

45. R. J. Gunning Co. *v.* Cusack, 50 Ill. App. 290.

46. *Illinois.*— Morrison *v.* King, 62 Ill. 30.

Iowa.— Thompson *v.* Miner, 30 Iowa 386.

New Jersey.— Mayo *v.* Newhoff, 47 N. J. Eq. 31, 19 Atl. 837.

Ohio.— National Exch. Bank *v.* Cunningham, 46 Ohio St. 575, 22 N. E. 924.

Pennsylvania.— Geible *v.* Smith, 146 Pa. St. 276, 23 Atl. 437, 28 Am. St. Rep. 796; Pierce *v.* Cleland, 133 Pa. St. 189, 19 Atl. 352, 7 L. R. A. 752.

Texas.— Howell *v.* Estes, 71 Tex. 690, 12 S. W. 62.

Wisconsin.— Benedict *v.* Barling, 79 Wis. 551, 148 N. W. 670; Galloway *v.* Bonesteel, 65 Wis. 79, 26 N. W. 262, 56 Am. Rep. 616; Jarstadt *v.* Smith, 51 Wis. 96, 8 N. W. 29; Dillman *v.* Hoffman, 38 Wis. 559.

47. Stillwell *v.* Foster, 80 Me. 333, 14 Atl. 731.

48. Farrington *v.* Bundy, 5 Hun (N. Y.) 617.

49. Brigham *v.* Smith, 4 Gray (Mass.) 297, 64 Am. Dec. 76; Fritz *v.* Tompkins, 18 Misc. (N. Y.) 514, 41 N. Y. Suppl. 985; Clark *v.* Cogge, Cro. Jac. 170.

50. Brigham *v.* Smith, 4 Gray (Mass.) 297, 64 Am. Dec. 76.

51. McTavish *v.* Carroll, 7 Md. 352, 61 Am. Dec. 353.

52. Shoemaker *v.* Shoemaker, 11 Abb. N. Cas. (N. Y.) 80; Outerbridge *v.* Phelps, 58 How. Pr. (N. Y.) 77.

map or plan and sells lots bounded by such streets which are referred to in deeds of conveyance as boundaries, the legal effect of the grants is to convey to the grantees the right of way over the streets respectively as laid out. This is not merely a matter of description, but an implied covenant that there are such streets as are referred to in the deeds and the grantor and all persons claiming under him are forever estopped to deny their existence.[53] Furthermore this also constitutes

53. *Alabama.*—Teasley *v.* Stanton, 136 Ala. 641, 33 So. 823, 96 Am. St. Rep. 88.

California.— Kittle *v.* Pfeiffer, 22 Cal. 484; Breed *v.* Cunningham, 2 Cal. 361.

Georgia.— Ford *v.* Harris, 95 Ga. 97, 22 S. E. 144; Harrison *v.* Augusta Factory, 73 Ga. 447.

Illinois.— Smith *v.* Young, 160 Ill. 163, 43 N. E. 486; Field *v.* Barling, 149 Ill. 556, 37 N. E. 850, 41 Am. St. Rep. 311, 24 L. R. A. 406; Henderson *v.* Hatterman, 146 Ill. 555, 34 N. E. 1041; Cihak *v.* Klekr, 117 Ill. 543, 7 N. E. 111 [*reversing* 17 Ill. App. 124]; Zearing *v.* Raber, 74 Ill. 409.

Indiana.— Indianapolis *v.* Kingsbury, 101 Ind. 200, 51 Am. Rep. 749; Tate *v.* Ohio, etc., R. Co., 7 Ind. 479; Haynes *v.* Thomas, 7 Ind. 38.

Iowa.— Garstang *v.* Davenport, 90 Iowa 359, 57 N. W. 876; Fisher *v.* Beard, 32 Iowa 346; Dubuque *v.* Maloney, 9 Iowa 450, 74 Am. Dec. 358.

Kansas.— Riley *v.* Stein, 50 Kan. 591, 32 Pac. 947.

Kentucky.— Memphis, etc., Packet Co. *v.* Grey, 9 Bush 137; Rowan *v.* Portland, 8 B. Mon. 232; Douthitt *v.* Canaday, 73 S. W. 757, 24 Ky. L. Rep. 2159; Hoskins *v.* J. B. Wathem Bros. Co., 47 S. W. 595, 20 Ky. L. Rep. 814.

Louisiana.— Burke *v.* Ward, 29 La. Ann. 38, 29 Am. Rep. 316; Cahill *v.* Connelly, 14 La. Ann. 280; Bruning *v.* New Orleans Canal, etc., Co., 12 La. Ann. 541; Sarpy *v.* Municipality No. 2, 9 La. Ann. 597, 61 Am. Dec. 221.

Maine.— Dorman *v.* Bates Mfg. Co., 82 Me. 438, 19 Atl. 915; Bartlett *v.* Bangor, 67 Me. 460; Stetson *v.* Bangor, 60 Me. 313; Sutherland *v.* Jackson, 32 Me. 80.

Maryland.— Hawley *v.* Baltimore, 33 Md. 270; Moale *v.* Baltimore, 5 Md. 314, 61 Am. Dec. 276; White *v.* Flannigain, 1 Md. 525, 54 Am. Dec. 668.

Massachusetts.— Crocker *v.* Cotting, 181 Mass. 146, 63 N. E. 402; Boland *v.* St. John's School, 163 Mass. 229, 39 N. E. 1035; Cole *v.* Hadley, 162 Mass. 579, 39 N. E. 279; Lefavour *v.* McNulty, 158 Mass. 413, 33 N. E. 610; Kelley *v.* Saltmarsh, 146 Mass. 585, 10 N. E. 460; Franklin Ins. Co. *v.* Cousens, 127 Mass. 258; Peck *v.* Denniston, 121 Mass. 17; Tobey *v.* Taunton, 119 Mass. 404; Calhane *v.* Goss, 113 Mass. 423; Gaw *v.* Hughes, 111 Mass. 296; Fox *v.* Union Sugar Refinery, 109 Mass. 292; Lewis *v.* Beattie, 105 Mass. 410; Howe *v.* Alger, 4 Allen 206; Stetson *v.* Dow, 16 Gray 372; Rodgers *v.* Parker, 9 Gray 445; Farnsworth *v.* Taylor, 9 Gray 162; Loring *v.* Otis, 7 Gray 563; Tufts *v.* Charlestown, 2 Gray 271; Parker *v.* Framingham, 8 Metc. 260; Van O'Linda *v.* Lothrop, 21 Pick. 292, 32 Am. Dec. 261; Emerson *v.* Wiley, 10 Pick. 310; Parker *v.* Smith, 17 Mass. 413, 9 Am. Dec. 141.

Michigan.— Horton *v.* Williams, 99 Mich. 423, 58 N. W. 369; Ward *v.* Detroit, etc., R. Co., 62 Mich. 46, 28 N. W. 785; Riedinger *v.* Marquette, etc., R. Co., 62 Mich. 29, 28 N. W. 775; Bell *v.* Todd, 51 Mich. 21, 16 N. W. 304; Grand Rapids, etc., R. Co. *v.* Heisel, 47 Mich. 393, 11 N. W. 212; McConnell *v.* Rathbun, 46 Mich. 303, 9 N. W. 426; Karrer *v.* Berry, 44 Mich. 391, 6 N. W. 853; White *v.* Smith, 37 Mich. 291; Smith *v.* Lock, 18 Mich. 56.

Minnesota.— Long *v.* Fewer, 53 Minn. 156, 54 N. W. 1071; Dawson *v.* St. Paul F. & M. Ins. Co., 15 Minn. 136, 2 Am. Rep. 109; Wilder *v.* St. Paul, 12 Minn. 192.

Missouri.— Tatum *v.* St. Louis, 125 Mo. 647, 28 S. W. 1002; Field *v.* Mark, 125 Mo. 502, 28 S. W. 1004; Heitz *v.* St. Louis, 110 Mo. 618, 19 S. W. 735; Moses *v.* St. Louis Sectional Dock Co., 84 Mo. 242; St. Charles First Presb. Church *v.* Kellar, 39 Mo. App. 441.

Nevada.— Lindsay *v.* Jones, 21 Nev. 72, 25 Pac. 297.

New Jersey.— Seibert *v.* Graff, (Ch. 1897) 38 Atl. 970; White *v.* Tide Water Oil Co., 50 N. J. Eq. 1, 25 Atl. 199; Dill *v.* Board of Education, 47 N. J. Eq. 421, 20 Atl. 739, 10 L. R. A. 279; Dodge *v.* Pennsylvania R. Co., 43 N. J. Eq. 351, 11 Atl. 751 [*affirming* 45 N. J. Eq. 366, 19 Atl. 622]; Price *v.* Plainfield, 40 N. J. L. 608; Clark *v.* Elizabeth, 40 N. J. L. 172; Morris, etc., R. Co. *v.* Prudden, 20 N. J. Eq. 530; Atty.-Gen. *v.* Morris, etc., R. Co., 19 N. J. Eq. 386. Where defendant, a religious camp-meeting association, having laid out and mapped its seaside property into lots reserving a tier of blocks extending from the ocean westward as a camp-ground for religious services and tenting purposes and having sold to the complainant lots by this map fronting on the blocks so reserved, whereon he erected a summer residence, it was held that the association had thereby entered into an implied covenant with the complainant that these blocks should be devoted to the uses indicated and that it had no right to divide them into lots for the purpose of leasing them for a term of years with the privilege of erecting thereon permanent cottages. Lennig *v.* Ocean City Assoc., 41 N. J. Eq. 606, 7 Atl. 491, 56 Am. Rep. 16.

New York.— Haight *v.* Littlefield, 147 N. Y. 338, 41 N. E. 696; People *v.* Underhill, 144 N. Y. 316, 39 N. E. 333; Cord *v.* Atkins, 138 N. Y. 184, 33 N. E. 1035; Cunningham *v.* Fitzgerald, 138 N. Y. 165, 33 N. E. 480, 40 L. R. A. 244; Hennessy *v.* Murdock, 137 N. Y. 317, 33 N. E. 330; Story *v.* New York El. R. Co., 90 N. Y. 122, 43 Am. Rep. 146; *In re*

an incipient dedication to the public, which according to the great weight of authority the grantor cannot revoke, although there has been no formal acceptance by the public authorities, or by user by the general public.[54] Notwithstanding the fact the streets are never used or accepted by the public, the purchasers nevertheless acquire the same right in the streets so described as against the grantor and each other as they would if they were in fact public streets. These private easements pass as appurtenant to the lots granted independently of any general dedication or acceptance by the public. As regards his grantees the grantor dedicates the land described as a street whether the public ever accepts it as such or not.[55] The purchaser of a lot bounded by a street or avenue according to a map or plat filed by the grantor acquires an easement in such street or avenue as it exists at the time of the conveyance, and whether he takes title to the middle or margin of the street or avenue the grantor may be restrained from cutting down the grade in front of his premises thus rendering access thereto more difficult.[56] And if he does take title to the middle of the street or avenue the

Eleventh Ave., 81 N. Y. 436; White's Bank *v.* Nichols, 64 N. Y. 65; Wiggins *v.* McCleary, 49 N. Y. 346; Cox *v.* James, 45 N. Y. 557; Bissell *v.* New York Cent. R. Co., 23 N. Y. 61; Huttemeier *v.* Albro, 18 N. Y. 48; Child *v.* Chappell, 9 N. Y. 246; Nicklas *v.* Keller, 9 N. Y. App. Div. 216, 41 N. Y. Suppl. 172; Lambert *v.* Huber, 22 Misc. 462, 50 N. Y. Suppl. 793; Kenyon *v.* Hookway, 17 Misc. 452, 41 N. Y. Suppl. 230; Foster *v.* Buffalo, 64 How. Pr. 127; Matter of Opening Sixty-seventh St., 60 How. Pr. 264; *In re* Opening Twenty-Ninth St., 1 Hill 189; Matter of Thirty-Second St., 19 Wend. 128; Wyman *v.* New York, 11 Wend. 486; Livingston *v.* New York, 8 Wend. 85, 22 Am. Dec. 622; Watertown *v.* Cowen, 4 Paige 510, 27 Am. Dec. 80. The owner of a tract of land conveyed one lot thereof which as shown on a map of the land was bounded on the north by an alley, the conveyance referred to the tract as shown by the map and to the lot as bounded in part by lines of certain other lots which were shown on the map and on the north by a line drawn parallel to the northerly line of another lot and thirty feet distance northerly therefrom. It was held that the failure of the conveyance in terms to refer to the alley did not indicate an intention to discontinue it, but the map having been made the basis of the description in the conveyance would be read into it and an easement in the alley would pass. Lowenberg *v.* Brown, 79 N. Y. App. Div. 414, 79 N. Y. Suppl. 1060.

Ohio.— Lowe *v.* Redgate, 42 Ohio St. 329; Huelsman *v.* Mills, 6 Ohio Dec. (Reprint) 1192, 10 Cinc. L. Bul. 194, 12 Am. L. Rec. 301.

Oregon.— Carter *v.* Portland, 4 Oreg. 339.

Pennsylvania.— Dobson *v.* Hohenadel, 148 Pa. St. 367, 23 Atl. 1128; Patterson *v.* Harlan, 124 Pa. St. 67, 16 Atl. 496; Ott *v.* Kreiter, 110 Pa. St. 370, 1 Atl. 724; Trutt *v.* Spotts, 87 Pa. St. 339; McKee *v.* Perchment, 69 Pa. St. 342; McCall *v.* Davis, 56 Pa. St. 431, 94 Am. Dec. 92; Crow *v.* Wolbert, 7 Phila. 178.

Rhode Island.— Chapin *v.* Brown, 15 R. I. 579, 10 Atl. 639.

Tennessee.— Brown *v.* Berry, 6 Coldw. 98.

Texas.— Wolf *v.* Brass, 72 Tex. 133, 12 S. W. 159; Weynand *v.* Lutz, (Civ. App. 1895) 29 S. W. 1097; Dwyer *v.* Hosea, 1 Tex. Unrep. Cas. 596.

West Virginia.—Cook *v.* Totten, 49 W. Va. 177, 38 S. E. 491, 87 Am. St. Rep. 792.

United States.— Fitzgerald *v.* Barbour, 55 Fed. 440, 5 C. C. A. 180; Grogan *v.* Hayward, 4 Fed. 161, 6 Sawy. 498.

England.— Espley *v.* Wilkes, L. R. 7 Exch. 298, 41 L. J. Exch. 241, 26 L. T. Rep. N. S. 918; Roberts *v.* Karr, 1 Taunt. 495, 10 Rev. Rep. 592.

Canada.— Geoffrion *v.* Montreal Park, etc., R. Co., 20 Quebec Super. Ct. 559.

See 17 Cent. Dig. tit. "Easements," § 47; and DEDICATION, 13 Cyc. 455 *et seq.*

Effect on subsequent grantees of other lands.— Although the grantor and his heirs may be estopped by the recitals in a deed to deny the existence of the street or alley, yet subsequent grantees of other lands claiming under him are not affected by such recitals, unless the right to use such street or alley was in fact granted by the first deed. Brizzalaro *v.* Senour, 82 Ky. 353.

54. See DEDICATION, 13 Cyc. 455 *et seq.*

55. *Illinois.*— Smith *v.* Young, 160 Ill. 163, 43 N. E. 486; Newell *v.* Sass, 142 Ill. 104, 31 N. E. 176.

Kentucky.— Henderson *v.* Fahey, 7 Ky. L. Rep. 289.

New Jersey.— Dill *v.* Board of Education, 47 N. J. Eq. 421, 20 Atl. 739, 10 L. R. A. 276; Booraem *v.* North Hudson County R. Co., 40 N. J. Eq. 557, 5 Atl. 106.

New York.— Taylor *v.* Hopper, 62 N. Y. 649; Bissell *v.* New York Cent. R. Co., 23 N. Y. 61. And see Haight *v.* Littlefield, 147 N. Y. 338, 41 N. E. 696; People *v.* Underhill, 144 N. Y. 316, 39 N. E. 333.

United States.— Barbour *v.* Lyddy, 49 Fed. 896.

England.— Espley *v.* Wilkes, L. R. 7 Exch. 298, 41 L. J. Exch. 241, 26 L. T. Rep. N. S. 918; Roberts *v.* Karr, 1 Taunt. 495, 10 Rev. Rep. 592.

See 17 Cent. Dig. tit. "Easements," § 48.

56. Cunningham *v.* Fitzgerald, 138 N. Y. 165, 33 N. E. 840, 20 L. R. A. 244.

removal of the soil therefrom in front of his premises clearly amounts to a trespass for which he may have an action for damages.[57] So also the words "rights, liberties, privileges and appurtenances" are sufficient to create a right of common when the deed refers to a plat and papers which show that a right of common in a described lot is annexed to the land.[58]

(B) *Grant of Municipal Corporation.* So where a municipal corporation acting through its properly constituted authorities sells or conveys a town or city lot bounded by streets or alleys marked out on a plat, and the grantee enters upon it and expends money in improving it he is entitled to a right of way over such street or alley as appurtenant to the land and any subsequent conveyance by his grantor of the portions of such street or alley by which the grantee's lot is bounded will be held void.[59] But the rule is different where the plat is made by municipal officers whose powers in the premises are limited and defined by statute; for if they exceed their authority, no estoppel can arise, inasmuch as every person is presumed to know the nature and extent of the powers of municipal officers and therefore cannot be deemed to have been deceived or misled by acts done without legal authority.[60]

(C) *Extent of Right* — (1) IN GENERAL. The right acquired by a purchaser of land sold by reference to a map or plat is not merely coextensive with the land conveyed, or necessarily merely so with the street upon which it abuts. It may extend over such other streets and avenues designated on the plat by reference to which the land was sold as are reasonably necessary to afford the grantee a convenient way to a public street or highway as far as the grantor's title extends.[61] And indeed it has been held that where a sale of lots is made by reference to a public map of a town every purchaser of a lot takes as appurtenant thereto, every advantage, privilege, and easement represented on the map or plat as belonging to it and is entitled so far as any interference by the grantor is concerned to have all streets remain public which were designated as such on the plat.[62] And if under such circumstances the purchaser's lot be bounded by a *cul*

57. Shapine *v.* Shaw, 150 Mass. 262, 22 N. E. 894.

58. Knowles *v.* Nichols, 14 Fed. Cas. No. 7,897, 2 Curt. 571.

59. Moose *v.* Carson, 104 N. C. 431, 10 S. E. 689, 17 Am. St. Rep. 681, 7 L. R. A. 548; *In re* Penny Pot Landing, 16 Pa. St. 79.

60. Seeger *v.* Mueller, 133 Ill. 86, 24 N. E. 513.

61. *Kentucky.*— Rowan *v.* Cortlandt, 8 B. Mon. 232.

Maine.— Bartlett *v.* Bangor, 67 Me. 460.

Massachusetts.— Drew *v.* Wiswall, 183 Mass. 554, 67 N. E. 666.

Michigan.— Smith *v.* Smith, 46 Mich. 301, 9 N. W. 435.

New York.— Matter of New York City, 2 Wend. 472.

Rhode Island.— Chapin *v.* Brown, 15 R. I. 579, 10 Atl. 639.

Where the owner of land in a city constructs a road therein, and designates it as a street in a plat, laying out the tract in lots, and reserves such street in the sale of the lots, an owner of a lot so sold has an easement in the entire way so created, as against the owners of the other lots so sold, which is violated by the obstruction of the way, although the city never accepts the way as a street. Collins *v.* Buffalo Furnace Co., 73 N. Y. App. Div. 22, 76 N. Y. Suppl. 420.

Where the owner of land in a city made a plat thereof on which was designated a street named W Place, connecting at its western end with a public street, but terminating at its eastern end on the land of such owner and not connecting with any other street, and the city expressly refused to accept such plat, but the owner nevertheless graded W Place and sold lots thereon, but afterward he and his grantees of the land abutting on the eastern third of W Place treated such portion as private property and were compelled by the city to pay assessments upon it as such for the opening and improvement of another street and such eastern portion of W Place was never used by the public as a highway and had been fenced off from the western portion before plaintiff acquired title by mesne conveyance to a lot fronting on the latter, it was held that such eastern portion of W Place never became a public street and that plaintiff had no right to remove the fence, or to have it abated as a nuisance. It should be observed that section 2204 of the Revised Statutes of Wisconsin declares that no covenant shall be implied in any conveyance of real estate, whether such conveyance contains special covenants or not, due account of which was taken by the majority of the court in this decision. Mahler *v.* Brumder, 92 Wis. 477, 62 N. W. 502, 31 L. R. A. 695, Winslow and Marshall, JJ., dissenting.

62. *California.*—San Leandro *v.* Le Breton, 72 Cal. 170, 13 Pac. 405.

Indiana.— Logansport *v.* Dunn, 8 Ind. 378.

de sac he has a right to have the whole of it kept open and not merely that part which is necessary for his use in reaching some other highway.[63] The purchasers acquire a legal right to have the streets kept open to the full width delineated on the map.[64] Although it has been held that the purchaser of a lot calling to bind on a street not yet opened by the public authorities is entitled to a right of way over it, if it be of the lands of his vendor, to its full extent and dimensions, only until it reaches some other street or public way,[65] and is not entitled to such right of way at all if his lot fronts on another street which is opened.[66] And generally there are limits to the easements raised in this way by implication. A reference to a plan laying out a large tract of land does not necessarily give every purchaser of a lot a right of way over every street laid down upon it. Although a grantee is sometimes entitled to have ways kept open which his land does not touch if they are necessary or convenient in order to reach a highway, he acquires no right of way by implication over streets which his land does not touch and which do not lead to a public street or highway.[67] In determining whether or not a conveyance of a lot in which an unopened and unused street, the fee of which is in the grantor, is named as a boundary is a dedication of the street to the public, or conveys an easement over it to the grantee, the controlling question is the intention of the parties. The condition, value, situation of the property, the use

Iowa.— Fisher *v.* Beard, 32 Iowa 346; Dubuque *v.* Maloney, 9 Iowa 450, 74 Am. Dec. 358.

Kentucky.— Schneider *v.* Jacob, 86 Ky. 101, 5 S. W. 350, 9 Ky. L. Rep. 382; Memphis, etc., Packet Co. *v.* Grey, 9 Bush 137; Wickliffe *v.* Lexington, 11 B. Mon. 155; Rowan *v.* Portland, 8 B. Mon. 232.

Minnesota.— Winona *v.* Huff, 11 Minn. 119.

Missouri.— Hannibal *v.* Draper, 15 Mo. 634.

New York.— Wyman *v.* New York, 11 Wend. 486.

Ohio.— Huber *v.* Gazley, 18 Ohio 18.

Oregon.— Portland *v.* Whittle, 3 Oreg. 126.

Texas.— Lamar County *v.* Clements, 49 Tex. 347.

See 17 Cent. Dig. tit. "Easements," § 47.

Purchasers acquire interest in all streets.— Where one sells building lots by reference to a plan, the purchasers obtain an interest in all the streets marked upon it, and the right to have them converted into public streets as soon as the public authorities can be induced to do so. Bartlett *v.* Bangor, 67 Me. 460.

63. Rodgers *v.* Parker, 9 Gray (Mass.) 445; Thomas *v.* Poole, 7 Gray (Mass.) 83. But see Mabler *v.* Brumder, 92 Wis. 477, 66 N. W. 502, 31 L. R. A. 695.

64. Molitor *v.* Sheldon, 37 Kan. 246, 15 Pac. 231; White *v.* Tide Water Oil Co., 50 N. J. Eq. 1, 25 Atl. 199; Livingston *v.* New York, 8 Wend. (N. Y.) 85, 22 Am. Dec. 622. *Compare* Fonda *v.* Borst, 2 Abb. Dec. (N. Y.) 155, 2 Keyes (N. Y.) 48, holding that the purchaser of rural property under a deed in which the grantor bounds the premises conveyed by a road or proposed road over land retained by him is entitled to a right of way over such land, but to entitle him to have the road or street opened to the width indicated upon the grantor's map it must have been accepted by the public by a formal opening or by user.

Another reasonable way left open.—Where the owner of a tract of land laid the same out into lots and streets and leased some of the lots according to the maps of the survey, the lots to be bounded on one side by a street as described on the map, it was held that he was not liable for obstructing such proposed street, upon a refusal of the city to accept the same, there being another reasonable and convenient way left open from the premises to an established highway. Underwood *v.* Stuyvesant, 19 Johns. (N. Y.) 181, 10 Am. Dec. 215.

65. Hawley *v.* Baltimore, 33 Md. 270. See also Hall *v.* Baltimore, 56 Md. 187.

66. Matter of Brook Ave., 40 N. Y. App. Div. 519, 58 N. Y. Suppl. 163.

67. Pearson *v.* Allen, 151 Mass. 79, 23 N. E. 731, 21 Am. St. Rep. 426; Regan *v.* Boston Gas Light Co., 137 Mass. 37; Tobey *v.* Taunton, 119 Mass. 404; Fox *v.* Union Sugar Refinery, 109 Mass. 292; Rodgers *v.* Parker, 9 Gray (Mass.) 445; Johnson *v.* Shelter Island Grove, etc., Assoc., 47 Hun (N. Y.) 374; *In re* Opening of Twenty-Ninth St., 1 Hill (N. Y.) 189; Badeau *v.* Mead, 14 Barb. (N. Y.) 328.

Illustration.— Where the owner of property filed a map thereof, which stated that the streets and avenues designated thereon were shown for convenience in description only, and not with the intent of dedicating the same to public use, and after the conveyance of certain blocks as shown on said map the owner executed a declaration to the effect that the indorsement on the map was not intended to restrict the free use of the said streets and avenues by the grantee of said block, his heirs and assigns for the purpose of access and egress to and from any of the lots designated on the map or mentioned in the deed, it was held that the declaration gave lot-owners, purchasers from such grantee, a right of necessity over the streets on which their lot abutted, so far as to enable them to reach the next open street, but that they acquired no easements over other streets

to which it has been put, and all the attendant facts and circumstances should also be considered in connection with the terms of the deed.[68] Such a grant contains an implied covenant that a street has been laid out, but not that it has been graded or rendered fit for travel.[69] And the grantor is not bound to grade and work the way so that it shall be fit for travel, unless he has promised to do so.[70] If, however, he has made such a promise, it may be proved by parol evidence.[71]

(2) WHETHER FEE TO SOIL PASSES. Unless there are express words to the contrary such grants convey also the fee of the soil to the center of the street or alley subject to the right of way of the grantor and those claiming under him; for the presumption of ownership *ad medium filum viæ*, in the absence of proof to the contrary, applies to private as well as to public ways.[72] But if there are express words in the deed showing an intent not to grant title to the soil of the streets or dedicate the same to the public, the grantee acquires only a way of necessity over so much of the street as is necessary to gain access to and egress from his lot.[73]

(II) *SALE OF LAND BOUNDED BY ROAD.* Where a grantor conveys land by a deed describing it as bounded by a road the fee of which is vested in the grantor and which is mentioned or referred to in the deed, the grantee acquires a right of way over the road.[74] This it has been held is true, whether the road is in exist-

designated on the map. Matter of East One Hundred and Forty-Second St., 83 N. Y. App. Div. 430, 82 N. Y. Suppl. 445.

68. Winston *v.* Johnson, 42 Minn. 398, 45 N. W. 958; Matter of Opening One Hundred and Sixteenth St., 1 N. Y. App. Div. 436, 37 N. Y. Suppl. 508.

69. Loring *v.* Otis, 7 Gray (Mass.) 563.

70. Cole *v.* Hadley, 162 Mass. 579, 39 N. E. 279; Durkin *v.* Cobleigh, 156 Mass. 108, 30 N. E. 474, 32 Am. St. Rep. 436, 17 L. R. A. 270.

71. Cole *v.* Hadley, 162 Mass. 579, 39 N. E. 279; Durkin *v.* Cobleigh, 156 Mass. 108, 30 N. E. 474, 32 Am. St. Rep. 436, 17 L. R. A. 270.

72. *Iowa.*— Dubuque *v.* Maloney, 9 Iowa 450, 74 Am. Dec. 358.

Kentucky.— Schneider *v.* Jacob, 86 Ky. 101, 5 S. W. 350, 9 Ky. L. Rep. 382.

Massachusetts.— Kelley *v.* Saltmarsh, 146 Mass. 585, 16 N. E. 460; Peck *v.* Denniston, 121 Mass. 17; Walker *v.* Boynton, 120 Mass. 349; Motley *v.* Sargent, 119 Mass. 231; Clark *v.* Parker, 106 Mass. 554; Lewis *v.* Beattie, 105 Mass. 410; Stark *v.* Coffin, 105 Mass. 328; Winslow *v.* King, 14 Gray 321; Fisher *v.* Smith, 9 Gray 441.

Missouri.—St. Charles First Presb. Church *v.* Kellar, 39 Mo. App. 441.

Nevada.— Lindsay *v.* Jones, 21 Nev. 72, 25 Pac. 297.

New Jersey.—Freeman *v.* Sayre, 48 N. J. L. 37, 2 Atl. 650; Dill *v.* Board of Education, 47 N. J. Eq. 421, 20 Atl. 739, 10 L. R. A. 276; Dodge *v.* Pennsylvania R. Co., 43 N. J. Eq. 351, 11 Atl. 751.

New York.—Wiggins *v.* McClary, 49 N. Y. 346; Bissell *v.* New York Cent. R. Co., 23 N. Y. 61.

England.— Smith *v.* Howden, 14 C. B. N. S. 398, 108 E. C. L. 398; Holmes *v.* Bellingham, 7 C. B. N. S. 329, 6 Jur. N. S. 534, 29 L. J. C. P. 132, 97 E. C. L. 329.

Presumption as to grantor's intent.—"In the construction of deeds, where lands are bounded on or by a way, either public or private, the law presumes it to be the intention of the grantor to convey the fee of the land to the centre of the way, if his title extends so far. This presumption is of course controlled, whenever there are words used in the description showing a different intention. But it has been held that giving measurement, in the deed, of side lines, which reach only to the outer line of the way, are not alone sufficient to overcome it." Clark *v.* Parker, 106 Mass. 554, 556 [*citing* Codman *v.* Evans, 1 Allen (Mass.) 443; Fisher *v.* Smith, 9 Gray (Mass.) 441; Phillips *v.* Bowers, 7 Gray (Mass.) 21].

73. Ott *v.* Kreiter, 110 Pa. St. 370, 1 Atl. 724; Spackman *v.* Steidel, 88 Pa. St. 453; Van Meter *v.* Hankinson, 6 Whart. (Pa.) 307. It was so held where the map by reference to which the lot was sold contained the statement "the streets and avenues designated on this map are shown thereon for convenience in description only and not with intent to dedicate the same to public use"; and the deed conveying the lot contained the following clause, "streets and avenues shown on said map mentioned herein being shown thereon and referred to herein for convenience in description only and not with intent to convey the same or dedicate the same to public use." Matter of New York, 83 N. Y. App. Div. 513, 82 N. Y. Suppl. 417.

74. Smyles *v.* Hastings, 22 N. Y. 217; Baker *v.* Mott, 78 Hun (N. Y.) 141, 28 N. Y. Suppl. 968 [*affirmed* in 152 N. Y. 637, 46 N. E. 1144]; Lankin *v.* Terwilliger, 22 Oreg. 97, 29 Pac. 268; Roberts *v.* Karr, 1 Taunt. 495, 10 Rev. Rep. 592.

Right extends entire length of way.— The deed in which the land conveyed is bounded upon a private way estops the grantor and those claiming under him to deny the existence of the way for its entire length as then actually laid out or clearly indicated and prescribed. Tobey *v.* Taunton, 119 Mass. 404.

ence or is to be made by the grantor over lands retained by him,[75] and it is sufficient that the beneficial use of the premises requires the use of the way. Such use need not be in absolnte necessity.[76]

(III) *Whether Private Easement Survives Public Easement.* There is some controversy as to whether the private right of way in grantees holding by conveyances bounding their lands on streets and highways is merged in the public right when the dedication is consummated by a public acceptance, or whether it is merely suspended thereby and will revive if the public right is afterward abandoned.[77] According to one view when the public right attaches the preceding private right is thereby extinguished, and if the public right is subsequently surrendered the owners of adjoining property take the land to the middle of the street discharged of all right of way. In other words the grantees of lots bounded by a street or streets take by their deeds no private right of way in and over the public street distinct from and independent of the public right of way.[78] But according to the better opinion if the road be a public highway the easement so granted survives the extinguishment of the public easement by the discontinuance of the highway by act of law; for these private easements are independent of the public easement, and are in their nature as indestructible by acts of the public authorities or of the grantor of the premises as is the estate itself which is the subject of the grant.[79] And if a man grant land bounding expressly on the side of the highway, so that the title to the soil under the highway remains in him and the highway is discontinued by competent authority, the grantor cannot so use the soil of the highway as to defeat his grantee's right of way, or render it substantially less beneficial; whether this should be deemed to operate as an implied grant, warranty, covenant, or an estoppel is immaterial, for the right itself is inferred from that great principle of construction that every grant and covenant shall be so construed as to secure to the grantee the benefits intended to be conferred by the grant and that the grantor shall do nothing to defeat or essentially impair his grant.[80] But a right of way by necessity is construed strictly, and it has been held that such a right of way acquired by the grantee of a lot of land to a highway crossing an adjoining lot of the grantor, terminates at

Land bounded by road which is closed.— Where a grantor bounds his land by a road which the grantee knows is closed, he does not convey an easement in it, unless there is an express covenant in regard to it in the deed. King *v.* New York, 102 N. Y. 171, 6 N. E. 395.

75. Badeau *v.* Mead, 14 Barb. (N. Y.) 328.

76. Ranscht *v.* Wright, 9 N. Y. App. Div. 108, 41 N. Y. Suppl. 108.

77. In New Jersey it is said that this question is not settled. Dodge *v.* Pennsylvania R. Co., 43 N. J. Eq. 351, 11 Atl. 751.

78. Bailey *v.* Culver, 84 Mo. 531; Kimball *v.* Kenosha, 4 Wis. 321.

79. Holloway *v.* Southmayd, 139 N. Y. 390, 34 N. E. 1047, 1052; Dobson *v.* Hohenadel, 148 Pa. St. 367, 23 Atl. 1128. The case of White's Bank *v.* Nichols, 64 N. Y. 65, 73, was ejectment to recover a strip of land which by construction of a street under the direction of the public authorities remained between the new and the original street lines. Defendant was the owner of the abutting property and took possession up to the new street line and plaintiff claiming as the owner of the soil of the street sought to eject him. It was held that by the original grant of the lot to defendant's predecessor in the title its boundary was confined to the exterior line of the street, but that he had the right to an easement of which he could not be deprived and which consisted in the right to have the space of ground left open forever as a street and to use the way for every purpose that may be usual and reasonable for the accommodation of the granted premises. Plaintiff's recovery it will be seen was a barren one, for, although it obtained a judgment that the fee was in it, the judgment subjected it to defendant's easement. The original grant was of premises as shown upon a map of the block made by the grantors on which streets were designated, and while that circumstance entered into the discussion of the question of defendant's right to an easement, nevertheless it was laid down by Allen, J., as a general rule that "when land is granted bounded on a street or highway there is an implied covenant that there is such a way, that so far as the grantor is concerned it shall be continued, and that the grantee, his heirs and assigns shall have the benefit of it."

80. Parker *v.* Framingham, 8 Metc. (Mass.) 260; Plitt *v.* Cox, 43 Pa. St. 486. But see Wheeler *v.* Clark, 58 N. Y. 267; Darker *v.* Beck, 11 N. Y. Suppl. 94; Underwood *v.* Stuyvesant, 19 Johns. (N. Y.) 181, 10 Am. Dec. 215.

Street never opened.— The sale of a lot by

the side of the highway, and when that is discontinued and a new highway laid out beyond it over the grantor's lot it will not be enlarged so as to enable the grantee to use the discontinued portion for the purpose of reaching the new highway, his remedy being a claim for damages for the destruction of his easement.[81]

c. Right of Use of Park or Open Square. Land represented on a map or plat as a park, public square, or common, with reference to which the adjacent lots are sold, is irrevocably dedicated to the public for the use designated, and the purchasers of adjoining lots acquire as appurtenant thereto a vested right to have the space so designated kept open for the purpose and to the full extent which the designation imports. The sale and conveyance of lots according to such plat implies a covenant that the land so designated shall never be appropriated by the owner or his successors in interest to any use inconsistent with that represented on the original map.[82] And the purchaser of an adjoining lot acquires such an easement in the park or public square in front of it as entitles him to proceed in equity to prevent by injunction the appropriation of the park or square to any use other than that designated on the map or plat by reference to which he purchased his lot. He is not a mere volunteer seeking to enforce the rights of the public; he has a special interest of his own to protect.[83]

d. Right to Water Through Pipes or Conduits. If the owner of land devises a system of pipes or conduits through which water is conveyed from a spring on one portion of his premises to another portion for the benefit of the latter, and then alienates the portion to which the water is thus conveyed the right to receive water through such pipes or conduits over the land not conveyed will pass to the grantee by general words.[84]

a plan on which a public street is laid out as one of the boundaries and a conveyance describing the lot as a lot on W street, as the same shall be opened and bounded on the south by W street, does not create a covenant on which the grantors are liable where the street was subsequently vacated by legislative authority, and the grantors entered upon and occupied the land over which it was laid out. Bellinger *v.* Union Burial-Ground Soc., 10 Pa. St. 135.

81. Morse *v.* Benson, 151 Mass. 440, 24 N. E. 675.

82. *Alabama.*—Avondale Land Co. *v.* Avondale, 111 Ala. 523, 21 So. 318.

California.—Archer *v.* Salinas City, 93 Cal. 43, 28 Pac. 839, 16 L. R. A. 145.

Illinois.— Princeville *v.* Auten, 77 Ill. 325.

Indiana.— Doe *v.* Attica, 7 Ind. 641.

Iowa.— Fisher *v.* Beard, 32 Iowa 346, 40 Iowa 625; Warren *v.* Lyons, 22 Iowa 351; Leffler *v.* Burlington, 18 Iowa 361; Dubuque *v.* Maloney, 9 Iowa 450, 74 Am. Dec. 358.

Kansas.— Franklin County Com'rs *v.* Lathrop, 9 Kan. 453.

Kentucky.— Rowan *v.* Portland, 8 B. Mon. 232.

Massachusetts.—Atty.-Gen. *v.* Abbott, 154 Mass. 323, 28 N. E. 346, 13 L. R. A. 251.

Missouri.— Goode *v.* St. Louis, 113 Mo. 257, 20 S. W. 1048; Rutherford *v.* Taylor, 38 Mo. 315.

New Jersey.—Price *v.* Plainfield, 40 N. J. L. 608; Morris *v.* Sea Girt Land Imp. Co., 38 N. J. Eq. 304.

New York.— Cady *v.* Conger, 19 N. Y. 256; Anderson *v.* Rochester, etc., R. Co., 9 How. Pr. 553; Watertown *v.* Cowen, 4 Paige 510, 27 Am. Dec. 80; Hills *v.* Miller, 3 Paige 254, 24 Am. Dec. 218.

Ohio.— Huber *v.* Gazley, 18 Ohio 18.

Oregon.— Steel *v.* Portland, 23 Oreg. 176, 31 Pac. 479; Hogue *v.* Albina, 20 Oreg. 182, 25 Pac. 386, 10 L. R. A. 673; Meier *v.* Portland Cable R. Co., 16 Oreg. 500, 19 Pac. 610, 1 L. R. A. 856; Carter *v.* Portland, 4 Oreg. 339.

Texas.— State *v.* Travis County, 85 Tex. 435, 21 S. W. 1029; Lamar County *v.* Clements, 49 Tex. 347; Oswald *v.* Grenet, 22 Tex. 94.

England.— Tulk *v.* Moxhay, 11 Beav. 571. And see DEDICATIONS, 13 Cyc. 455 *et seq.*

83. *Connecticut.*— Wheeler *v.* Bedford, 54 Conn. 244, 7 Atl. 22.

Illinois.— Princeville *v.* Auten, 77 Ill. 325.

Iowa.— Fisher *v.* Beard, 32 Iowa 346, 40 Iowa 625.

Kansas.— Franklin County Com'rs *v.* Lathrop, 9 Kan. 453.

Missouri.— Price *v.* Thompson, 48 Mo. 361; Rutherford *v.* Taylor, 38 Mo. 315.

New Jersey.—Morris *v.* Sea Girt Land Imp. Co., 38 N. J. Eq. 304.

New York.— Pratt *v.* Buffalo City R. Co., 19 Hun 30; Watertown *v.* Cowen, 4 Paige 510, 27 Am. Dec. 80.

Ohio.— Brown *v.* Manning, 6 Ohio 298, 27 Am. Dec. 255.

England.— Tulk *v.* Moxhay, 11 Beav. 571.

84. Watts *v.* Kelson, L. R. 6 Ch. 166, 40 L. J. Ch. 126, 24 L. T. Rep. N. S. 209, 19 Wkly. Rep. 833.

Instances.— Both Bacon and Comyns refer to the case of Nicholas *v.* Chamberlain, Cro. Jac. 121, where it was held by all the court

e. Milling Rights. By conveyance of a mill the whole right of water enjoyed by the grantor as necessary to its use passes along with it as a necessary incident.[85] So also by the grant or reservation of a mill the land under it and so much of the adjacent land as is necessary for its use and commonly used with it will pass or be reserved by implication, unless there is in the conveyance language indicating a different intention.[86]

VI. TRANSFER OF THE RIGHT.

A. Passes as Appurtenant to Dominant Estate. Where an easement is annexed as appurtenant to land it passes as an appurtenance with a conveyance

upon demurrer, that if one erect a house and build a conduit thereto in another part of his land, and convey water by pipes to the house, and afterward sell the house with the appurtenances, excepting the land, or all the land to another, reserving to himself the house, the conduit and pipes pass with the house; because it is necessary, and quasi-appendant thereto; and he shall have liberty by law to dig in the land for amending the pipes or making them new, as the case may require. So it is if a lessee for years of a house and land erect a conduit upon the land, and after the term determines the lessor occupies them together for a time, and afterward sells the house with the appurtenances to one and the land to another, the vendee shall have the conduit and pipes, and liberty to amend them. So in Toothe *v.* Bryce, 50 N. J. Eq. 589, 25 Atl. 182, it appeared that complainant contracted to purchase from defendant and that defendant contracted to convey to complainant a tract of land, which was part of a larger tract owned by him, by deed, to be delivered and the price paid at a future day and at a place distant from the premises. At the date of the contract and thence until it was executed there were upon the premises conveyed a dwelling, stable, and greenhouse, the two latter of which were supplied with continuous streams of water forced up through an underground pipe from two hydraulic rams driven by the waters of a spring on the part of the land retained by defendant. This feature was seen by complainant and formed an item of value in his estimation of the property. Nothing was said at any time between the parties as to this flow of water. Defendant gave orders to his employees on the premises to stop the flow of water on the morning of the delivery of the deed and he stopped it at the stable about ten o'clock and at the greenhouse about three o'clock. The deed was delivered at eleven o'clock. It was held that the flow of water so driven up by the rams was an apparent and continuous easement which passed with the land conveyed as necessary for the beneficial use of the premises and with it as a secondary easement the right to enter upon the land retained to repair and maintain the rams and that defendant did not alter complainant's rights by stopping the flow at the barn just before the delivery of the deed.

Limitation of rule.—At the time defendant conveyed a part of his land to plaintiff's predecessor with the appurtenances thereto, a fish-pond on the part so conveyed was supplied with water conducted from springs on the adjoining lot by conduits, some of which were on land retained by defendant and others on land which he had previously conveyed to a third person. Subsequently defendant regained title to the latter tract and then diverted the water from the pond by destroying all the conduits. It was held that such act was not unlawful in respect to the conduits on the land not owned by defendant when plaintiff took his deed. Spencer *v.* Kilmer, 151 N. Y. 390, 45 N. E. 865.

85. Strickler *v.* Todd, 10 Serg. & R. (Pa.) 63, 13 Am. Dec. 649. To the same effect see New Ipswich Woolen Factory *v.* Batchelder, 3 N. H. 190, 14 Am. Dec. 346.

Use of word "appurtenances" in conveyance.—A water right passes by the word, "appurtenances," which is considered as comprehensive of the water right as if the privilege of using the water had been expressly inserted in the conveyance, even though the vendor declared when he executed the conveyance that he neither bought nor sold the water right. Pickering *v.* Stapler, 5 Serg. & R. (Pa.) 107, 9 Am. Dec. 336. And see Blaine *v.* Chambers, 1 Serg. & R. (Pa.) 169.

86. Moulton *v.* Trafton, 64 Me. 218; Farrar *v.* Cooper, 34 Me. 394; Crosby *v.* Bradbury, 20 Me. 61; Moore *v.* Fletcher, 16 Me. 63, 33 Am. Dec. 633; Forbush *v.* Lombard, 13 Metc. (Mass.) 109.

By the conveyance of a mill eo nomine no other land passes in fee except the land under the mill and its overhanging projections, but the term "mill" may include the free use of the head of water existing at the time of its conveyance, or any other easement which has been used with it and which is necessary to its enjoyment. Blake *v.* Clark, 6 Me. 436.

By the conveyance of a sawmill and the privileges and appurtenances thereto belonging, the land on which the mill stands and as much as is necessary for its use passes by the deed with the mill. Maddox *v.* Goddard, 15 Me. 218, 33 Am. Dec. 604.

Sheppard Touchstone, p. 89, says: "By the grant of mills, the waters, flood gates and the like that are of necessary use to the mill do pass."

A grant or a reservation of a house, mill, or other building annexed to land and to be used while thus annexed includes the land under it and not a mere easement therein. Esty *v.* Currier, 98 Mass. 500; Johnson *v.* Rayner, 6 Gray (Mass.) 107; Stockwell *v.*

or devise of the dominant estate and need not be specifically mentioned in the deed or will.[87] And according to one view this is true, although it may not be necessary to the beneficial enjoyment of the land by the grantee or devisee.[88] It has been held, however, that an easement of convenience merely does not pass by implication.[89]

B. Severance From Dominant Estate. A pure easement can exist only as an appurtenance to land, and it follows that an existing easement cannot be severed from the land to which it is appurtenant and made the subject of a separate grant or a reservation.[90]

VII. TERMINATION AND REVIVAL OF LOST RIGHT.

A. Abandonment and Non-User — 1. By Acts In Pais. A party entitled to a right of way or other mere easement in the land of another may abandon and extinguish such right by acts *in pais* and without deed or other instrument in writing.[91] The act or acts relied on, however, to effect such a result must be of a

Hunter, 11 Metc. (Mass.) 448, 45 Am. Dec. 220; Bacon *v.* Bowdoin, 22 Pick. (Mass.) 401; Allen *v.* Scott, 21 Pick. (Mass.) 25, 32 Am. Dec. 238.

87. *Alabama.*—Lide *v.* Hadley, 36 Ala. 627. 76 Am. Dec. 338.

Georgia.— Stovall *v.* Coggins Granite Co., 116 Ga. 376, 42 S. E. 723; Taylor *v.* Dyches, 69 Ga. 455.

Illinois.— Tinker *v.* Forbes, 136 Ill. 221, 26 N. E. 503; Clarke *v.* Gaffeney, 116 Ill. 362, 6 N. E. 689; Alexander *v.* Tolleston Club, 110 Ill. 65; Kuhlman *v.* Hecht, 77 Ill. 570.

Indiana.— Ross *v.* Thompson, 78 Ind. 90; Moore *v.* Crose, 43 Ind. 30.

Iowa.— Decorah Woolen Mill Co. *v.* Greer, 49 Iowa 490; Cook *v.* Chicago, etc., R. Co., 40 Iowa 451; Wetherell *v.* Brobst, 23 Iowa 586; Karmuller *v.* Krotz, 18 Iowa 352.

Kentucky.— Elizabethtown, etc., R. Co. *v.* Killen, 50 S. W. 1108, 21 Ky. L. Rep. 122.

Maine.— Cole *v.* Bradbury, 86 Me. 380, 29 Atl. 1097; Dority *v.* Dunning, 78 Me. 381, 6 Atl. 6; Bangs *v.* Parker, 71 Me. 458.

Massachusetts.—Handy *v.* Foley, 121 Mass. 258; George *v.* Cox, 114 Mass. 382; Barnes *v.* Lloyd, 112 Mass. 224; Schwoerer *v.* Boylston Market Assoc., 99 Mass. 285; Leonard *v.* Leonard, 2 Allen 543; Brown *v.* Thissell, 6 Cush. 254; Kent *v.* Waite, 10 Pick. 138.

Michigan.— Walz *v.* Walz, 101 Mich. 167, 59 N. W. 431.

Missouri.— Stilwell *v.* St. Louis, etc., R. Co., 39 Mo. App. 221.

New Hampshire.— Spaulding *v.* Abbot, 55 N. H. 423.

New Jersey.— Mitchell *v.* D'Olier, 68 N. J. L. 375, 53 Atl. 467, 59 L. R. A. 949; Richardson *v.* International Pottery Co., 63 N. J. L. 248, 43 Atl. 692.

New York.— Voorhees *v.* Burchard, 55 N. Y. 98; Wells *v.* Tolman, 88 Hun 438, 34 N. Y. Suppl. 840; Parsons *v.* Garner, 5 Hun 112; Watertown *v.* Cowen, 4 Paige 510, 27 Am. Dec. 80.

North Carolina.— Bowling *v.* Burton, 101 N. C. 176, 7 S. E. 701, 2 L. R. A. 285.

Ohio.— Meek *v.* Breckenridge, 29 Ohio St. 642.

Oregon.— Jackson *v.* Trullinger, 9 Oreg. 393.

Pennsylvania.—Rhea *v.* Forsyth, 37 Pa. St. 503, 78 Am. Dec. 441; Cope *v.* Grant, 7 Pa. St. 488; Myers *v.* Birkey, 5 Phila. 167.

Rhode Island.— Fiske *v.* Wetmore, 15 R. I. 354, 5 Atl. 375, 10 Atl. 627, 629.

Texas.— International, etc., R. Co. *v.* Bost, 2 Tex. App. Civ. Cas. § 383.

Wisconsin.— Mahler *v.* Brumder, 92 Wis. 477, 66 N. W. 502, 31 L. R. A. 695; Mabie *v.* Matteson, 17 Wis. 1.

See also *infra*, VII, E.

See 17 Cent. Dig. tit. "Easements," § 66.

88. Cole *v.* Bradbury, 86 Me. 380, 29 Atl. 1097; Dority *v.* Dunning, 78 Me. 381, 6 Atl. 6; Mosher *v.* Hibbs, 24 Ohio Cir. Ct. 375.

89. Wentworth *v.* Philpot, 60 N. H. 193; Smith *v.* Higbee, 12 Vt. 113.

90. *California.*— Wagner *v.* Hanna, 38 Cal. 111, 99 Am. Dec. 354.

Indiana.— Moore *v.* Crose, 43 Ind. 30.

Massachusetts.—Peck *v.* Conway, 119 Mass. 546; Winslow *v.* King, 14 Gray 321; Brown *v.* Thissell, 6 Cush. 254.

New York.— White *v.* Wiley, 13 N. Y. Suppl. 205.

Rhode Island.— Hall *v.* Lawrence, 2 R. I. 218, 57 Am. Dec. 715.

Virginia.— Tardy *v.* Creasy, 81 Va. 553, 59 Am. Rep. 676.

England.—Ackroyd *v.* Smith, 10 C. B. 164, 14 Jur. 1047, 19 L. J. C. P. 315, 70 E. C. L. 164.

See 17 Cent. Dig. tit. "Easements," § 63 *et seq.*

91. Vogler *v.* Geiss, 51 Md. 407; King *v.* Murphy, 140 Mass. 254, 4 N. E. 566; Dyer *v.* Sanford, 9 Metc. (Mass.) 395, 43 Am. Dec. 399; Bell *v.* Golding, 23 Ont. App. 485. Thus in Jennison *v.* Walker, 11 Gray (Mass.) 423, it was held that the non-user of an easement created by grant by the owners of the dominant estate for more than thirty years united with a use of the servient estate inconsistent with and adverse to the existence of the easement during that period of time was sufficient

decisive character.[92] And whether a party has abandoned his right to an easement is a question of fact for the determination of the jury.[93] An abandonment is to be more readily presumed where the easement is granted for the public benefit than where it is held for private use, otherwise an inactive corporation might deprive the public of useful and beneficial improvements.[94]

2. By Non-User — a. In General. Non-user for a period sufficient to create an easement by prescription will raise a presumption to defeat the right.[95] But this non-user is open to explanation and may be controlled by proof that the owner had no intention to abandon his easement while thus omitting to use it.[96] Abandonment is a question of intention and to constitute an abandonment the facts or circumstances must clearly indicate such an intention. Non-user is a fact in determining it, but, although continued for twenty years or more, is not conclusive evidence in itself of an abandonment.[97]

b. Where Easement Was Acquired by Prescription. But some of the cases make a distinction where the easement has been acquired by prescription. Thus it has been held that if the right to a road be acquired by adverse user for twenty years, its non-user for a like space of time with the knowledge and acquiescence of the owner of the inheritance will extinguish the right so acquired, because such cesser to use the road affords legitimate presumption of a release of the right.[98] There would seem to be no good reason for this distinction, as prescription is based on the presumption of a grant.[99] But irrational as it may seem it has been adopted by statute in some of the states and territories wherein it is in substance provided that a servitude acquired by enjoyment is

to justify the inference that the right originally conveyed by grant had been released and extinguished by a subsequent non-appearing deed.

92. Vogler *v.* Geiss, 51 Md. 407; Kent Furniture Mfg. Co. *v.* Long, 111 Mich. 383, 69 N. W. 657; Young *v.* Star Omnibus Co., 86 L. T. Rep. N. S. 41.

What does not amount to abandonment.— A city having acquired an easement for a slope for a street grade, the erection of a retaining wall by the city does not of itself establish an abandonment of the easement. Kuschke *v.* St. Paul, 45 Minn. 225, 47 N. W. 786. So where defendant had for more than thirty years used a passway over plaintiff's land it was held that his right to the way by prescription was not affected by the fact that for a short time he discontinued the use of a part of the passway by going over his own land. Bowen *v.* Cooper, 66 S. W. 601, 23 Ky. L. Rep. 2065.

What amounts to abandonment.— Where windows to which an easement of air and light pertains had been permanently closed for more than forty years and no effort to reopen them had been made, it was held that equity would not enjoin the erection of a building on an adjoining lot which would interfere with such easement if it still existed. Johnson *v.* Hahne, 61 N. J. Eq. 438, 49 Atl. 5.

93. Vogler *v.* Geiss, 51 Md. 407; King *v.* Murphy, 140 Mass. 254, 4 N. E. 566; Cooper *v.* Smith, 9 Serg. & R. (Pa.) 26, 11 Am. Dec. 658; Polson *v.* Ingram, 22 S. C. 541; Parkins *v.* Dunham, 3 Strobh. (S. C.) 224.

94. Henderson *v.* Central Pass. R. Co., 21 Fed. 358.

95. Dyer *v.* Depui, 5 Whart. (Pa.) 584; Hutto *v.* Tindall, 6 Rich. (S. C.) 396.

96. Pratt *v.* Sweetser, 68 Me. 344.

97. *Connecticut.*—Nichols *v.* Peck, 70 Conn. 439, 39 Atl. 803, 66 Am. St. Rep. 122, 40 L. R. A. 81.

Georgia.— Ford *v.* Harris, 95 Ga. 97, 22 S. E. 144.

Massachusetts.—King *v.* Murphy, 140 Mass. 254, 4 N. E. 566; Jamaica Pond Aqueduct Corp. *v.* Chandler, 121 Mass. 3; Dana *v.* Valentine, 5 Metc. 8.

New Jersey.— Raritan Water-Power Co. *v.* Veghte, 21 N. J. Eq. 463.

New York.—Valentine *v.* Schreiber, 3 N. Y. App. Div. 235, 38 N. Y. Suppl. 417; Corning *v.* Gould, 16 Wend. 531.

Pennsylvania.— Bombaugh *v.* Miller, 82 Pa. St. 203.

South Carolina.— Polson *v.* Ingram, 22 S. C. 541; Elliott *v.* Rhett, 5 Rich. 405, 57 Am. Dec. 750; Parkins *v.* Dunham, 3 Strobh. 224.

West Virginia.— Wooldridge *v.* Coughlin, 46 W. Va. 345, 33 S. E. 233.

England.— Crossley *v.* Lightowler, L. R. 2 Ch. 478, 36 L. J. Ch. 584, 16 L. T. Rep. N. S. 438, 15 Wkly. Rep. 801.

See 17 Cent. Dig. tit. "Easements." § 77.

98. Browne *v.* Baltimore M. E. Church, 37 Md. 108; Shields *v.* Arndt, 4 N. J. Eq. 234, *dictum*.

99. In Veghte *v.* Raritan Water Power Co., 19 N. J. Eq. 142, 156, Chancellor Zabriskie said: "Some hold, that a way acquired by prescription will be extinguished by non-user alone, while it requires adverse possession in case of a grant. I do not find any decision founded on this distinction, and it would seem unfounded, as prescription is based upon the presumption of a grant."

extinguished by disuse by the owner for the period prescribed for acquiring title by enjoyment.[1]

c. Where Easement Was Created by Grant. However this may be mere non-user of an easement created by deed for a period however long will not amount to an abandonment. To show this there must be acts of the owner showing an intention to abandon or an adverse user by the owner of the servient estate acquiesced in by the owner of the dominant estate.[2] Nothing short of a use by the owner of the servient estate which is adverse to the enjoyment of the easement by the owner thereof for a period sufficient to create a prescriptive right will destroy the right granted.[3]

d. Cesser of Use For a Time Insufficient to Create Prescriptive Right. But no matter how an easement was acquired mere non-user for a less time than that

1. Cal. Civ. Code (1899), § 811; Mont. Civ. Code (1895), § 1260; N. D. Rev. Codes (1899), § 3361; Okla. St. (1893) § 3734; S. D. Civ. Code § 277.

In Louisiana the statute provides that a right to a servitude is extinguished by the non-usage of the same during ten years, which for discontinuous servitudes begin from the day they ceased to be used. Thompson *v.* Meyers, 34 La. Ann. 615; De la Croix *v.* Nolan, 1 Rob. 321. The time to ground prescription will not begin to run against a servitude until it is shown that from the time pleaded the servitude was not exercised at all. Swain *v.* Webre, 106 La. 161, 30 So. 331.

2. *California.*—Smith *v.* Worn, 93 Cal. 206, 28 Pac. 944.

Georgia.— Ford *v.* Harris, 95 Ga. 97, 22 S. E. 144.

Illinois.—Illinois Cent. R. Co. *v.* Houghton, 126 Ill. 133, 18 N. E. 301, 9 Am. St. Rep. 581, 1 L. R. A. 213; Kuecken *v.* Voltz, 110 Ill. 264.

Indiana.— Kammerling *v.* Grover, 9 Ind. App. 628, 36 N. E. 922.

Iowa.— Noll *v.* Dubuque, etc., R. Co., 32 Iowa 66.

Kansas.— Edgerton *v.* McMullan, 55 Kan. 90, 39 Pac. 1021.

Kentucky.— Curran *v.* Louisville, 83 Ky. 628; Johnson *v.* Clark, 57 S. W. 474, 22 Ky. L. Rep. 418.

Louisiana.— Swain *v.* Webre, 106 La. 161, 30 So. 331.

Maine.— Tabbutt *v.* Grant, 94 Me. 371, 47 Atl. 899; Pratt *v.* Sweetser, 68 Me. 344.

Maryland.— Vogler *v.* Geiss, 51 Md. 407; Glenn *v.* Davis, 35 Md. 208, 6 Am. Rep. 389.

Massachusetts.— Butterfield *v.* Reed, 160 Mass. 361, 35 N. E. 1128; Barnes *v.* Lloyd, 112 Mass. 224; Bannon *v.* Angier, 2 Allen 128; Arnold *v.* Stevens, 24 Pick. 106, 35 Am. Dec. 305; White *v.* Crawford, 10 Mass. 183.

Michigan.— Lathrop *v.* Elsner, 93 Mich. 599, 53 N. W. 791; Day *v.* Walden, 46 Mich. 575, 10 N. W. 26.

New Hampshire.— Wheeler *v.* Wilder, 61 N. H. 2.

New Jersey.— Perth Amboy Terra Cotta Co. *v.* Ryan, 68 N. J. L. 474, 53 Atl. 699; Dill *v.* Board of Education, 47 N. J. Eq. 421, 20 Atl. 739, 10 L. R. A. 276; Riehle *v.* Henlings, 38 N. J. Eq. 20; Raritan Water-Power Co. *v.* Veghte, 21 N. J. Eq. 463.

New York.— Welsh *v.* Taylor, 134 N. Y. 450, 31 N. E. 896, 18 L. R. A. 535; Snell *v.* Levitt, 110 N. Y. 595, 18 N. E. 370, 1 L. R. A. 414; Pope *v.* O'Hara, 48 N. Y. 446; Weed *v.* McKeg, 79 N. Y. App. Div. 218, 79 N. Y. Suppl. 807; Valentine *v.* Screiber, 3 N. Y. App. Div. 235, 38 N. Y. Suppl. 417; Jewett *v.* Jewett, 16 Barb. 150; Lambert *v.* Huber, 22 Misc. 462, 50 N. Y. Suppl. 793; Marshall *v.* Wenninger, 20 Misc. 527, 46 N. Y. Suppl. 670; Longendyck *v.* Anderson, 59 How. Pr. 1.

North Carolina.— Beattie *v.* Carolina Cent. R. Co., 108 N. C. 425, 12 S. E. 913.

Pennsylvania.— Richmond *v.* Bennett, 205 Pa. St. 470, 55 Atl. 17; Erb *v.* Brown, 69 Pa. St. 216; Hall *v.* McCaughey, 51 Pa. St. 43; Weaver *v.* Getz, 16 Pa. Super. Ct. 418; Twibill *v.* Lombard, etc., R. Co., 3 Pa. Super. Ct. 487.

Rhode Island.— Steere *v.* Tiffany, 13 R. I. 568.

South Carolina.— Polson *v.* Ingram, 22 S. C. 541.

Vermont.— Mason *v.* Horton, 67 Vt. 266, 31 Atl. 291, 48 Am. St. Rep. 817.

England.— Metropolitan R. Co. *v.* Great Western R. Co., 64 J. P. 472, 82 L. T. Rep. N. S. 451.

See 17 Cent. Dig. tit. "Easements," § 78.

3. Smith *v.* Worn, 93 Cal. 206, 28 Pac. 944; Smyles *v.* Hastings, 22 N. Y. 217; Bombaugh *v.* Miller, 82 Pa. St. 203; Erb *v.* Brown, 69 Pa. St. 216; Lindeman *v.* Lindsey, 69 Pa. St. 93, 8 Am. Rep. 219.

Application of rule.— Where the grantee under a deed is by the same instrument given an easement in land adjoining, his mere acquiescence in the occupancy and control of such land by others for a shorter period than twenty years, unaccompanied by other and active evidences of an intention to abandon the same, will not of itself constitute an abandonment of the easement and estop him from claiming a right thereto. Johnson *v.* Stitt, 21 R. I. 429, 44 Atl. 513.

Right to dig ore.— In the case of a grant by deed of the right to dig ore in the land of another, the mere neglect of the grantee for forty years to exercise his right without any act of adverse enjoyment on the part of the owner of the land will not extinguish such right, and the occupation and cultivation of the land by the owner during such period are not evidence of adverse enjoyment to the

required by the statute of limitations for the perfection of the easement raises no presumption of an abandonment.[4] It seems, however, to be settled that when the non-user is accompanied by acts manifesting a clear intention to abandon, and which destroy the object for which the easement was created or the means of its enjoyment, an abandonment will take place.[5] A cesser of the use, coupled with any act clearly indicative of an intention to abandon the right, will have the same effect as an express release of the easement without any reference whatever to time,[6] and in case of continuous easements, or those of which the enjoyment is or may be continued, without the necessity of any interference of man, the presumption of their abandonment may arise from a period of time much less than it will take to acquire them.[7]

B. Merger by Unity of Title — 1. In General. An owner of land cannot have an easement in his own estate in fee, for the plain and obvious reason that in having the *jus disponendi* — the full and unlimited right and power to make any and every possible use of the land — all subordinate and inferior derivative rights are necessarily merged and lost in the higher right.[8] Accordingly when the owner of an estate enjoys an easement over another and acquires title to the

right to dig the ore. Arnold *v.* Stevens, 24 Pick. (Mass.) 106, 35 Am. Dec. 305.

4. Bannon *v.* Angier, 2 Allen (Mass.) 128; Dana *v.* Valentine, 5 Metc. (Mass.) 8; Williams *v.* Nelson, 23 Pick. (Mass.) 141, 34 Am. Dec. 45; Jones *v.* Van Bochove, 103 Mich. 98, 61 N. W. 342; Dyer *v.* Depui, 5 Whart. (Pa.) 584; Ward *v.* Ward, 7 Exch. 838, 21 L. J. Exch. 334; Hale *v.* Oldroyd, 15 L. J. Exch. 4, 14 M. & W. 789.

5. Davis *v.* Gale, 32 Cal. 26, 91 Am. Dec. 554; Jones *v.* Van Bochove, 103 Mich. 98, 61 N. W. 342; Crain *v.* Fox, 16 Barb. (N. Y.) 184; Corning *v.* Gould, 16 Wend. (N. Y.) 531; Mowry *v.* Sheldon, 2 R. I. 369.

Acts indicating intent to abandon.— An easement gained by prescription may be lost by abandonment, and abandonment may be shown by a cesser to use for even a short period accompanied by acts of the owner of the dominant estate, indicating an intention to abandon. Canny *v.* Andrews, 123 Mass. 155; Dyer *v.* Sanford, 9 Metc. (Mass.) 395, 43 Am. Dec. 399; Reg. *v.* Chorley, 12 Q. B. 515, 64 E. C. L. 515; Moore *v.* Rawson, 3 B. & C. 332, 5 D. & R. 234, 3 L. J. K. B. O. S. 32, 27 Rev. Rep. 375, 10 E. C. L. 156.

Evidence of an executed oral agreement to abandon the way and substitute for it another way is rightly admitted to show an abandonment. Pope *v.* Devereux, 5 Gray (Mass.) 409. So testimony of plaintiff's grantor that more than twenty years previously when he owned the easement he orally relinquished to defendant's grantor his right to the way and ceased to use it is admissible upon the question of abandonment and of adverse possession by defendant's grantor. Warshauer *v.* Randall, 109 Mass. 586.

6. Vogler *v.* Geiss, 51 Md. 407; King *v.* Murphy, 140 Mass. 254, 4 N. E. 566; Welsh *v.* Taylor, 134 N. Y. 450, 31 N. E. 896, 18 L. R. A. 535; Reg. *v.* Chorley, 12 Q. B. 515, 64 E. C. L. 515; Crossley *v.* Lightowler, L. R. 2 Ch. 478, 36 L. J. Ch. 584, 16 L. T. Rep. N. S. 438, 15 Wkly. Rep. 801.

7. Rhodes *v.* Whitehead, 27 Tex. 304, 84 Am. Dec. 631.

Easement of light and air.— In Moore *v.* Rawson, 3 B. & C. 332, 341, 5 D. & R. 234, 3 L. J. K. B. O. S. 32, 27 Rev. Rep. 375, 10 E. C. L. 156, it appeared that plaintiff had formerly been in the enjoyment of light and air from an ancient window in his house, but he pulled that down and erected another building on the lot with a blank wall where the ancient window had been, and it was held that after the adjoining premises had been improved he could not maintain his action for obstructing the light and air by cutting a window through the blank wall in the place where the ancient window had been. Littledale, J., said: "I think, that if a party does any act to show that he abandons his right to the benefit of that light and air which he once had, he may lose his right in a much less period than twenty years. If a man pulls down a house, and does not make any use of the land for two or three years, or converts it into tillage, I think he may be taken to have abandoned all intention of rebuilding the house; and, consequently, that his right to the light has ceased."

8. *Illinois.*— St. Louis Bridge Co. *v.* Curtis, 103 Ill. 410.

Kentucky.— Robb *v.* Hannah, 14 S. W. 360, 12 Ky. L. Rep. 361.

Louisiana.—Barton *v.* Kirkman, 5 Rob. 16; Alexander *v.* Boghel, 4 La. 312.

Maine.— Warren *v.* Blake, 54 Me. 276, 89 Am. Dec. 748.

Maryland.— McTavish *v.* Carroll, 7 Md. 352, 61 Am. Dec. 353.

Massachusetts.— Carbrey *v.* Willis, 7 Allen 364, 83 Am. Dec. 688; Ritger *v.* Parker, 8 Cush. 145, 147, 54 Am. Dec. 744; Grant *v.* Chase, 17 Mass. 443, 9 Am. Dec. 161.

Michigan.— Morgan *v.* Meuth, 60 Mich. 238, 27 N. W. 509.

New Hampshire.— Clark *v.* Boston, etc., R. Co., 24 N. H. 114.

New Jersey.— Stuyvesant *v.* Woodruff, 21 N. J. L. 133, 57 Am. Dec. 156; Brakely *v.* Sharp, 9 N. J. Eq. 9.

New York.— Parsons *v.* Johnson, 68 N. Y. 62, 23 Am. Rep. 149.

latter the easement is thereby extinguished.[9] Where an easement exists in favor of the owners of several parcels of land, and one of them acquires title to the servient estate, there is a merger as to his interests; but this does not affect the rights of the owners of the other parcels of land.[10] But the owner of an easement does not by asserting his right to the fee of the servient estate and by taking possession of it destroy his right to the easement. No acts of such owner will extinguish his right save those that indicate an intention to abandon them.[11] If one who has a right of common appurtenant purchase part of the land subject to the easement all his right of common is extinguished.[12]

2. NECESSITY FOR ESTATES OF SAME DIGNITY. Upon principle it seems that in order to extinguish an easement by the unity of title and possession of both the dominant and servient tenements in the same person, he should have a permanent and enduring estate, an estate in fee in both. At any rate, to perpetuate the extinguishment incident to unity of possession, the estates thus united must be respectively equal in duration and all other qualities, and not liable to be again disjoined by the act of the law.[13]

Pennsylvania.— Francies' Appeal, 96 Pa. St. 200.

Texas.— Howell *v.* Estes, 71 Tex. 690, 12 S. W. 62.

Vermont.— Wilder *v.* Wheeldon, 56 Vt. 344; Plimpton *v.* Converse, 42 Vt. 712.

Wisconsin.— Mabie *v.* Matteson, 17 Wis. 1.

England.— Damper *v.* Bassett, [1901] 2 Ch. 350, 70 L. J. Ch. 657, 84 L. T. Rep. N. S. 682, 49 Wkly. Rep. 536; Morris *v.* Edgington, 3 Taunt. 24, 12 Rev. Rep. 579.

Canada.— Attrill *v.* Platt, 10 Can. Supreme Ct. 425.

See 17 Cent. Dig. tit. "Easements," § 2.

One's own land may be subject to an easement in favor of himself and another as joint owners of other lands. Bradley's Fish Co. *v.* Dudley, 37 Conn. 136.

9. *Illinois.*— Cihak *v.* Klekr, 117 Ill. 643, 7 N. E. 111.

Maryland.— Capron *v.* Greenway, 74 Md. 289, 22 Atl. 269.

New Hampshire.— Morgan *v.* Meuth, 60 Mich. 238, 27 N. W. 509.

New Jersey.— Denton *v.* Laddell, 23 N. J. Eq. 64.

New York.— Riehlman *v.* Field, 81 N. Y. App. Div. 526, 81 N. Y. Suppl. 239; Friedlander *v.* Delaware, etc., Canal Co., 13 N. Y. Suppl. 323.

North Carolina.— McAllister *v.* Devane, 76 N. C. 57.

Pennsylvania.— Kieffer *v.* Imhoff, 26 Pa. St. 438.

Rhode Island.— *In re* Bull, 15 R. I. 534, 10 Atl. 484; Hall *v.* Lawrence, 2 R. I. 218, 57 Am. Dec. 715.

Texas.— Howell *v.* Estes, 71 Tex. 690, 12 S. W. 62.

Vermont.— Miller *v.* Lapham, 44 Vt. 416; Plimpton *v.* Converse, 42 Vt. 712.

See 17 Cent. Dig. tit. "Easements," § 75.

Where the owner of a part of the servient estate becomes the owner of the dominant estate there is a merger as to his interests but to that extent only. Barringer *v.* Virginia Trust Co., 132 N. C. 409, 43 S. E. 910.

When unity of ownership merely suspends easement.— Where a right of way has been created by deed and it has been open, visible, and necessary and in continuous use for nearly twenty-five years, except during a brief interval when both the dominant and servient estates became united in the same owner who for his convenience took a shorter route, such unity of ownership does not extinguish the right of way, but merely suspends it, and when both estates have subsequently been conveyed without reference to it by deeds absolute, it is revived and must be read into them. Fritz *v.* Tompkins, 168 N. Y. 524, 61 N. E. 893 [*reversing* 39 N. Y. App. Div. 73, 56 N. Y. Suppl. 847].

10. Tuttle *v.* Kilroa, 177 Mass. 146, 58 N. E. 682.

11. White's Bank *v.* Nichols, 64 N. Y. 65; Matter of Bd. of Education, 24 N. Y. App. Div. 117, 48 N. Y. Suppl. 1061.

12. Bell *v.* Ohio, etc., R. Co., 25 Pa. St. 161, 64 Am. Dec. 687.

13. *Maine.*— Dority *v.* Dunning, 78 Me. 381, 6 Atl. 6.

Massachusetts.— Atlanta Mills *v.* Mason, 120 Mass. 244; Ritger *v.* Parker, 8 Cush. (Mass.) 145, 147, 54 Am. Dec. 744. In this case it was held that a right of way appurtenant to land, over and upon adjoining land, is not extinguished by the vesting of both estates in the same person as mortgagee, under separate mortgages, until both mortgages are foreclosed.

New Hampshire.— Brewster *v.* Hill, 1 N. H. 350.

South Carolina.— Pearce *v.* McClanaghan, 5 Rich. 178, 55 Am. Dec. 710.

England.— Thomas *v.* Thomas, 2 C. M. & R. 34, 1 Gale 61, 4 L. J. Exch. 179, 5 Tyrw. 804.

See 17 Cent. Dig. tit. "Easements," § 75.

Applications of rule.—Where the mortgagor of a dominant tenement becomes the owner in fee of the servient tenement, the unity of the two estates does not extinguish the easement so as to affect the rights of one claiming an interest in the easement under a foreclosure of the mortgage on the dominant tenement in which the easement was expressly included. Duval *v.* Becker, 81 Md. 537, 32 Atl. 308. So where a person holds land by a defective title and an easement in

3. Severance After Merger. If therefore after such merger by the unity of title to the dominant and servient estates the owner grants the former dominant estate to another it passes without the former incidents unless they are revived by force of the grant itself, by such words of description as could bring them into being by way of new grant.[14] But although the old easement is not revived by the severance, yet if the necessity continues a new easement will be granted by implication upon the same principle and under the same circumstances that easements are granted by implication upon the severance of an estate originally entire.[15] No easement exists so long as the unity of possession remains, because the owner of the whole cannot have an easement in his own property, and he may at any time rearrange the quality of the several servitudes; but upon severance by the sale of a part the right of the owner to redistribute ceases and easements or servitudes are created corresponding to the benefits or burdens existing at the time of sale.[16]

C. By Act of God or Operation of Law. An easement may be extinguished by the act of God, by operation of law, or by the act of the party.[17] Where an easement is granted to a particular person, to be enjoyed during the continuance of certain conditions, it is extinguished whenever these conditions cease to exist.[18]

D. Termination of Title to Dominant Estate. If an easement is appurtenant merely to an estate for life[19] or for years[20] the right ceases upon the termination of that estate; but if appurtenant to the land itself and not to the particular estate it will remain as an appurtenance to the reversion.[21]

E. Severance and Partition. An easement is not extinguished by a division of the estate to which it is appurtenant, but the owner or assignee of any por-

the same land by a valid title, the easement is not extinguished by unity of possession. Tyler *v.* Hammond, 11 Pick. (Mass.) 193.

14. *Kentucky.*— Strohmier *v.* Leahy, 9 S. W. 238, 10 Ky. L. Rep. 333.

Massachusetts.— Ritger *v.* Parker, 8 Cush. 145, 147, 54 Am. Dec. 744.

Michigan.— Morgan *v.* Meuth, 60 Mich. 238, 27 N. W. 509.

New Jersey.— Fetters *v.* Humphreys, 19 N. J. Eq. 471.

New York.— Carsen *v.* Johnson, 68 N. Y. 62, 23 Am. Rep. 149; Riehlman *v.* Field, 81 N. Y. App. Div. 526, 81 N. Y. Suppl. 239; Fritz *v.* Tompkins, 18 Misc. 514, 41 N. Y. Suppl. 985.

Pennsylvania.— Kieffer *v.* Imhoff, 26 Pa. St. 438.

Vermont.— Plimpton *v.* Converse, 42 Vt. 712.

England.— Thomson *v.* Waterlow, L. R. 6 Eq. 36, 37 L. J. Ch. 495, 18 L. T. Rep. N. S. 545, 16 Wkly. Rep. 686; Barlow *v.* Rhodes, 1 Cromp. & M. 439, 2 L. J. Exch. 91, 3 Tyrw. 280.

Acts held to amount to revivor.— Where the title to tenements with an alley between them which had been dedicated to the use of both by a former proprietor became vested in the same person and the use of the alley was continued by him and his tenants occupying the respective tenements as theretofore, and the owner's interest in both was seized and sold at sheriff's sale to different purchasers, it was held that the right of way in the alley upon the severance of the title revived and continued as it existed before the unity of title. Kieffer *v.* Imhoff, 26 Pa. St. 438.

15. *Michigan.*—Wettlaufer *v.* Ames, (1903) 94 N. W. 950.

Ohio.— Bates *v.* Sherwood, 24 Ohio Cir. Ct. 146.

Pennsylvania.— Kieffer *v.* Imhoff, 26 Pa. St. 438; Hurlburt *v.* Firth, 10 Phila. 135, a case relating to a division wall.

South Carolina.— Ferguson *v.* Witsell, 5 Rich. 280, 57 Am. Dec. 744.

Tennessee.— Rightsell *v.* Hale, 90 Tenn. 556, 18 S. W. 245; Brown *v.* Berry, 6 Coldw. 98.

But see Miller *v.* Lapham, 44 Vt. 416, where the court said that in such cases the easement was not a right which had existed during the unity of title and had been revived, but one recreated on the principle that a grant carries by implication whatever is essential to its enjoyment.

16. Cave *v.* Crafts, 53 Cal. 135; Lampman *v.* Milks, 21 N. Y. 505.

17. Hancock *v.* Wentworth, 5 Metc. (Mass.) 446; Taylor *v.* Hampton, 4 McCord (S. C.) 96, 17 Am. Dec. 710; Stenz *v.* Mahoney, 114 Wis. 117, 89 N. W. 819.

18. Hall *v.* Armstrong, 53 Conn. 554, 4 Atl. 113. See also Colie *v.* Jamison, 4 Hun (N. Y.) 284, 6 Thomps. & C. (N. Y.) 576.

19. Hoffman *v.* Savage, 15 Mass. 130.

20. Newhoff *v.* Mayo, 48 N. J. Eq. 619, 23 Atl. 265, 27 Am. St. Rep. 455, holding, however, that where the estate is held under a lease containing a right of renewal that a renewal is a continuation of the original term, and that the easement will be preserved during such continuance.

21. Goodall *v.* Godfrey, 53 Vt. 219, 38 Am. Rep. 671. See also Symmes *v.* Drew, 21 Pick. (Mass.) 278.

tion of that estate may claim the right so far as it is applicable to his part of the property, provided the right can be enjoyed as to the separate parcels without any additional burden upon the servient estate;[22] accordingly a right of way which is appurtenant to an estate is appurtenant to every part of it, no matter into how many parts it may be subdivided, and it inures to the benefit of the owners of all subdivisions so situated that it can be used.[23] And a right of common of pasture appendant or appurtenant to an estate is apportionable upon a division of the dominant estate.[24] But where the use will increase the burden upon the servient estate the right to the easement will be extinguished,[25] and therefore common of estovers cannot be apportioned, because it would increase the burden on the servient tenement.[26]

F. Release, Agreement, or License. The owner of an easement may release the right to the owner of the servient estate by deed,[27] but such a release

22. Hills *v.* Miller, 3 Paige (N. Y.) 254, 24 Am. Dec. 218.

23. *California.*—Currier *v.* Howes, 103 Cal. 431, 37 Pac. 521.

Iowa.— Brossart *v.* Corlett, 27 Iowa 288.

Massachusetts.— Boland *v.* St. John's Schools, 163 Mass. 229, 39 N. E. 1039; Regan *v.* Boston Gas Light Co., 137 Mass. 37; Miller *v.* Washburn, 117 Mass. 371; French *v.* Morris, 101 Mass. 68; Whitney *v.* Lee, 1 Allen 198, 79 Am. Dec. 727; Underwood *v.* Carney, 1 Cush. 285.

New York.— Lansing *v.* Wiswall, 5 Den. 213; Hills *v.* Miller, 3 Paige 254, 24 Am. Dec. 218.

Ohio.— Shields *v.* Titus, 46 Ohio St. 528, 22 N. E. 717; Sachs *v.* Cordes, 11 Ohio Cir. Ct. 145, 5 Ohio Cir. Dec. 67.

Pennsylvania.— Ehret *v.* Gunn, 166 Pa. St. 384, 31 Atl. 200; Watson *v.* Bioren, 1 Serg. & R. 227, 7 Am. Dec. 617; *In re* Private Road, 1 Ashm. 417; McMakin *v.* Magee, 13 Phila. 105; Walker *v.* Gerhard, 9 Phila. 116; Myers *v.* Birkey, 5 Phila. 167.

Virginia.— Linkenhoker *v.* Graybill, 80 Va. 835.

West Virginia.— See Henrie *v.* Johnson, 28 W. Va. 190.

See 17 Cent. Dig. tit. "Easements," § 69.

Illustration.— Where land is described as being bounded by a street extending over land belonging to the grantor, and such land is subdivided, a right of way over such street passes to each subdivision that abuts on the street, but not to such subdivisions as do not abut thereon. Dawson *v.* St. Paul F. & M. Ins. Co., 15 Minn. 136, 2 Am. Rep. 109.

24. Van Rensselaer *v.* Radcliff, 10 Wend. (N. Y.) 639, 25 Am. Dec. 582; Livingston *v.* Ten Broeck, 16 Johns. (N. Y.) 14, 8 Am. Dec. 287; Hall *v.* Lawrence, 2 R. I. 218, 57 Am. Dec. 715.

Illustration.—Two tenants in common made partition of the land owned between them and one granted to the other "free liberty of carrying away gravel and sea weed off the beach belonging to his part of said farm, also stones below high water mark, and liberty to tip the sea weed on the bank on his part of said farm;" it was held that upon the severance of the dominant estate by a conveyance of different portions thereof to several persons the right of common was apportionable among the several grantees, the rule being that whenever common is admeasurable it is apportionable. Hall *v.* Lawrence, 2 R. I. 218, 57 Am. Dec. 715.

25. Livingston *v.* Ketcham, 1 Barb. (N. Y.) 592; Van Rensselaer *v.* Radcliff, 10 Wend. (N. Y.) 639, 25 Am. Dec. 582. See also Livingston *v.* Ten Broeck, 16 Johns. (N. Y.) 14, 8 Am. Dec. 287.

26. Livingston *v.* Ketcham, 1 Barb. (N. Y.) 592; Van Rensselaer *v.* Radcliff, 10 Wend. (N. Y.) 639, 25 Am. Dec. 582.

27. Richards *v.* Attleboro Branch R. Co., 153 Mass. 120, 26 N. E. 418; Flaten *v.* Moorhead, 58 Minn. 324, 59 N. W. 1044. See also Mitchell *v.* Leavitt, 30 Conn. 587; Wright *v.* Freeman, 5 Harr. & J. (Md.) 467.

Where tenants in common of an estate to which an easement is appurtenant make a partition thereof and execute mutual deeds of release stipulating that neither the grantor nor his heirs nor any other person claiming under him will ever claim or demand any right or title to such premises or their appurtenances, the easement is extinguished and cannot be revived by a grantee of one cotenant against the other. Hamilton *v.* Farrar, 128 Mass. 492.

Where two lots between which there is a common passageway are mortgaged and the mortgagee subsequently releases the lien of the mortgage from one of the lots without reserving any right as to the passageway the purchaser at a foreclosure sale of the other lot will acquire no right to the use of the way. Scrymser *v.* Phelps, 33 Hun (N. Y.) 474.

Where a mortgagor reserves in the mortgage deed the right to release certain easements appurtenant to the mortgaged premises, but the deed also contains a power of sale authorizing the mortgagee upon a breach of conditions to sell and convey the mortgaged estate absolutely and in fee simple, if the power reserved is not executed prior to such sale it will be extinguished by the sale and the purchaser will take the estate with its appurtenant easements. Bull's Petitioner, 15 R. I. 534, 10 Atl. 484.

General covenants of warranty will not be presumed to have relinquished the right to a way of necessity from the part of a tract of land retained by the grantor over the part

is within the provisions of the recording acts and if not recorded will not be binding upon a subsequent purchaser of the dominant estate in good faith and without notice of the transaction.[28] A lessee of the dominant estate cannot release an easement appurtenant thereto except to the extent of his own interest.[29] An easement cannot be extinguished or released by a mere unexecuted parol agreement,[30] but an intention on the part of the owner to abandon the right in whole or in part may be so established.[31] A license given by the owner of an easement to the owner of the servient estate to do any act on his land which prevents the further enjoyment of the easement is when executed irrevocable and extinguishes the right to the easement.[32] So if the owner of an easement agrees that the owner of the servient estate may erect an obstruction of a permanent character,[33] or if he agrees that a way to which he is entitled may be closed up and another way substituted,[34] these agreements when carried into effect will extinguish the right. In cases where the law would imply a grant or reservation of a way of necessity the right may be waived by parol agreement at the time of the conveyance.[35] An easement acquired by adverse use will not be defeated by obtaining a license for its further enjoyment,[36] although the application for such license is evidence that the former use was not adverse but permissive.[37]

G. Alterations or Obstructions Inconsistent With Easement. An easement may be extinguished by an act of the owner of the easement which is incompatible with the existence of the right claimed.[38] If the owner of an easement himself obstructs it in a manner inconsistent with its further enjoyment,[39] or permits the owner of the servient estate to do so,[40] the easement will be con-

conveyed. McEwan *v.* Baker, 98 Ill. App. 271.

28. Snell *v.* Levitt, 39 Hun (N. Y.) 227.

29. Glenn *v.* Davis, 35 Md. 208, 6 Am. Rep. 389; Robert *v.* Thompson, 16 Misc. (N. Y.) 638, 40 N. Y. Suppl. 754.

A release by a lessee to the extent of his interest refers only to the term at the time the release is executed and will not include an extension of the term. Hacke's Appeal, 101 Pa. St. 245.

30. Dyer *v.* Sanford, 9 Metc. (Mass.) 395, 43 Am. Dec. 399. See also Pope *v.* Devereux, 5 Gray (Mass.) 409.

31. Curtis *v.* Noonan, 10 Allen (Mass.) 406; Dyer *v.* Sanford, 9 Metc. (Mass.) 395, 43 Am. Dec. 399.

32. Boston, etc., R. Corp. *v.* Doherty, 154 Mass. 314, 28 N. E. 227; Dyer *v.* Sanford, 9 Metc. (Mass.) 395, 43 Am. Dec. 399. See also Winter *v.* Brockwell, 8 East 308, 9 Rev. Rep. 454.

The rule that an executed license cannot be countermanded does not apply to acts on the dominant estate which would create an easement, but is restricted to acts on the servient estate which would extinguish or modify the easement of the licensor. Morse *v.* Copeland, 2 Gray (Mass.) 302.

33. Vogler *v.* Geiss, 51 Md. 407; Dyer *v.* Sanford, 9 Metc. (Mass.) 395, 43 Am. Dec. 399.

34. Boston, etc., R. Corp. *v.* Doherty, 154 Mass. 314, 28 N. E. 227; Pope *v.* Devereux, 5 Gray (Mass.) 409.

35. Lebus *v.* Boston, 51 S. W. 609, 21 Ky. L. Rep. 411, 47 L. R. A. 79. See also Ewert *v.* Burtis, (N. J. Ch. 1888) 12 Atl. 893.

36. Dee *v.* King, 73 Vt. 375, 50 Atl. 1109; Perrin *v.* Garfield, 37 Vt. 304; Tracy *v.* Atherton, 36 Vt. 503.

37. Perrin *v.* Garfield, 37 Vt. 304; Tracy *v.* Atherton, 36 Vt. 503.

38. *Maine.*— Bonney *v.* Greenwood, 96 Me. 335, 52 Atl. 786; Ballard *v.* Butler, 30 Me. 94.

New York.— Corning *v.* Gould, 16 Wend. 531.

Rhode Island.— Steere *v.* Tiffany, 13 R. I. 568.

South Carolina.— Taylor *v.* Hampton, 4 McCord 96, 17 Am. Dec. 710.

Wisconsin.— Stenz *v.* Mahoney, 114 Wis. 117, 89 N. W. 819.

England.— Moore *v.* Rawson, 3 B. & C. 332, 5 D. & R. 234, 3 L. J. K. B. O. S. 32, 27 Rev. Rep. 375, 10 E. C. L. 156.

See 17 Cent. Dig. tit. "Easements," § 80.

39. *Missouri.*— Skrainka *v.* Oertel, 14 Mo. App. 474.

New York.— Corning *v.* Gould, 16 Wend. 531.

South Carolina.— Taylor *v.* Hampton, 4 McCord 96, 17 Am. Dec. 710.

Tennessee.— Monaghan *v.* Memphis Fair, etc., Co., 95 Tenn. 108, 31 S. W. 497.

England.— Moore *v.* Rawson, 3 B. & C. 332, 5 D. & R. 234, 3 L. J. K. B. O. S. 32, 27 Rev. Rep. 375, 10 E. C. L. 156.

See 17 Cent. Dig. tit. "Easements," § 80.

An obstruction erected by a third person who occupies a building on the dominant estate, but has no authority to act for the owner of the easement, will not extinguish the right. White *v.* Tide Water Oil Co., (N. J. Ch. 1895) 33 Atl. 47.

40. Stein *v.* Dahm, 96 Ala. 481, 11 So. 597; Vogler *v.* Geiss, 51 Md. 407; Cartwright *v.* Maplesden, 53 N. Y. 622; Aldrich *v.* Billings, 14 R. I. 233.

A mutual easement in a common stairway is extinguished by an obstruction on the part

sidered as abandoned. But to constitute such an abandonment the acts relied on must be of a decisive and conclusive character.[41] So the erection of an obstruction which is not of a material or permanent character,[42] or which constitutes only an occasional interference,[43] or which was erected merely for a temporary purpose,[44] will not constitute an abandonment of the right. An obstruction on the part of the owner of the servient estate to which the owner of the easement does not consent will not extinguish the right.[45] If the owner of an easement so alters the condition of the dominant estate as to necessarily increase the burden upon the servient estate to its injury and without the consent of the owner thereof, it will extinguish the easement;[46] but alterations which do not materially increase the servitude will not extinguish the right.[47]

H. Cessation of Purpose or Necessity — 1. Ways of Necessity. A way of necessity ceases as soon as the necessity to use it ceases.[48] So if the owner of a

of one owner and its ratification by the other. Dillman *v.* Hoffman, 38 Wis. 559.

Where the owner of the servient estate erects a permanent obstruction upon a way, at the same time providing a different way, which the owner of the way obstructed uses without objection and without making any claim for damages, the right to the way as originally located will be held to have been abandoned. Fitzpatrick *v.* Boston, etc., R. Co., 84 Me. 33, 24 Atl. 432.

Only the particular right obstructed is abandoned, and so the abandonment of a right of way by consenting to its obstruction does not extinguish the right to maintain a sewer pipe under the way which has never been obstructed. Stein *v.* Dahm, 96 Ala. 481, 11 So. 597.

41. Vogler *v.* Geiss, 51 Md. 407; Hayford *v.* Spokesfield, 100 Mass. 491; Dyer *v.* Sanford, 9 Metc. (Mass.) 395, 43 Am. Dec. 399. See also Vinton *v.* Greene, 158 Mass. 426, 33 N. E. 607.

Where consent to the obstruction of a way is given on condition that the owner may use another way around the obstruction no intention to abandon the right can be presumed. Peck *v.* Loyd, 38 Conn. 566.

An obstruction to an easement erected with the knowledge of a life-tenant of the dominant estate and without his objection will not constitute an abandonment of the easement as against the owner of the reversion who had no knowledge of the obstruction. Welsh *v.* Taylor, 134 N. Y. 450, 31 N. E. 896, 18 L. R. A. 535.

The closing up of a gate across a way by the owner of the way and the use of another route through an opening in the fence at some distance therefrom is not an abandonment of the original location to which he was entitled. Faulkner *v.* Duff, 20 S. W. 227, 14 Ky. L. Rep. 227.

Where the owner of the dominant estate erects a wall across an alley in which he has a right of way, but places a doorway in the wall, the right will not be abandoned. Boyd *v.* Hunt, 102 Tenn. 495, 52 S. W. 131.

Where adjoining owners contribute land to form a lane for their own use the fact that one, after he has acquired a prescriptive right of way over the land contributed by the other, puts an obstruction upon his own, will not extinguish his right of way over the other's land. Craven *v.* Rose, 3 S. C. 72.

42. Hayford *v.* Spokesfield, 100 Mass. 491; Ermentrout *v.* Stitzel, 170 Pa. St. 540, 33 Atl. 109.

43. Cuthbert *v.* Lawton, 3 McCord (S. C.) 194.

44. McKee *v.* Perchment, 69 Pa. St. 342; Taylor *v.* Hampton, 4 McCord (S. C.) 96, 17 Am. Dec. 710.

45. Lavillebeuvre *v.* Cosgrove, 13 La. Ann. 323.

46. Smith *v.* Margerum, 21 Pa. Co. Ct. 209. See also Delahoussaye *v.* Landry, 3 La. Ann. 549, where the court restricted the enjoyment of the easement to the purposes originally contemplated.

47. Salem City Nat. Bank *v.* Van Meter, 59 N. J. Eq. 32, 45 Atl. 280, holding that an easement for light and air will not be extinguished by tearing down the building to which it is appurtenant for the purpose of erecting a new one, where it appears from the plans of the new building that a window will be in substantially the same place as was the window of the old building.

48. *California.*— Carey *v.* Rae, 58 Cal. 159.

Connecticut.— Seeley *v.* Bishop, 19 Conn. 128; Collins *v.* Prentice, 15 Conn. 39, 38 Am. Dec. 61.

Kentucky.— Benedict *v.* Johnson, 42 S. W. 335, 19 Ky. L. Rep. 937.

Maryland.— Oliver *v.* Hook, 47 Md. 301.

Massachusetts.—Viall *v.* Carpenter, 14 Gray 126.

New Hampshire.— Abbott *v.* Stewartstown, 47 N. H. 228.

New York.— Palmer *v.* Palmer, 150 N. Y. 139, 44 N. E. 966, 55 Am. St. Rep. 653 [*reversing* 71 Hun 30, 24 N. Y. Suppl. 613]; New York L. Ins., etc., Co. *v.* Milnor, 1 Barb. Ch. 353.

England.— Holmes *v.* Goring, 2 Bing. 76, 9 Moore C. P. 166, 9 E. C. L. 488; Pomfret *v.* Ricroft, 1 Saund. 321.

See 17 Cent. Dig. tit. "Easements," § 81.

A judgment in partition establishing a new way extinguishes a former way of necessity. Carey *v.* Rae, 58 Cal. 159.

The fact that a former way of necessity continues to be the most convenient way will not prevent its extinguishment when it ceases

way of necessity acquires other property of his own over which he may pass,[49] or if a public way is laid out which affords access to his premises,[50] his right to the way of necessity ceases. But a mere revocable permission to use a way over the land of another person will not extinguish the right.[51] The rule that the right ceases with necessity has no application to ways acquired by express grant[52] or by prescription.[53]

2. EASEMENT FOR A PARTICULAR PURPOSE. If an easement is granted for a particular purpose the right terminates as soon as the purpose for which it was granted ceases to exist.[54] So if the purpose is abandoned,[55] or its accomplishment is rendered impossible,[56] the right is extinguished.

I. Removal or Destruction of Servient Tenement. Where a piece of land subject to an easement is washed away by the encroachment of a river the easement is extinguished;[57] and where an easement has been granted for a particular purpose in connection with a particular building it is extinguished by a destruction of that building.[58] So a grant of the right to use the hall or stairway of a certain building gives no interest in the soil which will survive a destruction of the building, and the right ceases whenever the building is destroyed without the fault of the owner of the servient estate,[59] and the owner of the easement will not acquire any right in any new building which may be erected in the place of the one destroyed.[60] An easement may survive a partial destruction of the servient tenement if there is anything remaining upon which the dominant tenement may operate.[61] If the easement is of such a nature that its enjoyment is not wholly dependent upon the building with which it is connected, and the reasons for its existence do not cease with the destruction of the building, the right will not be extinguished.[62] A prescriptive right to use a cer-

to be absolutely necessary. Pierce *v.* Selleck, 18 Conn. 321.

The fact that in a conveyance of the servient estate it is stated that the estate is subject to a right of way, which right of way is a way of necessity, will not enlarge the right of the owner of the way, which will cease as soon as the way is no longer necessary. New York Carbonic Acid Gas Co. *v.* Geysers Natural Carbonic Acid Gas Co., 72 N. Y. App. Div. 304, 76 N. Y. Suppl. 46 [*reversing* 35 Misc. 668, 72 N. Y. Suppl. 354].

49. Smith *v.* Tarbox, 31 Conn. 585; Viall *v.* Carpenter, 14 Gray (Mass.) 126; Baker *v.* Crosby, 9 Gray (Mass.) 421; New York Carbonic Acid Gas Co. *v.* Geysers Natural Carbonic Acid Gas Co., 72 N. Y. App. Div. 304, 76 N. Y. Suppl. 46 [*reversing* 35 Misc. 668, 72 N. Y. Suppl. 354]; Holmes *v.* Goring, 2 Bing. 76, 9 Moore C. P. 166, 9 E. C. L. 488.

The fact that the owner of the way has become a tenant in common of land over which access to his premises might be had will not extinguish his right to a way of necessity. Palmer *v.* Palmer, 150 N. Y. 139, 44 N. E. 966, 55 Am. St. Rep. 653 [*reversing* 71 Hun 30, 24 N. Y. Suppl. 613].

50. Abbott *v.* Stewartstown, 47 N. H. 228. See also New York L. Ins., etc., Co. *v.* Milnor, 1 Barb. Ch. (N. Y.) 353.

If the way established is not public, but a a mere private way for the accommodation of the owners of the premises on which it is located, the right will not be extinguished. Palmer *v.* Palmer, 150 N. Y. 139, 44 N. E. 966, 55 Am. St. Rep. 653 [*reversing* 71 Hun 30, 24 N. Y. Suppl. 613].

51. See Lide *v.* Hadley, 36 Ala. 627, 76 Am. Dec. 338.

52. Lide *v.* Hadley, 36 Ala. 627, 76 Am. Dec. 338; Perth Amboy Terra Cotta Co. *v.* Ryan, 68 N. J. L. 474, 53 Atl. 699; Mosher *v.* Hibbs, 24 Ohio Cir. Ct. 375. See also New York L. Ins., etc., Co. *v.* Milnor, 1 Barb. Ch. (N. Y.) 353.

53. Crounse *v.* Wemple, 29 N. Y. 540. See also Benedict *v.* Johnson, 42 S. W. 335, 19 Ky. L. Rep. 937.

54. Long *v.* Louisville, 98 Ky. 67, 32 S. W. 271, 17 Ky. L. Rep. 642; Hahn *v.* Baker Lodge No. 47, 21 Oreg. 30, 27 Pac. 166, 28 Am. St. Rep. 723, 13 L. R. A. 158.

55. Bangs *v.* Potter, 135 Mass. 245.

56. Central Wharf, etc., Corp. *v.* India Wharf, 123 Mass. 567.

57. Weis *v.* Meyer, 55 Ark. 18, 17 S. W. 339.

58. Hahn *v.* Baker Lodge No. 47, 21 Oreg. 30, 27 Pac. 166, 28 Am. St. Rep. 723, 13 L. R. A. 158.

The grant of a right to grind at a certain mill does not impose upon the grantor the duty of keeping the mill in repair, and the right terminates whenever the mill can no longer be used. Bartlett *v.* Peaslee, 20 N. H. 547, 51 Am. Dec. 242.

59. Shirley *v.* Crabb, 138 Ind. 200, 37 N. E. 130, 46 Am. St. Rep. 376; Bonney *v.* Greenwood, 96 Me. 335, 52 Atl. 786; Douglas *v.* Coonley, 84 Hun (N. Y.) 158, 32 N. Y. Suppl. 444.

60. Douglas *v.* Coonley, 84 Hun (N. Y.) 158, 32 N. Y. Suppl. 444.

61. See Bonney *v.* Greenwood, 96 Me. 335, 52 Atl. 786.

62. Hottell *v.* Farmers' Protective Assoc., 25 Colo. 67, 53 Pac. 327, 71 Am. St. Rep. 109, holding that in such cases the easement is

tain way as a means of access to a lot on which a building is situated is not lost by a destruction of the building;[63] nor will a right of way by express grant to a certain building be so extinguished, where it does not appear that it was intended exclusively for the benefit of the particular building named.[64]

J. Forfeiture For Misuser. The right to an easement is not lost by using it in an unauthorized manner[65] or to an unauthorized extent.[66] Such a misuser does not authorize the owner of the servient estate to prevent a further use of the easement by erecting obstructions,[67] or by restraining the owner of the easement by force or violence;[68] the proper remedy being an action on the case for damages.[69]

K. Adverse Possession. The right to an easement may be lost by an occupation on the part of the servient owner adverse to and inconsistent with the right claimed;[70] but the right will not be lost where the occupation is not clearly adverse,[71] or where it is not continued for the period prescribed by statute.[72] The maintenance for the necessary period of an obstruction of a permanent character which prevents the enjoyment of the easement is such an adverse possession,[73] but an obstruction which constitutes only a slight interference and is not in its nature inconsistent with the easement will not extinguish the right.[74]

merely suspended and will be revived in case the building is rebuilt, although there may be no obligation on the part of the servient owner to rebuild.

63. Chew *v.* Cook, 39 N. J. Eq. 396.

64. Bangs *v.* Parker, 71 Me. 458.

65. Mendell *v.* Delano, 7 Metc. (Mass.) 176; McMillan *v.* Cronin, 75 N. Y. 474; Deavitt *v.* Washington County, 75 Vt. 156, 53 Atl. 563.

66. McTavish *v.* Carroll, 13 Md. 429; Walker *v.* Gerhard, 9 Phila. (Pa.) 116.

67. Mendell *v.* Delano, 7 Metc. (Mass.) 176; Walker *v.* Gerhard, 9 Phila. (Pa.) 116.

68. McMillan *v.* Cronin, 75 N. Y. 474.

69. See Mendell *v.* Delano, 7 Metc. (Mass.) 176; McMillan *v.* Cronin, 75 N. Y. 474; Walker *v.* Gerhard, 9 Phila. (Pa.) 116.

70. Jesse French Piano, etc., Co. *v.* Forbes, 129 Ala. 471, 29 So. 683, 87 Am. St. Rep. 71; Woodruff *v.* Paddock, 130 N. Y. 618, 29 N. E. 1021; Matter of New York, 73 N. Y. App. Div. 394, 77 N. Y. Suppl. 31; Stephens *v.* Hockemeyer, 19 N. Y. Suppl. 666; Greenmount Cemetery Co.'s Appeal, (Pa. 1887) 4 Atl. 528; Yeakle *v.* Nace, 2 Whart. (Pa.) 123; Dupont *v.* Charleston Bridge Co., 65 S. C. 524, 44 S. E. 86; Bowen *v.* Team, 6 Rich. (S. C.) 298, 60 Am. Dec. 127. *Compare* Wright *v.* Freeman, 5 Harr. & J. (Md.) 467.

A negative easement may be lost by an open and notorious use of the premises under a claim of right for twenty years in violation of the covenant against such use. Stephens *v.* Hockemeyer, 19 N. Y. Suppl. 666.

Non-user united with an adverse use of the servient estate inconsistent with the existence of the easement will extinguish the right. Smith *v.* Langewald, 140 Mass. 205, 4 N. E. 571.

An action for damages will not lie for the obstruction of a right of way alleged to have arisen from an implied covenant contained in a reference in a deed to a street as a boundary, where possession of such street was never given or taken under the deed, and the owner had built thereon and had exclusive possession thereof for more than twenty-one years before suit brought, without any denial of title. Spackman *v.* Steidel, 88 Pa. St. 453.

71. Dill *v.* Board of Education, 47 N. J. Eq. 421, 20 Atl. 739, 10 L. R. A. 276; State *v.* Pettis, 7 Rich. (S. C.) 390.

The character of the adverse possession which will defeat a right of way acquired by adverse user must be such as would defeat a right of entry on real estate. Clay *v.* Kennedy, 72 S. W. 815, 24 Ky. L. Rep. 2034.

An adverse claim asserted only against strangers in interest and of which the owner of the easement has no notice will not affect the right. Boyd *v.* Hunt, 102 Tenn. 495, 52 S. W. 131.

The building of a sidewalk on a street over which an adjoining owner has a right of way is not an adverse possession against the easement. Kuecken *v.* Voltz, 110 Ill. 264.

72. Kuecken *v.* Voltz, 110 Ill. 264.

An adverse act committed in the presence of the owner of an easement and without his objection will not estop him from claiming the right at any time thereafter within twenty-one years. Edelman *v.* Yeakel, 27 Pa. St. 26.

73. Woodruff *v.* Paddock, 130 N. Y. 618, 29 N. E. 1021; Bowen *v.* Team, 6 Rich. (S. C.) 298, 60 Am. Dec. 127.

Where a building has been erected so as to encroach upon a right of way and has existed for more than twenty years without objection, the easement in the land covered by the building is lost. Bentley *v.* Root, 19 R. I. 205, 32 Atl. 918.

74. Smith *v.* Langewald, 140 Mass. 205, 4 N. E. 571; Dill *v.* Board of Education, 47 N. J. Eq. 421, 20 Atl. 739, 10 L. R. A. 276.

The erection and maintenance of a gate across a way which does not prevent its free and uninterrupted use will not extinguish the right to use the way (Gibson *v.* Porter, 15 S. W. 871, 12 Ky. L. Rep. 917; State *v.*

L. Dedication or Appropriation to Public Use. The right to an easement will be extinguished by a lawful appropriation to a public use of the land where the easement is located,[75] or of other land which will render the enjoyment of the easement impossible.[76] The owner of the servient estate may also make a lawful dedication of a private easement to public use provided the owner of the easement consents,[77] but not otherwise.[78] The action of public authorities in discontinuing a way as a public highway cannot affect any private right of way over the land secured to the owner of adjoining property by contract or otherwise, independently of any action of the public authorities in establishing or maintaining the way as a public highway.[79]

M. Revival of Lost Right.[80] Where an easement is once extinguished the right is forever gone and cannot be revived, and the use can be reëstablished only by the acquisition of a new title;[81] but if the right is merely suspended it may be revived.[82]

VIII. EVIDENCE AND DETERMINATION.

A. Presumptions and Burden of Proof. Where an easement is claimed by prescription the burden is upon the party claiming it to prove the facts essential to the acquisition of a prescriptive title;[83] but proof of an uninterrupted use for the necessary period without evidence to explain how it began raises a presumption that it was adverse and under a claim of right, and the burden is upon the owner of the land, if he relies on such a defense, to show that it was by virtue of some license, indulgence, or agreement inconsistent with the right claimed.[84] Disability on the part of the servient owner to resist an adverse use of his land will not be presumed, and if relied on as a defense to the claim of

Pettis, 7 Rich. (S. C.) 390), although it may modify its extent (Barnwell *v.* Magrath, 1 McMull. (S. C.) 174, 36 Am. Dec. 254).

Occasional obstructions placed in a way by the owner of the servient estate which are removed by the owner of the way whenever it is necessary to use the same do not constitute such an adverse holding as will defeat the right. Potts *v.* Clark, 62 S. W. 884, 23 Ky. L. Rep. 332.

75. Hancock *v.* Wentworth, 5 Metc. (Mass.) 446, holding, however, that the owner of the easement may maintain an action for the injury sustained.

An act merely authorizing the purchase of property to which an easement is appurtenant and the erection of a public building thereon will not, prior to such purchase and use of the property, destroy the easement. Hoboken M. E. Church *v.* Hoboken, 19 N. J. Eq. 355.

76. Mussey *v.* Union Wharf, 41 Me. 34.

77. Indianapolis *v.* Kingsbury, 101 Ind. 200, 51 Am. Rep. 749.

78. Sarcoxie *v.* Wild, 64 Mo. App. 403.

79. Central Trust Co. *v.* Hennen, 90 Fed. 593, 33 C. C. A. 189.

80. After merger see *supra*, VII, B, 3.

81. Van Rensselaer *v.* Radcliff, 10 Wend. (N. Y.) 639, 25 Am. Dec. 582; Taylor *v.* Hampton, 4 McCord (S. C.) 96, 17 Am. Dec. 710.

Where an estate to which an easement is appurtenant is conveyed without the easement the right will not be revived by the grantor again acquiring the property. Greenwood *v.* Metropolitan El. R. Co., 58 N. Y. Super. Ct. 482, 12 N. Y. Suppl. 919.

Where a private lane between two lots was abandoned by the owners, and a line fence built in the center thereof, a subsequent purchaser of one of the lots cannot revive the use of such lane. Hennesy *v.* Murdock, 17 N. Y. Suppl. 276.

The fact that a former dominant tenement is conveyed with its "appurtenances" does not give the grantee any right to an easement which has been extinguished prior to the conveyance. Fritz *v.* Tompkins, 18 Misc. (N. Y.) 514, 41 N. Y. Suppl. 985.

An underground easement which has been extinguished cannot be reëstablished against a subsequent purchaser of the servient estate without knowledge or notice by evidence of such user as would establish a right of way or watercourse. Smith *v.* Dutton, 4 Phila. (Pa.) 73.

82. Hottell *v.* Farmers' Protective Assoc., 25 Colo. 67, 53 Pac. 327, 71 Am. St. Rep. 109.

83. Bradley's Fish Co. *v.* Dudley, 37 Conn. 136; Palmer *v.* Wright, 58 Ind. 486; Hammond *v.* Zehner, 23 Barb. (N. Y.) 473; Plimpton *v.* Converse, 42 Vt. 712.

84. *Indiana.*— Mitchell *v.* Bain, 142 Ind. 604, 42 N. E. 230.

Kentucky.— O'Daniel *v.* O'Daniel, 88 Ky. 185, 10 S. W. 638, 10 Ky. L. Rep. 760; Lisle *v.* Embry, 42 S. W. 98, 19 Ky. L. Rep. 867.

Maryland.— Cox *v.* Forrest, 60 Md. 74.

New York.— Flora *v.* Carbean, 38 N. Y. 111; Colburn *v.* Marsh, 68 Hun 269, 22 N. Y. Suppl. 990; Hammond *v.* Zehner, 23 Barb. 473; Miller *v.* Garlock, 8 Barb. 153.

Pennsylvania.— Wanger *v.* Hipple, (1888) 13 Atl. 81; Steffy *v.* Carpenter, 37 Pa. St. 41.

an easement by prescription, the burden is upon him to establish the fact by a preponderance of evidence.[85] Where there have been interruptions by the owner of the servient estate in the use of an easement the burden is upon the party claiming the easement to show that they were consistent with the right claimed and not of such a character as to prevent his use of the easement from ripening into a prescriptive right.[86] Where a way of necessity is shown to have once existed, the continuance of the necessity will be presumed until the contrary is shown.[87] Where the owner of the servient estate relies upon an abandonment of the easement as a defense to plaintiff's claim, he has the burden of proving the defense;[88] but it has been held that where the servient owner alleges a loss of the right by a prescription of non-usage, it is not incumbent upon him to establish the defense, but that the person claiming the easement must prove a user during the time necessary to prevent the establishment of such prescription.[89] Where the right to an easement is pleaded as a defense to an action for damages, it is an affirmative defense which it is incumbent upon the party claiming the easement to establish.[90]

B. Admissibility — 1. In General. Evidence to be admissible must be pertinent to the allegations of the pleadings and tend to prove or disprove the particular matters in issue.[91] In determining whether the use of a way has been adverse or permissive evidence is admissible of the existence of other ways leading from the premises of the claimant over the land of other persons to the public highway;[92] and it is also competent for a relative of the claimant who is familiar

West Virginia.— Rogerson *v.* Shepherd, 33 W. Va. 307, 10 S. E. 632.

See 17 Cent. Dig. tit. "Easements," § 89.

Where the owners of adjoining lots make a way between them, each setting off an equal portion of land for that purpose, and they and their grantees use it in common as a way for a period of twenty years, it will be presumed that the use was under a claim of right and adverse. Townsend *v.* Bissell, 4 Hun (N. Y.) 297, 6 Thomps. & C. (N. Y.) 565.

Under the Iowa statute a mere use of an easement will not be taken as evidence of a claim of right, but the fact of an adverse possession must be established by evidence independent of the mere user of the easement. O'Reagan *v.* Duggan, 117 Iowa 612, 91 N. W. 909; McAllister *v.* Pickup, 84 Iowa 65, 50 N. W. 556.

A grant will be presumed from the uninterrupted adverse use of an easement for the period necessary to acquire a prescriptive title, and the burden is upon the owner of the land to show that the use was permissive. Clement *v.* Bettle, 65 N. J. L. 675, 48 Atl. 567; Hammond *v.* Zehner, 21 N. Y. 118; Pierce *v.* Cloud, 42 Pa. St. 102, 82 Am. Dec. 496.

The fact of open and continuous use should not be given the same significance under all circumstances, but the condition of the land over which the easement is claimed and the relation in which the parties stand to each other should be considered in deciding whether the use is adverse or permissive. Bradley's Fish Co. *v.* Dudley, 37 Conn. 136.

85. Fankboner *v.* Corder, 127 Ind. 164, 26 N. E. 766; Davidson *v.* Nicholson, 59 Ind. 411; Palmer *v.* Wright, 58 Ind. 486 [*citing* 2 Greenleaf Ev. § 539].

86. Plimpton *v.* Converse, 42 Vt. 712.

87. Blum *v.* Weston, 102 Cal. 362, 36 Pac. 778, 41 Am. St. Rep. 188.

88. Hennessy *v.* Murdock, 137 N. Y. 317, 33 N. E. 330.

89. De la Croix *v.* Nolan, 1 Rob. (La.) 321; Powers *v.* Foucher, 12 Mart. (La.) 70. But see Hennessy *v.* Murdock, 137 N. Y. 317, 33 N. E. 330.

90. Neale *v.* Seeley, 47 Barb. (N. Y.) 314. See also Hooten *v.* Barnard, 137 Mass. 36.

91. McIntire *v.* Talbot, 62 Me. 312; Randall *v.* Chase, 133 Mass. 210; Sale *v.* Pratt, 19 Pick. (Mass.) 191; Faulk *v.* Thornton, 108 N. C. 314, 12 S. E. 998.

Where the claim to an easement is based on a prescriptive right a deed which grants the right claimed but which does not recognize any prescriptive right independent of the deed itself is inadmissible as evidence of the right claimed. Hoyle *v.* New York, etc., R. Co., 60 Conn. 28, 22 Atl. 446.

A complaint alleging a continuous and uninterrupted use of a certain way for thirty-five years, and that during this time plaintiff had had no other way or means of getting from his land to the public highway, is sufficiently comprehensive to admit proof of a way acquired by either grant, prescription, or necessity. Steel *v.* Grigsby, 79 Ind. 184.

Where a right of way is pleaded as a defense to an action of ejectment evidence is admissible of a way either by grant or by prescription. Hamilton *v.* White, 4 Barb. (N. Y.) 60.

Describing windows as "ancient" in the complaint in an action to recover damages for their obstruction does not confine plaintiff to proof of a prescriptive right, but he may show that it was acquired by grant. Ward *v.* Neal, 35 Ala. 602.

92. Hewins *v.* Smith, 11 Metc. (Mass.) 241.

with the location of the way to testify that he was never aware of any adverse claim of right to the use of the way.[93] A plan showing the positions of the different tracts of land and the highway is competent evidence in determining whether a right of way exists by necessity;[94] and evidence of the purchase of other land by the owner of a way of necessity, over which he might have access to the public highway, is admissible to show that his right to the way has ceased to exist.[95] Where an abandonment of an easement by the predecessor in title of the person claiming it is relied on, it is competent for the predecessor to testify as to his intent in doing the acts which are relied on as showing an abandonment.[96] Evidence of interruptions in the use of a way is inadmissible where it does not appear that the person causing the interruptions had any title to the servient estate which has been transmitted to the present owner.[97]

2. Evidence as to Use. Where a right of way is claimed under a grant, evidence of the manner in which it has been used by the grantee is not admissible to establish the right to the way, but is admissible to show the extent and character of the right;[98] and evidence of its use by persons other than the person claiming it is admissible to show the existence of the way and its location.[99] Where a way is claimed by prescription evidence is not admissible on the part of defendant to show a permissive use by other persons not in privity with the present claimant or his grantors,[1] and where a prescriptive right of way is claimed at a particular point evidence is not admissible to show that such persons have been accustomed to cross the land at other and different places;[2] but where a prescriptive right of way is sought to be established by evidence of a beaten visible path made by those from whom the present owner derived title, this evidence may be explained by proof that other people were in the habit of crossing the land at the same place.[3]

3. Acts and Declarations of Former Owners. Declarations of a former owner of the servient estate, if made during his ownership,[4] and which tend to show the existence of the easement claimed are admissible against a subsequent owner;[5] but where they tend to disprove the existence of the easement they are not admissible in his favor.[6] Declarations of a former owner of the dominant estate made during his ownership are admissible to show an abandonment of the easement,[7] and in establishing an easement by prescription evidence of the acts of former owners of the dominant estate is admissible.[8]

4. Parol Testimony. The existence of an easement claimed by prescription may be established by parol evidence,[9] and when the easement is by grant and the language of the grant is ambiguous, parol evidence of the circumstances under

93. Rotch's Wharf Co. *v.* Judd, 108 Mass. 224.

94. Chase *v.* Perry, 132 Mass. 582.

95. Russell *v.* Napier, 82 Ga. 770, 9 S. E. 746.

96. Butterfield *v.* Reed, 160 Mass. 361, 35 N. E. 1128.

97. McIntire *v.* Talbot, 62 Me. 312.

98. Rexford *v.* Marquis, 7 Lans. (N. Y.) 249.

99. McFerren *v.* Mont Alto Iron Co., 76 Pa. St. 180.

1. McIntire *v.* Talbot, 62 Me. 312.

2. Smith *v.* Lee, 14 Gray (Mass.) 473.

3. Pope *v.* Devereux, 5 Gray (Mass.) 409.

4. Noyes *v.* Morrill, 108 Mass. 396.

5. Blake *v.* Everett, 1 Allen (Mass.) 248; Stuart *v.* Line, 11 Pa. Super. Ct. 345.

Where the location of a way of necessity is in issue declarations of a former owner of the servient estate, who had a right to locate the way and which tend to show that he had done so, are admissible. Kripp *v.* Curtis, 71 Cal. 62, 11 Pac. 879.

6. Blake *v.* Everett, 1 Allen (Mass.) 248. But see Sears *v.* Hayt, 37 Conn. 406 (holding that where there have been interruptions by the servient owner of the use of an easement claimed by prescription, evidence of declarations accompanying the acts of interruption is admissible to show that they were of a character adverse to plaintiff's claim); Dodge *v.* Stacy, 39 Vt. 558 (holding that where a way is claimed by prescription, declarations of a former owner of the servient estate tending to show a want of acquiescence on his part in the use of the easement are admissible).

7. King *v.* Murphy, 140 Mass. 254, 4 N. E. 566.

8. Okeson *v.* Patterson, 29 Pa. St. 22.

9. Kennedy *v.* McCollam, 34 La. Ann. 568; Burke *v.* Wall, 29 La. Ann. 38, 29 Am. Rep. 316; Macheca *v.* Avegno, 25 La. Ann. 55.

which it was made is admissible to show the intention of the parties.[10] Where the proprietor of two estates between which there exists an apparent servitude sells one of the estates, and the deed is silent as to the servitude, its existence may be shown by parol evidence.[11] Parol evidence is also admissible to establish the fact of plaintiff's possession of the dominant estate.[12] The use of an easement may be established by parol evidence,[13] and all agreements in regard to the use of easements may be proven by parol unless it is shown that they were reduced to writing.[14]

C. Sufficiency. If the easement is claimed by prescription proof of the adverse user may be by circumstantial as well as direct evidence, and no greater amount of proof is required than is necessary to prove other facts in civil cases.[15] It is unnecessary to give direct evidence of the actual use of an easement during every year of the period necessary to establish a prescriptive title, if the circumstances are such as to satisfy the jury that the use was continuous.[16] The presumption of a grant arising from the uninterrupted enjoyment of an easement for the period necessary to establish a prescriptive title may be overcome by evidence contradicting or explaining the facts upon which it rests,[17] but not by evidence that no grant was in fact made.[18] Where an easement is claimed by virtue of an express grant, the rights of the parties must be ascertained from the deed itself.[19] Where an easement is claimed under a lost grant, the proof of its

10. French *v.* Williams, 82 Va. 462, 4 S. E. 591.

11. Rozier *v.* Maginnis, 12 La. Ann. 108.

12. Macheca *v.* Avegno, 20 La. Ann. 339.

13. Blake *r.* Everett, 1 Allen (Mass.) 248.

14. Macheca *r.* Avegno, 25 La. Ann. 55.

The surrender of an old right of way may be shown by evidence of an executed oral agreement between the owners of the dominant and servient tenements to discontinue the old way and substitute a different one therefor. Pope *v.* Devereux, 5 Gray (Mass.) 409.

The claim to an implied reservation of a way of necessity may be rebutted by parol evidence of an agreement at the time of the conveyance that the way claimed was not necessary and that the grantor would thereafter use a different way. Lebus *v.* Boston, 107 Ky. 98, 51 S. W. 609, 52 S. W. 956, 21 Ky. L. Rep. 411, 706, 92 Am. St. Rep. 333, 47 L. R. A. 79.

The fact that the use of a way commenced under a claim of right may be shown by evidence of a parol agreement by the grantee of certain land that the grantor might continue to use a way over the land which was not reserved in the deed. Ashley *v.* Ashley, 4 Gray (Mass.) 197.

15. Bradley's Fish Co. *r.* Dudley, 37 Conn. 136.

Evidence showing a prescriptive title to an easement in plaintiff is not insufficient because it also shows a right by custom in others, such right not being inconsistent with that claimed by plaintiff. Kent *v.* Waite, 10 Pick. (Mass.) 138.

Proof of a use prior to defendant's ownership of the servient estate, and a subsequent use without asking his permission and without any objection on his part, is sufficient to sustain a finding that the use was under a claim of right and not permissive. Humphreys *v.* Blasingame, 104 Cal. 40, 37 Pac. 804.

Where the evidence as to plaintiff's use of the way claimed by prescription is conflicting, but there is evidence that the way had not been used for the period required by statute, and that it had not been kept in repair by plaintiff, a finding against plaintiff is authorized. Russell *v.* Napier, 82 Ga. 770, 9 S. E. 746.

That the use of a way began under a lease and therefore could not be adverse is not established by the uncorroborated testimony of a witness that he saw the lease, but was "not close enough to read it." Hey *v.* Collman, 79 N. Y. App. Div. 584, 79 N. Y. Suppl. 778.

16. Bodfish *v.* Bodfish, 105 Mass. 317.

17. Hall *v.* McLeod, 2 Metc. (Ky.) 98, 74 Am. Dec. 400; Lehigh Valley R. Co. *v.* McFarlan, 43 N. J. L. 605.

Declarations of the party claiming the easement which indicate a permissive use, but which are equivocal and inconsistent with other declarations made by him, are insufficient to establish that the use was permissive. Pierce *v.* Cloud, 42 Pa. St. 102, 82 Am. Dec. 496.

18. Lehigh Valley R. Co. *v.* McFarlan, 43 N. J. L. 605.

The production of an imperfect or unexecuted agreement making a formal grant of the same easement to the party claiming by prescription is insufficient to defeat the claimant's right. Bolivar Mfg. Co. *v.* Neponset Mfg. Co., 16 Pick. (Mass.) 241.

19. Voorhees *v.* Burchard, 6 Lans. (N. Y.) 176, holding that where the land to which an easement is appurtenant is conveyed with its appurtenances, the rights of the parties cannot be affected by evidence of a private understanding between the parties that the easement in question should not pass as an appurtenance.

An exception in a covenant against encumbrances of "such rights of way, if any, as may exist of record," is not an admission

contents must be clear, strong, and convincing.[20] Where a way is claimed by necessity, proof that plaintiff has purchased other land, over which he may have access to the public highway is sufficient to show that the way claimed is not a way of necessity.[21] A judgment for plaintiff in an action for disturbing a right of way is sufficient evidence of the existence of his right to the way at the time the judgment was rendered.[22] Proof that the owner of land over which another has a right of way did not object when the owner of the way used a different route from the one to which he was entitled is not sufficient to establish an agreement to substitute the route used for the other.[23] Where an abandonment of an easement is relied on there must be clear and convincing proof of an intention to abandon it as such.[24]

D. Questions of Law and Fact. What constitutes an easement or a right thereto is a question of law, but whether the facts necessary to the existence of the right have been proved is a question of fact for the jury.[25] Whether a person is estopped by his acts from contesting another's right to an easement is a question of law for the court.[26] Where an easement is claimed by prescription, the questions whether the character of its use has been adverse or permissive,[27] and whether a prescriptive right has in fact been acquired by such use[28] are questions of fact for the jury under proper instructions from the court as to the nature of adverse possession.[29] Whether an easement has been abandoned by the owner,[30] or in the case of a prescriptive right, whether it has been lost by nonuser,[31] are questions of fact for the jury. Where there have been interruptions by the owner of the servient estate to the use of an easement claimed by prescription, it is a question for the jury whether under the circumstances of the case they were of such a character as to have defeated the acquisition of the claimant's right.[32] Where a private right of way is pleaded as a defense to an action of trespass the existence of the right is a question of fact for the jury.[33] If there is any evidence which is reasonably sufficient to authorize the jury to find the fact to which it is pertinent, it must be left to them to determine its credibility, force, and effect.[34]

IX. EXTENT OF RIGHT, USE, AND OBSTRUCTION.

A. Extent of Right — 1. In General — a. Easements by Prescription. Where an easement is acquired by prescription the extent of the right is fixed and

that there are such rights. Botsford *v.* Wallace, 69 Conn. 263, 37 Atl. 902.

20. Peters *v.* Worth, 164 Mo. 431, 64 S. W. 490.

21. Russell *v.* Napier, 82 Ga. 770, 9 S. E. 746.

22. Wissler *v.* Hershey, 23 Pa. St. 333.

A verdict of damages for plaintiff is conclusive evidence of his right in a subsequent action betwen the same parties. Prather *v.* Owens, Cheves (S. C.) 236.

23. Tabbutt *v.* Grant, 94 Me. 371, 47 Atl. 899.

24. Hennessy *v.* Murdock, 137 N. Y. 317, 33 N. E. 330.

25. Polson *v.* Ingram, 22 S. C. 541.

26. Lewis *v.* Carstairs, 5 Watts & S. (Pa.) 205.

27. Humphreys *v.* Blasingame, 104 Cal. 40, 37 Pac. 804; Bradley's Fish Co. *v.* Dudley, 37 Conn. 136; Putnam *v.* Bowker, 11 Cush. (Mass.) 542; Stuart *v.* Line, 11 Pa. Super. Ct. 345.

Whether the evidence is sufficient to raise a presumption of a grant is a question of fact for the jury. Lewis *v.* Carstairs, 5 Watts & S. (Pa.) 205.

28. Heiser *v.* Gaul, 39 N. Y. App. Div. 162, 57 N. Y. Suppl. 198; Steffy *v.* Carpenter, 37 Pa. St. 41.

Where a grant of land extends up to the wall of a house owned by the grantor, the eaves of which project over the land conveyed, it is a question of fact for the jury whether the continuation of this projection for a length of time sufficient to acquire a prescriptive title gives an adverse title to the land itself, or an easement therein, or whether it was merely permissive. Carbrey *v.* Willis, 7 Allen (Mass.) 364, 83 Am. Dec. 688.

29. See Bradley's Fish Co. *v.* Dudley, 37 Conn. 136; Putnam *v.* Bowker, 11 Cush. (Mass.) 542.

30. Corning *v.* Gould, 16 Wend. (N. Y.) 531; Polson *v.* Ingram, 22 S. C. 541; Parkins *v.* Dunham, 3 Strobh. (S. C.) 224.

31. Browne *v.* Baltimore M. E. Church, 37 Md. 108.

32. Connor *v.* Sullivan, 40 Conn. 26, 16 Am. Rep. 10; Webster *v.* Lowell, 142 Mass. 324, 8 N. E. 54.

33. Van Blarcom *v.* Frike, 29 N. J. L. 516.

34. Boyden *v.* Ackenbach, 86 N. C. 397.

determined by the user in which it originated,[35] and cannot be extended except by a user which has been acquiesced in for the requisite length of time,[36] or where additional rights have been acquired by some other title.[37] Where an easement is claimed under a prescriptive right, but the occupation is substantially in accordance with a grant or reservation, it will be presumed to be held under the grant or reservation, and the extent of the right will be limited by the terms of that instrument.[38]

b. Easements by Express Grant. Easements by express grant or reservation must be limited to the matters contained in the deed.[39] Nothing passes by implication as incident to the grant except what is reasonably necessary to its fair enjoyment.[40] The extent of the rights acquired must therefore depend upon the construction placed upon the terms of the grant,[41] and in construing such instruments the court will look to the circumstances attending the transaction, the situation of the parties, and the state of the thing granted to ascertain the intention of the parties.[42] In cases of doubt the grant must be taken most strongly against the grantor.[43]

2. Ways — a. By Express Grant. The grant of a right of way over the land of the grantor confers only the right of passing over it,[44] together with such rights as are necessarily incident to its reasonable enjoyment as a way.[45] In

35. *Illinois.*— Ohio, etc., R. Co. *v.* Elliott, 34 Ill. App. 589.

Maryland.— Barry *v.* Edlavitch, 84 Md. 95, 35 Atl. 170, 33 L. R. A. 294.

Massachusetts.— Baldwin *v.* Boston, etc., R. Co., 181 Mass. 166, 63 N. E. 428.

New York.— Lewis *v.* New York, etc., R. Co., 162 N. Y. 202, 56 N. E. 540; Fries *v.* New York, etc., R. Co., 57 N. Y. App. Div. 577, 68 N. Y. Suppl. 670.

South Carolina.— Capers *v.* McKee, 1 Strobh. 164.

England.— Williams *v.* James, L. R. 2 C. P. 577, 36 L. J. C. P. 256, 16 L. T. Rep. N. S. 664, 15 Wkly. Rep. 928; Cowling *v.* Higginson, 1 H. & H. 269, 7 L. J. Exch. 265, 4 M. & W. 245.

See 17 Cent. Dig. tit. "Easements," § 96.

A prescriptive right of pasturage does not authorize the cutting of grass or gathering of fruit. Simpson *v.* Coe, 4 N. H. 301.

A prescriptive right to maintain a cellar under land belonging to another does not authorize any interference with the surface above. Koenigs *v.* Jung, 73 Wis. 178, 40 N. W. 801.

A prescriptive right to maintain a bridge spanning a mill-race does not authorize the building of a supporting pier in the raceway. McMillian *v.* Lauer, 24 N. Y. Suppl. 951.

36. Ohio, etc., R. Co. *v.* Elliott, 34 Ill. App. 589; Postlethwaite *v.* Payne, 8 Ind. 104.

37. McLaughlin *v.* Cecconi, 141 Mass. 252, 5 N. E. 261.

38. Atkins *v.* Bordman, 2 Metc. (Mass.) 457, 37 Am. Dec. 100, 20 Pick. (Mass.) 291; Smith *v.* Wiggin, 52 N. H. 112; Arbuckle *v.* Ward, 29 Vt. 43.

39. McCabe *v.* Hood, 13 Ohio Cir. Ct. 621, 5 Ohio Cir. Dec. 292.

The servient estate will not be burdened to a greater extent than was contemplated or intended at the time of the creation of the easement. Brossart *v.* Corlett, 27 Iowa 288.

40. Hotchkiss *v.* Young, 42 Oreg. 446, 71 Pac. 324.

A reservation in a deed of division of such privileges in the premises as the different grantees may require in the enjoyment of their respective shares confers only such rights as are necessary, and the rights cease with the necessity therefor. Viall *v.* Carpenter, 14 Gray (Mass.) 126.

41. Field *v.* Leiter, 118 Ill. 17, 6 N. E. 877; Clap *v.* McNeil, 4 Mass. 589.

42. *Iowa.*—Agne *v.* Slitsinger, 96 Iowa 181, 64 N. W. 836, 36 L. R. A. 701 [*reversing* (1894) 60 N. W. 483]; Brossart *v.* Corlett, 27 Iowa 288.

Massachusetts.— Randall *v.* Sanderson, 111 Mass. 114; Eames *v.* Collins, 107 Mass. 594.

Missouri.— St. Louis Safe Deposit, etc., Bank *v.* Kennett, 101 Mo. App. 370, 74 S. W. 474.

New Jersey.— Cooper *v.* Louanstein, 37 N. J. Eq. 284.

New York.— Rochester Electric Light Co. *v.* Rochester Power Co., 15 N. Y. Suppl. 33.

Vermont.— Walker *v.* Pierce, 38 Vt. 94.

See 17 Cent. Dig. tit. "Easements," § 97.

43. Dunn *v.* English, 23 N. J. L. 126.

44. Maxwell *v.* McAtee, 9 B. Mon. (Ky.) 20, 48 Am. Dec. 409; Patterson *v.* Philadelphia, etc., R. Co., 8 Pa. Co. Ct. 186.

45. Maxwell *v.* McAtee, 9 B. Mon. (Ky.) 20, 48 Am. Dec. 409; Hotchkiss *v.* Young, 42 Oreg. 446, 71 Pac. 324.

Incident to the grant of a right of way is the right to enter upon the land and construct a suitable road-bed and keep it in repair, to exclude strangers from its use, and to restrict the owner of the servient tenement to such uses as are consistent with the enjoyment of the easement. Herman *v.* Roberts, 119 N. Y. 37, 23 N. E. 442, 7 L. R. A. 226, 16 Am. St. Rep. 800.

The owner of the way may erect railings when necessary to render the way safe, provided they do not interfere with the rights

determining the extent of the way granted the grant will be construed in the light of the surrounding circumstances to give effect to the intention of the parties.[46]

b. Ways of Necessity. In the case of ways of necessity the extent of the right is limited by the necessity which creates it,[47] and cannot be extended to suit the convenience of the owner beyond what is actually necessary.[48]

c. Ways Not Touching Land Conveyed. The reference in a deed to a plan laying out a large tract does not give every purchaser of a lot a right of way over every street laid down upon it,[49] but only over such ways as have an immediate connection with the property conveyed,[50] except in the case of an interior lot, in which case the grantee is entitled to use such other connecting ways indicated upon the plan as may be necessary for the purpose of reaching public highways.[51]

d. Width of Ways. In determining the width of a way a grant will be construed with reference to the place in which the way is granted and the circumstances under which the grant was made.[52] Thus where a way is granted over a piece of land of a certain stated width it will depend upon the circumstances of the case whether the reference is to the width of the way,[53] or is merely descriptive of the property over which the grantee may have such a way as may be reasonably necessary.[54] The grant of a right of way without stating its width

of the owner of the servient estate. Chandler *v.* Goodridge, 23 Me. 78.

Right to make repairs see *infra*, IX, D, 2.

46. *Massachusetts.*— Eames *v.* Collins, 107 Mass. 594; Mendell *v.* Delano, 7 Metc. 176.

Michigan.— McConnell *v.* Rathbun, 46 Mich. 303, 9 N. W. 426.

New Jersey.— Dunn *v.* English, 23 N. J. L. 126.

New York.— Weed *v.* Donahue, 26 N. Y. App. Div. 360, 51 N. Y. Suppl. 661.

Pennsylvania.— Roberts *v.* Wilcock, 8 Watts & S. 464.

See 17 Cent. Dig. tit. "Easements," § 98.

The grant of a "right of way of an alley" implies a passageway leading away from the land and not merely an open space bordering on such land and unconnected with any other way. McConnell *v.* Rathbun, 46 Mich. 303, 9 N. W. 426.

The grant of a right of way "in the usual passways" is limited to such passways as were in existence and in condition to be used at the time of the grant, and were so marked or otherwise defined that their course could be definitely fixed. Cheswell *v.* Chapman, 38 N. H. 14, 75 Am. Dec. 158.

Where the owner of land establishes an alley across the rear of the lot, and subsequently sells the lot with a right of way to and from said lot through such alley, the right of way extends along the whole rear of the lot. Currier *v.* Howes, 103 Cal. 431, 37 Pac. 521.

47. Pierce *v.* Selleck, 18 Conn. 321; Morse *v.* Benson, 151 Mass. 440, 24 N. E. 675; Viall *v.* Carpenter, 14 Gray (Mass.) 126; New York L. Ins. Co. *v.* Milnor, 1 Barb. Ch. (N. Y.) 353.

A decree establishing a way of necessity is erroneous where it adjudges that the way shall be opened for "public use and travel." Kruegel *v.* Nitschman, 15 Tex. Civ. App. 641, 40 S. W. 68.

Restricting the right of passage to the daytime in a decree establishing a way of necessity is erroneous. Baldwin *v.* Erie Shooting Club, 127 Mich. 659, 87 N. W. 59.

48. Pearne *v.* Coal Creek Min., etc., Co., 90 Tenn. 619, 18 S. W. 402.

A way of necessity for the purpose of repairing a mill-race and dam cannot be regularly used for the ordinary purposes of a way. McTavish *v.* Carroll, 7 Md. 352, 61 Am. Dec. 353.

49. Pearson *v.* Allen, 151 Mass. 79, 23 N. E. 731, 21 Am. St. Rep. 426; Regan *v.* Boston Gas Light Co., 137 Mass. 37.

50. Johnson *v.* Shelter Island, etc., Assoc., 47 Hun (N. Y.) 374 [*disapproving* Wyman *v.* New York, 11 Wend. (N. Y.) 486].

See also Badeau *v.* Mead, 14 Barb. (N. Y.) 328.

51. Fox *v.* Union Sugar Refinery, 109 Mass. 292.

52. Tudor Ice Co. *v.* Cunningham, 8 Allen (Mass.) 139; Salisbury *v.* Andrews, 19 Pick. (Mass.) 250.

Where the width of a way is defined by permanent inclosures at the time of the grant, the width so determined will prevail over a description by feet recited in the deed. Stevenson *v.* Stewart, 7 Phila. (Pa.) 293.

Means for turning around is a necessary incident to the right of way for ingress and egress, but does not require that the way should be of this width throughout its entire length. York *v.* Briggs, 7 N. Y. St. 124.

In controversies between adjacent owners as to the width of ways between their respective estates the descriptions in deeds to one under whom both claim title are admissible in evidence. Brown *v.* Stone, 10 Gray (Mass.) 61, 69 Am. Dec. 303.

53. Tudor Ice Co. *v.* Cunningham, 8 Allen (Mass.) 139; Smith *v.* Union, etc., Co., 31 Pittsb. Leg. J. N. S. 21.

54. Long *v.* Gill, 80 Ala. 408; Johnson *v.* Kinnicutt, 2 Cush. (Mass.) 153.

will be held to be a suitable and convenient way,[55] what is suitable and convenient being dependent upon the circumstances of the case.[56] If the grant merely states the object for which the way is granted the dimensions must be inferred to be such as are reasonably sufficient for the accomplishment of that object.[57] If the grantee at the time of the grant practically locates the width by the erection of fences or other structures, and this location is acquiesced in by the grantor, it will operate as an assignment of the way and have the same legal effect as if its width had been fixed by the deed.[58]

3. Easements For Light, Air, and View. The extent of the right to light, air, and view when claimed under an express grant or reservation, must depend entirely upon the construction of the terms of the conveyance.[59] In the absence of an express grant or reservation there is no particular amount of light or air to which the law can say a building is entitled,[60] and the right must be limited by whatever is reasonably necessary for the purposes of habitation or business, due regard being paid to usage and the circumstances of the particular case.[61]

4. Secondary Easements. The express grant of a particular right carries with it by implication the additional right, sometimes called a secondary easement, of doing whatever is reasonably necessary for the enjoyment of the right granted.[62]

B. Location — 1. Who May Locate. If the grant of an easement does not fix its location, the owner of the servient estate has the right in the first instance to designate the location, and in the event of his failure to do so, it may be selected by the owner of the easement; but in either case the location must be a reasonable one.[63]

55. George *v.* Cox, 114 Mass. 382; Smith *v.* Sponable, 54 N. Y. App. Div. 615, 66 N. Y. Suppl. 177; Farrington *v.* Bundy, 5 Hun (N. Y.) 617.

Where a right of way is claimed under a parol contract and user, the width of the way will be confined to that accepted and used. Clay *v.* Cline, 18 Ohio Cir. Ct. 89, 9 Ohio Cir. Dec. 871.

56. Johnson *v.* Kinnicutt, 2 Cush. (Mass.) 153.

57. Atkins *v.* Bordman, 2 Metc. (Mass.) 457, 37 Am. Dec. 100; Davis *v.* Watson, 89 Mo. App. 15; Grafton *v.* Moir, 130 N. Y. 465, 29 N. E. 974, 27 Am. St. Rep. 533 [*affirming* 56 Hun 640, 9 N. Y. Suppl. 3]; Spencer *v.* Weaver, 20 Hun (N. Y.) 450; York *v.* Briggs, 7 N. Y. St. 124.

Acquiescence by the grantor in the use of a greater width does not render him liable for subsequently obstructing a part of the ground so used if a way is left suitable and sufficient for the purposes for which it was granted. Smith *v.* Wiggin, 52 N. H. 112.

58. George *v.* Cox, 114 Mass. 382. And see *infra*, IX, B, 5.

59. Brooks *v.* Reynolds, 106 Mass. 31.

The grant of a right to use an open court gives not only a right of way over the court but the right to have it kept open for light and air. Salisbury *v.* Andrews, 128 Mass. 336.

The grant of a mere right of way does not give the right to have the space above the way kept open for light and air, but only that it shall not be so darkened as to be unfit for the purpose of a way. Grafton *v.* Moir, 130 N. Y. 465, 29 N. E. 974, 27 Am. St. Rep. 533 [*affirming* 56 Hun 640, 9 N. Y. Suppl. 3].

60. Warren *v.* Brown, [1902] 1 K. B. 15, 71 L. J. K. B. 12, 85 L. T. Rep. N. S. 444, 50 Wkly. Rep. 97; Kelk *v.* Pearson, L. R. 6 Ch. 809, 24 L. T. Rep. N. S. 890, 19 Wkly. Rep. 665.

Under the Roman and Spanish law the right was limited to the estate contiguous to that in favor of which the right was claimed, and the rights of purchasers of lots fronting on streets could not extend beyond the width of the street. French *v.* New Orleans, etc., R. Co., 2 La. Ann. 80.

61. Fifty Associates *v.* Tudor, 6 Gray (Mass.) 255.

62. Willoughby *v.* Lawrence, 116 Ill. 11, 4 N. E. 356, 56 Am. Rep. 758; Patout *v.* Lewis, 51 La. Ann. 210, 25 So. 134; Shaffer *v.* State Nat. Bank, 37 La. Ann. 242; White *v.* Eagle, etc., Hotel Co., 68 N. H. 38, 34 Atl. 672; Rochester Electric Light Co. *v.* Rochester Power Co., 60 Hun (N. Y.) 581, 15 N. Y. Suppl. 33.

The grant of a right to construct and maintain a stairway implies the right to have any necessary platforms or landings. Farrington *v.* Bundy, 5 Hun (N. Y.) 617.

The reservation in a lease of the right to occupy a certain room in a dwelling-house gives no right to any other use of the yard than that of the passageway to and from the room reserved. Fort *v.* Brown, 46 Barb. (N. Y.) 366.

Rights incident to rights of way see *supra*, IX, A, 2.

Right to make repairs see *infra*, IX, D, 2.

Right to remove obstructions see *infra*, IX, F, 6.

63. McKell *v.* Collins Colliery Co., 46 W. Va. 625, 33 S. E. 765; Stephens *v.* Gordon, 22 Can. Supreme Ct. 61.

In Louisiana under Rev. Civ. Code, art. 779, if the location of an easement is not fixed

The same rule applies to the location of easements by necessity, such as ways of necessity.[64]

2. Location of Ways by Express Grant. In determining the location of a way by express grant the court will give effect to the intention of the parties as disclosed by the surrounding circumstances, provided such intention is not inconsistent with the language of the grant.[65] The words of the grant will be taken according to their common meaning, unless it appears that the parties intended to use them in a different sense.[66] If no location is specified in the grant, a reasonably convenient and suitable location will be implied.[67]

3. Ways Existing at Time of Grant. When a right of way is granted over certain land without fixing its location, but there is a way already located at the time of the grant, this will be held to be the location of the way granted,[68] and the grantee cannot be compelled to accept a substitute therefor.[69]

4. Ways of Necessity. The owner of the land over which a way of necessity is to pass has the right to determine its location,[70] subject to the restriction that the way located must be reasonably convenient;[71] but in the event of his failure to do so the person entitled to the way may make the location.[72] The fact that the owner of the servient estate has himself formerly used a particular way will not prevent his assigning any other practical and convenient way.[73] In some jurisdictions the location of ways of necessity is regulated by statute.[74]

by the grant, it is the duty of the owner of the servient estate to designate the place where he wishes the right to be exercised. Patout *v.* Lewis, 51 La. Ann. 210, 25 So. 134; Rucker *v.* Liddell, 5 La. Ann. 577.

64. See *infra*, IX, B, 4.

65. Kinney *v.* Hooker, 65 Vt. 333, 26 Atl. 690, 36 Am. St. Rep. 864.

Where a reservation of a right of way is ambiguous it will be located so as to impose as little burden upon the servient estate as is consistent with a fair use of the way. Brossart *v.* Corlett, 27 Iowa 288; Simonds *v.* Wellington, 10 Cush. (Mass.) 313.

Where there are two ways to which the description in the grant applies evidence of the declarations of the grantor is admissible to identify the one intended. French *v.* Hayes, 43 N. H. 30, 80 Am. Dec. 127.

The phrase "as is most convenient" in describing the location of a right of way refers solely to the convenience of the grantee. Miles *v.* Douglas, 34 Conn. 393.

A grant of the right to pass "over the accustomed way" refers to the custom existing at the time of the conveyance. Ferriss *v.* Knowles, 41 Conn. 308.

Where a grantor reserves the right to locate a way within certain limits over the lands granted, he may locate the way at any point within such limits, provided he does not act wantonly or oppressively in so doing. Hart *v.* Connor, 25 Conn. 331.

66. Comstock *v.* Van Deusen, 5 Pick. (Mass.) 163, holding that the grant of a right of way "across" a lot of land confers no right to enter at one place and come out at another on the same side.

67. Gardner *v.* Webster, 64 N. H. 520, 15 Atl. 144; Peabody *v.* Chandler, 42 N. Y. App. Div. 384, 59 N. Y. Suppl. 240.

68. Gerrish *v.* Shattuck, 128 Mass. 571; O'Brien *v.* Schayer, 124 Mass. 211; Peabody *v.* Chandler, 17 Misc. (N. Y.) 655, 40 N. Y. Suppl. 1028.

All the ways existing at the time of the grant need not be kept open if the grantee is provided with a reasonably convenient way for the purpose for which it is granted. Colt *v.* Redfield, 59 Conn. 427, 22 Atl. 426; Peabody *v.* Chandler, 42 N. Y. App. Div. 384, 59 N. Y. Suppl. 240.

The consent of the grantee to the closing of one of two existing ways does not preclude his right to have the remaining way kept open. Bangs *v.* Parker, 71 Me. 458.

69. Gerrish *v.* Shattuck, 128 Mass. 571.

70. *California.*— Kripp *v.* Curtis, 71 Cal. 62, 11 Pac. 879.

Indiana.— Ritchey *v.* Welsh, 149 Ind. 214, 48 N. E. 1031, 40 L. R. A. 105; Thomas *v.* McCoy, 30 Ind. App. 555, 66 N. E. 700.

Massachusetts.— Russell *v.* Jackson, 2 Pick. 574.

Michigan.— Powers *v.* Harlow, 53 Mich. 507, 19 N. W. 257, 51 Am. Rep. 154.

New York.— Fritz *v.* Tompkins, 18 Misc. 514, 41 N. Y. Suppl. 985; Holmes *v.* Seely, 19 Wend. 507.

South Carolina.— Capers *v.* Wilson, 3 McCord 170.

See 17 Cent. Dig. tit. "Easements," § 105.

71. Thomas *v.* McCoy, 30 Ind. App. 555, 66 N. E. 700; Russell *v.* Jackson, 2 Pick. (Mass.) 574.

72. Ritchey *v.* Welsh, 149 Ind. 214, 48 N. E. 1031, 40 L. R. A. 105; Fritz *v.* Tompkins, 18 Misc. (N. Y.) 514, 41 N. Y. Suppl. 985; Holmes *v.* Seely, 19 Wend. (N. Y.) 507.

73. Bass *v.* Edwards, 126 Mass. 445.

74. Under the Louisiana statute the way should be located on the side where the distance is shortest to the public road and at the place least injurious to the person on whose estate it is granted (Adams *v.* Harrison, 4 La. Ann. 165; Miller *v.* Thompson, 3 La. Ann. 567; Broussard *v.* Etie, 11 La. 394), due regard being paid at the same time to the interest of the other party (Littlejohn *v.* Cox, 15 La. Ann. 67).

5. Location by Agreement of Parties. Where the grant of a way does not designate its location, the location may be subsequently fixed by an express agreement of the parties,[75] or by an implied agreement arising out of the use of a particular way by the grantee and acquiescence on the part of the grantor.[76] The location thus determined will have the same legal effect as if it had been fully described by the terms of the grant.[77]

6. Change of Location — a. In General. The location of an easement cannot be changed by either party without the other's consent, after it has been once established either by the express terms of the grant[78] or by the acts of the parties.[79]

b. Ways. The location of a way when once established cannot be changed by either party without the other's consent,[80] except under the authority of an express grant or reservation to this effect.[81] It is competent, however, for the owner of the land and the person having a right of way over it to change the route or location of the way by mutual consent,[82] and such consent may be implied from their acts and acquiescence.[83]

7. Deviation From Course of Way. Where the owner of land which is subject

75. Crocker *v.* Crocker, 5 Hun (N. Y.) 587; Kraut's Appeal, 71 Pa. St. 64; March-Brownback Stove Co. *v.* Evans, 9 Pa. Super. Ct. 597; Kinney *v.* Hooker, 65 Vt. 333, 26 Atl. 690, 36 Am. St. Rep. 864.

76. *Illinois.*— Roberts *v.* Stevens, 40 Ill. App. 138.

Iowa.— Dickinson *v.* Crowell, 120 Iowa 254, 94 N. W. 495.

Massachusetts.— O'Brien *v.* Goodrich, 177 Mass. 32, 58 N. E. 151; Bannon *v.* Angier, 2 Allen 128.

Missouri.— Davis *v.* Watson, 89 Mo. App. 15.

New York.— Crocker *v.* Crocker, 5 Hun 587; Peabody *v.* Chandler, 17 Misc. 655, 40 N. Y. Suppl. 1028; Wynkoop *v.* Burger, 12 Johns. 222.

Ohio.— Warner *v.* Columbus, etc., R. Co., 39 Ohio St. 70.

Pennsylvania.—March-Brownback Stove Co. *v.* Evans, 9 Pa. Super. Ct. 597.

Wisconsin.— Fritsche *v.* Fritsche, 77 Wis. 266, 45 N. W. 1088.

See 17 Cent. Dig. tit. "Easements," § 106.

The rule stated in the text will not be allowed to extend the rights of the grantee so as to defeat an intention fairly expressed in the terms of the grant. Stetson *v.* Curtis, 119 Mass. 266.

Mere temporary use of a way with an intention to use a road in course of construction when completed is not a location, within a deed giving a right of way, to be located by mutual consent. Tuxedo Park Assoc. *v.* Sterling Iron, etc., Co., 60 N. Y. App. Div. 349, 70 N. Y. Suppl. 95.

77. Bannon *v.* Angier, 2 Allen (Mass.) 128; Warner *v.* Columbus, etc., R. Co., 39 Ohio St. 70.

The heirs of the grantor of a way are bound by the location in which he has acquiesced. Kraut's Appeal, 71 Pa. St. 64.

Where land is granted with a right of way, the location of which is not specified, and is subsequently reconveyed without mention of the right of way, the second grantee acquires only such a way as was used by the first. Kinney *v.* Hooker, 65 Vt. 333, 26 Atl. 690, 36 Am. St. Rep. 864.

78. Johnson *v.* Jaqui, 27 N. J. Eq. 552; Jaqui *v.* Johnson, 27 N. J. Eq. 526.

An easement for light and air cannot be claimed as to windows the size or location of which has been materially changed. Johnson *v.* Hahne, 61 N. J. Eq. 438, 49 Atl. 5.

79. Jennison *v.* Walker, 11 Gray (Mass.) 423; Moorhead *v.* Snyder, 31 Pa. St. 514; Garraty *v.* Duffy, 7 R. I. 476.

80. *Iowa.*— Karmuller *v.* Krotz, 18 Iowa 352.

Michigan.— Galloway *v.* Wilder, 26 Mich. 97.

New Jersey.— Manning *v.* Port Reading R. Co., 54 N. J. Eq. 46, 33 Atl. 802.

New York.— Wynkoop *v.* Burger, 12 Johns. 222.

Rhode Island.— Frazier *v.* Berry, 4 R. I. 440.

See 17 Cent. Dig. tit. "Easements," § 107.

The location of a way of necessity cannot be changed by either party. Ritchey *v.* Welsh, 149 Ind. 214, 48 N. E. 1031, 40 L. R. A. 105; Hines *v.* Hamburger, 14 N. Y. App. Div. 577, 43 N. Y. Suppl. 977; Pearson *v.* Spencer, 1 B. & S. 571, 7 Jur. N. S. 1195, 4 L. T. Rep. N. S. 769, 101 E. C. L. 571.

The owner of the land cannot straighten a way, the course of which is definitely marked, even though the way left is of the same width as before. Calvert *v.* Weddle, 44 S. W. 648, 19 Ky. L. Rep. 1883.

81. Lyon *v.* Lea, 84 Me. 254, 24 Atl. 844.

82. Green *v.* Richmond, 155 Mass. 188, 29 N. E. 770; Smith *v.* Lee, 14 Gray (Mass.) 473; Hamilton *v.* White, 4 Barb. (N. Y.) 60; Lawton *v.* Tison, 12 Rich. (S. C.) 88.

83. Rumill *v.* Robbins, 77 Me. 193; Larned *v.* Larned, 11 Metc. (Mass.) 421.

Whether the new way was intended as a permanent substitute for the old or merely for some temporary purpose is a question for the jury (Hamilton *v.* White, 4 Barb. (N. Y.) 60); but so long as it lies open the right to use it continues (Reignolds *v.* Edwards,

to a private right of way obstructs the way, a person entitled to use the same may enter upon and go over the adjoining land of the same owner provided he does no unnecessary damage.[84] But he has no right to do so, as he has in the case of public ways, merely because the way has become impassable from causes for which the owner of the land is not to blame.[85]

C. Use — 1. Easements by Express Grant — a. In General. Where an easement exists by express grant its use must be confined to the terms and purposes of the grant.[86] And it must further be used in a reasonable manner and so as not unnecessarily to injure the rights of the other party.[87] The extent of the use, when unlimited by the grant, must be governed by what is reasonable and customary in such cases.[88]

b. Ways. The owner of a right of way over the land of another is limited in its use to the terms of the grant from which the way is derived.[89] If the

Willes 282), and it cannot be closed without first restoring the old way to its former condition (Durkee *v.* Jones, 27 Colo. 159, 60 Pac. 618; Wright *v.* Willis, 63 S. W. 991, 23 Ky. L. Rep. 565; Hamilton *v.* White, 5 N. Y. 9).

Where the old road has been abandoned before the new road is opened there is no substitution. Lawton *v.* Tison, 12 Rich. (S. C.) 88.

84. Kent *v.* Judkins, 53 Me. 160, 87 Am. Dec. 544; Bass *v.* Edwards, 126 Mass. 445; Leonard *v.* Leonard, 2 Allen (Mass.) 543; Farnum *v.* Platt, 8 Pick. (Mass.) 339, 19 Am. Dec. 330; Haley *v.* Colcord, 59 N. H. 7, 47 Am. Rep. 176; Jarstadt *v.* Smith, 51 Wis. 96, 8 N. W. 29. But see Williams *v.* Safford, 7 Barb. (N. Y.) 309, holding that unlike the case of public ways, one having a private right of way over the land of another cannot deviate from the way, although the obstruction be caused by the owner of the land, his only remedy being to abate the nuisance or an action for damages, and that the rule is the same whether the way be by grant or prescription or one of necessity. See also Boyce *v.* Brown, 7 Barb. (N. Y.) 80.

Where a certain doorway through which a person has a right of way to the street is obstructed by the owner of the house, he may pass by some other convenient doorway. Miles *v.* Douglas, 34 Conn. 393.

Where a change in the course of an aqueduct is made necessary by the act of the owner of the servient estate, the owner of the easement may lay the aqueduct around the obstruction on the land of the same owner. Rockford Water Co. *v.* Tillson, 75 Me. 170.

85. Taylor *v.* Whitehead, 1 Dougl. (3d ed.) 745; Bullard *v.* Harrison, 4 M. & S. 387, 16 Rev. Rep. 493; Pomfret *v.* Ricroft, 1 Saund. 321, 322*a* note 3.

86. Ganley *v.* Looney, 14 Allen (Mass.) 40; McCabe *v.* Hood, 13 Ohio Cir. Ct. 621, 5 Ohio Cir. Dec. 292; Taylor *v.* Hampton, 4 McCord (S. C.) 96, 17 Am. Dec. 710.

A reservation for a particular purpose in the grant of an easement will be confined to the purpose so declared. Washburn *v.* Copeland, 116 Mass. 233.

A grant of herbage gives the grantee no right to use the land as a roadway. Southampton *v.* Post, 4 N. Y. Suppl. 75.

A common of pasture gives the commoner no incidental right to keep the common open as an ornament to his dwelling, or for his own personal pleasure or convenience. Bell *v.* Ohio, etc., R. Co., 25 Pa. St. 161, 64 Am. Dec. 687.

A grant of the right to maintain a mill dam and exercise the privileges belonging thereto does not authorize the grantee to take ice formed upon the dam. Julien *v.* Woodsmall, 82 Ind. 568.

The grant of a right to construct a railway through timber land does not authorize the cutting of cross-ties elsewhere than on the right of way. Waters *v.* Greenleaf-Johnson Lumber Co., 115 N. C. 648, 40 S. E. 718.

87. Kaler *v.* Beaman, 49 Me. 207.

The owner of an easement is not bound to use it in the particular manner prescribed by the instrument which creates it, provided he does not use it so as to increase the servitude, nor change it to the injury of the owner of the servient estate. Tallon *v.* Hoboken, 60 N. J. L. 212, 37 Atl. 895.

88. Bennett *v.* Seligman, 32 Mich. 500.

A grant of common in a described lot confers all rights of common which the land is capable of supporting, including the right to take seaweed from the beach. Knowles *v.* Nichols, 14 Fed. Cas. No. 7,897, 2 Curt. 571.

The grant of a right to use the surface of a fence for advertising purposes includes both the inner and the outer surfaces. Willoughby *v.* Lawrence, 116 Ill. 11, 4 N. E. 356, 56 Am. Rep. 758.

The grant of a "mill privilege" means the land on which the mill stands and the land and water then actually and commonly used in connection therewith, the amount of which cannot be reduced by proof that the entire amount in use is not necessary to the successful operation of the mill. Moore *v.* Fletcher, 16 Me. 63, 33 Am. Dec. 633.

89. Chandler *v.* Goodridge, 23 Me. 78; Abbott *v.* Butler, 59 N. H. 317; Wells *v.* Tolman, 156 N. Y. 636, 51 N. E. 271 [*reversing* 88 Hun 438, 34 N. Y. Suppl. 840].

When the width of the way is stated in the grant the grantee may use the entire width, although it is more than necessary for his purposes. Rotch *v.* Livingston, 91 Me. 461, 40 Atl. 426.

grant is for a particular purpose he cannot use it for any other,[90] or if it is granted for the benefit of some particular land, it cannot be used to accommodate some other tract of land adjoining or lying beyond.[91] In determining the uses contemplated by the grant the court will look to the surrounding circumstances to ascertain the intention of the parties,[92] and in the absence of facts indicating a contrary intention it will be presumed that the parties intended the words of the grant to be taken according to their ordinary meaning.[93] Where a way is granted or reserved without any limitation as to its use it will not necessarily be confined to the purposes for which the land was used at the time the way was created,[94] but may be used for any purpose to which the land accommodated by the way may naturally and reasonably be devoted.[95] It may be used for all the ordinary purposes of a way,[96] subject to the general rule that the use must be reasonable;[97] but it cannot be used for any other separate and distinct purpose.[98] What shall be deemed a reasonable and proper use of a way depends largely on the local situation and on public usage,[99] and also upon the nature and condition of the premises over which the way is granted.[1]

2. Easements by Prescription — a. In General. The use of easements by prescription is limited both as to its character[2] and its extent,[3] to the use by which the

90. *Connecticut.*—Myers *v.* Dunn, 49 Conn. 71.

Indiana.— Hoosier Stone Co. *v.* Malott, 130 Ind. 21, 29 N. E. 412.

Minnesota.— Shoemaker *v.* Cedar Rapids, etc., R. Co., 45 Minn. 366, 48 N. W. 191.

New Hampshire.— French *v.* Marstin, 24 N. H. 440, 57 Am. Dec. 294.

Pennsylvania.— Webber *v.* Vogel, 159 Pa. St. 235, 28 Atl. 226; Carty *v.* Shields, 5 Wkly. Notes Cas. 241.

Rhode Island.— Valley Falls Co. *v.* Dolan, 9 R. I. 489.

See 17 Cent. Dig. tit. "Easements," § 110.

91. Hoosier Stone Co. *v.* Malott, 130 Ind. 21, 29 N. E. 412.

See *infra*, IX, C, 5.

92. Mendell *v.* Delano, 7 Metc. (Mass.) 176.

The uses necessary at the time of the grant to the beneficial enjoyment of the property to be benefited will be considered in determining the uses contemplated by the parties. Smith *v.* Ladd, 41 Me. 314.

A grant of "a passageway six feet wide" will be held to be a grant of a foot-way only and not for the passage of vehicles. Perry *v.* Snow, 165 Mass. 23, 42 N. E. 117.

93. Choate *v.* Burnham, 7 Pick. (Mass.) 274.

94. Whittier *v.* Winkley, 62 N. H. 338.

A way granted for the purpose of carting clay from the land of the grantee is not limited in its use to carting from the clay pits open at the time of the grant. Perth Amboy Terra Cotta Co. *v.* Ryan, 68 N. J. L. 474, 53 Atl. 699.

95. Abbott *v.* Butler, 59 N. H. 317; Gillespie *v.* Weinberg, 148 N. Y. 238, 42 N. E. 676; Benner *v.* Junker, 190 Pa. St. 423, 43 Atl. 72; Gunson *v.* Healy, 100 Pa. St. 42.

The Louisiana statute authorizing the owner of land inclosed by the lands of others to claim a right of way over such lands "for the cultivation of his estate" does not restrict his use of the way to a passage for the purpose of cultivation only, but refers to the general enjoyment of the estate as he may deem most profitable. Littlejohn *v.* Cox, 15 La. Ann. 67.

96. Shreve *v.* Mathis, 63 N. J. Eq. 170, 52 Atl. 234.

97. Devine *v.* McRohan, 65 S. W. 799, 23 Ky. L. Rep. 1636.

98. Truax *v.* Gregory, 196 Ill. 83, 63 N. E. 674; Comstock *v.* Van Deusen, 5 Pick. (Mass.) 163.

It is an unauthorized use of a way for the grantee to use it as a place of deposit for merchandise (Appleton *v.* Fullerton, 1 Gray (Mass.) 186), to pile lumber upon the sides of the way (Kaler *v.* Beanan, 49 Me. 207), to build a log slide thereon (Proctor *v.* Campbell, 6 Pa. Co. Ct. 531, 1 Wilcox (Pa.) 270), to lay oil pipes (United States Pipe Line Co. *v.* Delaware, etc., R. Co., 62 N. J. L. 254, 41 Atl. 759, 42 L. R. A. 572), to erect electric light poles in the way (Carpenter *v.* Capital Electric Co., 178 Ill. 29, 52 N. E. 973, 69 Am. St. Rep. 286, 43 L. R. A. 645), to take ice formed within the boundaries of the way (Julien *v.* Woodsmall, 82 Ind. 568), or to take wood, grass, or anything appurtenant to the ownership of the soil (Emans *v.* Turnbull, 2 Johns. (N. Y.) 313, 3 Am. Dec. 427).

99. Van O'Linda *v.* Lothrop, 21 Pick. (Mass.) 292, 32 Am. Dec. 261.

1. Rowell *v.* Doggett, 143 Mass. 483, 10 N. E. 182, holding that the grant of a way over a strip eighteen feet wide through a field of bearing fruit-trees, which could not be used as a way for vehicles without cutting away the branches of the trees, can be used as a foot-way only.

2. Hart *v.* Chalker, 5 Conn. 311; Shaughnessey *v.* Leary, 162 Mass. 108, 38 N. E. 197; Atwater *v.* Bodfish, 11 Gray (Mass.) 150.

3. *Alabama.*— Wright *v.* Moore, 38 Ala. 593, 82 Am. Dec. 731.

New York.— Prentice *v.* Geiger, 74 N. Y. 341 [*affirming* 9 Hun 350]; Corning *v.* Gould, 16 Wend. 531.

South Carolina.— Elliott *v.* Rhett, 5 Rich. 405, 57 Am. Dec. 750.

right was established. The unauthorized use of the easement beyond the limits prescribed for does not, however, in any way affect the lesser rights actually acquired.[4]

b. Ways. The use of ways by prescription is limited to the user by which the right was created.[5] If the way has been used for a particular purpose it cannot be subsequently used for any other.[6] If it has been used for a variety of purposes covering generally all the purposes required by the dominant estate, it may be used for all the purposes which may reasonably be required for the use of that estate while substantially in the same condition;[7] but if the condition and character of the dominant estate are substantially altered the right of way cannot be used for new purposes required by the altered condition of the property and imposing a greater burden upon the servient estate.[8]

3. Who May Use. The owner of a way is not limited to its use by himself, but it may be used by his servants or employees in conducting his business, or he may permit persons transacting business with him to use it.[9] The grant of a right of way to a married woman for life includes her husband and the members of her family residing with her.[10] Where a way is appurtenant to an estate it may be used by those who own or lawfully occupy any part thereof,[11] and by all persons lawfully going to or from such premises, whether they be mentioned in the grant or not.[12]

4. Rights of Owner of Servient Estate. The owner of the servient estate may use his property in any manner and for any purpose consistent with the enjoyment of the easement.[13] Thus in the case of a way the owner of the servient estate may use the land over which it passes in any manner which does not materially impair or unreasonably interfere with its use as a way.[14] He may himself use it as a

Vermont.— Arbuckle *v.* Ward, 29 Vt. 43.

England.— Williams *v.* James, L. R. 2 C. P. 577, 36 L. J. C. P. 256, 16 L. T. Rep. N. S. 664, 15 Wkly. Rep. 928.

See 17 Cent. Dig. tit. "Easements," § 112.

4. Lynn *v.* Thomson, 17 S. C. 129. But see Garritt *v.* Sharp, 3 A. & E. 325, 1 Hurl. & W. 224, 4 N. & M. 834, 30 E. C. L. 163.

5. Richardson *v.* Pond, 15 Gray (Mass.) 387; Ballard *v.* Dyson, 1 Taunt. 279, 9 Rev. Rep. 770.

6. Atwater *v.* Bodfish, 11 Gray (Mass.) 150.

7. Parks *v.* Bishop, 120 Mass. 340, 21 Am. Rep. 519; Williams *v.* James, L. R. 2 C. P. 577, 36 L. J. C. P. 256, 16 L. T. Rep. N. S. 664, 15 Wkly. Rep. 928. See also Cowling *v.* Higginson, 1 H. & H. 269, 7 L. J. Exch. 265, 4 M. & W. 245.

8. Parks *v.* Bishop, 120 Mass. 340, 21 Am. Rep. 519; Atwater *v.* Bodfish, 11 Gray (Mass.) 150. See also Wimbledon *v.* Dixon, 1 Ch. D. 362, 45 L. J. Ch. 353, 33 L. T. Rep. N. S. 679, 24 Wkly. Rep. 466.

If the change is not in the kind of use, but merely one of degree imposing no greater burden on the servient estate, the right to use the easement is not affected. Baldwin *v.* Boston, etc., R. Co., 181 Mass. 166, 63 N. E. 428.

9. Shreve *v.* Mathis, 63 N. J. Eq. 170, 52 Atl. 234.

10. Griffith *v.* Rigg, 37 S. W. 58, 18 Ky. L. Rep. 463.

11. Gunson *v.* Healy, 100 Pa. St. 42.

12. Baxendale *v.* North Lambeth Liberal, etc., Club, [1902] 2 Ch. 427, 71 L. J. Ch. 806, 87 L. T. Rep. N. S. 161, 50 Wkly. Rep. 650.

Only trespassers on the dominant estate can be excluded. Gunson *v.* Healy, 100 Pa. St. 42.

13. *Kentucky.*— Maxwell *v.* McAtee, 9 B. Mon. 20, 48 Am. Dec. 409.

Maine.— Chandler *v.* Goodridge, 23 Me. 78.

Massachusetts.— Burnham *v.* Nevins, 144 Mass. 88, 10 N. E. 494, 59 Am. Rep. 61.

Michigan.— St. Joseph Valley R. Co. *v.* Galligan, 120 Mich. 468, 79 N. W. 685.

New York.— Tyler *v.* Cooper, 47 Hun 94.

See 17 Cent. Dig. tit. "Easements," § 114.

The grantor need not expressly reserve any right which he may exercise consistently with a fair enjoyment of the grant. Maxwell *v.* McAtee, 9 B. Mon. (Ky.) 20, 48 Am. Dec. 409.

14. *Maine.*— Morgan *v.* Boyes, 65 Me. 124.

Massachusetts.—Atkins *v.* Bordman, 2 Metc. 457, 37 Am. Dec. 100.

New Hampshire.— Low *v.* Streter, 66 N. H. 36, 20 Atl. 247, 9 L. R. A. 271.

New York.— Grafton *v.* Moir, 130 N. Y. 465, 29 N. E. 974, 27 Am. St. Rep. 533 [*affirming* 9 N. Y. Suppl. 3].

Pennsylvania.—Greenmount Cemetery Co.'s Appeal, (1886) 4 Atl. 528; Harper *v.* Greenmount Cemetery Co., 15 Wkly. Notes Cas. 172; Stevenson *v.* Stewart, 7 Phila. 293; Lloyd *v.* Wunderlich, 2 Del. Co. 377.

See 17 Cent. Dig. tit. "Easements," § 114.

The same legal rights apply to subterranean ways as to surface ways, and the owner of coal lands through which another has a right of way may cross that way by an entry if he does not substantially interfere with the use

way,[15] or may permit others to do so,[16] unless the rights of the owner of the easement are exclusive.[17] The owner of the servient estate cannot, however, make any use of his property incompatible with the existence of the easement by which, under an adverse holding for the statutory period, the easement would be defeated.[18]

5. Use Unconnected With Dominant Estate. An easement can be used only in connection with the estate to which it is appurtenant and cannot be extended by the owner to any other property which he may then own or afterward acquire.[19] A right of way cannot be used by the owner of the dominant tenement to pass to other land adjacent to or beyond that to which the easement is appurtenant,[20] and so cannot be extended by him to accommodate land which he did not own at the time the right of way was acquired.[21]

D. Maintenance and Repairs — 1. Duty to Maintain and Repair — a. In General. The owner of the servient estate is generally under no obligation to make repairs,[22] the rule being that he who uses the easement must keep it in the proper condition or suffer the resulting inconvenience,[23] unless there is a special

thereof. Pomeroy *v.* Salt Co., 37 Ohio St. 520.

15. Campbell *v.* Kuhlmann, 39 Mo. App. 628; Greenmount Cemetery Co.'s Appeal, (Pa. 1886) 4 Atl. 528; Harper *v.* Greenmount Cemetery Co., 15 Wkly. Notes Cas. (Pa.) 172.

The use by the owner of the servient estate must be reasonable and not such as will injure or impair the enjoyment of the easement by the grantee or subject him to extra labor and expense in keeping it in repair. Herman *v.* Roberts, 119 N. Y. 37, 23 N. E. 442, 16 Am. St. Rep. 800, 7 L. R. A. 226.

16. Morgan *v.* Boyes, 65 Me. 124.

17. Campbell *v.* Kuhlman, 39 Mo. App. 628.

If the burden of keeping a way in repair is imposed upon the grantees of certain lots for the benefit of which the way is opened, it will be held to be exclusively for the benefit of those lots, and the grantor will retain only the barren fee in the way, and cannot subsequently grant a right of way over the same to any other abutting owner. Greene *v.* Canney, 137 Mass. 64.

Whether a grant is exclusive in the sense of preventing the grantor or those subsequently acquiring the fee from enjoying similar rights over the same land depends first upon the terms of the original grant of the easement and secondly upon the nature of the easement itself. Campbell *v.* Kuhlmann, 39 Mo. App. 628.

18. Southern R. Co. *v.* Beaudrot, 63 S. C. 266, 41 S. E. 299.

19. McMakin *v.* Magee, 13 Phila. (Pa.) 105; Evans *v.* Dana, 7 R. I. 306.

20. *Alabama.*— West *v.* Louisville, etc., R. Co., 137 Ala. 568, 34 So. 852.

Indiana.— Louisville, etc., R. Co. *v.* Malott, 135 Ind. 113, 34 N. E. 709.

Maine.— Farley *v.* Bryant, 32 Me. 474.

Maryland.—Albert *v.* Thomas, 73 Md. 181, 20 Atl. 912.

Massachusetts.—Greene *v.* Canny, 137 Mass. 64; Davenport *v.* Lamson, 21 Pick. 72.

New Hampshire.— French *v.* Marstin, 32 N. H. 316.

New York.— Rexford *v.* Marquis, 7 Lans. 249.

Pennsylvania.— Webber *v.* Vogel, 159 Pa. St. 235, 28 Atl. 226; Greenmount Cemetery Co.'s Appeal, (1886) 4 Atl. 528; Coleman's Appeal, 62 Pa. St. 252; Shroder *v.* Brenneman, 23 Pa. St. 348; *In re* Private Road, 1 Ashm. 417.

Rhode Island.— Brightman *v.* Chapin, 15 R. I. 166, 1 Atl. 412.

West Virginia.— Shaver *v.* Edgell, 48 W. Va. 502, 37 S. E. 664; Springer *v.* McIntire, 9 W. Va. 196.

England.—Allan *v.* Gomme, 11 A. & E. 759, 9 L. J. Q. B. 258, 3 P. & D. 581, 39 E. C. L. 404; Lawton *v.* Ward, 1 Ld. Raym. 75; Colchester *v.* Roberts, 8 L. J. Exch. 195, 4 M. & W. 769; Howell *v.* King, 1 Mod. 190.

See 17 Cent. Dig. tit. "Easements," § 116.

If the way is appurtenant to each of two lots, the owner of the way may enter the second lot either directly from the way or by going across the first lot. Tuttle *v.* Kilroa, 177 Mass. 146, 58 N. E. 682.

21. Smith *v.* Porter, 10 Gray (Mass.) 66; Stearns *v.* Mullen, 4 Gray (Mass.) 151; Valentine *v.* Schreiber, 3 N. Y. App. Div. 235, 38 N. Y. Suppl. 417; Reise *v.* Enos, 76 Wis. 634, 45 N. W. 414, 8 L. R. A. 617.

Only the property contemplated by the grant can be accommodated by the way granted. American Academy of Music *v.* Weldon, 2 Pa. Dist. 422, 32 Wkly. Notes Cas. (Pa.) 307.

22. Ballard *v.* Butler, 30 Me. 94; Fritcher *v.* Anthony, 20 Hun (N. Y.) 495; Walker *v.* Pierce, 38 Vt. 94; Pomfret *v.* Ricroft, 1 Saund. 321, 322*a* note 3.

Where an easement is to be enjoyed through artificial means or appliances, the owner of the servient tenement is not bound to keep them in order unless that duty is imposed by contract. Bryn Mawr Hotel Co. *v.* Baldwin, 12 Montg. Co. L. Rep. (Pa.) 145.

The servient owner is under no obligation to remove obstructions existing at the time of the grant, provided he does not object to or resist their removal by the grantee. McCusker *v.* Spier, 72 Conn. 628, 45 Atl. 1011.

23. Herman *v.* Roberts, 119 N. Y. 37, 23 N. E. 442, 7 L. R. A. 226, 16 Am. St. Rep. 800; Holmes *v.* Seely, 19 Wend. (N. Y.) 507;

agreement or prescriptive right to the contrary.[24] If the character of the easement is such that a failure to keep it in repair will result in injury to the servient estate the owner of the easement will be liable in damages for the injuries so caused.[25]

b. Maintenance of Gates and Fences. In the absence of any stipulation in the grant or agreement to this effect the owner of the servient estate is under no obligation to construct fences along the course of a way,[26] or to erect gates across the same,[27] for the benefit of the owner of the way. He may, however, subject to certain restrictions, erect such gates and fences for his own convenience and the protection of his property.[28] It is the duty of the owner of the way to close and fasten such gates after he has passed through, and on his failure to do so he may be enjoined from using the way,[29] and will be liable for any damages resulting thereby to the servient estate.[30] He will also be liable in an action of trespass removing or injuring the gates.[31]

2. Right to Make Repairs. The owner of the dominant estate may do whatever is reasonably necessary to the enjoyment of the easement and to keep the same in a proper state of repair,[32] provided it is done without unnecessary inconvenience to the owner of the fee;[33] and the extent of the easement is not thereby

Wynkoop *v.* Burger, 12 Johns. (N. Y.) 222; Capers *v.* Fripp, Rice (S. C.) 224; Walker *v.* Pierce, 38 Vt. 94. See also Bakeman *v.* Talbot, 31 N. Y. 366, 88 Am. Dec. 275; Taylor *v.* Whitehead, 1 Dougl. (3d ed.) 745.

24. Doane *v.* Badger, 12 Mass. 65.

The grant of a right to use a well in common with the owner of the servient estate as long as the grantee shall pay half of the expense of keeping it in repair does not excuse the grantee from paying half of the expense incurred by one owner because he contributed more than his share of the expenses of a former owner. Sherman *v.* Congdon, 56 Conn. 355, 15 Atl. 754.

25. Fritcher *v.* Anthony, 20 Hun (N. Y.) 495, holding further that an agreement on the part of the owner of the servient estate to pay a part of the cost of repairs is not a bar to an action by him for damages.

The owner of the easement must maintain suitable safeguards against injury to stock belonging to the owner of the servient estate. Big Goose, etc., Ditch Co. *v.* Morrow, 8 Wyo. 537, 59 Pac. 159, 80 Am. St. Rep. 955; Williams *v.* Groucott, 4 B. & S. 149, 9 Jur. N. S. 1237, 32 L. J. Q. B. 237, 8 L. T. Rep. N. S. 458, 11 Wkly. Rep. 886, 116 E. C. L. 149.

26. Brill *v.* Brill, 108 N. Y. 511, 15 N. E. 538; Sachs *v.* Cordes, 11 Ohio Cir. Ct. 145, 5 Ohio Cir. Dec. 67; Sizer *v.* Quinlan, 82 Wis. 390, 52 N. W. 590, 33 Am. St. Rep. 55, 16 L. R. A. 512.

27. Rowe *v.* Nally, 81 Md. 367, 32 Atl. 198.

28. See *infra*, IX, F, 4.

29. Brill *v.* Brill, 108 N. Y. 511, 15 N. E. 538.

If plaintiff's right to maintain the gate is not established or admitted and no irreparable damage is threatened, equity will not assume jurisdiction. Bean *v.* Coleman, 44 N. H. 539.

30. Amondson *v.* Severson, 37 Iowa 602.

31. Houpes *v.* Alderson, 22 Iowa 160; Maxwell *v.* McAtee, 9 B. Mon. (Ky.) 20, 48 Am. Dec. 409; Dyer *v.* Walker, 99 Wis. 404, 75 N. W. 79.

32. *California.*— Pico *v.* Colimas, 32 Cal. 578.

Louisiana.— Gillis *v.* Nelson, 16 La. Ann. 275.

Maine.— Hammond *v.* Woodman, 41 Me. 177, 66 Am. Dec. 219.

Massachusetts.—Prescott *v.* White, 21 Pick. 341, 32 Am. Dec. 266.

New York.— Wells *v.* Tolman, 88 Hun 438, 34 N. Y. Suppl. 840; Roberts *v.* Roberts, 7 Lans. 55; Beals *v.* Stewart, 6 Lans. 408.

Pennsylvania.— Fetter *v.* Schmidt, 5 Lanc. L. Rev. 9.

England.— Pomfret *v.* Ricroft, 1 Saund. 321.

See 17 Cent. Dig. tit. "Easements," § 119.

A right of way, whether by grant or prescription, carries with it as incident thereto a right to make necessary repairs and to remove all obstacles to its enjoyment. McMillan *v.* Cronin, 75 N. Y. 474, 57 How. Pr. (N. Y.) 53 [*affirming* 13 Hun 68].

The owner of a way may dig up the surface of the soil and grade and level the same, provided in so doing he does not interfere with the rights of others in the way (Brown *v.* Stone, 10 Gray (Mass.) 61, 69 Am. Dec. 303; Greenmount Cemetery Co.'s Appeal, (Pa. 1886) 4 Atl. 528; Harker *v.* Greenwood Cemetery Co., 15 Wkly. Notes Cas. (Pa.) 172), and where the width of the way is specified in the grant he may grade and make suitable for use the entire width granted (Rotch *v.* Livingston, 91 Me. 461, 40 Atl. 426).

In repairing an artificial watercourse the adjacent soil may be dug up and used whenever there are no other means of making the necessary repairs. Thompson *v.* Uglow, 4 Oreg. 269.

33. Prescott *v.* White, 21 Pick. (Mass.) 341, 32 Am. Dec. 266; McMillen *v.* Cronin, 13 Hun (N. Y.) 68; Hotchkiss *v.* Young, (Oreg. 1903) 71 Pac. 324.

enlarged.[34] This includes a right of entry upon the servient estate for the purpose of making repairs whenever such repairs are necessary,[35] but at no other time and for no other purpose.[36]

E. Alterations. Ordinarily when the character and location of an easement are once definitely fixed, no material changes can be made by either party without the other's consent.[37] If, however, at the time of the grant the condition of the place where the right is to be exercised is unfit for the purposes of the grant, the grantee may make such alterations as will render the grant effectual;[38] and if the condition of the surrounding property is subsequently changed by lawful authority so as to interfere with the enjoyment of the easement, he may make such alterations as will render it effectual under the new conditions.[39] Where there are several owners in common of an easement neither one can make any alterations which will render it less convenient and useful to any appreciable extent to any one of the others.[40] The owner of the servient estate, while he may use his property in any manner consistent with the existence of the easement,[41] cannot make any alterations in his property by which the enjoyment of the easement will be materially interfered with.[42] The owner of the easement may, however, by acquiescing in the alteration, be deemed to have consented thereto.[43]

F. Obstructions and Disturbance — 1. In General. An obstruction or disturbance of an easement is anything which wrongfully interferes with the privilege to which the owner of the easement is entitled by making its use less convenient and beneficial than before.[44] To constitute an actionable wrong it must, however, be of a material character such as will interfere with the reasonable enjoyment of the easement.[45]

2. Building on or Adjacent to Ways. The owner of a right of way has no

34. Myers *v.* Baker, 45 N. Y. App. Div. 26, 60 N. Y. Suppl. 797.

35. Prescott *v.* White, 21 Pick. (Mass.) 341, 32 Am. Dec. 266; Roberts *v.* Roberts, 7 Lans. (N. Y.) 55.

36. Pico *v.* Colimas, 32 Cal. 578.

37. Jennison *v.* Walker, 11 Gray (Mass.) 423; Johnson *v.* Jaqui, 27 N. J. Eq. 552; Jaqui *v.* Johnson, 27 N. J. Eq. 526; Moorhead *v.* Snyder, 31 Pa. St. 514. See *supra*, IX, B, 6.

38. White *v.* Eagle, etc., Hotel Co., 68 N. H. 38, 34 Atl. 672.

39. Nichols *v.* Peck, 70 Conn. 439, 39 Atl. 803, 66 Am. St. Rep. 122, 40 L. R. A. 81, holding that where a private way has become useless by a change in the grade of the public highway with which it connects, the owner of the way may lower its grade to a corresponding level.

Mere matters of convenience do not entitle the owner of an established way to have it altered either as to its location or its extent. Dudgeon *v.* Bronson, 159 Ind. 562, 64 N. E. 910, 65 N. E. 752, 95 Am. St. Rep. 315.

40. Killion *v.* Kelly, 120 Mass. 47; Freeman *v.* Sayre, 48 N. J. L. 37, 2 Atl. 650; Ellis *v.* Academy of Music, 120 Pa. St. 608, 15 Atl. 494, 6 Am. St. Rep. 739. See also Weber *v.* Abbott, 3 Pa. Co. Ct. 274.

Where a common stairway is constructed by owners of adjoining buildings without any agreement as to its use, neither can make any alterations in the stairway, or any alterations in his own building that will subject the common way to new and more extensive burdens than under its former use. Allegheny Nat. Bank *v.* Reighard, 204 Pa. St. 391, 54 Atl. 268.

41. See *supra*, IX, C, 4.

42. Gerrish *v.* Shattuck, 132 Mass. 235; Haslett *v.* Shepherd, 85 Mich. 165, 48 N. W. 533; Manning *v.* Port Reading R. Co., 54 N. J. Eq. 46, 33 Atl. 802; Cunningham *v.* Fitzgerald, 138 N. Y. 165, 33 N. E. 840, 20 L. R. A. 244.

An easement by prescription cannot be altered by the owner of the servient tenement in making improvements in his property so as to diminish its use, as previously established, to the other party. Barry *v.* Edlavitch, 84 Md. 95, 35 Atl. 170, 33 L. R. A. 294.

The grade of a way cannot be changed by the owner of the servient estate so as to make it less convenient to any appreciable extent to the owner of the way. Vinton *v.* Greene, 158 Mass. 426, 33 N. E. 607.

43. Stockwell *v.* Fitzgerald, 70 Vt. 468, 41 Atl. 504.

44. Dickinson *v.* Whiting, 141 Mass. 414, 6 N. E. 92.

45. McTavish *v.* Carroll, 17 Md. 1.

Anything which would interfere only with an unauthorized use of an easement is not an obstruction. Spalding *v.* Bemiss, 1 S. W. 468, 8 Ky. L. Rep. 263.

Where a way is only used occasionally and for a particular purpose it is not necessarily an obstruction for the owner of the land to cultivate the same or to erect a fence across the way, where he offers to remove it whenever it is necessary to use the way. McTavish *v.* Carroll, 7 Md. 352, 61 Am. Dec. 353.

right to erect any buildings or other structures on or adjacent to the way.[46] One of several owners in common has the right as against the other owners in common to erect such structures for his own benefit as do not interfere with the exercise of the others' rights.[47] The rights of the owner of the servient estate in this regard are limited to the erection of such structures as are compatible with the rights of those entitled to use the way.[48] If by the terms of the grant or reservation the way must be of a certain width, no structures can be erected which encroach upon the width stated.[49] But where there is merely a general undefined right of way, it is only necessary that there should be sufficient space left to afford a convenient passage.[50]

3. Extending Structures Over Ways. Except in cases where there is an agreement or stipulation in the grant or reservation to the contrary,[51] the owner of the servient estate may extend buildings or other structures over a way, provided in so doing he does not interfere with the free use of the way.[52] He cannot, however, erect any structure which renders the way so low and dark, or otherwise interferes with and obstructs it, as to make its use for practical purposes less convenient and beneficial than before.[53]

4. Fences and Gates — a. In General. The owner of the servient estate may erect fences along the sides of a way,[54] but not across the way so as to entirely obstruct it.[55] In the case of a ditch or artificial watercourse he may erect fences across its course, provided the owner of the easement does not have an open right of way along the same.[56] The grant of a way without any reservation of a right to maintain gates does not necessarily imply that the owner of the land may not do so.[57] Unless it is expressly stipulated that the way shall be an open

The owner of the land may plow over a right of way, whenever its use as a way will not be interfered with. Moffitt *v.* Lytle, 165 Pa. St. 173, 30 Atl. 922.

Until a way of necessity is located the owner of the land may erect buildings at any place on the land, provided a sufficient space is left for a convenient way (Russell *v.* Jackson, 2 Pick. (Mass.) 574), but cannot so obstruct his property that no way could be located thereon (Ipswich Grammar School *v.* Jeffreys' Neck Pasture, 174 Mass. 572, 55 N. E. 462).

46. Murphey *v.* Harker, 115 Ga. 77, 41 S. E. 585; Gillespie *v.* Weinberg, 148 N. Y. 238, 42 N. E. 676 [*affirming* 6 Misc. 302, 26 N. Y. Suppl. 781]; Greenmount Cemetery Co.'s Appeal, (Pa. 1886) 4 Atl. 528.

47. Moon *v.* Mills, 119 Mich. 298, 77 N. W. 926, 79 Am. St. Rep. 390.

48. McDonogh *v.* Calloway, 2 La. Ann. 518.

49. Gerrish *v.* Shattuck, 128 Mass. 571; Tucker *v.* Howard, 122 Mass. 529; Ocean Pier, etc., Co. *v.* Woolsey, 4 N. Y. Suppl. 114 [*affirmed* (1890) 25 N. E. 954]; Morton *v.* Thompson, 69 Vt. 432, 38 Atl. 88.

50. Long *v.* Gill, 80 Ala. 408; Grafton *v.* Moir, 9 N. Y. Suppl. 3 [*affirming* 130 N. Y. 465, 29 N. E. 974, 27 Am. St. Rep. 533]; Jackson *v.* Allen, 3 Cow. (N. Y.) 220; Harding *v.* Wilson, 2 B. & C. 96, 3 D. & R. 287, 1 L. J. K. B. O. S. 238, 26 Rev. Rep. 287, 9 E. C. L. 50; Hutton *v.* Hamboro, 2 F. & F. 218.

51. Atty.-Gen. *v.* Williams, 140 Mass. 329, 2 N. E. 80, 54 Am. Rep. 468.

If the surrounding circumstances show that the parties intended an open way the owner of the servient estate will not be allowed to build over the way. Crocker *v.* Cotting, 181 Mass. 146, 63 N. E. 402.

52. Burnham *v.* Nevins, 144 Mass. 88, 10 N. E. 494, 59 Am. Rep. 61; Gerrish *v.* Shattuck, 132 Mass. 235; Sutton *v.* Groll, 42 N. J. Eq. 213, 5 Atl. 901; Hollins *v.* Demorest, 129 N. Y. 676, 29 N. E. 1093, 15 L. R. A. 487 [*affirming* 16 N. Y. Suppl. 384]; Ocean Pier, etc., Co. *v.* Wolsey, 51 Hun (N. Y.) 643, 4 N. Y. Suppl. 114 [*affirmed* (1890) 25 N. E. 954]; Patterson *v.* Philadelphia, etc., R. Co., 8 Pa. Co. Ct. 186; Stevenson *v.* Stewart, 7 Phila. (Pa.) 293; Kennedy *v.* Burgin, 1 Phila. (Pa.) 441.

53. Richardson *v.* Pond, 15 Gray (Mass.) 387.

The height that should be left is always a question of fact to be determined from the exigencies of each particular case. Weed *v.* McKeg, 79 N. Y. App. Div. 218, 79 N. Y. Suppl. 807 [*reversing* 37 Misc. 105, 74 N. Y. Suppl. 250].

54. Brill *v.* Brill, 108 N. Y. 511, 15 N. E. 538; Sizer *v.* Quinlan, 82 Wis. 390, 52 N. W. 590, 33 Am. St. Rep. 55, 16 L. R. A. 512.

55. Quintard *v.* Bishop, 29 Conn. 366; Morgan *v.* Boyes, 65 Me. 124.

56. Dixon *v.* Clow, 24 Wend. (N. Y.) 188.

57. Maxwell *v.* McAtee, 9 B. Mon. (Ky.) 20, 48 Am. Dec. 409; Short *v.* Devine, 146 Mass. 119, 15 N. E. 148; Jewell *v.* Clement, 69 N. H. 133, 39 Atl. 582; Bean *v.* Coleman, 44 N. H. 539.

The right of the grantee to have the way unobstructed by gates depends upon the terms of the grant, the purposes for which it was made, the nature and situation of the property subject to the easement, and the manner in which it has been used and occu-

one,[58] or it appears from the terms of the grant or the circumstances of the case that such was the intention of the parties,[59] the owner of the servient estate may erect gates across the way,[60] provided they are so located and constructed as not unreasonably to interfere with the right of passage.[61] The owner of the easement has no right either to build fences along the sides of a way[62] or to erect gates across it.[63]

b. Prescriptive Rights. In the case of ways of prescription some of the authorities hold that since the extent of the right is commensurate with and determined by the use, the owner of the servient estate cannot erect a gate across a private way acquired by prescription, where no gates were constructed during the time necessary to acquire the right of way.[64] Others, however, hold that the nature of the easement gained and not the particular use which created the right

pied. Baker *v.* Frick, 45 Md. 337, 24 Am. Dec. 506.

Their necessity and convenience to the owner of the land and their inconvenience to the owner of the way and all the other circumstances affecting either party are to be considered in determining whether the erection of gates or bars across a way is an unreasonable interference with the easement. Jewell *v.* Clement, 69 N. H. 133, 39 Atl. 582.

58. Mineral Springs Mfg. Co. *v.* McCarthy, 67 Conn. 279, 34 Atl. 1043; Garland *v.* Furber, 47 N. H. 301; Patton *v.* Western Carolina Educational Co., 101 N. C. 408, 8 S. E. 140; Brownell *v.* Dyer, 4 Fed. Cas. No. 2,038, 5 Mason 227.

59. Devore *v.* Ellis, 62 Iowa 505, 17 N. W. 740; Garland *v.* Furber, 47 N. H. 301. See also Fowle *v.* Bigelow, 10 Mass. 379.

The grant of a way "as now laid out," there being no gate across the way at the time of the grant, entitles the grantee to have the way kept open. Welch *v.* Wilcox, 101 Mass. 162, 100 Am. Dec. 113.

Where the grant imposes on the grantee the duty of erecting and maintaining fences along the sides of the way, it will be implied that the way is to be kept open. Devore *v.* Ellis, 82 Iowa 505, 17 N. W. 740.

The grant of a way which is bounded on each side by walls or fences at the time of the grant will be held as intended to remain in that condition, and cannot be subsequently obstructed by the erection of gates by the owner of the land. Dickinson *v.* Whiting, 141 Mass. 414, 6 N. E. 92.

The grant of the "free and uninterrupted" use of a way must be construed to mean the use of it as it then is, subject to such gates and bars as are already erected, but without other and further impediment. Garland *v.* Furber, 47 N. H. 301.

A grant of "the free use, right, and privileges" of a passageway does not necessarily mean an open way. Connery *v.* Brooke, 73 Pa. St. 80.

"A free and undisturbed right to the use" of a way is not a grant of an open way, preventing the grantor from maintaining gates at the termini. Boyd *v.* Bloom, 152 Ind. 152, 52 N. E. 751.

Where the way is definitely located at the time of the grant, and has always been used without gates, it will be implied that the parties intended that it should remain in this condition. Newsom *v.* Newsom, (Tenn. Ch. App. 1900) 56 S. W. 29.

60. *Illinois.*—Truax *v.* Gregory, 196 Ill. 83, 63 N. E. 674; Green *v.* Goff, 153 Ill. 534, 39 N. E. 975 [*affirming* 44 Ill. App. 589].

Indiana.—Phillips *v.* Dressler, 122 Ind. 414, 24 N. E. 226, 17 Am. St. Rep. 375.

Iowa.— Amondson *v.* Severson, 37 Iowa 602; Houpes *v.* Alderson, 22 Iowa 160.

Kentucky.— Maxwell *v.* McAtee, 9 B. Mon. 20, 48 Am. Dec. 409.

Massachusetts.—Short *v.* Devine, 146 Mass. 119, 15 N. E. 148.

New Hampshire.— Bean *v.* Coleman, 44 N. H. 539.

New Jersey.— Stevens *v.* Allen, 29 N. J. L. 68.

Ohio.— Methodist Protestant Church *v.* Habry, 7 Ohio Cir. Ct. 211, 4 Ohio Cir. Dec. 562.

Pennsylvania.— Hartman *v.* Fick, 167 Pa. St. 18, 31 Atl. 342, 46 Am. St. Rep. 658; Kohler *v.* Smith, 3 Pa. Super. Ct. 176, 39 Wkly. Notes Cas. 359.

Wisconsin.— Dyer *v.* Walker, 99 Wis. 404, 75 N. W. 79; Whaley *v.* Jarrett, 69 Wis. 613, 34 N. W. 727, 2 Am. St. Rep. 764.

See 17 Cent. Dig. tit. "Easements," § 125.

The inconvenience of opening and closing gates does not render them an obstruction inconsistent with a reasonable use of the way. Houpes *v.* Alderson, 22 Iowa 160.

61. Boyd *v.* Bloom, 152 Ind. 152, 52 N. E. 751; Hartman *v.* Fick, 167 Pa. St. 18, 31 Atl. 342, 46 Am. St. Rep. 658; Whaley *v.* Jarrett, 69 Wis. 613, 34 N. W. 727, 2 Am. St. Rep. 764.

62. Moffitt *v.* Lytle, 165 Pa. St. 173, 30 Atl. 922; Sizer *v.* Quinlan, 82 Wis. 390, 52 N. W. 590, 33 Am. St. Rep. 55, 16 L. R. A. 512.

In the case of a statutory right of way it has been held that the owner of the way may inclose the same by fencing, whenever such fencing is necessary to a reasonable enjoyment of the way. Harvey *v.* Crane, 85 Mich. 316, 48 N. W. 582, 12 L. R. A. 601.

63. Rowe *v.* Nally, 81 Md. 367, 32 Atl. 198.

64. Fankboner *v.* Corder, 127 Ind. 164, 26 N. E. 766; Shivers *v.* Shivers, 32 N. J. Eq. 578 [*affirmed* in 35 N. J. Eq. 566].

should control, and that a gate may be constructed across the way if it is not an unreasonable obstruction to the purposes for which the way has been used.[65]

5. Obstructions to Light, Air, and View. There is no particular amount of light or air of which a building may be deprived,[66] or any particular angle from its windows up to which an adjoining owner may build[67] without causing a disturbance of the easement. Whether there has been a disturbance is essentially a question of comparison, and if there has been a deprivation of light or air by which the house is rendered substantially less comfortable than before the owner is entitled to relief,[68] notwithstanding there may be as much left as a house ordinarily requires for purposes of inhabitancy or business.[69]

6. Right to Remove Obstructions. An obstruction placed in a private way is a nuisance and may be removed by any person having a right to use the way,[70] provided he can do so without a breach of the peace.[71] He may also remove any natural obstructions existing in or along the way which interfere with its use for the purposes for which it was granted.[72] Where the owner of the land has covenanted to keep the way open the grantee need not in case of an obstruction resort to an action for a breach of the covenant, but may himself remove the obstruction.[73]

G. Actions — 1. Rights of Action — a. By Owner of Easement. Any violation of the rights of the owner of an easement is actionable, whether any actual damage has resulted therefrom or not, for since the wrongful acts if continued might

65. Ames *v.* Shaw, 82 Me. 379, 19 Atl. 856; Knobloch *v.* Hollinger, 9 Ohio Cir. Ct. 286, 6 Ohio Cir. Dec. 424, each holding that the owner of the servient estate may construct a gate across a way by prescription used for agricultural purposes only.

66. Warren *v.* Brown, [1902] 1 K. B. 15, 71 L. J. K. B. 12, 85 L. T. Rep. N. S. 444, 50 Wkly. Rep. 97; Kelk *v.* Pearson, L. R. 6 Ch. 809, 24 L. T. Rep. N. S. 890, 19 Wkly. Rep. 665.

67. Home, etc., Stores *v.* Colls, [1902] 1 Ch. 302, 71 L. J. Ch. 146, 85 L. T. Rep. N. S. 701, 50 Wkly. Rep. 227.

Where the location of a proposed structure is admitted, the court will take judicial notice that a wall within three feet and eight inches from a window and extending fifteen inches above it will materially diminish the passage of light and air. Ware *v.* Chew, 43 N. J. Eq. 493, 11 Atl. 746.

68. Warren *v.* Brown, [1902] 1 K. B. 15, 71 L. J. K. B. 12, 85 L. T. Rep. N. S. 444, 50 Wkly. Rep. 97; Kelk *v.* Pearson, L. R. 6 Ch. 809, 24 L. T. Rep. N. S. 890, 19 Wkly. Rep. 665; Home, etc., Stores *v.* Colls, [1902] 1 Ch. 302, 71 L. J. Ch. 146, 85 L. T. Rep. N. S. 701, 50 Wkly. Rep. 227; Parker *v.* Stanley, 50 Wkly. Rep. 282.

The mere fact that a less amount of light or air is received than before is not sufficient to constitute a disturbance of the easement, where the comfort or usefulness of the building is not impaired. Fifty Associates *v.* Tudor, 6 Gray (Mass.) 255; Back *v.* Stacey, 2 C. & P. 465, 31 Rev. Rep. 679, 12 E. C. L. 677.

In determining what is a substantial injury it is proper to consider the uses of habitation or business to which the house has been or may reasonably be supposed to be capable of being put. Warren *v.* Brown, [1902] 1 K. B. 15, 71 L. J. K. B. 12, 85 L. T. Rep. N. S. 444, 50 Wkly. Rep. 97; Parker *v.* Stanley, 50 Wkly. Rep. 282.

69. Warren *v.* Brown, [1902] 1 K. B. 15, 71 L. J. K. B. 12, 85 L. T. Rep. N. S. 444, 50 Wkly. Rep. 97 [*overruling* [1900] 2 Q. B. 722, 69 L. J. Q. B. 842, 83 L. T. Rep. N. S. 318]; Home, etc., Stores *v.* Colls, [1902] 1 Ch. 302, 71 L. J. Ch. 146, 85 L. T. Rep. N. S. 701, 50 Wkly. Rep. 227.

70. *Maine.*— Morgan *v.* Boyes, 65 Me. 124.

Massachusetts.— Dickinson *v.* Whiting, 141 Mass. 414, 6 N. E. 92; Gordon *v.* Taunton, 126 Mass. 349.

Nebraska.— Keplinger *v.* Woolsey, (1903) 93 N. W. 1008.

New Jersey.— Freeman *v.* Sayre, 48 N. J. L. 37, 2 Atl. 650.

Pennsylvania.— Urich *v.* Reber, (1899) 17 Atl. 9.

See 17 Cent. Dig. tit. "Easements," § 129.

The fact that the grantee intends to make an unjustifiable use of the way at some future time will not make him a trespasser in removing an obstruction from the way. Hayes *v.* Di Vito, 141 Mass. 233, 4 N. E. 828.

A person using the way by permission of the owner of the land may remove an obstruction placed in the way by the grantee of the easement. Morgan *v.* Boyes, 65 Me. 124.

71. McEwan *v.* Baker, 98 Ill. App. 271; Patout *v.* Lewis, 51 La. Ann. 210, 25 So. 134.

72. Sargent *v.* Hubbard, 102 Mass. 380. But see O'Shaughnessey *v.* O'Rourke, 36 Misc. (N. Y.) 518, 73 N. Y. Suppl. 1070, holding that the owner of a way is not justified in cutting down trees which obstruct the way without first requesting the owner of the servient estate to have them removed.

73. Quintard *v.* Bishop, 29 Conn. 366, holding further that it is not necessary that he should be using the way at the time the obstruction is removed.

establish an adverse right the law will presume that he has been damaged.[74] A right of action exists as against a mere stranger who uses or intrudes upon the easement, for as to such persons the rights of the owner of the easement are exclusive.[75] The owner of the servient estate may use his property, including the easement itself, in any manner consistent with the rights of the other party;[76] but any use of a character adverse to that of the owner of the easement is actionable without proof of special damage.[77] The owner of the servient estate also has the right to obstruct the unauthorized extension of an easement, and if in so doing he obstructs the whole he is not liable unless the unauthorized extension might have been obstructed without interfering with the original right.[78]

b. By Owner of Servient Estate. If the owner of an easement exceeds his rights either in the manner or the extent of its use,[79] or if he enters upon[80] or uses[81] the land of the servient estate for any unauthorized purpose, he is guilty of a trespass and the servient owner may maintain such action, although no actual damages have been sustained by him.

c. Conditions Precedent — (i) *Removal of Obstructions on Plaintiff's Property.* Where there are obstructions on plaintiff's property without the removal of which nothing that defendant could lawfully be required to do would restore the enjoyment of the easement, plaintiff in order to maintain his action must either remove the obstructions or show his readiness to do so.[82]

(ii) *Notice to Owner of Servient Estate to Remove Obstructions.* A demand for the removal of an obstruction erected by the owner of the servient estate is not necessary to give plaintiff a right of action,[83] except where the easement is granted for a special purpose which requires only an occasional use, in which case no action will lie until after a reasonable notice to have the obstruction removed.[84] Notice is also necessary where the servient owner is not the original creator of the obstruction.[85]

2. Defenses. After a right of action for obstructing an easement has once accrued, an offer on the part of defendant to remove the obstruction,[86] or an agreement on the part of plaintiff that the obstruction may remain for a certain time,[87] is no defense to an action for the damages sustained prior to such offer or agreement. So the fact that there is another road which plaintiff might use is no defense to an action for obstructing a way to which he is entitled;[88] and where

74. Collins *v.* St. Peters, 65 Vt. 618, 27 Atl. 425; Harrop *v.* Hirst, L. R. 4 Exch. 43, 38 L. J. Exch. 1, 19 L. T. Rep. N. S. 426, 17 Wkly. Rep. 164; Bower *v.* Hill, 1 Bing. N. Cas. 549, 1 Hodges 334, 4 L. J. C. P. 153, 2 Scott 535, 27 E. C. L. 759.

The sale of the dominant estate pending an action for damages for the obstruction of an easement appurtenant thereto does not affect plaintiff's right of action for the damages actually sustained by him. Stilwell *v.* St. Louis, etc., R. Co., 39 Mo. App. 221.

75. Williams *v.* Esling, 4 Pa. St. 486, 45 Am. Dec. 710.

76. See *supra*, IX, C, 4.

77. Southern R. Co. *v.* Beaudrot, 63 S. C. 266, 41 S. E. 299.

Any unauthorized act by the owner of the servient estate which tends to deprive plaintiff of the benefit of the easement is actionable. Richardson *v.* International Pottery Co., 63 N. J. L. 248, 43 Atl. 692.

78. Elliott *v.* Rhett, 5 Rich. (S. C.) 405, 57 Am. Dec. 750.

If the servient owner causes others to obstruct a way by building a mill so close to the way that the teams of customers who are there with his knowledge and consent block up the way, it becomes his personal act and he is liable to the owner of the easement for the damages sustained. Dennis *v.* Sipperly, 17 Hun (N. Y.) 69.

79. Kaler *v.* Beaman, 49 Me. 207. See also Bryn Mawr Hotel Co. *v.* Baldwin, 12 Montg. Co. L. Rep. (Pa.) 145.

Where the extent of the right is expressly limited the grantee is liable in damages for any injury due to a further use of the right than is authorized by the terms of the grant. Ridgway *v.* Vose, 3 Allen (Mass.) 180.

80. Dixon *v.* Clow, 24 Wend. (N. Y.) 188.

81. Appleton *v.* Fullerton, 1 Gray (Mass.) 186; Ganley *v.* Looney, 14 Allen (Mass.) 40.

82. Elliott *v.* Rhett, 5 Rich. (S. C.) 405, 57 Am. Dec. 750.

83. Collins *v.* St. Peters, 65 Vt. 618, 27 Atl. 425.

84. Mansfield *v.* Shepard, 134 Mass. 520; Phipps *v.* Johnson, 99 Mass. 26.

85. Elliott *v.* Rhett, 5 Rich. (S. C.) 405, 57 Am. Dec. 750.

86. McTavish *v.* Carroll, 13 Md. 429.

87. Collins *v.* St. Peters, 65 Vt. 618, 27 Atl. 425.

88. Manbeck *v.* Jones, 190 Pa. St. 171, 42 Atl. 536.

the construction of a railroad obstructs a private way the fact that the company provided the best crossing possible under the circumstances is no defense to an action for the damages actually sustained.[89] Coverture is no defense to an action against a married woman who is the owner of the servient estate for obstructing an easement thereon.[90] Recovery and collection of a judgment for obstructing an easement is a bar to any other recovery for the same obstruction during the same period.[91]

3. JURISDICTION. A justice of the peace has no jurisdiction of an action for the obstruction or disturbance of an easement where the controversy involves plaintiff's title to the right.[92] But where the existence of the easement is not in dispute, and the action is merely to recover damages for an injury thereto, it may be brought in a court having no jurisdiction of actions for the recovery of land.[93]

4. NATURE AND FORM OF ACTION — a. At Law. The proper remedy for the injury or disturbance of an easement is an action on the case,[94] and not trespass[95] or ejectment.[96] So a writ of entry cannot be maintained for disturbing an easement,[97] and an action of forcible entry and detainer will not lie for obstructing a right of way.[98] In cases where a penalty is provided by statute for the particular injury complained of plaintiff will be confined to his remedy under the statute and cannot maintain an action for damages.[99]

b. In Equity — (1) *In General.* It is well settled that injunction will lie to protect the owner of an easement in its enjoyment.[1] Wherever the injury com-

89. Autenrieth *v.* St. Louis, etc., R. Co., 36 Mo. App. 254.

90. Hart *v.* Mentel, 26 Pittsb. Leg. J. (Pa.) 33.

91. Rogers *v.* Stewart, 5 Vt. 215, 26 Am. Dec. 296.

92. Osborne *v.* Butcher, 26 N. J. L. 308.

93. Gulf, etc., R. Co. *v.* Graves, 1 Tex. App. Civ. Cas. § 579.

A summary proceeding before an ordinary for the removal of obstructions from ways as provided for by the Georgia statute is confined to cases of private ways acquired by prescription. Brown *v.* Marshall, 63 Ga. 657.

94. *Connecticut.*— Wetmore *v.* Robinson, 2 Conn. 529.

Indiana.— Martin *v.* Bliss, 5 Blackf. 35, 32 Am. Dec. 52.

Maine.— Tuttle *v.* Walker, 46 Me. 280.

Maryland.— Shafer *v.* Smith, 7 Harr. & J. 67; Wright *v.* Freeman, 5 Harr. & J. 467.

Massachusetts.— Bowers *v.* Suffolk Mfg. Co., 4 Cush. 332; Cushing *v.* Adams, 18 Pick. 110.

New Hampshire.— Carleton *v.* Cate, 56 N. H. 130; Smith *v.* Wiggin, 48 N. H. 105.

New Jersey.— Osborne *v.* Butcher, 26 N. J. L. 308.

New York.— Lambert *v.* Hoke, 14 Johns. 383.

Pennsylvania.— Shroder *v.* Brenneman, 23 Pa. St. 348; Greenwalt *v.* Horner, 6 Serg. & R. 71; Jones *v.* Park, 10 Phila. 165.

South Carolina.— White *v.* Marshall, Harp. 122.

Vermont.— Wilson *v.* Wilson, 2 Vt. 68.

See 17 Cent. Dig. tit. "Easements," § 130.

95. *Connecticut.*— Wetmore *v.* Robinson, 2 Conn. 529.

Maryland.— Shafer *v.* Smith, 7 Harr. & J. 67.

New Jersey.— Osborne *v.* Butcher, 26 N. J. L. 308.

New York.— Lambert *v.* Hoke, 14 Johns. 383.

South Carolina.— White *v.* Marshall, Harp. 122.

See 17 Cent. Dig. tit. "Easements," § 130.

96. *Michigan.*— Taylor *v.* Gladwin, 40 Mich. 232.

New York.— Child *v.* Chappell, 9 N. Y. 246.

Pennsylvania.— Dark *v.* Johnston, 55 Pa. St. 164, 93 Am. Dec. 732; Carter *v.* Salter, 1 Del. Co. 403.

Vermont.— Judd *v.* Leonard, 1 D. Chipm. 204.

Wisconsin.— Fritsche *v.* Fritsche, 77 Wis. 270, 45 N. W. 1089.

See 17 Cent. Dig. tit. "Easements," § 130.

97. Smith *v.* Wiggin, 48 N. H. 105.

98. Roberts *v.* Trujillo, 3 N. M. 50, 1 Pac. 855.

99. Ross *v.* Georgia, etc., R. Co., 33 S. C. 477, 12 S. E. 101.

If the statutory remedy is of the same nature and authorizes the same judgment as the common-law action, a count at common law may be joined with a count under the statute. Lamphier *v.* Worcester, etc., R. Co., 33 N. H. 495.

Where the construction of a railroad obstructs a private right of way the case will be governed by the statutes for determining the compensation to which the owners of private property may be entitled, and the owner of the way cannot maintain an action for the injuries sustained. Ross *v.* Georgia, etc., R. Co., 33 S. C. 477, 12 S. E. 101.

1. *Colorado.*— Croke *v.* American Nat. Bank, (App. 1902) 70 Pac. 229.

Nebraska.— Keplinger *v.* Woolsey, (1903) 93 N. W. 1008.

plained of is irreparable,[2] or the interference is of a permanent or continuous character,[3] or the remedy at law by an action for damages will not afford adequate relief,[4] injunction is a proper remedy. In most cases of disturbance and interference with easements, however, an action on the case for damages is an adequate remedy, and an injunction should be denied where the injury is not irreparable,[5] or where the action at law would afford adequate relief;[6] and to entitle plaintiff to equitable relief his right to the easement in question must be clear,[7] but in this event, it need not be first established in an action at law.[8] If it is neither admitted nor established by an action at law but is expressly denied by defendant, equity will not usually afford any relief until it has been so established,[9] unless perhaps

1. *New Hampshire.*— Webber *v.* Gage, 39 N. H. 182.

New York.— McMillian *v.* Lauer, 24 N. Y. Suppl. 951; Wheeler *v.* Gilsey, 35 How. Pr. 139.

Virginia. — Sanderlin *v.* Baxter, 76 Va. 299, 44 Am. Rep. 165.

See 17 Cent. Dig. tit. "Easements," § 134.

The owner of property fronting on a public square may enjoin another owner from encroachments upon the square whenever any special damage to him would result therefrom. Wheeler *v.* Bedford, 54 Conn. 244, 7 Atl. 22.

Equity will enjoin the pollution of water where such pollution renders it unfit for the purposes contemplated by the grant of the right to use it. Shaffer *v.* State Nat. Bank, 37 La. Ann. 242.

2. *Georgia.*— Murphey *v.* Harker, 115 Ga. 77, 41 S. E. 585.

Illinois.— Edwards *v.* Haeger, 180 Ill. 99, 54 N. E. 176.

Kentucky.— Henry *v.* Koch, 80 Ky. 391, 44 Am. Rep. 484.

Texas.— Haby *v.* Koenig, 2 Tex. Unrep. Cas. 439.

Virginia.— Sanderlin *v.* Baxter, 76 Va. 299, 44 Am. Rep. 165.

See 17 Cent. Dig. tit. "Easements," § 134.

It is not necessary that the party to be restrained should also be insolvent if the injury caused by him is irreparable. Edwards *v.* Haeger, 180 Ill. 99, 54 N. E. 176.

3. Cadigan *v.* Brown, 120 Mass. 493; St. Louis Safe Deposit, etc., Bank *v.* Kennett, 101 Mo. App. 370, 74 S. W. 474; Webber *v.* Gage, 39 N. H. 182; Rhea *v.* Forsyth, 37 Pa. St. 503, 78 Am. Dec. 441.

When the circumstances indicate that an obstruction is intended to be permanent the owner of the easement is justified in seeking equitable relief. Patout *v.* Lewis, 51 La. Ann. 210, 25 So. 134.

4. *Illinois.*— Edwards *v.* Haeger, 180 Ill. 99, 54 N. E. 176.

Massachusetts. — Cadigan *v.* Brown, 120 Mass. 493.

New Hampshire. — Webber *v.* Gage, 39 N. H. 182.

Pennsylvania.— Rhea *v.* Forsyth, 37 Pa. St. 503, 78 Am. Dec. 441.

Virginia. — Sanderlin *v.* Baxter, 76 Va. 299, 44 Am. Rep. 165; Berkeley *v.* Smith, 27 Gratt. 892.

See 17 Cent. Dig. tit. "Easements," § 134.

5. Hieskell *v.* Gross, 3 Brewst. (Pa.) 430.

6. Hart *v.* Leonard, 42 N. J. Eq. 416, 7 Atl. 865; Welsh *v.* Taylor, 50 Hun (N. Y.) 137, 2 N. Y. Suppl. 815; Mulvany *v.* Kennedy, 26 Pa. St. 44.

An adequate remedy at law means a remedy vested in the complainant to which he may at all times resort at his own option fully and freely without let or hindrance (Wheeler *v.* Bedford, 54 Conn. 244, 7 Atl. 22), and which is plain and complete, and as practical and efficient to the ends of justice and its prompt administration as the remedy in equity (Keplinger *v.* Woolsey, (Nebr. 1903) 93 N. W. 1008).

7. Oswald *v.* Wolf, 129 Ill. 200, 21 N. E. 839; Bosley *v.* McKim, 7 Harr. & J. (Md.) 468; Hart *v.* Leonard, 42 N. J. Eq. 416, 7 Atl. 865; Rhea *v.* Forsyth, 37 Pa. St. 503, 78 Am. Dec. 441.

Where it appears that the easement has been misused to the injury of the servient estate, equity will not enjoin an obstruction of the easement, but will leave the parties to their remedy at law. McBryde *v.* Sayre, 86 Ala. 458, 5 So. 791, 3 L. R. A. 861.

Where the limitation of the right cannot be definitely determined in advance or defined with reasonable certainty, injunction is not a proper remedy. Bennett *v.* Seligman, 32 Mich. 500.

A right of way which is too indefinite for a determinate description will not be protected by a court of equity. Fox *v.* Pierce, 50 Mich. 500, 15 N. W. 880.

Where the width of the way claimed is uncertain, but the answer of defendant admits the existence of the right and a way of a certain width, equity has jurisdiction to restrain an obstruction. Bright *v.* Allan, 203 Pa. St. 386, 53 Atl. 248.

Where defendant alleges that windows which have been obstructed are unnecessary, the right to maintain such windows should be established by an action at law before the issuance of an injunction. Hagerty *v.* Lee, 45 N. J. Eq. 1, 15 Atl. 399.

8. Manbeck *v.* Jones, 190 Pa. St. 171, 42 Atl. 536; Hacke's Appeal, 101 Pa. St. 245; Hunter *v.* Wilcox, 23 Pa. Co. Ct. 191; Berkeley *v.* Smith, 27 Gratt. (Va.) 892.

9. Oswald *v.* Wolf, 129 Ill. 200, 21 N. E. 839; Rhea *v.* Forsyth, 37 Pa. St. 503, 78 Am. Dec. 441; Hieskell *v.* Gross, 3 Brewst. (Pa.) 430; McDonald *v.* Bromley, 6 Phila. (Pa.) 302.

the case be one of very pressing necessity in which it seems relief by way of an injunction may be properly granted.[10]

(II) *To Protect Rights of Way.* Injunction will lie to protect a right of way against interference or obstruction,[11] and is the proper remedy whenever the rights of plaintiff are clear,[12] and the obstruction is of a permanent or constantly recurring character so that an action for damages would not afford adequate relief.[13] It will also lie to restrain the owner of the servient estate from changing the grade of the way so as to render it less convenient,[14] or from using it in an improper manner inconsistent with the rights of the owner of the easement.[15] Relief by injunction will not be granted where the injury complained of is not an actual or threatened obstruction to the right of passage.[16]

(III) *To Protect Easements of Light and Air.* Equity will enjoin any obstruction of an easement of light and air which will materially impair the complainant's enjoyment of his property,[17] or which is in violation of a covenant in the deed under which he holds.[18] Where plaintiff fails to show that he will suffer a substantial deprivation of light or air by the threatened obstruction the injunction should be denied.[19]

(IV) *Mandatory Injunction.* Equity will not only enjoin a threatened

10. Sanderlin *v.* Baxter, 76 Va. 299, 44 Am. Rep. 165.

If the emergency is pressing and the threatened injury would be irreparable a temporary injunction should be granted pending the trial of the case at law. Rhea *v.* Forsyth, 37 Pa. St. 503, 78 Am. Dec. 441; Hieskell *v.* Gross, 3 Brewst. (Pa.) 430.

Where the conduct of plaintiff's business is dependent upon his use of the way in question, and he is in the actual possession and enjoyment of the way at the time of filing his bill, equity will enjoin a threatened obstruction pending litigation to determine plaintiff's right. Shreve *v.* Mathis, 63 N. J. Eq. 170, 52 Atl. 234.

11. Coleman *v.* Butt, 130 Ala. 266, 30 So. 364; Jay *v.* Michael, 92 Md. 198, 48 Atl. 61; Wheeler *v.* Gilsey, 35 How. Pr. (N. Y.) 139; Hacke's Appeal, 101 Pa. St. 245; Weaver *v.* Getz, 16 Pa. Super. Ct. 418.

If the way obstructed is the only one to which plaintiff has a right by grant or prescription, he is entitled to equitable relief, although he might by revocable license use another circuitous and inconvenient route over the lands of other persons. Shipley *v.* Caples, 17 Md. 179.

One tenant in common will be enjoined from erecting any obstructions in a way which are in violation of the covenants in the deed under which he and his cotenants hold. Swift *v.* Coker, 83 Ga. 789, 10 S. E. 442, 20 Am. St. Rep. 347.

Upon a covenant to make title to a lot of land, and for the free use of streets laid down on a certain plat, equity will by injunction compel the covenantor and those claiming under him to remove all obstructions placed in such streets by them. Brooke *v.* Barton, 6 Munf. (Va.) 306.

12. Manbeck *v.* Jones, 190 Pa. St. 171, 42 Atl. 536; Hunter *v.* Wilcox, 23 Pa. Co. Ct. 191.

13. *Georgia.*— Russell *v.* Napier, 80 Ga. 77, 4 S. E. 857.

Illinois.— McCann *v.* Day, 57 Ill. 101.

Maryland.— Schaidt *v.* Blaul, 66 Md. 141, 6 Atl. 669.

Massachusetts.— Nash *v.* New England Mut. L. Ins. Co., 127 Mass. 91.

Pennsylvania.— Manbeck *v.* Jones, 190 Pa. St. 171, 42 Atl. 536; Weidner *v.* Dauth, 21 Pa. Co. Ct. 440; Deer *v.* Doherty, 26 Pittsb. Leg. J. N. S. 104.

West Virginia.— Rogerson *v.* Shepherd, 33 W. Va. 307, 10 S. E. 632.

See 17 Cent. Dig. tit. "Easements," § 135.

14. Vinton *v.* Greene, 158 Mass. 426, 33 N. E. 607.

15. Herman *v.* Roberts, 119 N. Y. 37, 23 N. E. 442, 16 Am. St. Rep. 800, 7 L. R. A. 226.

16. Rivera *v.* Finn, 3 N. Y. Suppl. 22.

Where an obstruction does not interfere with the use of the way, and relief in equity would be of no real benefit to plaintiff, but a cause of great trouble to defendant, he will be left to his remedy at law. Bentley *v.* Root, 19 R. I. 205, 32 Atl. 918.

17. Clawson *v.* Primrose, 4 Del. Ch. 643; Dill *v.* Camden School Bd., 47 N. J. Eq. 421, 20 Atl. 739, 10 L. R. A. 276; Robeson *v.* Pittenger, 2 N. J. Eq. 57, 32 Am. Dec. 412; Fox *v.* Fitzsimons, 29 Hun (N. Y.) 574; Home, etc., Stores *v.* Colls, [1902] 1 Ch. 302, 71 L. J. Ch. 146, 85 L. T. Rep. N. S. 701, 50 Wkly. Rep. 227.

The fact that plaintiff can make other arrangements to supply the deficiency of light and air is not ground for refusing equitable relief. Clawson *v.* Primrose, 4 Del. Ch. 643.

18. Brown *v.* O'Brien, 168 Mass. 484, 47 N. E. 195; Lattimer *v.* Livermore, 72 N. Y. 174.

19. Hagerty *v.* Lee, 45 N. J. Eq. 1, 15 Atl. 399; Wilson *v.* Cohen, Rice Eq. (S. C.) 80.

A mere tendency to obstruct the free passage of light or air is not sufficient to warrant the issuance of an injunction. Gwin *v.* Melmoth, Freem. (Miss.) 505.

The obstruction of a window which is seldom used and of little value is not such a material injury as to demand the interven-

interference but will in a proper case require defendant to repair an injury already done,[20] or to remove an obstruction already erected and restore things to their former condition.[21] It is not every case, however, of a permanent obstruction that will call for such relief. Each case must be decided upon its own circumstances and it rests in the sound discretion of the court whether a mandatory injunction shall issue.[22] The court should consider the relative expense and inconvenience which it would occasion to the parties,[23] and should refuse to grant the injunction wherever it would operate inequitably and oppressively.[24]

(v) *Time to Sue and Laches.* A party seeking equitable relief against interference with an easement must be prompt in doing so. Any long delay not satisfactorily explained or accounted for will bar his right to such relief,[25] particularly where he is seeking by means of a mandatory injunction to compel the removal of a valuable structure.[26]

5. Parties — a. Who May Sue. Any one rightfully in possession of the premises to which an easement is appurtenant may maintain an action for injury to or disturbance thereof.[27] Accordingly it has been held that a lessee[28] or a tenant at

tion of a court of equity. Wilson *v.* Cohen, Rice Eq. (S. C.) 80.

20. Henry *v.* Koch, 80 Ky. 391, 44 Am. Rep. 484.

Equity will not allow the wrong-doer to compel the owner of the easement to sell his right at a valuation, but will require him to restore the premises as nearly as possible to their original condition. Tucker *v.* Howard, 128 Mass. 361.

21. Stallard *v.* Cushing, 76 Cal. 472, 18 Pac. 427; St. Louis Safe Deposit, etc., Bank *v.* Kennett, 101 Mo. App. 370, 74 S. W. 474; Rogerson *v.* Shepherd, 33 W. Va. 307, 10 S. E. 632. See also Collins *v.* Buffalo Furnace Co., 73 N. Y. App. Div. 22, 76 N. Y. Suppl. 420.

22. Green *v.* Richmond, 155 Mass. 188, 29 N. E. 770.

23. Berkeley *v.* Smith, 27 Gratt. (Va.) 892.

24. Green *v.* Richmond, 155 Mass. 188, 29 N. E. 770.

The court should direct an inquiry before itself, in cases where the injunction would subject defendant to serious inconvenience, to ascertain whether the injury is capable of being fully compensated by a pecuniary sum. Berkeley *v.* Smith, 27 Gratt. (Va.) 892.

Where plaintiff can obtain an adequate remedy by damages equity will not require an expensive structure to be removed. Welsh *v.* Taylor, 50 Hun (N. Y.) 137, 2 N. Y. Suppl. 815.

Where a way is not in use at the time of an obstruction so that the removal of the obstruction would be of no actual benefit to plaintiff and would occasion trouble and expense to defendant, equity will not order its removal but will leave the parties to their remedy at law. Chapin *v.* Brown, 15 R. I. 579, 10 Atl. 639.

25. Green *v.* Richmond, 155 Mass. 188, 29 N. E. 770; Trout *v.* Lucas, 54 N. J. Eq. 361, 35 Atl. 153; McCue *v.* Ralston, 9 Gratt. (Va.) 430.

Mere lapse of time will not defeat plaintiff's right where during the period of delay there has been no change of conditions which would render its enforcement unjust to the other party. St. Louis Safe Deposit, etc., Bank *v.* Kennett, 101 Mo. App. 370, 74 S. W. 474.

Where the lessee of the building has notified an intending purchaser that he will insist on his rights under his lease in case the purchaser shall build, he is not guilty of laches by taking no steps to protect those rights until after the purchaser has begun to excavate so near the leased building as to seriously obstruct the light and air. Ware *v.* Chew, 43 N. J. Eq. 493, 11 Atl. 746.

26. Lexington City Nat. Bank *v.* Guynn, 6 Bush (Ky.) 486.

Where plaintiff makes no objection to the erection of a railroad embankment which obstructs a private way until after its completion the court should allow the company a reasonable time to condemn the right of way before requiring the obstruction to be removed. Manning *v.* Port Reading R. Co., 54 N. J. Eq. 46, 33 Atl. 802.

27. Walker *v.* Clifford, 128 Ala. 67, 29 So. 588, 86 Am. St. Rep. 74; Hamilton *v.* Dennison, 56 Conn. 359, 15 Atl. 748, 1 L. R. A. 287; Carter *v.* Wakeman, 42 Oreg. 147, 70 Pac. 393.

A person not having a legal right to use the easement cannot maintain an action for an injury due to its obstruction. Carter *v.* Louisville, etc., R. Co., 66 S. W. 1006, 23 Ky. L. Rep. 2000.

The purchaser of the dominant estate, after the extinguishment of the easement, has no remedy for the obstruction of such easement prior to its extinguishment against one who also purchased the servient estate after the extinguishment. Ballard *v.* Butler, 30 Me. 94.

Where the owners of an easement in a right of way are required to maintain and keep the same in repair, they are entitled to maintain an action to restrict the unauthorized use of such way, although they are not the owners of the fee. Greene *v.* Canny, 137 Mass. 64.

28. Walker *v.* Clifford, 128 Ala. 67, 29 So. 588, 86 Am. St. Rep. 74; Avery *v.* New York Cent., etc., R. Co. 7 N. Y. Suppl. 341.

will[29] may maintain the action. The lessor or owner of the dominant estate, although not in possession, may also maintain an action whenever he can show that he is damaged by the injury complained of;[30] but one who is not in possession and whose interest is merely reversionary cannot maintain an action for any injury except to the reversion.[31]

b. Joinder of Parties Plaintiff. In a suit to enjoin an interference with an easement all who are affected in the same way by the acts of defendants and seek the same remedy against them may join as plaintiffs, although they hold their rights under separate titles.[32] A husband may join with his wife in an action for damages for an injury to an easement appurtenant to the wife's property.[33] A cotenant in possession may maintain an action for the obstruction of a way appurtenant to his property without joining the other cotenant as a party plaintiff.[34]

c. Who May Be Sued. Any person creating or assisting to create or maintain an obstruction to an easement may be sued whether he has any interest in the premises on which the easement is located or not.[35]

d. Joinder of Parties Defendant. Where the injury to plaintiff's easement is caused by the separate action of several others claiming the same easement under the same grant, they are properly made co-defendants.[36] In an action for damages for injury to an easement which is not caused by the owner of the servient estate but by a third person, the person who committed the wrongful act must be made a defendant.[37] The special administrator of the deceased owner of the servient estate who assists in maintaining an obstruction caused by such owner may be joined as a party defendant.[38] Where an action is brought by an abutting owner to have an alley opened and to remove obstructions, all the abutting owners having the right to object to such removal should be made parties defendant.[39]

6. Pleading — a. Complaint — (i) *Allegations of Ownership.* In an action for injuring or interfering with an easement the complaint must allege plaintiff's ownership of the easement in question;[40] but it need not set out the particular manner, whether by prescription, grant, or otherwise, in which the

29. Hamilton *v.* Dennison, 56 Conn. 359, 15 Atl. 748, 1 L. R. A. 287; Foley *v.* Wyeth, 2 Allen (Mass.) 135.

30. Cushing *v.* Adams, 18 Pick. (Mass.) 110.

Where a lease is for a long term so that by acquiescence on the part of the lessee the owner of the fee might be barred of his right of action, he may maintain a bill in equity for the removal of an obstruction. Hoyt *v.* Heister, 7 Ohio Dec. (Reprint) 420, 2 Cinc. L. Bul. Suppl. 5.

31. Walker *v.* Clifford, 128 Ala. 67, 29 So. 588, 86 Am. St. Rep. 74; Kimball *v.* McIntosh, 134 Mass. 362; Hastings *v.* Livermore, 7 Gray (Mass.) 194.

The owner of a reversion who occupies by permission merely of the life-tenant is not a tenant at will and cannot maintain an action for obstructing a right of way appurtenant to the estate which is not an injury to the reversion. Kimball *v.* McIntosh, 134 Mass. 362.

32. Cadigan *v.* Brown, 120 Mass. 493.

The grantee of land bounding on a street or square which the grantor has covenanted shall remain open may join with the city in a suit to restrain him from violating the covenant. Watertown *v.* Cowen, 4 Paige (N. Y.) 510, 27 Am. Dec. 80.

33. Cushing *v.* Adams, 18 Pick. (Mass.) 110.

34. Hudson *v.* Watson, 11 Pa. Super. Ct. 266.

35. Hardin *v.* Sin Claire, 115 Cal. 460, 47 Pac. 363.

36. Long *v.* Swindell, 77 N. C. 176.

37. Mulvany *v.* Kennedy, 26 Pa. St. 44, holding that such an action cannot be maintained against the owner of the servient estate alone.

38. Hardin *v.* Sin Claire, 115 Cal. 460, 47 Pac. 363.

39. Hoyt *v.* Heister, 7 Ohio Dec. (Reprint) 420, 2 Cinc. L. Bul. Suppl. 5.

One owner in common of a way may maintain a bill for the removal of an obstruction without making the other owner in common a party, where the relief asked would not require any act to be done to which the other owner in common would have a right to object. Walker *v.* Pierce, 38 Vt. 94.

40. Smith *v.* Wiggin, 51 N. H. 156; Carter *v.* Wakeman, 42 Oreg. 147, 70 Pac. 393.

It is a sufficient allegation of ownership to state that defendant has given plaintiff a private right of way and that plaintiff had entered upon and used such way for sixteen years without objection or hindrance (Nowlin *v.* Whipple, 79 Ind. 481) or that plaintiff is the owner of certain land and that the way in question has been used by him and those under whom he claims for fifty years continuously and that during all of this

title was acquired,[41] it being sufficient to allege generally plaintiff's right to the easement and a violation of this right by defendant.[42] If, however, plaintiff undertakes to set out his source of title the complaint must allege all the facts necessary to be proved to establish the same.[43] So where an easement is claimed by prescription the complaint must allege facts showing a user under such conditions as are necessary for the acquisition of a prescriptive title.[44]

(II) *DESCRIPTION AND LOCATION OF EASEMENT.* The complaint must describe the easement so as to show the nature, extent, and location of the right claimed.[45] So in an action for obstructing a private way the complaint must allege that it is a private and not a public way,[46] and must give its location [47] and termini.[48]

(III) *ALLEGATIONS OF INJURY SUSTAINED.* The complaint must show that the rights of plaintiff have been violated.[49] If plaintiff seeks to recover special

time it has been an easement appurtenant to such land (Mitchell *v.* Bain, 142 Ind. 604, 42 N. E. 230).

A complaint in which the right to a way is based upon two grounds, a right of necessity and a right by prescription, states but one cause of action. Harding *v.* Cowgar, 127 Ind. 245, 26 N. E. 799.

41. *Indiana.*— Hall *v.* Hedrick, 125 Ind. 326, 25 N. E. 350.

New Hampshire.— Smith *v.* Wiggin, 51 N. H. 156. But see Winnipiseogee Lake Co. *v.* Young, 40 N. H. 420.

Oregon.— Carter *v.* Wakeman, 42 Oreg. 147, 70 Pac. 393.

Pennsylvania.— Wissler *v.* Hershey, 23 Pa. St. 333.

South Carolina.— Craven *v.* Rose, 3 S. C. 72.

Contra, Boyden *v.* Achenbach, 79 N. C. 539.

See 17 Cent. Dig. tit. "Easements," § 141.

In an action for obstructing an easement for light and air it is not necessary to allege a right by prescription to the use of the windows, a declaration that plaintiff is possessed of the house and has a right to the light and air through these windows being sufficient to admit proof of the right, whether it arise by prescription, contract, or otherwise. Gerber *v.* Grabel, 16 Ill. 217; Story *v.* Odin, 12 Mass. 157, 7 Am. Dec. 46.

42. Standiford *v.* Goudy, 6 W. Va. 364.

43. Standiford *v.* Goudy, 6 W. Va. 364. See also Boyce *v.* Brown, 7 Barb. (N. Y.) 80; Whaley *v.* Stevens, 27 S. C. 549, 4 S. E. 145.

44. Overton *v.* Moseley, 135 Ala. 599, 33 So. 696; Johnson *v.* Lewis, 47 Ark. 66, 2 S. W. 329, 14 S. W. 466.

In alleging a prescriptive title it is not essential that the word "adverse" should be used, if facts showing that the possession was adverse are set out (Mitchell *v.* Bain, 142 Ind. 604, 42 N. E. 230), nor is it necessary to expressly state that plaintiff enjoys the right by prescription where he avers that he has enjoyed the right for a period long enough to have established a prescriptive title (Chollar-Potosi Min. Co. *v.* Kennedy, 3 Nev. 361, 93 Am. Dec. 409).

A right of way by prescription is not shown by alleging a habit of crossing another's land, without defining the way, or stating that its use had been by right and open and notorious. Johnson *v.* Lewis, 47 Ark. 66, 14 S. W. 466.

45. Fox *v.* Pierce, 50 Mich. 500, 15 N. W. 880; Carter *v.* Wakeman, 42 Oreg. 147, 70 Pac. 393.

The complainant need not state who owns the land on which the easement obstructed is located. Standiford *v.* Goudy, 6 W. Va. 364.

46. Lamphier *v.* Worcester, etc., R. Co., 33 N. H. 495. See also Antenrieth *v.* St. Louis, etc., R. Co., 36 Mo. App. 254, holding, however, that the defect in failing to state that the way is a private way and not a public highway is waived by defendant failing to move to make the petition more definite and certain.

For the obstruction of a public way a private action cannot be maintained except for a special injury. Boyden *v.* Achenbach, 79 N. C. 539.

47. Fox *v.* Pierce, 50 Mich. 500, 15 N. W. 880.

Where a way is not claimed as appurtenant to the premises of plaintiff to which it leads, it is not necessary to describe these premises in the complaint (Smith *v.* Wiggin, 51 N. H. 156), and such description may be stricken out as surplusage (Lamphier *v.* Worcester, etc., R. Co., 33 N. H. 495).

48. Lamphier *v.* Worcester, etc., R. Co., 33 N. H. 495. But see Harding *v.* Cowgar, 127 Ind. 245, 26 N. E. 799, holding that a description of a way as a well defined road thirty feet wide which had been in use for more than twenty years is sufficiently definite without setting out the course and termini of the way.

49. Hartshorn *v.* South Reading, 3 Allen (Mass.) 501; Murphy *v.* Bates, 21 R. I. 89, 41 Atl. 1011.

Alleging that a building is erected on the land to which a way is appurtenant without showing that it encroaches upon the way itself is insufficient. Clark *v.* Storrs, 4 Barb. (N. Y.) 562.

Where a gate is constructed across a way by the owner of the servient estate the complaint in an action for its removal must show that its location is such as to make it an unreasonable obstruction to the enjoyment of the easement. Bland *v.* Smith, 66 S. W. 181, 23 Ky. L. Rep. 1802.

damages they must be specifically set out in the complaint.[50] Where the action is simply for an injury to the possessory interest and not to the reversion, no allegation of damages to the reversionary interest is necessary.[51]

(iv) *Prayer For Relief.* The complaint is not demurrable for want of facts because it demands the wrong relief or greater relief than plaintiff is entitled to.[52]

b. Answer. Where defendant in an action for interference with an easement relies as a defense upon a right to use the same, the right must be specially pleaded;[53] but it has been held that the owner of the servient estate who claims as a defense an extinguishment of an easement through a prescriptive right to maintain the obstruction complained of, need not specially plead this defense.[54] A pleading is demurrable if it purports to answer the entire complaint and the matters therein pleaded, but amounts only to a partial defense.[55]

7. Evidence — a. Presumptions and Burden of Proof. Where an easement is claimed by prescription the burden is upon the party claiming it to prove an uninterrupted assertion of the right under a claim of title with the knowledge and acquiescence of the owner of the land for the necessary period;[56] but proof of such adverse enjoyment, without evidence to explain how it began, raises a presumption of a full and unqualified grant, and the owner of the land has the burden of proving that the use was under some license, indulgence, or special contract, inconsistent with a claim of right by the other party.[57] Where an easement is claimed as appurtenant to certain land, the burden is upon the party claiming it to show that the original grantee of the easement was the owner of the land in question at the time of the grant.[58] In a suit for a mandatory injunction to compel the removal of an obstruction, if defendant desires a judgment for damages in lieu of the injunction he has the burden of showing a state of facts which would justify such relief.[59]

b. Admissibility. On the question of plaintiff's right to an easement, evidence of an admission of such right by a former owner of the servient estate during his ownership is admissible against the present owner,[60] and on the other

A complaint in an action for obstructing a view is insufficient where it fails to show that the obstruction is of such a character that any injury could result therefrom. Lyon *v.* McDonald, 78 Tex. 71, 14 S. W. 261, 9 L. R. A. 295.

Where an easement is granted for a particular purpose it is not sufficient to allege an obstruction in general terms without stating that its use for that purpose is interfered with. Clark *v.* Storrs, 4 Barb. (N. Y.) 562.

Ownership of the easement at the time the damages accrued must be alleged to warrant a recovery. Galveston, etc., R. Co. *v.* Haas, 17 Tex. Civ. App. 309, 42 S. W. 658.

In an action for obstructing the right of way of a railroad by the erection of a fence, the complaint need not allege that the right of way is desired or required for railroad purposes or that it has been so used or is essential to such use. Southern R. Co. *v.* Beaudrot, 63 S. C. 266, 41 S. E. 299.

Where a way of necessity is appurtenant to plaintiff's property he need not allege that he is unable to obtain a way over the lands of others. Ellis *v.* Bassett, 128 Ind. 118, 27 N. E. 344, 25 Am. St. Rep. 421.

The allowance of a bill of particulars as to the injuries complained of is discretionary with the court. Vanderzee *v.* Hallenbeck, 14 N. Y. Civ. Proc. 99.

50. Adams *v.* Barry, 10 Gray (Mass.) 361.

In order to recover damages for loss of business and custom the causes of the loss must be specially set out. Fleming *v.* Baltimore, etc., R. Co., 51 W. Va. 54, 41 S. E. 168.

51. Cushing *v.* Adams, 18 Pick. (Mass.) 110.

52. Nowlin *v.* Whipple, 79 Ind. 481.

53. American Co. *v.* Bradford, 27 Cal. 360.

54. Bowen *v.* Team, 6 Rich. (S. C.) 298, 60 Am. Dec. 127.

55. Harding *v.* Cowgar, 127 Ind. 245, 26 N. E. 799, holding that where a way is claimed both by necessity and by prescription the answer is demurrable if the facts pleaded are a defense only to the right claimed by necessity.

56. American Co. *v.* Bradford, 27 Cal. 360.

57. O'Daniel *v.* O'Daniel, 88 Ky. 185, 10 S. W. 638, 10 Ky. L. Rep. 760; Burch *v.* Blair, 41 S. W. 547, 19 Ky. L. Rep. 641; Pierce *v.* Cloud, 42 Pa. St. 102, 82 Am. Dec. 496; Garrett *v.* Jackson, 20 Pa. St. 331; Hudson *v.* Watson, 11 Pa. Super. Ct. 266.

58. Smith *v.* Porter, 10 Gray (Mass.) 66.

59. Collins *v.* Buffalo Furnace Co., 73 N. Y. App. Div. 22, 76 N. Y. Suppl. 420.

60. Bennett *v.* Biddle, 150 Pa. St. 420, 24 Atl. 738.

hand defendant may give evidence of admissions by plaintiff inconsistent with the right claimed.[61] Where a way is claimed as a way of necessity, evidence is admissible for defendant to show the purchase of other land by plaintiff over which access to the public highway might be had.[62] Where the extent or location of a way is in question evidence of the manner in which it has been used by the owner of the easement and acquiesced in by the owner of the servient estate is admissible, whether the way be one by express grant[63] or a way of necessity.[64] On the question of damages due to the obstruction of a way, evidence of the injury caused thereby to persons other than plaintiff is not admissible;[65] but evidence is admissible of any expenditures made by plaintiff in improving the way,[66] or to show that defendant acted maliciously,[67] or with a knowledge of plaintiff's rights.[68] Evidence is admissible on the part of defendant to show in mitigation of damages that the way obstructed was not plaintiff's only means of access to his premises.[69] No evidence is of course admissible which is not covered by the allegations of the pleadings.[70] Evidence of special damages is not admissible unless such damages are specially set out in the complaint.[71]

c. Sufficiency. To warrant a recovery the evidence must establish both the right of plaintiff and also an unlawful interference with it by defendant.[72] But to establish his right, it is not necessary that plaintiff should show any title other than the actual use and occupation of the premises to which the easement is appurtenant,[73] unless from the nature of the proceedings the title is directly put in issue;[74] neither is it necessary in order to show a violation of his right for him to prove that any actual damages have been sustained.[75]

d. Variance. A material variance between the pleading and the proof is fatal to a recovery;[76] but proof of a right of a less extent than that claimed by

61. Turner *v.* Williams, 76 Mo. 617, holding that a notice served by plaintiff on defendant in which the way in question was stated to be a public road is admissible to show that at the time it was given plaintiff did not consider it a private way.

62. Russell *v.* Napier, 82 Ga. 770, 9 S. E. 746.

63. Hamilton *v.* Dennison, 56 Conn. 359, 15 Atl. 748, 1 L. R. A. 287.

Evidence of the length of time a way has been used is admissible, although the right is not claimed by prescription, it being proper to prove the construction given by the parties to the grant. Roush *v.* Roush, 154 Ind. 562, 55 N. E. 1017.

64. Jenne *v.* Piper, 69 Vt. 497, 38 Atl. 147, holding also that evidence is admissible of a declaration by the owner of the servient estate as to where he intended to locate the way.

65. McDonnell *v.* Cambridge R. Co., 151 Mass. 159, 23 N. E. 841; Pettingill *v.* Porter, 3 Allen (Mass.) 349.

66. Hill *v.* Hagaman, 84 Ind. 287.

67. Burnham *v.* Jenness, 54 Vt. 272, holding that evidence is admissible of a declaration by defendant that he erected the obstruction for the purpose of annoying plaintiff.

68. Bennett *v.* Biddle, 150 Pa. St. 420, 24 Atl. 738, holding that evidence is admissible that defendant had sought advice as to his right to obstruct the way, and had been informed that he could not do so.

69. Demuth *v.* Amweg, 90 Pa. St. 181.

70. Hughes *v.* Snee, 9 Pa. Dist. 526, holding that where the complainant alleges a particular title, evidence of a different source of title is not admissible.

If the complaint alleges both a grant and a prescriptive title evidence is admissible of either. Durkee *v.* Jones, 27 Colo. 159, 60 Pac. 618.

71. McTavish *v.* Carroll, 13 Md. 429; Fleming *v.* Baltimore, etc., R. Co., 51 W. Va. 54, 41 S. E. 168.

72. Davis *v.* Gurley, 44 Ga. 582.

73. Ferguson *v.* Witsell, 5 Rich. (S. C.) 280, 57 Am. Dec. 744; Smith *v.* Kinard, 2 Hill (S. C.) 642 note.

74. Smith *v.* Kinard, 2 Hill (S. C.) 642 note.

If the right to recover is based upon the existence of a prescriptive title, plaintiff must prove his case as laid. Gardner *v.* Swann, 114 Ga. 304, 40 S. E. 271.

If plaintiff alleges the particular title, he cannot recover unless the evidence establishes the particular title alleged. Hughes *v.* Snee, 9 Pa. Dist. 526.

75. Tuttle *v.* Walker, 46 Me. 280; Collins *v.* Buffalo Furnace Co., 73 N. Y. App. Div. 22, 76 N. Y. Suppl. 420; Fetter *v.* Schmidt, 5 Lanc. L. Rev. 9.

76. Hill *v.* Haskins, 8 Pick. (Mass.) 83; Ross *v.* Georgia, etc., R. Co., 33 S. C. 477, 12 S. E. 101.

A declaration alleging a right to have a way at all times kept open is not supported by proof of a grant of a way for the sole purpose of making repairs. Hill *v.* Haskins, 8 Pick. (Mass.) 83.

A complaint alleging the way obstructed to be a public way is not sustained by proof of

plaintiff on the trial is not fatal to a recovery if the complaint is so general that the proof is not inconsistent with its allegations.[77]

8. TRIAL — a. Questions of Law and Fact. Whether plaintiff has an easement in defendant's land is, when the essential facts are in dispute, a question for the jury.[78] And in the case of an easement by express grant if the terms of the grant are uncertain the jury must determine the extent and location of the right intended to be conveyed.[79] Whether the owner of the servient estate has used his property in a manner inconsistent with the rights of the owner of the easement,[80] or whether the owner of the easement has used it for an unauthorized purpose;[81] whether the use of the alleged easement has been adverse or merely permissive,[82] or whether there has been any change of ownership of the estates that would convert a use that was previously permissive into an adverse use;[83] whether the width of a way has been established by acquiescence of the grantor,[84] and, in an action for obstructing an alleged private way, whether the way is public or private,[85] are all questions of fact for the jury.

b. Instructions. The instructions of the court must fully inform the jury as to the nature of the right in issue between the parties.[86]

c. Verdict and Judgment. In an action to secure the removal of obstructions from a private way a verdict for plaintiff is not insufficient because no damages are found in his favor.[87] In a suit to enjoin the obstruction of an existing way, the judgment need not state its exact location by metes and bounds as in an original proceeding for its establishment.[88] A judgment assessing certain damages for the obstruction of an easement and also conferring authority, upon a contingency, to apply for further damages is unauthorized.[89] The judgment is conclusive only as to the matters directly in issue and passed upon by the jury.[90]

9. DAMAGES. The owner of an easement which has been injured or its enjoyment interfered with is entitled to recover from the wrong-doer the actual damages which he has sustained,[91] and if no actual damages be proved he is entitled

the existence of a private way. Gurney *v.* Ford, 2 Allen (Mass.) 576.

If the termini of a way are stated in the complaint, plaintiff, to prevail, must prove a right of way throughout the entire distance as claimed. Deerfield *v.* Connecticut River R. Co., 144 Mass. 325, 11 N. E. 105.

In the case of a notice allowed by statute as a substitute for a special plea the same strictness as to variance is not required. Manion *v.* Creigh, 37 Conn. 462.

77. Webster *v.* Lowell, 142 Mass. 324, 8 N. E. 54.

If a way is appurtenant to any part of plaintiff's premises he may recover for its obstruction, although the proof shows that the premises described in the complaint includes a tract lying beyond that to which the way is appurtenant. Pettingill *v.* Porter, 3 Allen (Mass.) 349.

78. Koons *v.* McNamee, 6 Pa. Super. Ct. 445, 42 Wkly. Notes Cas. (Pa.) 21.

79. Pettingill *v.* Porter, 3 Allen (Mass.) 349.

80. Meehan *v.* Barry, 97 Mass. 447; Jackson *v.* Allen, 3 Cow. (N. Y.) 220.

Whether the erection of gates across a way by the owner of the servient estate is an unreasonable interference with the easement is a question for the jury. Baker *v.* Frick, 45 Md. 337, 24 Am. Rep. 506; Jewell *v.* Clement, 69 N. H. 133, 39 Atl. 582; Brill *v.* Brill, 108 N. Y. 511, 15 N. E. 538; Huson *v.* Young, 4 Lans. (N. Y.) 63.

81. Appleton *v.* Fullerton, 1 Gray (Mass.) 186; Hawkins *v.* Carbines, 3 H. & N. 914.

82. Bennett *v.* Biddle, 150 Pa. St. 420, 24 Atl. 738; Bennett *v.* Biddle, 140 Pa. St. 396, 21 Atl. 363.

83. Bennett *v.* Biddle, 150 Pa. St. 420, 24 Atl. 738.

84. George *v.* Cox, 114 Mass. 382.

85. Deerfield *v.* Connecticut River R. Co., 144 Mass. 325, 11 N. E. 105; Fisher *v.* Farley, 23 Pa. St. 501; Galveston, etc., R. Co. *v.* Baudat, 17 Tex. Civ. App. 595, 45 S. W. 939.

86. McCardle *v.* Barricklow, 68 Ind. 356, where an instruction was held erroneous which failed to distinguish between a prescriptive right and a right which might have been exercised under a mere license.

87. Miller *v.* Richards, 139 Ind. 263, 38 N. E. 854.

88. Potts *v.* Clark, 62 S. W. 884, 23 Ky. L. Rep. 332; Burch *v.* Blair, 41 S. W. 547, 19 Ky. L. Rep. 641. *Compare* Ketchum *v.* Edwards, 153 N. Y. 534, 47 N. E. 918 [*reversing* 6 N. Y. App. Div. 160, 39 N. Y. Suppl. 1012].

89. Ackerman *v.* True, 56 N. Y. App. Div. 54, 66 N. Y. Suppl. 6.

90. Warshauer *v.* Randall, 109 Mass. 586, holding that where an easement is claimed over a strip of land lying between the premises of plaintiff and defendant, a judgment against plaintiff on the issue as to the existence of the easement claimed is not conclusive as to his title to the fee in half of the strip.

91. Tuttle *v.* Walker, 46 Me. 280.

to recover nominal damages.[92] No damages can be assessed for any injuries not alleged in the complaint,[93] and the recovery will be limited to the damages sustained up to the time of the commencement of the action,[94] except in certain cases where the obstruction is permanent and a necessarily continuous injury.[95] No special damages can be recovered unless alleged in the complaint.[96] Exemplary damages may be awarded for the interference with an easement whenever it is shown that defendant has acted in an oppressive or malicious manner,[97] or where he has persisted in an interference after plaintiff's right to the easement has been established by a prior action.[98] If plaintiff is owner of the easement only, he cannot recover for any injury resulting to the servient estate,[99] and if his interest is merely reversionary, and he is not in possession, he can only recover damages for the injury done to the reversion.[1] Where a private way is used by a trespasser without interfering with the owner's free use of it during the same period, the ordinary measure of damages is the injury done to the way or to the land by the wrongful use, including any increased cost of repairs caused by such use.[2] In the case of a temporary obstruction of a way, if the dominant estate is rented and there is no physical injury to the property, the measure of damages to the owner of the estate is the difference in rental value during the continuance of the obstruction;[3] but if occupied by the owner, the measure of damages is the diminution of the value of the use during the period of the obstruction.[4]

10. Appeal and Error.[5] A failure to give a requested instruction which states a correct proposition of law but is not applicable to the matters in issue,[6] or to give a particular instruction the substance of which is covered by the other instructions given,[7] is not error; but a failure to give a proper instruction requested which is not covered by the general charge, whereby a party is deprived of an important instruction to which he is entitled, is ground for reversal.[8] Error

Plaintiff is not limited to nominal damages in an action for the obstruction of a way (Smiles *v.* Hastings, 24 Barb. (N. Y.) 44), except in cases where no actual injury has been sustained (McDonnell *v.* Cambridge R. Co., 151 Mass. 159, 23 N. E. 841).

Where the obstruction complained of is an entire obstruction of a way, plaintiff may recover from defendant his entire damages, although there are other obstructions on the way. Rogers *v.* Stewart, 5 Vt. 215, 26 Am. Dec. 296.

92. Fitzpatrick *v.* Boston, etc., R. Co., 84 Me. 33, 24 Atl. 432; Tuttle *v.* Walker, 46 Me. 280; Fleming *v.* Baltimore, etc., R. Co., 51 W. Va. 54, 41 S. E. 168.

93. Lyon *v.* McDonald, 78 Tex. 71, 14 S. W. 261, 9 L. R. A. 295.

94. Freeman *v.* Sayre, 48 N. J. L. 37, 2 Atl. 650; Ackerman *v.* True, 56 N. Y. App. Div. 54, 66 N. Y. Suppl. 6.

Damages should be assessed only to the date of the writ and not up to the time of the trial. Cole *v.* Sprowl, 35 Me. 161, 56 Am. Dec. 696.

95. Autenrieth *v.* St. Louis, etc., R. Co., 36 Mo. App. 254; Neff *v.* Pennsylvania R. Co., 202 Pa. St. 371, 51 Atl. 1038, each holding that damages for the taking by a railroad company of a private way appurtenant to lands is the depreciation in the market value of the lands caused thereby.

If a railroad company is required by its charter to construct another suitable way wherever a way is obstructed by it, damages will only be allowed to the commencement of the suit. Brewster *v.* Sussex R. Co., 40 N. J. L. 57; Ellsworth *v.* Central R. Co., 34 N. J. L. 93.

If the obstruction is maintained by a private individual or corporation not vested with authority to invoke the power of eminent domain no permanent damages will be allowed. Ackerman *v.* True, 56 N. Y. App. Div. 54, 66 N. Y. Suppl. 6.

96. Adams *v.* Barry, 10 Gray (Mass.) 361.

97. Jones *v.* Sanders, 138 Cal. 405, 71 Pac. 506; Burnham *v.* Jenness, 54 Vt. 272.

98. Ellis *v.* Academy of Music, 120 Pa. St. 608, 15 Atl. 494, 6 Am. St. Rep. 739.

99. Johnson *v.* Arnold, 91 Ga. 659, 18 S. E. 370.

1. Hastings *v.* Livermore, 7 Gray (Mass.) 194.

2. Johnson *v.* Arnold, 91 Ga. 659, 18 S. E. 370.

3. See Bannon *v.* Rohmeiser, 34 S. W. 1084, 35 S. W. 280, 17 Ky. L. Rep. 1378. See also Hey *v.* Collman, 78 N. Y. App. Div. 584, 79 N. Y. Suppl. 778, holding that the diminution in rental value during the time of the obstruction is the proper measure of damages, although the property is not actually rented at the time.

4. Bannon *v.* Rohmeiser, 34 S. W. 1084, 35 S. W. 280, 17 Ky. L. Rep. 1378.

The reasonable cost of removing the obstructions is not the proper measure of damages. McTavish *v.* Carroll, 13 Md. 429.

5. See, generally, Appeal and Error.

6. Smith *v.* Lee, 14 Gray (Mass.) 473.

7. Howard *v.* O'Neill, 2 Allen (Mass.) 210; Smith *v.* Lee, 14 Gray (Mass.) 473.

8. Demuth *v.* Amweg, 90 Pa. St. 181.

must be clearly shown by the excepting party in order to obtain a reversal.[9] The appellate court will not reverse for a harmless error or error not objected to in the court below,[10] or for a finding of fact based upon conflicting testimony which is not clearly erroneous.[11]

EA SOLA DEPORTATIONIS SENTENTIA AUFERT QUÆ AD FISCUM PERVENIRET. A maxim meaning "A sentence of transportation deprives of monetary consideration."[1]

EAST. Toward the rising sun.[2] (See, generally, BOUNDARIES.)

EASTERLY. Due east.[3] (See EAST; and, generally, BOUNDARIES.)

EASTER TERM. In English law, formerly one of the four movable terms of the courts, but afterwards a fixed term, beginning on the 15th of April and ending on the 8th of May in every year, though sometimes prolonged so late as the 13th of May under stat. 11 Geo. IV, c. 70.[4] (See, generally, COURTS.)

EAST QUARTER SECTION LINE. A north and south line drawn through the center of the east half of the section.[5]

EASTWARDLY. Due east.[6] (See EAST; and, generally, BOUNDARIES.)

EATING-HOUSE. A public place[7] where food is sold to casual guests to be eaten upon the premises;[8] and may include an oyster-stall.[9] (See, generally, INNKEEPERS.)

EAVESDROPPING. See DISORDERLY CONDUCT.

EBB AND FLOW. See NAVIGABLE WATERS.

9. Burnham *v.* Jenness, 54 Vt. 272.

10. Ellis *v.* American Academy of Music, 120 Pa. St. 608, 15 Atl. 494, 6 Am. St. Rep. 739.

11. Frederick *v.* Frederick, 31 W. Va. 566, 8 S. E. 295.

1. Peloubet Leg. Max.

2. Webster Int. Dict.

In describing courses the words "north," "south," "east," and "west" mean true courses, and refer to the true meridian unless otherwise declared. Cal. Pol. Code (1899), § 3903; Mont. Pol. Code (1895), § 4103.

"East of the Cape of Good Hope," as used in the tariff act of 1872 see Powers *v.* Comly, 101 U. S. 789, 790, 25 L. ed. 805.

Meaning of "east half" and "west half" in a deed see People *v.* Hall, 43 Misc. (N. Y.) 117, 122, 88 N. Y. Suppl. 276.

3. Fratt *v.* Woodward, 32 Cal. 219, 227, 91 Am. Dec. 573 (but when used with other words which are added to qualify its meaning, it will be held to mean precisely what the qualifying words make it mean); Foster *v.* Foss, 77 Me. 279, 280; Cal. Pol. Code (1899), § 3904. *Compare* Scraper *v.* Pipes, 59 Ind. 158, 164.

In the sense in which it is used by the miner and prospector, the term denotes the general course of a vein or location running nearer towards the east than any of the other cardinal points of the compass. Wiltsee *v.* Arizona Min., etc., Co., (Ariz. 1900) 60 Pac. 896, 898.

4. Bouvier L. Dict.

5. Jackson *v.* Rankin, 67 Wis. 285, 288, 30 N. W. 301.

6. Simms *v.* Dickson, 22 Fed. Cas. No. 12,869, Cooke (Tenn.) 137, 140, unless there be some object which can be found to control the course. *Compare* Preeble *v.* Vanhoozer, 2 Bibb (Ky.) 118, 120, where it is said that the term signifies on which side of the base of the lines marking the survey the land is to lie.

7. Neal *v.* Com., 22 Gratt. (Va.) 917, 918, where it is said: "What constitutes an 'eating house' is defined by law. 'Any person who shall cook, or otherwise furnish for compensation, diet or refreshments of any kind for casual visitors at his house, and sold for consumption therein, and who is not the keeper of an ordinary, house of private entertainment or boarding house, shall be deemed to keep an eating house.'"

Distinguished from "inn."—"A mere eating-house for meals cannot now be considered an inn, nor can the liabilities attaching to innkeepers be extended to the proprietors of such establishments. They are wanting in some of the requisites necessary to constitute them inns, as no lodging places are provided for travelers." Carpenter *v.* Taylor, 1 Hilt. (N. Y.) 193, 195.

8. English L. Dict.

The words "regular hotels and eating houses," in a statute providing that all places where intoxicating liquors are sold shall be closed on Sunday, but that the term "place," in reference to regular hotels and eating houses, shall be construed to mean a room or part of the room where such liquors are usually exposed to sale, designate the place of the principal, and not the subordinate, business, which is the carrying on the hotel or eating house. Lederer *v.* State, 5 Ohio Cir. Ct. 623, 625, 3 Ohio Cir. Dec. 303.

9. Winter *v.* State, 30 Ala. 22, 23, construing a statute requiring a license for keeping a restaurant or eating-house.

Distinguished from "stall in a market-house" see State *v.* Hall, 73 N. C. 252, 253.

EBONY. A name given to various woods distinguished in general by their dark color and hardness, and extensively used for carving, ornamental cabinet-work, instruments, canes, etc.[10] (See, generally, CUSTOMS DUTIES.)

EBRIETY. That state and condition which inevitably follows from taking into the body, by swallowing or drinking, excessive quantities of intoxicating liquors.[11] (See DRUNK; and, generally, DRUNKARDS.)

ECCENTRICITY. A marked peculiarity in a person's mental condition.[12] (See, generally, INSANE PERSONS.)

ECCLESIA ECCLESIÆ DECIMAS SOLVERE NON DEBET.[13] A maxim meaning "A church ought not to pay tithes to a church."[14]

ECCLESIÆ MAGIS FAVENDUM EST QUAM PERSONÆ. A maxim meaning "The church is to be more favored than the parson."[15]

ECCLESIA EST DOMUS MANSIONALIS OMNIPOTENTIS DEI. A maxim meaning "The church is the mansion-house of the Omnipotent God."[16]

ECCLESIA EST INFRA ÆTATEM ET IN CUSTODIA DOMINI REGIS, QUI TENETUR JURA ET HÆREDITATES EJUSDEM MANU TENERE ET DEFENDERE. A maxim meaning "The church is under age, and in the custody of the king, who is bound to uphold and defend its rights and inheritances."[17]

ECCLESIA FUNGITUR VICE MINORIS; MELIOREM CONDITIONEM SUAM FACERE POTEST, DETERIOREM NEQUAQUAM. A maxim meaning "The church enjoys the privilege of a minor; it can make its own condition better, but not worse."[18]

ECCLESIA NON MORTIUR. A maxim meaning "The church does not die."[19]

ECCLESIA SEMPER IN REGIS TUTELA. A maxim meaning "The church is always under protection of the king."[20]

ECCLESIASTICAL. Something belonging to or set apart for the church, as distinguished from "civil" or "secular," with reference to the world.[21]

ECCLESIASTICAL CORPORATION. A corporation where the members who compose it are entirely spiritual persons.[22] (See, generally, CHARITIES; RELIGIOUS SOCIETIES.)

10. Century Dict.

The terms "ebony" and "rosewood," as used in a tariff act providing that manufactures of ebony and rosewood, etc., should be subject to a duty of forty per cent. *ad valorem*, did not mean articles manufactured from ebony and rosewood entirely, but included as well fancy boxes made of common wood, and veneered with rosewood or ebony, invoiced as rosewood and ebony boxes, and known to the trade by those names, and also as fancy boxes and furnishing boxes, it not appearing that there are any articles known as "ebony boxes" or "rosewood boxes" made wholly from those woods. Sill *v.* Lawrence, 22 Fed. Cas. No. 12,850, 1 Blatchf. 605.

11. Com. *v.* Whitney, 11 Cush. (Mass.) 477, 479, where it is stated that the word is nearly synonymous with "inebriation" and "intoxication."

12. Ekin *v.* McCracken, 11 Phila. (Pa.) 534, 535, where the term is distinguished from "unsoundness of mind."

13. "A maxim that is binding as long as the land is actually held by an ecclesiastic." Lagden *v.* Flack, 2 Hagg. Const. 303, 308.

14. Wharton L. Lex.

Applied in Blinco *v.* Marston, Cro. Eliz. 479; Atty.-Gen. *v.* Cholmley, 2 Eden 304, 313, 28 Eng. Reprint 915; Lagden *v.* Flack, 2 Hagg. Const. 303, 308; St. Paul's Church *v.* Lincoln, 4 Price 65, 77.

15. Wharton L. Lex.

16. Black L. Dict. [*citing* 2 Inst. 164].

17. Black L. Dict. [*citing* Liford's Case, 11 Coke 46*b*, 49].

18. Black L. Dict. [*citing* Coke Litt. 341].

19. Wharton L. Lex. [*citing* 2 Inst. 3].

20. Morgan Leg. Max.

21. Wharton L. Lex. See also 7 Cyc. 151.

22. 1 Blackstone Comm. 470 [*quoted* in Robertson *v.* Bullions, 9 Barb. (N. Y.) 64, 87, where it is said: "'Such as bishops, certain deans and prebendaries; all archdeans, parsons and vicars, which are sole corporations; deans and chapters at present, and formerly prior and convent, abbots and monks, and the like; bodies aggregate.' And in describing the class of lay corporations known as 'eleemosynary,' he adds: 'And all these eleemosynary corporations are, strictly speaking, lay and not ecclesiastical, even though composed of ecclesiastical persons, and although they in some things partake of the nature, privileges and restrictions of ecclesiastical bodies.' . . . It is not the profession of piety by the individuals that renders the corporation of which they are the members, ecclesiastical. The corporation must be spiritual in a legal and not in a popular or scriptural sense. Lay corporations may be for the advancement of religion, and the members may all be clergymen, even, but that does not make the corporation ecclesiastical"].

Religious corporations incorporated under the law of New York are not "ecclesiastical

ECCLESIASTICAL COUNCIL.[23] A judicial tribunal, whose province it is, upon the proper presentation of charges, to try them on evidence admissible before such a tribunal.[24] (See, generally, RELIGIOUS SOCIETIES.)

ECCLESIASTICAL COURT. In England a term used to designate a court administering the canon law.[25] (See ARCHDEACON'S COURT; COURT OF ARCHES; and, generally, COURTS; RELIGIOUS SOCIETIES.)

ECCLESIASTICAL LAW. The law administered in the ecclesiastical courts.[26]

ECCLESIASTICAL THINGS. A term which includes the church buildings, the ornaments, church property, the cemetery, or property given to the church for poor orphans or any other pious purpose whatever.[27] (See, generally, RELIGIOUS SOCIETIES.)

ECLECTIC PRACTICE. In medicine a system of practice which is unusual and eccentric.[28] (See, generally, PHYSICIANS AND SURGEONS.)

ECUMENIC. Universal.[29]

ECUMENICAL COUNCIL. A universal council, a council of all, not of a part, and is only applied to the councils of the catholic church.[30] (See, generally, RELIGIOUS SOCIETIES.)

EDERE.[31] In the law of libel, as applied to an offending publication, the act

corporations" in the sense of the English law. Robertson *v.* Bullions, 11 N. Y. 243, 266, per Selden, J.

23. "An ecclesiastical council is a tribunal well known in the history of our Commonwealth, and recognized and regarded in judicial decisions." Stearns *v.* Bedford First Parish, 21 Pick. (Mass.) 114, 124.

24. Sheldon *v.* Easton Cong. Parish, 24 Pick. (Mass.) 281, 289, where it is said: "They have no power to dissolve a contract or to absolve either party from its obligation. They may not only try and determine the existence of the causes which work a forfeiture of the clerical office, but they may also, and this seems to be their appropriate and peculiar duty, give their advice in cases where there is no forfeiture."

This tribunal is frequently resorted to in the settlement of clergymen, in reconciling and healing differences and divisions in churches, and in adjusting and terminating controversies between pastors and their churches and parishes. Stearns *v.* Bedford First Parish, 21 Pick. (Mass.) 114, 124, where it is said: "But notwithstanding the frequency of their occurrence, it is not easy accurately to define their powers, or to ascertain the precise force and effect of their adjudications. It is frequently called an advisory court. Its determination or result is often called advice, and is usually if not uniformly given in the form of counsel to the parties."

25. Equitable L. Assur. Soc. *v.* Paterson, 41 Ga. 338, 364, 5 Am. Rep. 535. See also 7 Cyc. 272 note 23; 6 Cyc. 753 note 60, 915 note 92; 5 Cyc. 713 note 5.

"In Anglo-Saxon times, there was no distinction between the lay and ecclesiastical jurisdiction. . . . It was not until after the Norman conquest, that the common law and the ecclesiastical courts were separated." Short *v.* Stotts, 58 Ind. 29, 35 [*quoting* 3 Chitty Bl. Comm. 61, 63].

At common law, the ecclesiastical courts had exclusive jurisdiction of the probate of wills of personal property. Goodman *v.* Winter, 64 Ala. 410, 426, 38 Am. Rep. 13.

Enumeration of courts having ecclesiastical jurisdiction see 1 Blackstone Comm. 84.

26. Wharton L. Lex.

Functions pertain to marriage and divorce. —"Of the several branches of the unwritten law of England, there is one, properly to be deemed common law, yet technically called ecclesiastical law; another, technically, the common law; another, the law of admiralty; and another of very great importance, is known as equity. To the branch of the common law called ecclesiastical the subject of marriage and divorce, in England, pertains." De Witt *v.* De Witt, 67 Ohio St. 340, 346, 66 N. E. 136, 138 [*quoting* 1 Bishop Marr. & Div. § 114]. See also Equitable L. Assur. Soc. *v.* Paterson, 41 Ga. 338, 364, 5 Am. Rep. 535, where it is said: "The existence in England of two Courts — Ecclesiastical and Common Law — one administering the cannon [canon] and the other the Common Law, kept these distinctions [between marriage and divorce] very clear." (See generally COMMON LAW; DIVORCE; WILLS.)

27. As used in the *corpus juris canonici*, which is an abridgment of the canon law of the Church of Rome. Smith *v.* Bonhoof, 2 Mich. 115, 121, where it is said: "No faculty of disposing of ecclesiastical things is known to be given to any layman, no matter how pious he may be."

28. Bradbury *v.* Bardin, 34 Conn. 452, 453, where it is said: "[It is] not countenanced by the classes before referred to, [allopathic physicians] but characterized by them as spurious and denounced as dangerous. It is sufficient to say that the two modes of treating human maladies are essentially distinct, and based upon different views of the nature and causes of diseases, their appropriate remedies, and the modes of applying them."

29. Groesbeeck *v.* Dunscomb, 41 How. Pr. (N. Y.) 302, 344.

30. Groesbeeck *v.* Dunscomb, 41 How. Pr. (N. Y.) 302, 344, where "ecumenical council" is distinguished from "synod."

31. Derivation of term. — "The description of a libeller in our indictments seems to me to have been borrowed from the civil law, and

of delivery, which precedes the manifestation of the contents.[32] (See, generally, LIBEL AND SLANDER.)

EDGE. The border or part adjacent to a line of division; the part nearest some limit.[33]

EDIBLE. Eatable; fit to be eaten as food; esculent.[34]

EDICTA MAGISTRATUM, CONSTITUTIO PRINCIPIS. A maxim meaning "The ordinance of the magistracy (or civil government) is the constitution (or decree) of the Emperor."[35]

EDICTS OF JUSTINIAN. Thirteen constitutions or laws of this prince, found in most editions of the Corpus Juris Civilis, after the Novels.[36] (See CORPUS JURIS.)

EDITION. As applied to a publication, the total number of copies issued or published at once;[37] a republication, sometimes with a revision and correction; any publication of a book before published.[38] (See, generally, COPYRIGHT.)

EDITION DE LUXE. As applied to a publication, an elaborate and costly edition, often limited; a sumptuous edition, as regards paper, illustrations, binding, etc.;[39] a generic expression, meaning simply an elegant edition of some kind.[40] (See EDITION; and, generally, COPYRIGHT.)

EDITION OF A BOOK. The publication of it.[41] (See COPY; EDITION; and, generally, COPYRIGHT.)

EDITOR. A person who superintends the publication of a newspaper.[42] As applied to the production of bronze statuary the term is used to designate the

I agree that their word *edo* is represented by our word publish; but I deny that edere means to manifest the contents of a paper." Rex *v.* Burdett, 4 B. & Ald. 95, 128, 6 E. C. L. 404.

32. Rex *v.* Burdett, 4 B. & Ald. 95, 128, 6 E. C. L. 404, per Best, J., where it is said: "And the subsequent manifestation is expressed by some other term, as *exponere* or *manifestare*. Thus, in Cicero, De Legibus, lib. 3, art. 20, he says, '*apud eosdem qui magistratu abierint edant et exponant quid in magistratu gesserint.*' Here, the word 'edant' means 'they uttered,' and the word 'exponant,' 'they exposed to public view what was so uttered.'" And, after quoting from the civil law, in Codex, lib. 9, tit. 36, the court continued: "Here, the word *ediderit* is not used, but *manifestaverit*. Why? because it constituted no crime for a person who found a paper, and, being ignorant of its contents, delivered it to another. To punish him with death would have been a species of cruelty of which the worst of the Romans were incapable; but if, instead of destroying it, he manifested it, then he was to be considered as the author. The reason I quote this passage is to show that where '*ediderit*' is used, it means a delivery only; but when they intend to express a disclosure of the contents of a paper, they use the word *manifestaverit*."

33. Century Dict.

A deed of land defining one of its boundaries as the "edge of the mill pond" means the bank of the pond, and gives the land a defined boundary without regard to the contingent subsidence of the water constituting a pond, thereby leaving the land dry, and passes no title to the land under the pond. Holden *v.* Chandler, 61 Vt. 291, 294, 18 Atl. 310.

34. Century Dict.

An edible spice is a spice which is eaten as spices are eaten, namely, as a sauce, a condiment, a relish, not as a food product capable of sustaining life. *In re* Cruikshank, 54 Fed. 676, 677, where it is said: "The adjective 'edible' found in this connection must be considered as a relative term qualified somewhat by the noun which follows it."

The word "edible" in the tariff act of 1890, relating to the duties on certain drugs, etc., which are not edible, etc., is intended to exclude from the exemption such of the enumerated articles as are edible according to the common understanding. Cruikshank *v.* U. S., 59 Fed. 446, 448, 8 C. C. A. 171.

35. Tayler L. Gloss.

36. Black L. Dict.

37. Mooney *v.* U. S. Industrial Pub. Co., 27 Ind. App. 407, 61 N. E. 607, 608. See also Reade *v.* Bentley, 3 Kay & J. 271, 27 L. J. Ch. 254, 259, where it is said: "I apprehend the meaning of the word 'editions' is the putting forth the work before the public at successive periods, and whether that is done by moveable type or by stereotype does not seem to me to make any substantial difference. . . . The 'edition' means, whenever you have in your store-house a certain quantity of copies, you issue them to the public, and there are various modes of doing this recognized by the trade."

38. Webster Dict. [*quoted* in Banks *v.* McDivitt, 2 Fed. Cas. No. 961, 13 Blatchf. 163].

39. Barrie *v.* Miller, 104 Ga. 312, 315, 30 S. E. 840, 69 Am. St. Rep. 171, where it is said: "From these definitions it will be seen that the expression quoted may mean an artist proof edition, or it may not."

40. Barrie *v.* Miller, 104 Ga. 312, 315, 30 S. E. 840, 69 Am. St. Rep. 171.

41. Hone *v.* Kent, 6 N. Y. 390, 395.

42. Pennoyer *v.* Neff, 95 U. S. 714, 721, 24 L. ed. 565 [*citing* Webster Dict.], where it

founder who casts the statuary from the clay model made by the artist.[43] (See generally, LIBEL AND SLANDER; NEWSPAPERS.)

EDMUNDS-TUCKER LAW. See BIGAMY.

EDUCATE. To prepare and fit for any calling or business, or for activity and usefulness in life.[44] (See, generally, COLLEGES AND UNIVERSITIES; SCHOOLS AND SCHOOL-DISTRICTS.)

EDUCATION.[45] The bringing up;[46] the process of developing and training the powers and capabilities of human beings.[47] In its broadest sense, the word comprehends not merely the instruction received at school or college, but the whole course of training, moral, intellectual and physical;[48] is not limited to the ordinary instruction of the child in the pursuits of literature. It comprehends a proper attention to the moral and religious sentiments of the child.[49] And it is sometimes used as synonymous with "learning."[50] (See COLLEGES AND UNIVERSITIES; SCHOOLS AND SCHOOL-DISTRICTS.)

EDUCATIONAL. Pertaining to education.[51] (Educational Purposes: Charitable Gifts For, see CHARITIES. Exemption From Taxation of Property Devoted to, see TAXATION.)

is said: "And the term sometimes includes not only the person who wrote or selected the articles for publication, but the person who published the paper and put it into circulation."

The editor of a newspaper is a person who, while he may not furnish as the production of his mind the words, sentences, and ideas printed, or set the type or work the press, superintends the correction of the proof sheet of the printer, and who, in regard to the publication of the paper, selects the matter for publication. Brown *v.* Woods, 6 J. J. Marsh. (Ky.) 11, 18.

43. Merritt *v.* Tiffany, 132 U. S. 167, 170, 10 S. Ct. 52, 33 L. ed. 299.

44. Webster Dict. [*quoted* in Mount Hermon Boys' School *v.* Gill, 145 Mass. 139, 146, 13 N. E. 354].

"Educate," as used in Tenn. Code, § 2521, empowering a county court to remove a guardian for neglecting to educate or maintain his ward, means proper moral as well as intellectual and physical instruction. Ruohs *v.* Backer, 6 Heisk. (Tenn.) 395, 400, 19 Am. Rep. 598.

45. "Education is a broad and comprehensive term." Mt. Hermon Boys' School *v.* Gill, 145 Mass. 139, 146, 13 N. E. 354. See also Cook *v.* State, 90 Tenn. 407, 409, 16 S. W. 417, 13 L. R. A. 183; Barnes *v.* Ross, [1896] A. C. 625, 638.

46. Whicker *v.* Hume, 14 Beav. 509, 520.

47. Webster Dict. [*quoted* in Mt. Hermon Boys' School *v.* Gill, 145 Mass. 139, 146, 13 N. E. 354].

When it begins.— In Clavering *v.* Ellison, 7 H. L. Cas. 707, 726, 29 L. J. Ch. 761, 11 Eng. Reprint 282, Lord Cranworth said: "No two minds would agree upon the question when education begins."

48. Ruohs *v.* Backer, 6 Heisk. (Tenn.) 395, 400, 19 Am. Rep. 598 [*cited* in State *v.* Lesueur, 99 Mo. 552, 558, 13 S. W. 237, 7 L. R. A. 734]. See also Mt. Hermon Boys' School *v.* Gill, 145 Mass. 139, 146, 13 N. E. 354.

49. Com. *v.* Armstrong, 1 Pa. L. J. 393, 394, under an interpretation of a father's duty toward a child.

Extended use of term.— In Barnes *v.* Ross, [1896] A. C. 625, 638, Lord Halsbury, L. C., said: "I take in the first place the education of the boy; and I think it is necessary to give to that word 'education' a very wide signification. It is not a question simply of what literary accomplishments he may become the master of, but he is to be fitted for life as a gentleman inheriting ample means and having duties in the place in which he is to exercise his functions afterwards, and it may be . . . he should also be accustomed to the amusements and habits of those with whom he has afterwards to associate and among whom he is to live. . . . Passing on to another matter, one cannot help thinking that during his education at Eaton (still using the word 'education' in a very extended sense) it may have been very proper and appropriate that he should be familiar with the amusements which are there in vogue."

50. Whicker *v.* Hume, 7 H. L. Cas. 124, 162, 4 Jur. N. S. 933, 28 L. J. Ch. 396, 11 Eng. Reprint 50. But *compare* Whicker *v.* Hume, 14 Beav. 509, 520, where it is said: "And though in modern times it is in a great degree synonymous with learning, I think 'education,' in the old authorities, did not necessarily include 'learning.'"

"Whatever we learn by observation, by conversation, or by other means away from what has been implanted by nature is education. In fact, every thing not known intuitively and instinctively is education." Cook *v.* State, 90 Tenn. 407, 410, 16 S. W. 417, 13 L. R. A. 183.

51. Century Dict.

The meaning of the phrase "educational purposes" has been considered in the following cases:

Illinois.— O'Day *v.* People, 171 Ill. 293, 298, 49 N. E. 504; Chicago, etc., R. Co. *v.* People, 163 Ill. 616, 621, 45 N. E. 122.

Massachusetts.— Peck *v.* Claflin, 105 Mass. 420, 423. And see Essex *v.* Brooks, 164 Mass. 79, 83, 41 N. E. 119; Drury *v.* Natick, 10 Allen (Mass.) 169, 179.

Missouri.— North St. Louis Gymnastic Soc. *v.* Hudson, 85 Mo. 32, 34.

EDUCATIONAL APPLIANCE. Something necessary or useful to enable the teacher to teach the school children.[52]

EDUCATIONAL STAFF. Teaching staff.[53]

EFFECT.[54] A result[55] which follows a given act;[56] and sometimes used as synonymous with weight.[57]

EFFECTED.[58] Completed;[59] and sometimes used as meaning enforced.[60]

EFFECTS. See PROPERTY.

EFFECTUAL. Producing an effect, or the effect desired or intended.[61]

EFFECTUS SEQUITUR CAUSAM. A maxim meaning "The effect follows the cause."[62]

EFFICIENT. A term sometimes used as the equivalent of COMPETENT,[63] *q. v.*

EFFICIENT CAUSE. The "working cause," or that cause which produces effects or results.[64]

EFFICIENT MACHINERY. Such machinery as is capable of well producing the effect intended to be secured by the use of it for the purpose for which it was made.[65] (See, generally, MASTER AND SERVANT; NEGLIGENCE.)

EFFORT.[66] An exertion of strength; strenuous endeavors; laborious attempts; struggle directed to the accomplishment of an object; exertion, as an attempt to scale a wall; an effort to excel.[67]

E. G. An abbreviation of *exempli gratia*. For the sake of an example.[68]

Nebraska.— Curtis *v.* Allen, 43 Nebr. 184, 191, 61 N. W. 568.

New Hampshire.—Haynes *v.* Carr, 70 N. H. 463, 480, 49 Atl. 638.

North Carolina.— Markham *v.* Southern Conservatory of Music, 130 N. C. 276, 278, 41 S. E. 531.

Rhode Island.—St. Mary's Church *v.* Tripp, 14 R. I. 307, 309.

Tennessee.— State *v.* Fisk University, 87 Tenn. 233, 241, 10 S. W. 284.

52. Honaker *v.* Board of Education, 42 W. Va. 170, 174, 24 S. E. 544, 57 Am. St. Rep. 847, 32 L. R. A. 413 [*citing* Honey Creek School Tp. *v.* Barnes, 119 Ind. 213, 217, 21 N. E. 747]. But see Marion First Nat. Bank *v.* Adams School Tp., 17 Ind. App. 375, 46 N. E. 832, 833, where it is held that the term does not include reading-circle books.

53. People *v.* White, 64 N. Y. App. Div. 390, 392, 72 N. Y. Suppl. 91 [*cited* in People *v.* Board of Education, 86 N. Y. App. Div. 537, 539, 83 N. Y. Suppl. 803], construing Greater New York Charter, §§ 1103, 1117.

54. Distinguished from "faith" and "credit" see Com. *v.* Green, 17 Mass. 515, 545.

Beneficial effect.— See also Neilson *v.* Harford, 11 L. J. Exch. 20, 26, 8 M. & W. 806, where the word "effect" was used as equivalent to "beneficial effect" in specification of a patent.

55. As used in the expression "with like effect." Moench *v.* Young, 16 Daly (N. Y.) 143, 144, 9 N. Y. Suppl. 637.

56. Roberts *v.* Donnell, 31 N. Y. 446, 449.

57. As the effect of evidence. Jessen *v.* Donahue, (Nebr. 1903) 96 N. W. 639, 640.

"Effect of evidence" is not synonymous with burden of proof. Hill *v.* Nichols, 50 Ala. 336, 339.

58. Distinguished from "affected" in Commercial Travelers' Mut. Acc. Assoc. of America *v.* Fulton, 79 Fed. 423, 426.

Other insurance "effected" in an insurance policy see Warwick *v.* Monmouth County Mut. F. Ins. Co., 44 N. J. L. 83, 85, 43 Am. Rep. 343.

59. Phipps *v.* North Pelham, 61 N. Y. App. Div. 442, 445, 70 N. Y. Suppl. 630.

Sales "effected."— A contract providing that one of several joint owners of land should have a commission on sales which he "effected" means sales of which he was the procuring cause, and did not require a sale in the sense of a binding consummated agreement. McCreery *v.* Green, 38 Mich. 172, 184. See also Ward *v.* Cobb, 148 Mass. 518, 520, 20 N. E. 174, 12 Am. St. Rep. 587.

60. Nickelson *v.* Negley, 71 Iowa 546, 547, 32 N. W. 487, so held under a statute providing that a landlord's lien on crops may be effected by the commencement of an action within a prescribed period, in which the landlord shall be entitled to a writ of attachment.

61. Century Dict.

"An effectual attachment" considered with reference to the service of a summons see Peabody *v.* Hamilton, 106 Mass. 217, 222.

62. Morgan Leg. Max.

63. As where in the selection of fellow servants a master is required to employ "efficient men." Norwalk, etc., R. Co. *v.* Ampey, 93 Va. 108, 136, 25 S. E. 226.

64. Pullman Palace Car Co. *v.* Laack, 143 Ill. 242, 262, 32 N. E. 285, 18 L. R. A. 215 [*citing* Webster Dict.], and distinguishing the term from "proximate cause."

65. Maxwell *v.* Bastrop Mfg. Co., 77 Tex. 233, 237, 14 S. W. 35, where it is said: "But efficient machinery would not necessarily be 'new machinery.'"

66. "Effort to collect" see Burnett *v.* Thompson, 1 Ala. 469, 470.

67. Webster Unabr. Dict. [*quoted* in Miles *v.* State, 18 Tex. App. 156, 171].

68. Black L. Dict.

EIGHT-HOUR LAW. See MASTER AND SERVANT.

EI INCUMBIT PROBATIO, QUI DICIT, NON QUI NEGAT: CUM PER RERUM NATURAM FACTUM NEGANTIS PROBATIO NULLA SIT.[69] A maxim meaning "The proof lies upon him who affirms, not upon him who denies: since, by the nature of things, he who denies a fact cannot produce any proof."[70]

EI NIHIL TURPE, CUI NIHIL SATIS. A maxim meaning "To whom nothing is sufficient, to him nothing is base."[71]

EITHER.[72] One or the other of two, taken indifferently as the case requires; being one or the other of two; being both of two, or each of two taken together, but viewed separately;[73] each or both;[74] one or the other, properly of two things;[75] one of two;[76] each of two; the one and the other;[77] one or another of any number;[78] one or the other of two or more specified things.[79] The word is used sometimes in the sense of one or the other of several things, and sometimes in the sense of one and the other;[80] and it may have the same meaning as "any."[81] (See ALL.[82])

EJECT. As applied to a person, to compel him against his desire to leave a place.[83] (See, generally, CARRIERS; LANDLORD AND TENANT.)

69. A maxim of the Roman law.— State *v.* O'Neill, 151 Mo. 67, 81, 52 S. W. 240. And "equally the maxims of the admiralty, equity, and common law courts." Clarke *v.* The Dodge Healy, 5 Fed. Cas. No. 2,849, 4 Wash. 651, 656.

70. Wharton L. Lex.

Applied or quoted in the following cases:

Arkansas.— Hershy *v.* Latham, 46 Ark. 542, 550.

Maine.— Stetson *v.* Corinna, 44 Me. 29, 43.

Missouri.— State *v.* O'Neill, 151 Mo. 67, 81, 52 S. W. 240.

New York.— Sowarby *v.* Russell, 6 Rob. 322, 324; Merzbach *v.* New York, 30 N. Y. Civ. Proc. 322, 326.

United States.—Clarke *v.* The Dodge Healy, 5 Fed. Cas. No. 2,849, 4 Wash. 651.

Canada.— Central Vermont R. Co. *v.* Stanstead, etc., Mut. F. Ins. Co., 5 Quebec Q. B. 224, 249.

71. Wharton L. Lex. [*citing* 4 Inst. 53].

72. Distinguished from "*alias Dictus*" or "*alias*" see 2 Cyc. 79 note 30.

Used in a statute relative the survival of an action see Wilson *v.* Banner Lumber Co., 108 La. 590, 591, 32 So. 460.

"From and after the decease of them or either of them" as used in a will see Doe *v.* Royle, 13 Q. B. 99, 111, 66 E. C. L. 99.

73. Century Dict. [*quoted* in Lyon *v.* Lyon, 88 Me. 395, 399, 34 Atl. 180, where it is said: "The strictly accurate and authoritative signification of the word . . . relates to two units or particulars only"]. And see Chicago, etc., R. Co. *v.* Chicago, 172 Ill. 66, 68, 49 N. E. 1006 [*quoting* Webster Dict.]; Com. *v.* Hide, etc., Ins. Co., 112 Mass. 136, 147, 17 Am. Rep. 72.

74. Jackson *v.* Stewart, 20 Ga. 120, 124. But see Martin *v.* Nahoa, 4 Hawaii 427, 429, where a statute provided that all contracts for service between masters and servants, when either of the contracting parties is of Hawaiian birth, shall be rendered and printed in both the Hawaiian and English languages. The court said: "The word 'either' is a distributive or alternative term. It carries the meaning that, when one of the parties is of Hawaiian birth and the other is not, such contract shall be executed in Hawaiian and English. The negative or excluding force of the word 'either' is equal to its affirmation and including force. . . . The term 'either' does not include 'both,' nor does 'both' the greater intend and therefore include the less, 'either.'" And *compare* Walsh *v.* Virginia, etc., R. Co., 8 Nev. 110, 116.

75. Webster Dict. [*quoted* in Lyon *v.* Lyon, 88 Me. 395, 399, 34 Atl. 180].

76. Lafoy *v.* Campbell, 42 N. J. Eq. 34, 37, 6 Atl. 300.

77. Webster Dict. [*quoted* in Chicago, etc., R. Co. *v.* Chicago, 172 Ill. 66, 68, 49 N. E. 1006].

78. Dew *v.* Barnes, 54 N. C. 149, 151; Graham *v.* Graham, 23 W. Va. 36, 43, 48 Am. Rep. 364; Webster Dict. [*quoted* in Messer *v.* Jones, 88 Me. 349, 355, 34 Atl. 177].

In school articles signed by several employers, providing that either party can discontinue the school at the end of the quarter, "either" means the teacher, or a majority of the employers. Bird *v.* Thornburgh, 1 B. Mon. (Ky.) 4, 5.

79. Ft. Worth St. R. Co. *v.* Rosendale St. R. Co., 68 Tex. 169, 178, 4 S. W. 534.

80. Chidester *v.* Springfield, etc., R. Co., 59 Ill. 87, 89, where it is said: "Its use in this last sense is not infrequent. Thus, it is common to say on either hand, on either side, meaning, thereby, on each hand or side."

81. Lafoy *v.* Campbell, 42 N. J. Eq. 34, 37, 6 Atl. 300; People *v.* Willis, 6 N. Y. App. Div. 231, 39 N. Y. Suppl. 987.

82. "Either" does not mean "all." Ft. Worth St. R. Co. *v.* Rosedale St. R. Co., 68 Tex. 169, 178, 4 S. W. 534. But see Maine *v.* Gilman, 11 Fed. 214, 215, where the phrase "either party," as used in the federal statute relating to the removal of causes, was construed to mean "all the plaintiffs" or "all the defendants."

83. Bohannon *v.* Southern R. Co., 112 Ky. 106, 112, 65 S. W. 169, 23 Ky. L. Rep. 1390.